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PLAYING THE NUMBERS: COURT-MARTIAL PANEL SIZE AND THE MILITARY DEATH PENALTY

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I. Introduction

On 1 April 1998, 3387 inmates were under death sentences in the United States.[2] More than three-fourths of these inmates were entitled to have their sentences determined by twelve-member juries.[3] While several hundred were tried in systems where judges decide whether to impose a death sentence,[4] only six were convicted and sentenced to death by a panel of fewer than twelve lay members. All six of those death row inmates[5] were tried in the military justice system, which allows as few as five lay members to impose a death sentence.[6]

Merely because the military's death penalty system is unique, however, does not necessarily mean it is unconstitutional. The Supreme Court has upheld aspects of the military justice system that would be unconstitutional in any civilian criminal justice system.[7] The Court of Appeals for the Armed Forces (CAAF)[8] has expressly rejected a challenge to capital courts-martial panels with fewer than twelve members,[9] and the Supreme Court has shown little interest in the issue.[10]

This article concludes that the judiciary is unlikely to invalidate capital courts-martial with fewer than twelve members. The unanimity requirement for military death penalty cases, however, suggests that the

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2. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. 1 (Spring 1998).

lack of a fixed number of members is a far more significant systemic defect than the lack of twelve-member panels. Because members who are removed from a court-martial panel are usually not replaced when a quorum remains, the defense in a capital case faces a dilemma: whether to remove biased members, which carries the heavy price of reducing the statistical chance of finding the one vote necessary to avoid a death sentence. In cases where the defense chooses not to pay that price, the larger panel size can be preserved only by declining to challenge the biased member, thereby compromising the system's impartiality and reliability. Additionally, allowing the variable court-martial panel size to influence the outcome of capital cases introduces an arbitrary and irrational factor into the military death penalty sentencing scheme.

This article reviews the historical development of the current court-martial-panel size rules, followed by an examination of the law governing jury size in civilian criminal justice systems. This article then presents an overview of military death penalty procedures and examines the constitutionality of trying capital courts-martial before panels with fewer than twelve members. After analyzing the constitutionality of trying capital courts-martial before panels with no fixed size, this article concludes with

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3. In 29 states and in federal Article III courts, capital defendants have the right to have their sentence determined by juries. ARK. CODE ANN. § 5-4-602 (Michie 1997); CAL. PENAL CODE § 190.4(2) (West 1988); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1998); GA. CODE ANN. § 17-10-2(c) (1997); 720 ILL. COMP. STAT. ANN. 5/9-1(d) (West Supp. 1998); KAN. STAT. ANN. § 21-4624(e) (1995); KY. REV. STAT. ANN. § 532.025 (Banks-Baldwin 1998); LA. CODE CRIM. PRO. ANN. § 905.1 (West 1997); MD. ANN. CODE OF 1957 art. 27 § 413(b) (1996); MISS. CODE ANN. § 99-19-101 (1994); MO. ANN. STAT. §§ 565.006, 565.030 (West Supp. 1998); NEV. REV. STAT. ANN. § 175.552 (Michie 1997); N.H. REV. STAT. ANN. § 630.5(II) (1996); N.J. STAT. ANN. 2C:11-3 (West Supp. 1998); N.M. STAT. ANN. § 31-20-A-1 (Michie 1994); N.Y. CRIM. PRO. LAW § 400.27 (McKinney 1996); N.C. GEN. STAT. § 15A-2000 (1997); OHIO REV. CODE ANN. § 2929.022 (Anderson 1996); OKLA. STAT. ANN. tit. 21, § 701.10 (West Supp. 1998); OR. REV. STAT. § 163.150 (1997); PA. STAT. ANN. tit. 42 § 9711 (West 1982); S.C. CODE ANN. § 16-30-20 (Law Co-op. Supp. 1997); S.D. CODIFIED LAWS § 23A-27A-2 (Michie Supp. 1997); TENN. CODE ANN. § 40-35-203(c) (1997); TEX. CRIM. P. CODE ANN. § 37.071 (West Supp. 1998); UTAH CODE ANN. § 76-3-207 (Supp. 1997); VA. CODE ANN. § 19.2-264.4 (Michie Supp. 1998); WASH. REV. CODE ANN. § 10.95.050(2) (West 1990); WYO. STAT. ANN. § 6-2-102 (Michie 1997); 18 U.S.C.A. § 3593(b) (West Supp. 1998). States with jury sentencing and the federal government account for 2625 of the inmates on death row. *See generally* DEATH ROW, U.S.A., *supra* note 2. "[E]very state that delegates capital sentencing decisions to juries uses twelve person juries for this purpose and allows the return of death verdicts only with the jurors' unanimous consent." Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing*, 64 IND. L.J. 617, 644 (1989). Federal criminal juries also consist of twelve members and require unanimity for a verdict. FED. R. CRIM. P. 23(b), 31.

a discussion of potential means to bring the military's death penalty system into closer alignment with its civilian counterparts.

II. Court-Martial Panel Size: An Overview

Supreme Court case law indicates that history is a key factor in evaluating the constitutionality of military justice procedures.[11] Accordingly, a legal analysis of capital court-martial panel size should begin with a historical review.

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4. In Alabama, Delaware, Florida, and Indiana, the jury makes a recommendation, but the judge decides whether to impose a death sentence. ALA. CODE § 13A-5-46 (1994); DEL. CODE ANN. tit. 11, § 4209(d) (1998); FLA. STAT. ANN. § 921.141 (West 1998); IND. CODE ANN. § 35-50-2-9(e)-(g) (Michie Supp. 1998). In Arizona, Idaho, Montana, and Nebraska, once a defendant is convicted of a capital offense, the judge determines whether to impose a death sentence without any jury input. ARIZ. REV. STAT. ANN. § 13-703 (West Supp. 1997); IDAHO CODE § 19-2515 (1997); MONTANA CODE ANN. § 46-18-301 (1997); NEB. REV. STAT. ANN. § 29-2520 (1995). In Colorado, the death penalty sentencing power is given to three-judge panels. COLO. REV. STAT. ANN. § 16-11-103 (West 1998). The nine jurisdictions where only judges possess the authority to impose death sentences account for 754 of the United States' death row inmates. *See generally* DEATH ROW, U.S.A., *supra* note 2. The Supreme Court has held that the "Constitution permits the trial judge, acting alone, to impose a capital sentence." Harris v. Alabama, 513 U.S. 504, 515 (1995). The Court has even upheld the constitutionality of a judge imposing a death sentence against the jury's recommendation. *Id.*; Spaziano v. Florida, 468 U.S. 447 (1984). *See generally* Michael Mello & Ruthann Robson, *Judge over Jury: Florida's Practice of Imposing Death over Life in Capital Cases*, 13 FLA. ST. U.L. REV. 21 (1985). Even in these systems that allow judges to impose a death sentence, however, capital defendants are entitled to have their guilt or innocence decided by unanimous twelve-member juries. ALA. CONST. art. I, § 11 (12-member juries); ALA. R. CRIM. P. 23.1 (unanimity requirement); ARIZ. REV. STAT. ANN. § 21-102A (12-member juries in capital cases; unanimity requirement); COLO. CONST. art. 2, § 23 (12-member juries); COLO. REV. STAT. ANN. § 16-10-108 (unanimity requirement); DEL. CT. CRIM. R. 223(b) (12-member juries); DEL. CT. CRIM. R. 31(a) (unanimity requirement); FLA. STAT. ANN. § 913.10 (12-member juries in capital cases); FLA. R. CRIM. PRO. 3.440 (unanimity requirement); IND. CONST. art. I, § 7; State v. Scheminisky, 174 P. 611 (Ind. 1918) (interpreting the state constitution to require 12-member juries reaching a unanimous verdict in felony cases); IND. CODE ANN. § 35-37-1-1 (1998) (12-member juries); Brown v. State, 457 N.E.2d 179, 180 (Ind. 1983) (unanimity requirement); MONT. CODE ANN. § 3-15-106 (12-member juries); MONT. CONST. art. II, § 26 (unanimity requirement); NEB. CONST. art. I, § 6 (12-member juries and unanimity requirement for felony cases).

A. The Historical Development of Court-Martial Panel Size

1. The U.S. Army's Original Practice

Before Congress adopted the Uniform Code of Military Justice (UCMJ) in 1950, separate laws governed Army and Navy courts-martial.[12]

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5. Lance Corporal Wade Walker was sentenced to death by a ten-member panel. Record, United States v. Walker (No. 95-01607) (on file with Navy-Marine Corps Appellate Defense Division, Washington, D.C.). Private Dwight Loving, Lance Corporal Kenneth Parker, and Senior Airman Simoy were sentenced to death by eight-member panels. United States v. Loving, 41 M.J. 213, 310 (1994) (Sullivan, C.J., concurring), *aff'd*, 517 U.S. 748 (1996); Record, United States v. Parker (No. 95-01500) (on file with Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.); United States v. Simoy, 46 M.J. 592, 625 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence). Sergeant James Murphy and Specialist Ronald Gray were sentenced to death by six-member panels. Record, United States v. Murphy, (No. ACMR 8702873) (on file with Army Defense Appellate Division, Falls Church, Va.); Record, United States v. Gray (No. ACMR 8800807) (on file with Army Defense Appellate Division, Falls Church, Va.). The two most recent courts-martial to impose death sentences, those trying Army Sergeant William Kreutzer and Marine Sergeant Jessie Quintanilla, both had twelve-member panels. Record, United States v. Kreutzer (No. ARMY 9601044) (on file with Army Court of Criminal Appeals, Falls Church, Va.); Darlene Himmelspach, *Marine Sergeant Is Sentenced to Death*, SAN DIEGO UNION-TRIBUNE, Dec. 6, 1996.

6. *See* UCMJ art. 18, art. 16(1) (West 1998).

7. *See*, *e.g.*, Weiss v. United States, 510 U.S. 163 (1994) (upholding the lack of fixed terms of office for military trial and appellate judges); Parker v. Levy, 417 U.S. 733 (1974) (holding that military criminal statutes need not be as precise as civilian criminal statutes). *See also Spaziano*, 426 U.S. at 464 (noting that the "Eighth Amendment is not violated every time a state reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws").

8. In 1994, the Court of Military Appeals was renamed the CAAF, and the four Courts of Military Review were renamed Courts of Criminal Appeals. Nat'l Defense Authorization Act for 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831. This article will refer to the courts by their names at the time of their relevant decisions.

9. United States v. Loving, 41 M.J. 213, 287 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996); United States v. Curtis, 32 M.J. 252, 267-68 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991).

10. *See infra* note 154 and accompanying text.

11. Weiss v. United States, 510 U.S. 163, 177-78 (1994). The Supreme Court indicated, "We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." *Id.* at 177. Nevertheless, history "is a factor that must be weighed" in considering the constitutionality of a challenged military justice practice. *Id.* at 177-78.

12. *See* WILLIAM T. GENEROUS, JR., SWORDS AND SCALES 4-5 (1973) ("Up until the beginning of the Korean War, the United States had always operated two distinct court-martial systems, the Army's and the Navy's.").

The 1775 Articles of War that governed the Continental Army required that general courts-martial consist of thirteen officers.[13] While the 1775 Articles of War did not set out the vote necessary to adjudge a death sentence,[14] in 1776 the Articles of War were amended to require a two-thirds vote for capital sentences.[15]

In the wake of the Revolutionary War, the Army retained a small force of less than one thousand soldiers.[16] The scarcity of officers in the post-war Army[17] made convening thirteen-member courts-martial impossible, leading Congress to revise the court-martial panel size requirement in 1786.[18] Congress authorized general courts-martial with as few as five members, though the legislation required that thirteen-member courts-martial be convened where that many officers could be assembled "without manifest injury to the service."[19] Following the Constitution's adoption, Congress reenacted the 1786 requirements.[20]

The "manifest injury" standard initially proved significant in capital cases. In 1819, Attorney General William Wirt delivered an opinion to Secretary of War John C. Calhoun concerning a five-member court-martial

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13. Articles of War of June 30, 1775, art. 33, 2 J. CONT. CONG. 111, 117 (1775). Colonel Wiener notes that the requirement for 13-member courts-martial "went back at least to 1666, it was inferentially retained in the First Mutiny Act, and it was specifically set forth in every later set of Articles of War, both English and American." Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 8 (1989).

14. *See generally* Articles of War of June 30, 1775, *supra* note 13; *see also* Howard C. Cohen, *The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W.L. REV. 9, 30 (1983).

15. Articles of War of Sept. 20, 1776, § 14, art. 5, 5 J. CONT. CONG. 788-89 (1776). The 1776 revision included a total of fourteen capital offenses. Keith J. Allred, Comment, *Rocks and Shoals in a Sea of Otherwise Deep Commitment: General Court-Martial Size and Voting Requirements*, 35 NAV. L. REV. 153, 158 (1986). General Washington's view that the 1775 Articles of War were insufficient to maintain discipline led to the 1776 revision. Articles of War of Sept. 20, 1776, *supra*, at 670-71 n.2 (1776). John Adams, the principal author of the 1776 Articles of War, modeled them after the British Articles of War. *Id.; see also* GEORGE B. DAVIS, MILITARY LAW OF THE UNITED STATES 340-41 (3d ed. 1913) (concluding that the American Articles of War were based on the 1774 version of the British Articles of War). *See* Allred, *supra*, at 158-59 (discussing 18th Century British court-martial procedures).

16. In 1789, the U.S. Army numbered 672 soldiers. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 9 (1958). By 1794, however, the Army had expanded to 3692 soldiers. *Id.*

17. One historian reports that in 1786, the Army contained fewer than 40 officers. RICHARD KOHN, EAGLE AND SWORD 70 (1975).

that had imposed a death sentence for desertion.[21] In an early application of the "death is different" principle,[22] Attorney General Wirt wrote:

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18. Articles of May 31, 1786, 30 J. CONT. CONG. 316 (1786). The legislation's preamble noted:

> [C]rimes may be committed by officers and soldiers, serving with small detachments of the forces of the United States, and where there may not be a sufficient number of officers to hold a general court-martial, according to the rules and Articles of War, in consequence of which Criminals may escape punishment, to the great injury of the discipline of the troops and the public service.

