REVISING THE COURT MEMBER SELECTION PROCESS

COLONEL JAMES A. YOUNG III, UNITED STATES AIR FORCE[1]

> *Justice ought to bear rule everywhere, and especially in armies; it is the only means to settle order there, and there it ought to be executed with as much exactness as in the best governed cities of the kingdom, if it be intended that the soldiers should be kept in their duty and obedience.*
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> — Louis de Gaya, *The Art of War*[2]

I. Introduction

The method for selecting military members to sit on courts-martial has been under attack for some time.[3] The battle has been joined during and immediately following combat operations. It is during combat operations that the tension between our constitutional system of government and the need for military discipline in an effective fighting force becomes most acute. Cases arising out of the exigencies of war may result in harsher sentences than in peacetime because the offenses often have a greater impact on morale and discipline than the same offenses committed during peacetime. These cases attract the attention of the politicians, the media, and the public who are focused on the military action.

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1. Judge Advocate, United States Air Force. Presently assigned as a senior judge on the Air Force Court of Criminal Appeals, Bolling Air Force Base, District of Columbia (1993-95 and 1998 to present). B.A., 1968, Lehigh University; J.D., 1975, University of Pennsylvania Law School. His many former assignments include Chief Judge for the European Judicial Circuit, Ramstein Air Base, Germany (1995-98); Military Judge, Second Judicial Circuit, Maxwell Air Force Base, Alabama (1988-91); and staff judge advocate (Headquarters, Air Force Office of Special Investigations (1991-93) and 47th Air Base Wing, Laughlin Air Force Base, Texas, (1985-88)). Previous publications: *The Accomplice in American Military Law*, 45 A.F. L. REV. 59 (1998); *Multiplicity and Lesser-Included Offenses*, 39 A.F. L. REV. 159 (1996); *The Continued Vitality of Peremptory Challenges in Courts-Martial*, ARMY LAW., Jan. 1992, at 20.

2. LOUIS DE GAYA, THE ART OF WAR (1678) *quoted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY iii (1921) [hereinafter MCM, 1921].

3. 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 15-31.00 (1991).

After both World War I and World War II, the court member selection process was debated and changes were made. In the wake of the Vietnam conflict, military justice came under scrutiny as never before. The sixties and seventies saw numerous articles and studies of the military justice system that were critical of the court member selection process.[4] The Court of Military Appeals criticized the process,[5] and legislative proposals for change were submitted to Congress.[6] With the passing of the Vietnam era and the introduction of the all-volunteer military, criticism of the military justice system appeared to diminish, until recently. Lately, Congress has shown a renewed interest in the court member selection process. Although the catalyst for this interest is unclear, several recent cases questioning the fairness of the military justice system have received considerable publicity. The process for selecting court members is so alien to the civilian courts process, it is an easy target. While there is little evidence to suggest that the system is used routinely to "rig the court," many military personnel and civilians think that it is.[7]

In the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999,[8] Congress ordered the Secretary of Defense to submit alternatives to the current method for selecting members of the armed forces to serve on courts-martial. The only alternative specifically mentioned by Congress was a random selection method. All the alternatives examined by the Secretary were to be consistent with the criteria specified for service

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4. Major Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. REV. 343, 349 (1978) (listing law review articles). *See* U.S. GENERAL ACCOUNTING OFFICE, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS (1977); UNITED CHURCH OF CHRIST TASK FORCE ON MINISTRIES TO MILITARY PERSONNEL, IN ORDER TO ESTABLISH JUSTICE 173 (10th General Synod, 1975); U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES 88-90 (1972) ("[I]n the interest of fairness, as well as the appearance of fairness, it would be wise to adopt some form of random selection [of court members]."); ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 76, 81-84 (1969).

5. United States v. McCarthy, 2 M.J. 26, 26 n.3 (C.M.A. 1976) ("Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process.").

6. Smallridge, *supra* note 4, at 352-53.

7. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-31.00.

8. Pub. L. No. 105-261, § 552, 112 Stat. 1920 (1998).

on courts-martial contained in Article 25(d)[9] of the Uniform Code of Military Justice (UCMJ).[10] Article 25(d) provides as follows:

> (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.
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> (2) When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

This article explains the current method of selecting court members, reviews the historical underpinnings of the current rule to understand how we got where we are today, and examines alternatives to the current system that comply with the congressional mandate to maintain the Article 25(d) selection criteria. After demonstrating that the court member selection criteria contained in Article 25(d)(2) are incompatible with a random selection scheme, this article proposes abolishing the criteria and adopting a random selection scheme, but only after establishing military judges as the sole sentencing authority.

II. The Current System

Under the Sixth Amendment to the Constitution, an accused is entitled to a trial by "an impartial jury."[11] Federal jurors are selected for the venire randomly, from a cross-section of the community, using a written plan established by each United States district court.[12] But, the jurors actually chosen to hear the case "need not mirror the community."[13] Although juries have historically been comprised of twelve jurors, the number

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9. UCMJ art. 25(d) (LEXIS 1999).

10. The Uniform Code of Military Justice is codified at 10 U.S.C. §§ 801-948.

11. U.S. CONST. amend. VI, cl. 1. A jury trial is not required for petty offenses. Duncan v. Louisiana, 391 U.S. 145, 156-58 (1968).

12. 28 U.S.C.S. §§ 1861-1871 (LEXIS 1999).

13. JAMES C. CISSELL, FEDERAL CRIMINAL TRIALS § 12-4(a) (1996) (citing Taylor v. Louisiana, 419 U.S. 522, 538 (1975)).

appears to be an "historical accident" and is not constitutionally required.[14] The Constitution does not require that a guilty verdict be unanimous,[15] although it appears that at least six jurors must vote for conviction.[16]

Courts-martial are not subject to "the Sixth Amendment right to trial by jury with accompanying considerations of constitutional means by which juries may be selected."[17] Instead, Congress has established the laws governing courts-martial pursuant to its authority to regulate the land and naval forces.[18] In reviewing these laws, the Supreme Court has accorded Congress considerable deference.[19]

Courts-martial do not have juries or jurors. Instead, they have "court members." The difference in terms is not a matter of mere semantics, but rather reflects the historical differences between their respective duties and the processes by which they are selected. In the military, certain commanding officers are authorized to determine whether a case shall be tried by court-martial.[20] The accused is not entitled to a panel composed of a cross-section of the military community.[21] The commanding officer, or "convening authority," is required by statute to select as court members "such members of the armed forces as, *in his opinion*, are *best qualified* for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[22] The convening authority may select only officers to serve as members, unless the accused is enlisted and requests, in writing, that enlisted members be included in the panel. If the accused so requests, at least one-third of the court members must be

14. Williams v. Florida, 399 U.S. 78, 89 (1970).

15. Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972).

16. *See* Ballew v. Georgia, 435 U.S. 223 (1978) (holding that at least six members must concur in finding of guilty); Burch v. Louisiana, 441 U.S. 130 (1969) (holding that conviction for a serious offense by five out of six jurors sufficiently threatened the fairness of the proceedings and the proper role of the jury to violate the Sixth Amendment right to a jury trial).

17. United States v. Kemp, 46 C.M.R. 152, 154 (C.M.A. 1973). *See* United States v. Roland, 50 M.J. 66, 68 (1999); United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986) (citing *cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866)).

18. U.S. CONST. art. I, § 8, cl. 14.

19. Weiss v. United States, 510 U.S. 163, 177 (1994) (citing Middendorf v. Henry, 425 U.S. 25, 43 (1976)).

20. *See* UCMJ arts. 22, 23, 24 (LEXIS 1999) (explaining which commanding officers may convene courts-martial).

21. United States v. Lewis, 46 M.J. 338, 341 (1997).

22. UCMJ art. 25(d)(2) (emphasis added).

enlisted. The enlisted members may not come from the accused's unit.[23] The accused can be convicted on the vote of as few as two-thirds of the members,[24] on a court panel that may number as few as three members in a special court-martial[25] and five members in a general court-martial.[26]

Normally, the convening authority's legal staff is tasked with providing the convening authority a fairly short list of names of military members who are available to sit on the court-martial panel.[27] The convening authority often selects the court panel from this list, although it is not unusual for him to select at least some members who were not included in the list.[28] Military appellate courts have upheld this process as "a reasonable means of assisting the convening authority, provided it does not improperly exclude eligible service members."[29]

While a military accused does not have a right to a civilian jury,[30] he does have a right to court members who are fair and impartial.[31] Thus, the convening authority may not detail as a court member the accuser, a witness for the prosecution, or an individual who acted as investigating officer or as counsel in the same case,[32] or, "when it can be avoided," any member junior in rank or grade to the accused.[33] The convening authority may not systematically exclude from consideration any segment of military society,[34] except E-1s and E-2s.[35] Further, the convening authority cannot "pack" the panel to achieve a desired result.[36] The convening authority's subordinates are also precluded from packing the list of available personnel from which the convening authority selects the court panel.[37] However, "[t]he fact that there is a high percentage of commanders on a court, in and

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23. UCMJ art. 25(c)(1). Appointing enlisted members from the same unit is not a jurisdictional defect. United States v. Wilson, 21 M.J. 193 (C.M.A. 1986).

24. UCMJ art. 52(a)(2). Unanimous verdicts are required to convict an accused of any offense for which the death penalty is mandatory. UCMJ art. 52(a)(1).

25. UCMJ art. 16(2). Special courts-martial are often unofficially equated to misdemeanor trials.

26. UCMJ art. 16(1). General courts-martial are often unofficially equated to felony trials.

27. United States v. Roland, 50 M.J. 66, 69 (1999)

28. *Id.*

29. *Id.* (citing United States v. Kemp, 46 C.M.R. 152 (1973)).

30. *Id.* at 68 (1999) (dictum) (citing Solorio v. United States, 483 U.S. 435, 453 (1987) (Marshall, J., dissenting)).

