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HE CALLED FOR HIS PIPE, AND HE CALLED FOR HIS BOWL, AND HE CALLED FOR HIS MEMBERS THREE—SELECTION OF MILITARY JURIES BY THE SOVEREIGN: IMPEDIMENT TO MILITARY JUSTICE

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> Tendencies, no matter how slight, toward the selection of jurors by any method other than a process which will insure a trial by a representative group are undermining processes weakening the institution of jury trial, and should be sturdily resisted.
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> —Justice Frank Murphy[2]

> [L]et it be again remembered, that delays and little inconveniences in the forms of justice are the price that all free nations must pay for their liberty in more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of our constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the

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2. United States v. Glasser, 315 U.S. 60, 86 (1942).

> utter disuse of juries in questions of the most momentous concern.
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> —Justice Sir William Blackstone[3]

I. Introduction

A district attorney is vested with prosecutorial discretion. What if he picked the jury from among those who work directly for him? The governor wields the power of clemency. What if she picked the jury? The grand jury, guided by the prosecutor and cloaked in secrecy, formally investigates criminal allegations. What if they chose the membership of each petit jury? The military commanding officer is apprised of suspected misconduct within his unit. He stays informed and may properly influence the course of ongoing criminal investigations. He decides whether, who, and on what charges to prosecute. Ultimately, he determines the propriety of all convictions and sentences. He is the district attorney, the governor, and the grand jury rolled into one. In the exercise of justice, he is as close to a true sovereign as this nation has, and he picks the jury from among those who work for him.

The Uniform Code of Military Justice[4] (UCMJ) governs trials of criminally accused service members. Under this statute and its implementing rules, the commanding officer of the accused "convenes" a court-martial[5] and "refers" charges to it for trial.[6] The process of convening a court-

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3. 4 WILLIAM BLACKSTONE, COMMENTARIES *350.

4. *See* 10 U.S.C. §§ 801-946 (1994).

5. *See* UCMJ arts. 22-24 (1995); MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 504 (1995) (implementing these articles) [hereinafter MCM]. Service regulations of the different branches of the military augment the UCMJ provisions and establish what level of commanding officer shall be designated as a convening authority and for what level of court-martial. For example, in the Army, brigade level commanding officers (generally colonels) are typically designated as special court-martial convening authorities. In the Navy, ships' commanding officers (generally captains or commanders) are so designated. In the Marine Corps, battalion level commanders (lieutenant colonels) are special court-martial convening authorities. In the Air Force, group commanders (colonels) hold the position. In all services, flag officers in command are generally appointed as general court-martial convening authorities. For general procedures and examples, see U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-2 (24 June 1996); U.S. DEP'T OF NAVY, JUDGE ADVOCATE GENERAL INSTR. 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL, § 0120 (3 Oct. 1990) (C2, 23 Feb. 1995). The term "commanding officer" is used in this article interchangeably with special or general court-martial convening authority.

martial includes selecting its jury (or members) according to the specifically listed criteria of Article 25.[7] The convening authority must select members who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[8] There are no statutory or regulatory methods for actually accom-

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6. *See* UCMJ arts. 30, 32-35; MCM, *supra* note 5, R.C.M. 601 (implementing these articles).

7. The first three subsections of Article 25 discuss the general eligibility of commissioned officers, warrant officers, and enlisted personnel to serve as court-martial members. *See* UCMJ art. 25(a)-(c). Article 25(d) sets forth the specific criteria for member selection, discussed presently. The final subsection governs the convening authority's delegable power to excuse members who were previously detailed. *See id*. art. 25(e).

8. *Id*. art. 25(d)(2). That provision continues: "No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case." *Id*. Subsection (d)(1) states: "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." *Id*. art. 25(d)(1). *See* MCM, *supra* note 5, R.C.M. 501-505 (implementing Article 25).

The 1920 revisions to the Articles of War first incorporated specific member selection criteria as follows:

> When appointing courts-martial, the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.

Articles of War of 1920, art. 4, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 494 (1921) [hereinafter 1921 MANUAL]. The tradition of staff assistance in this duty began with the 1921 *Manual for Courts-Martial*. Paragraph 6 charged the staff judge advocate with advising the convening authority on the qualifications of potential members pursuant to Article 4. *See* 1921 MANUAL, *supra*, ¶ 6(c) n.2. Article 16 of the Articles of War disallowed trial of officers by a panel including any officers junior to the accused. *See* Articles of War of 1920, art. 16, *reprinted in* 1921 MANUAL, *supra*, app. 1, at 498. In 1950, the drafters of the UCMJ fashioned Article 25 from Articles 4 and 16 of the Articles of War. *See* UCMJ art. 25 (1958) (as amended in 1968, 1983, and 1986). They added "education" to the previously enunciated qualifications of age, training, experience, and judicial temperament. They substituted "length of service" as another subjective qualification in place of the previous requirement for two years of active service. *See id*. art. 25(d)(2). The drafters suggested panels of members who are senior to the accused in all cases. *See id*. art. 25(d)(1).

plishing the selection. Scholars have identified preferred methods,[9] but the actual practice varies widely among and within the services.[10]

There are two basic problems with this process, one largely theoretical, the other very practical. First, it is unconstitutional. The Supreme Court has interpreted the Constitution's provisions governing trial by jury to include fundamental standards for jury selection. Specifically, the Court mandates impartial selection of juries from a fair cross-section of the community.[11] The law entitles the accused service member to a panel of members;[12] however, the selection process used to impanel this military jury is entirely at odds with the constitutional standards. The usurpation of this fundamental individual right also violates the concept of separation of powers, which is central to the structure of the government.[13] Second, it is unfair, both in reality and in appearance. The process naturally breeds unlawful command influence and its mien. At best, military jury selection incorporates the varied individual biases of numerous convening authorities and their subordinates. At worst, it involves their affirmative misconduct. "Court-stacking" is consistently achieved, suspected, or both.[14] Further, the convening authority exerts improper dominion and control over the independence of military jurors.[15]

The failure to recognize and to address these two problems is a consequence of a third, more complex and over-arching problem of perception. Article 25 reflects the theory that "military justice" means "military discipline." Article 25 survives, despite its prima facie unconstitutionality, through the judicially created "separate society" concept of the military.[16] Discipline is crucial to the military's proper functioning. Therefore, runs this concept, the military is unencumbered by constitutional standards of justice that are thought to impede discipline. Unlawful command influence, where manifestly encountered, is usually remedied case-by-case. However, courts and commentators often view command control of disci-

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9. *See* Major Lawrence J. Morris, *Keystones of the Military Justice System: A Primer for Chiefs of Justice*, ARMY LAW., Oct. 1994, at 15.

10. *See infra* Part III.

11. *See infra* notes 29 and 39 and accompanying text.

12. In fact, in the military, trial by members is the default setting. The accused may request trial by military judge alone. *See* MCM, *supra* note 5, R.C.M. 903. Absent a "substantial reason why, in the interest of justice," the *Manual for Courts-Martial* counsels the judge to grant such requests. *Id*. R.C.M. 903(B) discussion.

13. *See* discussion *infra* Part II.C.

14. *See* discussion *infra* Part III.A.

15. *See* discussion *infra* Part III.B.

16. *See infra* notes 327-330 and accompanying text.

pline as integral to command control of the mechanisms of justice.[17] They fail to recognize that justice complements discipline rather than diminishing it. The statistically occasional unlawful control has become a condemnable but tolerable side effect of the institutional need for discipline.

The proposed National Defense Authorization Act for Fiscal Year 1999,[18] passed by the House of Representatives and placed in the Senate, directs the Secretary of Defense to report to Congress on court-martial panel selection by 15 April 1999.[19] The bill specifically tasks the Secretary of Defense to develop, with the secretaries of the military departments, a plan for random selection of court-martial members.[20]

This article explores the theoretical and practical shortcomings of the current member selection procedures under the UCMJ and proposes a comprehensive solution. First, the article examines the history and development of the constitutional right to trial by a jury impartially selected from a fair cross-section of society. The article exposes the weaknesses underlying the judicially created and sustained exception to this right for military trials. As constitutional principles of jury selection and the practice of military law each evolve, their incongruity becomes ever more apparent. Second, the article develops the rich and diverse history of unlawful command influence in the selection of, and interaction with, court-martial members. The continued vibrancy of unlawful command influence in this area tracks the consistent failure of the appellate judiciary to curtail it. Third, this article develops a model for a new system of court-martial jury selection, administered and maintained by computer database. Finally, the article defends the model, focusing on its theoretical and practical advantages over Article 25 and advocating a new approach to the interplay of justice and discipline.

II. The Theoretical Problem with Military Jury Selection: Conflict Between Article 25 and the Constitution

Five years after Congress enacted the UCMJ, the United States Supreme Court voiced foreboding lack of confidence in the statute's ability to guarantee constitutional standards. The Court stated: "[M]ilitary tribu-

17. *See* discussion *infra* Part IV.B.3.
18. H.R. 3616, 105th Cong. (1998).
19. *See id.* § 561(a).
20. *See id.* § 561(b).

nals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."[21] The statement delicately and unwittingly identified a fundamental problem with military jury selection, which is, in substance, unchanged today.[22] Put bluntly, the practice is unconstitutional.

A. The Constitutional Right to Trial by Jury: History, Tradition, and Evolution

The right to trial by jury enjoys a rich history from antiquity through the present day.[23] The United States Constitution reflects in text and context the importance of the right at this nation's birth. The Constitution twice guarantees the right to trial by jury to the criminally accused. Article III provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.[24]

The Sixth Amendment adds:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory pro-

21. U.S. *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955) (holding that former members of the armed services may not be tried by court-martial, as they, like all other civilians, are entitled to all of the procedural and substantive rights and safeguards provided in federal district court).

22. The 1986, 1983, and 1968 amendments to Article 25 affected subsections (c) and (e), primarily in ministerial fashion. *See* Military Justice Amendments of 1986, Pub. L. No. 99-661, § 825(c)(1), 100 Stat. 3816, 3906; Military Justice Act of 1983, Pub. L. No. 98-209, § 825(e), 97 Stat. 1393, 1394; Military Justice Act of 1968, Pub. L. No. 90-632, § 825(c)(1), 82 Stat. 1335, 1336.

23. *See infra* notes 132, 144.

24. U.S. CONST. art. III, § 2, cl. 3.

> cess for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.[25]

The Supreme Court has added specific meaning to these broad edicts. In 1930, the accused's express and intelligent waiver of his right to trial by jury was ineffective by itself. The Court also demanded the approval of the judge and the prosecutor before sanctioning a bench trial.[26] In the 1940s, the Court impressed some lasting requirements on the right to trial by jury. The Court declared trial by jury "a prized shield against oppression."[27] A unanimous Court found that "[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community."[28] Further, said the Court, "[t]he American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community . . . without systematic and intentional exclusion of any [group.]"[29]

The late 1960s and 1970s saw the most important interpretation to date. In the seminal case of *Duncan v. Louisiana*,[30] the Court found the right to trial by jury to be "fundamental to the American scheme of justice" and binding on the states through the Fourteenth Amendment.[31] "[T]he truth of every accusation . . . should afterward be confirmed by the . . . suffrage of twelve of his equals and neighbors, indifferently chosen and supe-

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25. *Id*. amend. VI. The Constitution also guarantees the right to trial by jury in civil cases. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." *Id*. amend. VII.

26. *See* Patton v. United States, 281 U.S. 276, 312 (1930). Five years later, the Court espoused a strong commitment to the principles of the constitutional jury trial provisions.

> [T]rial by jury has always been, and still is generally regarded as the normal and preferable mode of disposing of issues of fact in civil cases at law as well as in criminal cases. Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that *any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care*.

Dimick v. Schiedt, 293 U.S. 474 (1935) (emphasis added).

27. Glasser v. United States, 315 U.S. 60, 84 (1941).

28. Smith v. Texas, 311 U.S. 128, 130 (1940) (striking down a state statutory scheme that, in practice, operated to racially discriminate in the selection of grand jurors).

29. Thiel v. Southern Pac., 328 U.S. 217 (1946).

30. 391 U.S. 145 (1968).

31. *Id.* at 149.

rior to all suspicion."[32] The Court subsequently retreated from this encompassing language. In *Baldwin v. New York*,[33] the Court held that potential punishment short of six months' incarceration fails to trigger the right under the federal Constitution.[34] In *Williams v. Florida*,[35] the Court found no constitutional violation for state juries numbering six.[36] In *Johnson v. Louisiana*,[37] the Court upheld the constitutionality of a state jury's conviction that was reached by a two-thirds majority vote.[38] However, the Court remained committed to its principles concerning the scope and importance of the right. The Court held that "*the fair cross-section requirement [is] fundamental to the jury trial guaranteed by the Sixth Amendment* . . . . Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system."[39]

The language of the basic tenets of criminal law set out in Article III and the Sixth Amendment to the Constitution is broad and clear. The Supreme Court's interpretation is sweeping. However, neither the legislature nor the judiciary has ever considered any of it to be applicable to *military* criminal law. This exception is an old judicial creation. Scrutiny of its supposed foundations reveals little justification, and analysis of the con-

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32. 4 BLACKSTONE, *supra* note 3, at *349-50, *quoted in Duncan*, 391 U.S. at 151-52. The *Duncan* Court stated that "the jury trial provisions in the Federal and State constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan*, 391 U.S. at 155-56.

33. 399 U.S. 66 (1970) (plurality opinion).

34. The Court presented a balanced argument.

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. We cannot, however, conclude that these administrative conveniences, in light of the practices that now exist in every one of the 50 States as well as in the federal courts, can similarly justify denying an accused the important right to trial by jury where the possible penalty exceeds six months' imprisonment.

Id. at 73-74.

35. 399 U.S. 78 (1970).

text in which this exception was created reveals no basis for continued application.

B. *Ex parte Milligan* and *Ex parte Quirin*: Denial of the Constitutional Right to Trial by Jury in the Military

36. *Id*. at 86-90. The Court offered an interesting background.

> [T]he oft-told history of the development of trial by jury in criminal cases . . . revealed a long tradition attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement. That same history, however, affords little insight into the considerations that gradually led the size of that body to be generally fixed at 12. Some have suggested that the number 12 was fixed upon simply because that was the number of the presentment jury from the hundred, from which the petit jury developed. Other, less circular but more fanciful reasons for the number 12 have been given . . . and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke's explanation that the "number of twelve is much respected in holy writ, as 12 apostles, 12 stones, 12 tribes, etc.," is typical. In short, while sometime in the 14th century the size of the jury at common law came to be fixed generally at 12, that particular feature of the jury system appears to have been a historical accident, unrelated to the great purposes which gave rise to the jury in the first place.

Id. (citations omitted).

37. 406 U.S. 356 (1972).

38. *Id*. at 360. "[T]hree dissenting votes to acquit raises no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." *Id*. "That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." *Id.* at 361.

39. Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (emphasis added) (striking down, under fair cross-section requirements of the Sixth and Fourteenth Amendments, a state constitutional and statutory jury service exemption for women). In fact, the Supreme Court justified its decisions that allowed states to provide for convictions by juries of less than 12 and on less than unanimous vote with the fair cross-section requirement. In *Williams*, the Court stated that the number of persons on the jury should "be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." *Williams*, 399 U.S. at 100. *See* Apodaca v. Oregon, 406 U.S. 404, 410-11(1972) (plurality opinion) ("[A] jury will come to . . . a [commonsense] judgment as long as it consists of a group of laymen representative of a cross section of the community who have the duty and the opportunity to deliberate . . . on the question of . . . guilt.").

One hundred thirty-two years ago, the Supreme Court decided *Ex parte Milligan*.[40] During the Civil War, Lamdin Milligan was a civilian citizen of the United States and the State of Indiana. Apparently, he neither belonged to nor associated with the armed services of the Union or the Confederacy.[41] Milligan was arrested at his home in October 1864 under the orders of the commandant of the Military District of Indiana.[42] The Union government accused him of violating domestic law and the law of war. The government alleged that he communicated with the enemy, resisted the draft, and conspired to seize munitions and to release prisoners of war.[43] The same commandant who ordered the arrest convened a military commission, which tried and convicted Milligan.[44]

The Supreme Court determined that a military commission may not, even during civil war, try a civilian citizen when state and federal courts are open and operating.[45] The civilian citizen in such circumstances enjoys his full panoply of constitutional rights.[46] According to the Court, these include one of the most important freedoms that Mr. Milligan was denied, his right to be tried by a jury.[47]

The theme of *Milligan* is the maintenance of civil liberty even during national strife. For pages of eloquent text, the Court paid tribute to the virtues of constitutionally secured rights against oppression, tyranny, and the dangers of martial control.

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.[48]

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40. 71 U.S. (4 Wall.) 2 (1866).
41. *See id.* at 6.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 107, 127.
46. *See id.* at 118-24.
47. *Id.* at 122.

Then, on one page in the middle of the opinion, in the middle of extolling the paramount nature of the right to trial by jury, the Court withheld the right from those in military service.

> [I]f ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service.[49]

The Court explained that the language of the Sixth Amendment is "broad enough to embrace all persons and cases"[50] but acknowledged the specific exception in the Fifth Amendment to the requirement for grand jury presentment and indictment in military cases.[51] The Court then concluded that "the Framers of the Constitution, *doubtless*, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."[52] The Court provided no reference or support for this conclusion.[53] Following this brief foray into constitutional analysis that was marginally related to the facts of the case, the Court returned to its worship of basic constitutional rights. *"All other*

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48. *Id.* at 121. The Court further stated: "[n]o graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law." *Id.* at 118-19.

> The crimes with which Milligan was charged were of the gravest character, and the petition and exhibits in the record . . . admit his guilt. But whatever his desert of punishment may be, it is more important to the country and every citizen that he should not be punished under an illegal sentence, sanctioned by this court of last resort, than that he should be punished at all. The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice.

Id. at 132 (Chase, C.J., concurring).

49. *Id.* at 123 (emphasis added).

50. *Id.*

51. *See id.* "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. CONST. amend. V.

52. *Milligan*, 71 U.S. (4 Wall.) at 123 (emphasis added).

53. *See id.*

persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury."[54]

Almost eighty years after *Milligan*, the Supreme Court decided *Ex parte Quirin*.[55] During World War II, Richard Quirin was a citizen of the German Reich and a member of its armed forces.[56] In mid-June 1942, following the declaration of war between the United States and Germany, he infiltrated the sovereign territory of the United States. He was equipped and ordered to destroy industries and activities that furthered the United States war effort.[57] The United States Supreme Court held that a military commission *could* try captured German spies in accordance with the law of war.[58] The Court found no Sixth Amendment right, under these circumstances, to trial by jury in the civil courts.[59] Again venturing beyond the facts before it, the Court justified its conclusion in overly broad dicta. "The fact that 'cases arising in the land or naval forces' are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth."[60]

Since the *Quirin* decision, a tired and thoughtless mantra has developed in military Sixth Amendment jurisprudence. "The . . . right to a trial by jury . . . has long been recognized as inapplicable to trials by court-martial."[61] This verbiage or similar language, which is always hinged on the apparently seminal cases of *Quirin* and *Milligan*, appears repeatedly throughout pertinent case law.[62] Whenever an issue concerning jury selection arises, the message is generally simple and devoid of analysis, appli-

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54. *Id.*

55. 317 U.S. 1 (1942).

56. *Id*. at 21.

57. *See id*. Richard Quirin had lived in the United States, but was born in Germany and returned to Germany between 1933 and 1941. Quirin and his countrymen came ashore on Long Island, New York bearing explosives, incendiaries, fuses, and timing devices. They landed under the cover of darkness from the submarine that brought them across the Atlantic. They wore German Marine Infantry uniforms during their landing and buried these with their supplies once ashore. They proceeded to New York City in civilian attire. All were trained in Germany for espionage and sabotage. The German government paid them during this training and promised further compensation for their acts of destruction within the United States. *Id.*

58. *Id*. at 48.

59. *Id.* at 29, 39-41.

60. *Id*. at 40 (citing *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 6 (1866)).

61. United States v. Loving, 41 M.J. 213, 285 (1994) (citing *Quirin*, 317 U.S. at 39-41; *Milligan*, 71 U.S. (4 Wall.) at 137-380), *aff'd on other grounds*, 517 U.S. 748 (1996).

cation, or exploration: the military accused does not enjoy the constitutionally guaranteed right to trial by jury, as clearly determined by the Supreme Court in *Quirin* and *Milligan*. However, two aspects of these decisions vitiate their value as precedent on this issue. First, both cases advance little and fundamentally flawed analysis in support of a military exception to the Sixth Amendment. Second, both cases reached this con-

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62. *See, e.g.*, United States v. Witham, 47 M.J. 297, 301 (1997) ("[A] military accused has no Sixth Amendment right to trial by jury.") (citing *Quirin*, 317 U.S. 1); United States v. Curtis, 44 M.J. 106, 132 (1996) ("[T]he Supreme Court has indicated that service members have never had a right to a trial by jury.") (citing *Qurin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2), *rev'd as to sentence on reconsideration*, 46 M.J. 129 (1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988) ("[T]he right to trial by jury has no application to the appointment of members of courts-martial.") (citing *Qurin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.") (citing *Milligan*, 71 U.S. (4 Wall.) 2); United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973) (making a remarkable connection between distinct elements of the Constitution by asserting that "[c]ourts-martial are not part of the judiciary of the United States within the meaning of Article III . . . . *Consequently*, the Sixth Amendment right to trial by jury with accompanying considerations of [jury selection] has no application to the appointment of members of courts-martial" (emphasis added)); United States v. Jenkins, 42 C.M.R. 304, 306 (C.M.A. 1970) ("Under the Fifth and Sixth Amendments to the Constitution, members of the armed forces do not have the right to indictment by grand jury and trial by petit jury . . . .") (citing *Qurin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); United States v. Ruiz, 46 M.J. 503, 507 (A.F. Ct. Crim. App. 1997) ("[C]ourts-martial have never been considered subject to the jury trial demands of the Sixth Amendment of the Constitution.") (citing *Qurin*, 317 U.S. 1); United States v. Simoy, 46 M.J. 592, 624 (A.F. Ct. Crim. App. 1997) (Morgan, J., concurring) ("Since *Ex parte* Milligan . . . [the Fifth Amendment's express] exception has been assumed to extend to the right to trial by a petit jury guaranteed in the Sixth Amendment."); United States v. Thomas, 43 M.J. 550, 589 (N.M. Ct. Crim. App. 1995) ("[I]t is clear that the Supreme Court has held that Article III, as well as the Fifth and Sixth Amendments, do not require jury trials for all cases other than impeachment.") (citing *Qurin*, 317 U.S. 1), *aff'd in part, rev'd in part on other grounds*, 46 M.J. 311 (1997); United States v. Gray, 37 M.J. 751, 755 (A.C.M.R. 1993) ("A court-martial has never been subject to the jury-trial demands of Article III of the Constitution.") (citing *Qurin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2); United States v. Corl, 6 M.J. 914 (N.M.C.M.R. 1979), *aff'd*, 8 M.J. 47 (C.M.A. 1979) ("The Sixth Amendment right to a jury trial, by long-established principle, is inapplicable to trial by courts-martial.") (citing *Qurin*, 317 U.S. 1; *Milligan*, 71 U.S. (4 Wall.) 2).

On 5 October 1994, the National Defense Authorization Act for Fiscal Year 1995 changed the names of the United States Courts of Military Review and the United States Court of Military Appeals. *See* Pub. L. No. 103-337, 108 Stat. 2663 (1994). The new names are the United States Army Court of Criminal Appeals, the United States Air Force Court of Criminal Appeals, the United States Navy-Marine Corps Court of Criminal Appeals, the United States Coast Guard Court of Criminal Appeals, and the United States Court of Appeals for the Armed Forces.

clusion deep in dicta that had little to do with the actual holdings and on facts having little contemporary application.

1. Flawed Analysis

In Milligan and Quirin, the Supreme Court reasoned that the framers of the Constitution must have intended to create a military exception to the Sixth Amendment in the absence of an explicit one. In both cases, the Court infers this intent from the express exclusion of the armed forces from the Fifth Amendment's grand jury clause. The language of the Constitution and the process and history of its drafting support the opposite inference.

a. Textual Weaknesses of the Milligan/Quirin Inference

The framers knew very well how to exempt the military from the strictures of the Bill of Rights and did so within the Bill of Rights. They surgically removed the grand jury clause from among several Fifth Amendment criminal due process rights otherwise apparently applicable to the military. The framers removed it carefully by specifying land and naval forces as well as militia forces in service during exigency. Did they also intend to remove only the jury trial provision from among the several criminal due process rights in the Sixth Amendment? If so, the text of the Sixth Amendment should reflect the exception as clearly and carefully as does the Fifth.[63]

On the other hand, the specific language of the Sixth Amendment calls for trial by a jury "of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."[64] Perhaps this provision contemplates juries composed only of permanent residents of the state or district. Courts-martial "jurors" come from the necessarily transient military community. Perhaps the terms "state" and "district" *imply* that the Sixth Amendment does not guarantee a jury in courts-martial. This argument is perhaps the only way, on

63. *See* Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193, 206 (1972) (asserting that the constitutional jury trial provisions do not infer exclusion of courts-martial).

64. U.S. CONST. amend. VI.

the Sixth Amendment text alone, to imply a military exception. The argument, however, is weak for several reasons.

First, the Sixth Amendment begins, "In all criminal prosecutions . . . ."[65] Second, the immediately preceding Fifth Amendment makes an exception for "*cases* arising in the [armed] forces."[66] Third, looking to the context of this language, the framers apparently added the "state and district" requirement to ensure close proximity among trial, jury, and alleged crime.[67] Before the Revolutionary War, Great Britain feared that colonial juries would undermine the interests of the crown; therefore, Parliament transported many who were charged with criminal misconduct back to England for trial.[68] The *Declaration of Independence* specifically complained of this practice.[69] The "state and district" language and the context of its drafting do not appear to exclude courts-martial from the Sixth Amendment's application. Instead, the language establishes a vicinage requirement, which is generally satisfied in military criminal cases. The argument that the Sixth Amendment right to a jury trial—or any other Bill

65. *Id*.

66. *Id*. amend. V (emphasis added).

67. *See* JAMES J. GOBERT, JURY SELECTION, THE LAW, ART, AND SCIENCE OF SELECTING A JURY § 2.02 (2d ed. 1990).

68. *See id*. at 36-37 (citing William Wirt Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 MICH. L. REV. 59 (1944); Drew L. Kershen, *Vicinage*, 29 OKLA. L. REV. 803 (1976), 30 OKLA. L. REV. 1 (1977)).