Id.

Ironically, the Continental Congress's motivation for adopting the reduction in court-martial size appears to be a case in which two death sentences were imposed in violation of the existing size requirement. Despite the requirement for thirteen-member general courts-martial, a five-member court sitting at Fort McIntosh in Western Pennsylvania convicted two soldiers of desertion and sentenced them to death. Articles of War of Sept. 20, 1776, *supra* note 15, at 119, 123. The two prisoners were held in irons while the fort's commanding officer, Major John Palsgrave Wyllys, awaited permission from the War Office to carry out the executions. *Id.* at 119. The death sentences proved to be a poor deterrent. Shortly after the sentences were adjudged, three additional soldiers deserted. *Id.* at 119-20. When these three soldiers were recaptured, Major Wyllys ordered their immediate execution. *Id.* at 120. Secretary at War Henry Knox found the five-member general court-martial to be illegal and ordered the two initial deserters' release. *Id.* at 123. Nevertheless, upon informing the Continental Congress of this episode, Secretary Knox contended that "the small number of troops at present in the service of the United States, and their dispersed situation, render it difficult, and almost impossible to form a general court-martial, of the numbers required by the Articles of War; therefore desertion and other capital crimes may be committed without its being practicable to inflict legally the highest degree of punishment provided by the laws." *Id.* at 120. On 27 March 1786, the Continental Congress adopted a resolution ratifying Secretary Knox's finding that the initial court-martial was illegal; the Continental Congress also ordered the arrest of Major Wyllys. *Id.* at 136-37. Four days later, the Continental Congress adopted legislation authorizing general courts-martial consisting of five to thirteen members. *Id.* at 316. The Continental Congress later agreed to Secretary Knox's recommendation that Major Wyllys be released from arrest because his conduct arose from an urgent need to stop desertions that made his actions "justifiable on military and political principles." Articles of May 31, 1786, *supra* note 18, at 433-35. Secretary Knox noted, however, the possibility that the state of Pennsylvania might take action against Major Wyllys. *Id.* at 435. In 1790, Major Wyllys was killed in battle. Wiener, *supra* note 13, at 8 n.39.

19. Articles of May 31, 1786, *supra* note 18, at 316.

20. Act of May 31, 1789, § 4, 1 Stat. 95, 96. *See also* Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96; Act of April 30, 1790, ch. 10, § 13, 1 Stat. 121; Act of March 3, 1795, ch. 44, § 14, 1 Stat. 432; Act of May 30, 1796, ch. 39, § 22, 1 Stat. 486; Act of March 2, 1799, ch. 31, § 4, 1 Stat. 725-26.

> This being a case . . . of life and death, I beg leave to recall to your recollection, sir, that, by the 64th article of the Rules and Articles of War, it is required that general courts-martial shall not consist of less than thirteen, where that number can be convened *without manifest injury to the service*. The court in the case of Williamson having consisted of *five* commissioned officers only, was not a legal court if *thirteen* could have been convened without manifest injury to the service. The phrase, you will observe, is not "where that number (thirteen) can be *conveniently* convened," but where they can be convened *at all*, not only without *probable* injury, but without *manifest* injury to the service. It is difficult to conceive an emergency in time of peace so pressing as to disable the general officer who orders the court from convening thirteen commissioned officers on a trial of life and death, *without manifest injury to the service*. And if a smaller number act without such manifest emergency, I repeat that they are not a lawful court, and an execution under their sentence would be murder.[23]

During the early 1800s, convening authorities regularly appointed supernumaries to thirteen-member courts.[24] These supernumaries would take the place of members who were absent or who were removed by successful challenges for cause.[25] Thus, as a matter of practice, during this era court-martial panels in capital cases would consist of thirteen members, with nine votes necessary to impose a death sentence.

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21. 1 Op. Att'y Gen. 296 (1819). The accused, Private Peter Williamson, pled guilty to desertion. The court-martial originally sentenced him to be confined at hard labor with a ball and chain attached to his leg for the remainder of his enlistment. The day after imposing this sentence, however, the court-martial reconsidered and condemned Private Williamson to death by firing squad. *Id.* at 297. Attorney General Wirt opined that the court-martial did not exceed its power when it altered the sentence. *Id.* at 297-99.

22. The Supreme Court has repeatedly emphasized that because "death is qualitatively different from a sentence of imprisonment, however long, . . . there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (plurality opinion). In recognition of this principle, the phrase "death is different" is frequently invoked to express the necessity for heightened procedural protections in death penalty cases. *See generally* Deborah W. Denno, *Death Is Different and Other Twists of Fate*, 83 J. CRIM L. & CRIMINOLOGY 437, 439-40 (1992).

23. 1 Op. Att'y Gen. at 299-300. "[A]s a matter of legal propriety," Attorney General Wirt recommended that "in every case of life and death at least, the President ought to be satisfied of the manifest injury which the service would have sustained in convening a court of thirteen before he gives his sanction to a sentence of death by a smaller number." *Id*. at 300.

The Supreme Court, however, soon removed the "manifest injury" requirement. In 1827, Justice Story wrote for a unanimous Court that this requirement "is merely directory to the officer appointing the court."[26] Justice Story concluded that the convening authority's "discretion as to the number which can be convened without manifest injury to the service, being in a matter submitted to his sound discretion, must be conclusive."[27] Thus, after 1827, the "manifest injury" standard had little practical effect.[28]

2. The U.S. Navy's Original Practice

The Rules for the Regulation of the Navy of the United Colonies of North America, adopted in 1775, required naval courts-martial to consist of at least six members.[29] That size requirement was reduced in 1782, when

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24. *See* ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW, AND COURTS-MARTIAL, AS PRACTICED IN THE UNITED STATES OF AMERICA 10-12 (1809); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 79-80 (2d ed. 1920); WILLIAM C. DEHART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS-MARTIAL 88-89 (1859). Colonel Winthrop notes, "Supernumaries are constantly detailed with general courts in the early Orders of the War Department . . . especially from 1809 to 1836." WINTHROP, *supra*, at 80 n.58. Colonel Winthrop, however, denounced the detailing of supernumaries as a "contravention of the Articles of War." *Id.* at 80. Writing in 1896, he noted that the practice "has been disused in our service for some fifty years." *Id.* Colonel Winthrop did note, however, that in "[a] comparatively recent, though isolated case," a Civil War general court-martial included "a supernumary, who, upon a vacancy occurring on the trial of an officer, took a seat as a member." *Id.* at 80 n.59.

25. Peremptory challenges did not exist at the time. In fact, peremptory challenges were first adopted for Army courts-martial in 1920, and for naval courts-martial in 1951. *Hearings on H.R. 2498 Before Subcomm. of the House Armed Services Comm.*, 81st Cong., 1027 (1949). *See also* H.R. REP. NO. 81-491, at 22 (1949); WINTHROP, *supra* note 24, at 206 (noting that "in the American military code only challenges for legal cause have ever been permitted"); DEHART, *supra* note 24, at 118 ("[P]eremptory challenges are not allowable by courts-martial because the interests and circumstances of the military service will not at all times permit an equal facility of replacing a member, as exists in the case of a challenged juror in civil courts. And therefore it is incumbent upon courts-martial, to see that *frivolous* causes of challenge are not too readily admitted.").

26. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

27. *Id.* at 21.

28. Colonel Winthrop noted that *Martin v. Mott* "settled the law on this point, and the question as to the legality of a court of less than thirteen members is not now raised in practice." WINTHROP, *supra* note 24, at 79 (footnote omitted) (citing 2 Op. Att'y Gen. 534, 535 (1832); 6 Op. Att'y Gen. 506, 510-11 (1854)).

29. These Rules for the Regulation of the Navy provided, "A court-martial shall consist of at least three Captains and three first lieutenants, with three Captains and three first lieutenants of Marines, if there shall be so many of the Marines then present, and the eldest Captain shall preside." 3 J. CONT. CONG. 382-83 (1775).

the Continental Congress allowed three-member naval courts-martial, but required five-member courts for capital cases.[30] The Continental Congress, however, provided no express guidance regarding the percentage of votes needed to convict or to impose any particular punishment.

Following the Revolutionary War, the American Navy disbanded.[31] The Navy was reborn in 1798 when, in the midst of French attacks on American merchant vessels trading with Britain,[32] Congress established the Department of the Navy.[33] The following year, Congress adopted Articles for the Government of the Navy.[34] These Articles followed the existing Army practice of requiring that general courts-martial consist of five to thirteen officers.[35] In 1800, Congress repealed the 1799 Articles and adopted more specific naval court-martial procedures.[36] While the 1800 Articles for the Better Government of the Navy continued to provide that five to thirteen

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30. 7 J. CONT. CONG. 392 (1782) ("[A] marine court of enquiry or court-martial for enquiring into or trying of all capital cases, shall consist of at least five commissioned navy and marine officers, two of whom shall be captains, and in all cases not capital it shall consist of three such officers, one of whom shall be a captain in the navy of the United States.").

31. In 1785, the United States sold off the last of its Revolutionary War ships, the frigate ALLIANCE. 1 OFFICE OF NAVAL RECORDS, NAVAL DOCUMENTS RELATED TO THE QUASI-WAR BETWEEN THE UNITED STATES AND FRANCE v (1935).

32. *See generally* JAMES M. MORRIS, HISTORY OF THE U.S. NAVY 25 (1993 ed.).

33. Act of April 30, 1798, ch. 35, 1 Stat. 553. In addition to creating the Department of the Navy, Congress authorized the seizure of armed French vessels. Act of May 28, 1798, ch. 48, 1 Stat. 561. The resulting military conflict, the Quasi-War, lasted from 1798 to 1801. *See generally* MICHAEL A. PALMER, STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE, 1798-1801 (1987). One naval historian concluded that the Quasi-War provided the "first real test for the Federalist navy – a test that it passed with flying colors. Cruising mainly in the Caribbean (where most of the American shipping losses had occurred), the navy defeated two French frigates, captured over a hundred privateers, and recovered more than seventy American merchant vessels." DONALD R. HICKEY, THE WAR OF 1812 at 6-7 (1990).

34. Act of March 2, 1799, ch. 24, 1 Stat. 709. In 1797, Congress adopted legislation that authorized the President, "should he deem it expedient, to cause the frigates United States, Constitution, and Constellation, to be manned and employed." Act of July 1, 1797, ch. 7, § 1, 1 Stat. 523, 523-24. That same act provided:

> [T]he officers, non-commissioned officers, seamen, and marines, belonging to the Navy of the United States, shall be governed by the rules for the regulation of the navy heretofore established by resolution of Congress of the twenty-eighth of November, one thousand seven hundred and seventy-five, as far as the same may be applicable to the constitution and laws of the United States, or by such rules and articles as may hereafter by established.

Id. § 8, 1 Stat. at 525.

officers must sit on general courts-martial, Congress added a requirement that "as many officers shall be summoned on every such court as can be convened without injury to the service, so as not to exceed thirteen."[37] Congress also provided that naval courts-martial, like those in the Army, could adjudge a capital sentence only upon a two-thirds vote.[38]

The House of Representatives debate on the 1800 Navy legislation suggests that a majority believed the Constitution's jury trial guarantee did not constrain Congress when carrying out its constitutional authority to make rules for the government and regulation of the land and naval forces.[39] During the debate, John Randolph of Virginia moved that the legislation be sent back to the Committee of the Whole.

> He said he did this from impressions that some of the provisions of it were unconstitutional, men being to be tried, and suffer by the decision of a court martial, when the Constitution says, article 3, section 2: "The trial of all crimes, except in cases of impeachment, shall be by jury." And the amendments to the Constitution, article 7 [sic], says: "No person shall be held to

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35. Article 47 provided:

> No court-martial, to be held or appointed by virtue of this act, shall consist of more than thirteen, nor less than five persons, to be composed of such commanders of squadrons, captains and sea lieutenants, as are then and there present, and as are next in seniority to the officer who presides; but no lieutenant shall sit on a court-martial, held on a captain, or a junior lieutenant on that of a senior.

1 Stat. at 713.

36. Act of April 23, 1800, ch. 33, 2 Stat. 45.

37. *Id.* at 50 (discussing art. 35). This requirement persisted until the UCMJ's adoption. The naval services' equivalent of the *Manual for Courts-Martial* (*MCM*) during the pre-UCMJ period specifically directed that "[w]hen less than thirteen members are detailed on a general court-martial, the precept [the naval services' equivalent of the convening order] should specifically state that 'no other officer can be detailed without injury to the service.'" NAVAL COURTS & BOARDS " 345 (1937). The convening authority's certification, however, was not subject to review. In the wake of *Martin v. Mott*, Attorney General Roger Taney opined that the "injury to the service" standard "is merely directory of the officer appointing the court; and his decision as to whether that number can be convened without manifest injury to the service, being a matter submitted to his sound discretion, must be conclusive." 2 Op. Att'y Gen. 534, 535 (1832). *See supra* notes 26-28 and accompanying text.

38. Article 41, 2 Stat. at 51.

39. U.S. CONST., art. I, § 2, cl. 14.

> 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"; this, he conceived, prevented Congress ordering any court-martial.
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> Mr. [RANDOLPH] said he had no kind of objection to the bill, but he wished his scruples on these articles to be cleared up to him, or he must vote against it on the ground of unconstitutionality.
>
> Mr. [Josiah] PARKER [of Virginia] said he considered it indispensable that persons in the Navy, as had been always the case in the Army, should be tried for offences by court martial. He believed the objections were fully answered by that part of the Constitution, article 1, section 8: "Congress shall have power to make rules for the government and regulation of the land and naval forces." The "rules and regulations," he supposed to be everything that related to subordination, which he thought was borne out by the exception in the amendment mentioned by the gentleman.
>
> The motion to recommit was lost by a large majority.[40]

Thus, at a very early date, Congress implicitly rejected the view that the Constitution's jury trial guarantee applies to courts-martial. Sixty-six years later, the Supreme Court echoed that conclusion.[41]

B. Court-Martial Reform

While the law governing the Army's court-martial panel size and voting requirements would evolve over time, the law governing the Navy remained static.[42] The Navy's rules for capital courts-martial had little prac-

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40. 10 ANNALS OF CONG. 655-56 (1800).

41. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107 (1866).

42. Aside from an 1850 law abolishing flogging, the only substantial pre-UCMJ revision of the Articles for the Government of the Navy occurred in 1862. *See* Act of Sept. 28, 1850, ch. 80, 9 Stat. 513, 515; Act of July 17, 1862, ch. 204, 12 Stat. 600. The 1862 amendments, however, did not affect the court-martial size or capital sentencing provisions. *See also* REVISED STATUTES, § 1624, art. 39 (1878) (codifying Articles for the Government of the Navy).

tical effect; no more than seventeen sailors and marines[43] have been executed in the Department of the Navy's history–none since 1849.[44] Throughout the Army's history, on the other hand, death sentences have been carried out frequently during wartime and occasionally in times of peace.[45]

Partly as a result of controversy created by a 1917 court-martial that resulted in thirteen African-American soldiers' execution a mere twelve days after their trial ended,[46] the Army's justice system underwent a substantial revision in the wake of World War I. This revision, which Congress enacted in 1920, eliminated the earlier provision that a general court-martial

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43. Congress established the Marine Corps and provided that Marines were subject to the Articles of War when ashore, and subject to the laws of naval discipline when aboard ships. Act of July 11, 1798, ch. 72, 1 Stat. 594. *See* 1 Op. Att'y Gen. 187 (1816); WINTHROP, *supra* note 24, at 97 (noting that the Marine Corps was subject to the Articles of War when detached for service with the Army).

44. *See generally* JAMES E. VALLE, ROCKS & SHOALS 102-42 (1980). The Navy's last execution occurred on 23 October 1849. Five members of the schooner EWING's crew had been sentenced to death for throwing a midshipman in command of a shore boat overboard, then rowing away in an attempt to desert to California's gold fields. At the last moment, the Pacific Squadron's commodore commuted three of the death sentences to one hundred lashes, loss of pay, and confinement at hard labor for the remainder of the sailors' enlistments. The remaining two sailors were hanged from the fore yardarm of the squadron's flagship. *See generally id.* at 105-08.

45. The Department of Justice reports that since 1930, the U.S. Army and Air Force carried out 160 executions. BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT 1979 at 9 n.12 (1980). Three of those executions were Air Force cases. Gary D. Null, *Air Force Executions*, THE REPORTER, March 1996, at 33. The Army has executed 157 soldiers since 1930, the most recent in 1961. BUREAU OF JUSTICE STATISTICS, *supra*, at 9 n.12. The majority of these Army executions, 142, occurred during World War II. Fred Hiatt, *Army Tribunal Overturned on Death Penalty*, WASH. POST, Oct. 12, 1983, at A4. The Army also executed 35 soldiers during World War I. J. Robert Lilly & J. Michael Thomson, *Executing U.S. Soldiers in England, World War II*, 37 BRIT. J. CRIMINOLOGY. 262, 277 (1997). Army documents indicate that the Union Army carried out 267 executions during the Civil War. JOHN M. LINDLEY, A SOLDIER IS ALSO A CITIZEN: THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920 at 204 (1990). One study, however, has indicated that the actual number of executions was greater than this official figure. ROBERT I. ALOTTA, CIVIL WAR JUSTICE: UNION ARMY EXECUTIONS UNDER LINCOLN 187 (1989) ("We can determine without a shadow of a doubt that at least 275 men were executed. Beyond that, it is only conjecture."). Thus, the Army has carried out at least 459 executions since the last Navy execution in 1849.

46. LINDLEY, *supra* note 45, at 20 n.42. The 13 executed soldiers were among 56 tried for offenses including murder and mutiny as a result of a race riot in Houston, Texas. *See generally id.* at 7-21. The court-martial, which was held in Fort Sam Houston's chapel, was the largest murder trial in U.S. history. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975 at 125 (1975). *See generally* ROBERT V. HAYNES, A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917 (1976).

should consist of thirteen members where that number could be assembled without "manifest injury to the service."[47] The 1920 legislation stated instead that a general court-martial could consist of "any number of members not less than five."[48] The same statute increased the vote required for a death sentence from two-thirds to unanimous.[49] For any term of imprisonment exceeding ten years, the voting requirement was increased from the mere majority that had been required since 1775 to "three-fourths of all the members present."[50] For "all other convictions and sentences," the long-standing simple majority requirement was increased to two-thirds.[51] The 1921 *Manual for Courts-Martial* (*MCM*) expressed a preference for small court-martial panels, recommending that general courts-martial consist of no more than nine members.[52]

In 1948, Congress adopted the short-lived Elston Act,[53] which governed Army and Air Force[54] courts-martial until the UCMJ took effect in 1951. The Elston Act's most significant departure from previous practice was to allow, for the first time in U.S. military history, enlisted personnel to serve on courts-martial.[55] The Elston Act gave enlisted accused the right to require that at least one-third of the court-martial's members also be enlisted.[56]

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47. 30 J. CONT. CONG. 316 (1786). *See supra* note 19 and accompanying text.

48. Articles of War of June 4, 1920, ch. 227, 41 Stat. 787, 788.

49. *Id.* art. 43, 41 Stat. at 795-96.

50. *Id.*

51. *Id.*

52. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 7(a) n.1 (1921 ed.). The 1921 *MCM* explained that "it is not expected that appointing authorities will usually detail on a general court-martial many more members than required by the statute." *Id.*

53. Ch. 625, §§ 201-47, 62 Stat. 604, 627-44 (1948) (repealed by the UCMJ); *see generally* GENEROUS, *supra* note 12, at 23-33.

54. Dr. Generous notes that initially some uncertainty existed concerning the Elston Act's applicability to the Air Force. GENEROUS, *supra* note 12, at 31. He explains that President Truman signed the Elston Act into law on June 24, 1948, with an effective date of February 1, 1949. The day after signing the Elston Act, President Truman "signed the Air Force Military Justice Act, which extended the Articles of War to the newly created air service. This statute, which took effect immediately, spoke of 'laws now in effect.' But the laws then 'in effect' were the 1920 Articles of War, not the Elston Act." *Id.* In 1950, the United States Court of Appeals for the Fourth Circuit held that the Elston Act rather than the previous Articles of War applied to the Air Force. Stock v. Dep't of Air Force, 186 F.2d 968, 970-72 (4th Cir. 1950).

55. GENEROUS, *supra* note 12, at 24.

56. Ch. 625, § 203, 62 Stat. 604, 628 (1948).

C. The Uniform Code of Military Justice

The 1920 Army procedures served as the basis for the UCMJ's court-martial size and voting requirements.[57] Under the UCMJ, general courts-martial can consist of any number of members greater than four.[58] With the exception of spying in time of war, for which the death penalty is mandatory,[59] a two-thirds vote is necessary to convict.[60] The members' unanimous concurrence is required[61] to convict a service member of an offense for which death is a mandatory sentence, or to impose a death sentence where the accused is convicted of an offense for which the death penalty is authorized but not mandatory.[62] The UCMJ also included the Elston Act's provision giving enlisted accused the right to have enlisted personnel constitute at least one-third of the court-martial panel.[63] Although the UCMJ has undergone several revisions since its initial adoption, this basic structure remains largely unchanged.[64]

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57. S. REP. NO. 486, 81st Cong., 2d Sess., at 16 (1950). In 1950, naval law still precluded courts-martial with more than 13 members. The Senate Report tersely stated, "The maximum limits of the number of members is believed unnecessary." *Id.* Thus, Congress chose to adopt the procedures under which the Army had been operating since 1920. *See supra* notes 48-51 and accompanying text.

58. UCMJ art. 16(1)(A) (West 1998).

59. UCMJ art. 106. The Supreme Court has held that in civilian systems, mandatory death penalties are unconstitutional. Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion). This has led one commentator to opine that Article 106's mandatory death sentence for spying during time of war is unconstitutional. David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of its Mandatory Death Penalty*, 127 MIL. L. REV. 1 (1990).

60. UCMJ art. 52(a)(2).

61. UCMJ art. 52(a)(1), (b)(1).

62. A total of 15 UCMJ offenses carry a death sentence. UCMJ art. 85 (desertion in time of war), UCMJ art. 90 (assaulting or willfully disobeying superior commissioned officer in time of war), UCMJ art. 94 (mutiny in time of war), UCMJ art. 99 (misbehavior before the enemy), UCMJ art. 100 (subordinate compelling surrender), UCMJ art. 101 (improper use of countersign), UCMJ art. 102 (forcing a safeguard), UCMJ art. 104 (aiding the enemy), UCMJ art. 106 (spying, for which the death penalty is mandatory), UCMJ art. 106a (espionage), UCMJ art. 110 (willful hazarding of a vessel), UCMJ art. 113 (misbehavior of sentinel in time of war), UCMJ art. 118(1) (premeditated murder), UCMJ art. 118(4) (felony murder), UCMJ art. 120 (rape).

63. UCMJ art. 25(c).

64. The only significant change to the military justice system's capital procedures as originally promulgated in 1984 is the addition of a requirement that the members unanimously convict the accused of a capital offense. MANUAL FOR COURTS-MARTIAL, UNITED STATES, Rule for Courts-Martial 1004(a)(2) (1995) [hereinafter MCM]. Congress added this provision to the *MCM* in 1986. *See* MCM, *supra*, 1004(a)(2) analysis. Before this change, a court-martial could impose the death penalty only with the members' unanimous concurrence, but the initial conviction did not require unanimity.

Before 1968, all courts-martial were tried before a panel of members. The Military Justice Act of 1968, which established the position of military judge, allowed the accused the right to elect to be tried by a military judge alone.[65] The right to trial by military judge alone,[66] however, does not apply in capital cases; a military capital case may be tried only before a panel of members.[67]

No special provisions govern the selection of members in capital cases. As in any other general court-martial case, the convening authority[68] is free to detail any number of members greater than four.[69] Counsel for both the government and the defense may make an unlimited number of challenges for cause, and both the government and defense may also exercise one peremptory challenge.[70] If fewer than five members remain after counsel exercise their challenges, the convening authority must appoint additional members to the court-martial.[71]

Several UCMJ provisions affect a capital court-martial's panel size. First, the convening authority has the discretion to decide how many members to detail initially. Second, if an enlisted accused exercises his right to enlisted members, the convening authority must detail additional mem-

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65. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1355 (codified at UCMJ art. 16(1)(B), 2(C) (West 1998)). *See generally* JONATHAN LURIE, PURSUING MILITARY JUSTICE 197-99 (1998).

66. The Court of Military Appeals has characterized the accused's option of electing trial by a military judge alone as "a right." United States v. Sherrod, 26 M.J. 30, 32 (C.M.A. 1988).

67. UCMJ art. 18 (West 1998); MCM, *supra* note 64, R.C.M. 501(a)(1)(A); *Id.* R.C.M. 201(f)(1)(C). The Court of Military Appeals rejected a constitutional challenge to the requirement that capital courts-martial be tried before a panel of members. United States v. Matthews, 16 M.J. 354, 363 (C.M.A. 1983).

68. The convening authority's selection of court-martial members is one of the most frequently criticized aspects of the military justice system. Court-martial members are picked by the same officer who decided to refer the case to a court-martial, rather than being chosen on a random basis. For examples of criticism of the convening authority's selection of court-martial members, see United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring) (contending that the convening authority's selection of court-martial members "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack"); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 19-20 (1991); 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-31.00 (1991) ("Arguably, the most critical and least necessary vestige of the historical origins of the military criminal legal system is the personal appointment of the members by the convening authority."); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343 (1978).

bers, while perhaps removing some of the originally detailed officer members. Third, through challenges for cause and peremptory challenges, the trial counsel, defense counsel, and military judge also affect the panel size. Finally, if after challenges the total number of members falls below five or, if applicable, the proportion of enlisted members falls below one-third, the convening authority will appoint additional members to the court, and another round of challenges will follow. As a result, court-martial panel size can and does vary considerably from case to case.

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69. The European Court of Human Rights concluded that the British military justice system's similar practice of allowing the "convening officer" to hand-pick court-martial members violates the European Convention on Human Rights' requirement for "independent and impartial" criminal tribunals. Findlay v. United Kingdom, 1997 Eur. Ct. H.R. 263 ("In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court-martial which decided Mr. Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr. Findlay's doubts about the tribunal's independence and impartiality could be objectively justified."). The British Parliament has since adopted a substantial revision of the British court-martial system that gives a neutral "court administration officer" the power to select court-martial members. Armed Forces Act, 1996, ch. 46 (Eng.). Minister of Defence Nicholas Soames explained:

> The main features of the changes are as follows: there will be changes in the formal part played in court-martial proceedings by the military chain of command. Its functions, such as settling charges, responsibility for the prosecution and appointing court-martial members, will remain in the services but generally be independent of the chain of command; there will be an enhancement of the part played at court-martial by the judge advocate, who is similar in many ways to a judge in a civilian court; the right for defendants to choose to have their cases tried by court-martial, rather than dealt with summarily by the commanding officer, will be extended; access to the courts-martial appeal court, which is composed of senior civilian judges, will be extended, to enable it to hear appeals against sentence as well as against conviction.

268 PARL. DEB., H.C. (6th ser.) w344-45 (1995). Defence Minister Soames added, "The court-martial system has served the services very well over the years. We believe that the proposals represent a major improvement to the present system and will enable it to continue to fulfill its purpose for a long time to come." *Id.* at w345. *See* J. W. Rant, *The British Court-Martial System: It Ain't Broke, But It Needs Fixing*, 152 MIL. L. REV. 179 (1996) (commentary by the Judge Advocate General of the Armed Forces of the United Kingdom on the European Commission of Human Rights report on *Findlay v. United Kingdom* and the resulting changes in the British court-martial system).

70. MCM, *supra* note 64, R.C.M. 912. In a capital case tried in a United States district court, both the prosecution and the defense are entitled to 20 peremptory challenges. FED. R. CRIM. P. 24(b).