31. *Id.* (citing Wainwright v. Witt, 469 U.S. 412 (1985); Chandler v. Florida, 449 U.S. 560 (1981))

32. UCMJ art. 25(d)(2).

33. UCMJ art. 25(d)(1). This precludes a member voting for conviction of his superior to improve his own promotion chances.

of itself, is not indicative of an improper selection process."[38] Court packing does not deprive the court-martial of jurisdiction, but an appellate court "may not affirm unless [it is] convinced beyond a reasonable doubt that the court members were properly selected."[39]

To facilitate the accused's ability to challenge the composition of the court and the process by which the members were selected, the Court of Appeals for the Armed Forces has granted broad discovery and compulsory process.[40] Once the defense makes a preliminary showing that the members were improperly selected, the burden shifts to the prosecution to "demonstrate that no impropriety occurred."[41] Furthermore, an accused has the right to have the members questioned concerning their suitability to sit on the court.[42] A member shall be excused for cause on any of several

34. *Roland*, 50 M.J. at 68 (citing United States v. Nixon, 33 M.J. 433 (C.M.A. 1991)); United States v. McClain, 22 M.J. 124 (C.M.A. 1986); United States v. Daigle, 1 M.J. 139 (C.M.A. 1975) (holding improper the convening authority's fixed policy of excluding lieutenants and warrant officers from the membership of courts-martial)); United States v. Greene, 43 C.M.R. 72, 76-77 (C.M.A. 1970) (holding that the convening authority violated the UCMJ by appointing only senior officers to the court-martial panel).

35. United States v. Yager, 7 M.J. 171 (C.M.A. 1979) (noting that enlisted members in the lowest pay grades of E-1 and E-2 are presumptively unqualified under Article 25(d)(2)).

36. United States v. White, 48 M.J. 251 (1998); United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991); United States v. Smith, 27 M.J. 242 (C.M.A. 1988) (involving female members selected for case involving sex crimes). Court "packing," or stacking, occurs when a subordinate provides the convening authority with a list of potential court members, or the convening authority selects the court members, on some basis other than the criteria of Article 25(d)(2), for the purpose of getting a desired result. For example, selecting supporters of hard discipline; or selecting women solely because the crime alleged was rape. *See* United States v. Hedges, 29 C.M.R. 458 (1960) (finding that because of its composition the court-martial appeared to be "hand-picked" by the government).

37. *Hilow*, 32 M.J. at 440-41.

38. *White*, 48 M.J. at 253-54 (stating that commanders have unique military experience which is conducive to selection as a court-martial member).

39. United States v. Lewis, 46 M.J. 338, 341 (1997).

40. United States v. Roland, 50 M.J. 66, 69 (1999). Upon a defense request, the prosecution must provide questionnaires submitted by potential court-members outlining their military careers and personal life, and any written materials considered by the convening authority in selecting the members. *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(a) (1998) [hereinafter MCM]. The list of members of the pool provided to the convening authority and the convening authority's selection is typically done in writing.

41. *Roland*, 50 M.J. at 69.

42. MCM, *supra* note 40, R.C.M. 912(d). It is normal practice for the military judge to permit counsel to conduct the voir dire personally. However, it is within the military judge's discretion to conduct the examination himself. If he does so, he must also ask supplemental questions submitted by counsel, which he deems appropriate.

specified grounds or "in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."[43] Although military judges have great discretion in ruling on challenges for cause, the CAAF has made it clear that they must grant such challenges liberally.[44] Each party is also entitled to one peremptory challenge,[45] although that challenge must not be used to eliminate members based on their race or gender.[46]

Court members are protected from attempts by military members, including superiors, to coerce or unlawfully influence the outcome of a case and from disciplinary measures based on "the findings or sentence adjudged by the court, or with respect to any other exercise[] of its . . . functions in the conduct or the proceedings."[47] Nor may their performance as court members be reflected in fitness reports used to help determine promotions or assignments.[48]

III. How the Current System Developed

Before proposing to change the current system, it might be advantageous to understand how and why the military uses the current system. The purpose of the military justice system is broader than its civilian counterpart. "The purpose of the criminal law is to define socially intolerable conduct, and to hold conduct within the limits which are reasonably acceptable from the social point of view."[49] The purpose of the military justice system, on the other hand, is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[50] The Constitution, Congress, and the Supreme Court have long recognized the necessity of having a military justice system separate and different from civilian systems of justice.[51] A separate system of military justice grew out of the need

43. *Id.* R.C.M. 912(f).
44. United States v. White, 36 M.J. 284, 287 (C.M.A. 1993).
45. UCMJ art. 41(b)(1) (LEXIS 1999).
46. United States v. Witham, 47 M.J. 297 (1997).
47. UCMJ art. 37(a).
48. UCMJ art. 37(b).
49. ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW § 1B (3d ed. 1982).
50. MCM, *supra* note 40, pt. I, ¶ 3.
51. The Continental Congress adopted 69 articles of war on 30 June 1775. W. AYCOCK & S. WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE

for discipline–to be effective, commanders must be able to count on military prsonnel to carry out their assigned duties in the face of mortal danger.[52]

For most of the history of this nation, criteria were not established for selecting members for courts-martial; the convening authority had unfettered discretion to select any officer under his command,[53] except members of the Judge Advocate General's Department,[54] chaplains,[55] and those disqualified because of some prior participation in the case.[56] Yet, the court

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51. (continued) § 5 (1955) *cited in* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE § 1-6(A) (4th ed. 1996). The Fifth Amendment to the Constitution provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment of a Grand Jury, *except in cases arising in the land or naval forces . . . .*" U.S. CONST. amend. V (emphasis added). In 1806, Congress enacted 101 articles of war. 2 Stat. 359 (1806), *reprinted in* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 976 (2d ed. 1920 reprint). *See* Dynes v. Hoover, 61 U.S. 65, 79 (1857).

52. *See* 1 GILLIGAN & LEDERER, *supra* note 3, §§ 1-10.00; SCHLUETER, *supra* note 51, § 1-1.

53. Article of War 4 (1916) *reprinted in* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, App. 1 (1917) [hereinafter MCM, 1917]. Of course, a court member was subject to challenge for cause if he were the accuser, investigated the offense, would be a witness for the prosecution, sat as a member of the court in a former trial of the accused on the same charges, is related to the accused, or was prejudiced or biased against the accused. *Id.* ¶ 121(*a*); WINTHROP, *supra* note 51, at 214-30.

54. WINTHROP, *supra* note 51, at 70. In the early days of the American military, lawyers were not as prevalent as they are today. Their duties included acting as trial "judge-advocate" in important cases and reviewing and reporting on the proceedings of trials which would make them unavailable to sit as members. *Id.* at 70 n.6. The trial "judge-advocate" served as the prosecutor, advisor to the court in matters of form and law, and where the accused was without counsel, he would "render [the accused], both in and out of court, such assistance as may be compatible with his primary duty of efficiently conducting the prosecution." *Id.* at 197-98 (foonotes omitted). Until 1892, he sat with the members during their closed session deliberations to provide them advice, but he could not vote. *Id.* at 195. From 1921 until 1951, a "law member" was appointed to general courts-martial. This officer issued interlocutory rulings subject to objection by the other members. He actively participated in the deliberations and voted on the findings and sentence, as he was a member of the court. *Compare* MCM, 1917, *supra* note 53, ¶ 81 *with* MCM, 1921, *supra* note 2, ¶ 81 *and* MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY, ¶ 4*e* (1949) [hereinafter MCM, 1949] *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, ¶ 39*b* (1951) [hereinafter MCM, 1951].

55. WINTHROP, *supra* note 51, at 70. Chaplains were legally eligible for court-martial duty, but the Secretary of War made it known that he did not view such a practice favorably. *Id.* at n.7. *See also* GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 494 (2d ed. rev. 1909). The *MCM, 1917* noted that chaplains, veterinarians, dental surgeons, and second lieutenants in the Quartermaster Corps were not in practice detailed to serve as members of courts-martial. MCM, 1917, *supra* note 53, ¶ 6(*b*).

56. Articles of War 8, 9 (1916), *reprinted in* MCM, 1917, *supra* note 53, app. 1.

members did not just serve as jurors. As there were no judges in the military justice system, the court members themselves performed many judicial duties; they determined the sufficiency of the charges, objections by the accused to the proceedings, and challenges for cause against other members of the court.[57] They also ruled on objections to evidence,[58] and, if they found the accused guilty of any offense, they determined an appropriate sentence.[59]

Experiences in World War I resulted in establishing court member selection criteria for the first time. Before entry into the war, the American army was "small and compact, and for the most part removed from centers of population. There was little public interest, either in the Army itself or in military affairs."[60] With war came the rapid mobilization of civilians into the Army and a concomitant increase in the number of officers. With so many men under arms, from every city, village, and town in the nation, the press and the public became considerably more interested in military affairs.

For the first time since the Civil War, the Army had a considerable cadre of officers who were unaccustomed to command and almost totally unfamiliar with the military justice system.

> These new officers, not sitting easily in the saddle, and feeling unsure of themselves (1) are prone as commanding officers to resort too readily to courts-martial, and (2) as court martial judges they display ignorance of military law and traditions, uncertainty of themselves, undue fear of showing leniency lest they be thought weak or unmilitary, and a tendency to avoid responsibility by giving severe . . . sentences, accompanied with recommendations to clemency, attempting thereby to shoulder onto higher authority the responsibility for determining the proper quantum of punishment; a responsibility which our sys-

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57. WINTHROP, *supra* note 51, at 163-4; 1 GILLIGAN & LEDERER, *supra* note 3, § 15-11.00.

58. WINTHROP, *supra* note 51, at 288.

59. *Id.* at 390.

60. JONATHAN LURIE, ARMING MILITARY JUSTICE: THE ORIGINS OF THE UNITED STATES COURT OF MILITARY APPEALS, 1775-1950, 46-47 (1992) (quoting William C. Rigby, Draft of Report on Court-Martial Procedures, *in Records of the Judge Advocate General*, NARC, RG 153, entry 26, box 20. N.p. (1919)).

> tem contemplates shall be assumed and discharged by the court martial judges themselves.[61]

By the end of World War I, a debate within the Army Judge Advocate General's Department about the fairness of military justice spilled over into Congress and the press.[62] The story is complicated and political, but a complete understanding of it is not necessary for the purposes of this article.[63] While the debate started over the appellate authority of The Judge Advocate General,[64] it resulted in proposals for a complete overhaul of the military justice system. With the rapid demobilization after the conclusion of the war, the corresponding diminution of interest by the people and the press, and the political maneuvering of the Army, the overhaul became a revision. Regardless, Congress mandated several changes. For the first time, the convening authority was required to apply formal criteria to the court member selection process.

> When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament; and officers having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial in excess of the minority membership thereof.[65]

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61. *Id.* at 46 (quoting Rigby, *supra* note 60, records).