69. "[The King of England] has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation . . . [f]or transporting us beyond Seas to be tried for pretended offenses . . . ." THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776), *reprinted in* SOURCES OF OUR LIBERTIES 319, 320 (Richard L. Perry & John C. Cooper eds., spec. ed. 1990). *See* THE DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 2 (Oct. 14, 1774), *reprinted in* SOURCES OF OUR LIBERTIES, *supra*, at 286 (lodging the similar complaint that "it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions").

of Rights provision—is inapplicable by implication simply ignores the plain language of the amendments.[70]

The argument also ignores the text of Article III of the Constitution. This article grants the right to a jury broadly in the "Trial of all Crimes," save "Cases of Impeachment."[71] Whether or not Article III provisions are considered at all applicable to courts-martial,[72] this text demonstrates the ability of the framers to create exceptions to important, broadly worded rights where they intended to do so. Further, it shows the precision with which they did so.[73]

b. Contextual Weaknesses of the Milligan/Quirin Inference

The process of the Constitution's drafting implies that the military *is* subject to the jury trial requirement of the Constitution. The framers had several opportunities to include a military exception to the right to trial by jury, and they affirmatively rejected such an exception that was contained in submitted proposals. First, some state constitutions, adopted years before the federal Constitution, contained an explicit exception of this nature.[74] Then, some states submitted proposals for a federal Bill of Rights and included this express exception.[75] Finally, one of the principal drafters

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70. *See* Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958) (arguing that the entire Bill of Rights is inapplicable to the military by implication); Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference*: *Weiss v. United States*, 70 CHI.-KENT L. REV. 265, 284 (1994) (arguing that various provisions of the Bill of Rights have been denied to service members by implication).

71. U. S. CONST. art. III.

72. *See infra* section C.

73. *See* Remcho, *supra* note 63, at 206.

74. *See*, *e.g.*, MASS. CONST. pt. I, art. XII (1780), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 373, 376 ("[T]he legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury."); N.H. CONST. pt. I, art. XVI (1783), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 373, 376 ("Nor shall the legislature make any law that shall subject any person to a capital punishment, excepting for the government of the army and navy, and the militia in actual service, without trial by jury."). *Cf.* MD. CONST. Declaration of Rights, ¶ XIX (1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 346, 348; PA. CONST. pt. A, ¶ IX (1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 328, 330; VA. CONST. Bill of Rights, § 8 (1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 311, 312. The Maryland, Pennsylvania, and Virginia Constitutions provided a guarantee of the right to trial by jury, but made no distinction for cases that arose in the armed forces or militia.

of the Bill of Rights, James Madison, proposed that this exception be added to Article III.[76] If the framers believed that they had originally drafted Article III too broadly, they had only to re-engineer it through the amendment process then taking place.[77] If the framers believed that the Sixth Amendment was unclear, they need only have looked to the states' proposals or their own language in the immediately preceding Fifth Amendment to clarify it. The adopted version of the Constitution and the amendments included the exception where the framers intended—Grand Jury presentment and indictment—and affirmatively precluded it where they did not—petit jury.[78]

Finally, the concept of courts-martial that incorporated a jury system was not foreign to the framers. In 1958, Colonel Frederick Weiner argued that the Constitution must have been drafted with the understanding that the Sixth Amendment did not apply to trials by courts-martial.[79] He asserted, as part of his rationale, that service members had never, prior to or during the Constitution's drafting, enjoyed the right to trial by jury.[80] This argument depends on an unnecessarily narrow definition of the word

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75. Maryland submitted seven proposed amendments. The second of the Maryland proposals stated:

> [t]hat there shall be a trial by jury in all criminal cases, according to the course of proceeding in the state where the offence is committed; and that there be no appeal from matter of fact, or second trial after acquittal; but this provision shall not extend to such cases as may arise in the government of the land or naval forces.

A Fragment of Facts, Disclosing the Conduct of the Maryland Convention on the Adoption of the Federal Constitution (Apr. 21, 1788), *reprinted in* 2 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 507, 509-10 (Jonathan Elliot ed., 2d ed., n.p. 1836) [hereinafter DEBATES]. Virginia's eighth proposed amendment read:

> [t]hat in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in favor, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces) nor can he be compelled to give evidence against himself.

The Debates in the Convention of the Commonwealth of Virginia on the Adoption of the Federal Constitution (June 27, 1788), *in* 3 DEBATES, *supra*, at 592-93.

"jury." Indeed, military juries were not drawn from the civilian populace. However, they did exist as a matter of written law.

First, the Provisional Congress of Massachusetts Bay adopted The Massachusetts Articles of War on 5 April 1775.[81] These Articles, which imported wholesale the British court-martial system,[82] mandated general courts-martial of not less than thirteen field grade officers[83] and regimental courts-martial of not less than five officers.[84] They provided to the commanding officer no specific guidance or criteria for selecting members,[85] but they did charge the members to "behave with calmness, decency, and impartiality."[86] Second, the Second Continental Congress adopted the first American Articles of War on 30 June 1775.[87] The American Articles of War virtually duplicated the Massachusetts articles relating to the administration of courts-martial.[88] Third, an appointed committee drafted the American Articles of War of 1776.[89] Again, the provisions related to courts-martial administration were left largely unchanged.[90] Finally, in

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76. Mr. Madison stated:

> The amendments which have occurred to me proper to be recommended by Congress to the State Legislatures, are these:
>
> . . . .
>
> Seventhly. That in article 3d, section 2, the third clause be struck out, and in its place be inserted the clauses following, to wit:
>
> The trial of all crimes (except in cases of impeachments, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage . . . .

1 ANNALS OF CONGRESS 450-52 (Joseph Gales ed., 1789) (remarks of Mr. James Madison). Note that the Virginia Constitution, which James Madison helped draft in 1776, contained no military exception to the right to trial by jury. *See* SOURCES OF OUR LIBERTY, *supra* note 69, at 308-10. Likewise, Maryland, in 1776, saw no need for such exception. *See id.* at 346, 348. However, Virginia's and Maryland's proposed amendments to the federal Constitution, drafted in 1790, like the later-drafted state constitutions, contained the exception. The developing trend was to include a military exception to the right to trial by jury. The framers resisted this trend and patterned the Sixth Amendment after the state constitutions of the previous decade.

77. *See generally* FRANCIS H. HELLER, THE SIXTH AMENDMENT 28-34 (1951) (detailing the House and Senate debates and the committee drafting process of the Sixth Amendment).

1789, following the ratification of the Constitution, Congress reenacted, without change, the Articles of War that were then in force.[91]

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78. The *Milligan* concurrence arrived at the opposite conclusion.

> Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the [grand jury clause of the] fifth amendment . . . and it is admitted that the exception applies to the other amendments as well as to the fifth. Now, we understand this exception to have the same import and effect as if the powers of Congress in relation to the government of the army and navy and the militia had been recited in the amendment, and cases within those powers had been expressly excepted from its operation. The states, most jealous of encroachments upon the liberties of the citizen, when proposing additional safeguards in the form of amendments, excluded specifically from their effect cases arising in the government of the land and naval forces . . . . The amendments proposed by the states were considered by the first Congress, and such as were approved in substance were put in form, and proposed by that body to the states. Among those thus proposed, and subsequently ratified, was that which now stands as the fifth amendment of the Constitution. We cannot doubt that this amendment was intended to have the same force and effect as the amendment proposed by the states. We cannot agree to a construction which will impose on the exception in the fifth amendment a sense other than that obviously indicated by action of the state conventions. *We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment*.

Ex parte Milligan, 71 U.S. (4 Wall.) 2, 137-38 (1866) (Chase, C.J., concurring) (emphasis added). One commentator, Gordon Henderson, argued that most of the Bill of Rights does apply to the military; nevertheless, he maintained that, because state proposals contained a specific exception to the right to trial by jury for the armed forces, the framers meant for such an exception to exist. Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 303-14 (1957). Henderson reasoned that the failure of the Sixth Amendment to contain the same exception as the Fifth was the result of forgetfulness! *Id*. The following year, Henderson was assailed for his theory that *any* of the provisions of the Bill of Rights applied to the military. *See* Wiener, *supra* note 70, at 266. In 1972, Joseph Remcho pointed out that Henderson's analysis was contrary to accepted means of statutory construction. Remcho, *supra* note 63, at 206.

79. *See* Weiner, *supra* note 70, at 280.

80. *See id*. "Since, however, the significance of this and other constitutional provisions 'is to be gathered not simply by taking the words and a dictionary,' we know—indeed it has *never been doubted*—that . . . [t]he soldier or sailor never had a right to trial by a jury." *Id.* (emphasis added) (citations omitted). Just like the *Milligan* opinion nearly a century earlier, Weiner tried to give weight to his opinion through the mere force of it. He offers no support for his proposition that the framers were of such clear mind about the inapplicability of the Bill of Rights to the military that they had no reason to voice their views.

The commanding officer of 1789 chose the jury. The military accused did not enjoy the right to trial by jury, as constitutionally defined *today*, or even in 1958. However, contrary to the argument of Colonel Weiner, the American service member has always enjoyed the right to *a* trial by jury. The initial and on-going drafting of Articles of War in colonial times suggests that the constitutional framers understood this. If so, and if they

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81. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 12 (2d ed. 1920). The Massachusetts Bay Colony adopted these articles for the governance of its own troops as forces began to muster in Boston for the impending hostilities. *Id*. Other colonial assemblies adopted similar articles shortly thereafter. *See id.* n.32; DAVID A. SCHLEUTER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 1-6(A) (3d ed. 1992).

82. *See* SCHLEUTER, *supra* note 81, § 1-6(A).

83. *See* Massachusetts Articles of War, art. 32, *reprinted in* WINTHROP, *supra* note 81, at 950.

84. *See* Massachusetts Articles of War, art. 37, *reprinted in* WINTHROP, *supra* note 81, at 950.

85. *See* Massachusetts Articles of War, art. 36, *reprinted in* WINTHROP, *supra* note 81 at 950.

86. *See* Massachusetts Articles of War, art. 34, *reprinted in* WINTHROP, *supra* note 81 at 950. For the analogous British provisions then in effect, see British Articles of War of 1765, § XV, which is reprinted in WINTHROP, *supra* note 81, at 942.

87. *See* WINTHROP, *supra* note 81, at 22.

88. *See* American Articles of War of 1775, arts. 33-39, *reprinted in* WINTHROP, *supra* note 81, at 956.

89. *See* WINTHROP, *supra* note 81, at 22.

90. *See* American Articles of War of 1776, § 14, *reprinted in* WINTHROP, *supra* note 81, at 961, 967. In 1786, these provisions were amended to include a detailed oath by which the members swore to try the case before them "without partiality, favor, or affection." American Articles of War of 1786, § 14, art. 6, *reprinted in* WINTHROP, *supra* note 81, at 973. Further amendments reduced courts-martial to their present-day minimum sizes of five for general courts-martial and three for regimental (now, special) courts-martial. *See* American Articles of War of 1786, § 14, arts. 1, 3, *reprinted in* WINTHROP, *supra* note 81, at 972.

91. *See* WINTHROP, *supra* note 81, at 23.

The Rules for the Regulation of the United Colonies governed the Navy in 1775. Later, the Articles for the Government of the Navy served as the sea-going counterpart to the Articles of War. Both had provisions for courts-martial similar to the provisions in the Articles of War. *See generally* EDWARD M. BYRNE, MILITARY LAW 2-6 (3d ed. 1981) (providing a synopsis of the origins of naval military law). Under the latter, however, the Navy used only the general court-martial forum. *See* The Rules and Regulations of the United States Navy, art. 35 (23 Apr. 1800), *reprinted in* JAMES E. VALLE, ROCKS AND SHOALS 285, 291 (1980). *See generally* WINTHROP, *supra* note 81, at 17-19; SCHLEUTER, *supra* note 81, §§ 1-4, 1-5. These sources contain useful histories of trial by court-martial and the institutions of military discipline and military justice dating to antiquity.

intended to exclude military juries from the constitutional rights relating to jury trial, they would have so indicated.

On the other hand, courts-martial have never included the practice of grand jury presentment and indictment; yet, the Fifth Amendment expressly excepts the military from that practice. The Constitution *fails* specifically to exclude the military from its provisions governing a practice that the military engaged in, petit jury. Elsewhere, the Constitution explicitly excludes the military from its provisions governing a practice in which the military has never engaged, grand jury. The logical conclusion is that the framers recognized the practice by the military of using criminal juries made up of military members. They regulated the practice with the same provisions used to regulate civilian practice. Likewise, the framers recognized and specifically sanctioned the military's existing practice of dispensing with the grand jury process.[92]

c. The Internal Inconsistency of Milligan

Incredibly, the *Milligan* Court well understood these principles of textual and contextual constitutional analysis. The Court understood them and *applied* them to the subject at hand. Following a discussion of the limited need in times of emergency to suspend the writ of habeas corpus,[93] the Court noted:

> The Constitution goes no further. It *does not say* after a writ of *habeas corpus* is denied a citizen, that he shall be tried otherwise than by the course of the common law; *if it had intended this result, it was easy by the use of direct words to have accomplished it*. The illustrious men who framed that instrument were guarding the foundations of civil liberty against the abuses of unlimited power; they were full of wisdom, and the lessons of history informed them that a trial by an established court, *assisted by an impartial jury*, was the only sure way of protecting the citizen against oppression and wrong. Knowing this, they

92. Winthrop quotes Chief Justice Chase's concurrence in *Milligan* for the proposition that, while "our military law is very considerably older than our Constitution," all United States public law "began either to exist or to operate anew" under the Constitution. WINTHROP, *supra* note 81, at 15.

93. "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." U.S. CONST. art. I, § 9, cl. 2.

> *limited the suspension* to one great right, and left the rest to *remain forever inviolable*.[94]

The Court knew how to look to the plain and direct language of the Constitution as the beginning of constitutional interpretation.

> The founders of our government were familiar with the history of [the Revolutionary War]; and secured in a written constitution *every right* which the people had wrested from power during a contest of ages . . . . The provisions of that instrument on the administration of criminal justice are *too plain and direct*, to leave room for misconstruction or doubt of their true meaning. Those applicable to this case are found in that clause of the original Constitution which says "That the trial of all crimes, except in case of impeachment, shall be by jury;" and in the fourth, fifth, and sixth articles of the amendments.[95]

Further, the Court was adept at examining constitutional history. The following language appears immediately after the Court quotes the Sixth Amendment in its entirety:

> These securities for personal liberty thus embodied, were such as wisdom and experience demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, *might be denied them by implication*, that when the original Constitution was proposed for adoption it encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.[96]

Given the importance historically accorded the right to trial by jury, especially during the time of the Constitution's formulation, the framers likely contemplated as broad a right as conceivable.[97] Neither the express language used nor the circumstances surrounding the Constitution's origin admit of exception to this right for trials by court-martial. *Ex parte Milligan* and *Ex parte Quirin* got it wrong. Courts rely on them today to justify denying military men and women the constitutionally guaranteed right to

94. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126 (1866) (emphasis added).
95. *Id.* at 119 (emphasis added).
96. *Id.* at 120 (emphasis added).

trial by jury, but they are not paying attention to the weak analysis in these old opinions.[98] They are also not paying attention to the *facts* of these cases. Neither *Milligan* nor *Quirin* concerned the trial of a United States service member. Neither of the cases even concerned trial by court-martial.

2. Marginal Application

Quirin concerned a military commission specifically appointed by the President to try the several suspected spies and saboteurs for violations of

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97. This foundation of criminal justice, which is contained in the Sixth Amendment, enjoyed the concerted praise of the nation's forefathers. Alexander Hamilton wrote:

> The friends and adversaries of the plan of the [constitutional] convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this; that the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.

THE FEDERALIST NO. 83 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In his first address to Congress, Thomas Jefferson said:

> [I]t will be worthy of your consideration whether the protection of the inestimable institution of juries has been extended to all the cases involving the security of our persons and property. Their impartial selection also being essential to their value, we ought further to consider whether that is sufficiently secured in those states where they are named by a marshal depending on the executive will or designated by the court or by officers dependent on them.

Thomas Jefferson, First Annual Message Before the U.S. Congress (Dec. 8, 1801), *in* THOMAS JEFFERSON, IN HIS OWN WORDS 67, 76 (Maureen Harrison & Steve Gilbert eds., Barnes & Noble Books 1996) (originally published as THOMAS JEFFERSON: WORD FOR WORD (1993)). *See generally* GODFREY D. LEHMAN, WE THE JURY . . ., at 14 (1997) (quoting several prominent constitutional framers and early national political figures).

98. *See supra* note 61 and accompanying text. The *Loving* court cited pages of the concurrence in *Milligan*, for the proposition established by that Court's majority opinion. *See* Stephen Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 133 (1992). Lamb notes that the dicta of *Milligan* was "elevated" to the holding of that Court by Justice Marshall, whose dissent in *Solorio v. United States* would have benefited from the opposite. *Id*. *See* Solorio v. United States, 483 U.S. 435 (1987) (abandoning the "service connection" test in favor of the "status" test for UCMJ jurisdiction).

the law of war and the Articles of War.[99] The Court noted that "the Articles [of War] . . . recognize the 'military commission' appointed by military command as an appropriate tribunal for the trial and punishment of offenses against the law of war *not ordinarily tried by court martial* [sic]."[100] *Milligan* also concerned trial by military commission, convened in 1864 by the military commandant of the District of Indiana.[101]

The forum in *Quirin* and *Milligan* was critically distinct from those of their progeny. Military commissions convened before, during, and immediately after World War II were wholly different entities than courts-martial that were conducted under the Articles of War or later under the UCMJ. No separate statute or provisions of the Articles of War governed their constitution or procedure.[102] Military commissions could be composed of as few as three members, and, if this minimum was unobtainable, the flaw was not fatal to the result.[103] In *Quirin*, the President promulgated the complete rules of evidence and procedure in one short paragraph.[104] In fact, over the past half-century, the courts have ignored the specific *Quirin* language that they consistently cite. The courts have used *Quirin* to support the finding that the Sixth Amendment is inapplicable to *courts-mar-*

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99. *Ex parte* Quirin, 317 U.S. 1, 18 (1942).

100. *Id.* at 27 (emphasis added).

101. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 6 (1866).

102. *See* WINTHROP, *supra* note 81, at 835-45. The same is true today, although a 1951 addition to the *Manual for Courts-Martial* purports to apply the rules applicable to courts-martial to military commissions. MCM, *supra* note 5, pt. I, ¶ 2(a)(2). This provision was added in anticipation of the passage of the Prisoner of War Geneva Convention (discussed *infra* notes 108-109 and accompanying text). MANUAL FOR COURTS-MARTIAL, UNITED STATES, ch. I, ¶ 2 (1951).

103. *See* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 309 (3d ed. 1913).

104. The appointing order stated:

> The commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Appointment of a Military Commission, 7 Fed. Reg. 5103 (1942).

tial. The *Quirin* Court stated, "we must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by *military commission*."[105]

While the UCMJ provides for trial by military commission under appropriate circumstances,[106] such a forum is perhaps not even viable today. Rules for Courts-Martial 402, 403, 404, and 407 detail the possible dispositions of charges against military personnel; they are silent with regard to military commission.[107] Article 102 of the Third Geneva Convention prevents the trial of prisoners of war by any means other than those used by the detaining power to try its own service members.[108] War crimes author Howard Levie suggests that military commission is no longer available at all for the trial of prisoners of war.[109] One commentator suggested that the UCMJ "grants jurisdiction [to military commissions] *only* over violations of the international laws of war."[110] In any case, to comply with the convention, it appears that the United States would have to try its own service members by military commission before it could attempt to use military commissions for the trial of prisoners of war.[111] The United States has not convened a military commission since the 1949 Diplomatic Conference of Geneva, despite participating in several international armed conflicts since then. Thus, the forum utilized in *Quirin* and *Milligan*

105. *Ex parte* Quirin, 317 U.S. 1, 40 (1942) (emphasis added).

106. *See* UCMJ art. 21 (1994). "The provisions of this chapter . . . do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . ." *Id*. Article 2 of the UCMJ provides for jurisdiction over, inter alia, "prisoners of war when in custody of the armed forces" and, "in time of war, persons serving with or accompanying an armed force in the field." *Id*. arts. 2(a)(9), (a)(10). Articles 104 and 106, the punitive provisions for aiding the enemy and spying, respectively, provide for jurisdiction over any person. *Id*. arts. 104, 106. Article 106 is limited to time of war. Both articles provide specifically for trial by court-martial or by military commission. *Id*.

107. MCM, *supra* note 5, R.C.M. 402-404, 407.

108. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 102, T.I.A.S. No. 3364. "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the detaining power . . . ." *Id*.

109. *See* HOWARD S. LEVIE, TERRORISM IN WAR—THE LAW OF WAR CRIMES 258-59 (1993). *But see* Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 517-20 (1994) (suggesting that military commission may be the appropriate forum for trying prisoners of war).

110. Major Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 21 (1996).

111. *See* COMMENTARY, III GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 476 (Jean S. Pictet ed., 1960).

enjoys a far less influential existence today than it did in 1866 or 1942. Nevertheless, they form the entire precedential foundation for stripping a constitutional right from members of the armed forces.

Milligan and *Quirin* fail to justify a military exception to the constitutional right to trial by jury. Courts today fail to account for the weaknesses of these cases, their internal shortcomings, and their limited applicability on an issue of great importance. Much more broadly, courts fail to recognize a fundamental flaw in the denial of this right—they fail to square the denial with the basic principle of American constitutional government, which separates the various powers.

C. Violation of the Separation of Powers Doctrine

As a fundamental principle of constitutional law in the United States, the separate branches of government check and balance each other.[112] If the executive branch, which is charged with enforcing the law, could effectively control the judicial branch in its decision-making about the application of the law, there would be no need for a judicial branch in the first place. Trial by jury enhances the independence of the various branches and helps to check their independent powers.[113] In the military, where legislative and executive powers run to their maximum anyway,[114] the courts

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112. *See* STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 45-47 (1998).

> The enumerated powers strategy reflects the framers' belief that the way to prevent power from being abused is to diffuse it . . . . [I]t represented the framers' principal response to *all* the kinds of constitutional problems with which we are familiar.
>
> Most obviously, the strategy dealt with what we call "separation of powers" questions; it allocated powers among the organs of government at the national level . . . .
>
> . . . [T]he enumerated powers strategy was also the framers' principal method of protecting individual rights—a matter which in modern times has become the major constitutional concern.

Id. at 45.

also remove this Sixth Amendment check on power. The judiciary's two-pronged reasoning is flawed.

1. Two-Pronged Analysis

First, the judiciary asserts that courts-martial derive their sole authority from Article I. Specifically, Section 8 grants Congress power "[t]o raise and support Armies"[115] "[t]o provide and maintain a Navy"[116] and "[t]o make Rules for the Government and Regulation of the land and naval Forces."[117] Second, the courts argue that Article I power is independent of Article III and the Sixth Amendment. The judiciary routinely and thoroughly defers to Congress and the President in handling military matters in general. In *Chappell v. Wallace*,[118] the Supreme Court said, "[i]t is clear that the Constitution contemplated that the Legislative Branch has plenary control over rights, duties, and responsibilities in the framework of the military establishment, including regulations, procedures and remedies related to military discipline; and Congress and the courts have acted in conformity with that view."[119] In *Solorio v. United States*,[120] the Court noted that "[j]udicial deference . . . is at its apogee when legislative action

113. "The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." Taylor v. Louisiana, 419 U.S. 522, 530 (1975) (citing Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968)). *See* LYSANDER SPOONER, AN ESSAY ON THE TRIAL BY JURY 6-16 (Boston, Bela Marsh 1852) (strongly advocating the jury's role in checking the legislative and executive functions in England and the United States); GOBERT, *supra* note 67, at 10-12 (discussing the benefits that are secured by the citizenry's check on power through trial by jury); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 6-11 (1993) (discussing the same).

114. *See infra* notes 119-121 and accompanying text.

115. U.S. CONST. art. I, § 8, cl. 12.

116. *Id*. cl. 13.

117. *Id*. cl. 14.

118. 462 U.S. 296 (1983) (holding that enlisted personnel may not bring civil suit against their seniors alleging racially discriminatory duty assignment, performance evaluations, and disciplinary measures).

under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[121]

The ongoing torrent of judicial deference has, from the beginning, swept along the denial of the right to trial by jury. In *Dynes v. Hoover*,[122] the Supreme Court stated:

> Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and . . . the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed . . . the two powers are entirely independent of each other.[123]

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119. *Id*. at 300-301. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (denying a First Amendment challenge to a military restriction on wearing religious apparel openly) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."); Rostker v. Goldberg, 453 U.S. 57 (1981) (denying a Fifth Amendment due process challenge to gender-discriminatory draft registration) ("This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference . . . ."); Parker v. Levy, 417 U.S. 733, 756 (1974) (rejecting First and Fifth Amendment challenges to conviction of conduct unbecoming an officer for encouraging draftees to disobey orders) ("For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.").

120. 483 U.S. 435 (1987) (abandoning the "service connection" test in favor of the "status" test for UCMJ jurisdiction).

121. *Id*. at 447 (citations omitted). *See* Middendorf v. Henry, 425 U.S. 25, 43 (1976) ("In making such an analysis [balancing the interests of the individual against those of the regime to which he is subject] we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, that counsel should not be provided in summary courts-martial."). In *Rostker v. Goldberg*, the Supreme Court recalled that it "has consistently recognized Congress' 'broad constitutional power' to raise and regulate armies and navies." 453 U.S. at 65 (citation omitted). The Court added that "[n]ot only is the scope of Congress' constitutional power in this area broad, but the lack of competence on the part of the courts is marked." *Id*. The *Goldman* Court echoed this sentiment. "Not only are courts 'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,' but the military authorities have been charged by the Executive and Legislative branches with carrying out our nation's military policy." 475 U.S. at 507-08 (quoting Chief Justice Earl Warren, *The Bill of Rights and the Military*, The Third James Madison Lecture at the New York University Law Center (Feb. 1, 1962), *in* 37 N.Y.U. L. REV. 181, 187 (1962)).

122. 61 U.S. (20 How.) 65 (1857).

In *United States v. Kemp*,[124] the Court of Military Appeals (COMA) proclaimed:

> Courts-martial . . . derive their authority from the enactments of Congress under Article I of the Constitution, pursuant to congressional power to make rules for the government of the land and naval forces. Consequently, 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.[125]

Neither the foregoing language of the Section 8 clauses nor that of any other constitutional war power suggests that the language of Article III or the Sixth Amendment is inapplicable in the military context. Further, none of these provisions suggests abandonment of the separation of powers doctrine. On the contrary, the grant to Congress in Section 8 of Article I—consistent with the grant of legislative powers in Section 1 of that Article—is to make rules, not to exercise judicial power. The specific language of Clause 14 includes a grant of power to make rules for the "government" as well as the "regulation" of the armed forces.[126] Should this clause be interpreted so broadly as to abrogate separation of powers principles in the military context? Such a construction ignores the framers' fear of a powerful and independent military.[127] In the absence of specific language to the

123. *Id*. at 79.

124. 46 C.M.R. 152 (C.M.A. 1973).

125. *Id*. at 154.

126. "The term 'Regulation' itself implies, for those appropriate cases, the power to try and to punish." Relford v. Commandant, 401 U.S. 355, 367 (1971) (applying O'Callahan v. Parker, 397 U.S. 934 (1970), *overruled by* Solorio v. United States, 483 U.S. 435 (1987), and deciding that an offense committed on post that violates personal or proprietary security is service connected and may be tried by court-martial). "It is not necessary to attempt any precise definition of the boundaries of this power. But may it not be said that government includes . . . the regulation of internal administration?" *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 138-39 (1866) (Chase, C.J., concurring).