71. MCM, *supra* note 64, R.C.M. 505(c)(2)(B).

III. Jury Size and Voting Requirements

The Sixth Amendment provides, in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."[72] As originally drafted by James Madison and as originally passed by the House of Representatives, the Bill of Rights jury provision contained an express exemption for "cases arising in the land and naval forces."[73] While the House's original version of the Bill of Rights combined the petit and grand jury guarantees into one amendment, the Senate moved the grand jury provision to a different amendment and omitted the petit jury provisions altogether.[74] The exemption for cases arising in the land and naval forces moved, along with the grand jury provision, into the Senate's Seventh Article,[75] which ultimately became the Fifth Amendment.[76]

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72. U.S. CONST. amend. VI.

73. As originally proposed by Madison, what became the Bill of Rights included the following provision:

> The trial of all crimes (except in cases of impeachment, and cases arising in the land and 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, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all cases punishable with loss of life or member, presentment or indictment by a grand jury, shall be an essential preliminary, provided that in cases of crimes committed within any county which may be in possession of an enemy, or in which a general insurrection may prevail, the trial may by law be authorized in some other county of the same state, as near as may be to the seat of the offense.
>
> In cases of crimes committed not within any county, the trial may by law be in such county as the laws shall have prescribed. In suits at common law, between man and man, the trial by jury, as one of the best securities to the rights of the people, ought to remain inviolate.

1 ANNALS OF CONG. 452-53 (Joseph Gales & William W. Seaton eds., 1789), *reprinted in* THE COMPLETE BILL OF RIGHTS § 12.1.1.1.a (Neil H. Cogan ed. 1997) [hereinafter Cogan].

The version that ultimately emerged from the House of Representatives was almost identical to Madison's original. Cogan, *supra*, § 12.1.1.14; *see also* 1 ANNALS OF CONG. 808-09.

74. Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 312 (1957) (noting that "[a]s the amendments stood at this point, there was no petit-jury guarantee and no mention of military cases").

75. Cogan, *supra* note 73, § 7.1.1.14; *see* 1 ANNALS OF CONG. 80.

In order to resolve differences in the House of Representatives' and the Senate's competing drafts of the Bill of Rights,[77] the two chambers appointed a Conference Committee.[78] That Committee revised and adopted a version of the Eighth Article that included a right to an impartial jury but without any reference to courts-martial.[79] The House and Senate adopted this version, which was to become the Sixth Amendment.[80]

This history led one commentator to speculate that the Framers' omission of a military justice exemption to the Sixth Amendment right to trial by jury was "merely an oversight."[81] Another commentator, Colonel Frederick Wiener, on the other hand, maintains that the Framers did not intend any portion of the Sixth Amendment to apply to courts-martial,[82] thus making any specific exemption for the jury trial right unnecessary. Regardless of the correct historical explanation, the Supreme Court has repeatedly indicated that the constitutional right to trial by jury does not apply to courts-

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76. The difference in numbering resulted from the first two proposed amendments' failure to become part of the Bill of Rights. Congress never ratified the first proposed amendment, which dealt with the House of Representatives' size. Cogan, *supra* note 73, at 707 n.1. The second proposed amendment, which limited the manner by which congressional pay could be increased, was ratified as the twenty-seventh amendment in 1992, more than 200 years after it was originally proposed. *See generally* Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORD. L. REV. 497 (1992).

77. Among the primary differences between the House and the Senate was the House's desire for a petit jury guarantee and the Senate's objection to the House proposal's limitations on the geographic area from which the jury could be drawn. Eugene M. Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 409 (1972).

78. Cogan, *supra* note 73, §§ 12.1.1.21, 12.1.1.22; *see* 1 ANNALS OF CONG. 85-86.

79. Cogan, *supra* note 73, § 12.1.1.23.

80. *Id.* §§ 12.1.1.24, 12.1.1.27; *see* 1 ANNALS OF CONG. 948, 90.

81. Van Loan, *supra* note 77, at 411. Van Loan explains:

> By the time the conference committee had been appointed on September 21, 1789, the members of Congress had become weary of their labors and were anxious to return home. Passage of amendments to the Constitution was a major obstacle to adjournment. . . . Perhaps in its haste Congress neglected to notice the ambiguity it had left in regard to the jury and the military.

Id. See Henderson, *supra* note 74, at 305 (opining that the Framers' "failure specifically to write the [court-martial] exception into the sixth amendment was the result of oversight or poor draftsmanship"); *id.* at 301 (opining that "[t]he most logical explanation for the failure to mention courts-martial in [Article III's jury] clause is that it was the result of oversight").

82. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 280-84 (1958).

martial.[83] The military justice system's exemption from the Sixth Amendment right to trial by jury is significant because if the right did apply, the current statutory scheme under which general courts-martial operate would be unconstitutional.

The Burger Court paid several visits to the question of panel size and voting requirements. The Court's first foray into this area came in its 1970 *Williams v. Florida* decision,[84] which upheld Florida's[85] use of six-member juries in non-capital felony cases. The Court appeared to base its holding on its view of how juries function, reasoning:

> To be sure, the number [of jurors] should probably 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. But we find little reason to think that these goals are in any meaningful sense less likely to be achieved when the jury numbers six, than when it numbers twelve, particularly if the requirement of unanimity is retained.[86]

The *Williams* decision provoked an onslaught of criticism from the academic community, as several professors methodically attacked the empirical judgments and the empirical studies underlying the decision.[87]

In 1972, the Supreme Court started down a parallel track when it held that Oregon's system of allowing a conviction upon a twelve-member

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83. *See, e.g.*, O'Callahan v. Parker, 395 U.S. 258, 261 (1969); Solorio v. United States, 483 U.S. 435 (1987); Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) (plurality opinion); Welchel v. McDonald, 340 U.S. 122, 127 (1950); *Ex parte* Quirin, 317 U.S. 1, 39-43 (1942); Kahn v. Anderson, 255 U.S. 1, 8 (1921); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 107 (1866). Commentators have observed, however, that all of the Supreme Court's pronouncements on this issue have been dicta. Comment, Frank J. Chmelik, *The Military Justice System and the Right to Trial by Jury: Size and Voting Requirements of the General Courts-Martial for Service Connected Civilian Offenses*, 8 HASTINGS CONST. L.Q. 617, 639 (1981); Lamb, *supra* note 68, at 132. *See also* United States v. Kemp, 46 C.M.R. 152, 154 (1973) ("[T]he 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.").

84. 399 U.S. 78 (1970).

85. The Sixth Amendment jury trial guarantee is a fundamental right that applies to the states through the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968).

86. *Williams*, 399 U.S. at 100. *Williams* overruled several previous cases holding that the Constitution compels 12 member juries. *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 349 (1898); Maxwell v. Dow, 176 U.S. 581 (1900).

jury's ten-to-two vote was constitutionally permissible.[88] The Court also upheld Louisiana's system of allowing a twelve-member jury to convict in a felony case upon a nine-to-three vote.[89]

Finally, in 1978, the Supreme Court drew a line that states could not cross. *Ballew v. Georgia*[90] held that Georgia's use of five-member juries in criminal cases violated the Sixth Amendment. The following year, in *Burch v. Louisiana*,[91] the Supreme Court held that Louisiana also violated the Sixth Amendment by allowing a six-member jury to reach a verdict by a five-to-one vote.

While the *Ballew*/*Burch* line of cases allowed departure from the traditional twelve-member jury deciding guilt or innocence by a unanimous vote, none of the Supreme Court's jury size cases involved a capital trial. The Supreme Court has never had occasion to consider the constitutionality of fewer than twelve jurors imposing a death sentence because, in fact, no state has adopted such a system.[92] The only jurisdiction in the United States where fewer than twelve lay members can impose a death sentence is the military justice system.

Surprisingly, the CAAF has never discussed the *Ballew*/*Burch* line of cases' applicability to courts-martial.[93] The Tenth Circuit Court of Appeals[94] and two of the military justice system's intermediate appellate courts,[95] on the other hand, have held that these cases do not apply to the military justice system.

Shortly after Congress provided the Supreme Court with direct certiorari jurisdiction over military justice cases,[96] the Court showed some interest in this issue. *Hutchinson v. United States*, the first case in which a writ of certiorari was sought under the authority created by the Military Justice Act of 1983,[97] was a capital case until the Court of Military Appeals set aside the death penalty.[98] Lance Corporal Hutchinson's certiorari petition asked

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87. *See, e.g.*, Peter W. Sperlich, . . . *And Then There Were Six: The Decline of the American Jury*, 63 JUDICATURE 262 (Dec.-Jan. 1980); Michael Saks, *Ignorance of Science Is No Excuse*, 10 TRIAL 18 (1974); Hans Zeisel, . . . *And Then There Were None: Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710 (1974).

88. Apodaca v. Oregon, 406 U.S. 404 (1972).

89. Johnson v. Louisiana, 406 U.S. 356 (1972).

90. 435 U.S. 223 (1978).

91. 441 U.S. 130 (1979).

92. *See* Williams v. Florida, 399 U.S. 78, 103 (1970) (noting that "no state provides for less than 12 jurors" in capital cases).

the Supreme Court to review whether the Fifth Amendment Due Process Clause prohibited convictions for "capital offenses by a two-thirds vote of a court-martial composed of only six members."[99] At Justice Brennan's

93. The CAAF exercises discretionary review except in death penalty cases, where it must review any case in which a Court of Criminal Appeals has affirmed a death sentence, and cases where one of the judge advocates general certifies an issue to the court. UCMJ art. 67 (West 1998). In 1978, the Court of Military Appeals exercised its discretionary jurisdiction to grant review of the court-martial panel size/voting requirement issue. United States v. Lamela, 6 M.J. 11 (C.M.A. 1978). However, before resolving the issue, the court vacated the grant. 6 M.J. 32 (C.M.A. 1978).

In a 1984 death penalty opinion, the court implicitly rejected the *Ballew*/*Burch* issue. United States v. Hutchinson, 18 M.J. 281 (C.M.A. 1984) (summary disposition). In *Hutchinson*, the defense argued that "the appellant was denied due process and equal protection when he was convicted by a nonunanimous vote of a panel composed of only six members." United States v. Hutchinson, Mandatory Brief on Behalf of Accused at 50 (capitalization omitted). Because death penalty cases fall within the Court's mandatory jurisdiction, Lance Corporal Hutchinson could raise the issue without the court granting review. *See* UCMJ art. 67(a)(1). While setting aside Lance Corporal Hutchinson's death sentence on another ground, the court indicated that it found the remaining issues raised in the brief to be "without merit." *Hutchinson*, 18 M.J. at 281.

In a 1976 decision, the court cited *Apodaca v. Oregon*, 406 U.S. 404 (1972), and suggested that "the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process." United States v. McCarthy, 2 M.J. 26, 29 n.3 (C.M.A. 1976). In a 1982 concurring opinion, however, Chief Judge Everett stated, without explanation, that "I am satisfied that [the denial of a motion based on *Burch* and *Ballew* does] not require reversal of appellant's conviction." United States v. Brown, 13 M.J. 381, 381 (C.M.A. 1982) (summary disposition) (Everett, C.J., concurring in the result). *See also* 1 GILLIGAN & LEDERER, *supra* note 68, § 15-40.00 (discussing *Ballew v. Georgia*'s applicability to the military justice system).

94. Mendrano v. Smith, 797 F.2d 1538, 1546-47 (10th Cir. 1986); Dodson v. Zelez, 917 F.2d 1250, 1261 (10th Cir. 1990) (indicating that *Ballew* and *Burch* "are not applicable to military courts-martial").

95. United States v. Hensler, 40 M.J. 892, 900 (N.M.C.M.R. 1994), *aff'd on other grounds*, 44 M.J. 184 (1996); United States v. Rojas, 15 M.J. 902, 919 (N.M.C.M.R. 1983), *set aside on other grounds*, 17 M.J. 154 (C.M.A. 1984) (death penalty case with seven-member panel); United States v. Seivers, 9 M.J. 612 (A.C.M.R. 1980), *aff'd on other grounds*, 9 M.J. 397 (C.M.A. 1980) (summary disposition); United States v. Yoakum, 8 M.J. 763 (A.C.M.R. 1980), *aff'd*, 9 M.J. 417 (C.M.A. 1980) (summary disposition); United States v. Guilford, 8 M.J. 598, 601-02 (A.C.M.R. 1979); United States v. Corl, 6 M.J. 914, 915 (N.C.M.R. 1979), *aff'd on other grounds*, 8 M.J. 47 (C.M.A. 1979) (summary disposition); United States v. Meckler, 6 M.J. 779 (A.C.M.R. 1978); United States v. Wolff, 5 M.J. 923, 924-25 (N.C.M.R. 1978); United States v. Montgomery, 5 M.J. 832, 834 (A.C.M.R. 1978), *petition denied*, 6 M.J. 89 (C.M.A. 1978). One commentator has argued that the Supreme Court's jury size and voting cases should apply to courts-martial. Cohen, *supra* note 14, at 9; *see also* Rubson Ho, *A World that Has Walls: A Charter Analysis of Military Tribunals*, 54 U. TORONTO FAC. L. REV. 149, 177-79 (1996) (criticizing the trial of Canadian courts-martial before panels with fewer than 12 members).

request, the case was put on the Supreme Court's "discuss list."[100] The Court, however, denied certiorari.[101]

Lance Corporal Hutchinson's petition marked the high point of the Supreme Court's interest in the applicability of its jury size precedent to courts-martial. Two subsequent certiorari petitions that raised the issue were denied without being included on the Court's discuss list.[102] While no definitive case law from either the CAAF or the Supreme Court addresses the issue, *Ballew* and *Burch* are treated as inapplicable to the military justice system.

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96. *See* The Military Justice Act of 1983, Pub. L. No. 98-209, § 19, 97 Stat. 1393, 1405-06 (codified as amended at UCMJ art. 67a, 28 U.S.C. § 1259 (1994)) (expanding the Supreme Court's certiorari jurisdiction to include direct appeals in which the Court of Military Appeals had granted review, direct appeals falling within the Court of Military Appeals' mandatory jurisdiction, and cases in which the Court of Military Appeals granted extraordinary relief). Before 1983, military cases had sometimes come before the Supreme Court through collateral attacks, such as federal habeas corpus proceedings. *See generally* Richard D. Rosen, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5 (1985).

97. Petition for a Writ of Certiorari, Hutchinson v. United States, 469 U.S. 981 (1984) (84-254). Hutchinson filed his petition August 15, 1984. The Military Justice Act of 1983 had taken effect on August 1, 1984. Pub. L. No. 98-209 § 12(a)(1), 97 Stat. 1393, 1407 (1983).

