

## The Liberal Grant Mandate: An Historical and Procedural Perspective

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*The origins of any legal doctrine are always complex; their explanations lie in both accessible and inaccessible history, in philosophical movements both comprehensible and mysterious . . . Lurking at all times is the risk of erroneously assigning a cause-and-effect relationship to temporal juxtapositions of developments in different fields.*<sup>1</sup>

### I. Introduction

The policy that trial courts should liberally grant challenges for cause is a “long-standing tradition in our military law.”<sup>2</sup> Over time, this concept came to be known as the “liberal grant mandate.”<sup>3</sup> In its original form, however, this “mandate” was anything but. Rather, it was a non-partisan, exhortative policy that simply recommended that courts “be *liberal* in passing upon challenges [for cause].”<sup>4</sup> The premise of this policy was 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.”<sup>5</sup> Thus, military courts have regularly cited this policy in the context of reviewing rulings on challenges for cause since its inception.<sup>6</sup>

In 2002, in *United States v. Downing*,<sup>7</sup> Judge Sullivan questioned the continued relevance of the liberal grant mandate, arguing that “reasons for this policy, although deeply historical in origin, [had] largely dissipated over time.”<sup>8</sup> Several years later, Judge Erdmann, writing for the majority in *United States v. James*,<sup>9</sup> took the contrasting position that the liberal grant mandate was indeed still relevant: “It is a response to the unique nature of the military justice system ‘because in courts-martial peremptory challenges are much more limited than in most

civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere.”<sup>10</sup> In furtherance of this view, the Court of Appeals for the Armed Forces (CAAF) would transform this once advisory policy into a rule that bore very little semblance to its original form.

This article explores the “deeply historical” reasons for the liberal grant mandate that Judge Sullivan alluded to in *Downing* and examines Judge Sullivan’s argument that these reasons have “dissipated over time.” It also analyzes the relevance of these reasons in the context of the CAAF’s latest efforts to adorn the liberal grant mandate with the trappings of a legal imperative. Ultimately, it concludes that the CAAF’s interpretation and application of the mandate as the enforceable rule that it is today is inconsistent with its intended exhortative purpose, and has not proven to be any more effective in preventing potential member issues on appeal.

### II. Origins of the Mandate: An Historical and Procedural Perspective

The origins of the “liberal grant mandate” can be traced back as far as the 1890 predecessor to the modern day *Manual for Courts-Martial (MCM)*.<sup>11</sup> The *Instructions for Courts-Martial and Judge Advocates (1890 Instructions)* provided military law practitioners of the day with “instructions and forms for procedure and record of courts-martial.”<sup>12</sup> With regard to challenges of court-martial panel members, the *1890 Instructions* specifically provided for court-martial members to “be challenged by a prisoner, but *only for cause* stated to the court.”<sup>13</sup>

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<sup>1</sup> David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161, 1180 (1998).

<sup>2</sup> *United States v. Porter*, 17 M.J. 377, 380 (C.M.A. 1984) (Fletcher, J., concurring).

<sup>3</sup> *United States v. Moyar*, 24 M.J. 635, 639 (A.C.M.R. 1987) (coining the phrase “liberal grant mandate”).

<sup>4</sup> INSTRUCTIONS FOR COURTS-MARTIAL AND JUDGE ADVOCATES, UNITED STATES ARMY 19 (1890) [hereinafter 1890 INSTRUCTIONS] (emphasis added), available at [http://www.loc.gov/rr/frd/Military\\_Law/CM-manuals.html](http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html) (last visited Mar. 1 2010).

<sup>5</sup> *United States v. Clay*, 64 M.J. 274, 277 (C.A.A.F. 2007).

<sup>6</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 205 (2d. ed. 1920 reprint).

<sup>7</sup> 56 M.J. 419 (C.A.A.F. 2002).

<sup>8</sup> *Id.* at 425 (Sullivan, J., concurring).

<sup>9</sup> 61 M.J. 132 (C.A.A.F. 2005).

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<sup>10</sup> *Id.* at 139 (quoting *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)).

<sup>11</sup> Military Legal Resources: Manuals for Courts-Martial, FED. RES. DIVISION, [http://www.loc.gov/rr/frd/Military\\_Law/CM-manuals.html](http://www.loc.gov/rr/frd/Military_Law/CM-manuals.html) (last visited Mar. 1, 2010) [hereinafter Military Legal Resources] (“The 1951 MCM was the first manual to be drafted by a committee representing all three services, and was the first manual to be issued under the 1950 UCMJ.”).

<sup>12</sup> 1890 INSTRUCTIONS *supra* note 4, at \*5.

<sup>13</sup> *Id.* at 19 (citing 88th Article of War, *reprinted in* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 205 (2d ed. 1920 reprint)) (emphasis added).

During this period, as it is today, a general court-martial panel required a quorum of at least five commissioned officers,<sup>14</sup> appointed by the convening authority,<sup>15</sup> and on whom was impressed the “grave and important” nature of their duties.<sup>16</sup> Service on a court-martial panel required a sense of “justice and propriety” and required the members to possess a “competent knowledge of Military Law” as well as a “perfect[] acquaint[ance] with all orders and regulations, and with the practice of Military Courts.”<sup>17</sup> This requisite knowledge was appropriate given that they collectively voted and ruled on all matters pertaining to the court-martial from findings to sentence and everything in between, and consequently played the role of both judge *and* jury in a court-martial.<sup>18</sup> This authority also extended to deciding challenges for cause: “The *court* shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.”<sup>19</sup>

The 1890 *Instructions* promulgated procedures governing the challenge process in accordance with the Articles of War and remained largely consistent through 1969 when the military judge replaced the law officer as the presiding official at courts-martial.<sup>20</sup> The following is a summary of the challenge procedure as provided in the 1890 *Instructions* and as supplemented through subsequent editions of the *MCM*.