127. *See, e.g.*, THE DECLARATION OF INDEPENDENCE paras. 12, 13 (U.S. 1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 319, 320 (complaining that England had "kept among us, in times of peace, standing armies, without the consent of our legislatures" and had "affected to render the military independent of, and superior to the civil power"); VA. CONST. Bill of Rights, § 13 (1776), *reprinted in* SOURCES OF OUR LIBERTY, *supra* note 69, at 311, 312 (declaring "[t]hat a well-regulated militia . . . is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, [are] dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power").

contrary, the framers likely intended the judiciary to exercise control over military justice proportional to their control over civilian justice.[128]

Finally, the argument that the principles of "Article III" courts do not apply to "Article I" courts is itself textually and contextually flawed. The argument ignores the very exception contained within the jury trial clause. "Cases of Impeachment" are the sole province of Congress under Article I.[129] Yet, Article III specifically excludes them from its own operation. Therefore, the tenets of Article III must extend beyond just those cases arising or courts established under Article III. Just like "cases of impeachment," "cases arising in the land or naval forces" stem from the powers of

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128. The Constitution certainly makes no distinction. "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ." *Id*. § 2. This section continues with numerous examples of cases or controversies to which the judicial power shall apply. One of the examples specifically applies the judicial power "to Controversies to which the United States shall be a party . . . ." *Id*. These first two sections of Article III are broadly worded. They contain no hint of exception for the military or any other specialty jurisdiction. The language here sweeps within the judicial power of the United States "all Cases . . . arising under this Constitution," which, on its face, includes courts-martial. Conversely, the language of Article I grants Congress power "To *make Rules* for the Government and Regulation of the land and naval Forces." *Id*. art. I, § 8, cl. 14 (emphasis added). Inference and speculation is the only way to conclude from this language (together with all of those provisions known as the war powers) that courts-martial are thereby beyond the reach of Article III. By attempting to make the case for judicial deference to the legislative and executive branches in military affairs, the Court in *Orloff v. Willoughby* instead highlights the importance of separation of powers even in this area.

> [J]udges are not given the task of running the Army. The responsibility . . . rests upon the Congress and upon the President of the United States and his subordinates . . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as *the Army must be scrupulous not to intervene in judicial matters.*

Orloff v. Willoughby 345 U.S. 83, 93-94 (1953) (denying writ of habeas corpus to review military draft induction) (emphasis added). *See* United States v. Newak, 15 M.J. 541, 548 (A.F.C.M.R. 1982) (Miller, J., concurring), *rev'd in part*, 24 M.J. 238 (C.M.A. 1987).

129. "The Senate shall have the sole Power to try all Impeachments . . . . When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present." U.S. CONST. art. I, § 3, cl. 6. "Judgment in Cases of Impeachment shall not extend further than to removal from Office . . . but the party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment, and Punishment, according to Law." *Id*. cl. 7.

Congress under Article I. The framers expressly excepted the former from the language of Article III that created the right to trial by jury; they did not except the latter. Commentator Gordon Henderson advanced this point in the 1950s.[130] Commentator Joseph Remcho reasserted it in the 1970s.[131] Their observations on the text of the Constitution were fundamental lessons worth repeating *and applying* in the 1990s and beyond.

2. Progress on Other Fronts

Selection of court-martial members by the convening authority is a classic violation of the principle of separation of powers.[132] The Supreme Court of Canada acknowledged this in 1992. In *Généreux v. The Queen*,[133] that Court held that judicial independence will not accommodate selection of general court-martial members by the convening authority.[134] "In particular, it is unacceptable that the authority that convenes the court martial, i.e., the executive, which is responsible for appointing the prosecutor, should also have authority to appoint members of the court martial, who serve as the triers of fact."[135] The court was interpreting, for the first time, the impact of the 1982 Canadian Charter of Rights and Freedoms[136] on military law.[137] The Charter guarantees that an accused is "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal . . . ."[138] The Court found that the military's jury selection procedure violated the "independence" prong of this guarantee.

> It is unacceptable that an external force be in a position to interfere in matters that are directly and immediately relevant to the adjudicative function, for example, . . . sittings of the court and court lists. Although there must of necessity be some institutional relations between the judiciary and the executive, such relations must not interfere with the judiciary's liberty in adjudicating individual disputes and in upholding the law and values of the Constitution.[139]

The Court stressed that lack of tribunal independence, real or perceived, violates the Charter.[140] The Court found that "a reasonable person, familiar with the constitution and structure of the General Court Martial"

130. *See* Henderson, *supra* note 78, at 301.
131. *See* Remcho, *supra* note 63, at 206.

would conclude that the tribunal did not enjoy the protections necessary

132. A 19th century commentator angrily, though cogently, summarized the violation of this principle.

> Since 1285, seventy years after Magna Carta, the common law right of all free British subjects to eligibility as jurors has been abolished, and the qualifications of jurors have been made a subject of arbitrary legislation. In other words, the government has usurped the authority of *selecting* the jurors that were to sit in judgment upon its own acts. This is destroying the vital principle of the trial by jury itself, which is that the legislation of the government shall be subjected to the judgment of a tribunal, taken indiscriminately from the whole people without any choice by the government, and over which the government can exercise no control. If the government can select the jurors, it will, of course, select those who it supposes will be favorable to its enactments.

SPOONER, *supra* note 113, at 148. Spooner was indicting the civilian practices of England and the United States, but his words capture the problem of present-day jury selection under the UCMJ.

The Magna Carta, which was signed by King John in 1215, is accepted as the first written guarantee of trial by jury and is presently saluted for this virtue. LLOYD E. MOORE, THE JURY 49 (1973). Its 39th clause provides that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way ruined; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers, or by the laws of the land." MAGNA CARTA para. 39 (Eng. 1215), *reprinted in* J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992).

> At Runnymede, at Runnymede,
> Your rights were won at Runnymede!
> No freeman shall be fined or bound,
> Or dispossessed of freehold ground,
> Except by lawful judgment found
> And passed upon him by his peers.
> Forget not, after all these years,
> The Charter signed at Runnymede.

Rudyard Kipling, The Reeds of Runnymede (1911).

133. [1992] S.C.R. 259.

134. *Id*. at 260. The Canadian member selection process involved less specific criteria than the American process, but was otherwise similar and was governed by statute. *See* National Defense Act, R.S.C., ch. N-5, §§ 166-170 (1985) (Can.). The Supreme Court of Canada also held that the Canadian constitutional guarantee of judicial independence required military judges to serve a fixed term of office. *Généreux* [1992] S.C.R. at 260.

135. *Généreux* [1992] S.C.R. at 263.

136. Constitution Act, R.S.C. (1982) (Can.).

137. *See Généreux* [1992] S.C.R. at 280-81.

138. Constitution Act, R.S.C. § 11(d).

for judicial independence.[141]

The principles of the Canadian guarantee of independent and impartial trial are similar to those of Article III and the Sixth Amendment to the United States Constitution. The pre-1992 Canadian court-martial system was similar to the contemporary United States military system. Canada is geographically, politically, and culturally the closest nation in the world to the United States. These parallels suggest change in the court-martial system in the United States.

The framers ratified the Constitution and adopted the Bill of Rights in the late eighteenth century. The Supreme Court decided *Ex parte Milligan* in the second half of the nineteenth century and *Ex parte Quirin* in the first half of the twentieth century. Courts continue to rely on these decisions today for *their* interpretation of the Constitution. Doing so, the courts ignore the major developments of the second half of the twentieth century that bear directly on the right to trial by jury in courts-martial.

D. Application of the Sixth Amendment to the Military Today

Even if the framers believed that Article III and the Sixth Amendment were inapplicable to courts-martial and even if those provisions did not apply in 1866, or 1942, they should apply *now.*

> It is no answer to . . . insist that what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time . . . . When we are dealing with the words of the Constitution . . . "we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."[142]

During the last forty years, the Supreme Court rendered several decisions that contain important interpretations of the constitutional right to

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139. *Généreux* [1992] S.C.R. at 286.

140. *Id*.

141. *Id*. at 308.

142. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 442-43 (1934) (quoting Missouri v. Holland, 252 U.S. 416, 433 (1920) (asserting broad and widely accepted fundamental tenets of constitutional interpretation)).

trial by jury. During the last forty years, Congress enacted important legislation that implements the constitutional right to trial by jury. During the last forty years, the courts and Congress specifically extended many other Bill of Rights protections to service members. Finally, court-martial jurisdiction has expanded most notably during the last *decade*.

1. The Recently Developed Character of the Sixth Amendment

The Supreme Court gave constitutional significance to the impartial selection and fair cross-section requirements as recently as the late 1960s and 1970s.[143] Those principles have appeared throughout history sporadically,[144] but federal jurisdictions selected juries by the same means as practiced in the local state courts until 1948.[145] Methods varied; some dis-

143. *See supra* notes 30-39 and accompanying text.

144. Scholars and historians disagree over the ancient influences on the development of the English jury system. *See generally* MOORE, *supra* note 132, at 1-34 (detailing various theories and their sources pertaining to possible Greek, Roman, Scandinavian, Germanic, Frankish, and other influences on the development of the English jury preceding the Norman conquest); ROBERT VON MOSCHZISKER, TRIAL BY JURY § 65 (1922) (identifying conflicting sources on the origins of trial by jury); WILLIAM FORSYTH, TRIAL BY JURY 1-12 (1875). Over the centuries, the representational character and the method of selection of juries varied widely. Early Greek juries evolved from bodies that were purely constituted of nobility to large groups of citizenry selected by lot. *See* MOORE, *supra* note 132, at 2. Roman juries were selected by the senate from among its own members to sit for one year. *See* MOSCHZISKER, *supra*, §§ 13-14. Following the Norman conquest of England in 1066, methods of selection and the representational character of juries varied. In the twelfth century, juries sometimes consisted of entire townships or representatives from several townships. *See* FORSYTH, *supra*, at 88.

Criminal jury trials evolved during the twelfth century, first as a matter of privilege—the accused could buy one—then as a matter of right. *See* MOSCHZISKER, *supra*, § 54. Even following the Magna Carta, juries were selected by law enforcement agents, nobility, or even royalty. *See* MOORE, *supra* note 132, at 56-70; MOSCHZISKER, *supra*, §§ 29-43. During the thirteenth and fourteenth centuries, juries began to develop from groups of "witnesses," who had foreknowledge of the facts of the case, to bodies of "twelve good and lawful men of the neighborhood," who were summoned by the sheriff (mayor) and instructed on impartiality by the court. FORSYTH, *supra*, at 131-32. S*ee* MOORE, *supra* note 132, at 59. By the early eighteenth century, juries were selected from among those peers of the accused who were between twenty-one and seventy years old, not outlaws or convicts, and who were of the highest respectability in the community. In felony cases, apparently balancing the right of the government to select the panel, the accused enjoyed between twenty and thirty-five peremptory challenges compared with none for the crown. *See* MOORE, *supra* note 132, at 68-69. While the sheriff would choose the panel on the basis of these qualifications, the actual jurors were ordinarily selected from the panel by lot. *See id.*

145. *See* 1 EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 2.01 (3d ed. 1977).

tricts used voter registration lists, tax rolls, or local association and organization lists to gather potential jurors.[146] Others used "key men," citizens of the community, chosen by court clerk or jury commissioner and "likely to be acquainted with persons possessed of the requisite qualifications" for jury duty.[147]

Lack of uniformity in selection methods and discriminatory practices led the federal government to seek reform. Throughout the 1940s, 1950s, and 1960s, Congress sponsored several conferences, held numerous hearings, and experimented with various laws concerning federal jury selection.[148] The effort culminated in the Federal Jury Selection and Service Act of 1968.[149] This legislation established that:

> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose.[150]

Under this statute, random selection of the initial pool of jurors is from voter registration lists or other sources "where necessary to foster the policy and protect the rights served by [the statute]."[151] The random selection

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146. *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 15-2.1, commentary at 15-33 (1980).

147. DEVITT & BLACKMAR, *supra* note 145, § 2.03. The "key man" system was regularly employed in state and federal jurisdictions until 1968. *See* JEFFREY ABRAMSON, WE, THE JURY 99 (1994).

148. *See* DEVITT & BLACKMAR, *supra* note 145, §§ 2.01-2.03.

149. 28 U.S.C. §§ 1821, 1861-1869, 1871 (1964) (amended 1968, 1970, 1972, 1978, 1983, 1986, 1988, 1990, 1992).

150. 28 U.S.C. § 1861 (1994). Qualifications include: eighteen years of age; United States citizenship; one year of district residency; ability to speak, read, write, and understand English; mental and physical ability to perform jury duty; and a record reflecting no state or federal felony charges pending. *Id*. § 1865. The act exempts active duty service members, firemen, policemen, and public officers of the United States from federal jury service. *Id*. § 1863(b)(6). Volunteer safety personnel are excused upon individual request. *Id*. § 1863(b)(5)(B). If the district court finds that jury service would impose "undue hardship or extreme inconvenience" on a specific group or class, individual requests for excusal may be granted. *Id*. § 1863(b)(5)(A). Race, color, religion, sex, national origin, or economic status are impermissible characteristics for exclusion. *Id*. § 1862.

of the actual jury venire must be by jury wheel or other random lot selection process.[152]

The language of this statute is broad, using phrases like "policy of the United States," "all litigants," and "all citizens."[153] The statute makes no exception for trial by court-martial. The evolution of "civilian" Sixth Amendment jurisprudence, which is illustrated by the cases of the 1960s and 1970s and this comprehensive congressional endeavor, supports a similar evolution of "military" Sixth Amendment jurisprudence.

2. The Recently Developed Application of the Constitution to the Military

Over the last forty years, courts have specifically applied an increasing number of Bill of Rights provisions to the armed forces. In *United States v. Tempia*,[154] the COMA extended Fifth Amendment protections, under *Miranda v. Arizona*,[155] to members of the armed forces. The court stated that "[t]he time is long since past . . . when this Court will lend an attentive ear to the argument that the members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights."[156]

a. Recent Sixth Amendment Application

In *Middendorf v. Henry*,[157] the Supreme Court noted that "[t]he question of whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved."[158] The Court declined to resolve this broad issue and decided instead that a summary court-martial is not a "criminal prosecution" within the meaning of

151. *Id*. § 1863(b)(2).

152. *Id*. § 1863(b)(4). A court clerk or jury commissioner manages the selection process. *Id.* § 1863(b)(1).

153. *See id.*

154. 37 C.M.R. 249 (C.M.A. 1967).

155. 384 U.S. 436 (1966).

156. *Tempia*, 37 C.M.R. at 253.

157. 425 U.S. 25 (1976).

158. *Id*. at 33 (citations omitted). To illustrate the debate, the Court cites various sources and cases containing opposing views and holdings.

the Sixth Amendment.[159] In a footnote, however, the Court characterized the dissent as follows:

> Since under [the dissent's] analysis the Sixth Amendment applies to the military, it would appear that not only the right to counsel but the right to jury trial, which is likewise guaranteed by that Amendment, would come with it . . . . Whatever may be the merits of "selective incorporation" under the Fourteenth Amendment, *the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel*.[160]

Two years later, the COMA noted:

> As to the constitutional right to consult counsel, we have followed the lead of the Supreme Court of the United States and held that at every "critical" stage of the prosecution the Constitution requires that a military accused have recourse to the experienced advice of counsel.
>
> The realities of modern criminal prosecution have compelled the highest court of the land to broadly construe the guarantees of the Sixth Amendment. The governing rationale of the Supreme Court has been that the person confronting the puissance of the State will not be forced to stand alone but will be guaranteed his right to a fair trial consistent with the adversary nature of criminal prosecution.[161]

This language foretold years of judicial acknowledgment of, and commitment to, the military accused's Sixth Amendment right to counsel.[162] The COMA's 1963 analysis in *United States v. Culp*,[163] also suggests that the Sixth Amendment right to trial by jury may be linked to that amendment's right to counsel.

> In his *Commentaries on the Constitution* (1833), Justice Joseph Story pointed out that the protections of the Sixth Amendment, except the right of compulsory process and the right to have the assistance of counsel, "does but follow out the established course of the common law in all trials for crimes" . . . . Justice Story

159. *Id*. at 34.
160. *Id*. at 34 n.13 (emphasis added).
161. United States v. Jackson, 5 M.J. 223, 224 (C.M.A. 1978) (citations omitted).

> points out [that] "*the remaining clauses [of the Sixth Amendment] are of more direct significance and necessity.*" The distinction thus noted between the right to counsel and the other provisions of the Sixth Amendment, I believe, become material in our consideration of the question now before us.[164]

In *Culp*, the COMA held that the military accused did not, as a matter of right, enjoy the Sixth Amendment right to counsel at special courts-martial.[165] The court relied heavily on its own historical analysis of the apparently more significant right to trial by jury and its purported inapplicability to the military.[166] Since *Culp*, the judiciary has unequivocally *mandated* that the Sixth Amendment right to counsel applies to the military accused. Surely, then, the Sixth Amendment right to trial by jury, "of more direct significance and necessity," should now also apply to the military accused with equal or greater force.[167]

b. Recent Fifth Amendment Application

One of the protections of the Bill of Rights that is specifically granted to members of the armed forces is the due process guarantee of the Fifth Amendment.[168] In fact, the courts have chosen the Fifth Amendment over

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162. *See*, *e.g.*, United States v. Walters, 45 M.J. 165, 166 (1996) ("Based on the Sixth Amendment right to counsel and the Uniform Code of Military Justice, this [c]ourt has been diligent in ensuring the right to effective assistance of counsel, starting with the pretrial stage through appellate review.") (citations omitted); United States v. Ingham, 42 M.J. 218, 223 (1995) ("Article 27, UCMJ, and the Sixth Amendment of the Constitution guarantee a military accused the right to effective assistance of counsel. [The Supreme Court's test for determining effective assistance] has been applied by Courts of Military Review and is compatible with existing military standards.") (citations omitted); United States v. Scott, 24 M.J. 186, 187-88 (C.M.A. 1987) ("By virtue of Article 27, UCMJ, as well as the Sixth Amendment of the Constitution, a military accused is guaranteed the effective assistance of counsel. This guarantee applies whether counsel is detailed, or selected by the accused."); United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985) ("Th[e] constitutional right to counsel [attaches] 'at . . . the time that adversary judicial proceedings have been initiated against him . . . whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' In the military, this sixth-amendment right to counsel does not attach until preferral of charges.") (citations omitted); United States v. Annis, 5 M.J. 351, 353 (C.M.A. 1978) ("[R]egarding effective assistance of counsel, we observe that this right is extended to the military accused both by the Sixth Amendment to the Constitution and the Uniform Code of Military Justice.").

163. 33 C.M.R. 411 (C.M.A. 1963).

164. *Id*. at 417-18 (emphasis added) (citations omitted).

165. *Id*. at 428.

the Sixth (and Article III) to analyze jury selection in the military. In *United States v. Crawford*,[169] the COMA stated:

> Constitutional due process includes the right to be treated equally with all other accused[s] in the selection of impartial triers of the facts. Methods of selection which are designed to produce a court membership which has, or necessarily results in, the appearance of a "packed" court are subject to challenge.[170]

In *United States v. Santiago-Davila*,[171] the COMA applied *Batson v. Kentucky*[172] to courts-martial. The *Santiago-Davila* court concluded that an accused has an equal protection right, through the due process clause of the Fifth Amendment, to be tried by a panel that is free from the systematic exclusion of any cognizable racial group.[173] In *United States v. Carter*,[174]

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166. The Court reasoned that:

> We have seen that the apparently mandatory provision of the Sixth Amendment of trial by jury is, when correctly interpreted, restricted by the common law as it existed when the amendment was adopted, its contemporary interpretation, and in the light of the long-continued and consistent interpretation thereof. Does the same result follow as to assistance of counsel? I believe it does. The law existing at the time of adoption would seem to be most forcefully illustrated by the British Articles of War of 1765, existing at the beginning of the Revolution, the Articles enacted by the Continental Congress, and the Articles enacted by the first Congress, before the adoption of the Bill of Rights.
>
> . . . [The British] articles contain no reference to assistance of counsel for the accused, and no such right existed.
>
> . . . [In] The Articles of War enacted by the Continental Congress on September 20, 1776 . . . [a]gain, there is no provision for counsel for the accused.

Id. at 418-22.

167. Interestingly, three years before *Culp* was decided, the COMA held that the confrontation clause of the Sixth Amendment requires that a military accused must be afforded the opportunity to be present for the taking of a written deposition. *See* United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960).

168. "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend V.

169. 35 C.M.R. 3 (C.M.A. 1964).

the court maintained that "the accused does possess a due-process right to a fair and impartial factfinder."[175]

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170. *Id*. at 6 (citing United States v. Hedges, 29 C.M.R. 458 (C.M.A. 1960); United States v. Sears, 20 C.M.R. 377 (C.M.A. 1956)). The *Hedges* court affirmed a board of review decision to set aside the conviction because the panel of nine included seven members who were involved in some aspect of law enforcement—the president of the court was a lawyer, and two members were provost marshals. *Hedges*, 29 C.M.R. at 459. The court noted that "neither a lawyer nor a provost marshall is per se disqualified . . . ." *Id.* However, the court agreed with the board of review that "the composition of the court-martial was such as to give the distinct appearance that the members were 'hand-picked' by the government." *Id*. at 458. In *Sears*, where the accused had hired a civilian attorney, the convening authority assigned three judge advocates to the panel "to neutralize any attempt by [civilian] counsel to influence the court to rule in favor of the accused." *Sears*, 20 C.M.R. at 384. One of the judge advocates survived challenge. Throughout the trial, he passed notes, which advised how to rule on objections, to the President of the court. *Id*. The court found this to "smack of court-packing." *Id*.

171. 26 M.J. 380 (C.M.A. 1988).

172. 476 U.S. 79 (1986) (disallowing racially-based peremptory challenges by the prosecutor).

173. *Santiago-Davila*, 26 M.J. at 390. *Accord* United States v. Tulloch, 47 M.J. 283 (1997); United States v. Moore, 28 M.J. 366 (C.M.A. 1989). In *United States v. Witham*, the court held "that gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or a military accused." 47 M.J. 297, 298 (1997).

174. 25 M.J. 471 (C.M.A. 1988).

175. *Id*. at 473 (citing United States v. Thomas, 22 M.J. 388 (C.M.A. 1986), *cert. denied*, 479 U.S. 1085 (1987)). The Fifth Amendment-Sixth Amendment distinction is sometimes confused. In *United States v. Curtis*, the CAAF stated that the accused "has a Sixth Amendment right to a fair and impartial jury." 44 M.J. 106, 133 (1996), *rev'd as to sentence on recon*., 46 M.J. 129 (1997). The court was addressing issues of pretrial publicity, almost certainly not contemplating the full sweep of this broad language as it might apply to jury selection. The following year, however, the court managed to confuse the issue head on.

> Membership on a court-martial panel is limited statutorily by Congress to those [meeting the criteria of] Art. 25(d)(2), UCMJ.
>
> A military accused "has a *Sixth Amendment right* to a fair and impartial *jury*" as factfinder, and the selection of court members and the conduct of their deliberations is governed by statutory and constitutional provisions that are designed to ensure fair and impartial consideration . . . .

United States v. Hardy, 46 M.J. 67, 74 (1997) (emphasis added) (holding that the military judge did not err in declining to give a jury nullification instruction). Ironically—given the patchwork application of Sixth Amendment rights to service members—the opinion continues, "[n]either Congress nor the President . . . has authorized a court-martial panel to pick and choose among the laws and rules that are applicable to military life in order to determine which ones should be obeyed by members of the armed forces." *Id.*

This Fifth Amendment guarantee of a fair and impartial factfinder *sounds* better than that available under the Sixth. After all, is not the Supreme Court's fair cross-section requirement under the latter simply a means to this end? Unfortunately, "fair and impartial," rather than a firm and established standard, operates sporadically as a general notion without much bite. The cases discussed in Part III, below, involving unlawful command influence in the member selection process reflect the judiciary's inconsistent or indecisive application of the principle, where the courts apply it at all.

The use of the Fifth Amendment to structure the rights of the accused concerning panel selection and composition have led to some twisted results. In *Crawford*, the COMA held that the deliberate inclusion of an African-American panel member was not a violation of equal protection.[176] Instead, the court recognized this as an effort to establish on the panel "a fair representation of a substantial part of the community."[177] Later, in *United States v. Smith*,[178] the court came to the same conclusion regarding gender distinctions.

> [A] convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community.
>
> . . . Congress has not required that court-martial panels be unrepresentative of the military population. Instead, Congress has authorized deviations from the principle of representativeness, if the criteria of Article 25 are complied with. Thus, a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels.
>
> . . . .
>
> In our view, a convening authority may take gender into account in selecting court members, if he is seeking in good faith to assure that the court-martial panel is representative of the military population.[179]

176. United States v. Crawford, 35 C.M.R. 3, 13 (C.M.A. 1964).
177. *Id*.
178. 27 M.J. 242 (C.M.A. 1988).

So, the accused has no constitutional right to fair cross-sectional representation, but the government does? This turns the Sixth Amendment and its foundations on their ear and ignores the convening authority's affirmative obligation to select the "best qualified" under Article 25.[180] The court is apparently willing to bend Article 25 for the sake of increasing racial and gender diversity in the military justice process. They couch this willingness in terms of a Fifth Amendment *right of the accused* to be tried by a diverse jury. Unfortunately, the right obtains only when the *government* desires to appear politically correct.[181] The accused is still prevented from asserting *his* right to panel diversity under the Sixth Amendment.

3. Expanding Military Jurisdiction

Historically, military courts did not exercise jurisdiction over common law crimes, even in time of war.[182] It was not until fifty years after *Milligan* was decided that courts-martial jurisdiction reached common law crimes in time of peace. Under the Articles of War of 1806,[183] the first complete revision following the adoption of the Constitution,[184] Congress left common law crimes outside the jurisdiction of courts-martial altogether.[185] In 1863, Congress extended military jurisdiction over common law crimes, but only in time of war.[186] Congress substantially revised the Articles of War in 1916.[187] Except for the capital crimes of rape and mur-

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179. *Id*. at 249. *See* United States v. Lewis, 46 M.J. 338, 341 (1997) (citing *Smith* for the proposition that the convening authority may *insist* that a panel contain women and racial minorities—"important segment[s] of the military community").

180. *See* Lamb, *supra* note 98, at 143 (noting the incompatibility between the clearly stated "best qualified" criteria of Article 25 and notions of cross-sectional representation).

181. Jeffrey Abramson makes some compelling arguments that *purposefully* seeking diversity may be dangerous.

> [T]he purpose of the cross-sectional jury [is] not to recruit jurors to represent the "deep-rooted biases" of their section of town; it [is] to draw jurors together in a conversation that, although animated by different perspectives, still [strives] to practice a justice common to all perspectives. This is a noble justification for the cross-sectional ideal and one that defends the aspiration for jurors who render verdicts across all the fault lines of identity in America.