62. Most notable was a case involving 10 African-American soldiers tried for murder and sentenced to death. The sentence was executed two days later. The cases were reviewed in the office of The Judge Advocate General four months after they were hanged. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1921-1966*, 17 A.F. L. REV. 55, 60 (1975) (citing Letter to Senator Chamberlain from former acting TJAG Ansell, 16 August 1919, *in* 58 CONG. REC. 3942 (1919)). Others put the figure at 13 hanged. LURIE, *supra* note 60, at 69. After World War I, a special clemency board created by the Army recommended reduction of the sentences in over 77% of the cases that came before it and remitting over 18,000 years of confinement. *Id*. at 111.

63. For an enlightening discussion of the debate, see LURIE, *supra* note 60, at 46-126.

64. *Id.* at 52. The established procedure was to recommend to the Secretary of the War to revise courts-martial in which errors were detected.

65. Article of War 4 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; MCM, 1921, *supra* note 2, ¶ 6. The Articles for the Government of the Navy did not prescribe such qualifications for court members. United States v. McClain, 22 M.J. 124, 129 n.2 (C.M.A. 1986).

Another change authorized both parties to exercise one peremptory challenge against any of the court members, except the law member.[66]

At the same time, the attempt by some reformers to have a trial judge appointed to each general court-martial failed. Instead, the convening authority was required to appoint a law member, when possible a member of the Judge Advocate General's Department, to each general court-martial.[67] This officer ruled on all interlocutory questions, except challenges for cause against court members. Except on objections concerning the admissibility of evidence, the law member's decision was subject to objection by any other member and a vote of the entire panel.[68] As the law member was a member of the court, he participated in all of the deliberations and decisions of the court, including voting on findings and sentence.[69]

The imposition of criteria for selecting court members made eminent sense. Congress did not want a repeat of the World War I experience. As court members still performed some judicial duties, it made sense to select them by applying standards similar to those for selecting judges.

During the inter-war years, changes to the military justice system were modest and mostly technical.[70] During World War II, however, the nation was destined to repeat the rapid mobilization and demobilization of forces that had been the catalyst of the earlier 1918-1920 debate over court member selection. The grievances had not changed. Some saw the system as "an instrument of oppression by which officers fortify low-caliber leadership."[71] A commission appointed by the American Bar Association found the military justice system was well designed to secure swift and sure justice and that the results of courts-martial were quite reliable. But, the committee was convinced court-martial sentences were often too severe and too disparate.[72] Many veterans' organizations agreed.[73]

Early in 1947, both the Army and the Navy submitted bills to Congress calling for reform of the military justice system. But before any

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66. Article of War 19 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

67. Article of War 8 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

68. Article of War 31 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; MCM, 1921, *supra* note 2, ¶ 89a; MCM, 1949, *supra* note 54, ¶ 40.

69. Article of War 8 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1.

70. Crump, *supra* note 62, at 55.

71. *Id.* at 58 (quoting Maurice Rosenblatt, *Justice on a Drumhead*, NATION, CLXII (Apr. 27, 1946) at 502).

72. *Id.* at 58-60.

73. *Id.* at 61.

action could be taken on the Army bill or hearings conducted on the Navy bill, the National Security Act of 1947[74] created the Department of the Air Force and unified the branches of the military services under the Department of Defense.[75]

Congress further reformed the Army and Air Force system in the Elston Act of 1948.[76] Among other reforms, the Elston Act permitted an enlisted accused to elect trial by a court consisting of at least one-third enlisted personnel, none of whom would be from his unit.[77] Enlisted members could not be drawn from the accused's unit,[78] and, when possible, had to have at least two years of service, as did the other court members.[79] The law member was given powers approaching those of a judge; his decisions on interlocutory questions were final except for those pertaining to challenges for cause, motions for findings of not guilty, and the accused's sanity.[80]

The unification of the services under the Department of Defense and the continued calls for reform led to the adoption of the UCMJ in 1950.[81] For the first time, all of the military services would employ the same law. The law member was replaced by a quasi-judge, called a law officer, who was not a member of the court and did not enter the deliberations.[82] In the UCMJ, Congress added "education" and "length of service" as criteria for selecting court members and eliminated the requirement that, when possible, court members with less than two years of service not constitute a majority.[83]

As a result of amendments to the UCMJ in 1968,[84] the law officer became a military judge.[85] With the new name, came greater responsibilities. The military judge, not the president of the court-martial, was now

74. Pub. L. 80-253, 61 Stat. 495 (1947).

75. Crump, *supra* note 62, at 62.

76. The so-called Elston Act was actually an amendment to the Selective Service Act of 1948. Pub. L. No. 80-759, 62 Stat. 604 (1948).

77. Article of War 4 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

78. Article of War 16 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

79. Article of War 4 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1.

80. Article of War 31 (1948), *reprinted in* MCM, 1949, *supra* note 54, app. 1; 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

81. 10 U.S.C. §§ 801-940 (1950).

82. *See* UCMJ arts. 26, 51 (1950); MCM, 1951, *supra* note 54, ¶¶ 4*e*, 39.

83. UCMJ art. 25(d)(2) (1950).

84. Military Justice Act of 1968, 82 Stat. 1335 (1968).

85. 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

the presiding officer.[86] "The finality of the military judge's rulings was extended to all questions of law and all interlocutory questions, except the factual issue of the accused's mental responsibility."[87] Military judges could be detailed to special courts-martial whereas there was no authority to so appoint law officers.[88] The accused now had an option to select trial by military judge alone.[89] There was only one traditional judicial duty that was not given to military judges–sentencing.[90] The court members retained their sentencing authority except for cases in which the accused chose to be tried by military judge alone.[91]

IV. An Analysis of Article 25(d)(2)

The primary impetus for adopting the best-qualified criteria of Article 25(d)(2) was the wretched sentencing practices of court members during World War I.[92] But, adopting criteria also made sense in light of the number of other judicial duties assigned to court members in a system without judges. Some commentators believed the criteria would establish blue-ribbon panels[93] of members able to grasp complex legal concepts, render a fair decision on guilt, and, where guilt is found, assess a sentence that is fair to the accused while meeting the needs of good order and discipline in the military. But, applying these criteria to select court members is more difficult than it may appear.

The criteria contained in Article 25(d)(2) are inherently subjective, and neither the UCMJ nor the *Manual for Courts-Martial* provides useful definitions or guidance for interpreting them. How is a convening authority supposed to evaluate a potential court member's age? Is older supposed to be wiser? Is it another way of showing a preference for experience, or is the criterion just meant to convey a warning about selecting an entire panel of very young members? If age and length of service are important

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86. UCMJ art. 26(a) (1968).

87. Gilbert D. Stevenson, *The Inherent Authority of the Military Judge*, 17 A.F. L. REV. 1, 5 (1975) (footnotes omitted) *quoted in* 1 GILLIGAN & LEDERER, *supra* note 3, § 14-10.00.

88. *Compare* UCMJ art. 26(a) (1950) *with* UCMJ art. 26(a) (1968).

89. UCMJ art. 16 (1968).

90. There are a few states in which the jury does have sentencing responsibilities. 1 GILLIGAN & LEDERER, *supra* note 3, at 515 n.15.

91. UCMJ art. 51(a) (1968).

92. *See* LURIE, *supra* note 62, at 77-78, 103, 111, 128.

93. *See* United States v. Rome, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting); United States v. Matthews, 16 M.J. 354, 383 (C.M.A. 1983) (Fletcher, J., concurring).

criteria, it would appear that officers and enlisted personnel with less than ten years of experience would not qualify. But, the Court of Appeals for the Armed Forces held that it is only permissible to "look first at senior grades so long as lower grades are not systematically excluded."[94]

How is the convening authority to evaluate a person's education? Does a professional degree make one more suitable for court-martial duty than a bachelor's degree or a high school diploma? Should the type of education matter–liberal arts degree versus engineering degree? If the case is likely to involve scientific evidence, should the convening authority appoint mostly persons with degrees in science? What sort of "training" does the statute envision a court member should have? If an accused is charged with negligent homicide or dereliction of duty because of improper maintenance on an aircraft, should the convening authority select mostly maintenance personnel to sit on the court? What is judicial temperament and how is a convening authority expected to evaluate a potential member's possession of such an attribute? People often disagree on the meaning of such terms. One need only look to some of the rancorous debates over the nominations of federal judges to see how truly subjective assessments of judicial temperament can be.[95]

The Article 25(d)(2) criteria seem to be premised on a belief that the convening authority has the ability to personally assess the qualities of the members he details for court-martial duty. This may have been true in the past, when commands were smaller. It may even be true today for special courts-martial, where the convening authority is usually selecting members from the same installation he commands. But, it is certainly not true for general courts-martial. A general court-martial convening authority, especially overseas, may have several installations under his command and may be located hundreds of miles from the installation at which the accused is to be tried.[96] It is unlikely that he knows many prospective members at that installation other than the senior leadership, well enough

94. United States v. White, 48 M.J. 251, 254 (1998).

95. Consider the debates in the Senate over the nominations of Robert Bork and Clarence Thomas to sit on the Supreme Court of the United States. *See* SENATOR PAUL SIMON, ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK AND THE INTRIGUING HISTORY OF THE SUPREME COURT'S NOMINATION BATTLES (1992); ETHAN BRONNER, BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA (1989).

96. Except for very large installations, the commanders of most Air Force bases (normally a wing commander) are usually only authorized to convene special courts-martial. General courts-martial may be convened by commanders of numbered air forces (e.g., 8th Air Force) and a few large installations.

to personally apply the selection criteria in the manner contemplated by the drafters of the UCMJ. Thus, the convening authority is forced to rely on his staff and subordinate commanders to recommend service members for court-martial duty. But, that means someone other than the convening authority is actually deciding that the member is "best qualified" for court-martial duty under Article 25(d)(2).

This raises another problem. What does "best qualified" mean? The term suggests that the convening authority should detail only the most qualified members. Typically, that would be commanders and other senior officers and enlisted members. While the convening authority is not prohibited from appointing senior leadership to sit on a court,[97] the military appellate courts would probably not view favorably the detailing of the same members to every court. In any event, appointing senior leadership to every court-martial would seriously diminish the ability of these individuals to accomplish other important duties.