Upon establishing the jurisdictional data for the court-martial on the record, the trial judge advocate exercised his “duty” to challenge any member to whom he objected.<sup>21</sup> The accused was then provided the opportunity to present challenges for cause against the members.<sup>22</sup> The court could not “receive a challenge to more than one member at a time.”<sup>23</sup> Thus, even if the accused “deem[ed] all the members to be prejudiced or otherwise personally subject to exception, and though his grounds of objection may be the same to each member, he [could not] include them all in a

general challenge, but [was] permitted to challenge them singly only.”<sup>24</sup> Further, the accused bore the burden of convincing a panel of officers that one of their own was biased against him or otherwise should not sit on the panel at his court-martial.<sup>25</sup>

The 1890 *Instructions* did not provide any specific guidance on what were considered acceptable grounds for challenge other than that a “challenge against a member that he [was] the author of the charges and a material witness, [was] ordinarily sufficient ground to justify” a challenge against a member.<sup>26</sup> The general rule was that the court could not excuse a member in the absence of a challenge<sup>27</sup> and the court was not to “entertain . . . [a challenge] upon the mere assertion of the accused, if it is not admitted by the challenged member.”<sup>28</sup> In other words, the accused was required to allege a specific basis for his challenge. Furthermore, a “positive declaration by the challenged member that he [was] not prejudiced against the accused, nor interested in the case, [would] ordinarily satisfy the accused, and in the [absence] of material evidence in support of the objection, justify the court in overruling [the challenge].”<sup>29</sup> Thus, it was not “unusual for a member objected to for prejudice against the accused, to disclaim having any such feeling or bias as imputed and to state that he is aware of no reason why he cannot judge impartially in the case.”<sup>30</sup>

In the absence of an admission by the member of the basis for a challenge, or if the accused was not satisfied with a member’s assertion of impartiality, the merits of the challenge were litigated in the presence of the other panel members.<sup>31</sup> During this “trial of the challenge,”<sup>32</sup> the accused could “offer testimony [or other evidence] in support of his objection,” or voir dire the member “in the same manner that a juror may be examined by criminal courts.”<sup>33</sup> The accused and the challenged member would then withdraw, and the remaining officers would deliberate on the challenge.<sup>34</sup>

<sup>14</sup> *Id.* at 5; WINTHROP, *supra* note 6, at 70, 77, 159.

<sup>15</sup> 1890 INSTRUCTIONS, *supra* note 4, at 3; WINTHROP, *supra* note 6, at 159.

<sup>16</sup> 1890 INSTRUCTIONS, *supra* note 4, at 3 (quoting Headquarters, U.S. Dep’t of Army, Adjutant Gen. Order No. 28 (8 May 1880)).

<sup>17</sup> *Id.*

<sup>18</sup> See *United States v. Norfleet*, 53 M.J. 262, 266–67 (C.A.A.F. 2000).

<sup>19</sup> 1890 INSTRUCTIONS, *supra* note 4, at 19 (citing 88th Article of War, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 205 (2d ed. 1920 reprint)) (emphasis added); see also *Norfleet*, 53 M.J. at 266 (“From the Revolutionary War through World War I, courts-martial consisted of panels of officers in which all questions—including interlocutory issues—were decided by the panel as a whole.”).

<sup>20</sup> UCMJ art. 26(a) (1968) (emphasis added).

<sup>21</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. VIII, § I, ¶ 120 (1921) [hereinafter 1921 MCM].

<sup>22</sup> 1890 INSTRUCTIONS, *supra* note 4, at 5.

<sup>23</sup> *Id.* at 19 (citing 88th Article of War, reprinted in WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 205 (2d ed. 1920 reprint)).

<sup>24</sup> WINTHROP, *supra* note 6, at 207.

<sup>25</sup> *Id.* at 212.

<sup>26</sup> 1890 INSTRUCTIONS, *supra* note 4, at 20.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 19 (citation omitted).

<sup>29</sup> *Id.* (citation omitted).

<sup>30</sup> WINTHROP, *supra* note 6, at 210.

<sup>31</sup> 1890 INSTRUCTIONS, *supra* note 4, at 19.

<sup>32</sup> WINTHROP, *supra* note 6, at 210–11.

<sup>33</sup> 1890 INSTRUCTIONS, *supra* note 4, at 19 (citation omitted); see also WINTHROP, *supra* note 6, at 211 (stating other types of evidence could be submitted, e.g. documentary evidence, in support of a challenge).

<sup>34</sup> 1890 INSTRUCTIONS, *supra* note 4, at 6.

A vote on the challenge was then taken, and a majority vote was required to sustain a challenge.<sup>35</sup> The 1891 *Instructions for Courts-Martial Including Summary Courts* (1891 *Instructions*) ensured the “equality of members” in all deliberations, regardless of rank.<sup>36</sup> Beginning in 1920, the vote on the challenge was taken by secret written ballot,<sup>37</sup> reflecting a concern for anonymity and fairness in the process. Tie votes were considered to be a vote “in the negative . . . [and] the objection or motion [was] not sustained.”<sup>38</sup> If the challenge was sustained, the member was excused. However, if the challenge was denied, the challenged officer would resume his seat with the rest of the panel and the next challenge would be addressed.<sup>39</sup> This had the great potential to place the accused in a very awkward position where, as a result of directly questioning a member’s impartiality, an otherwise impartial juror might take exception and consequently become biased against the accused.

Given the labor-intensive and confrontational nature of this challenge process, the court-martial panel members represented a significant obstacle between an accused and a fair trial. Under these circumstances, it is not difficult to imagine the dilemma an accused faced in deciding whether and how to challenge any member of his court-martial panel. Moreover, because the “relevance and validity” of an accused’s challenge were determined by the very same individuals against whom he was bringing the challenge, the accused faced an uphill battle in ensuring an impartial panel throughout the challenge process.