ABRAMSON, *supra* note 147, at 127. Purposefully creating diverse panels may simply serve to point out racial, gender, or cultural differences. Jurors may feel compelled to voice or to vote a particular agenda based on the quota they know they are filling. *See id*. at 101.

der, and absent the affirmative assertion of civilian jurisdiction, Congress made common law crimes punishable by peacetime courts-martial.[188] In

182. European methods of military command, control, and discipline from the eleventh through the sixteenth centuries took on some vestiges of criminal trials, but no true distinction between civil and military systems of justice emerged. *See* WINTHROP, *supra* note 81, at 45-46; SCHLEUTER, *supra* note 81, at 13. Beginning with the Mutiny Act of 1689, British courts-martial were granted limited peacetime jurisdiction over the offenses of mutiny, sedition, and desertion. *See* WINTHROP, *supra* note 81, at 19. *See also* Mutiny Act of 1689, 1 W. & M. ch. 4, *reprinted in* WINTHROP, *supra* note 81, at 929. A detachment of mainly Scottish troops mutinied and deserted in the face of orders from the king to sail for Holland. England was not at war, and, at the time, courts-martial exercised jurisdiction in time of war only. Though concerned about a standing army in peacetime, subject to its own governing regulations, Parliament assented to the peacetime jurisdiction of military courts over the offenses of mutiny, sedition, and desertion only. The act was to remain in effect for just over six months, but Parliament passed successive Mutiny Acts until 1718. *See* WINTHROP, *supra* note 81, at 19-20; SCHLEUTER, *supra* note 81, at 21. The act expressly mandated civilian trials for service members otherwise accused. "[N]oe man may be forejudged of life or limbe, or subjected to any kinde of punishment by martiall law, or in any other manner than by the judgment of his peeres, and according to the knowne and established laws of this realme." Mutiny Act of 1689, 1 W. & M., ch. 4, *reprinted in* WINTHROP, *supra* note 81, at 929. In 1718, Parliament enacted the British Articles of War. *See* WINTHROP, *supra* note 81, at 20. The 1765 version of these articles, which were in force at the time of the American Revolution, provided:

> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offence against the persons or property of our subjects, . . . the commanding officer and officers of every regiment, troop, or party, to which the person or persons so accused shall belong, are hereby required, . . . to deliver over such accused person or persons to the civil magistrate; and likewise to be aiding and assisting to the officers of justice, in apprehending and securing the person or persons so accused, in order to bring them to a trial.

British Articles of War of 1765, § XI, art. I, *reprinted in* WINTHROP, *supra* note 81, at 937.

183. *See* Act of Apr. 10, 1806, ch. 20, 2 Stat. 359.

184. *See* WINTHROP, *supra* note 81, at 48.

185. *See* Articles of War of 1806, *reprinted in* WINTHROP, *supra* note 81, at 976.

186. *See* Act of Mar. 3, 1863, ch. 75, § 30, 12 Stat. 731, 736.

187. *See* Act of Aug. 29, 1916, ch. 418, sec. 3, § 1342, 39 Stat. 619, 650.

188. *See* Articles of War of 1916, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 305 (1917).

1987, the Supreme Court allowed military jurisdiction to encompass any offense that is based on the accused's status as a service member.[189]

Citing *Milligan* and *Quirin* today for the proposition that the Sixth Amendment right to trial by jury does not apply to a military accused ignores a vast difference in the structure of military justice.[190] Then, courts-martial were specialized, limited-jurisdiction tribunals. Now, in substance, they are hardly distinguishable from federal district courts. Yet, the scope of the important Sixth Amendment right to trial by jury remains frozen in time.

Article 25 operates to deny the American service member the right to trial by a jury impartially selected from a fair cross-section of the community. The article violates the charter of the United States government. Courts continue to misapprehend the text and context of that charter, and they ignore the incorrect and inapposite analysis of that charter by apparently controlling decisions. They ignore the development of that charter and the coincident development of military criminal jurisprudence under that charter. If the mere constitutional argument does not convince the courts that Article 25 must go, perhaps the real and perceived practical effects of the violation will.

III.The Practical Problem with Military Jury Selection: Reality and Appearance of Unlawful Command Influence

The COMA described unlawful command influence as "the mortal enemy of military justice."[191] Unfortunately, in the area of jury selection, unlawful command influence, real and perceived, is alive and well. Faced with it squarely in individual cases, courts will fashion a remedy. However, the decisive rhetoric is accompanied by indecisive and inconsistent action. Unlawful command influence is more an annoying nuisance than a "mortal enemy" in the area of member selection.

Unlawful command influence that affects the fairness and impartiality of the court-martial membership manifests itself in two general catego-

189. *See* Solorio v. United States, 483 U.S. 435 (1987).

190. *See* Remcho, *supra* note 63, at 205 ("[E]ven . . . accept[ing] the theory . . . in *Quirin* that right to trial by jury was 'frozen at common law,' the right . . . could only be denied persons accused of 'military' crimes, since at common law non-military offenses were usually tried by civilian jury.").

191. United States v. Thomas, 22 M.J. 388, 393-94 (C.M.A. 1986).

ries. First, the convening authority may select, or his subordinates may nominate, particular members to affect the results of the court-martial. This practice is known as "court stacking." Second, the convening authority, or a subordinate who is cloaked with "the mantle of command authority,"[192] may exercise unwarranted control over current or future panels to achieve particular results. This involves the use of influence. This part of the article examines these two categories of the current system's practical problem of command influence.

A. "Court-Stacking"

The current method of member selection presents two broad "court-stacking" problems. First, the member screening, nomination, selection, and replacement processes involve numerous lesser actors than the convening authority. Second, the courts have left the standards and definitions of the Article 25 criteria to the individual preferences of convening authorities. These problems multiply the potential for abuse, decrease the consistency of results, and add significantly to needless litigation.

1. The Involvement of Too Many Subordinates

Article 25 apparently contemplates staff assistance for the convening authority in the selection of members.[193] This can lead to problems, even if the convening authority is unaware of subordinate abuse *and* there is no apparent prejudice to the accused.

a. At the Trial Counsel Level

In *United States v. Hilow*,[194] a division deputy adjutant general selected nominees for court-martial panels who he believed to be "commanders and supporters of a command policy of hard discipline."[195] Three levels of command approved the deputy adjutant general's list before it was submitted, along with other lists, to the convening authority. The convening authority was unaware of the "stacking" attempt, and he followed

192. United States v. Stombaugh, 40 M.J. 208, 211 (C.M.A. 1994).

193. *See supra* note 8. *See also* United States v. Kemp, 46 C.M.R. 152, 155 (C.M.A. 1973).

194. 32 M.J. 439 (C.M.A. 1991).

the Article 25 criteria in selecting six of the members from this tainted nomination.[196] Apparently, the accused was also unaware of the stacking, but he elected to be tried by military judge alone after determining that the panel was a "severe" one.[197]

The COMA believed that the sequence of events from preferral through election of forum "established a prima facie case of forbearance or 'nexus'" between the taint and the forum election decision.[198] The court ordered a new hearing on sentence.[199] "[S]election of court members to secure a result in accordance with command policy [is] . . . a well recognized form of unlawful command influence" in violation of Article 37(a).[200]

The court also found a violation of Article 25(d).

> The import of this provision is that the convening authority must personally select members of a court-martial whom he believes will be experienced, impartial, and fair in fulfilling their adjudi-

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195. *Id*. at 441. The deputy adjutant general (an Army captain) claimed that he was acting at the direction of the staff judge advocate's office. A Dubay hearing found no evidence to support this claim, but determined that the deputy adjutant general did select personnel for nomination whom he believed fit this criteria. *Id*. at 440-41. *See* United States v. Dubay, 37 C.M.R. 411 (C.M.A. 1967).

196. The lower court believed that the unlawful influence of this staff subordinate was attenuated by the convening authority's ignorance and proper application of the Article 25 criteria. *See* United States v. Hilow, 29 M.J. 641, 643-44 (A.C.M.R. 1989).

197. *See id*. at 655 n.13.

198. *Hilow*, 32 M.J. at 443. Judge Cox wrote:

> A traveler in a strange land is seeking a safe highway to his destination. He comes to a fork in the road, and he must make a choice. Unknown to him, one road is secure and will lead him unscathed to his journey's end. The other road winds through the Valley of Doom, an evil empire inhabited by thieves, charlatans, and scofflaws, where no man can venture safely. Fortunately for the traveler, he selects the secure path and arrives safely at his destination. Like the traveler, appellant faced a choice—trial by military judge alone or trial by members. Unknown to appellant, the member option was tainted; the judge-alone option was not. Fortunately, he chose judge-alone and got a fair trial.

Id. at 444 (Cox, J., dissenting in part). Judge Cox would have affirmed on harmless error grounds.

199. *Id*. at 443.

200. *Id*. at 441 (citations omitted).

> catory responsibilities . . . . Moreover, to intelligently make his selections, a convening authority must be fully informed of any attempts to "stack" the court-martial panel or any other matters which may cast doubt on the fairness of the proceedings.[201]

The court was clearly concerned with public perception as well.

> The right to trial by fair and impartial members or a professional military judge is the cornerstone of the military justice system. Denial of a full and fair opportunity to exercise this right creates an appearance of injustice which permeates the remainder of the court-martial. When such a perception is fostered or perpetuated by military authorities through ignorance or deceit, it substantially undermines the public's confidence in the integrity of the court-martial proceedings.[202]

Hilow epitomizes the problem of widespread potential for abuse in the member selection process. With so many individuals and levels of command involved, how will the convening authority ever be "fully

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201. *Id*. at 441-42. Interestingly, the court adds the factors of "fair and impartial" to the "experience" factor, which might logically be said to include the other explicit Article 25 factors.

202. *Id*. at 442-43 (citations omitted).

informed," or even aware, if anyone in the nomination or selection process really wants to "stack" the panel?[203]

In *United States v. Smith*,[204] the COMA discovered a remarkable system of nominating members for courts-martial at Fort Ord, California. The convening authority had previously detailed potential members to one of several standing panels and a list of alternates.[205] The staff judge advocate's office tasked a specialist-five[206] legal clerk to determine, for individual courts-martial, the availability of these primary and alternate members.[207] Apparently, if trials involved crimes committed by soldiers of one race against a different race, the panel was to reflect racial diversity. If the crime involved rape or sexual misconduct, at least two women were to be detailed to the panel.[208] If such guidelines were not problematic

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203. The *Hilow* court did not demand complete integrity of the process. The court noted that "[t]his is not a case where the tainted candidates were not detailed to appellant's court-martial or where appellant, being aware of the command subordinate's manipulation, still chose trial by members." *Id*. at 442. The Army Court of Military Review availed itself of this language in *United States v. Redman*, in which "unusual results" from the standing court-martial panel had caused the convening authority to choose a new one. 33 M.J. 679, 681 (A.C.M.R. 1991). Specifically, "we were going through the court-martial process and we were winding up with Article 15 punishments." *Id*. n.4. Following a subsequent trial in which the military judge found the appearance of impropriety, the convening authority re-appointed the original panel, and the accused withdrew his pending command influence motion and agreed to trial by members. *See id*. at 681-82. Distinguishing *Redman* from *Hilow*, the Army court noted that Redman had waived the unlawful command influence by knowingly accepting trial by members. *Id*. The court found that Articles 25 and 37 had been violated, but it affirmed the findings and sentence. *Id*. at 683. The *Redman* court found that the original panel of members was unaware of the convening authority's dissatisfaction with them. *Id*.

204. 27 M.J. 242 (C.M.A. 1988).

205. *Id*. at 244.

206. Referred to as a "spec5," this specialist rank, which no longer exists, was equivalent to sergeant in pay grade E-5.

207. *Smith*, 27 M.J. at 243-44.

208. *Id*. The specialist's supervisors averred that this practice was not policy, but the senior trial counsel was less than convincing:

> Although there was no established policy, we thought it was a good idea to have females on sex cases in order to avoid any idea of exclusion. I never set this policy. However, if there was a policy, I thought it made for a broad cross section of the community. Female members made for a better representative sample especially in sex cases due to the sexual issues.

Id. at 246.

enough on their own, the prosecutors apparently promulgated them. The specialist indicated that, by the time the *Smith* case came to trial, "the selection of court members had become a 'game' for the trial counsel."[209] When the specialist could not find two available females for the *Smith* case (which alleged indecent assault by a male officer on a female officer), she spoke first with her direct supervisor. She also spoke with the chief of the criminal law division. Both advised her on procedures for obtaining the names of female members.[210] When this failed, she contacted a trial counsel, who, understanding the nature of this case, "thought female members would be 'a nice touch'"[211] and provided the names of three women from his command.[212] When the convening authority reviewed the nominations for this panel, which included some original and some alternate panel members and two of the three women nominated by the trial counsel, he applied an ad hoc mixture of Article 25 criteria and practical considerations in choosing the panel.[213] Apparently unaware of the influence of a prosecutor in this case, the convening authority selected the two female military police officers who had been nominated. He candidly admitted,

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209. *Id*. at 245.
210. *Id*.
211. *Id*. at 247.
212. *Id*. at 245. According to the trial counsel:

> All three of these women were military police, and I referred to them as "hardcore." As a trial counsel, you want court members who are "hardcore." However, I thought that any of these women would be intelligent and fair members who would acquit the defendant if the evidence was not there.

Id. at 247.
213. *Id*. The convening authority stated:

> My philosophy regarding selection of court panels involves striking several balances. I look at age because I believe that it is associated with rank and experience. I look for a spread of units on the panel to include division units, non-division units, and tenant activities. I look at the types of jobs and positions of individuals in an effort to have a mix of court members with command or staff experience. I also look for some female representation on the panel.

Id.

however, that "[i]n sex cases . . . I have a predilection toward insuring [sic] that females sit on the court."[214]

The COMA set aside the findings and the sentence, determining that "trial counsel at Fort Ord were not adequately insulated from the process of selecting court-martial members."[215] The court demonstrated appreciation for public perception in its carefully explained, overly deferential rationale.

> Trial counsel in a court-martial is an advocate, who in his representation of the Government is *usually* seeking a conviction. The members of a court-martial—like the members of a civilian jury—are supposed to be fair and impartial. If a prosecutor is involved in selecting the members, *it seems likely that*, due to his institutional bias, he will want to have a certain type of member. Moreover, to the extent that the prosecutor participates in this selection process, it is inevitable that the public will *suspect* that the membership mirrors his preference.[216]

The courts have sought to exclude trial counsel from the member selection process, but not from conducting "ministerial duties" associated with court-martial procedure. Unfortunately, these allowed duties continue, if subtly, his influence in the member selection process. In *United*

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214. *Id*.

215. *Id*. at 250.

216. *Id*. at 251 (emphasis added). The Air Force Court of Criminal Appeals ignored the public relations aspects of its decision in *United States v. Stokes*. 8 M.J. 694 (A.F.C.M.R. 1979). In *Stokes*, a sergeant apparently "prepared the list" of enlisted personnel who were to be added to the court-martial panel pursuant to the accused's request. *Id*. at 695. The sergeant had joked with the senior enlisted advisor who provided the names that he wanted "the toughest NCOs that he could find." *Id*. The same sergeant, again "jokingly," told a defense counsel after the trial "that it would be unwise to request enlisted members for future cases because he was choosing the prospective members." *Id*. at 696. Finding that all of this banter had been given and taken in jest, the court could adduce no evidence that improper criteria were used to select the panel. *Id*. In *United States v. McCall*, the court-martial was called to order, and the trial counsel indicated that the members who were present were not the members whose names appeared on the convening order. 26 M.J. 804 (A.C.M.R. 1988). He further volunteered that a replacement order with the correct names would be forthcoming. *Id*. at 805. The court found that the convening authority had underscored the names on a nomination list of members whom he desired to use as replacements and that two of the names actually appearing on the replacement order were not so marked. *Id.* The court determined that someone in the convening authority's criminal law center had chosen two of the replacement members independently and had placed their names on the replacement order. *Id.* at 806.

States v. Marsh,[217] the COMA recognized that trial counsel may properly advise members of scheduled trial dates. The court found no difference between that duty and reporting to the convening authority on the availability of potential members.[218] Both encourage pretrial contact between prosecutor and juror. The latter also creates an opportunity for the prosecutor to help a member decide or to decide himself that a possibly unfavorable member is unavailable. The *Marsh* court went even further, noting that a chief of a criminal law division is not per se barred from recommending specific members.[219]

Some abuse might be expected where control of the process has deteriorated to the *Smith* level. Unfortunately, even staff judge advocates, who should certainly appreciate the pitfalls, often improperly affect member selection.

b. At the Staff Judge Advocate Level

In *United States v. McClain*, [220] the staff judge advocate recommended only senior officers and non-commissioned officers for courts-martial panel selection. He specifically intended to avoid lighter sentences, which he perceived to be the result of junior officer and enlisted participation.[221] The COMA found that this violated Article 25 and then pointed out various subsidiary problems with this selection procedure.

> First, it created an appearance that the Government was seeking to "pack" the court-martial against [the] appellant. This appearance was enhanced by the circumstance that not only were the

217. 21 M.J. 445 (C.M.A. 1986).

218. *Id*. at 447-48.

219. *Id*. at 448. In *United States v. Abney*, nominations for court-martial panel members were "compiled and submitted" to the convening authority by a civilian attorney who worked in the military justice section of the staff judge advocate's office. No. ACM 30700, 1995 WL 329430, at *1 (A.F. Ct. Crim. App. May 17, 1995) (per curiam). Rejecting a claim that the convening authority "rubber-stamped" this employee's pro-prosecution selections, the court found that he had "assembled the nominees using Article 25 criteria, and not because of a perceived pro-prosecution bias." *Id. But see* United States v. Beard, 15 M.J. 768, 772 (A.F.C.M.R. 1983) (finding that recommendations by the assistant trial counsel/military justice chief on court membership were reversible error); United States v. Crumb, 10 M.J. 520 (A.C.M.R. 1980) (holding that the chief trial counsel may not replace court members).

220. 22 M.J. 124 (C.M.A. 1986).

221. *Id*. at 130.

> senior enlisted members appointed to the court but also the junior officer members were excused. Second, this selection deprived enlisted members in grades E-4 through E-6 of the opportunity to obtain experience as court-martial members. Third, it indicated a lack of confidence by the convening authority and his staff judge advocate in the ability of junior officers and enlisted members to adjudge a sentence that would be fair to both the accused and the Government.[222]

The Air Force Court of Criminal Appeals recently retreated from the spirit, if not the letter, of *McClain*. In *United States v. Upshaw*,[223] the staff judge advocate, through honest mistake, excluded from the nomination list all pay grades below E-7.[224] The court found the mistake insufficient to overcome the presumption of legality, regularity, and good faith that attaches to the member selection process.[225] This decision completes a rather absurd equation. If the accused suffers no prejudice, though the government intended as much (*Hilow*), he gets relief. If the accused does suffer prejudice, but the government did not mean it (*Upshaw*), he does not.

The year before *McClain*, in *United States v. Autrey*,[226] the convening authority deliberately excluded company grade officers from the court-martial panel of an accused first lieutenant.[227] The staff judge advocate forwarded to the convening authority a list of nominated field grade officers and his pretrial advice. "Company grade officers are excluded from the

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222. *Id.* at 131. In *United States v. Greene*, the chief of military justice ensured, in accordance with a policy memorandum published by the staff judge advocate, that only colonels and lieutenant colonels were nominated for court-martial panel consideration. 43 C.M.R. 72, 77 (C.M.A. 1970). Upon learning of this policy, the military judge ordered the trial counsel to inform the convening authority that he is not bound to appoint any particular ranks, but that he must consider all ranks. The convening authority responded that he had reviewed the current panel composition and was comfortable with his selections under the criteria of Article 25. *Id*. at 75-76. The accused elected trial by military judge alone, noting his displeasure with the top-heavy panel. *Id*. at 76. The COMA reversed the Air Force Court of Military Review's determination that "selection of members solely from a list of senior officers is proper." *Id*. *See* United States v. Cook, 18 C.M.R. 715, 717 (A.F.B.R. 1955) (finding a violation of Article 37 where the staff judge advocate had first drafted the member appointment memorandum and then sought assignment as the trial counsel).

223. No. ACM 32255, 1997 WL 165680, at *1 (A.F. Ct. Crim. App. Apr. 4, 1997) (per curiam).

224. *Id*.

225. *Id*. (citing United States v. Carman, 19 M.J. 932, 936 (A.C.M.R. 1985)).

226. 20 M.J. 912 (A.C.M.R. 1985).

227. *Id*. at 913.

list and recommend that no company grade officers be detailed as [First Lieutenant] Autrey is well-known among them on this installation."[228] The staff judge advocate testified on a motion for appropriate relief that he had two reasons for his recommendation. First, among the 220-250 captains on the installation, "a tremendously large portion thereof" were ineligible because of duty assignment, and "a good number" of the remainder knew each other and would talk among themselves about this case.[229] Second, because of the severity of the charges (larceny, filing a false claim, and false statement), "the accused should have the benefit of having the most mature, sound, and competent court members to consider the facts and make a determination."[230]

Setting aside the findings and sentence, the Army Court of Military Review was understandably suspicious of both asserted reasons.

> It strains credulity to imagine that the appellant might have been personally acquainted with each of the approximate 100 eligible captains to the extent that they would be unable to sit as members of his court-martial. Even were he to be such a social butterfly . . . this is a matter properly addressed during voir dire proceedings.
>
> . . . [T]he idea that those in the grade of captain may be excluded from court-martial duty on the theory that they do not meet the statutory criteria as set out in Article 25(d)(2) has no basis in fact or logic.[231]

"Court-stacking," real or perceived, accomplished directly by the convening authority or indirectly by a subordinate, harms the individual case and the idea of justice in the military. Participation by a large number of people virtually invites improper influence before the convening authority even has a chance to apply Article 25 criteria, and it certainly invites public scrutiny.[232] When the convening authority does apply the criteria,

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228. *Id*.
229. *Id*. at 914.
230. *Id*.
231. *Id*. at 916-17.
232. *See infra* notes 331, 342-343, 347-351 and accompanying text.

she has such unguided discretion that almost any aspect of her decision can be, and is, challenged.

2. Lack of Objective Standard or Definition to the Article 25 Criteria

The Article 25 criteria for choosing members are inherently subjective. The terms themselves lack definition, and the UCMJ provides no guidance on the method of their application. Because the convening authority provides the definition and the method of application, the selection process reflects his individual preferences. Convening authorities draw judicial scrutiny for choosing predominantly senior personnel or commanders for court-martial panels. Likewise, the courts will examine convening authorities who essentially abandon their responsibility to select the members affirmatively and personally. Unfortunately, the gamut of allowable individual definition and application is wide.

a. Choosing Senior Personnel or Commanders

Article 25 does not include rank, seniority, or command among its listed criteria. The courts, however, will support the appropriate characterization of these qualities under the listed Article 25 criteria. In *United States v. Crawford*,[233] the COMA held that the convening authority may not deliberately and systematically exclude the lower enlisted ranks when selecting a court-martial panel.[234] The court noted, however, that Article 25, by its terms, will result in mostly senior panels.[235] In *United States v. Cunningham*,[236] the Army Court of Military Review sanctioned the intentional inclusion of commanders, noting that the attributes of command are entirely consistent with the qualifications of Article 25.[237] In *United States v. Smith*,[238] the same court found that a convening authority's letter directing his staff judge advocate to provide specific ranks for the panel[239] was an impermissible selection process based on grade alone.[240] The court all but acknowledged that the convening authority could have legally selected

233. 35 C.M.R. 3 (C.M.A. 1964).

234. *Id*. at 10. The court found no systematic exclusion in the failure of the Army to include soldiers below pay grade E-4 on any court-martial panels between 1959 and 1963. *Id. See* United States v. James, 24 M.J. 894, 896 (A.C.M.R. 1987) (finding no systematic exclusion where no lieutenants or warrant officers had served on panels in the past year). *But see* United States v. Daigle, 1 M.J. 139, 141 (C.M.A. 1975) (disallowing the intentional exclusion of all lieutenants and warrant officers from consideration for court-martial panels).

the same members. He simply should have articulated as his basis the correspondence of seniority and the Article 25 criteria.[241]

United States v. Lynch[242] involved negligent hazarding of a vessel. The Coast Guard Court of Military Review approved the convening authority's decision to appoint as members only officers with "sea-going"

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235. *See Crawford*, 35 C.M.R. at 8-12. In *United States v. Carman*, the convening authority selected five lieutenant colonels and one major for a special court-martial. 19 M.J. 932, 935 (A.C.M.R. 1985). The court expressed concern that prejudice results when the convening authority appears to select prosecution-favorable members, but affirmed anyway, noting that the selection of senior officers was consistent with Article 25. *Id*.

> In today's Army, senior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates. The military continuously commits substantial resources to achieve this. Additionally, those officers selected for highly competitive command positions in the Army have been chosen on the "best qualified" basis by virtue of many significant attributes, including integrity, emotional stability, mature judgment, attention to detail, a high level of competence, demonstrated ability, firm commitment to the concept of professional excellence, and the potential to lead soldiers, especially in combat. These leadership qualities are totally compatible with the UCMJ's statutory requirements for selection as a court member.

Id. See United States v. Roland, No. ACM 32485, 1997 WL 517667, at *2 (A.F. Ct. Crim. App. Aug. 11, 1997) (asserting that "[i]t is not improper for the convening authority to look to officers or enlisted members of senior rank because they are more likely to be best qualified by reason of age, education, training, experience, length of service, and judicial temperament"); United States v. McLaughlin, 27 M.J. 685, 686-87 (A.C.M.R. 1988) (finding, no violation of Article 25 with the convening authority's written systematic policy of replacing only the most junior officer members when enlisted members were requested).

236. 21 M.J. 585 (A.C.M.R. 1985).

237. *Id*. at 587. *See* United States v. White, No. ACM S29207, 1997 WL 38202, at *3 (A.F. Ct. Crim. App. Jan. 8, 1997) (finding nothing improper with a nine-member panel that contained seven commanders after the convening authority had expressed, in a recent letter, a concern with the apparent lack of commanders and senior enlisted personnel available for court-martial service).

238. 37 M.J. 773 (A.C.M.R. 1993).

239. The convening authority's handwritten notes said, "get an E8 from 1st Brigade, get an E7 from DISCOM [Division Support Command], get an E8 from Divarty [Division Artillery], and get an E7 from Victory Brigade." *Id*. at 775.

240. *Id*. at 776.