98. United States v. Hutchinson, 18 M.J. 281 (C.M.A. 1984) (summary disposition). The court relied on United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), to set aside the death sentence.

99. *Hutchinson*, 469 U.S. at 981. Under a 1986 amendment to the R.C.M., a death sentence can no longer be imposed unless the members unanimously convict the accused of a death-eligible offense. MCM, *supra* note 64, R.C.M. 1004(a)(2).

100. Discuss List #2 (October 30, 1984) (available in Thurgood Marshall Papers, Library of Congress, Box 356, Folder 1). The discuss list, as the name suggests, determines which certiorari petitions will be discussed at the Court's conferences. The process begins with the Chief Justice circulating the initial list; any Justice may add a case to the list. "Approximately 30 percent of the filed cases reach the discuss list. The remaining requests for review are rejected, without further consideration." THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 228 (Kermit L. Hall, ed. 1992); *see also* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 6-7, 227-30 (7th ed. 1993).

101. *Hutchinson*, 469 U.S. at 981. Unfortunately, neither Justice Marshall's nor Justice Brennan's papers record the vote on Lance Corporal Hutchinson's petition. Four votes are required for a grant of certiorari. *See generally* STERN ET AL., *supra* note 100, at 230-33.

IV. The Military Death Penalty–A Procedural Overview

In 1983, the Court of Military Appeals decided the landmark case of *United States v. Matthews*,[103] which invalidated the existing military death penalty system because it did not adequately guide the sentencer's discretion. Shortly after the *Matthews* ruling, President Ronald Reagan promulgated a new military death penalty scheme, which is codified as amended in Rule for Courts-Martial (R.C.M.) 1004.

Rule for Courts-Martial 1004 provides that a court-martial can impose a death sentence only if the government pleads and proves at least one specified "aggravating factor."[104] Unless the members unanimously conclude that the government has proven an aggravating factor beyond a reasonable doubt, the court-martial cannot impose a death sentence.[105]

If the members unanimously find at least one aggravating factor, they must then balance the aggravating factor or factors and other aggravating circumstances against any mitigating circumstances. Unless the members unanimously conclude that all of the evidence in aggravation substantially

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102. The first question presented in the certiorari petition in *Garwood v. United States* was "[w]hether a military accused is denied his right to due process of law under the fifth amendment when he is convicted of non-petty offenses by a two-thirds vote of a general court-martial composed of only five members." Garwood v. United States, Petition for a Writ of Certiorari at i, 474 U.S. 1005 (1985) (No. 85-175). The case was not included on the discuss list and the Court denied certiorari. Thurgood Marshall Papers, Library of Congress, Box 543, Folder 5; 474 U.S. 1005 (1985) (order denying certiorari). In *Delacruz v. United States*, the second question presented in the certiorari petition was, "Does a defendant charged with common law murder have a constitutional right to be acquitted if only five members of a seven-member panel vote for a guilty verdict?" Delacruz v. United States, Petition for a Writ of Certiorari at 1, 481 U.S. 1052 (1987) (No. 86-1675). *Delacruz* was not included on the discuss list and the Court denied certiorari. Thurgood Marshall Papers, Library of Congress, Box 548, Folder 8; 481 U.S. 1052 (1987) (order denying certiorari).

103. 16 M.J. 354 (C.M.A. 1983).

104. MCM, *supra* note 64, R.C.M. 1004(c) (setting out 23 aggravating factors). The Department of Defense Joint Service Committee on Military Justice has proposed an additional aggravating factor in cases where a murder victim is 14-years-old or younger. 62 Fed. Reg. 24640, 24642 (1997) (to be codified at R.C.M. 1004(c)(7)(K)) (proposed April 29, 1997).

105. MCM, *supra* note 64, R.C.M. 1004(a)(4).

outweighs the mitigating circumstances,[106] the court-martial cannot impose a death sentence.[107]

In 1986, President Reagan revised R.C.M. 1004 and imposed a third prerequisite for a capital sentence: a court-martial can adjudge a death sentence only if the members unanimously find that the accused is guilty of a death-eligible offense.[108]

The CAAF has established a fourth prerequisite by holding that even if the members unanimously find an aggravating factor and determine that the aggravating circumstances substantially outweigh the mitigating circumstances, any member has the discretion to vote for life.[109] Thus, in essence, the members must unanimously conclude that death is an appropriate sentence in the case. At any one of these four stages, a single member has the ability to preclude the court-martial panel from imposing a death sentence.

Because of the unanimity requirement, a court-martial's decision whether to impose a death sentence may be greatly affected by the number of members. Common sense and elementary statistical analysis suggest that the larger the court-martial panel, the less likely it is to reach the four unanimous conclusions necessary to impose a death sentence.

V. The Lack of a Twelve Member Requirement

The Supreme Court has noted that "no state provides for less than [twelve] jurors [in capital cases]."[110] This suggests that the Court implicitly recognizes the value of the larger body as a means of legitimizing society's decision to impose the death penalty. Despite this uniform civilian practice to the contrary, capital courts-martial can be, and often are, tried

106. In *United States v. Loving*, the CAAF held that the "substantially outweigh" standard "merely requires court members to tip the balance against the death penalty in close cases." 41 M.J. 213, 278-79 (1994), *aff'd on other grounds*, 517 U.S. 758 (1996).

107. MCM, *supra* note 64, R.C.M. 1004(a)(4)(C).

108. Exec. Order No. 12,550 (Feb. 19, 1986) (codified at R.C.M. 1004(a)(2)). Before this change, unless an offense carried a mandatory death sentence, a conviction by a two-thirds majority was sufficient for the case to remain death-eligible.

109. *Loving*, 41 M.J. at 276-77 (stating, "We agree with defense counsel that the military death penalty procedures give the court-martial the absolute discretion to decline to impose the death penalty even if all the gates toward death-eligibility are passed").

110. Williams v. Florida, 399 U.S. 78, 103 (1970).

before panels with fewer than twelve members. In fact, five of the seven service members on death row today were tried before court-martial panels ranging in size from six to ten.[111] Worse yet, a five-member panel can try a capital court-martial, although a five-member jury would be impermissible for any civilian offense carrying a sentence greater than confinement for six months.[112] Nevertheless, the CAAF has rejected constitutional challenges to the military's departure from this universal civilian practice and the Supreme Court has yet to rule on the issue.[113]

Any challenge to panel size based on the Sixth Amendment right to jury trial is doomed by the considerable body of case law denying service members protection under that right.[114] Several alternative constitutional arguments could be advanced, including challenges based on the Eighth Amendment heightened reliability requirement, the Fifth Amendment Due

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111. *See supra* note 5. The military justice system may even prevent conscientious convening authorities from guaranteeing the protection of a twelve-member panel in capital courts-martial. In *United States v. Parker*, eight members remained following voir dire and challenges. The convening authority agreed to a defense request to appoint additional members to ensure that twelve members would ultimately hear the case. United States v. Parker, No. 95-1500, Record at 475 (on file with the Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.). The military judge, however, refused to allow the appointment of additional members, ruling that R.C.M. 505(c)(2)(B) "prohibits the addition of new members after assembly unless the court is below quorum. Quorum is five. Such a procedure by the convening authority would be improper and in violation of the manual. I cannot permit it, or I would risk reversal." Record at 476. The military judge added:

> I would also state for the record for anyone who is concerned about the constitutionality of the death penalty with less than 12 members, I would suggest that they review the Florida statute. That scheme has been approved many times by the U.S. Supreme Court, and although there is a requirement to have a unanimous verdict of 12 members to convict, to adjudge death in Florida you only need 7 of 12; and that very low percentage is much less of a burden for the government than getting eight out of eight which is required in this case since we have eight members.

Id. at 476-77.

The military judge, however, misunderstood Florida death penalty procedures. In fact, the jury cannot "adjudge death" in Florida; rather, the jury makes a recommendation to the trial judge, who is the actual sentencing authority. *See supra* note 4.

112. Ballew v. Georgia, 435 U.S. 223 (1978); Baldwin v. New York, 399 U.S. 66 (1970) (plurality) (holding that the constitutional right to jury trial attaches to cases in which confinement for more than six months is an authorized punishment).

113. *See infra* note 154 and accompanying text.

114. *See supra* note 83 and accompanying text.

Process Clause, and the Fifth Amendment equal protection guarantee. No court, however, is likely to accept any of these arguments.

A. The Eighth Amendment Heightened Reliability Requirement

Although the Supreme Court has indicated that the twelve-member jury is "a historical accident,"[115] reasons exist to believe that such juries are superior to smaller ones. In his *Ballew* opinion,[116] Justice Blackmun wrote, "[R]ecent empirical data suggest that progressively smaller juries are less likely to foster effective deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts."[117] He also found that "[g]enerally, a positive correlation exists between group size and the quality of both group performance and group productivity."[118] Justice Blackmun ultimately concluded that

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115. *Williams*, 399 U.S. at 103. The Court explained:

> 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, but they were all brought forward after the number was fixed, and rest on little more than mystical or superstitious insights into the significance of "12." Lord Coke explained 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. at 87-90 (internal footnotes omitted).

116. The *Ballew* Court unanimously concluded that the Constitution does not permit five-member juries. But while Justice Blackmun delivered the judgment of the Court, Justice Stevens was the only other Justice to clearly join in that opinion. Ballew v. Georgia, 435 U.S. 223, 245 (1978) (Stevens, J., concurring). Justice White concurred in the judgment on the ground that "a jury of fewer than six persons would fail to represent the sense of community and hence not satisfy the fair cross-section requirement of the Sixth and Fourteenth Amendments." *Id.* (White, J., concurring). Justice Powell, joined by Chief Justice Burger and Justice Rehnquist, concurred in the judgment while criticizing Justice Blackmun's "heavy reliance on numerology derived from statistical studies." *Id.* at 246 (Powell, J., concurring). Justice Brennan, joined by Justices Stewart and Marshall, joined Justice Blackmun's opinion "insofar as it holds that the Sixth and Fourteenth Amendments require jurors in criminal trials to contain more than five persons." *Id.* (Brennan, J., concurring). It is unclear whether Justices Brennan, Stewart, and Marshall agreed with Justice Blackmun's reasoning.

117. *Ballew*, 435 U.S. at 232.

these studies suggest that juries with fewer than six members are impermissible. One analyst has opined, however, that Justice Blackmun did not follow the empirical evidence to its logical conclusion. Professor Kaye contends that the empirical findings upon which Justice Blackmun relied also "create grave doubts about the proper functioning of the six-member jury."[119] Indeed, Justice Blackmun cited studies that found twelve-member juries were superior to six-member juries.[120]

The CAAF has recognized that the Eighth Amendment requires "heightened . . . reliability in capital punishment cases."[121] The military justice system's departure from the twelve-member civilian standard may appear vulnerable under this heightened reliability requirement because, as Justice Blackmun suggested in *Ballew*, smaller panels may be less reliable than larger ones.[122]

Much of Justice Blackmun's reasoning in *Ballew*, however, is inapplicable to courts-martial. For example, Justice Blackmun's conclusion that "progressively smaller juries are less likely to foster effective group delib-

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118. *Id*. at 232-33.

119. David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIF. L. REV. 1004, 1025 (1980). Professor Kaye disputes Justice Blackmun's suggestion that six-to-eight member juries may be optimal. *Id.* at 1025-32. Professor Kaye ultimately rejects as arbitrary any numerical line drawing as inherently arbitrary. *Id*. at 1033. Instead, he advocates a twelve-member jury based upon "the clear mandate of history." *Id.* at 1033. In the military context, however, history provides no such "clear mandate." *See supra* notes 12-40 and accompanying text.

120. *Ballew*, 435 U.S. at 234-35 (citing MICHAEL J. SAKS, JURY VERDICTS: THE ROLE OF SIZE AND SOCIAL DECISION RULE 86-87 (1977); HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 460 (1966); Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 680 (1975)).

121. United States v. Loving, 41 M.J. 213, 278 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). In *Loving*, the CAAF applied *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion), to find this heightened reliability requirement. The Supreme Court's review of *Loving*, however, casts some doubt over *Woodson*'s applicability to courts-martial. Justice Kennedy's majority opinion noted that "we shall assume that *Furman* and the case law resulting from it are applicable to the crime and sentence in question." 517 U.S. at 755; *see also id.* at 777-79 (Thomas, J., concurring) (opining that the Supreme Court's Eighth Amendment jurisprudence does not apply to capital courts-martial). Despite the Supreme Court's failure to indicate definitively that its Eighth Amendment capital precedent applies to the military justice system, the Court of Military Appeals resolved that question in *Matthews*. United States v. Matthews, 16 M.J. 354 (C.M.A. 1983) (holding that "a service member is entitled both by [Article 55] and under the Eighth Amendment to protection against 'cruel and unusual punishments,'" subject to the possibility of some limitations in the Eighth Amendment applicability resulting from military necessity).

122. *Supra* note 117 and accompanying text.

eration,"[123] relied in part on the importance of a large group to remember important details "[b]ecause most juries are not permitted to take notes."[124] This reasoning is simply inapplicable to courts-martial, where members generally may take notes.[125]

Two intermediate military appellate courts have noted other distinctions between court-martial panels and the juries at issue in *Ballew.* The Army Court of Military Review observed that unlike jurors, court-martial members "are drawn exclusively from the accused's own profession based on specialized qualifications (one of which is judicial temperament), with specialized knowledge of the profession."[126] Additionally, unlike most jurors, court-martial members are allowed to propose questions for witnesses.[127] The Navy Court of Military Review pointed to another distinction: while large juries increase the likelihood of obtaining minority representation through the random selection process, court-martial panels are not chosen randomly.[128] And while a military accused does not have a right to a panel consisting of "a representative cross-section of the military population,"[129] convening authorities may exercise their discretion in appointing members to provide for minority representation to obtain "a fair representation of a substantial part of the community."[130] Additionally, the military rank structure may have an effect on deliberations and voting with no counterpart on civilian juries. Absent the unlikely event of empirical research concerning how court-martial panels operate, no basis will exist for determining the extent to which *Ballew*'s reasoning applies to the military justice system.