With the detailing of military judges to preside over courts-martial in 1969,[98] court members no longer perform many of the judicial duties with which they were formerly tasked. The sole judicial duty they now perform is sentencing. But, the inability of court members to perform this duty was precisely why Congress legislated the criteria in Article 25(d)(2) in the first place. As long as members are required to perform the sentencing function, there is good reason to retain criteria for selecting mature, intelligent, and experienced court members.

V. Article 25(d)(2) and Random Selection of Court Members

While noting the theoretical problems with Article 25(d)(2), it would not be fair to dismiss the congressional mandate outright without first examining how Article 25(d)(2) would affect any random selection scheme. Before evaluating the alternatives, this article must define a few terms. These terms are not normally associated with the selection of court members, but should assist in clearly defining the alternatives.

> The *pool* consists of those military members eligible to sit on a particular court-martial from which the *venire* is selected.

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97. *See* United States v. White, 48 M.J. 251, 253-54 (1998) (stating commanders have unique military experience which is conducive to selection as court-martial members).

98. The Military Justice Act of 1968 was implemented in 1969, and military judges were detailed to preside over all general courts-martial and special courts-martial for which a bad-conduct discharge could be adjudged.

> The *venire* consists of the members detailed to sit on a court-martial.
>
> The *panel* consists of the members that make it through challenges and actually hear evidence and render judgment on the case.

If Congress insists on retaining Article 25(d)(2), there are two basic random selection alternatives to the current system: (1) randomly select a pool of candidates from the base population and then select the venire by applying Article 25(d)(2) criteria; and (2) identify a pool of eligible court members by applying Article 25(d)(2) to the military population of the base, post, command, or ship and then randomly select the venire from that pool.

In the first alternative, some sort of random selection method would be employed to identify the pool. The convening authority would then select the venire from the pool by applying the Article 25(d)(2) criteria. The ability of the convening authority to shape the panel would be directly proportional to the size of the pool. The larger the pool, the more discretion the convening authority would have in selecting the venire. Thus, large pools would not alleviate the perception of unfairness. There would be little if any difference from the current system in which the convening authority selects from the largest pool, the entire military population of the installation. Severely restricting the size of the panel would diminish the convening authority's discretion, but would also inhibit his ability to select members who would best be able to sentence the accused, if the court-martial convicts. Article 25(d)(2) would be rendered meaningless.

In the second alternative, the convening authority would apply the criteria of Article 25(d)(2) to each member of the base population to establish the pool. Then some random selection scheme would be applied to the pool to pick the venire. Implementing this alternative would be problematic. The larger the segment of the population against which the Article 25(d)(2) criteria are applied, the more time consuming the task for a flag officer already burdened with considerable other responsibilities. The convening authority and his staff would have to monitor the list continuously to delete members who move to another station or get in trouble and to add members who arrive at the new station or have matured into warranting consideration as court members. Article 25(d)(2) requires that the convening authority select the "best qualified," not those who are merely qualified. If the convening authority conscientiously applies the "best qualified" criteria in evaluating the base personnel, the pool would be quite

small. Selecting the venire randomly from this pool, hand-picked by the convening authority, will not convince critics that the system is fairer.

Article 25(d)(2) is not the sine qua non; it is the problem. It is basically incompatible with a random selection system. As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate. Some of that criticism might disappear if someone other than the convening authority applied the criteria. The two most likely candidates for such duties would be a different convening authority or a military judge. But, such a system would be cumbersome and impractical. It is doubtful that either a different convening authority or a military judge would be able to personally apply the criteria to prospective court members they do not know. They would still have to rely on the recommendations of the prospective members' commanders and supervisors. And, because flag officers are likely to know each other, there would be allegations that one convening authority picked harsh disciplinarians with the expectation that when he referred a case to trial, other convening authorities would reciprocate.

Having the military judge select the members sounds promising, but offers its own problems. While military judges may be presumed to be fair, is the selection of court members compatible with duties as a military judge? The military judge is even further removed from the court members than is the convening authority. The only way the military judge could apply the Article 25(d)(2) criteria is to depend on others to judge a prospective member's experience and judicial temperament. The choices forced on the military judge would open the position to criticism by the accused and the defense bar. After all, if the accused had wanted the military judge so involved, he could have requested trial before a military judge sitting alone.

V. A Proposal

Now that this article has established that the random selection of court members is incompatible with the criteria contained in the first sentence of Article 25(d)(2), should the quest for a more impartial method of selecting court members be abandoned? If Congress is truly convinced that the current method for selecting court members is, or appears to be, unfair, then it does not make sense to stop looking for a remedy. It just means that any remedy must include a mechanism for insuring the sentencing authority has the experience and judicial temperament to render a fair and just sen-

tence that caused Congress to enact Article 25(d)(2) in the first place. If we could devise such a system, the need for Article 25(d)(2) would disappear, and consequently, the door would be open to explore alternatives for the random selection of court members. To be viable, any proposal must satisfy three criteria: (1) remedy the perception of unfairness caused by the convening authority's power to select the court members who will try the case, (2) assure that verdicts and sentences are fair and just, and (3) be efficient and promote good order and discipline in the armed forces.[99]

This article proposes a system that eliminates the sentencing concerns of Congress and provides for the random selection of court members who are superior in rank to the accused. The main features of the proposed system include the following:

(1) Military judges will preside over all special and general courts-martial.

(2) A military judge performs the sentencing function in all special and general courts-martial, except capital cases.

(3) The convening authority will refer a case for trial by general or special court-martial, not to a specific court panel.

(4) If an accused elects trial before court members, the venire will consist of a cross-section of the military community (by grade), who are superior in rank to the accused and have at least two years of military service, randomly selected from those military members assigned to the installation or command and not a member of the accused's unit. Enlisted accused will no longer get to elect whether the panel shall contain enlisted members.

(5) The elimination of peremptory challenges.

A. The Military Judge as Sentencing Authority

Debate over whether military judges should be the sole sentencing authority has been percolating since at least 1919, when Samuel Ansell proposed such a scheme.[100] The Military Justice Act of 1983 Advisory Commission recommended against adopting judge-only sentencing.[101]

99. *See* MCM, *supra* note 40, pt. I, ¶ 3.

While judge-only sentencing is worthy of a more thorough treatment, this section covers only the major points of the debate.[102]

Several reasons have been cited for moving to a judge-only sentencing system, but the most important is that military judges are trained, professional jurists who are better able to perform the sentencing function than court members. Military judges are commissioned officers who are members of the bar of a federal court or the highest court of a state. The Judge Advocate General (TJAG) of the service to which the officer belongs certified the officers as qualified to perform judicial duties.[103] Although the UCMJ does not impose any Article 25(d)(2) criteria on the selection of military judges, the officers that the TJAGs appoint to these positions have considerable legal training and experience.

Military judges receive initial and continuing training provided by both military and civilian judicial training institutions.[104] They likely have considerable experience with sentences from their days as trial and defense counsel, from reading appellate opinions, and sentencing service members who elect trial by military judge alone. They have a considerably better understanding of the law, the rationales for sentencing, and the collateral consequences of a sentence than do members. They are more likely to monitor trends in sentencing and be more concerned with disparate sen-

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100. Major Gerald F. Crump, *A History of the Structure of Military Justice in the United States, 1775-1920*, 16 A.F. L. REV. 41, 65 (1974). During World War I, while The Judge Advocate General of the Army, Major General Enoch Crowder, served as the provost marshal overseeing the conscription effort, his trusted aide, Brigadier General Ansell, performed the duties of The Judge Advocate General. With the end of the war, and after a bitter debate with General Crowder over proposed changes to the military justice system, Ansell was returned to his "permanent" rank of lieutenant colonel, and then retired in July 1919. He had been returned to the rank of lieutenant colonel before he made the proposal. *Id.* at 59-64; LURIE, *supra* note 60, at 102, 115. Of course, there were no military judges at that time.

101. *See* THE MILITARY JUSTICE ACT OF 1983 ADVISORY COMMISSION REP. 12 (1984) [hereinafter 1983 ADVISORY COMMISSION].

102. *See* Major Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (providing a thorough analysis of many of the issues involved).

103. UCMJ art. 27(b) (LEXIS 1999).

104. Each military trial judge receives three weeks of initial training at The Army Judge Advocate General School at Charlottesville, Virginia. Each year, the Air Force hosts a week-long interservice judges' seminar at The Air Force Judge Advocate General School at Maxwell Air Force Base, Alabama. Judges from each of the military services have also attended the National Judicial College in Reno, Nevada.

tences than would officers and enlisted members who are rarely called upon to perform court-martial duty.

> The experienced and professional military lawyers who find themselves appointed as trial judges . . . have a solid feel for the range of punishments typically meted out in courts-martial. . . . We have every confidence that this accumulated knowledge is an explicit or implicit factor in virtually every case in which a military judge imposes sentence.[105]

Unlike court members, who normally report up their chain of command to the convening authority who referred the case to trial, military judges report up a judicial chain of command to the TJAG of their service.[106] Thus, judge-only sentencing would insulate the sentencing function from undue command influence and improve the public's perception of military justice. Civilians are used to having trained, professional, independent judges impose sentences. Retaining court member sentencing in a random selection scheme would not change public perception that courts-martial are appointed to do the convening authority's bidding. While one could argue about the independence of military judges, because they are not in the same chain of command as the convening authority, they are certainly more independent than are the court members.

The military employs an individualized sentencing scheme. "Generally, sentence appropriateness should be judged by 'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'"[107] This can be a daunting task that requires an expertise court members cannot possibly be expected to possess. In the military, all known offenses committed by an accused may be tried at the same time, even if the offenses are not related to each other in any way.[108] Unlike the federal and state systems, a military accused is not sentenced for each offense separately, with some running concurrently with others. The military has a unitary system of sentencing–the accused receives one sentence for all of his offenses.[109]

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105. United States v. Lacy, 50 M.J. 286, 288 (1999) (quoting United States v. Ballard, 20 M.J. 282, 286 (C.M.A. 1985)).

106. UCMJ art. 26(c).

107. United States v. Snelling, 14 M.J. 267, 268 (1982) (quoting United States v. Mamaluy, 27 C.M.R. 176, 180-81 (1959)).

108. MCM, *supra* note 40, R.C.M. 307(c)(4) ("Charges and specifications alleging all known offenses by an accused may be preferred at the same time.").

109. *See* United States v. Weymouth, 43 M.J. 329, 336 (1995).