241. *See id.*

242. 35 M.J. 579 (C.G.C.M.R. 1992), *rev'd on other grounds*, 39 M.J. 233 (C.M.A. 1994).

experience.[243] The court found that this was permissible consideration and selection by the convening authority under the "experience" criterion of Article 25.[244] Essentially, the appellate court sanctioned a panel of experts, which has traditionally been viewed as antithetical to the concept of trial by jury.[245]

Article 25 requires a balance by the convening authority. On one hand, he may not supplement the statutory criteria with his personal criteria. On the other hand, he must personally select the members. Article 25 encourages litigation of both issues; however, the courts forgive convening authorities who ignore the Article 25 criteria more readily than they do those who manipulate them.

b. Failing to Personally Select

The COMA sanctioned a near total abandonment of Article 25 criteria in *United States v. Yager*.[246] There, the convening authority used random selection from all ranks above private first class.[247] The court upheld the conviction and implicitly approved both the failure to choose members

243. *Id*. at 587-88.

244. *Id*.

245. *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES, OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS xii (1977) ("The jury—a group of ordinary people assembled for a limited period to decide a given case—is considered the fairest instrument of justice because of a belief that the danger of bias is even greater when 'experts' are used."). The English author G. K. Chesterton mused:

> When it wants a library catalogued, or the solar system discovered, or any trifle of that kind, [society] uses up its specialists. But when it wishes anything done which is really serious, it collects twelve of the ordinary men standing round. The same thing was done, if I remember right, by the founder of Christianity.

G. K. CHESTERTON, TREMENDOUS TRIFLES 55 (12th ed. 1930).

246. 7 M.J. 171 (C.M.A. 1979).

247. *Id*.

according to the "best qualified" standard of Article 25 and the "deliberate and systematic" exclusion of the two lowest enlisted pay grades.[248]

In *United States v. Allgood*,[249] the convening authority at Fort Dix referred charges to a court-martial that had been convened by a previous commander of a unit that was no longer in existence.[250] After the trial, the convening authority asserted that, before he referred the charges, he had "adopted" the members who had been selected by the previous commander.[251] The Court of Appeals for the Armed Forces (CAAF) recognized "that 'adoption,' at least in the Army context, is generally understood to include personal evaluation and selection of court-martial members as required by Article 25."[252] However, the CAAF accepted the convening authority's assertion. Setting aside the Army Court of Military Review's findings,[253] the CAAF dismissed the fact that most of the detailed members had transferred from Fort Dix before referral.[254]

Several cases concerning the convening authority's "adoption" of a panel that had been selected by a predecessor in command turn on a presumption of propriety. "Absent any evidence to the contrary, [the court] presume[s] regularity in the convening process, including knowledge on the part of the convening authority as to the identity of the members of the appellant's court-martial."[255]

Clearly, the convening authority wields wide discretion to determine what fits the listed criteria of Article 25. Apparently, the convening authority may sometimes disregard the criteria altogether. This individu-

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248. *See id*. at 173. *See* United States v. Pearl, 2 M.J. 1269, 1271 (A.C.M.R. 1976) (approving an "experimental program for the selection of court members on a random basis").

249. 41 M.J. 492 (1995).

250. *Id*. at 493. The convening authority assumed command of the United States Army Training Center and Fort Dix in September 1992. On 1 October 1992, the Training Center was redesignated as United States Army Garrison, Fort Dix. On 30 October 1992, the convening authority referred this case to a general court-martial that was convened by, and with panel members selected by, the former commander of the United States Army Training Center and Fort Dix. *Id.*

251. *Id*. at 496. The accused was tried on 4 November 1992. *Id.* at 493. On 11 December 1992, the convening authority issued a memorandum for record in which he indicated that, prior to referral of this case, he adopted the panel selections of his predecessor. *Id*. at 496.

252. *Id*.

253. *Id*.

254. *See id*. at 498 (Cox, J., dissenting). *See also* United States v. Allgood, 37 M.J. 960, 962 n.2 (A.C.M.R. 1993).

alized process invites real and perceived abuse. It also decreases the consistency of justice in the system. Finally, it encourages attack, at trial and on appeal, on the convening authority's member selection decision.[256]

In *United States v. Brown*,[257] the Air Force Court of Military Review lamented:

> Literally hundreds of pages of record were consumed as appellant's trial defense counsel launched a no-holds-barred attack on the selection process for the members of the court-martial. At one time or another the special court-martial convening authority's staff judge advocate, the special court-martial convening authority himself, the general court-martial convening authority, and his SJA, were called to testify on the selection process. The first salvo scored a direct hit, as the special court-martial convening authority, through his SJA, had effectively ruled out consideration of enlisted members below the grade of E-5 . . . . Appellant's efforts at the second go-round focused on "stacking" the court with senior members. It was appellant's position then that the convening authority's a priori decision that he wanted senior representation on courts-martial was prohibited . . . . He was particularly concerned that all of the lieutenant colonels and colonels on Vandenberg [Air Force Base] were part of the "pool" which the base routinely forwarded to the appropriate convening authority for consideration.

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255. United States v. Rader, No. NMCM 97 00242, 1997 WL 651316, at *1 (N.M. Ct. Crim. App. Sept. 26, 1997) (per curiam). *Accord* United States v. Vargas, 47 M.J. 552 (N.M. Ct. Crim. App. 1997). When there is evidence to the contrary, relief may be forthcoming, even before reaching the appellate level. In a recent case, defense counsel moved for appropriate relief to dismiss the entire panel of members on the basis of court-stacking. Counsel alleged that the convening authority selected members based solely on their propensity to adjudge a harsh sentence. When the convening authority testified on the motion, the military judge asked him whether he had used age, education, training, experience, length of service, and judicial temperament as criteria in selecting these members. The convening authority responded candidly that he would never dare to influence the jury selection process by considering these attributes. In fact, the convening authority testified that he had no idea who these enlisted members were; he was careful to ensure that his sergeant major chose all of the enlisted members. The defense prevailed on the motion. Interview with Major John R. Ewers, Military Judge, Sierra Judicial Circuit, Navy-Marine Corps Trial Judiciary, Camp Pendleton, Cal., in Charlottesville, Va. (Nov. 18, 1997).

256. In *United States v. Yager*, the defense applauded the convening authority's random selection scheme, but challenged it nonetheless because it violated the language of Article 25. 7 M.J. 171, 171-72 (C.M.A. 1979).

257. No. ACM 32225, 1997 WL 101934, at *1 (A.F. Ct. Crim. App. Feb. 20, 1997).

> . . . In the end, appellant had a wide range of grade representation: O-6, O-5, O-4, O-3, E-9, E-7, E-5, and E-4. There was no indication that any grade was impermissibly excluded from consideration, nor was there any evidence of an intent to "stack" the court-martial panels.[258]

In defending the proposed 1968 Federal Jury Selection and Service Act[259] before Congress, the head of the federal judiciary's Committee on the Operation of the Jury System, Judge Irving Kaufman, stated:

> The judges of my Committee considered this matter [of subjective criteria as juror qualifications] at length. We came to these conclusions: . . . long experience with subjective requirements such as "intelligence" and "common sense" has demonstrated beyond any doubt that these vague terms provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith.
>
> . . . .
>
> The end result of subjective tests is not to secure more intelligent jurors, but more homogeneous jurors. If this is sought in the American jury, then it will become very much like the English jury—predominantly middle-aged, middle-class, and middle-minded.[260]

Surviving "court-stacking" allegations is but half the game under Article 25. A thornier and more sinister problem plagues the current system. The convening authority may intentionally or unwittingly exert influence over the otherwise independent judgment of his present or future panel members.

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258. *Id*. at *5-6.

259. *See supra* notes 149-153 and accompanying text.

260. *Federal Jury Selection: Hearings on S. 1319 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong. 49, 255 (1967) [hereinafter *Hearings on S. 1319*] (statement of Judge Irving R. Kaufman, U.S. Court of Appeals for the Second Circuit, and Head, Committee on the Operation of the Jury System).

B. Influence

Public outcry at perceived widespread abuses in the military justice system during World War II[261] led first to the Elston Act in 1948[262] and then to the 1950 enactment of the UCMJ.[263] The Elston Act added to the Articles of War a prohibition against convening authorities and commanders reprimanding, coercing, or unlawfully influencing any court-martial member in reaching the findings or sentence in any case.[264] Article 37 of the UCMJ, which was modeled on this provision, broadly prohibits convening authorities or commanders from censuring court-martial members, judges, or counsel.[265] The article further prohibits coercion and unauthorized influence of court-martial members by *any* member of the armed

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261. During World War II, approximately two million courts-martial were convened. *See* Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1, 11 (1987). Numerous examples of harsh punishments and extremely abbreviated due process were reported to Congress. *See* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 14-21 (1973). Congress was deluged by demands for reform of the court-martial system from organizations such as the American Bar Association and the American Legion. *See* Cox, *supra*, at 12.

262. Elston Act, 62 Stat. 604, 627-44 (1948). The Elston Act contains the 1948 amendments to the Articles of War.

263. *See* Earnest L. Langley, Note, *Military Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice*, 29 TEX. L. REV. 651 (1951) (noting that the perceived abuses centered around unlawful command influence).

264. *See* Articles of War of 1948, art. 88, *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES, app. 1, at 273, 296 (1949) [hereinafter 1949 MANUAL].

265. Article 37(a) provides:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercises of its or his functions in the conduct of the proceedings.

UCMJ, art. 37(a) (West 1995).

forces.[266] Finally, the article proscribes evaluation reports based on duty performance as a court-martial member.[267]

1. United States v. Youngblood and Recent Coercion

Convening authorities do not typically censure or reprimand members directly. Instead, a subtler coercion and unauthorized influence infects military justice, as highlighted by a recent case. In *United States v. Youngblood*,[268] several court-martial panel members attended a staff meeting ten days before trial. At the meeting, the convening authority and the staff judge advocate discussed "the state of discipline in the unit and the . . . convening authority's views of 'appropriate' levels of punishment."[269]

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266. Article 37(a) continues:

> No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

Id.

267. Article 37(b) provides:

> In the preparation of an effectiveness, fitness, or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial.

Id. art. 37(b). *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (adding the language of article 37(b)); Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (insulating judges and defense counsel from the actions of convening authorities).

268. 47 M.J. 338 (1997). *See* Lieutenant Colonel Lawrence J. Morris, *"This Better Be Good": The Courts Continue to Tighten the Burden in Unlawful Command Influence Cases*, ARMY LAW., May 1998, at 49, 60-65 (analyzing *Youngblood* in the context of recent forms of unlawful command influence).

269. *Youngblood*, 47 M.J. at 339.

The staff judge advocate had identified a specific example concerning a former commander within the unit who had "under-reacted" in a case of child abuse.[270] The convening authority then added that his response had been to forward a letter to that commander's next duty-station; in the letter, the convening authority opined that the former commander "had peaked."[271] During voir dire, the members expressed varying degrees of confidence in the independence of their individual judgment.[272]

The CAAF set aside the sentence because the trial judge denied challenges for cause against these members.[273] The court found that the members harbored "implied bias."[274] "Implied bias is reviewed through the eyes of the public."[275] "The focus 'is on the perception or appearance of fairness of the military justice system.'"[276] The court acknowledged that this case involved challenges for cause based on unlawful command influence,[277] but avoided that underlying issue altogether by deciding the case on the military judge's abuse of discretion in denying the challenges.[278]

Youngblood is important in two major respects. First, it highlights the continued vitality of unlawful command influence. Not only did the convening authority exert improper influence, his staff judge advocate affirmatively assisted in the endeavor. Whether characterized as "command influence" or "implied bias," the result here was the same—the sentence was adjudged by a panel of officers who were clearly aware of the threat to their professional futures if they "under-reacted." In the late seventeenth century case of William Penn, the trial court punished the acquitting

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270. *Id*. at 340.

271. *Id*.

272. *Id.* When asked about his concern over the possibility of a similar letter being addressed to his next command, one member stated "that he would do what was right but that the remarks at the staff conference were 'at a minimum in my subconscious and, you know, parts of it are very clearly in my conscious.'" *Id.* Another member responded that her opinion was her opinion, "[a]lthough it can be somewhat influenced by guidance and information out there . . . ." *Id.* A third member stated that he was "definitely" left with the impression that the commander who "under-reacted" would suffer adverse professional consequences. *Id*.

273. *Id*. at 341.

274. *Id*. The accused pleaded guilty; the findings were untainted. *Id.*

275. *Id*. (citing United States v. Lavender, 46 M.J. 485, 488 (1997); United States v. Napolean, 46 M.J. 279, 283 (1997)).

276. *Id*. (quoting United States v. Dale, 42 M.J. 384, 386 (1995)). *See* Major Gregory B. Coe, *"Something Old, Something New, Something Borrowed, Something Blue": Recent Developments in Pretrial and Trial Procedure*, ARMY LAW., Apr. 1998, at 44, 74-78 (discussing implied bias).

277. *See Youngblood*, 47 M.J. at 341.

jurors with fines and imprisonment.[279] In principle, the *Youngblood* jurors faced a similar threat. A commander's determination that a member has professionally "peaked" could be the end of a member's livelihood. How is the potential punishment of jurors here different in principle from the potential punishment of jurors by the thirteenth century writ of attaint[280] or the sixteenth century Star Chamber?[281] Put another way, why did the nation's founding fathers fight the revolutionary war if this right, which

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278. The court relied on Rule for Courts-Martial 912(f)(1)(N). *Id*. *See* MCM, *supra* note 5, R.C.M. 912(f)(1)(N). Judge Sullivan invited the majority to call this what it was: unlawful command influence. He also focused on public perception.

> Plainly speaking, both sides in a court of law are entitled to a panel of fair jurors, jurors who have not had any pressure put on them to be lenient or to be harsh. The only allowable pressure on a juror is the duty to be fair. Whether a juror succumbs to any improper pressure is really not the main point. A jury system must appear fair for it to be recognized as fair.

Youngblood, 47 M.J. at 343 (Sullivan, J., concurring in part and dissenting in part) (citations omitted). Judge Sullivan continued, "[a]s Lord Chief Justice Hewart said: A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Id.* (quoting The King v. Sussex Justices, 1 K.B. 256, 259 (1924)).

279. William Penn and William Mead, Quaker activists, were tried in London on charges of unlawful assembly after they conducted a disruptive Quaker meeting. The jury sought to return various verdicts, such as "guilty of speaking," which essentially exonerated the accused. The trial judges disallowed these verdicts. After several sessions of deliberations and findings, the jury found the defendants not guilty. The jurors were fined and imprisoned. On a writ of habeas corpus, the appellate court freed the jurors in a historic decision that celebrated the need for jury independence. *See* VAN DYKE, *supra* note 245, at 5; 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 345-46 (A. L. Goodhart & H. G. Hanbury eds., 7th ed. 1956).

> The [Penn] decision articulates a principle we now fully accept: that if the jury is to play its intended role as an impartial fact-finder, expressing the community's decision, it must be independent. Otherwise, it is not really the community's voice but the voice of the crown (or state), and *the entire rationale for using a jury is erased*.

VAN DYKE, *supra* note 245, at 5 (emphasis added).

280. The writ of attaint appeared in England from 1202 to 1825. It provided for the reversal of a jury's verdict and punishment of the jurors if they reached an untrue or perjurious verdict. *See* 1 HOLDSWORTH, *supra* note 279, at 337-40.

was fundamental to their cause, was to be abrogated two and a quarter centuries later?[282]

Second, *Youngblood* demonstrates the lack of real commitment to the concept of a "fair and impartial panel."[283] The trial judge abused his discretion. The Air Force Court of Criminal Appeals affirmed the findings and sentence[284] and noted:

> We find nothing improper about the commander's meeting, which focused upon the responsibility of commanders for discipline within their unit . . . . We note that the briefings given at the commanders' meeting made no reference to how court-martial members should carry out their responsibilities and no attempt was made to offer guidance on how specific offenses should be disciplined.[285]

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281. The Star Chamber was a panel of English appellate judges who fined and imprisoned trial juries for returning verdicts that were contrary to the wishes of the Crown. *See* THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 181-84 (5th ed., Butterworth & Co. Ltd. 1956) (1929).

282. The colonists brought the right to trial by jury with them from England. Their various colonial charters contained specific guarantees in one form or another of the right. *See* MOORE, *supra* note 132, at 97-100. As the fervor toward independence grew, so did the importance and appreciation of this right. The first session of the American Stamp Act Congress in 1765 declared that "trial by jury is the inherent and invaluable right of every British subject in these colonies." RESOLUTIONS OF THE STAMP ACT CONGRESS para. 8 (Oct. 19, 1765), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 69, at 270. In 1774, the First Continental Congress resolved "[t]hat the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage according to the course of that law." DECLARATION AND RESOLVES OF THE FIRST CONTINENTAL CONGRESS para. 6 (Oct. 14, 1774), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 69, at 286, 288. Indeed, the revolution was claimed to be founded in part on the abridgment "of the accustomed and inestimable privilege of trial by jury, in cases affecting both life and property." DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (July 6, 1775), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 69, at 295, 296. "[D]epriving us, in many cases, of the benefits of trial by jury" was listed in The Declaration of Independence as one of the reasons for its necessity. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776). Virtually all of the state constitutions that were drafted during and after the Revolutionary War contained specific guarantees of the right to trial by jury. *See supra* note 75.

283. *See supra* notes 168-175 and accompanying text.

284. United States v. Youngblood, No. ACM 31617, 1996 WL 367389, at *1 (A.F. Ct. Crim. App. June 24, 1996), *aff'd in part, rev'd in part*, 47 M.J. 338 (1997).

285. *Id*. at *2.

While a majority on the CAAF rejected the Air Force court's decision and set aside the sentence, the CAAF refused to address the real issue of unlawful command influence.[286]

Youngblood illustrates recent unlawful command-level influence and intermediate appellate level failure to address it. Unfortunately, its problems and lessons are anything but recent.

2. Older Lessons in Coercion

In *United States v. Reynolds*,[287] the convening authority expressed his dissatisfaction with previous court-martial results at his morning meeting.[288] Specifically, he opined that anyone who was involved with drugs ought to be made "a civilian as soon as possible."[289] Further, he pointed out that circumstances warranting discharge necessarily exist if a commander convenes a court-martial.[290] This meeting took place on the morning of the accused's court-martial for distribution of drugs, and four members of the panel were present at the meeting. [291] The staff judge advocate, who was also at the meeting, interrupted the convening authority's remarks, attempted to rehabilitate the audience, and even testified at a pretrial hearing that morning to outline the discussion.[292] On voir dire, the four members who attended the meeting all agreed that the commander's influence would not affect them.[293] The court affirmed the results in a three-two decision and found that the commander's remarks were inappropriate, but nothing more "than a mere appearance of evil."[294] One dissenting judge noted:

> [S]ubstantial doubt existed as to the fairness of the proceedings . . . . I cannot say with any degree of certainty that this jury panel

286. The CAAF *does* recognize the importance of public perception of fairness within the military justice system. *Rather* than examining the evident unlawful command influence, the court based its entire ruling on "implied bias," or how the public would view this panel. *See* United States v. Youngblood, 47 M.J. 338, 341-42 (1997).

287. 40 M.J. 198 (C.M.A. 1994).

288. *Id*. at 200.

289. *Id.*

290. *Id.*

291. *Id*. at 199.

292. *Id*. at 199-200.

293. *Id*. at 202.

294. *Id.*

> was untainted by command influence. The affirmance of a conviction that may be tainted with command influence would be inconsistent with the very purpose of the creation of this Court by Congress.[295]

The other focused on the appearance of impropriety.

> Courts-martial must not only be fair; they must appear to be fair. Appellant's case falls far short on the appearance of fairness . . . . I find defense counsel's failure to challenge the four affected members for cause inexplicable. There is no doubt that they should not have sat as members "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." While I do not doubt the sincerity or honesty of the members in their disclaimers regarding [the commander's] comments, the conflict between their personal interests and their sworn duty as court members demanded that they be excused in the interests of justice. If counsel would not challenge them, the military judge should have done so sua sponte or declared a mistrial.[296]

Judge Cox, who authored the *Reynolds* majority opinion, also wrote the court's opinion nine years earlier in *United States v. Brice*.[297] In that drug trafficking case, the convening authority ordered, mid-trial, that all members of the command, including panel members, attend an anti-drug lecture delivered by the visiting Commandant of the Marine Corps.[298] During the lecture, the Commandant "stated that drug trafficking was 'intolerable' in the military and such persons should be 'out' of the Marine Corps."[299] As in *Reynolds*, all of the members assured the court that these remarks would have no influence on their impartiality.[300] The COMA reversed the Navy-Marine Corps Court of Military Review and held that the trial judge should have granted a mistrial upon the court's reconvening. Interestingly, unlike the remarks in the *Reynolds* case, the Commandant's

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295. *Id*. at 204 (Sullivan, C.J., dissenting).

296. *Id*. at 204 (Gierke, J., dissenting) (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(f)(1)(N) (1984) [hereinafter 1984 MANUAL]) (citations omitted).

297. 19 M.J. 170 (C.M.A. 1985).

298. *Id*. at 171.

299. *Id*.

300. *Id.*

lecture did not come from the convening authority. Further, the *Brice* court avoided characterizing these remarks as command influence.

> We do not in any way wish to be viewed as condemning the contents of the commandant's remarks since the drug problem in the military demands command attention; nor do we feel that such remarks necessarily constitute illegal command influence. Instead, we base our decision on the confluence of subject and timing, particularly as they affect the minds—however subtly or imperceptibly—of the triers of fact in this particular case.[301]

The difficulty in reconciling *Reynolds* with other cases of this tenor is not necessarily surprising. It does demonstrate the individualized nature of the appellate remedy and the less than full commitment to the eradication of unlawful command influence and the evil of its appearance. More importantly, *Brice*, *Reynolds*, and *Youngblood* are not sporadic anecdotal examples of convening authorities and staff judge advocates exerting improper influence. They are part of a continued pattern, the boundaries of which are unknown beyond those cases that are reviewed by the courts.[302]

IV. The Solution: Select Court-Martial Members from Installation-Level Venire Pools

Article 25 is neither constitutional nor fair. Article 25 must go. Its replacement must be an efficient method of impartial panel selection from a fair cross-section of the community. Section A, below, identifies the mechanics of a proposed model for such a method based on a computer

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301. *Id*. at 172 n.3. The court compared the *Brice* facts with those in *United States v. McCann*. *Id*. *See* United States v. McCann, 25 C.M.R. 179 (C.M.A. 1958). During a recess in that case, which concerned charges of drunken operation of a ground control approach facility, panel members attended a lecture on military justice that was delivered by the staff judge advocate. The staff judge advocate characterized certain acts of misconduct as more reprehensible in the military than in the civilian community. He specifically discussed the case of a ground control approach operator who incapacitated himself for duty through use of alcohol. *Id*. at 180. The court set aside the conviction and held that this "'justice' lecture constituted an improper influence upon the court members in regard to a case upon which they were then sitting." *Id*.

302. *See* Martha H. Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. REV. 65, 70-77 (1988) (providing synopses of cases from the 1950s through the 1980s that illustrate the on-going influence, sometimes subtle, sometimes blatant, of convening authorities over members).

maintained database. Section B defends the model on theoretical and practical grounds. Where particularly relevant, section A provides some of the justification for the model.

A. Mechanics of the Proposed Model

1. The Venire Pool

This model for efficient and fair panel selection begins as part of the check-in procedure at a new duty station. Personnel who are reporting to a particular installation, including members of the active reserve, would complete a generic court-martial questionnaire as part of the check-in procedure with the administrative officer of the receiving command. Those who are involved with law enforcement and the military justice process (for example, trial and defense counsel and military justice clerks) would be exempt. The questionnaires would be forwarded to the installation administrative officer (G-1). Each calendar quarter, the G-1 would add all of the new names to the venire pool. The venire pool would be a computer-maintained database. Several commercially available programs allow input, management, and retrieval of data according to fields or categories of information.[303] The venire pool would include the following fields that are related to the actual selection process: name, rank, report date (by calendar quarter—for example, 1/97, 2/97, 3/97, or 4/97), and availability. Other fields that are related to the administration of the process could include home and work telephone numbers and assigned unit.

When the convening authority "refers" charges, he would do so to "a" special or general court-martial. The charge sheet otherwise would be unchanged. No convening order would be necessary. When the defense formally enters forum selection, the installation G-1 would be notified if the accused chose members. The G-1 would then query the database for members. Sorting would be by rank, reporting quarter, availability, and alphabetical order. Personnel who are of equivalent or senior rank to the accused and who have been assigned on station the longest (or residing in

303. Microsoft, Inc. markets a database program called "Access," which is currently available in the Microsoft Office Suite that is in use throughout the United States Army and that is intended to be employed by the other services. Other companies that *specialize* in database software include: Bluestream Database Software Corp., Chicago, Ill.; Customized Database Systems, Inc., White Plains, N.Y.; Database Solutions, Lake Arrowhead, Cal.; Database Systems Integrators, Elk Grove, Cal.; and Integrated Database Software, Plymouth, Minn.

the area the longest, if in the reserves) would be at the "top of the list" in alphabetical order. Alphabetization would randomly shuffle all quarterly new arrivals.[304] Disqualification "flags" would operate to bypass the convening authority and investigating officer. The availability field would operate to bypass personnel who are deployed, temporarily assigned elsewhere, or on leave. The viability of this field would depend on close coordination between administrative offices.[305] The G-1 would "detail" the first fourteen people who, together, proportionally represent the rank group structure of the installation. [306] The G-1 would forward their questionnaires to the appropriate staff judge advocate for distribution to the parties. Once detailed, members would be reentered into the venire pool with a new reporting quarter as if they had just arrived on station. They would

304. When formal schools graduate, particular installations may receive many service members of a distinct military community, all of whom have similar rank, know each other, and are destined for service in the same subordinate units.

305. One way to simplify the task of inputting availability data would be to have the database accessible to all administrative offices. Safeguards against tampering and against access to the entire venire so as to determine the order of jurors would have to be employed.

306. The five rank groups would be the service equivalents of: field grade officers, company grade officers, staff noncommissioned officers, noncommissioned officers, and the lowest enlisted ranks. The Supreme Court places no significance on the number twelve, but has established a lower threshold of six. *See* Ballew v. Georgia, 435 U.S. 223 (1978) (striking down a state statute that established five-member juries in misdemeanor trials). The *Ballew* Court relied on a series of studies which suggested, inter alia, that reducing the jury size from six to five might provide an inadequate cross-section of the community and would impair effective group deliberation. *See id*. at 231-33 nn.10-11. *See also* United States v. Corl, 6 M.J. 914 (N.M.C.M.R 1979), *aff'd*, 8 M.J. 47 (C.M.A. 1979) (finding *Ballew* concerns inapposite to military jury selection under Article 25 and therefore rejecting equal protection arguments that military panels of less than six are unconstitutional). *Accord* United States v. Wolff, 5 M.J. 923 (N.M.C.M.R. 1978), *petition denied*, 6 M.J. 305 (C.M.A. 1979); United States v. Montgomery, 5 M.J. 832 (A.C.M.R. 1978). Six should be the minimum number, but nine to twelve should be the goal. Various studies suggest, and various commentators argue, that both representativeness and reliability decrease significantly as juries are reduced below twelve and fatally so in juries of six. *See, e.g.*, VAN DYKE, *supra* note 245, at 194-203. Capital cases should be tried by a minimum of twelve members, and the G-1 should detail eighteen for such cases.

then be alphabetically shuffled into that quarter's list of new arrivals so as not to rise together to the top of the list again.[307]

The G-1 would be responsible for notification to the members of their assignment and the date, time, place, and uniform for trial. She would issue orders from the installation commander to each member, including orders to active duty for reserve personnel.[308] Any special instructions would come from the military judge through the G-1. Depending on the pace of jury trials at a particular installation, the G-1 could notify personnel who are approaching the top of the list of their potential impending assignment.