Even more fundamentally, *Ballew* specifically held that six-member juries are constitutionally permissible.[131] While a capital court-martial panel with only five members may be vulnerable to attack through an Eighth

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123. *Ballew*, 435 U.S. at 232.

124. *Id.* at 233.

125. *See* MCM, *supra* note 64, R.C.M. 921(b) ("Unless otherwise directed by the military judge, members may take with them in deliberations their notes, if any . . . ."); *id.* R.C.M. 1006(b).

126. United States v. Guilford, 8 M.J. 598, 602 (A.C.M.R. 1979).

127. *Id.*

128. United States v. Wolff, 5 M.J. 923, 925 (N.C.M.R. 1978). *See Ballew*, 435 U.S. at 237 (noting that "the opportunity for meaningful and appropriate representation does decrease with the size of panels").

129. United States v. Santiago-Davila, 26 M.J. 380, 389 (C.M.A. 1988).

130. United States v. Crawford, 35 C.M.R. 3, 13 (1964).

131. Ballew v. Georgia, 435 U.S. 223, 239 (1978) ("[W]e adhere to, and reaffirm our holding in *Williams v. Florida.*").

Amendment heightened reliability application of the *Ballew* rationale, larger panels are not. Thus, even if the Supreme Court viewed the *Ballew* rationale as applicable to courts-martial, only death sentences imposed by five-member panels would be invalidated.[132]

B. The Fifth Amendment Due Process Clause

A due process challenge to a capital court-martial with fewer than twelve members would likely fare even worse than the Eighth Amendment heightened reliability argument. The Supreme Court has established an extremely high threshold for finding a due process violation in the military justice system. The Court has noted that "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings."[133] That protection, however, is subject to the requirement that "in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces."[134] Under this deferential standard of review, a court-martial procedure will be struck down only on the basis of a concern so "extraordinarily weighty as to overcome the balance struck by Congress."[135]

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132. No one on military death row today was tried by a court-martial with fewer than six members. *See supra* note 5. One post-*Matthews* Army capital case was tried before a five-member court-martial panel, but a death sentence was not imposed. Record, United States v. Tarver, 29 M.J. 605 (A.C.M.R. 1989), *petition denied*, 32 M.J. 316 (C.M.A. 1991) (No. ACMR 87-01179) (on file at Washington National Records Center, Suitland, Maryland). In another post-*Matthews* Army capital case, the government and the defense agreed to a six-member quorum. Record at 412, United States v. Dock, 35 M.J. 627 (A.C.M.R. 1992), *aff'd*, 40 M.J. 112 (C.M.A. 1994) (No. ACMR 0446898) (on file at Washington National Records Center, Suitland, Md.). A seven-member panel sentenced Private First Class Dock to confinement for life. The agreement to a six-member quorum may, however, have been unenforceable. *See* MCM, *supra* note 64, R.C.M. 505(c)(2)(B); *see generally supra* note 111.

133. Weiss v. United States, 510 U.S. 163, 176 (1994).

134. *Id*. at 177. U.S. CONST. art. I, § 8. The due process standard governing challenges to states' criminal procedures is also quite deferential. A criminal procedure will not be invalidated under the Due Process Clause "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" Medina v. California, 505 U.S. 437, 445-46 (1992) (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

135. *Weiss*, 510 U.S. at 177-78 (internal quotation marks omitted).

The Supreme Court has indicated that historical practice is critical when assessing whether a challenged practice violates fundamental fairness.[136] While the Court cautioned that "[w]e do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today,"[137] the Court added that history is "a factor that must be weighed" in the due process "calculation."[138]

As we have seen, the history of court-martial panel size is rather muddled.[139] During the Revolutionary War, Army courts-martial were required to consist of thirteen members, while naval courts-martial initially required a minimum of six members, later reduced to five for capital cases. Before the Constitution's ratification, the minimum size of Army courts also decreased to five members. While up to thirteen members were to be detailed unless manifest injury to the service would result, the Supreme Court's 1827 *Martin v. Mott* decision[140] effectively reduced that caveat to a mere recommendation. In 1920, the preference for thirteen member courts was removed entirely from the Articles of War,[141] though it persisted in the Articles for the Government of the Navy until 1951.[142]

Even considering Attorney General Wirt's 1819 opinion that thirteen members should be appointed in capital cases,[143] the Supreme Court would likely hold that this history does not speak with sufficient clarity "to overcome the balance struck by Congress."[144] The Due Process Clause, therefore, is an unlikely vehicle for establishing an accused's right to a twelve-member panel in a capital court-martial case.

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136. *Id.* at 177, 181.

137. *Id.* at 177.

138. *Id.* at 178.

139. *See supra* notes 12-40 and accompanying text.

140. 25 U.S. (12 Wheat.) 19 (1827); *see supra* notes 26-28 and accompanying text.

141. *See supra* note 48 and accompanying text.

142. 34 U.S.C. § 1200, art. 39 (1946) (repealed by the UCMJ) (providing, "A general court-martial shall consist of not more than thirteen nor less than five commissioned officers as members; and as many officers, not exceeding thirteen, as can be convened without injury to the service, shall be summoned on every such court").

143. *See supra* note 23 and accompanying text.

144. Weiss v. United States, 510 U.S. 163, 177-78 (1994).

C. The Fifth Amendment Equal Protection Guarantee

An alternative potential basis for establishing a constitutional right to a twelve-member capital court-martial panel is the equal protection guarantee.[145] In two instances, courts will subject governmental classifications to strict scrutiny: (1) if the classification discriminates on the basis of a protected classification, such as race, alienage, or national origin; or (2) if the classification interferes with the exercise of a fundamental right.[146] Where a classification does not burden a protected group or interfere with a fundamental right, it will be sustained if it satisfies the rational basis test.[147] Affixing the appropriate standard of review usually determines an equal protection challenge's outcome: "[s]trict scrutiny is virtually always fatal to the challenged law," while "[t]he rational basis test is enormously deferential to the government and only rarely have laws been declared unconstitutional for failing to meet this level of review."[148] A rational basis review is particularly unlikely to result in invalidation of a congressional classification concerning the military. As the Supreme Court noted in an equal protection challenge to the Selective Service System's registration of men, but not women, "perhaps in no other area has the Court accorded Congress greater deference" than in cases concerning "Congress' authority over national defense and military affairs."[149]

A court applying this deferential standard would almost certainly reject an equal protection challenge to a capital court-martial with fewer than twelve members. Military status is clearly neither a suspect nor quasi-

145. The Equal Protection Clause appears only in the Fourteenth Amendment, which does not apply to the federal government. Nevertheless, the Supreme Court has held that the Fifth Amendment Due Process Clause includes an equal protection guarantee. Bolling v. Sharpe, 347 U.S. 497 (1954). *See generally* Kenneth Karst, *The Fifth Amendment Guarantee of Equal Protection*, 55 N.C.L. REV. 540 (1977); *see also* United States v. Santiago-Davila, 26 M.J. 380, 390 (C.M.A. 1988) (relying on the equal protection guarantee to apply Batson v. Kentucky, 476 U.S. 79 (1986), to the military).

146. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.1 (1997); DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 13-3(N)(1) (4th ed. 1996). In cases of discrimination based on quasi-suspect classifications, such as gender and illegitimacy, the courts apply a middle-tier level of scrutiny. *Id.*

147. CHEMERINSKY, *supra* note 146, § 9.2; SCHLUETER, *supra* note 146, § 13-3(N)(1).

148. CHEMERINKSY, *supra* note 146, § 9.1.

149. Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981); *see* Schlesinger v. Ballard, 419 U.S. 498 (1975) (rejecting equal protection challenge to Navy policy establishing different promotion rules for male and female officers). The Court may, however, choose to abandon this deferential standard when reviewing capital courts-martial. *See infra* note 192 and accompanying text (discussing Justice Stevens' concurrence in *Loving v. United States*, 517 U.S. 748, 774 (1996)).

suspect classification.[150] Thus, the only means of obtaining heightened scrutiny would be to show that the failure to provide twelve-member panels offends a "principle of justice so rooted in the traditions and conscience of our people as to be ranked fundamental."[151]

The Supreme Court has never announced a constitutional right to a twelve-member capital jury. Rather, the Court has merely recognized that no state allows smaller juries to impose a death sentence,[152] a fact that eliminates any opportunity for the Court to decide whether a death sentence imposed by a smaller jury would be unconstitutional. Nevertheless, in light of the considerable body of Supreme Court case law allowing judges rather than juries to impose a death sentence, it is doubtful that a twelve-member capital sentencing panel can truly be considered fundamental.

D. Judicial Consideration of the Twelve-Member Panel Issue

Constitutional attacks on capital court-martial panel size have thus far failed to win judicial support. The CAAF has flatly rejected the argument that the Constitution compels twelve-member capital court-martial panels,[153] and the Supreme Court has twice declined to consider the issue.[154] A denial of certiorari, of course, is not a ruling on the merits of a claim,[155] so these denials do not necessarily mean that the Court would decline to consider the twelve-member panel issue in a future case. Nevertheless, the lack of an established right to a twelve-member jury in capital cases, coupled with judicial deference to Congress concerning military justice matters, suggests

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150. *See* CHEMERINSKY, *supra* note 146, § 9.7 (noting that "the only types of discrimination for which the Supreme Court has approved either intermediate or strict scrutiny" are classifications based on "race, national origin, gender, alienage, or legitimacy").

151. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

152. Williams v. Florida, 399 U.S. 78, 103 (1970).

153. United States v. Curtis, 32 M.J. 252, 267-68 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991); United States v. Loving, 41 M.J. 213, 287 (1994), *aff'd on other* grounds, 517 U.S. 748 (1996). *Curtis* rejected this challenge in light of other factors that the court viewed as promoting fairness, such as the military judge's power to recommend clemency and the intermediate military appellate courts' review of the facts, law, and sentence appropriateness in every case. 32 M.J. at 268. *Loving* simply stated, "This issue was resolved against appellant in *United States v. Curtis*, 32 M.J. at 267-68." 41 M.J. at 287.

In *Curtis*, while agreeing with the majority opinion that the Constitution does not mandate "a 12-member panel in a military capital case," then-Chief Judge Sullivan offered his "personal view" that "in peacetime, a service member in a capital case should be tried by a 12-member court-martial." *Curtis*, 32 M.J. at 271 (Sullivan, C.J., concurring); *see also Loving*, 41 M.J. at 310 (Sullivan, C.J., concurring in part and in the result).

that the Supreme Court would ultimately uphold trial of capital cases before courts-martial with fewer than twelve members. The likelihood of such a ruling on the twelve-member panel issue, however, does not mean that the military's panel size rules are free from constitutional defects.

VI. The Variable Size of Capital Court-Martial Panels

Far more disturbing than the lack of a twelve-member guarantee is the variable number of members on capital court-martial panels. While a general court-martial must consist of at least five members,[156] there is no maximum number.[157] Thus, the size of courts-martial panels varies from case to case. This variability introduces tremendous unfairness into the capital court-martial system.

A. The Effect of Variable Panel Size on Non-Capital Cases

In a non-capital case, the absence of a fixed number of members can benefit the accused. For example, to win an acquittal in a six-member court-martial, the defense needs at least three not-guilty votes, or fifty percent of the court-martial members. In a five-member court-martial, on the other hand, the accused can secure an acquittal with just two not-guilty votes, or forty percent of the court-martial members. The percentage of members necessary to secure an acquittal is even smaller for eight-member and eleven-member panels.[158] Because the defense ordinarily has the option of exercising the last peremptory challenge in a court-martial,[159] it

154. *Curtis*, 502 U.S. at 952 (order denying certiorari); *Loving*, 515 U.S. at 1191 (order granting certiorari). In *Curtis*, the Solicitor General opposed the certiorari petition solely on grounds of ripeness. Memorandum for the United States in Opposition at 3-4, Curtis v. United States, 502 U.S. 952 (1991) (No. 91-99) ("Whatever the merits of petitioner's claims, they are not ripe for review by this Court."). Justices White and Blackmun dissented from the denial of certiorari in *Curtis*, but they did not indicate whether they wished to hear the issue relating to court-martial panel size or the other issue raised by the petition, which concerned the separation of powers question ultimately resolved by *Loving. See* 517 U.S. 748 (1996). In *Loving*, the Solicitor General addressed the merits of the twelve-member panel issue in opposing certiorari. Brief for the United States in Opposition at 20-24, Loving v. United States, 517 U.S. 748 (1996) (No. 94-1966). *See also* Hutchinson v. United States, 469 U.S. 981 (1984) (order denying certiorari); *supra* notes 97-101 and accompanying text.

155. *See generally* STERN ET AL., *supra* note 100, at 239-43.

156. UCMJ art. 18 (West 1998).

157. *See supra* notes 57-58 and accompanying text.

will often be within the defense counsel's power to improve the chances of victory by changing the percentage of members necessary to secure an acquittal.

B. The Effect of Variable Panel Size on Capital Cases

Unlike non-capital cases, the lack of a fixed number of members on capital court-martial panels typically hurts the accused.[160] Almost every time a member is removed from the court through either a challenge for cause or a peremptory challenge, the number of votes that the government must obtain to secure a death sentence is reduced.[161] Thus, a capital accused has a statistical incentive to maximize the size of the court-martial panel.

Air Force Court of Criminal Appeals Judge C. H. Morgan's concurring opinion in *United States v. Simoy*[162] addressed the issue of panel size in a military death penalty case. In *Simoy*, the defense counsel succeeded in

158. In an eight-member court-martial, an accused is acquitted if three members, accounting for 37.5% of the court-martial panel, vote not guilty. In an eleven-member court-martial, an accused is acquitted if four members, accounting for 36.36% of the court-martial panel, vote not guilty. To be acquitted by a twelve member court-martial, an accused must win five votes, accounting for 41.67% of the panel. Thus, in a non-capital case, a twelve member panel actually disadvantages the accused compared to an eleven member panel. Because the percentage of members necessary for a conviction varies according to the number of members on the panel, this aspect of court-martial practice has been characterized as a "numbers game." United States v. Newson, 29 M.J. 17, 19 n.1 (C.M.A. 1989). *See generally* Cohen, *supra* note 13, at 16-17 n.65; Smallridge, *supra* note 68, at 376; Lamb, *supra* note 68, at 132 n.274.