It was in this procedural context that the liberal grant mandate appeared in its earliest form. Without elaboration, the 1890 *Instructions* simply advised, “Courts should be liberal in passing upon challenges . . . .”<sup>40</sup> Perhaps this exhortation recognized the inherent conflict of interest involved when members, whom the convening authority had appointed to sit on a court-martial, collectively ruled on challenges to their own impartiality. In any event, while this

simple language did not have the mandatory force or effect of a rule of law, it served as a subtle reminder to the court-martial panel that “where any reasonable doubt exist[ed] of the indifference of the member in the case to be tried, it [would] be safer and in the interest of justice to sustain the objection and excuse him.”<sup>41</sup> Nonetheless, as of 1920, it had not gone unnoticed by observers of the military justice system that “the proceedings of courts-martial [had] been not unfrequently [sic] disapproved in General Orders for the reason that valid objections to members have failed to be allowed.”<sup>42</sup>

Perhaps to reinforce the exhortation to liberally grant challenges, the 1927 *Manual* supplemented the liberal grant language with a not-so-subtle reminder that “failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.”<sup>43</sup> Additionally, the drafters of the *MCM* began to provide more definitive guidance to the panel members in resolving challenges by enumerating specific bases for successful challenges. For example, the 1908 *Manual* directed the court to sustain challenges where it was admitted or proven that a member had “investigated the charges and expressed the opinion that they can be established.”<sup>44</sup> In 1917, in accordance with common law principles,<sup>45</sup> challenges were categorized as either “principal challenges” or “challenges for favor.”<sup>46</sup>

“Principal challenges” alleged a “specific fact of such a nature that . . . , it raises *per se*, and necessarily, a presumption of bias or prejudice which cannot be rebutted and the effect of which is *absolutely to exclude the juror*.”<sup>47</sup> Examples of a “principal challenge” included circumstances where a member had formed an opinion on the guilt or innocence of the accused, was “related by blood or marriage to the accused,” or had “declared enmity against the accused.”<sup>48</sup> Proof or admission of the facts underlying such a challenge was sufficient to sustain the challenge.

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<sup>35</sup> A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ch. VII, § I, ¶ 90 (1917) [hereinafter 1917 MCM].

<sup>36</sup> INSTRUCTIONS FOR COURTS-MARTIAL, INCLUDING SUMMARY COURTS, UNITED STATES 9 (2d ed. 1891) [hereinafter 1891 INSTRUCTIONS] (citation omitted).

<sup>37</sup> 1921 MANUAL, *supra* note 21, ch. VIII, § I, ¶ 125.

<sup>38</sup> A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES ARMY 22 n.3 (1908) [hereinafter 1908 MCM] (citation omitted).

<sup>39</sup> A MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY ch. XII, ¶ 58f (1927) [hereinafter 1927 MCM].

<sup>40</sup> 1890 INSTRUCTIONS, *supra* note 4, at 19 (emphasis added) (citation omitted).

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<sup>41</sup> WINTHROP, *supra* note 6, at 212.

<sup>42</sup> *Id.* at 213.

<sup>43</sup> 1927 MCM, *supra* note 39, ch. XII, ¶ 58f.

<sup>44</sup> 1908 MCM, *supra* note 38, at 29.

<sup>45</sup> Common law recognized four classes of challenges for cause: (1) *propter honoris respectum* (on account of a respect for nobility); (2) *propter delictum* (on account of crime); (3) *propter defectum* (on account of defect—personal or legal incapacity); and (4) *propter affectum* (on account of favor or bias). WINTHROP, *supra* note 6, at 214–17. The fourth class involved facts or circumstances from which partiality on the part of a member “must be, or may be, inferred.” *Id.* at 216. As such, they were “by far the most numerous class of challenges taken to jurors, and so to members of military courts.” *Id.* This class of challenges was divided into two subcategories: “principal challenges” and “challenges for favor.” *Id.*

<sup>46</sup> 1917 MCM, *supra* note 35, ch. VIII, § I, ¶ 121.

<sup>47</sup> WINTHROP, *supra* note 6, at 216 (emphasis added).

<sup>48</sup> 1917 MCM, *supra* note 35, ch. VIII, § I, ¶ 121(a).

Challenges “for favor” involved allegations of “prejudice, hostility, bias, or intimate personal friendship.”<sup>49</sup> These grounds for challenge were “for being in favor of one side or the other [which do not], of themselves, imply bias.”<sup>50</sup> Challenges for favor were determined “after hearing the grounds for [the challenge] and the reply, if any, of the challenged member, as well as any other evidence . . . .”<sup>51</sup>

In 1927, the *MCM* eliminated the distinction between challenges for favor and principal challenges in favor of a non-exhaustive list of nine enumerated “challenges for cause.”<sup>52</sup> These enumerated grounds for challenge combined those previously considered to be principal challenges with those based on personal and legal defects of a member.<sup>53</sup> The list concluded with a general “catch-all” challenge based on “[a]ny 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*.”<sup>54</sup> This “catch-all” challenge would be the precursor to Rule for Courts-Martial (RCM) 912(f)(1)(N),<sup>55</sup> from which the doctrines of actual and implied bias were later developed.<sup>56</sup>

Thus, in conjunction with the warning of the consequences of failure to grant challenges when “good ground was shown,” and a comprehensive list that provided specific guidance on what constituted good cause for a challenge, the liberal grant language properly equipped the court-martial panel to fairly resolve challenges to legality, fairness, and impartiality of their service on the panel. Unfortunately, in light of and despite all these “protections,” it appeared that the forest was lost for the trees in that the one obstacle around which these precautions had been built still remained: the authority of the court-martial panel to collectively rule on challenges.