2. The U.S. Navy and Deployed Units

This model uses the ground installation, base, or post as a center of gravity for the venire pool. The Navy currently conducts some courts-martial at sea, where the "installation" is normally the ship. The random selection method of the model would generally satisfy fair cross-section standards and alleviate "court-packing" concerns under these circumstances. However, everyone on board works for the captain of the ship in relatively close quarters, and the potential influence problems would remain. Every ship has a home port, and every ship pulls into some port on a regular basis. Under this model, the Navy would conduct courts-martial ashore almost exclusively.[309] The base or station would serve as the installation. Home ports would add ships' companies to their venire pools and make non-availability field entries for ships' companies that are put-

307. This model is not dependent on a computer database program. The principles are subject to manual application. Each calendar quarter, the G-1 would manually shuffle all of the names received along with the names of any new arrivals and personnel who are just completing court-martial member duty. The shuffled quarterly additions would then be added to the bottom of a "hard-copy" venire pool list.

308. Reserve personnel would be paid and would earn retirement points for jury duty. They would not be excused from regularly scheduled drill or periods of annual active duty training. Some reserve personnel reside long distances from the base or station where they drill. If these individuals did not reside near (perhaps more than 100 miles away) *any* base or station to which they could be administratively attached for court-martial duty, they could be exempt.

309. One broad exception, which involves relatively frequent naval operations, would permit trial at sea. Where several ships are traveling by squadron or group, such units can be designated as one "installation" for court-martial member selection purposes.

ting to sea within thirty days. Panels that are selected from other ports' venire pools would try ship's company accused worldwide, if necessary.

Likewise, members of air and ground units that are deployed overseas would maintain their "place in line" on the venire pool at their parent installations. Non-availability field entries would bypass their names until they returned. Deployed personnel, like ships' companies, could be tried worldwide, if necessary. Sometimes, units deploy for indeterminate periods into remote or hostile areas that are not serviced conveniently by a base or station. These units would operate under the jury trial regime described below for "time of war."

3. Time of War

Combat requires deployment, reorganization, and modification of military units, including some military installations themselves. This article's proposed model of jury selection based on installation-wide continuity requires modification during sustained large-scale hostilities and some small-scale deployments. Further, combat requires a measure of unit continuity and cohesion not afforded by constantly rotating court-martial panels.

In time of war, non-theater military installations would continue to operate under the model described above. The senior commander *in-theater* would designate ad-hoc "installations" for court-martial purposes. The commander could make these designations where and when the administrative or operational scenario permitted or required. Depending on the size of the deployment and the anticipated duration of hostilities, the commander could designate several "installations." He could designate them according to geography, task organization, administrative capabilities, or other convenient distinction. In the alternative, the commander could designate just one "installation." Once the commander designates the "installation," members for courts-martial would be chosen in the same

way as under the basic model, but panels would sit for pre-determined periods of time rather than for individual cases.[310]

B. Rationale Supporting the Proposed Model

1. Meeting and Exceeding the Constitutional Standards

a. Random Selection

Random selection of jurors is not a constitutional goal unto itself. Instead, it serves the dual purposes of fairness and diversity. In the individual case, it is fair, and it appears fair because the process involves no interested party.[311] In general, it ensures that all juries are empanelled by the same standard. It furthers equality between one case and the next. It enhances the notions and appearances of justice. Random selection also helps to achieve the diversity of society that is sought through the fair cross-section requirement.[312]

Civilian jurisdictions rely typically on voter registration lists, vehicle or drivers license registration records, tax roles, or even telephone directories to source venire pools.[313] As random methods of reaching large unknown and indeterminate populations, these methods achieve, as best they can, fairness and diversity. The military knows, on a daily basis, exactly who is within the geographical boundaries of its jurisdictions and their physical availability.[314] Personnel accountability is supposed to be a military hallmark. Further, the very existence of the armed services depends upon the expendability of every individual serving. The military (hopefully) trains for the eventuality of losses at all levels. The military is comprised of jurisdictions full of imminently available and immediately

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310. During the Civil War, the Confederate Army used courts-martial comprised of three permanent members who were assigned at the corps level. On 9 October 1862, the Congress of the Confederate States of America passed "An Act to organize Military Courts to attend the Army of the Confederate States in the field and to define the Powers of said Courts." *See* WINTHROP, *supra* note 81, at 1006-07. Interestingly, these courts were independent of the commands to which they were assigned. *See id*.

311. Author Jon M. Van Dyke noted that "[j]urors are supposed to be drawn at random from the community. When they are not, the jury may overrepresent [sic] some segments of society and underrepresent [sic] others, an imbalance that raises the specter of bias." VAN DYKE, *supra* note 245, at xi.

312. *See infra* note 319.

313. *See* 1 ANN FAGAN GINGER, JURY SELECTION IN CIVIL & CRIMINAL TRIALS §§ 2.25-2.27 (2d. ed. 1984); GOBERT, *supra* note 67, § 6.01.

reachable jurors.[315] The military services are uniquely capable of achieving fairness and diversity through efficient random selection that involves minimal institutional disruption. In combat, of course, the military takes real casualties. Clearly, the military justice process should not multiply these effects by removing needed personnel from the "front lines" for court-martial member duties.[316] The standing panels proposed under this model for wartime account for this requirement without harming the principles of random selection or fair cross-section.

Scholars, legislators, practitioners, and others have proposed models that advance some element of random selection. These proposals, however, leave the actual selection to the convening authority, "the unit," or some representative of executive or quasi-judicial authority, or they leave some facet of juror screening in place, or both.[317] The model proposed in this article eliminates any human bias from the process, thereby maximizing impartiality.

b. Fair Cross-Section

The fair cross-section requirement *is* of constitutional stature.[318] One of the premises of the jury system is that it incorporates community norms and standards.[319] The military, much more than civilian jurisdictions, involves transitory populations. The model's longevity preference favors

314. David Schleuter identified computerized random selection as particularly amenable to the military. "I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial when a service member's liberty and property interests are at stake." David Schleuter, Military Justice for the 1990's—A Legal System Looking for Respect, The Twentieth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Mar. 28, 1991), *in* 133 MIL. L. REV. 20 (1991).

315. Under the model proposed in this article, 28 U.S.C. § 1863(b)(6), which exempts active duty service members from federal jury service, should be amended to excuse reserve personnel from federal jury duty. *See* 28 U.S.C. § 1863(b)(6) (1994). The "expendability" of reserve personnel in their civilian employment or endeavors is not at all so certain. Relieving them of any burden to sit as federal petit or grand jurors should help to alleviate the disruption to the course of their livelihoods.

316. This is not always a concern. In *United States v. Beehler*, the staff judge advocate submitted to the convening authority a nomination list that contained the names of only five people, all of whom were then detailed by the convening authority. 35 M.J. 502, 503 (A.F.C.M.R. 1992). The explanation was that availability of potential members was severely limited due to the installation's heavy involvement in Operation Desert Shield and preparations for deployment to Southwest Asia. *Id*. Interestingly, four of the five members were commanders. *Id.*

jurors who have acclimatized to the community, personally and profes-

317. As early as 1919, Brigadier General Samuel Ansell, the acting Judge Advocate General of the Army, proposed that the convening authority select an initial panel from which a judge advocate would select eight members to hear a general court-martial or three members to hear a special court-martial. *See* THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS 1775-1975, at 133 (1993). General Ansell proposed a unique feature that was designed to enhance the concept of trial by peers. Of the eight members selected to try general courts martial, three would be of the same rank as the accused. *Id*. Three fourths of the members would have to agree on a finding of guilty, thereby requiring the concurrence of at least one of the accused's peers. General Ansell failed to reconcile this interesting dynamic with his concurrent recommendation to increase peremptory challenges to two. *See id.*

In the early 1970s, several different proposals surfaced. *See* Birch Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); Kenneth J. Hodson, The Manual for Courts-Martial—1984, The First Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Apr. 12, 1972), *in* 57 MIL. L. REV. 1 (1972).

Several proposals and implemented models seek harmony with the existing criteria of Article 25. They fail to account for the inherent tension between random selection and selection according to subjective criteria. *See* Rex Brookshire II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 96-104 (1972). In *United States v. Yager*, the COMA upheld a system by which the convening authority randomly selected members from a screened "master juror list." 7 M.J. 171 (C.M.A. 1979). In *United States v. Smith*, the COMA again sanctioned random selection, as long as the convening authority personally appoints the members who are randomly selected. 27 M.J. 242 (C.M.A. 1988). The *Smith* court stated:

> We are aware that at times there have been experiments in the armed services with some form of random selection of court-martial members . . . . [I]t would appear that even this method of selection is permissible, if the convening authority decides to employ it in order to obtain representativeness in his court-martial panels and if he personally appoints the court members who have been randomly selected.

Id. at 249. Like Brookshire, the COMA wanted it both ways. In essence, the COMA does not condemn random selection, but it requires that the convening authority select according to subjective criteria. In other words, it requires that the selection *not* be random.

In 1992, another commentator proposed a model similar to Brigadier General Ansell's, in which the convening authority would nominate potential members on the sole consideration of availability. *See* Lamb, *supra* note 98, at 160-61. The convening authority would detail a military judge or an inspector general as a "panel commissioner" who would randomly select a panel from the list of nominees. *Id*. Under this model, panels would likely be chosen from those who are considered by the convening authority to be the most expendable. Furthermore, all of the members would still be selected by the convening authority; they simply go through an intermediate selection process before getting to the courtroom. The model would not address any of the "court stacking" or influence concerns discussed in Part III of this article.

318. *See supra* note 39 and accompanying text.

sionally. The model includes members of the reserve component in the venire pool. This expansion of the community from which to draw a fair cross-section is justified on several practical and theoretical grounds.

The services depend more and more on their reserve components. Military leadership considers the reserves to be an integral part of mission and operation, a "force multiplier."[320] From a practical standpoint, including the reserves in the active military justice process would be in keeping with their increased roles and responsibilities. It would also spread the

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319. In the introduction to his work, Jon Van Dyke wrote:

> In a complex society such as ours, a jury that is the true "conscience of the community" must include a fair cross-section of the groups that make up the community. Each person comes to the jury box as an individual, not as a representative of an ethnic, racial, or age group. But since people's outlooks and experiences do depend in part upon such factors as socioeconomic status, ethnic background, sex, or age, to ignore such differences is to deny the diversity in society as well as the fundamental character of the "community" whose voice is to be heard in the jury room.
>
> . . .
>
> . . . A jury representing the broad spectrum of society is a jury whose independence and impartiality need not be suspect, and whose legitimacy is thus protected.
>
> Steps that threaten the jury's impartiality by impeding its independence and representativeness should be viewed with great suspicion.

VAN DYKE, *supra* note 245, at xiv. "[W]e . . . want . . . jurors to draw upon and combine their individual experiences and group backgrounds in the joint search for the most reliable and accurate verdict." ABRAMSON, *supra* note 147, at 11. "[T]he democratic aim of the cross-sectional jury was to enhance the quality of deliberation by bringing diverse insights to bear on the evidence, each newly evaluating the case in light of some neglected detail or fresh perspective that a juror from another background offered the group." *Id.* at 101. "[T]he purpose of the cross-sectional jury . . . was to draw jurors together in a conversation that, although animated by different perspectives, still strove to practice a justice common to all perspectives." *Id.* at 127.

320. *See, e.g., Prepared Statement of Major General Roger W. Sandler, USA (Ret.), Executive Director, Reserve Officers Association of the United States Before the House Appropriations Committee, National Security Subcommittee*, FED. NEWS SERV., Mar. 19, 1998 (providing a thorough exposition of the myriad ways the reserve components are expanding and contributing to the mission of the armed forces); *Prepared Statement of Vice Admiral D.T. Oliver, Chief of Naval Personnel and Deputy Chief of Naval Operations (Manpower and Personnel) and Rear Admiral B.E. McGann, Commander, Navy Recruiting Command, Before the House Committee on National Security, Military Personnel Subcommittee*, FED. NEWS SERV., Mar. 12, 1998.

jury duty burden, easing somewhat the diversion of the active military from its "basic fighting purpose."[321]

From a theoretical standpoint, including reservists in the venire pool would enliven the constitutional concept of civilian control of the military. The constitutional framers intended for juries to serve as a check on government.[322] Juries check the written law of the legislature and the enforcement of that law by the executive.[323] The framers also intended that civilians not only check, but also control, the military.[324] Reservists who are assigned to court-martial panels would serve both purposes simultaneously because they are civilians who have an understanding of the military. They would also provide a broader community for selection. Further, because military jurisdiction has expanded to encompass common law crimes during peacetime,[325] civilian participation ensures a civilian stake in *civilian* security and welfare.[326] Finally, by involving civilians in the process, they have a stake in the military justice system. They learn about the military justice system.

The judiciary sees military society as a separate society from that of civilians because military society is predicated on the maintenance of dis-

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321. United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955). "[T]rial of soldiers . . . is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served . . . ." *Id*. *See infra* text accompanying note 396-397 (attacking the specific reasoning of this proposition). This general message, that the armed forces exist to fight and to win America's battles, is meritorious.

322. *See* Baldwin v. New York, 399 U.S. 66 (1970).

> [T]he primary purpose of the jury is to prevent the possibility of oppression by the government; the jury interposes between the accused and his accuser the judgment of laymen who are less tutored perhaps than a judge or panel of judges, but who at the same time are less likely to function or appear as but another arm of the government that has proceeded against him.

Id. at 72.

323. *See supra* notes 113, 132.

324. *See generally* JAMES B. JACOBS, SOCIO-LEGAL FOUNDATIONS OF CIVIL-MILITARY RELATIONS (1986) (providing unique insight and perspective on numerous subtleties of civilian interaction and control of the military based on constitutional and practical considerations); JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW 211-12 (2d ed. 1983) (outlining the fundamentals of the concept of civilian control of the military); JOSEPH W. BISHOP, JUSTICE UNDER FIRE 9 (1974) (stressing the importance of civilian control of the military).

325. *See supra* notes 182-190 and accompanying text.

cipline.[327] Success of the armed forces in combat may well depend on the abilities of its members to transcend traditional societal beliefs and behavior. Therefore, a separate military society may be valuable, even crucial, to the effective functioning of the armed forces.[328] Where there is the tendency toward separatism, however, there exists also the danger of actual or perceived elitism or extremism.[329] There is at least the danger of misunderstanding and misperception. Controlled by and serving civilians, the military should be familiar to civilians. Civilians should understand and appreciate the separation that exists, not fear it. Where separate norms and practices are inherently necessary—such as combat and its preparation—the concept of separation achieves maximum justification. Otherwise, the military should take advantage of opportunities to demystify its practices or to bring them into the mainstream, especially regarding the constitutional rights of its members.[330] Expanding the venire pool to include the reserves would encourage civilian understanding and appreciation for military justice, in place of the present system, which engenders the opposite.

2. Curtailing Unlawful Command Influence in the Jury Selection Process

a. Appearance Supported by Reality

In 1970, Robert Sherrill, a critical commentator, wrote a scathing, even paranoid, indictment of military justice.

> Jittery, naive, suspicious in matters relating in any way to "rights," the military professionals do the best they can. But

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326. Before striking down the Canadian courts-martial member selection process, the Canadian Supreme Court specifically found the Canadian Charter of Rights and Freedoms applicable to the military. Généreux v. The Queen [1992] S.C.R. 259, 281. *See supra* notes 133-141 and accompanying text.

> Although the [military disciplinary code] is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The code serves a public function as well by punishing specific conduct which threatens public order and welfare. Many of the offences with which an accused may be charged . . . relate to matters which are of a public nature.

Généreux [1992] S.C.R. at 281.

> their training has left them pitifully limited; they wear blinders that shut out the beauty of the liberties of the civil landscape and hold their eyes to the old rutted military road. They fight very well. But they are not much good, either by training or instinct, for anything else. And since fighting alone is enormous enough a responsibility in a world full of fighters, the military should not be given the extra burden of reforming its justice.

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327. In *Parker v. Levy*, the U.S. Supreme Court stated:

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . . The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."

417 U.S. 733, 743 (1974) (quoting United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

> The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting . . . . [C]enturies of experience has developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.

Chappell v. Wallace, 462 U.S. 296, 300 (1983). "We have only recently [in *Parker v. Levy*] noted the difference between the diverse civilian community and the much more tightly regimented military community." Middendorf v. Henry, 425 U.S. 25, 38 (1976) (denying the military accused before a summary court-martial the right to counsel). "To prepare for and perform its vital role, the military must insist upon a . . . discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975) (holding that federal courts may not interfere in on-going courts-martial). "[I]nherent differences in values and attitudes . . . separate the military establishment from civilian society. In the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual." Reid v. Covert, 354 U.S. 1, 38-39 (1957) (holding that UCMJ jurisdiction cannot be extended to civilian dependents who accompany the armed forces overseas in peacetime). "The military constitutes a specialized community governed by a separate discipline from that of the civilian." Orloff v. Willoughby, 345 U.S. 83, 94 (1953) (denying writ of habeas corpus to review military draft induction).

> Justice is too important to be left to the military. If military justice is corrupt—and it is—sooner or later it will corrupt civilian justice.[331]

More than a decade later, while military justice had not yet poisoned all of civilian justice, it was continuing to lend credence to Sherrill's criticism. In *United States v. Swagger*,[332] the installation commander and convening

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328. *See supra* note 119 and accompanying text. *See also* United States v. Gay, 16 M.J. 586, 612 (A.F.C.M.R. 1983) (Miller, J., dissenting), *aff'd*, 18 M.J. 104 (C.M.A. 1984). Delivering what is perhaps the simplest rationale for the separate society concept, Judge Miller surmised that:

> [The Supreme Court] has also recognized that . . . a[n effective military] force can best be achieved via a military society apart from the civilian one; a society in which individual military members, who most often come directly from the civilian society, can be trained (or reprogrammed) to the point that, setting aside the teachings of a lifetime, they will be able to violently kill other human beings upon command and obey all commands of designated supervisors, even though by doing so, they may well subject themselves to a violent death.

Id. In a footnote, Judge Miller continues:

> Simply stated, it involves transitioning a typical recruit from a society that disdains death and violence into one in which he or she must accept it as a part of everyday life. It involves nothing short of re-programming a sizable portion of their lifelong value systems, at least with respect to their acceptance of military mission.

Id. at 612 n.28.

In *Généreux v. The Queen*, the Canadian Supreme Court noted that it, as well as the accused in the case, appreciated this principle as well.

> The appellant concedes that a separate system of military law, along with a distinct regime of service tribunals to apply this law, is consistent with [the Canadian Charter of Rights and Freedoms]. He agrees it is necessary that military discipline be enforced effectively and speedily by tribunals whose members are associated with the military and therefore sensitive to its basic concerns. At the same time, he submits that, within the inherent limits of an institution having the power to discipline its own members, the adjudicative or disciplinary body must meet the standards of independence and impartiality required by the [Charter].

Généreux v. The Queen [1992] S.C.R. 259, 287-88.

authority appointed his provost marshal as the president of the accused's panel.[333] This colonel had twenty-five years of experience as a military policeman. His previous assignments included other tours as installation

329. The word "extremism" is used here in its general sense. That is, the general norms of the military culture may become, or may be perceived to be, so out of step with those of civilian society as to be considered dangerous or otherwise socially unacceptable. Recently, former Assistant Secretary of the Army Sara Lister referred to Marines as extremists, and she went on to say, "[w]herever you have extremists, you've got some risks of total disconnection with society. And that's a little dangerous." Bill McAllister & Dana Priest, *Under Fire, Army Assistant Secretary Resigns; Fallout From Speech Calling Marines 'Extremists' Prompts Departure*, WASH. POST, Nov. 15, 1997, at A1. She almost certainly did not mean to characterize the Marine Corps as racist or as advocating anti-governmental or anti-constitutional violence, activities that are commonly believed to be elements of "extremism." Instead, her comments epitomize the point here. She almost certainly *did* misunderstand the nature of the Marine Corps' mission, history, role, and traditions. Mrs. Lister was a civilian of high office, *within the Department of Defense*. When someone of her stature voices concerns of this nature, the military is on clear notice that civilians misunderstand the military and may react in unexpected and detrimental ways. Ironically, her follow-on comment, quoted above, is exactly right.

330. Brigadier General John Cooke, the former Commander, United States Army Legal Services Agency and the former Chief Judge, United States Army Court of Criminal Appeals, recently noted that part of the genius underlying the Constitution is its link between the people and the soldiers. *See* Brigadier General John S. Cooke, The Manual for Courts-Martial—20X, The Twenty Sixth Annual Kenneth J. Hodson Lecture delivered to The Judge Advocate General's School, U.S. Army (Mar. 10, 1998), *in* 156 MIL. L. REV. 1 (1998). He noted that American service members swear an oath of allegiance to the *Constitution*, and thereby to the people. *Id*. Military justice is a system that belongs to the military, he professed, but the military is accountable to the people. *Id*. General Cooke proclaimed that the American people care about servicemen. They expect an effective fighting force *in consonance with the values in the Constitution*. *Id* at 5.

Retired Brigadier General Dulaney L. O'Roark, Jr. expressed similar sentiments in a 1995 lecture on leadership. "While young Americans are still capable of patriotism and commitment to national service, they have increasing expectations of fair treatment and good leadership. If they find this lacking, they will 'vote with their feet' and quickly take us back to the hollow army of the mid-1970s." Brigadier General (ret.) Dulaney L. O'Roark, Jr., Transformational Leadership: Teaching the JAG Elephant to Dance, The First Annual Hugh J. Clausen Leadership Lecture delivered to The Judge Advocate General's School, U.S. Army (Feb. 22, 1995), *in* 146 MIL. L. REV. 224 (1994). General O'Roark briefly advocated three peacetime military justice reforms that he felt would balance the needs of discipline and the expectations of service members regarding fair treatment. First, military judges should be given sentencing authority similar to that of their civilian counterparts, to include suspended sentences, shock probation, and community service. *Id*. at 228. Second, a form of random jury selection that does not compromise seniority should be developed. *Id*. Third, convictions should be by unanimous jury vote only. *Id*.

331. ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 212-13 (1970).

332. 16 M.J. 759 (A.C.M.R. 1983).

333. *Id*. at 759.

provost marshal and Criminal Investigation Command region commander.[334] He had extensive education in the field of law enforcement, including a masters degree in criminal justice.[335] He testified for the prosecution routinely and admitted on voir dire that "there was 'no way' he could leave this experience 'at the courtroom door.'"[336] The appointment by the convening authority of his subordinate who was directly and immediately responsible for crime prevention on the installation is only slightly less incredible than the military judge's denial of the challenge for cause against this member. The Army Court of Military Review complained:

> Once again this court is required to adjudicate an issue on appeal that should never have come to be . . . .
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> . . .
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> Our position that the issue raised here is unnecessary litigation has been stated in numerous unpublished opinions of this Court and in . . . [one published opinion], where we pointed out that the appointment of policemen as courts-martial members is not a good practice . . . .
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> . . .
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> . . . [T]he very essence of [this member's] existence as an Army officer was to enforce the law and prevent crime at Fort Ord. To this end he reviewed investigative reports (perhaps even that pertaining to this case) and results of trial. Referring to our common experience and knowledge we are aware of the great responsibility of a provost marshal at a major Army installation, and that ultimately he directs, coordinates, or consults on all installation law enforcement activity. We believe that to ask or expect an officer to step from that position temporarily to that of president of a court-martial, and to exercise an objective and unbiased mental process to determine the guilt or innocence of an accused, places a burden upon an individual that is greater than most can or should bear. We are convinced that at least is the common perception. Therefore, as the embodiment of law enforcement and crime prevention at Fort Ord, [this member's] presence at Swagger's trial as president of the court-martial provided an "appearance of evil" . . . and requires reversal. At the risk of being redundant—we say again—individuals assigned to military police duties should not be appointed as members of

334. *Id*. at 760.
335. *Id*.
336. *Id*.

> courts-martial. Those who are the principal law enforcement officers at an installation must not be.[337]

More than a decade after *Swagger*, military judges *still* fail to grasp its meaning. In *United States v. Dale*,[338] the convening authority detailed his deputy chief of security police to the court-martial panel in a child sexual abuse case.[339] The CAAF noted that this panel member was intimately involved in day-to-day law enforcement; indeed, he was the "embodiment of law enforcement and crime prevention" for the installation.[340] The CAAF set aside the conviction after finding that the military judge abused his discretion in denying a challenge for cause.[341]

In 1991, David Schleuter delivered a lecture on military justice at The Judge Advocate General's School, U.S. Army, which he subtitled "a legal system looking for respect."[342] "At a minimum, it looks bad," said Schleuter about the selection of members by commanders.[343] One year later, an

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337. *Id*. at 759-60 (citations omitted).

338. 42 M.J. 384 (1995).

339. *Id*. at 385.

340. *Id*. at 385-86.

341. *Id*. at 386. *See* United States v. Berry, 34 M.J. 83 (C.M.A. 1992) (finding abuse of discretion in denial of causal challenge against a member who was the command duty investigator for base security and who knew and worked with key government witnesses). *But see* United States v. Fulton, 44 M.J. 100 (1996) (finding that it was proper for the trial judge to deny a challenge against a member who was the chief of security police and had contact with the accused's commander only on serious matters that required high level decisions); United States v. McDavid, 37 M.J. 861 (A.F.C.M.R. 1993) (noting that there is no per se exclusion of security police from court-martial panels).

342. *See* Schleuter, *supra* note 314.

343. *Id*. at 20. Sherrill and Schlueter are not alone. "It is a system which, in critical aspects no longer meets the standards and expectations established by the developing currents of due process." Kevin Barry, *Reinventing Military Justice*, PROCEEDINGS, July 1994, at 57. "[T]his method of jury selection constitutes an "insurmountable" obstacle to fairness in . . . courts-martial proceedings. Notwithstanding the integrity of military commanders, it is impossible to avoid at least the appearance of impropriety." Ruzic, *supra* note 70, at 288-89. "Appearance-symbolism is critical in any system of justice. It is even more critical when the system is one in which the bulk of criminal defendants—often members of disadvantaged minorities—find themselves toward the bottom of an official totem pole . . . ." Eugene Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 132 (1989). "As long as the possibility of [command] control remains, it will continue to bring suspicion and discredit upon trials by courts-martial and upon the administration of military justice itself." Frank Fedele, The Evolution of the Court-Martial System and the Role of the U.S. Court of Appeals in Military Law 152 (1954) (unpublished DJS dissertation, George Washington University School of Law) (on file with the George Washington University School of Law library).

interesting addition to the seemingly endless problems surrounding convening authority involvement in the member selection process appeared in *United States v. Kroop*.[344] The accused, a lieutenant colonel squadron commanding officer, faced charges of sexual harassment and sexual misconduct with subordinate officers and enlisted women. At the same time, his general court-martial convening authority was under investigation for "crimes of a sexual nature similar to appellant's or . . . misconduct . . . at least equally reprehensible . . . even if it were not criminal."[345] The Air Force Court of Military Review decided that this did not disqualify the convening authority from referring charges to, and selecting the members for, the accused's court-martial.[346] Would civilians vest prosecutorial discretion in a person who is under investigation himself? Perhaps. Would they allow the jury to be chosen by a suspected criminal? Assuredly not. At a minimum, *Kroop* looks bad.