159. MCM, *supra* note 64, R.C.M. 912(g).

160. Some capital cases will feature vigorous contention over guilt or innocence, or a defense attempt to secure a conviction under a lesser included offense rather than under a death-eligible offense. In one Army capital court-martial tried in 1988, the accused was acquitted of all charges. Record, United States v. Chrisco (No. ACMR 8800382) (tried February 4, 1988) (on file at Washington National Records Center, Suitland, Maryland). In such courts-martial where guilt or innocence is the primary issue, defense counsel may choose to emphasize a favorable percentage over a larger panel.

161. An exception is where the exercise of a challenge will require the appointment of additional members. This occurs when a challenge will reduce the number of members below the jurisdictional minimum of five or, in cases where the accused has elected to be tried by a panel including enlisted members, when the exercise of a challenge reduces the percentage of enlisted members below one-third of the court. In such cases, the total number of members ultimately seated in the case may increase as a result of the challenge.

162. 46 M.J. 592 (A.F. Ct. Crim. App. 1996) (en banc), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence).

removing three members through challenges for cause. The trial counsel exercised the government's peremptory challenge, after which the defense counsel used his peremptory challenge to remove a fifth member. The original panel of thirteen members was reduced to eight.[163] Judge Morgan wrote:

> Little mathematical sophistication is required to appreciate the profound impact in this case of reducing the court-martial panel size. To use a simple metaphor–if appellant's only chance to escape the death penalty comes from his being dealt the ace of hearts from a deck of fifty-two playing cards, would he prefer to be dealt thirteen cards, or only eight? If he had been made to understand the algorithm of his trial court in those terms, would he have consented to his counsel's connivance in reducing the number of cards he was dealt?
>
> People are not playing cards, of course. Human behavior is more complex, and there is a chance no "ace of hearts" existed in the entire military community who would have voted against the death penalty, much less among the challenged five members. But why take a chance and reject a draw that may turn out to be that ace? Simple arithmetic tells us that the chances of finding such a person improve linearly with each additional individual placed into the pool. Each challenge of an individual "spots" the prosecution one vote, and becomes in essence, a vote for death. Instead of having to convince thirteen people that appellant deserved death in three different votes, the government only had to convince eight, a considerably simplified task.[164]

Judge Morgan observed that the military system is fundamentally different than civilian jurisdictions. Because civilian juries have a fixed number of members, those jurors who are "challenged off *are replaced*. A defendant considering challenging a juror can be assured that the decision to do so will not correspondingly reduce the size of his jury."[165] In the mil-

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163. *Id.* at 625 (Morgan, J., concurring).

164. *Id.* at 625-26 (Morgan, J., concurring). Judge Morgan raised this issue in the course of deciding whether the defense counsel had been ineffective when he peremptorily challenged a member. Judge Morgan ultimately determined that the defense could not make an adequate showing that the exercise of the peremptory challenge changed the court-martial's outcome. *Id.* at 628 (Morgan, J., concurring).

165. *Id.* at 627 (Morgan, J., concurring).

itary, on the other hand, in most cases the removal of a member simply reduces the size of the panel that will ultimately hear the case.[166]

This reality may greatly influence the defense's tactical decisions. A defense counsel who is attempting to obtain a large panel will not engage in voir dire, with the exception of questions designed to rehabilitate any member who appears vulnerable to a challenge for cause by either the government or the defense. After all, it does the defense little good to discover that a member is biased against the accused. An accused whose primary goal is to avoid the death penalty may choose to leave biased members on the panel rather than reduce the panel size by removing them even if only a minuscule chance exists that they could overcome their bias and vote for the defense. On the other hand, if the defense's voir dire reveals a bias against the government, or a moral qualm against the death penalty,[167] then the prosecution would be able to improve its chances of success by reducing the court-martial panel's size. Even if the defense counsel does not intend to exercise challenges, revealing a bias against the accused could result in a smaller panel, as the military judge might remove the member *sua sponte*,[168] or the trial counsel might attempt to have the member removed. Vigorous voir dire thus carries risks for the defense with little countervailing benefit.

A defense counsel attempting to obtain the largest possible panel would obviously also refrain from making a challenge for cause or exercising a peremptory challenge unless doing so would reduce the panel below the five-member minimum or, in cases where an enlisted accused has chosen to be tried by a panel including enlisted members, where the challenge would reduce the percentage of enlisted members below one-third of the panel. The defense counsel attempting to maximize the panel size would even refrain from challenging a member who admits being biased in the government's favor because, as Judge Morgan observed in *Simoy*, that biased member will not be replaced by a neutral member.

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166. Exceptions to this general rule occur where a challenge would require the convening authority to detail additional members to the court. *See supra* note 161.

167. The Supreme Court has held that a juror may be excluded from a death penalty case for possessing views about capital punishment that "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)). The military justice system follows this line of cases. *See* United States v. Curtis, 33 M.J. 101, 106-07 (C.M.A. 1991), *cert. denied*, 502 U.S. 1097 (1992).

168. *See* MCM, *supra* note 64, R.C.M. 912(f)(4).

The trial counsel, on the other hand, has an interest in reducing the panel size.[169] Every member that the government succeeds in removing is one less potential source for the single vote that could preclude a death sentence. Thus, the trial counsel can be expected to engage in vigorous voir dire, to make challenges for cause, and to exercise the government's peremptory challenge.

The rules governing capital court-martial panel size thus promote the spectacle of a panel vetted and groomed by the government but not the defense. Providing the government with an incentive to voir dire members and exercise challenges while discouraging the defense from doing so is particularly perverse in court-martial practice, as the convening authority's power to select members gives the government "the functional equivalent of an unlimited number of peremptory challenges."[170] A system that encourages the defense counsel in a capital case to imitate a potted plant[171] is constitutionally suspect.

C. A Constitutional Analysis of Variable Panel Size in Capital Courts-Martial

While a challenge to court-martial panels with fewer than twelve members would likely fail on due process, equal protection, and heightened reliability grounds, a challenge to the variable size of capital court-martial panels should succeed under any of these constitutional bases.

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169. *See Simoy*, 46 M.J. at 628 n.7 (Morgan, J., concurring).
170. United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).
171. The CAAF has noted:

> The term "potted plant" is used in America's image-based society to distinguish passive non-players ("is a potted plant") from people of action ("is not a potted plant"). It is derived from Brendan V. Sullivan, Jr.'s, response to Senator Inouye, when the Senator was attempting to limit Mr. Sullivan's role in protecting his client (Oliver North) from what Mr. Sullivan perceived as unfair questioning by the Senate staff during the 1987 Irangate Hearings: "Well sir, I'm not a potted plant. I'm here as the lawyer. That's my job."

United States v. Martinez, 42 M.J. 327, 332 n.7 (1995), *cert. denied*, 516 U.S. 1075 (1996).

1. The Fifth Amendment Due Process Clause

Even though the Sixth Amendment right to jury trial does not extend to courts-martial, the Court of Military Appeals has established that an accused has "a due-process right to a fair and impartial fact finder."[172] This holding is consistent with Supreme Court precedent recognizing that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors."[173] Denial of the right to trial before "a panel of impartial, 'indifferent' jurors . . . violates even the minimal standards of due process."[174] An important aspect of this right is the ability to engage in meaningful voir dire. The Supreme Court has recognized that in order to obtain an impartial jury, the defense has a constitutional right to subject jurors to voir dire concerning potential bias.[175]

Of course, the military death penalty system does not prevent the defense from engaging in voir dire or exercising challenges. But the system exacts an enormous price for exercising those options. Imposing costs on the defense's right to promote the factfinder's impartiality violates the doctrine of unconstitutional conditions,[176] which recognizes that "[t]here are rights of constitutional stature whose exercise a state may not condition by the exaction of a price."[177]

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172. *Carter*, 25 M.J. at 473; United States v. Jefferson, 44 M.J. 312, 321 (1996) ("The reliability of a verdict depends upon the impartiality of the court members."). *But see* United States v. Curtis, 44 M.J. 106, 133 (1996) ("Appellant has a Sixth Amendment right to a fair and impartial jury."), *rev'd on other grounds*, 46 M.J. 19 (1997). *See generally* Lamb, *supra* note 68, at 135-37.

173. Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991).

174. Irvin v. Dowd, 366 U.S. 717, 722 (1961). Interestingly, *Irvin* was decided at a time when Supreme Court case law held that the Fourteenth Amendment did not require jury trials for criminal cases. Fay v. New York, 332 U.S. 261 (1947). State trials before the Supreme Court's ruling in *Duncan v. Louisiana* were on a footing similar to military trials today: they were not bound by the Sixth Amendment jury trial provision, but they were bound by the due process guarantee and its requirement for fundamental fairness. 391 U.S. 145 (1968).

175. Morford v. United States, 339 U.S. 258, 259 (1950) (per curiam); *see also Jefferson*, 44 M.J. at 321 ("*Voir dire* is fundamental to a fair trial.").

176. "The doctrine of unconstitutional conditions holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether." The doctrine "reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

United States v. Jackson[178] applied the doctrine of unconstitutional conditions to a federal death penalty statute. *Jackson* dealt with the Federal Kidnapping Act, which allowed a jury, but not a judge, to impose a death sentence for violations of the Act. Thus, under the legislation, "the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenious enough to seek a jury acquittal stands forewarned that, if the jury finds him guilty and does not wish to spare his life, he will die."[179] The Supreme Court invalidated the statute's death penalty scheme, finding that its "inevitable effect" is "to discourage assertion of the Fifth Amendment right to plead not guilty and to deter exercise of the Sixth Amendment right to demand a jury trial."[180] The Court reasoned that "[w]hatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[181] Deterring defendants from exercising their Fifth and Sixth Amendment rights was needless because Congress could have adopted other sentencing systems, including systems in place in some states, that do not chill the exercise of constitutional rights.[182]

The right to an impartial factfinder, while arising under the Fifth Amendment Due Process Clause in a military context,[183] is derived from the Sixth Amendment right to trial by an impartial jury, one of the very rights at issue in *Jackson*. The right to an impartial factfinder is thus a constitutional protection "whose exercise a state may not condition by the exaction of a price."[184] Like the limitations on exercising constitutional rights at issue in *Jackson*, the military death penalty system's deterrence of voir dire and challenges is needless. Congress could have easily established a system in which members who are "challenged off *are replaced*."[185] Examples of such systems abound including not only every state's criminal justice system, but

177. Garrity v. New Jersey, 385 U.S. 493, 500 (1967). *See* United States v. Carter, 25 M.J. 471, 475 (C.M.A. 1988) (noting that "since Congress obviously attached importance to the peremptory challenge, clearly it did not intend to countenance procedural rules which would have a 'chilling effect' on the use of this challenge").

178. 390 U.S. 570 (1968).

179. *Id.* at 581.

180. *Id.* (footnote omitted).

181. *Id.* at 582.

182. *Id.*

183. *See supra* note 172 and accompanying text (discussing United States v. Carter, 25 M.J. 471 (C.M.A. 1988)).

184. Garrity v. State of New Jersey, 385 U.S. 493, 500 (1967).

185. United States v. Simoy, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, ___ M.J. ___, No. 97-7001/AF (Oct. 20, 1998) (setting aside the death sentence and authorizing a rehearing on the sentence).

also criminal trials in United States district courts. Congress' failure to adopt such a system for the military results in an impermissible deterrent on the exercise of a fundamental right.

Discouraging the defense from engaging in voir dire and exercising challenges in capital cases presents a test of the Supreme Court's assertion that Congress "is subject to the requirements of the Due Process Clause when legislating in the area or military affairs."[186] If the military death penalty scheme's assault on the fundamental right to an impartial factfinder does not violate the Due Process Clause, it is difficult to imagine what would. Accordingly, the small "measure of protection" that the Due Process Clause provides to military defendants[187] should be sufficient to invalidate the variable size of capital courts-martial.

2. The Equal Protection Guarantee

The Supreme Court's recognition of an impartial factfinder as a "fundamental right" also implicates the equal protection guarantee. As discussed above, when a governmental classification interferes with a fundamental right, it violates the equal protection guarantee unless it is narrowly drawn to serve a compelling government interest.[188]

It is difficult to imagine *any* government interest that would be prejudiced by trying capital courts-martial before a fixed number of members, much less a compelling interest. Assuming that the fixed number of members in capital cases would be set above five, some capital courts-martial may require additional members. In 1786, when the Army included just forty officers, convening courts-martial with more than five members was not always practicable.[189] With today's military force consisting of almost 1.5 million active-duty members,[190] on the other hand, any necessity to occasionally detail a few additional members for capital courts-martial should not prove burdensome.

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186. Weiss v. United States, 510 U.S. 163, 176 (1994).

187. *Id*.

188. *See supra* note 145 and accompanying text.

189. *See supra* note 17.

190. Nat'l Def. Auth. Act for 1998, Pub. L. No. 105-85, § 401, 111 Stat. 1629, 1719 (establishing end strength of 1,431,379 for Department of Defense active duty personnel); Coast Guard Auth. Act for 1997, Pub. L. No. 104-324, § 102, 110 Stat. 3901, 3905 (establishing end strength of 37,561 for active duty Coast Guard personnel).

The fundamental nature of the right to an impartial fact-finder should be sufficient to overcome any deference the military normally enjoys in equal protection cases.[191] Additionally, some question exists as to whether a deferential equal protection standard is even appropriate when considering capital courts-martial. Writing for a total of four members of the Court, Justice Stevens recently opined, "[W]hen the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians."[192] Requiring service members to choose between accepting trial by biased members or diminishing their own statistical chances of escaping a death sentence a choice faced by no civilian death penalty defendant in the nation offends this equal protection principle.

3. The Right to Be Free from Cruel and Unusual Punishments

The variable panel size in capital courts-martial must also be scrutinized under the Eighth Amendment Cruel and Unusual Punishments Clause. The Supreme Court has not expressly ruled that its Eighth Amendment capital jurisprudence applies to courts-martial.[193] Nevertheless, the

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191. *See supra* note 149 and accompanying text.