### III. The Beginning of the End

Surprisingly, despite the concern for the fairness and impartiality reflected in the precautions that had been implemented to ensure a fair challenge process, the practice by which the court-martial panel collectively determined

challenges remained in place through the promulgation of the 1969 *Manual for Courts-Martial*. In 1920, the Articles of War 8 and 31 were amended to require the convening authority to appoint one of the members of the panel to serve as a “law member.”<sup>57</sup> The “law member” was either a judge advocate or a “specially qualified” officer, if a judge advocate was not available, who was authorized to rule on interlocutory matters,<sup>58</sup> in addition to serving as a voting member of the panel on findings, sentence, and challenges.<sup>59</sup> Notably, the 1920 amendments to the Articles of War also included an amendment that provided for the exercise of one preemptory challenge per side.<sup>60</sup> However, despite the provision of the “law member,” the authority to decide challenges remained with the collective panel.

The post-World War II years would see even more significant changes to the composition of the court-martial panel and the manner in which it operated. In 1950, Congress enacted the Uniform Code of Military (UCMJ) in response to the “substantial criticism of the military justice system as it operated in World War II.”<sup>61</sup> The 1951 *Manual for Courts-Martial* (1951 *MCM*) became the first such manual “drafted by a committee representing all three services, and was the first manual to be issued under the 1950 UCMJ.”<sup>62</sup>

In 1950, Article 26(a), UCMJ provided for the appointment of a “law officer” in general courts-martial.<sup>63</sup> The “law officer” was an attorney who, in contrast to the “law member,” was not a voting member of the court-martial panel.<sup>64</sup> Rather, the authority and duties of the “law officer” now more resembled that of a judge than a juror.<sup>65</sup> Interestingly, a tie vote on a challenge now disqualified the member challenged.<sup>66</sup> In any event, while the introduction of the “law officer” to the military justice system reflected a strong “Congressional resolve to break away completely from the old procedure and insure [sic], as far as legislatively possible, that the law officer perform in the

<sup>49</sup> *Id.* ch. VIII, § I, ¶ 121(b).

<sup>50</sup> WINTHROP, *supra* note 6, at 216.

<sup>51</sup> 1917 *MCM*, *supra* note 35, ch. VIII, ¶ I, ¶ 121(b).

<sup>52</sup> 1927 *MCM*, *supra* note 39, ch. XII, ¶ 57e.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (2008) [hereinafter 2008 *MCM*].

<sup>56</sup> See *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004) (stating that while RCM 912(f)(1)(N) “applies to both actual and implied bias, the thrust of the rule is implied bias” because it focuses on the “perception . . . of fairness in the military justice system”).

<sup>57</sup> *United States v. Norfleet*, 53 M.J. 262, 266 (C.A.A.F. 2000).

<sup>58</sup> See 2008 *MCM*, *supra* note 55, R.C.M. 801(e) (5) discussion (“A question is interlocutory unless the ruling on it would finally decide whether the accused is guilty. Questions which may determine the ultimate issue of guilt are not interlocutory.”); see also *Norfleet*, 53 M.J. at 266.

<sup>59</sup> 1921 *MCM*, *supra* note 21, at IX; see also *Norfleet*, 53 M.J. at 266.

<sup>60</sup> *Id.* at X.

<sup>61</sup> *Norfleet*, 53 M.J. at 266.

<sup>62</sup> Military Legal Resources, *supra* note 11.

<sup>63</sup> *Norfleet*, 53 M.J. at 267.

<sup>64</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 39(b) (1951) [hereinafter 1951 *MCM*].

<sup>65</sup> *Norfleet*, 53 M.J. at 267.

<sup>66</sup> 1951 *MCM*, *supra* note 64, ¶ 62h(3) (“A majority of the ballots cast by the members present at the time the vote is taken shall decide the question of sustaining or not sustaining the challenge.”).

image of a civilian judge,”<sup>67</sup> the authority to decide challenges for cause still remained with the panel members.

All of these changes to the composition and organization of the court-martial panel reflect a progressive transition toward a military justice system that more closely resembled the civilian system. Having come to the proverbial edge of the water with the introduction of the “law officer,” the only logical next step left in this transition was to actually provide for a judge to preside over courts-martial. Then, as if on cue, Congress replaced the “law officer” with the “military judge” when it enacted the Military Justice Act of 1968 (Act of 1968).<sup>68</sup>

Articles 19 and 26(a), as amended by the Act of 1968, required the convening authority to detail a military judge to all general courts-martial and to any special courts-martial for which a bad conduct discharge was authorized.<sup>69</sup> Pursuant to Article 26(b), the military judge was required to be a

[c]ommissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.<sup>70</sup>

The Act of 1968 endowed the military judge with “functions and powers more closely aligned to those of Federal district judges.”<sup>71</sup> In consonance with the reasons for creating the positions of the “law member” and the “law officer,” the provision of the military judge helped further “increase the independence of military judges and members and other officials of courts-martial from unlawful influence by convening authorities and other commanding officers.”<sup>72</sup>

Under the new Article 26(c), the military judge answered directly to the “Judge Advocate General, or his designee,” and served as a military judge as his primary duty.<sup>73</sup> This requirement served “to separate the military judiciary from the traditional lines of command,”<sup>74</sup> and further “enhance[d] the independence of judicial

decisionmaking by military judges.”<sup>75</sup> Article 26(c) also provided that neither the convening authority nor any member of his staff may “prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance of duty as a military judge.”<sup>76</sup> The addition of the military judge to courts-martial was a paradigm shifting change for many obvious reasons, some of which have been discussed above. In the context of challenges, this change was monumental in that it marked the first time in military justice jurisprudence that the authority to decide challenges for cause against members was removed from the collective court-martial panel; now, the military judge would “determine the relevancy and validity of challenges for cause . . . .”<sup>77</sup>

The introduction of the military judge into the military justice system also possibly set the stage for a more subtle amendment to the way challenges for cause were viewed—at least by the drafters of the *MCM*. The 1969 *Manual for Courts-Martial* (1969 *MCM*) would be the last time the *MCM* would include the language of the liberal grant mandate in its text. Since the *1890 Instructions*, the admonition that courts-martial panels “be liberal in granting challenges” appeared in every edition of the *MCM*, dutifully reminding courts-martial panels of their obligation to ensure that the accused’s court-martial is free from substantial doubt as to “legality, fairness, and impartiality.”<sup>78</sup>

For the first time in almost a century, this language did not appear in the text of the *MCM* when it was revised in 1984.<sup>79</sup> This notable deletion was explained in the Drafters’ Analysis.