Four years after Mr. Schlueter's address, another lecturer, Jonathan Lurie, found little intervening improvement. "Let me predict that unless our military justice system is reformed, either from within or without, mil-

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344. 34 M.J. 628 (A.F.C.M.R. 1992).

345. *Id*. at 632.

346. *Id*. at 632-33. Curiously, the court comforts itself by finding that the "appellant's convening authority did not personally compile the pool of officers used to select [the] appellant's court members. He selected the court members from a pool of potential court members nominated by the [intermediate] commander . . . ." *Id*. at 632. Equally perplexing was the court's previous order for new action.

> The first time this case came before us we noted that the convening authority acting on [the] appellant's case was himself suspected of sexual misconduct similar to that alleged against appellant. In "*an abundance of caution* over the need to preserve the appearance of propriety in the military justice system," we set aside the action taken by that convening authority. We remanded the case for new staff judge advocate's recommendations and new action by a different convening authority.

Id. at 630-31 (emphasis added).

itary justice will keep on looking for respect, and will face insuperable difficulty in finding it."[347]

Recently, the Army tried the Sergeant Major of the Army for alleged sexual harassment, indecent assault, and various other sexually related offenses. The trial was high profile due to its subject matter and the position of the accused as the Army's top enlisted soldier. One need only flip open the *New York Times* to hear the critics of the 1970s speak anew.

> The court-martial of Sgt. Maj. Gene McKinney on charges of sexual misconduct brings to mind the old saw that military justice is to justice as military music is to music.
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> . . .
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> . . .[I]n the military justice system, jury members are selected by the officer who convenes the trial, which is roughly like having the district attorney picking all the jurors.
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> . . .
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> . . .[W]hen allegations of sexual misconduct surfaced a few years [after the Tailhook scandal of 1991] at the Aberdeen Proving Ground in Aberdeen, Md., the Army reacted swiftly and harshly. It even called a press conference to publicize the cases. The base commander . . . handpicked the jury, and several drill sergeants were sent to prison. In a curious twist, the [base commander] was discovered immediately afterward to have had an extramarital affair and was forced to retire.
>
> All these cases—and their resulting unfairness—can be traced to one larger problem. The [UCMJ], last overhauled in 1983, is outdated.[348]

This report appeared before the trial. Sergeant Major McKinney's court-martial acquitted him of eighteen specifications involving sexual misconduct. The court convicted him of one specification of obstruction of justice.[349] The court sentenced him to a one-grade reduction in rank and a reprimand.[350] Evidently, the report's concerns were unfulfilled as to this

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347. Jonathan Lurie, Military Justice 50 Years After Nuremberg: Some Reflections on Appearance v. Reality, Remarks at the Conference on Nuremberg and the Rule of Law (Nov. 18, 1995), *in* 149 MIL. L. REV. 189, 190 (1995). Mr. Lurie is the official historian of the CAAF.

particular trial. However, no post-trial report celebrated the ability of a military jury to dispense justice independently.[351]

The model proposed in this article removes the military's "district attorney" from the jury-picking process altogether. The model eliminates "court-stacking," along with perceptions like Sherrill's, Schleuter's, Lurie's, and that of the New York Times. The *Swagger* and *Kroop* circumstances would be obsolete. By diffusing random selection over a much larger population than is currently considered, the model also substantially reduces the potential for direct unlawful influence. The *Youngblood*/*Rey-*

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348. Joseph Finder, *The Army on Trial*, N.Y. TIMES, Feb. 17, 1998, at A19. Finder launches a multi-faceted attack on military justice in general and its application to Sergeant Major McKinney in particular. Some of his criticism is unfounded and some is based on incorrect assumptions. However, the McKinney trial is a classic modern example of the practical problems that plague the appearance of the military's jury selection process.

> In a military trial, lawyers work for the convening authority . . . .
>
> "It's akin to a district attorney prosecuting a case and selecting the jury members," said Eugene Fidell, the President of the independent National Institute of Military Justice.
>
> In the military, it is not unethical for potential jury members to work under the command of the convening authority, even though the jurors often owe their next job assignment to performance assessments made by the convening authority.
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> "You have the potential for the convening authority to ensure that people on the jury are people he is convinced are going to be hard-liners," said Kevin Barry, a former Coast Guard judge.

Eric Rosenberg, *Similarities and Big Differences in Military, Civilian Trials*, ARIZ. REPUBLIC, Feb. 1, 1998, at A21. In fact, the perceptions sometimes get completely out of hand. "Another key difference is that, unlike civilian judges, military judges are not appointed to a fixed term—and *they serve at the will of the convening authority.* 'Thus, they may or [may] not be independent,' Fidell said." *Id.* (emphasis added). Fidell's quote was almost certainly taken out of context by the newspaper.

349. *See* Mark Thompson, *No Go: Why the Army Lost a High-Profile Sex Case*, TIME, Mar. 23, 1998, at 52.

350. *See* Andy Soltis, *Jury Spares Sex-Case Sarge Time in the Brig*, N.Y. POST, Mar. 17, 1998, at 12.

351. Interestingly, Sergeant Major McKinney, an African American, was tried by a jury of four other Sergeants Major and four officers. Of the officers, two were female and one was African American. *See Jury Chosen in Sex Trial of Army Sergeant Major*, DALLAS MORNING NEWS, Feb. 7, 1998, at 4A. That the *perception* of injustice took hold at all, even in light of this "rainbow coalition" panel, sends the military a clear message that its jury selection practice is considered largely unacceptable.

nolds staff meetings would have minimal impact because the chance of a member being present would be slight.

The need to revise U.S. military jury selection methods is reflected in the reforms of other nations,[352] most notably the nation that gave us the jury trial in the first place. It is also reflected in reforms in other similar areas of military justice, most notably the continued efforts to protect the independence of the military judge.

b. Reforms in Other Nations

In February 1997, the European Court of Human Rights ruled, in *Findlay v. United Kingdom*,[353] that the British court-martial member selection system violated the European Convention for the Protection of Human Rights and Fundamental Freedoms (Human Rights Convention).[354] Findlay was tried in 1991. Britain's 1955 Army Act[355] then governed the British member selection system. Like the current UCMJ, the convening "officer," under that statute, preferred the charges, specified the type of court-martial, and personally selected the members.[356] The European Commission of Human Rights, first reviewing the case,[357] unanimously agreed that this method violated Article 6(1) of the Human Rights Convention. Article 6(1) states in pertinent part that "[i]n the determination . . . of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[358]

The European Court of Human Rights agreed. The court set forth the following elements of independence: (1) the manner of appointment of court-martial members, (2) the term of office of court-martial members, (3) the existence of guarantees against outside pressures, and (4) an appearance of independence.[359] As to impartiality, the court articulated the

352. *See, e.g.*, *supra* notes 133-141, 326, 328 and accompanying text (regarding Canadian reform).

353. App. No. 22107/93, 24 Eur. H.R. Rep. 221 (1997).

354. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter Human Rights Convention], *reprinted in* ALESSANDRA DEL RUSSO, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 271 (1971).

355. Army Act, 1955, 3 & 4 Eliz. 2, ch. 18 (Eng.).

356. *See id.* §§ 84-90.

357. *Findlay*, 24 Eur. H.R. Rep. at 234 (commission report).

358. Human Rights Convention, *supra* note 354, art. 6(1).

following elements: (1) subjective freedom from personal prejudice or bias and (2) the existence of sufficient guarantees to exclude any legitimate objective doubt as to this freedom.[360] The court held that the "convening officer was central to [the] prosecution and closely linked to the prosecuting authorities."[361] The court found that the members, "all of whom were . . . subordinate to . . . and serving in units commanded by [the convening officer]," were not sufficiently independent of the convening officer and that the trial failed to offer adequate guarantees of impartiality.[362]

The government of the United Kingdom argued several theories in support of its system of member selection to the commission.[363] Before

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359. *Findlay*, 24 Eur. H.R. Rep. at 244.

360. *Id*. at 244-45.

361. *Id*. at 245.

362. *Id*. at 246 (noting specifically that the accused's "misgivings about the independence and impartiality of the tribunal were objectively justified"). This is a not revolutionary analysis. In 1977, Jonathan Van Dyke wrote:

> The impartiality . . . built into the jury system—and protected by the Constitution's Sixth Amendment guarantee of trial by "impartial jury"—can, however, be threatened. In order to be impartial, and be viewed as impartial (and hence the legitimate vehicle of justice—a critical aspect of the jury system), a jury must also be independent. Freedom from outside influence is necessary to preserve impartiality. If jury members seem to be hand-picked by one side or the other, the jury's impartiality and hence its integrity will be suspect. It may be—or may seem to be—biased because of its makeup. The jury, then, must be chosen in a way that leads to its acceptance by the community as independent.

VAN DYKE, *supra* note 245, at xiii.

363. The government first asserted that "the special disciplinary requirements flowing from the vital duties of the armed forces require a separate code of military law and, in turn, a separate military judicial system." *Findlay*, 24 Eur. H.R. Rep. at 235 (commission report). The government went on to argue that procedural safeguards protected the independence of the members. The government cited, among other things: the oath taken by the members, the inability of the convening officer to remove individual members, the majority requirement for member decisions, and the secrecy of deliberations. *Id*. The government also identified several structural guarantees of the independence of the members: 1) the prosecutor was not appointed by the convening authority, but by the independent Army Legal Services; 2) the convening officer's responsibility was the largely administrative "setting up" of the court-martial; 3) the members were chosen from various different units, some were not appointed by name, and none of them knew the convening officer; and 4) the accused did not object to the constitution of the court. *Id*. at 235-36. Finally, the government highlighted that the civilian judge advocate (military judge), who was entirely independent of the military, ensured a fair trial. *Id*. at 236.

the court, apparently conceding the case by this point,[364] the government simply revealed its substantially revised procedures contained in the Armed Forces Act of 1996,[365] which were to become effective 1 April 1997. The legislation effectively removes the commanding officer from the court-martial process. Under the new British system, the commanding officer briefs his "higher authority" concerning criminal charges that the commanding officer has investigated. The "higher authority" decides whether to refer the matter to a "prosecuting authority."[366] The prosecuting authority, an independent judge advocate section, is vested with traditional prosecutorial discretion.[367] If the matter is prosecuted, an independent "court administration officer" convenes a court-martial and selects the members.[368] The notes to the legislation point out that "[t]he purpose of the reforms is to reinforce the independence of the courts-martial . . . principally by reducing the apparent influence of the chain of command while preserving its necessary involvement."[369]

As of 1997, Canada, Great Britain, and the European Community all agree that member selection by the convening authority fails to meet minimum standards of independence and impartiality in practice and appearance. How ironic that American colonists wrested independence from Great Britain by force of arms in part because Great Britain denied the colonists the "accustomed and inestimable privilege of trial by jury, in cases affecting both life and property."[370] Now America is alone in the free world in denying the right, as the Constitution describes it, to its service members.

c. Reforms in the United States

Thirty years ago, Congress revised the UCMJ on a theory similar to Great Britain's. In 1968, Congress acted specifically to isolate the presid-

364. *See id.* at 242.

365. Armed Forces Act, 1996, ch. 46 (Eng.).

366. *Id*. sched. 1, pt. I, § 76.

367. *Id*. sched. 1, pt. II, § 83B.

368. *Id*. sched. 1, pt. III, § 84C.

369. *Id*. § 5, notes. *See id.* § 15 notes (stating that "[t]he role of the convening officer is being abolished as part of the wider court-martial reforms included in the [Act], with the purpose of reducing the potential for the chain of command to exercise undue influence over court-martial proceedings").

370. DECLARATION OF THE CAUSES AND NECESSITY OF TAKING UP ARMS para. 3 (July 6, 1775), *reprinted in* SOURCES OF OUR LIBERTIES, *supra* note 69, at 296.

ing officer at courts-martial from the influence of the convening authority. Congress replaced the law officer, who at that time was appointed by the convening authority, with a military judge.[371] This reflected an appreciation for the separation of executive and judicial functions and the potential for unlawful command influence. The amendment, however, did not go far enough. Members, untrained in the law and working directly for the convening authority, arguably require greater protections from command influence than a law officer, who is theoretically cognizant of his impartial role and is working directly for someone other than the convening authority. Further, if the forum choice is members, the independence of the fact-finder and sentencing authority is surely more important than that of the presiding officer, who has important, but not ultimate, decision-making power.

In 1968, Congress decided that the *potential* for influence by the convening authority over the presiding officer warranted change. Why, thirty years later, after continued *demonstrated* influence over the members,[372] has Congress not implemented similar reform for the members?[373] Instead, the focus of today's suggestions is further isolation of the military judge.

The former Chief Judge of the Army Court of Criminal Appeals, retired Brigadier General John Cooke, recently argued to establish tenure for military judges.[374] He opined that military judges *are in fact* indepen-

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371. *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 826, 82 Stat. 1335, 1336-38.

372. *See supra* Part III.

373. John Henry Wigmore, Dean of the Northwestern University Law School from 1901 to 1929, and best known as the author of JOHN HENRY WIGMORE, ON EVIDENCE, stated:

> We are good friends of jury trial. We believe in it as the best system of trial ever invented for a free people in the world's history . . . . [W]e believe that a system of trying facts by a regular judicial official, known beforehand and therefore accessible to the arts of corruption and chicanery, would be fatal to justice. The grand solid merit of jury trial is that the jurors of fact are selected at the last moment from the multitude of citizens. They cannot be known beforehand, and they melt back into the multitude after each trial.

John Henry Wigmore, *To Ruin Jury Trial in the Federal Courts*, 19 ILL. L. REV. 97, 98 (1924). Wigmore was distinguishing jury from judge, but the same concerns apply with even greater force to a jury that is hand-picked well before trial.

374. *See* Cooke, *supra* note 330.

dent, but that they should get credit for it; the public should *appreciate* their independence.[375] Brigadier General Cooke did not, however, see a similar need to enhance, let alone to establish, the independence of the members. He acknowledged that member selection is perhaps the area of military justice that is most susceptible to public criticism. He nevertheless proposed to maintain the current method, largely for practical reasons. [376]

Ultimately, this article's model not only removes the convening authority from the member selection process, it also removes the case from his "jurisdiction." The convening authority is charged with the good order and discipline of his unit. His prosecutorial role in the military justice system is consonant with that responsibility.[377] Under the current system, as the unlawful command influence cases illustrate, the commander's prosecutorial or discipline-maintaining functions sometimes hamper the achievement of justice. Restricting the convening authority in words and actions in order to preserve justice also hampers his ability to maintain discipline. As it stands, a commander must be circumspect in his remarks to his unit regarding his views on crime and punishment. Otherwise, he may later influence the same jurors he chooses. Commanders, however, should be perfectly clear on their views about misconduct and its consequences. The military desires commanders whose natural tendency is to react negatively, quickly, and publicly, to crime in their units.[378] Ironically, as addressed in the next subsection, the very rationale for restricting the ser-

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375. *Id*.

376. *Id*. General Cooke stated that the current system generates better quality panels, allows the convening authority the flexibility to replace members efficiently when necessary, and is, in fact, fair. *Id*. He would not change the current system, because he considers none of the proposals he has seen any better (though he expressed willingness to consider further proposals for reform). *Id*. Specifically, members are still military personnel and beholden to commanders, and random selection proposals appear to be administratively over-burdensome. *Id*. General Cooke admitted that this practical rationale does not answer the public's perception, does not alone justify a departure from constitutional standards of jury selection, and fails to address existing unlawful command influence. *Id*. He views the current system as the best default. *Id*.

377. Luther West advocated that, "with only minor exceptions, the system of military justice must be completely removed from the operational control of the military departments, and placed in the hands of civilian administrators, preferably under the control of the Attorney General of the United States." Luther West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A. L. REV. 153-54 (1970). This view is extreme, and it ignores the inherent obligation and responsibility of commanders for the good order and discipline of their units.

vice member's right to trial by jury was, and continues to be, grounded in the misperception that discipline is thereby enhanced.

3. The Discipline Paradigm of Military Justice

a. Genesis

If Article 25 is neither constitutional nor fair, how does it survive? In *Ex parte Milligan*,[379] the Supreme Court explained, in one sentence, *why* the framers "doubtless" intended to exempt the military from any jury-trial requirements.

> The *discipline* necessary to the *efficiency* of the army and navy, required other and *swifter* modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service.[380]

The *Milligan* Court considered the justice involved in a jury trial too expensive in terms of discipline for the military. The Court saw a tension between the right to trial by jury and the institutional need for discipline. The *Milligan* Court happened upon the discipline paradigm of military justice and applied it to the constitutional right to trial by jury. Under the discipline paradigm, the principal function of military justice is the maintenance of discipline. The primary tenet of the paradigm holds that, because the commander is responsible for discipline, he should also control the "machinery by which it is enforced . . . ."[381]

World War I, although to a lesser degree than World War II, generated substantial debate regarding the fairness of the military justice system.

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378. Clearly, the commander must not have free reign. Unlawful command influence pertaining to witness intimidation must be policed. *See* Bower, *supra* note 302, at 88-92 (recommending specific guidelines for educating and protecting convening authorities in this area and suggesting remedial measures when it is too late). The more senior commanders, to whom large populations of potential members report, would still have to maintain a judicious demeanor.

379. 71 U.S. (4 Wall.) 2 (1866). *See supra* Part II (analyzing the case).

380. *Id*. at 123 (emphasis added).

381. BISHOP, *supra* note 324, at 24.

The famous Ansell-Crowder dispute raged over whether the Articles of War should serve as a tool of discipline or a tool of justice,[382] and many reforms emerged in the 1920 Amendments to the Articles of War.[383]

During congressional hearings on the enactment of the UCMJ, the American Bar Association (ABA) recommended the removal of commanders from the court-martial convening process.[384] The ABA proposed that the service judge advocates general and designated subordinates choose court-martial panel members.[385] Professor Morgan, the principal drafter of the UCMJ legislation,[386] responded that it would be "impracticable" and "unthinkable" to allow the judge advocate general to tell commanding officers to whom to assign court-martial duties.[387] Colonel Frederick Wiener, a noted former Army judge advocate testified:

> There is a suggestion on the panel system that has now been watered down. The suggestion is that the Judge Advocate General select the court from the panel. Who selects the panel? The commanding general. Why shouldn't he select the court? In practice, and I speak from experience in four jurisdictions, the court is picked by the staff of the Judge Advocate General. He finds out who is available and he knows the officers at headquarters who have the experience and who have the proper judicial temperament, which the Fourth Article of War requires, and he tries to get the ablest and most experienced people possible.[388]

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382. *See* Cox, *supra* note 261; Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick B. Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1969).

383. *See infra* note 433.

384. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services*, 81st Cong. 730-31 (1949) [hereinafter *Hearings on H.R. 2498*] (Report of the American Bar Association Special Committee on Military Justice).

385. *Id*. at 717-23. Mr. Spiegelberg, the chairman of the ABA special committee, cited a report that sixteen of forty-nine general officers "affirmatively and proudly testified that they influenced their courts." *Id*. at 719.

386. Secretary of Defense James Forrestal appointed Harvard Law Professor Edmund Morgan to chair the committee to draft the UCMJ legislation. *See* GENEROUS, *supra* note 261, at 34-53.

387. *Hearings on H.R. 2498*, *supra* note 384, at 723.

388. *Id*. at 782-83 (statement of Colonel Frederick B. Wiener).

The UCMJ contained notable reforms in military justice,[389] but Congress rejected the ABA recommendation.[390] The tenets of the discipline paradigm survived.

Colonel Samuel Hays' 1970 remarks at the Conference on Human Rights of the Man in Uniform capture the discipline paradigm of military justice.

> The primary objective of the system of military justice must always be to maintain discipline within the organization and to ensure prompt compliance with its dictates . . . . *[I]t must be focused more on producing organizational effectiveness than on punishing or protecting individual action* . . . . [It] must act as a deterrent to undesirable behavior and an instrument to reinforce organizational standards and command control.[391]

More than a quarter century later, the military adheres fully to Colonel Hays' sentiment. In *United States v. Solis*,[392] the CAAF recently stated

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389. *See supra* notes 261, 263, 265-267. *See also infra* note 433.

390. During the debates on the Military Justice Act of 1983 (Pub. L. No. 98-209, 97 Stat. 1393), a proposal to remove the convening authority from the member selection process was again submitted. *See Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Senate Comm. On Armed Services*, 97th Cong. 277-89 (1982) (statement of Steven S. Honigman, Chairman of the Committee on Military Justice and Military Affairs of the Association of the Bar of the City of New York).

> [T]he commander should be relieved of an additional administrative burden, that of the personal selection of members of the courts-martial jury under article 25(d)(2). Perhaps no other element of the uniform code contributes to the perception and possibly at times the reality of unfairness as the fact that the same commander who personally decides to invoke the military justice system also selects the jurors who determine guilt or innocence and impose the sentence.
>
> This spectre of command influence over courts-martial proceedings should be eliminated. In its place we recommend that members of the courts-martial be chosen at random from a pool of eligible individuals.

Id. at 278.

391. Colonel Samuel H. Hays, Remarks at the Conference on Human Rights of the Man in Uniform (Mar. 1970), *quoted in* CONSCIENCE AND COMMAND 5 (James Finn ed. 1971) (emphasis added). Colonel Hays was formerly a professor in the Office of Military Psychology and Leadership, U.S. Military Academy.

that "[t]he primary purpose of military criminal law—to maintain morale, good order, and discipline—has no parallel in civilian criminal law."[393]

b. The Fallacies of the Discipline Paradigm

The discipline paradigm ignores a fundamental axiom: a court-martial system based in justice enhances discipline by fostering a greater sense of fairness.[394] The paradigm fails to account for the substantial overlap between justice and discipline. Each includes a fair measure of the other. If all else is equal, when justice is maximized, so is discipline. The obedience, morale, and esprit de corps of individual service members and of the military unit increase when trials by court-martial reach just results, are perceived to be just, and are observed to have been reached by just procedure.

Arguing that the focus or goal of military justice should be discipline *rather than* justice is nonsensical. They are inextricably intertwined. The Ansell-Crowder dispute was *irrelevant*. The question is not whether military justice should be a slave to discipline or a vehicle for the vindication of individual rights. Military justice, like running a motor pool, conducting close order drill, or training an infantry battalion, has a mission. If done properly, it enhances discipline. If done poorly, it detracts from discipline. Like those other activities, it is a mistake to declare its primary purpose to be the maintenance of discipline. Its primary purpose should be the accomplishment of its own mission, in this case maximizing justice, and good discipline will follow.[395] The military maximizes justice not when it seeks exception from constitutional principles, but when it seeks to *exceed* them.

A humorous expression sometimes appears on the walls of military office spaces or passageways: "The beatings will continue until morale improves." This simple phrase bluntly but eloquently captures the absurdity of the idea that discipline can be advanced *despite* justice. Colonel Hays got it backwards. His call to look first to "organizational effectiveness" rather than "punishing or protecting individual action" is a call to

392. 46 M.J. 31 (1997) (holding that the "exculpatory no" doctrine does not apply to the military offense of false official statement under Article 107 of the UCMJ).

393. *Id*. at 34.

394. "[G]ood justice never has had a bad effect on discipline. Discipline delivers the accused for trial; justice takes over the trial for possible punishment." Fedele, *supra* note 343, at 150.

anarchy. It ignores the fact that the organization is nothing more than the individuals who comprise it. If individual action is not appropriately punished or protected first, "organizational effectiveness" is *at least* decreased, if not destroyed.

In 1955, the Supreme Court, in *United States ex rel. Toth v. Quarles*,[396] attempted to justify decreased measures of justice in the armed forces. The Court stated that "trial of soldiers to *maintain discipline* is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."[397] This language highlights the illogic of the discipline paradigm. Apparently, discipline is important enough to the func-

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395. General William Westmoreland, Chief of Staff of the Army during the Vietnam era, wrote:

> [J]ustice should [not] be meted out by the commander who refers a case to trial or by anyone not duly constituted to fill a judicial role. A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice, and in fulfilling this role, it will promote discipline. The protection of individual human rights is more than ever a central issue within our society today. An effective system of military justice, therefore, must provide of necessity practical checks and balances to assure protection of the rights of individuals. It must prevent abuses of punitive powers, and it should promote the confidence of military personnel and the general public in its overall fairness.

William Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971).

> [I]t seems too clear for argument that courts-martial are criminal courts, possessing penal jurisdiction exclusively and performing a strictly judicial function in enforcing a penal code and applying highly punitive sanctions.
>
> . . . As the civil judiciary is free from the control of the executive, so the military judiciary should be untrammelled and uncontrolled in the exercise of its function by the power of military command.
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> . . . The court-martial can no longer be regarded as a mere instrument for the enforcement of discipline.

Fedele, *supra* note 343, at 148-50.

396. 350 U.S. 11 (1955).

397. *Id*. at 17.

tioning of the armed forces to limit the constitutional rights of its members. Further, according to the discipline paradigm, the primary function of military justice is to maintain discipline. If this is true, "trial of soldiers to maintain discipline" cannot be considered "merely incidental."

Forty years later, the CAAF demonstrated equally illogical reasoning in *Solis*. Maintenance of morale, good order, and discipline, though perhaps characterized as public safety, order, and deterrence, are very much primary purposes of civilian criminal law. Ultimately, military justice serves military discipline just like civilian justice serves civilian order.