The sentencing authority is not encumbered by guidelines, but has the unfettered discretion to impose any sentence between "no punishment" and the maximum punishment prescribed by Congress or the President.[110] The maximum sentence to confinement is calculated by totaling the maximum confinement that may be imposed for each offense. The sentencing authority often has to determine an appropriate sentence for a number of unrelated offenses with a maximum period of confinement that may reach beyond one hundred years.

The military judge instructs the members on, among other things, the goals of sentencing, the maximum sentence they may adjudge, and the requirement to consider all factors in aggravation, extenuation, and mitigation.[111] But, no one tells the members how these factors are to be evaluated or what to apply them to. Court members are rightly concerned that the sentence they adjudge is neither too harsh nor too lenient. With the small number of courts-martial being tried these days, few court members have much experience. Further, even experienced members may never have sat on a case with similar charges before. It is not surprising that court members readily admit that they are uncomfortable with the sentencing function.[112]

The critics of judge-only sentencing, including the Military Justice Act of 1983 Commission, have asserted several reasons against adopting judge-only sentencing. These include: (1) the lack of "persuasive evidence that judge sentencing produces more consistent sentences than court-member sentencing for similarly situated accuseds,"[113] (2) judge-only sentencing would terminate an important right of the accused to choose a sentencing forum, (3) many service members prefer member trials and sentencing, (4) the court panel enjoys a knowledge of existing stan-

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110. Except for offenses warranting the death penalty, Congress left the maximum punishment to the discretion of the President. UCMJ art. 56.

111. *See* MCM, *supra* note 40, R.C.M. 1005(e).

112. This fact is based on the author's personal experiences. While serving as the staff judge advocate at Laughlin Air Force Base, Texas, from 1985-88, several officers who sat on courts-martial complained that military judges did not provide them realistic guidance on how to determine an appropriate sentence. While sitting as a trial judge, on at least two occasions, I was approached, after trial, by court members who voiced similar complaints. The president of one court-martial, in which the possible sentence was well over 50 years, asked, on the record, if I could provide the court with a ball-park figure of what an appropriate period of confinement would be for the offenses of which the accused was convicted, to which the court members could then apply the aggravating and mitigating factors to reach an appropriate sentence.

113. 1983 ADVISORY COMMISSION, *supra* note 101, at 4-5.

dards of the military community that are not shared by the military judge, (5) the sentences rendered by court members provide military judges important feedback on the values and needs of a military community that helps establish a standard for cases tried by military judge alone, and (6) court member sentencing ensures a fair sentence in cases in which the military judge has learned of inadmissible evidence. This article will next considers each of the Commissions' criticisms of judge-alone sentencing.

(1) *Consistent sentences.* The commission may be correct in asserting that there are no studies to show that military judges are more consistent in sentencing than court members. But, the commission's own survey indicated that the overwhelming number of participants perceived that military judge's were far more likely to adjudge more consistent sentences in similar cases.[114]

(2) *Military accused have long enjoyed a right to elect member sentencing the removal of which would deprive them of an option they value*; and (3) *many accused prefer member sentencing.* Before the introduction of military judges in 1969, military accused did not elect sentencing by members; it was required by statute.[115] And, the election is not as great a right as the Commission suggests. Under the current system, the accused is faced with a dilemma. If the accused elects trial on the findings before members and is convicted, he is stuck with members for sentencing. While he may believe he has a better chance of an acquittal before court members, he may be afraid of the severity of the sentence they would impose if they convict, especially in a case with a sympathetic victim. By adopting judge-only sentencing, an accused would no longer have to worry about the sentencing consequences of trying his case to a court-martial panel of members.

Initially, adopting judge-only sentencing may lead to more contested trials than is presently the case. Such a reaction should be expected because military judges will not have much of a record of sentencing in contested cases. This issue should disappear once military judges start sentencing in cases litigated before court members and defense counsel

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114. *Id.* at 369. Except for the judges on the Navy appellate court, who split evenly, all other groups "agreed overwhelmingly that military judge sentencing is more consistent in similar cases than member sentencing." The other groups included convening authorities, trial and defense counsel, staff judge advocates, and trial and appellate judges.

115. *Compare* UCMJ art. 52(b) (1950) *with* UCMJ art. 52(b) (1968).

and accused are convinced that military judges will reward them for pleading guilty.

As the critics suggest, judge-only sentencing would deprive an accused of an option that many value. But, why should an accused get to select the sentencing authority? The current system promotes sentence disparities and is the reason military accused want to retain it.[116] They can exploit the system by demanding trial by the sentencing authority likely to be the most lenient for his offenses. If a court-martial sentence is to promote good order and discipline, it seems incongruous that an accused would be permitted to decide who sentences him.

(4) *The court panel enjoys a knowledge of existing "attitudes and concerns of a particular command"*[117] *that are not shared by the military judge*; and (5) *the sentences rendered by court members provide feedback to the military judge on the community standards.* These conclusions are based on several premises that are of questionable validity. First, is the premise that the "attitudes and concerns of a particular command" should play a significant role in military sentencing. The Court of Appeals for the Armed Forces has consistently held that command policies do not belong in the courtroom because they raise the specter of unlawful command influence.[118] The service courts of criminal appeals can only approve a sentence if they find it to be correct in law and fact.[119] The military appellate judges are even further removed from the local command's concerns than is the trial judge, yet it is doubtful they would approve the sentence of one accused who is sentenced to a considerably harsher sentence than similarly situated accused in other commands.

Second, court member sentencing would have to produce consistent results to provide meaningful feedback to the military judge. Such is not the case, and the Commission's own opinion polls demonstrate as much.[120] How can court member sentencing establish community "punishment norms," when an enlisted accused gets to choose whether to be tried by a

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116. Only defense counsel and convening authorities opposed judge only sentencing. 1983 ADVISORY COMMISSION, *supra* note 101, *Minority Report in Favor of Proposed Change to Judge-Alone Sentencing*, at 28 n.1. "The right to members' sentencing is no more than the right to gamble on a group of inexperienced or overly sympathetic laymen reaching a less severe sentence than a professional judge." *Id.* at 39.

117. 1983 ADVISORY COMMISSION, *supra* note 101, at 5.

118. United States v. Grady, 15 M.J. 275, 276 (C.M.A. 1983).

119. UCMJ art. 66(c) (LEXIS 1999).

120. *See supra* note 114.

court consisting of officers or officer and enlisted members? Furthermore, we can expect the random selection of court members to exacerbate the lack of experience of court members in sentencing. The resulting disparate sentences would not provide useful guidance on which military judges could base a sentence. The community standards for a court composed of officers is unlikely to be the same as for a court in which enlisted members participate.[121]

Although military judges now provide detailed sentencing instructions to the court members, it is impossible to educate court members on the collateral consequences of a sentence. The Court of Appeals for the Armed Forces insists that "courts-martial [are] to concern themselves with the appropriateness of a particular sentence for an accused and his offense, without regard to the collateral administrative effects of the penalty under consideration."[122] But, how can a sentence be just if the sentencing authority does not understand what the sentence means to the accused in practical terms?

No wonder court members readily admit they are uncomfortable with the sentencing function.[123] Court members are concerned with adjudging an appropriate sentence and understand that the accused's sentence should not be considerably different from other accused who are similarly situated. Telling court members that they may adjudge a minimum of "no punishment" and a maximum that might include a punitive discharge and confinement for 120 years does not provide them with any meaningful guidance on which to fashion a fair and just sentence. Without knowing what is an appropriate range of punishments for a particular offense, they are often clueless as to how they are supposed to be applying the aggravating, extenuating, and mitigating factors.[124]

(6) *Court members ensure a fair sentence in cases in which the military judge has learned of inadmissible evidence*. Military judges are keenly aware of their responsibilities not to consider inadmissible evidence when they sentence.[125] They understand the court of criminal appeals must review the sentence and "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds

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121. Enlisted accused charged with cheating on promotion examinations invariably demand trial by officer members because they expect that enlisted members would view such transgressions more harshly.

122. United States v. Henderson, 29 M.J. 221, 222 (C.M.A. 1989).

123. *See supra* note 112.

124. *Id.*

correct in law and fact and determines, on the basis of the entire record, should be approved."[126] The trial judges also have their experience, training, and knowledge of other cases to act as a check on the imposition of an inappropriately harsh or light sentence.[127]

Judge-only sentencing is an important step to improving the military justice system and is absolutely necessary if Congress decides to order the random selection of court members. Judge-only sentencing will ensure that sentences are made by trained professionals concerned with the consistency, as well as the fairness, of the sentence.

B. Military Judges Preside Over all Special and General Courts-Martial

In 1968, when Congress introduced military judges into courts-martial, they left a loophole. The UCMJ still permits convening authorities to refer cases to special courts-martial without a military judge; however, such a court-martial cannot adjudge a punitive discharge.[128] Despite this provision, service regulations compel the use of military judges in all special and general courts-martial.[129] Even during conflicts such as Vietnam and Desert Storm, military judges traveled to, and presided over, courts-martial in the combat zone.[130] The rigorous technical demands placed on courts-martial by the UCMJ, the President in his Rules for Courts-Martial and Military Rules of Evidence, and the appellate courts, militate against convening authorities referring cases to court without a military judge presiding. But, to advance to a judge-only sentencing system, Congress must

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125. *Cf.* United States v. Howard, 50 M.J. 469, 471 (1999) ("Military and civilian judges are routinely tasked with hearing facts for limited purposes, which they later disregard if consideration would be improper.").

126. UCMJ art. 66(c) (LEXIS 1999).

127. *See* United States v. Lacy, 50 M.J. 286, 288 (1999).

128. UCMJ art. 19.

129. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-12.00.

130. The author presided over the two Air Force courts-martial associated with Operation Desert Shield in Saudi Arabia in January 1991. *See* THE ANNUAL REPORT OF THE JUDGE ADVOCATE GENERAL OF THE NAVY PURSUANT TO THE UNIFORM CODE OF MILITARY JUSTICE, FISCAL YEAR 1991, 34 M.J. CXVIII (noting that the Marine Corps tried 67 courts-martial in FY 91 in-theater during Desert Shield/Desert Storm); COLONEL JACK CROUCHET, VIETNAM STORIES: A JUDGE'S MEMOIR (1997).

amend Article 16, UCMJ, to abolish special courts-martial to which no military judge is detailed.