Paragraph 62h(2) of MCM, 1969 (Rev.) advised that the military judge “should be liberal in passing on challenges, but need not sustain a challenge upon the mere assertion of the challenger.” This *precatory language* has been deleted from the rule as an *unnecessary* statement. This deletion is not intended to change the *policy* expressed in that statement.<sup>80</sup>

The reference in the Drafters’ Analysis to the deleted language as “precatory” and “unnecessary” raises several interesting observations and questions. First, the liberal grant language had never been held out to be mandatory in nature. In fact, the non-mandatory tenor of the language

<sup>67</sup> United States v. Griffith, 27 M.J. 42, 45 (C.M.A. 1988).

<sup>68</sup> Pub. L. No. 90-632, 82 Stat. 1335 (1968).

<sup>69</sup> UCMJ arts. 19, 26 (1968).

<sup>70</sup> *Id.* art. 26(b).

<sup>71</sup> United States v. Norfleet, 53 M.J. 262, 267 (C.A.A.F. 2000).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 267–68.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 268.

<sup>76</sup> *Id.*

<sup>77</sup> UCMJ art. 41 (1968).

<sup>78</sup> 2008 MCM, *supra* note 55, R.C.M. 912(f)(1)(N).

<sup>79</sup> MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984) [hereinafter 1984 MCM].

<sup>80</sup> *Id.* R.C.M. 912(f)(3) analysis, at A21-54 (emphasis added).

made clear that it was simply advisory in nature. Nonetheless, the explicit qualification of the deleted language as “precatory” confirmed the advisory nature of the “mandate.”<sup>81</sup>

Second, the explanation that the language had been deleted because it was “unnecessary” naturally raised the question of why it was considered “unnecessary.” One explanation is that a military judge, having been trained and educated in the law, was presumed to know the law and be able to apply it correctly.<sup>82</sup> Therefore, the judge would, by virtue of this knowledge and training, be less likely to be influenced by extraneous factors than a member untrained in the law might be.

Another reason why the language may have been removed, and why it had been included in the text of the *MCM* for so long in the first place, is that, along with the appearance of the military judge, the “reasons for this policy, although deeply historical in origin, [had] largely dissipated . . . .”<sup>83</sup> Once the military judge displaced the panel members as the final arbiters of challenges for cause, the role of the court-martial panel became more limited to that of a fact-finding body and, thus, more closely aligned with a civilian jury than ever before.<sup>84</sup> The court-martial panel was no longer subject to the conflict of interest inherent in having to rule on challenges against themselves. As a result, a significant avenue of potential influence between the convening authority and the panel members he had selected had been closed off. Moreover, because the military judge’s billet did not fall within the traditional lines of command, separation and independence from the convening authority’s sphere of potential influence enhanced the degree of fairness and impartiality associated with the military judge’s ruling on challenges for cause.

#### IV. The Liberal Grant Mandate Lives On

Despite the conspicuous deletion of the “unnecessary” liberal grant language from the *Manual*, appellate courts continued to routinely reference this practice in opinions addressing the propriety of military judges’ rulings on challenges for cause.<sup>85</sup> In fact, some even expressly referenced the Drafters’ Analysis indicating that the deletion was “not intended to change the policy expressed in that

<sup>81</sup> See *supra* notes 7–8 and accompanying text.

<sup>82</sup> United States v. Downing, 56 M.J. 419, 424 (C.A.A.F. 2002) (Crawford, J., concurring) (citing United States v. Prevatte, 40 MJ 396, 398 (C.M.A. 1994)).

<sup>83</sup> *Id.* at 425 (Sullivan, J., concurring).

<sup>84</sup> See United States v. Norfleet, 53 M.J. 262, 267 9 (C.A.A.F. 2000).

<sup>85</sup> United States v. Smart, 21 M.J. 15, 19 (C.M.A. 1985); United States v. Rome, 47 M.J. 467, 469 (C.A.A.F. 1998); United States v. Schlamer, 52 M.J. 80, 93 (C.A.A.F. 1999); *Downing*, 56 M.J. at 422; United States v. Moyar, 24 M.J. 635, 638 (A.C.M.R. 1987).

statement.”<sup>86</sup> And thus, the liberal grant mandate lived on in spirit.

Indeed, it was not uncommon for appellate courts referencing the liberal grant language to do so in a tone that revealed a growing sense of frustration at having to address challenges for cause on appeal that military judges clearly (from the appellate courts perspective) should have granted:

We urge all trial judges and prosecutors to read and reread the guidance as to liberally granting challenges . . . . We cannot over-emphasize the time wasted untangling these matters on appeal. We thus press home to military judges, in the strongest possible terms, what was said by the Commander-in-Chief in another context: “Read my lips.”<sup>87</sup>

Despite the courts’ repeated invocation of the mandate, often in the context of reversing a military judge’s ruling on a challenge, no appellate court has reversed a military judge’s denial of a challenge for cause on the ground that the judge did not apply the liberal grant mandate.<sup>88</sup> The liberal grant mandate remained more a policy that appellate courts wished trial judges followed more often than a rule to be enforced on appeal.<sup>89</sup>

#### V. Policy Becomes Mandate

By 2002, the appellate courts began to take an increasingly mandatory tone regarding the application of the liberal grant mandate at trial, in stark contrast to the more suggestive tone of the original language that once appeared in the *MCM*.<sup>90</sup> Invariably, the appellate courts justified the application of the liberal grant mandate to challenges for cause “because in courts-martial peremptory challenges are

<sup>86</sup> United States v. White, 36 M.J. 284, 287 (C.M.A. 1993) (citing 1984 *MCM*, *supra* note 79, R.C.M. 912(f)(3) analysis, at A21-54).