Since *Milligan*, the courts have continued to appreciate the simple logic that the efficiency of the armed services depends on discipline. Repeatedly, the Supreme Court has used the military's need for discipline to limit various constitutional rights of service members.[398] Even subscribing fully to the discipline paradigm, however, the model proposed by this article survives analysis under the frameworks adopted by the Supreme Court and military courts to balance individual rights against military necessity.

c. Balancing Individual Rights and Military Necessity

In *Middendorf v. Henry*,[399] the Supreme Court held that summary courts-martial were not "criminal prosecutions" within the meaning of the Sixth Amendment.[400] They found the constitutional right to counsel inapplicable to such proceedings.[401] The Court reached this result by balancing the competing interests. "[W]hether this process embodies a right to counsel depends upon an analysis of the interests of the individual and those of the regime to which he is subject."[402] In *Schlesinger v. Councilman*,[403] the Court held that federal courts may not interfere in pending or ongoing courts-martial and similarly balanced the interests involved.[404] The Court stated that "[i]n enacting the [UCMJ], Congress attempted to balance these military necessities [levels of respect for duty and discipline foreign to civilian life] against the equally significant interest of ensuring fairness to

398. *See supra* notes 119, 121.
399. 425 U.S. 25 (1976).
400. *Id*. at 33.
401. *Id*. at 48.
402. *Id.* at 43.
403. 420 U.S. 738 (1975).
404. *Id*. at 757-58.

servicemen charged with military offenses, and to formulate a mechanism by which these often competing interests can be adjusted."[405]

Application of the Fourth Amendment in the military involves similar balancing. In *United States v. Ezell*,[406] the COMA noted that "[i]t is now settled that the protections of the Fourth Amendment and, indeed, the entire Bill of Rights, are applicable to . . . military [personnel] unless expressly or by necessary implication they are made inapplicable."[407] "This is not to say, however, that in its application the Fourth Amendment

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405. *Id*. In *Goldman v. Weinberger*, an Air Force officer who desired to wear a yarmulke with his uniform brought a First Amendment free exercise of religion challenge against the Air Force's prohibition against wearing unauthorized headgear. 475 U.S. 503 (1986). In upholding the Air Force regulation, the Supreme Court held that "when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Id*. at 507. In *Brown v. Glines*, the Court upheld military restrictions on the rights of service members to circulate petitions on base. 444 U.S. 348 (1980). "We [have] recognized that a base commander may prevent the circulation of material that he determines to be a clear threat to the readiness of his troops." *Id*. at 354 (citation omitted). The *Brown* Court further stated:

> Since a commander is charged with maintaining morale, discipline, and readiness, he must have authority over the distribution of materials that could affect adversely these essential attributes of an effective military force . . . . Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline.

Id. at 356.

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

Parker v. Levy, 417 U.S. 733, 758 (1974).

406. 6 M.J. 307 (C.M.A. 1979) (holding that military commanders are not per se disqualified from authorizing searches, but that they must truly be neutral and detached in doing so).

407. *Id*. at 313 (citing Burns v. Wilson, 346 U.S. 137 (1953); United States v. Jacoby, 29 C.M.R. 244 (C.M.A. 1960)).

does not take into account the exigencies of military necessity and unique conditions that may exist within the military society."[408]

The *Middendorf* Court balanced the interests of the military in keeping discipline simple and expedient against the interests of the accused in just treatment. Discussing first the "military necessity" prong, the Court examined the effect of providing defense counsel at summary courts-martial.[409] The Court reasoned that providing a trained attorney to represent an accused in this forum would entice the government to provide the same for itself.[410] The Court noted that the assigned lawyers would represent their clients zealously according to profession and disposition.[411] The Court concluded that "presence of counsel will turn a brief, informal, [quickly convened] hearing . . . into an attenuated proceeding consum[ing] the resources of the military to a degree . . . beyond what is warranted by the relative insignificance of the offenses being tried."[412] Turning to the interests of the service member, the Court noted that, in addition to the lesser significance of the forum, an accused can always invoke his right to counsel by refusing a summary court-martial.[413] *Middendorf* is a particularly appropriate case for examining the Court's balancing procedure. The concern there, as with court-martial panel member selection, was an important Sixth Amendment right of criminal due process.

What is the result then of balancing, in the context of the proposed model, the individual's right to trial by jury against the military's need for discipline? On the discipline side of the scales, the potential does not exist here for transforming a brief or informal hearing into a lengthy or formal process. The formality of the process is unaffected, and the proposed model likely *increases* efficiency. Considering nothing else, dispensing with juries altogether *would* result in "swifter modes of trial." Likewise,

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408. United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981) (holding that traditional military inspection, so long as it is reasonable under the circumstances, vitiates expectations of privacy in the area inspected).

409. Middendorf v. Henry, 425 U.S. 25, 45 (1976).

410. *Id*.

411. *Id*.

412. *Id*. The Court pointed out that the maximum punishment of one month confinement at a summary court-martial was substantially less than the *minimum* authorized punishment in some juvenile cases, for which no right to counsel attaches. *Id.* at 46 n.22.

dispensing with counsel, probable cause requirements, and the right against self-incrimination would increase the speed of trial.

The military accused has always enjoyed the right to a panel of military members. Therefore, the question is narrowed. Can military trials be swift enough if the members are "indifferently chosen and superior to all suspicion," as required by *Duncan v. Louisiana*?[414] Will military trials be swift enough if the members are chosen from "the fair cross-section . . . fundamental to the jury trial guaranteed by the Sixth Amendment," according to *Taylor v. Louisiana*?[415] The model proposed by this article is based on computer database. Panel selection should be faster than the current manual analysis and administration inherent to Article 25. More importantly, the database would be administered by personnel who do database

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413. *Id*. "No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if he objects thereto . . . ." UCMJ art. 20 (West 1995). "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under . . . this title." *Id*. art. 38(b). In *Goldman v. Weinberger*, the Court seemed to adopt a rational basis test for this balancing involving First Amendment rights. 475 U.S. at 508. The Court first recognized the military need to diminish individuality in favor of group identification and accomplishment of mission. "Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank." *Id*. The Court noted that the Air Force uniform regulations were strict, but allowed for some exceptions. *Id*. at 508-09. Religious headgear could be worn during indoor ceremonies, and religious apparel could be worn in designated living quarters. *Id.* Goldman argued that his free exercise of religion in wearing an "unobtrusive" yarmulke did not create a "clear danger" of undermining discipline and might even increase morale by making the Air Force a more "humane place." *Id*. at 509. The Court found that the Air Force perceived a need for uniformity that was not overcome by the First Amendment. *Id*. at 509-10.

> Quite obviously, to the extent the regulations do not permit the wearing of religious apparel . . . military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity.

Id.

414. 391 U.S. 145, 151-52 (1968).

415. 419 U.S. 522, 530 (1975).

administration. They will (hopefully) know how to accomplish their mission. The convening authority and his all-too-numerous member selection assistants can worry about winning the nation's battles instead of where they can find a female to sit on the next sex case.[416]

From the standpoint of member availability under the proposed model, convening authorities share the burden of providing members, and the base of personnel from which members are drawn is much broader. The disruption to the operations of all commands should be decreased. Additionally, there are numerous intangible benefits related to increased fairness and the perception (within and without the military) of increased fairness.

On the individual's side of the scales, unlike *Middendorf*, the accused is not offered the choice to "invoke" his right to a trial by jury by opting for a higher forum. Further, as pointed out in *Duncan* and *Taylor*, the accused will enjoy, under the model, a right that is fundamental to all other Americans. The accused will enjoy one of the particularly important rights as analyzed in *United States v. Culp*.[417]

One further very legitimate question, which addresses a broader analogy than *Middendorf* alone, must be answered. Why not treat Sixth Amendment application like First and Fourth Amendment application? The military accused has always had a right to a panel of members, albeit chosen by the convening authority. So, the military accused receives his Sixth Amendment right to trial by jury; however, like these other provisions of the Bill of Rights, exigencies of duty and discipline place certain limits on its application. There are two compelling rejoinders.

First, unlike the unrestricted application of First and Fourth Amendment rights to the military, unfettered Sixth Amendment application would not produce tangible or identifiable detrimental effects on duty and discipline. The discipline paradigm works well and finds strong justification in matters that relate to First Amendment (uniformity of appearance, respect, and obedience to orders) and Fourth Amendment (barracks and personal hygiene, safety, health, and welfare) jurisprudence. The paradigm breaks down, however, in matters that relate to criminal due process inside the courtroom (Sixth Amendment rights to counsel, confrontation, compulsory process, and speedy trial by jury and Fifth Amendment rights to due

416. *See supra* text accompanying notes 204-214.

417. 33 C.M.R. 411 (C.M.A. 1963).

process and against self-incrimination). One cannot easily discern adverse consequences to duty and discipline from the full measure invocation of these fundamental rights at trial.

Second, the Sixth Amendment right to trial by jury, as recent case law interprets it and recent legislation implements it, is a fundamentally more important constitutional right. The jury, "indifferently chosen" from "the fair cross-section" of the community, decides the ultimate question of guilt or innocence and, in the military, imposes punishment. Invoked at an obviously critical stage of the proceedings, the right to a jury is much more analogous to the right to counsel than the right to freedom from unreasonable search. Where the latter implicates evidentiary exclusionary rules, the former bears on the decision to convict or to acquit. Though the full meaning of the Sixth Amendment right to trial by jury has evolved, the constitutional framers recognized a greater relative value to the right.

This article generally defies the discipline paradigm of military justice to justify cogently a military exception to the Sixth Amendment. Even when subjected to the contemporary paradigm analysis, however, the model proposed in this article survives scrutiny. On the other hand, the model is not a perfect match with constitutional standards.

4. Departure of the Model from Constitutional Standards

a. The Seniority Requirement

The proposed model retains one aspect of discipline that is antithetical to the constitutional scheme. The military accused would be tried by members who are senior to, or of the same rank as, the accused. The military depends on its hierarchical structure to maintain its required discipline. Corporals and Sergeants should not sit in judgment of First Sergeants or First Lieutenants in the courtroom for the same reason they do not sit in judgment of them outside the courtroom.

This raises equal protection concerns. Officers are more likely to be tried by their peers.[418] Juries for junior enlisted accuseds will have been drawn from a much larger cross-section of the community. However, these concerns clash with compelling and tangible harm to institutional discipline in the *Middendorf* balance. If juniors wield the power of judgment

418. *See* Remcho, *supra* note 63, at 226-27.

and punishment over seniors in the formal arena of justice, the influence of all seniors is diminished in the less formal day-to-day functioning of the services. A second's hesitation on the battlefield can mean the difference between victory and defeat. That second (or more) may be compromised by the natural deterioration of the military hierarchy should the roles and expectations of service members be so different within military justice from without.

This facet of the model is exemplary of the "separate society" concept addressed earlier in this article.[419] This departure from the constitutional norm is a necessary manifestation of separatism. Article 25 is a complete denial of impartial selection from a fair cross-section of the community. Unlike Article 25, the seniority requirement of this model should not raise concerns of extremism. It should not generate the poor public perception of military justice that is created by the current method of "district attorney" juror selection.[420]

b. Rank-Group Restriction on Pure Randomness

Random selection is a means to achieve the constitutionally required fair cross-section.[421] The military's structure is uniquely hierarchical (few commanding many), and the installation venire pools are relatively small. Between individual cases, pure random selection would lead to inconsistent achievement of a fair cross-section based on rank, age, and related factors. A private first class (E-2) would be statistically likely to face a jury of all E-2s and E-3s. Though unlikely, an E-2 might face a panel of all lieutenant colonels (O-5s), however.

This model encourages younger and more junior juries than are currently impaneled under Article 25. The rank-group restriction on the model prevents that tendency from operating so drastically as to vitiate the fair cross-section principle in individual cases. Although the rank-group restriction deviates from constitutional norms, it upholds constitutional principles for the government and each accused service member.

Further, unlike purposefully engineering a jury to achieve proportional race or gender representation, members who are selected under this

419. *See supra* notes 327-330 and accompanying text.
420. *See supra* note 343 and accompanying text.
421. *See supra* §§ 1a, 1b.

model are unlikely to view themselves as advocates or voting blocks for a particular cognizable group. Again, it is a deviation that is required by the military "separate society," and observers are likely to understand and to applaud it.

c. Overseas and Deployed Courts-Martial

Many service members will be tried overseas due to permanent assignment there, and others will be tried during deployment or while at sea. Generally, overseas venire pools will contain fewer reserve personnel than will venire pools in the United States. The overseas accused may fairly raise Fifth Amendment equal protection and Sixth Amendment challenges to the proposed model on this basis. One way to compensate might be to include Department of Defense civilian employees in the overseas venire pools. Another way might be to consolidate overseas trials in a few locations where and when reserve personnel would be available.

Even uncompensated, this deviation is one of understandable scope. The military must be deployed worldwide, and it must have military justice capability worldwide. Additionally, the deviation is minimal. As discussed above, reserve personnel are included in the venire pool largely to help achieve the benefit of cross-sectional representation related to broader based community norms. Assuming that the military could afford to ship reserve personnel around the world to sit on overseas courts-martial, this benefit would be unrealized. Likewise, civilian appreciation of military justice and civilian control of the military are goals that are furthered by the model as an institution, not by individual cases. Finally, the fair cross-section requirement stems from an appreciation of cognizable differences in race, gender, religion, and other congenital distinctions.[422] Difference in military component is hardly a distinction worth mentioning next to these characteristics.

5. Positive Aspects of Article 25?

By abandoning the criteria set forth in Article 25, the military loses some measure of what would be considered in any other endeavor to be quality control. There is nothing overtly sinister about the criteria themselves. Maximizing experience and judicial temperament, for example,

422. *See supra* notes 39, 181 and accompanying text.

might always be a good thing. There are two problems, however. First, the criteria are not applied and maximized by an impartial entity. Instead, they are applied by people, with their own inherent biases. In the case of the military, they are applied by the same individual who initiates the prosecution. Second, maximizing the criteria, even if it could be accomplished objectively, fails to account for the accepted nature of the jury trial. The most experienced, most educated, and best-trained mechanic is the one who should be working on military trucks. The endeavor of justice, however, is different. Decisions of juries are not to represent the elite, but the broad spectrum of society, as represented by Chesterton's twelve ordinary men.[423]

The words of Richard Henry Lee at the Virginia state convention to ratify the federal Constitution extol the values of representative juries in a free democracy.

> It is essential in every free country that common people should have a part and share of influence in the judicial as well as in the legislative department.
>
> . . .
>
> The trial by jury in the judicial department, and the collection of the people by their representatives in the legislature, are those fortunate inventions which have procured for them, in this country, their true proportion of influence, and the wisest and most fit means of protecting themselves in the community. Their situation as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of society; and to come forward, in turn, as the centinels[sic] and guardians of each other.[424]

At first blush, these eloquent sentiments appear antithetical to the effective functioning of a military organization. Why would the military want its functional equivalent of the common people—the privates, specialists, and corporals—sharing in any influence of the military's hierar-

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423. *See supra* note 245; VAN DYKE, *supra* note 245, at 13.

424. Richard Henry Lee, Letter IV, Oct. 12, 1787, *reprinted in* PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 316 (Paul L. Ford ed., Da Capo Press 1968) (1888). *See* John Henry Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 171 (1929) ("[J]ury-duty will bring all respectable citizens sooner or later to have acquaintance with court methods, and in such a way as to compel serious thought and give the needed scrap of judiciary education common to all.").

chical structure, which is designed to exact complete and immediate obedience, respect, and thereby mission accomplishment? However, Lee's last sentence is directly applicable to the military context. The privates, specialists, and corporals will someday be sergeants and sergeants major. Their participation in the process of criminal justice in the military allows them not only "to acquire information and knowledge in the affairs and government" of the military, but also to assume a real and tangible stake in those affairs. Their ability to assume roles later as "[s]entinels and guardians of each other," exactly what the military wants, is enhanced.

Lee's words capture part of the concept of increased discipline in the armed forces through increased justice. Let the senior officers and enlisted personnel take a lesser role in the administration of justice. Hand the reins of justice, which are inevitably hitched to the horses of discipline, over to the personnel who are most affected by their manipulation. A fair cross-section will not—and, of course, should not—exclude the influence of the senior and the experienced. Indeed, the military system of justice contemplates that they will be mentors in the deliberation room, as they are in the field. However, a fair cross-section will dramatically build the knowledge of, increase the accountability of, and enhance the discipline of the military's *future* mentors.[425]

Proponents of selection criteria see no conflict between representativeness and juror qualifications. Former North Carolina Senator Sam Ervin believed that jurors, who are representative of the community, must also be sufficiently intelligent to understand the issues placed before them.[426] He believed that the fair cross-section requirement was improper because it highlighted that society is made up of classes.[427] He believed that it indicated that there is one truth for one class and another for a different class.[428] However, the arguably objective criterion of intelligence—like the related Article 25 criteria—adds nothing to the pursuit of justice from the perspectives of the accused and society. As noted by former Attorney General Ramsey Clark while debating in Congress with Senator Ervin over the 1968 Jury Selection Act:

> The defendant has to have confidence, as does society, in [the jurors'] absolute impartiality, and if some particular intelligence

425. *See supra* note 222 and accompanying text.

426. *See* Sam J. Ervin, Jr., *Jury Reform Needs More Thought*, 53 A.B.A. J. 132, 134 (1967).

427. *See id.*

428. *See id.*

> test is used, it necessarily will reflect preferences and prejudices. However hard the testing person might have tried to be selective, he will only represent his own point of view and the person standing trial might be prejudiced.[429]

Judge Walter Gewin, who served on the federal judiciary's Committee on the Operation of the Jury System, put it most cogently.

> [C]areful study has given support to the opinions of some scholars that the so-called blue ribbon jury is not superior to the one chosen by random selection. This is so because the indispensable faculty for good jury service is *judgment*, an inherent mental quality which does not perforce coincide with superior intelligence.[430]

History and experience have taught that, with justice (*unlike* running a motor pool, close order drill, or training an infantry battalion), the decision-makers themselves need not be the experts. The pursuit and perception of fairness require that they not be the experts. In fact, "expert fact-finders" is an illusory concept. Yet, unappreciative of the differences between military justice and fixing a truck, the military goes about in search of "expert fact-finders" with the criteria of Article 25.

Finally, appreciation of "human nature and the ways of the world,"[431] is collective. It comprises the individual experiences—some lengthy,

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429. *Hearings on S. 1319*, *supra* note 260, at 49 (statement of Ramsey Clark, Attorney General of the United States).

430. Walter Gewin, *The Jury Selection and Service Act of 1968: Implementation in the Fifth Circuit Court of Appeals*, 20 MERCER L. REV. 349-50 (1969).

431. The closing substantive instructions on findings given to the court-martial members by the military judge include the following sentences:

> You should bear in mind that only matters properly before the court as a whole should be considered. In weighing and evaluating the evidence, you are expected to utilize your own common sense, your knowledge of human nature and the ways of the world. In light of all the circumstances in the case, you should consider the inherent probability or improbability of the evidence . . . . The final determination as to the weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK ch. 2, § V, at 53 (30 Sept. 1996).

some not, but all different—of each juror. Those who would argue for a minimum level of juror education, experience, or intelligence, so that the jury will appreciate the complex facts and issues presented in today's courtrooms, misunderstand the roles of jurors and attorneys in an adversarial system. The uneducated or unintelligent *advocate* dumps complex facts and issues at the feet of the jury and expects the jury to find the right answer. That advocate, who is, unfortunately, joined by a public that is privy only to the result, later complains that the unintelligent jury failed to reach the right answer. If the facts and issues of a case are complex, it is the attorney's role, in a system that is grounded in the presumption of innocence and proof beyond a reasonable doubt, to make them understandable. The attorney has all of the tools necessary to do so, but one of them should not be the built-in education or experience of the fact-finder, who is otherwise presumed to be a clean slate.

V. Conclusion

The inexorable "civilianization of military law"[432] imports into military justice more and more features of traditional civilian justice.[433] Indeed, in many respects, military justice exceeds the expectations of traditional civilian justice.[434] Even within the ambit of the Sixth Amendment, military law provides greater due process than many civilian jurisdictions. The military allows an accused who is appearing even in its misdemeanor forum—special court-martial—to request a jury.[435] The Supreme Court has long since denied a jury trial, as a matter of right, to civilians who face misdemeanor punishment.[436] In the military, everyone who is accused of a crime, or who is otherwise entitled to counsel, gets a lawyer, often the lawyer of his choice.[437] In every civilian jurisdiction, by contrast, indigence is the only ticket to counsel as a matter of entitlement. Yet, the military clings stubbornly to one old vestige of criminal practice that is entirely foreign to civilians, foreign to the Constitution, and foreign to fundamental fairness and its appearance—jury selection by the sovereign.

The right to trial by a jury that is impartially constituted from a fair cross-section of society is fundamentally important to the American system of justice. *Ex parte Milligan* and *Ex parte Quirin* wrongly decided that the American service member could not partake of it. Those cases improperly analyzed the constitutional and historical underpinnings of the right to

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432. Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970).

trial by jury and its application to the military. The Supreme Court developed the constitutional standard of the Sixth Amendment, impartial jury selection from a fair cross-section of society, in the late 1960s. The courts began to recognize that the Bill of Rights applies to the military at roughly the same time. The scope of military criminal jurisdiction reached its currently widest sweep barely over a decade ago. Yet, courts continue blindly to rely on *Milligan* and *Quirin* and their poorly reasoned conclusion, which

433. The 1806 amendments to the Articles of War presumed the accused innocent if he remained silent, allowed the accused to challenge members, prohibited double jeopardy, and established a two-year statute of limitations. *See* Articles of War of 1806, arts. 70, 71, 87, 88, *reprinted in* WINTHROP, *supra* note 81, at 982-83; SCHLEUTER, *supra* note 81, § 1-6(B). *See also supra* note 183 and accompanying text. In 1863, Congress permitted the accused to seek a continuance. *See* Act of Mar. 3, 1863, ch. 75, § 29, 12 Stat. 731, 736; SCHLEUTER, *supra* note 81, § 1-6(B). In 1920, Congress revised the Articles of War to provide for swearing of charges, assignment of defense counsel, pre-trial investigation, rulings on the admissibility of evidence at trial by a law member, and court-martial boards of review. *See* Articles of War of 1920, *reprinted in* 1921 MANUAL, *supra* note 8, app. 1; GENEROUS, *supra* note 261, at 10. The Elston Act, which incorporated a change that was recommended by the ABA, amended the Articles of War to provide for enlisted membership on court-martial panels. *See* Articles of War of 1948, art. 4, *reprinted in* 1949 MANUAL, *supra* note 264, app. 1, at 275-76. The UCMJ replaced the law member with a non-voting certified attorney law officer, who functioned more like a judge than an advisor. *See* UCMJ art. 26 (1950) (amended 1968, 1983). It established civilian appellate review of courts-martial in the COMA. *See id.* art. 67. The Military Justice Act of 1968 replaced the law officer with a military judge and provided for trial by military judge alone at both the special and general court-martial. *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. *See also* UCMJ art. 16 (1958) (amended 1968, 1983); *id*. art. 26 (amended 1968, 1983). The act expressly forbade the convening authority from evaluating the military judge or criticizing defense counsel. *See* 82 Stat. 1335. *See also supra* note 267. In 1980, the President promulgated for courts-martial the Military Rules of Evidence, which were virtually identical to the Federal Rules of Evidence. *See* Exec. Order No. 12,198, 3 C.F.R. 151 (1980). The Military Justice Act of 1983 provided for Supreme Court review of COMA decisions and purported to assert increased subject matter jurisdiction of courts-martial. *See* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393; UCMJ art. 67a (1984).

434. The pretrial investigation, mandated under Article 32 of the UCMJ for felony prosecutions in the military, provides far greater due process to the accused than the civilian grand jury process. *See* UCMJ art. 32 (West 1995); MCM, *supra* note 5, R.C.M. 405. Post-trial and appellate review are far more comprehensive in military justice than in the civilian system. *See id*. R.C.M. 1101-1210.

435. MCM, *supra* note 5, R.C.M. 903.

436. *See supra* notes 33-34 and accompanying text.

437. *See* UCMJ arts. 27, 38 (West 1995).

was reached upon facts of no moment today. In doing so, the courts withhold a fundamental right of criminal due process.

The concept of separation of powers lies at the root of the United States governmental structure. The rejection of trial by jury in the military disserves that concept on several levels. Article I powers have speculative relation to the procedural and substantive individual rights of the military accused. Yet, courts have construed these powers to eclipse clearly and broadly stated Article III concepts that are on point. Those in whom prosecutorial discretion is vested, the agents of the executive, select the trial jury.

Donald L. Burnett, Jr., Dean of Brandeis School of Law, recently delivered a lecture to the students and faculty of The Army Judge Advocate General's School, U.S. Army.[438] His inspiring words on upholding the values of the legal profession included a tribute to the concept of separation of powers. Embodied in the American "charter" of government, which was created at that "turning point in history" when the constitutional convention met in 1787, the principle lies at the heart of the legal profession's values.[439] Dean Burnett asked whether a judiciary that is controlled by the political branches would ever have upheld equal protection on the basis of race or gender. He asked if such a judiciary would have ensured that every criminally accused enjoys his Sixth Amendment right to counsel.[440] Courts and the military have affirmatively precluded every criminally accused from enjoying the Sixth Amendment right to a jury. Does the military system of jury selection uphold today the concepts of justice that are central to the American "charter" of government?[441] The rest of

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438. Donald L. Burnett, Jr., The Twenty-Second Edward Hamilton Young Lecture delivered to The Judge Advocate General's School, U.S. Army (Feb. 26, 1998) (transcript available at the Judge Advocate General's School, U.S. Army, Charlottesville, Va.).

439. *Id*.

440. *Id*.

441. Author Jon Van Dyke stated that:

> The jury is the embodiment of the realization that only by gathering together persons from all sectors of society, presenting the evidence in a controversy to them, and asking them to deliberate on the issues involved can we be sure that all relevant perspectives have been considered and that the verdict represents the community's collective judgment on the controversy.

VAN DYKE, *supra* note 245, at 219.

the free world has asked that question of themselves and their charters; their answers resound from Europe and Canada: "no."

Command influence is a necessary byproduct of command selection of jurors. Where apparent, court stacking or command interference with ongoing courts is devastating to the fairness of the individual case and the appearance of fairness in the entire system. Where it is not apparent, the public suspects it. Remarkably, cases like *Youngblood*, which features the convening authority and his staff judge advocate overtly suggesting threats to the lenient, are alive and well. Cases like *Swagger*, where the convening authority appointed his installation provost marshal to the panel, continue to reflect the vitality of the problem.

The need for discipline in the armed forces is crucial and may justify significant departure from some constitutional norms that are familiar to civilians. However, courts and the military have lost sight of the coexistence of discipline and justice. It is assumed that discipline is enhanced by restricting justice under the Sixth Amendment. Judges, legislators, and military leaders are blinded to the opposite conclusion, that heightened discipline is obtained through heightened justice.

The military services offer uniquely fertile potential for implementing constitutional standards of jury selection. In what other jurisdiction can the entire population actually serve as the venire pool? In what other jurisdiction does the removal of the juror from her regular duties have less potential impact? In what other jurisdiction can a computer database truly generate a fair cross-section of society for every trial? Whether or not the House of Representatives is soon joined by the Senate in requesting a plan for random selection of military juries, computer database venire pools, as proposed by this article, should replace jury selection by the sovereign extant under Article 25. By using the model proposed in this article, the military will satisfy constitutional standards of criminal due process and will drastically curtail unlawful command influence, and discipline *will improve*.

> He puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for a while a soldier.
>
> —Justice Sir William Blackstone[442]

442. 1 BLACKSTONE, *supra* note 3, at *408.

> For the jury system is the handmaid of freedom. It catches and takes on the spirit of liberty, and grows and expands with the progress of constitutional government.
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> —Charles S. May[443]

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443. Charles S. May, Commencement Address to the University of Michigan Law School (Mar. 1875), *in* J. W. DONOVAN, MODERN JURY TRIALS AND ADVOCATES 165-90 (2d rev. ed., New York, Banks & Brothers 1882).