C. Referral of Case to Trial

In the military, the convening authority decides whether an accused will stand trial by court-martial. "Referral is the order of a convening authority that charges against an accused will be tried by a *specified* court-martial."[131] The UCMJ does not require the convening authority to refer the case to a specific panel,[132] but it has been done this way throughout our history.[133] The practice is now enshrined in the President's pretrial procedural rules, the Rules for Courts-Martial (R.C.M.).[134]

Before 1969,[135] the practice was efficient and made sense. There were no military judges, so all courts-martial were tried before court members. By referring a case to a specified court panel, the convening authority could order a case to trial by a court panel already in existence. Now, the accused may elect trial before a military judge sitting alone[136] and does so in over fifty percent of the cases.[137] Under these circumstances, it is no longer efficient to select court members before referral when it is more than likely that the accused will agree to trial by judge alone.

The convening authority should merely refer the case to a general or special court-martial. If the accused wants to be tried by court members, he can demand them at arraignment, or earlier through counsel. There is no reason to waste the time and resources necessary to run the program to identify a pool of members, determine their availability, and then select the venire, if the accused decides to be tried by military judge alone. In many cases, the accused has already elected to be tried by military judge alone as part of his pretrial agreement. As the UCMJ does not require referral to

131. MCM, *supra* note 40, R.C.M. 601(a) (emphasis added).

132. United States v. Clark, 11 M.J. 179, 182 (C.M.A. 1981); 1 GILLIGAN & LEDERER *supra* note 3, § 10-31.00 n.47.

133. WINTHROP, *supra* note 51, at 158.

134. UCMJ art. 36(a) (LEXIS 1999) ("Pretrial, trial, and post-trial procedures . . . may be prescribed by the President . . . .").

135. The Military Justice Act of 1968, 82 Stat. 1335 (1968), provided for military judges. UCMJ art. 16 (1968).

136. UCMJ art. 16 (LEXIS 1999).

137. *See* 1 GILLIGAN & LEDERER, *supra* note 3, § 15-60.00 (Supp. 1998).

a specified court, the process can be changed simply by amending R.C.M. 601(a).

The defense community may argue that referring a case to a specific court provides the accused with an important right–knowing the names of the court members before he has to elect the forum that will try him. Thus, the accused can try to assess whether the panel or the military judge would be more lenient. Although the convening authority has permitted an accused to make such judgments, it is as a matter of economy, not of right. Those economies have disappeared with the increase in pretrial agreement induced judge-alone trials that now predominate. The proposed changes in the court member selection process are aimed at eliminating the appearance of undue command influence by removing the convening authority from the process. The accused will be in a state similar to that of his civilian counterpart; the court members will not be selected until after the accused demands trial before members.

D. A Random Selection Scheme

This proposal outlines one possible random selection scheme. The scheme itself would be codified in only the broadest terms to permit the services to implement the changes in a manner to meet their own peculiar needs.

In constructing a proposal for the random selection of court members, the first issue that must be confronted is the composition of the pool. Under the current system, probably because the convening authority has such broad discretion in selecting the venire, there are only few rules limiting the composition of the pool.

First, unless an enlisted accused affirmatively requests enlisted members on the panel, the pool is limited to eligible officers.[138] Granting an enlisted accused this right may have made sense when court members were required to determine the sentence if they convicted the accused of any offense, but it makes no sense in a system in which court members are selected randomly and have no part in sentencing. Article 25(c)(1), UCMJ, should be amended to eliminate this choice. Enlisted members

138. UCMJ art. 25(d)(1) (LEXIS 1999).

should be eligible to sit on the court-martial of any military member inferior in grade.

Second, a military member is not eligible to serve on a court-martial if, in the same case, he acted as an accuser, counsel, investigating officer, or a prosecution witness.[139] This rule must be retained, but it is more easily applied in excluding a member from the venire, rather than from the pool.

Finally, when possible, service members who are junior in grade to the accused are not to be detailed as members of a court-martial.[140] This rule makes sense, as it prevents the appearance that the junior members of the court have an interest in seeing the accused cashiered from the service so that they can be promoted.[141] The rule could be designed into the computer program used to select the pool and should be retained. Of course, this will cause the pool to shrink and expand depending upon the accused's grade.

While there is no statute specifically prohibiting members with certain specialties from serving on courts-martial, service regulations have long discouraged the appointment of many professionals. The Army discourages convening authorities from detailing chaplains, veterinarians, doctors, dentists, and members of the Inspector General's Corps (IG) to court-martial duty.[142] In practice, the services do not detail judge advocates to sit on courts-martial, either.

It seems appropriate to exclude judge advocates, chaplains, and members of the IG from the pool. Judge advocates are viewed in the military as the backbone of the military justice system. Junior judge advocates are often prosecutors, defense counsel, or subordinate to the staff judge advocate whose office is prosecuting the case. If not, the judge advocate is probably closely acquainted with the counsel who are prosecuting or defending the case. It just does not make sense to waste the time and

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139. *Id.* art. 25(d)(2).

140. *Id.* art. 25(d)(1). Since at least 1874, federal statutes have prohibited the detailing of court members who are junior to the accused. Article of War 79, 18 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 51, at 993; Article of War 16, 39 Stat. 619, 650-70 (1916), *reprinted in* MCM, 1917, *supra* note 53, app. 1; Article of War 16, 41 Stat. 787 (1920), *reprinted in* MCM, 1921, *supra* note 2, app. 1; UCMJ art. 25(d)(1) (1950).

141. *See* WINTHROP, *supra* note 51, at 72.

142. SCHLUETER, *supra* note 51, § 8-3(C)(1).

resources of voir dire and challenge to qualify judge advocates when they will normally be excused.

Chaplains and members of the IG should also be eliminated from the pool. Chaplains do not merely counsel and preach to their congregations. They are tasked with providing aid and comfort to all military members. Members of the IG are, in some ways, like ombudsmen. Their duty is to investigate complaints of wrongs. Thus, both chaplains and members of the IG often have knowledge of the facts of a case from talking to either the accused or to the accused's victims. It just makes sense to eliminate these members from the pool before a venire is selected. If not, a system whereby they may be excused from the venire before the court-martial convenes may be appropriate.

Doctors, dentists, and veterinarians, on the other hand, do not have duties that are incompatible with court-martial duty. In fact, they are often detailed as members in Air Force courts-martial.[143] Of course, with the draw down of medical professionals in the military, having them sit on courts-martial could seriously degrade the ability of hospital commanders to provide necessary medical services to the military community in a timely manner. Rather than a blanket exclusion from the pool, it might be more appropriate to leave this issue to the individual services to resolve by regulation.

Between 1921 and 1951, service members with less than two years of service could constitute no more than the minority membership of the court-martial unless manifest injustice would result.[144] The UCMJ eliminated this provision, but the appellate courts have declared that service members in the two lowest enlisted grades are presumed to lack the experience and maturity contemplated by Congress in establishing the criteria in Article 25(d)(2).[145]

There is good reason for totally excluding service members with less than two years of military service from the pool, whether they are officers or enlisted members. This is not a function of any perceived inability to

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143. This fact is based on the author's personal experience as a military trial judge presiding over several hundred courts-martial and, as an appellate judge, reading the records of trial in several hundred other cases.

144. *Compare* Article of War 4 (1916), (1920), and (1948) *with* UCMJ art. 25(d) (1950).

145. *See* United States v. Lewis, 46 M.J. 338, 342 (1997); United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

perform the duty, especially if sentencing were reserved for the military judge, but is merely a reflection of the reality of military training. For the first two years of service, most military members are deeply involved in training–first basic training, then advanced training, and often on-the-job training when they arrive at their first duty station. Interrupting such training can disrupt training schedules and cause considerable difficulty with individual military members completing their course work and being ready to move on to their next assignment. By making those with less than two years of service ineligible, the program will be easier to administer and would not be unduly prejudicial to an accused.

Once the pool is established, the venire must be selected. In the federal model, you would expect each venire to represent a cross-section of the community from which it was drawn because each member in the pool has an equal chance of being selected for the venire. Military demographics are considerably different than those of the general public. Although military personnel range in age from seventeen to sixty-two years of age, a substantial portion of the population is twenty-five and under, enlisted, and has less than two years of military service.[146] If each member of the pool, heavily weighted with young, junior enlisted members, had an equal chance of sitting on a court-martial, it is unlikely that any panel would represent a cross-section of the military community. In fact, we could reasonably expect some panels to be composed entirely of members in the grades of E-4 and below who are under twenty-five years of age.

To avoid such a situation, the selection scheme should guarantee that the venire consists of a cross-section of the military community by grade. This could be accomplished by setting up categories of members based on grade: senior officer (O-6 and above if necessary),[147] field grade officer (O-4 and O-5), company grade officer (O-2 and O-3),[148] senior non-commissioned officer (E-7 to E-9), noncommissioned officer (E-5 and E-6),

146. As of the beginning of the year 2000, the demographics in the Air Force reflected the following: Approximately 41% of the enlisted force and 12% of the officers were 25 years of age or under; approximately 19% of the enlisted force and 11% of the officers had under two years of service; and, enlisted members in the grades E-1 – E-4 represented approximately 48% of the enlisted force and over 38% of the total Air Force. *See* Air Force Personnel Center, *Interactive DEmographic Analysis System (IDEAS II)* (visited 5 Jan. 2000) <www.afpc.randolph.mil>.

147. Due to the limited number of senior officers and the gravity of their other responsibilities, it may be appropriate to limit their participation to general courts-martial and cases in which, because of the accused's grade, they were necessary.

148. O-1s usually have less than two years of military service. Those that have more than two years of service could be considered for court-martial duty along with the O-2s.

and junior enlisted (E-3 to E-4).[149] A computer program would randomly rank each member of the category.

The staff judge advocate would then eliminate the convening authority, the accuser, witnesses, persons in pretrial or post-trial confinement, and those with court-martial convictions, and perhaps non-judicial punishments, from the list. The staff judge advocate would contact the commanders for the highest ordered members in each category to determine the members' availability to sit on the court-martial. The convening authority, or the member's commander if the convening authority is not in the member's chain of command, would make the final determination of availability. The names and reasons of those who claim to be unavailable would be referred to the convening authority for a final determination.

Before the court-martial is assembled, the convening authority may excuse any detailed member by reason of duty, emergency, illness, or disqualification. The convening authority may delegate this authority to his staff judge advocate or principal assistant. Any member excused after being detailed to the court-martial would be replaced by the next available member in the excused member's category. Decisions by the convening authority and the staff judge advocate eliminating members from the venire, and the reasons therefore, shall be submitted to the military judge in writing and be attached to the record of trial.