<sup>87</sup> United States v. Jobson, 28 M.J. 844, 849 n.1 (A.F.C.M.R. 1989) (internal citations omitted). See also United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985) (“[Denial of challenge] was particularly unreasonable ‘in view of the limited availability of peremptory challenges at courts-martial.’”); United States v. Townsend, 65 M.J. 460, 467 (C.A.A.F. 2008) (Baker, J., concurring) (“Why would a military judge take a chance, where, in fact, the accused has objected to the member sitting on his court and preserved the issue? Why take the chance that an appellate court will disagree and reset the clock after years of appellate litigation?”).

<sup>88</sup> Colonel Louis J. Puleo, *Implied Bias: A Suggested Disciplined Methodology*, ARMY LAW., Mar. 2008, at 35.

<sup>89</sup> *White*, 36 M.J. at 287 (“A trial court’s standard is to grant challenges for cause liberally. An appellate court’s standard is to overturn a military judge’s ruling on a challenge for cause only for a clear abuse of discretion.”).

<sup>90</sup> United States v. Daulton, 45 MJ 212, 217 (C.A.A.F. 1996) (“Military judges *must* follow the liberal-grant mandate in ruling on challenges for cause.”) (emphasis added).

much more limited than in most civilian courts and because the manner of appointment of court-martial members presents perils that are not encountered elsewhere.”<sup>91</sup>

In *United States v. Downing*,<sup>92</sup> the CAAF reviewed a military judge’s denial of a defense challenge for cause against an officer member based on the member’s friendship with the trial counsel.<sup>93</sup> In the course of affirming the case, the CAAF determined that “[i]n light of the manner in which members are selected to serve on courts-martial, including the single peremptory challenge afforded counsel under the UCMJ, . . . military judges *must* liberally grant challenges for cause.”<sup>94</sup>

In a concurring opinion, Judge Sullivan, in response to the mandatory tone in which the courts were beginning to cite the liberal grant mandate, attempted to stem what he perceived to be a unsettling tide.<sup>95</sup> Judge Sullivan reminded the courts that, “[r]egardless of the Manual drafters’ assertion that this policy is still in effect, the President removed the only express statement of this policy in 1984.”<sup>96</sup> Judge Sullivan further argued,

[P]olicy, unlike law, is unenforceable and largely hortatory in nature. In addition, the reasons for this policy, although deeply historical in origin, have largely dissipated over time. Finally, in view of the broad discretion afforded by this Court to a trial judge in deciding challenges for cause, a qualitative standard of liberality is nearly impossible to ensure.<sup>97</sup>

Indeed, a close look at the history of the liberal grant mandate and its role in the challenge process bears out Judge Sullivan’s argument in that the perils once associated with the manner in which challenges for cause were resolved had been mitigated, if not eclipsed, by the development of enumerated grounds for challenge and the advent of the military judge. As concurring opinions often go, however, Judge Sullivan’s historic observations would fall on deaf ears—perhaps partly because the liberal grant mandate was

neither law nor necessary to the analysis and holding in *Downing*. Ironically, dicta would soon become law as the CAAF began the process of giving the liberal grant mandate the force and effect of law in the years following the *Downing* decision. In hindsight, Judge Sullivan’s cautionary remarks regarding the impossibility of enforcing a liberal grant mandate from the appellate bench would prove prophetic.

After *Downing*, the increased frequency<sup>98</sup> with which the CAAF addressed issues arising from a military judge’s denial of challenges for cause reflected the court’s “growing sense of frustration . . . [with] military judges who do not . . . articulate their reasons for denying the challenge in light of the court’s liberal grant mandate.”<sup>99</sup> In an effort to encourage military judges to more strictly adhere to the liberal grant mandate, the CAAF began to add teeth to this once merely exhortative policy.

In *United States v. James*,<sup>100</sup> the CAAF examined whether the liberal grant mandate was applicable to government challenges for cause. Once again citing the convening authority’s “opportunity to provide his input into the makeup of the panel through his [detailing] power,” and the limited peremptory challenges available to the accused, the court declared that there was “no basis for application of the ‘liberal grant’ policy when a military judge is ruling on the Government’s challenges for cause.”<sup>101</sup> In limiting the liberal grant mandate’s application to defense challenges, the CAAF again signaled that this principle was more than just an advisory policy to be begrudgingly applied or frustrated with “*pro forma* questions to rehabilitate challenged members.”<sup>102</sup>

Another message imparted through the CAAF’s one-sided application of the liberal grant mandate was that the concept of “impartiality” could be applied in a biased manner. This new partisan application of the liberal grant mandate stood in stark contrast to the view previously expressed by the Court of Military Appeals in *United States v. Reynolds*<sup>103</sup> that “[b]oth the Government and the accused [were] entitled to members who will keep an open mind and decide the case based on evidence presented in court and the law as announced by the military judge.”<sup>104</sup> This remained the Court’s position through 1999 as reflected in *United*

<sup>91</sup> *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting *United States v. Smart*, 21 M.J. 15, 19 (C.M.A. 1985)); see also *Miller*, 19 M.J. at 164; *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Schlamer*, 52 M.J. 80, 93 (C.A.A.F. 1999); *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Moyar*, 24 M.J. 635, 638 (A.C.M.R. 1987).