192. Loving v. United States, 517 U.S. 748, 774 (1996) (Stevens, J., concurring). Justices Souter, Ginsburg, and Breyer joined Justice Steven's *Loving* concurrence. *Id.* Justice Stevens' opinion also suggested that trial by court-martial may be impermissible for death penalty offenses that are not related to military service. *Id. Compare* Meredith L. Robinson, Note, *Volunteers for the Death Penalty? The Application of* Solorio v. United States *to Military Capital Litigation*, 6 GEO. MASON L. REV. 1049 (1998) (concluding that "[b]ecause a service member at a court-martial is deprived of certain protections of the Bill of Rights, Congress and the Supreme Court must ensure that only those crimes with a service connection may be tried by a capital court-martial," *id.* at 1071-72), *with* John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177 (1997) (concluding that the Constitution permits court-martial jurisdiction over capital offenses regardless of whether they are service connected).

193. In *Loving*, the majority opinion "assume[d] that [*Furman v. Georgia*, 408 U.S. 238 (1972)] and the case law resulting from it are applicable" to the military justice system. 517 U.S. at 755. Justice Thomas, on the other hand, questioned whether "the extensive rules we have developed under the Eighth Amendment for the prosecution of civilian capital cases, including the requirement of proof of aggravating factors, necessarily apply to capital prosecutions in the military." *Id.* at 777 (Thomas, J., concurring in the judgment). He also noted, "Although the applicability of *Furman* . . . and its progeny to the military is an open question, the United States surprisingly makes no argument that the military is exempt from the Byzantine rules that we have imposed upon the states in their administration of the death penalty." *Id.* at 777 n.*.

Court of Military Appeals has held that while the Eighth Amendment protections might sometimes have to yield to military necessity, "a service member is entitled both by [Article 55] and under the Eighth Amendment to protection against 'cruel and unusual punishments.'"[194] Indeed, a service member's protection under Article 55 of the UCMJ, which prohibits "cruel or unusual punishments,"[195] may provide "even wider" protection than is granted by the Eighth Amendment.[196]

One aspect of the protection against cruel and unusual punishments is the requirement for heightened reliability in capital cases–a protection that the CAAF has specifically held applies to courts-martial.[197] A death penalty system that deters meaningful voir dire and the exercise of challenges by one party, while encouraging vigorous use of these tools by the other, violates this heightened reliability requirement. Biases against the government will likely be discovered through voir dire, and members possessing such biases will be removed. Biases against the accused, on the other hand, may never be brought to light. Panels drastically tilting toward the government are the almost inevitable result of a system that encourages the defense to keep members on the panel while encouraging the government to remove members. This interference with the adversarial system's norms substantially diminishes the reliability of a capital court-martial.

The cruel and unusual punishment protection also prohibits the arbitrary imposition of death sentences.[198] Yet the lack of a fixed number of members injects an entirely arbitrary factor into the death penalty equation: the number of members who sit on the court-martial.

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194. United States v. Matthews, 16 M.J. 354, 368 (C.M.A. 1983). The court noted that the possibility of different application in a military setting "is especially great with respect to offenses committed under combat conditions when maintenance of discipline may require swift, severe punishment, or in violation of the law of war, [for example], spying." *Id.*

195. 10 U.S.C.A. § 855 (West 1998).

196. *Matthews*, 16 M.J. at 363 (quoting United States v. Wappler, 9 C.M.R. 23, 26 (1953)).

197. United States v. Loving, 41 M.J. 213, 278 (1994) (citing Woodson v. North Carolina, 428 U.S. 280 (1976) (plurality opinion)), *aff'd on other grounds*, 517 U.S. 748 (1996).

198. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 306-07 (1987); *Woodson*, 428 U.S. at 303 (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); United States v. Curtis, 44 M.J. 106, 166 (1996), *rev'd in part on other grounds*,46 M.J. 129 (1997) (per curiam); United States v. Gray, 37 M.J. 751, 759 (A.C.M.R. 1993), *mandatory review case filed*, 38 M.J. 305 (C.M.A. 1993) ("the Eighth Amendment prohibition against cruel and unusual punishment does prohibit the 'arbitrary and capricious' imposition of the death penalty").

Common sense suggests that the total number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to a court-martial. Yet convening authorities have no guidance concerning how many members to appoint in capital cases. Such unconstrained discretion is the very definition of arbitrariness. A review of convening authorities' actual practice in appointing members to capital cases demonstrates the process's haphazard nature: the courts-martial of the seven service members under death sentence today began with panels ranging in size from nine to twenty members.[199]

This arbitrary factor's unfairness is starkly demonstrated by two hypothetical capital courts-martial arising from the same murder. The commanding general of one accused convenes a court-martial with twenty members; the commanding general of another convenes a court-martial with only ten members. While no legal principle justifies treating the two accused differently, one has a far greater statistical chance of obtaining the single vote necessary to preclude a death sentence. Such an irrelevant factor determining who lives and who dies is precisely the sort of arbitrariness that the Supreme Court has condemned. The military's death penalty scheme, therefore, violates the Eighth Amendment, as well as the due process and equal protection guarantees.

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199. Sergeant Kreutzer's court-martial began with a twenty-member panel. Record, United States v. Kreutzer (No. ARMY 9601044) (on file with Army Court of Criminal Appeals, Falls Church, Virginia). Sergeant Murphy's court-martial began with only nine members. Record, United States v. Murphy (No. ACMR 8702873) (on file with Army Defense Appellate Division, Falls Church, Va.). Of the remaining five trials, one began with nineteen members, two began with fifteen members, and two began with twelve members. Electronic Interview with Lieutenant Lisa C. Guffey, defense appellate attorney, United States Navy, June 22, 1998 (concerning United States v. Quintanilla, which began with 19 members); Record, United States v. Gray (No. ACMR 8800807) (on file with Army Defense Appellate Division, Falls Church, Va.) (indicating that 15 members began the capital case of United States v. Gray); Record, United States v. Walker (No. 95-01607) (on file with Navy-Marine Corps Appellate Defense Division, Washington, D.C.) (indicating that 15 members began the capital case of United States v. Walker); United States v. Loving, 41 M.J. 213, 310 (1994) (Sullivan, C.J., concurring) (indicating that the court-martial began with 12 members), *aff'd*, 517 U.S. 748 (1996); Record, United States v. Parker (No. 95-01500 (on file with Navy-Marine Corps Court of Criminal Appeals, Washington, D.C.) (indicating that the court-martial began with 12 members).

VII. Conclusion

Trying a capital case before a court-martial with fewer than twelve members provides the accused with less protection than a civilian capital defendant would enjoy. With the exception of the military, no capital jurisdiction in the United States allows the death penalty to be imposed without giving the defendant the right to have a twelve-member jury determine guilt or innocence. In thirty of the country's forty death penalty jurisdictions, the defendant also has the right to have a twelve-member jury decide whether to adjudge a death sentence. Providing a military capital accused with less protection is certainly unfair, but it is unlikely to be held unconstitutional.

The extreme unfairness arising from the variable number of members on capital court-martial panels, on the other hand, calls out for judicial intervention. The lack of a fixed number of members deters the defense counsel in a capital case from engaging in voir dire or exercising challenges. This is true regardless of the number of members detailed to the court-martial panel. Thus, this unfairness will infect even those capital court-martial panels in which the convening authority originally detailed twelve members or more.

But judicial action alone cannot bring the military death penalty scheme into compliance with constitutional requirements. While the courts can, and should, declare that the current system is unconstitutional, it is beyond the judiciary's power to remedy the defect.[200] That power, and hence that responsibility, lies with either Congress or the President.

Congress, which bears the constitutional responsibility to make rules and regulations for the land and naval forces,[201] clearly has the authority to establish fixed panel sizes for capital courts-martial. Congress could adopt such a policy through a quite simple UCMJ amendment. Because Congress has delegated to the President the authority to make procedural rules for courts-martial,[202] Congress could merely establish a requirement for fixed panel size in capital courts-martial, and then leave it to the President to adopt specific rules to implement that requirement.

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200. Through the Code Committee, however, the CAAF judges could suggest UCMJ amendments to eliminate variable court-martial panel size in capital cases. *See* 10 U.S.C.A. § 946(c)(2)(B)(ii) (West 1998).

201. U.S. CONST., art. I, § 8, cl. 14.

202. UCMJ art. 36 (West 1998).

One question Congress would face if it adopted a requirement for a fixed number of members in capital cases is what should be the fixed number. The best answer to that question is twelve. Congress has already expressed a general preference for military justice procedures that mirror those used "in the trial of criminal cases in the United States district courts."[203] The Federal Rules of Criminal Procedure provide for twelve-member juries.[204] The absence of any states providing for juries with fewer than twelve members in death penalty cases[205] further suggests the appropriateness of twelve-member panels in capital courts-martial. A UCMJ amendment providing for a fixed number of members should, therefore, require the impaneling of twelve members in general courts-martial empowered to adjudge death.

Even absent such a congressional mandate, requiring a fixed number of members in capital courts-martial would be within the President's power. Under Article 36, the President is empowered to adopt procedural rules for courts-martial, provided that these rules are not "contrary to or inconsistent with" the UCMJ.[206] Establishing a fixed number of members for capital cases would not be inconsistent with any provision of the UCMJ. Article 16 requires that a general court-martial consist of "a military judge and not less than five members."[207] Beyond this requirement, the UCMJ is silent concerning the number of members on a general court-martial panel. Thus, establishing a fixed number of members for capital courts-martial is not inconsistent with the UCMJ, provided that the number is greater than four.[208]

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203. *Id.*

204. FED. R. CRIM. P. 23(a).

205. Williams v. Florida, 399 U.S. 78, 103 (1970).

206. UCMJ art. 36(a). In *Loving v. United States*, the Supreme Court identified Article 36 as one of three UCMJ articles by which Congress delegated to the President the power to establish aggravating factors for capital cases. 517 U.S. 748, 770 (1996). The Supreme Court also relied on Article 18, which provides that a court-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by [the UCMJ], including the penalty of death when specifically authorized by" the UCMJ, and Article 56, which provides that "[t]he punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense." *Id.* at 768-70.

207. UCMJ art. 16(1).

208. *Cf.* Brief of Public Citizen, Inc., as *Amicus Curiae* in Support of the Petition at 18, Loving v. United States, 517 U.S. 748 (1996) (No. 94-1966) (noting that "the UCMJ does not forbid twelve person panels, but only requires that panels cannot include fewer than five members. Thus, it cannot be said that Congress has a policy *against* twelve person juries in military capital cases . . . .").

The Supreme Court's view of the President's authority to make procedural rules for courts-martial provides further support for the conclusion that requiring a fixed number of members in military death penalty cases is within the President's power. In *Loving v. United States*, the Supreme Court noted that "[f]rom the early days of the Republic, the President has had congressional authorization to intervene in cases where courts-martial decreed death."[209] The Court continued:

> It would be contradictory to say that Congress cannot further empower [the President] to further limit by prospective regulation the circumstances in which courts-martial can impose a death sentence. Specific authority to make rules for the limitation of capital punishment contributes more toward principled and uniform military sentencing regimes than does case-by-case intervention, and it provides greater opportunity for congressional oversight and revision.[210]

Providing that death can be adjudged only by a court-martial with a fixed number of members would be just such a limitation by prospective regulation upon the circumstances in which courts-martial can impose a death sentence. The President's authority to adopt such a regulation, therefore, appears to have already won the Supreme Court's approval.[211] Thus, the President is free to adopt a Rule for Courts-Martial requiring a fixed number of members in capital cases even without congressional authorization. In keeping with Article 36's preference for establishing court-martial procedures that are consistent with the Federal Rules of Criminal Procedure,[212] the President should set that fixed number at twelve.

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209. 517 U.S. at 773 (citing Article of War 65, Act of April 10, 1806, ch. 20, 2 Stat. 359, 367) (providing that no "sentence of a general court-martial, in the time of peace, extending to the loss of life . . . [shall] be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States, for his confirmation or disapproval, and orders, in the case"). *See* UCMJ art. 71(a) ("If the sentence of the court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President. In such a case, the President may commute, remit, or suspend the sentence, or any part thereof, as he sees fit.").

210. 517 U.S. at 773.

211. *See* MCM, *supra* note 64, R.C.M. 1004(a)(2) (noting that the requirement that the members return a unanimous conviction in order for a death penalty to be imposed is such a presidentially-prescribed limitation on the imposition of a death sentence). *See supra* note 64. R.C.M. 1004(a)(2) has not been the subject of litigation.

212. *See supra* note 203 and accompanying text.

Once a fixed number is required whether by congressional or executive action the Rules for Courts-Martial will have to be modified to provide a scheme for achieving a fixed-size panel. One possibility would be to begin with a large number of members perhaps twenty who would be subject to voir dire and challenges, including each side's peremptory challenge.[213] If more than twelve remain after challenges, twelve would be assigned to the panel through some random process. If fewer than twelve members remain after challenges, the convening authority would then detail additional members, who would also be subject to voir dire and challenges.[214] This process would continue until a twelve-member panel was seated. Additionally, the President should consider reviving the process of designating supernumeraries, who would play the same role as alternate jurors in the civilian system.[215]

Regardless of which branch takes the initiative, the problem should be cured quickly. Reforming the system will not only protect the due process rights of military capital defendants, but also serve the government's interest in ensuring that a constitutionally-viable military death penalty remains in effect. Until the problem of variable panel size in death penalty cases is eliminated, capital courts-martial will remain a numbers game fixed in the prosecution's favor.

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213. Article 41(b) of the UCMJ provides that "[e]ach accused and the trial counsel is entitled to one peremptory challenge." UCMJ art. 41(b). The Court of Military Appeals has construed this provision to mean that "each accused is 'entitled' to an opportunity to a single peremptory challenge exercisable as to any person who ultimately sits to try his case." United States v. Carter, 25 M.J. 471, 474 (C.M.A. 1988). Thus, the President does not appear to have the authority to provide more than one peremptory challenge in capital cases absent the detailing of additional members if the court-martial falls below the requisite quorum. *See id.* at 474-75.

214. These members would be subject to both causal and peremptory challenge. *See supra* note 213.

215. *See supra* notes 24-25 and accompanying text.