The court would be convened with an equal number of members from each category. The court would be assembled with the members remaining after voir dire and challenges.

E. Peremptory Challenges

While peremptory challenges have been part of American jurisprudence for over 200 years and of the common law for several additional centuries,[150] they are not constitutionally required.[151] They also were not part

149. E-1s and E-2s usually have less than two years of military service and should not be considered.

150. Batson v. Kentucky, 476 U.S. 79, 112 (1986) (Burger, C.J., dissenting).

151. *See, e.g.*, *Batson*, 476 U.S. at 91; Swain v. Alabama, 380 U.S. 202, 219 (1965); Stilson v. United States, 250 U.S. 538, 586 (1919).

of court-martial practice until 1921 in the Army[152] and 1951 in the Navy.[153]

Adopting a scheme for randomly selecting court members is not dependent upon either the existence or elimination of the peremptory challenge. However, because the random selection of court members represents such a fundamental change to the system, it is worth considering whether peremptory challenges will still be necessary and appropriate.

Peremptory challenges were designed to be exercised without explanation.[154] Over the past thirty-five years, however, the Supreme Court has restricted their use. In 1965, the Court held in *Swain v. Alabama*,[155] that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution for prosecutors to use peremptory challenges to systematically exclude African-American jurors in every criminal trial. But, *Swain* placed "a crippling burden of proof" on defendants that basically immunized prosecutors' peremptory challenges from judicial scrutiny.[156] Twenty-one years later, in *Batson v. Kentucky*, the Supreme Court adopted a new procedure that made it easier for the accused to establish a prima facie case of purposeful discrimination–now, it could be based solely on the prosecutor's conduct at the defendant's trial. The Supreme Court has extended the *Batson* rationale to apply to defense challenges,[157] challenges based on race when the accused and juror were not members of the same race,[158] and to gender-based challenges.[159]

The Court of Military Appeals adopted *Batson* in *United States v. Santiago-Davila*.[160] As the Supreme Court extended *Batson*, the Court of Military Appeals followed suit. Thus, in the military, the *Batson/Santiago-*

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152. *Compare* Article of War 18, 41 Stat. 787 (1920) ("The accused or the trial judge advocate . . . shall be entitled to one peremptory challenge . . . .") *with* Article of War 18, 39 Stat. 653 (1916) ("Members of a general or special court-martial may be challenged by the accused, but only for cause stated to the court.").

153. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-55; UCMJ art. 41(b) (1950).

154. Lewis v. United States, 146 U.S. 370, 378 (1892) (It is "an arbitrary and capricious right; and it must be exercised with full freedom, or it fails of its full purpose."); MCM, 1951, *supra* note 52, ¶ 62*e* ("A peremptory challenge does not require any reason or ground therefor to exist or to be stated.").

155. 380 U.S. 202 (1965).

156. *Batson*, 476 U.S. at 92-93.

157. Georgia v. McCollum, 505 U.S. 42 (1992).

158. Powers v. Ohio, 499 U.S. 400 (1991).

159. J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127 (1994).

160. 26 M.J. 380 (C.M.A. 1988).

Davila rationale applies to defense challenges,[161] challenges when the accused is not a member of a cognizable group,[162] and to gender-based challenges.[163]

In the federal system, each party uses peremptory challenges to try to shape the jury. There are two impediments to the peremptory challenge being an effective tool for shaping the court panel in the military: (1) each side gets only one peremptory challenge,[164] and (2) the exercise of that peremptory challenge is subject to objection if used against a member of a cognizable group; in such an instance, to overcome the challenge, the party exercising it must establish a connection between the reason for the challenge and the "rejected member's ability to faithfully execute his duties on a court-martial."[165] But, as long as the convening authority who refers the case to trial also selects the court members, the accused and many critics will view the peremptory challenge as an indispensable requirement for a fair trial.

Although *Batson* was based on the harm caused to the accused by eliminating jurors of his own race from the jury, the Supreme Court recognized that "the prosecutor's discriminatory use of peremptory challenges harms the excluded jurors and the community at large," as well.[166] In expanding the scope of *Batson*, the Court changed its focus and concentrated more on the harm to the excluded jurors and the community.[167] But, if jurors and court members have some right not to be removed arbitrarily, why should members of cognizable groups have any more right to serve than other members of the community?[168]

If Congress adopts a scheme for the random selection of court members, it should abolish the peremptory challenge. The challenge will no longer be necessary to protect the accused from the convening authority's court member selections or the possibility that members will be removed

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161. United States v. Witham, 47 M.J. 297, 298 (1997).

162. *See* United States v. Ruiz, 49 M.J. 340, 343 (1998); *Witham*, 47 M.J. at 302-03.

163. *Witham*, 47 M.J. at 298.

164. UCMJ art. 41(b)(1) (LEXIS 1999); MCM, *supra* note 40, R.C.M. 912(g).

165. United States v. Tulloch, 47 M.J. 283, 286 (1997).

166. *Powers*, 499 U.S. at 406 (citing Batson v. Kentucky, 476 U.S. 79, 87 (1986)).

167. *See* J.E.B. v. Alabama *ex rel*. T.B., 511 U.S. 127, 141 (1994); Georgia v. McCollum, 505 U.S. 42, 48-49 (1992); *Powers*, 499 U.S. at 406.

168. *See* Akil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U. C. DAVIS L. REV. 1169, 1182 (1995).

because of purposeful discrimination.[169] To abolish peremptory challenges, Congress will need to amend Article 41, UCMJ.[170]

VI. Conclusion

In 2000, we mark the 50th anniversary of the UCMJ. It is a time to celebrate the success of a remarkable document that, with minor modifications, survived the massive changes the military and the nation have undergone since its adoption. Some view this anniversary as not just a time to celebrate, but an opportunity to establish a broad-based commission to conduct a thorough and comprehensive review of the entire military justice system.[171] Others are not persuaded that the UCMJ needs a comprehensive review by a commission that will include segments of society unfamiliar with the military justice system.[172] They believe such a review will inevitably lead to the further "civilianization" of the military justice system and a resulting deterioration of discipline–the heart and soul of every military organization. It is within this environment that Congress ordered the Secretary of Defense to propose reforms to the court member selection process.

The Secretary of Defense can resist change, or he can embrace it. In the current environment, resisting change would be a mistake. It is clear from the congressional mandate that Congress is interested in change. By failing to advocate a viable alternative to the current court member selection process, the Secretary of Defense would be inviting Congress to impose change from outside the military and lend credibility to those who propose a comprehensive review of the system.

> [I]t is vitally important if there is an outside threat to the system, to carefully assess the threat to see if it is justified. If it appears to be justified, no amount of wriggling will save the situation, and rapid steps should be taken to remedy it. Such steps should be taken by the armed forces themselves. Waiting is fatal, for it

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169. *See Batson*, 476 U.S. at 102-03 (Marshall, J., concurring) (ending discrimination in peremptory challenges requires eliminating them entirely).

170. 10 U.S.C.S. § 841 (LEXIS 1999). The Appendix contains a suggested amendment to Article 41.

171. AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ARMED FORCES LAW REPORT TO THE HOUSE OF DELEGATES (1999).

172. This fact is based on the author's personal discussions with senior judge advocates in the Army, Navy, Marine Corps, and Air Force.

> means that the solution will be enforced by an outside authority, whose understanding of the needs of the Services may not be sufficient to ensure that the system survives in an acceptable state.[173]

The threat to the court member selection process is real and justified. It "is the most vulnerable aspect of the court-martial system; the easiest for the critics to attack."[174] When it is impossible to convince even military judges from other countries that our current system of selecting court members is fair,[175] it is unlikely Congress or the American public will be so convinced. Many in the public and even the military believe that courts-martial are routinely rigged, although little evidence exists to suggest it.[176] Sooner or later, however, the system will be changed. But, the military should not fear change, for change is inevitable in the democratic society it serves. Just as the military is evolving to meet new missions and employ new weapon systems, the military justice system must evolve to meet the expectations of justice in our society and to enhance the performance of the military mission. It is better for the military to embrace change now and attempt to control its course by proposing changes that will minimize the damage, rather than have some unpalatable alternative imposed by Congress.

The convening authority's inability to control the composition of court-martial panels will not spell the end of discipline in the military. Instead, it will do much to erase the perception that military justice is unfair. After all, justice is not incompatible with discipline.

> Once a case is before a court-martial, it should be realized by all concerned that the sole concern is to accomplish justice under the law. This does not mean justice as determined by the commander referring a case or by anyone not duly constituted to fulfill a judicial role. It is not proper to say that a military court-martial has a dual function as an instrument of discipline and as

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173. His Honour Judge James W. Rant, CB, QC, Findlay, *The Consequences: Remarks Given at The Judge Advocate General School, November 1997*, THE REPORTER, Sept. 1998, at 7 (reporting on changes to British court-martial procedures resulting from finding of European Court of Human Rights that the convening authority's role in the court-martial system was a violation of the European Convention on Human Rights–Findlay v. United Kingdom, 24 Eur. Ct. H.R. 221 (1997)).

174. United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring).

175. The author has tried.

176. 1 GILLIGAN & LEDERER, *supra* note 3, § 15-31.00.

> an instrument of justice. It is an instrument of justice and in fulfilling this function it will promote discipline.[177]
>
> The military needs to be in the vanguard, continually looking for changes that will not only enhance the ends of justice, but also the needs of military discipline and efficiency. It is essential that the military develop and propose its own reform to the court member selection process. The primary requirements for such a system should be judge-only sentencing and the random selection of members within grade categories. Such a system should assuage the reformers, ensure that courts-martial are fair, just, and efficient, and promote good order and discipline in the armed forces.

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177. THE COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 12 (Jan. 18, 1960), *quoted in* SCHLUETER, *supra* note 49, § 1-1.

APPENDIX

Proposed Changes to the UCMJ and R.C.M.

This appendix provides the statutory and rule changes necessary to implement the change to the court member selection process proposed in this article. Deletions are indicated by strike-throughs and additions are indicated by underlines.