<sup>92</sup> 56 M.J. 419 (C.A.A.F. 2002).

<sup>93</sup> *Id.* at 420.

<sup>94</sup> *Id.* at 422 (citing *United States v. Daulton*, 45 M.J. 212 (C.A.A.F. 1996)) (emphasis added).

<sup>95</sup> *Id.* at 424 (Sullivan, J., concurring) (“Turning to the question whether military judges must ‘liberally’ grant challenges for cause, I think our position on this matter should be reconsidered.”).

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* (citations omitted).

<sup>98</sup> The CAAF has reviewed at least fifteen cases concerning the propriety of military judges’ ruling on challenges for cause since *Downing*. See generally Puleo, *supra* note 88 (tracking recent challenge cases at the CAAF).

<sup>99</sup> Puleo, *supra* note 88, at 35.

<sup>100</sup> 61 M.J. 132 (C.A.A.F. 2005).

<sup>101</sup> *Id.* at 139.

<sup>102</sup> *United States v. Moyar*, 24 M.J. 635, 638 (A.C.M.R. 1987).

<sup>103</sup> 23 M.J. 292 (C.M.A. 1987).

<sup>104</sup> *Id.* at 294 (emphasis added).

*States v. Schlamer*,<sup>105</sup> where the CAAF upheld a military judge's grant of a government challenge by expressly applying the liberal grant mandate to the government's challenge.<sup>106</sup>

The CAAF's campaign to transform the liberal grant mandate from a policy to an enforceable rule continued with its decision in *United States v. Clay*.<sup>107</sup> *Clay* was a rape case in which a member revealed during voir dire that in light of the fact that he had two teenage daughters, "if [he] believed . . . that an individual were guilty of raping a young female, [he] would be merciless within the limit of the law."<sup>108</sup> The defense challenged the member for actual bias under RCM 912(f)(1)(N), and the military judge denied the challenge without explanation.<sup>109</sup>

In setting aside the case, the CAAF noted that a challenge under RCM 912(f)(1)(N) encompassed both actual and implied bias,<sup>110</sup> and the issue presented was "one of implied bias, and in particular, the application of the liberal grant mandate."<sup>111</sup> The court once again cited the role of the convening authority in selecting courts-martial members and the limit of one peremptory challenge per side as the reasons military judges were required to be liberal in granting defense challenges for cause. Because the record did not reflect that the military judge had considered either implied bias or the liberal grant mandate, the CAAF held that the military judge had abused his discretion in denying the challenge.<sup>112</sup>

With this decision, the court announced a new standard of review to be used when the liberal grant was improperly applied: "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."<sup>113</sup> The court subsequently refined this deference-shifting principle in *United States v. Townsend*<sup>114</sup> as follows: "Where a

military judge does not indicate on the record that he has considered the liberal grant mandate in ruling on a challenge for implied bias, we will accord that decision less deference during our review of the ruling."<sup>115</sup>

While the outcome in *Clay* was probably the correct one, the manner in which the CAAF arrived at the result would have far more impact than the result itself. With *Clay*, the CAAF effectively turned the principle that military judges know the law and apply it correctly on its head.<sup>116</sup> This was especially disconcerting because the court previously applied this very presumption in determining whether a military judge had considered the mandate in deciding a challenge for cause.<sup>117</sup> Most importantly, however, the fact that the improper application of the liberal grant mandate to a challenge for cause would trigger a separate, even less deferential, standard of review than the one used for implied bias challenges completed the liberal grant mandate's transformation into a rule of law.

When the CAAF decided *James* and *Clay*, the notion that the liberal grant mandate's existence and application were justified by the role of the convening authority in selecting courts-martial members and the limit of one peremptory challenge per side was neither new nor in dispute.<sup>118</sup> In fact, these justifications had been recited in case law for so long that it had become "part of the fabric of military law."<sup>119</sup> It is almost no surprise, then, that no one blinked a disapproving eye (except, perhaps, Judge Sullivan) when the CAAF looked to these "historical concerns" to justify dressing an advisory policy in the clothing of an enforceable rule of law and treating it as such. This is especially noteworthy considering that in doing so, the CAAF significantly departed from many principles it had previously espoused in cases like *Reynolds* and *Schlamer*.<sup>120</sup>

A critical analysis of these purported historical justifications for the liberal grant mandate reveals no logical connection between these reasons and the mandate's role in helping to ensure a fair and impartial court-martial panel. First, the application of the liberal grant mandate, even if limited to defense challenges, does not change or counter-balance the fact that the convening authority ultimately chooses the members that sit on the panel. Even when the liberal granting of defense challenges results in a reduction

<sup>105</sup> 52 M.J. 80 (C.A.A.F. 1999).

<sup>106</sup> *Id.* at 95 (finding that the judge had acted "consistently with the liberal-grant mandate").

<sup>107</sup> 64 M.J. 274 (C.A.A.F. 2007).

<sup>108</sup> *Id.* at 275 (emphasis in original).

<sup>109</sup> *Id.* at 276.

<sup>110</sup> *Id.* ("Actual and implied bias are separate legal tests, not separate grounds for challenge.") (internal quotation marks omitted).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 278.

<sup>113</sup> *Id.* at 277. A military judge's ruling on a challenge for cause is reviewed for an abuse of discretion. *United States v. James*, 61 M.J. 132, 138 (C.A.A.F. 2005). However, with regard to implied bias, because the courts apply an objective test, the "standard . . . is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Moreno*, 63 M.J. 129, 134 (2006). This new standard of review associated with the liberal grant mandate purported to provide even less deference than the already amorphous implied bias standard.

<sup>114</sup> 65 M.J. 460 (C.A.A.F. 2008).