Article 16, UCMJ, 10 U.S.C. § 816

§ 816. Art. 16. Courts-martial classified

The three kinds of courts-martial in each of the armed forces are—

(1) general courts-martial, consisting of—

(A) a military judge and not less than five members; or

(B) only a military judge, if before the court is assembled the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge and the military judge approves;

(2) special courts-martial, consisting of—

~~(A) not less than three members; or~~

~~(B)~~(A) military judge and not less than three members; or

~~(C)~~(B) only a military judge, if ~~one has been detailed to the court, and~~ the accused under the same conditions as those prescribed in clause (1) (B) so requests; and

(3) summary courts-martial, consisting of one commissioned officer.

Article 19, UCMJ, 10 U.S.C. § 819

§ 819. Art. 19. Jurisdiction of special courts-martial

Subject to section 817 of this title [10 U.S.C. § 817] (article 17), special courts-martial have jurisdiction to try persons subject to this chapter [10 U.S.C. §§ 801 et seq.] for any noncapital offense made punishable by this chapter [10 U.S.C §§ 801 et seq.] and, under such regulations as the President may prescribe, for capital offenses. Special courts-martial may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter [10 U.S.C. §§ 801 et seq.] except death, dishonorable discharge, dismissal, confinement for more than six months, hard labor without confinement for more than three months, forfeiture of pay exceeding two-thirds pay per month, or forfeiture of pay for more than six months. A bad-conduct discharge may not be adjudged unless a complete record of the proceedings and testimony has been made, counsel having the qualifications prescribed under section 827(b) of this title [10 U.S.C. § 827(b)] (article 27(b)) was detailed to represent the accused~~, and a military judge was detailed to the trial, except in any case in which a military judge could not be detailed to the trial because of physical conditions or military exigencies. In any such case in which a military judge was not detailed to the trial, the convening authority shall make a detailed written statement, to be appended to the record, stating the reason or reasons a military judge could not be detailed~~.

Article 25, UCMJ, 10 U.S.C. § 825

§ 825. Art. 25. Who may serve on courts-martial

(a) Any commissioned officer on active duty is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

(b) Any warrant officer on active duty is eligible to serve on general and special courts-martial for the trial of any person, other than a commissioned officer, who may lawfully be brought before such courts for trial.

(c) (1) Any enlisted member of an armed force on active duty who is not

a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member of an armed force who may lawfully be brought before such courts for trial~~, but he shall serve as a member of a court only if, before the conclusion of a session called by the military judge under section 839(a) of this title (article 39(a)) prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If such members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained.~~

(2) In this article, "unit" means any regularly organized body as defined by the Secretary concerned, but in no case may it be a body larger than a company, squadron, ship's crew, or body corresponding to one of them.

(d) (1) When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade, or has less than two years of military service.

(2) ~~When convening a court-martial,~~ As provided in regulations to be prescribed by the Secretary concerned, the convening authority shall detail as members of the court-martial ~~thereof~~ such members of the armed forces as are selected at random from a cross-section of the command and reasonably available to the location of trial~~, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament~~. No member of an armed force is eligible to serve as a member of a general or special court-martial when he is the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case.

(e) Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating in the

case by reason of duty, emergency, illness, or disqualification. Under such regulations as the Secretary concerned may prescribe, the convening authority may delegate his authority under this subsection to his staff judge advocate or legal officer or to any other principal assistant.

Article 26, UCMJ, 10 U.S.C. § 826

§ 826. Art. 26. Military judge of a general or special court-martial

(a) A military judge shall be detailed to each general and special court-martial. ~~Subject to regulations of the Secretary concerned, a military judge may be detailed to any special court-martial.~~ The Secretary concerned shall prescribe regulations providing for the manner in which military judges are detailed for such courts-martial and for the persons who are authorized to detail military judges for such courts-martial. The military judge shall preside over each open session of the court-martial to which he has been detailed.

(b) A military judge shall be a commissioned officer of the armed forces who is a member of the bar of a Federal court or a member of the bar of the highest court of a State and who is certified to be qualified for duty as a military judge by the Judge Advocate General of the armed force of which such military judge is a member.

(c) The military judge of a general court-martial shall be designated by the Judge Advocate General, or his designee, of the armed force of which the military judge is a member for detail in accordance with regulations prescribed under subsection (a). Unless the court-martial was convened by the President or the Secretary concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge. A commissioned officer who is certified to be qualified for duty as a military judge of a general court-martial may perform such duties only when he is assigned and directly responsible to the Judge Advocate General, or his designee, of the armed force of which the military judge is a member and may perform duties of a judicial or nonjudicial nature other than those

relating to his primary duty as a military judge of a general court-martial when such duties are assigned to him by or with the approval of that Judge Advocate General or his designee.

(d) No person is eligible to act as military judge in a case if he is the accuser or a witness for the prosecution or has acted as investigating officer or a counsel in the same case.

(e) The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor may he vote with the members of the court.

Article 40, UCMJ, 10 U.S.C. § 840

§ 840. Art. 40. Continuances

The military judge or a summary court-martial ~~without a military judge~~ may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.

Article 41, UCMJ, 10 U.S.C. § 841

§ 841. Art. 41. Challenges

(a) ~~(1)~~ The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel, but only for cause ~~stated to the court~~. The military judge, ~~or, if none, the court,~~ shall determine the relevancy and validity of challenges for cause, and may not receive a challenge to more than one person at a time. Challenges for cause by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.

(b) ~~(2)~~ If exercise of a challenge for cause reduces the court below the minimum number of members required by section 816 of this title (article 16), all parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any challenge for cause then apparent

against the remaining members of the court before additional members are detailed to the court~~. However, peremptory challenges shall not be exercised at that time.~~

~~(b)~~ ~~(1)~~ ~~Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court.~~

~~(2)~~ ~~If exercise of a peremptory challenge reduces the court below the minimum number of members required by section 816 of this title (article 16), the parties shall (notwithstanding section 829 of this title (article 29)) either exercise or waive any remaining peremptory challenge (not previously waived) against the remaining members of the court before additional members are detailed to the court.~~

~~(c)~~ ~~Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge.~~

Article 45, UCMJ, 10 U.S.C. § 845

§ 845. Art. 45. Pleas of the accused

(a) If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he had pleaded not guilty.

(b) A plea of guilty by the accused may not be received to any charge or specification alleging an offense for which the death penalty may be adjudged. With respect to any other charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a <u>summary</u> court-martial ~~without a military judge~~, a finding of guilty of the charge or specification may~~, if permitted by regulations of the Secretary concerned,~~ be entered immediately ~~without vote~~. This find-

ing shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence, in which event the proceedings shall continue as though the accused had pleaded not guilty.

Article 50a, UCMJ, 10 U.S.C. § 850a

§ 850a. Art. 50a. Defense of lack of mental responsibility

(a) It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

(b) The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.

(c) Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge~~, or the president of a court-martial without a military judge,~~ shall instruct the members of the court as to the defense of lack of mental responsibility under this section and charge them to find the accused—

(1) guilty;
(2) not guilty; or
(3) not guilty only by reason of lack of mental responsibility.

(d) Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused—

(1) guilty;

(2) not guilty; or

(3) not guilty only by reason of lack of mental responsibility.

(e) Notwithstanding the provisions of section 852 of this title (article 52), the accused shall be found not guilty only by reason of lack of mental responsibility if—

(1) a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or

(2) in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established.

Article 51, UCMJ, 10 U.S.C. § 851

§ 851. Art. 51. Votings and rulings

(a) Voting by members of a general or special court-martial on the findings ~~and on the sentence, and by members of a court-martial without a military judge upon questions of challenge,~~ shall be by secret written ballot. The junior member of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

(b) The military judge ~~and, except for questions of challenge, president of a court-martial without a military judge~~ shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused~~, or by the president of a court-martial without a military judge upon any question of law other than a motion for a finding of not guilty,~~ is final and constitutes the ruling of the court. However, the military judge ~~or the president of a court-martial without a military judge~~ may change his ruling at any time during the trial. ~~Unless the ruling is final, if any member objects thereto, the court shall be cleared and closed and the question decided by a voice vote as provided in section 852 of this title [10 U.S.C. § 852] (article 52), beginning with the junior in rank.~~

(c) Before a vote is taken on the findings, the military judge ~~or the presi-~~

~~dent of a court-martial without a militaryjudge~~ shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them—

(1) that the accused must be presumed to be innocent until his guilt is established by legal and competent evidence beyond reasonable doubt;

(2) that in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted;

(3) that, if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and

(4) that the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the United States.

(d) Subsections (a), (b), and (c) do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings ~~and, if the accused is convicted, adjudge an appropriate sentence~~. The military judge of such a court-martial shall make a general finding and shall in addition on request find the facts specially. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

(e) Except in capital cases, the military judge shall sentence an accused convicted of any offense. If court members convict the accused of an offense referred to trial as a capital offense by a unanimous vote, the court members will also determine the sentence.

Article 52, UCMJ, 10 U.S.C. § 852

§ 852. Art. 52. Number of votes required

(a) (1) No person may be convicted of an offense for which the death penalty is made mandatory by law, except by the concurrence of all the

members of the court-martial present at the time the vote is taken.

(2) No person may be convicted of any other offense, except as provided in section 845(b) of this title [10 U.S.C. § 845(b)] (article 45(b)) or by the concurrence of two-thirds of the members present at the time the vote is taken.

(b) ~~(1)~~ No person may be sentenced to suffer death, except by the concurrence of all the members of the court-martial present at the time the vote is taken and for an offense in this chapter [10 U.S.C. §§ 801 et seq.] expressly made punishable by death.

~~(2) No person may be sentenced to life imprisonment or to confinement for more than ten years, except by the concurrence of three-fourths of the members present at the time the vote is taken.~~

~~(3) All other sentences shall be determined by the concurrence of two-thirds of the members present at the time the vote is taken.~~

(c) All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty ~~or to reconsider a sentence, with a view toward decreasing it,~~ may be made by a any lesser vote which indicates that the reconsideration is not opposed by the number of votes required for that finding ~~or sentence. A tie vote on a challenge disqualifies the member challenged.~~ A tie vote ~~on a motion for a finding of not guilty or~~ on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused.

Article 53, UCMJ, 10 U.S.C. § 853

§ 853. Art. 53. Court to announce action

A court-martial shall announce its findings ~~and sentence~~ to the parties as soon as determined.

R.C.M. 601

Rule 601. Referral

(a) *In general.* Referral is the order of a convening authority that charges against an accused will be tried by a ~~specified~~ general, special or summary *court-martial.*