<sup>115</sup> *Id.* at 464.

<sup>116</sup> *United States v. Downing*, 56 M.J. 419, 424 (C.A.A.F. 2002) (Crawford, J., concurring) (citing *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994)).

<sup>117</sup> *Id.* ("While a statement by the military judge that he considered the liberal-grant mandate . . . would be helpful on appellate review, no such statement is required. Military judges are presumed to know the law and apply it correctly.")

<sup>118</sup> *Clay*, 64 M.J. at 276-77.

<sup>119</sup> *Id.* at 277.

<sup>120</sup> See *supra* notes 104, 106 and accompanying text.

of panel members below the required quorum in a court-martial, the convening authority must still select the additional members.<sup>121</sup> There is no legal basis for a military judge to grant a challenge merely because the convening authority selected a member. More to the point, no legal basis exists for the judge to even consider such a fact in determining a challenge on other grounds. The argument that the liberal grant mandate would act as a moral deterrent to a convening authority who, in selecting members for a court-martial panel, might be tempted to stray from the requirements of Article 25, UCMJ, is far too speculative to justify the one-sided application of a concept whose main purpose is to ensure impartiality.

Likewise, the application of the liberal grant mandate does nothing to ameliorate the fact that military law allows only one peremptory challenge per side in courts-martial. The disparity between the number of peremptory challenges available to the military accused and his civilian counterpart reflect logistical limitations inherent in the military justice system rather than any nefarious design. More specifically, the number of peremptory challenges provided under military law reflect the fact that “[i]n civilian life the pool of potential jurors is considerably greater than the number of qualified court members available in the military community”<sup>122</sup> and, perhaps to a lesser degree, the quorum requirements for trial in the military.<sup>123</sup> Viewed in this light, it may even be argued that the one peremptory challenge that the military accused wields has the potential to have more impact on the composition of a panel than the many a civilian defendant has, especially since a two-thirds majority consensus of the members is required for a conviction.<sup>124</sup>

The view that the military judge should grant challenges liberally because the accused has only one peremptory challenge essentially requires the military judge to exercise peremptory challenges on behalf of the accused. However, as with the purported notion that the convening authority’s selection of the court-martial panel drives the application of the liberal grant mandate at the trial level, there is no *legal* basis for a military judge to consider the limited number of peremptory challenges in ruling on a defense challenge for cause.

## VI. What’s In a Name?

As Judge Sullivan stated, “the reasons for this policy, although deeply historical in origin, have largely dissipated

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<sup>121</sup> 2008 MCM, *supra* note 55, R.C.M. 912(g)(2) discussion.

<sup>122</sup> *United States v. Mason*, 16 M.J. 455, 457 (Everett, J., dissenting) (C.M.A. 1983); *see also* FED. R. CRIM. P. 24(b) (allocating peremptory challenges in federal criminal cases).

<sup>123</sup> 2008 MCM, *supra* note 55, R.C.M. 501 (requiring a minimum of five and three members for general and special court-martial, respectively).

<sup>124</sup> *Id.* R.C.M. 921(c)(2)(b).

over time.”<sup>125</sup> An examination of the evolution of the liberal grant mandate suggests that the “deeply historical” reasons for the liberal grant mandate were the procedures used to decide challenges for cause by a majority vote of the panel members. When this practice ended with the introduction of the military judge, the reasons for the mandate indeed “dissipated.” The explanation that the mandate exists because the convening authority appoints the panel members or because only one peremptory challenge is permitted per side is misguided.

Accordingly, courts should recognize that the liberal grant mandate was originally intended to be an exhortative policy and is, by its very nature, “unenforceable and largely hortatory.”<sup>126</sup> Calling a policy a “mandate” and creating a new and unique standard of review to enforce it does not necessarily make it so. The application of the liberal grant mandate, in its most recent form, has become an exercise in awkwardness on both the trial and appellate levels. It has failed to produce much in the way of consistent results, and consequently, clarity of guidance, as to its proper use. Perhaps this is so because the enforcement of this elusive standard essentially relies on proving the speculative effects of a negative—what a military judge procedurally failed to do—rather than on what facts actually exist on the record that support the military judge’s ruling on a challenge for cause.

“An appellate court’s standard” has always been “to overturn a military judge’s ruling on a challenge for cause only for a clear abuse of discretion.”<sup>127</sup> The added layer of analysis currently required by the relatively new and less deferential standard associated with the liberal grant mandate only makes for a more complex analysis—and likely one that would not produce a different outcome. An analysis of the recent cases, such as *Clay*, that have purported to apply the new “less than more than” standard under the liberal grant mandate, would arguably have had the same outcome based on an application of the traditional abuse of discretion standard. The message to the trial courts sent by a reversal based on the more familiar abuse of discretion standard, however, would be a much clearer indication of what military judges should not do.

As discussed, a historical perspective does not support the current application of the liberal grant mandate. Nonetheless, regardless of what the future holds for the application of the liberal grant mandate as an enforceable rule, and whatever the applicable standard of review, the liberal grant mandate should always remain an appropriate guiding principle for military judges to apply when ruling on challenges for cause, regardless of which party raises them.

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<sup>125</sup> *United States v. Downing*, 56 M.J. 419, 425 (C.A.A.F. 2002) (Sullivan, J., concurring).

<sup>126</sup> *Id.*

<sup>127</sup> *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993).

Trial courts *should*, therefore, as a matter of policy, liberally grant challenges for cause when there is reasonable doubt regarding the impartiality of a member. Addressing such potential member issues at the outset of judicial proceedings

would undoubtedly obviate the need for years of appellate litigation and serve both the interests of justice and efficiency of the courts.<sup>128</sup>

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<sup>128</sup> United States v. Clay, 64 M.J. 274, 277 (C.A.A.F. 2007).