JURY NULLIFICATION: CALLING FOR CANDOR FROM THE BENCH AND BAR

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It is not only [the juror's] right, but his Duty . . . to find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the Direction of the Court.[2]

I. Introduction

This article addresses the controversial issue of jury nullification. *Black's Law Dictionary* defines jury nullification as a jury's "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because a result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[3] It occurs when a jury returns a verdict of not guilty despite its belief that the accused is, in fact,

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2. 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

3. BLACK'S LAW DICTIONARY 862 (7th ed. 1999).

guilty of the charge. In effect, the jury "nullifies" the charge because it believes the charge is either immoral or applied unfairly to the accused.

As the Court of Appeals for the District of Columbia noted in 1972, "The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge; for example, acquittals under the fugitive slave law."[4] Although military panels differ somewhat from civilian juries, both have the power to nullify the law.[5]

There are many circumstances under which jury nullification may be an issue in a military trial.[6] Imagine, for example, a court-martial of a soldier who refuses to take anthrax shots. Other soldiers in the command, whose earlier refusals were widely publicized in the local media, received nonjudicial punishment and administrative separation for their misconduct. Now, fearing the continuing press coverage will somehow discredit

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4. United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).

5. Before reaching the issue of nullification, a right to a jury trial must exist. The Constitution excludes members of the "land and naval forces" from the right to indictment by grand jury and trial by petite jury for capital and infamous crime. *See* CONST. amends. V, VI. A service member's right to a trial by a panel of military members is established by a federal statute based on the exercise of Congress's power under Article I, § 8, Clause 14 of the Constitution. *See* UCMJ arts. 16, 51-52 (2000). Rule for Courts-Martial 805(b) expresses this right, stating that "[u]nless trial is by a military judge alone . . . no court-martial proceeding may take place in the absence of any detailed member except as specified in the rule." MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 805(b) (2002) [hereinafter MCM]. This creates a system in which military accuseds have the right to choose the common-sense judgment of a panel over the more trained, but possibly less sympathetic, legal judgment of a single military judge. In fact, if an accused fails to elect whether to be tried before a panel or a military judge, he is presumed to want a panel composed of officers to judge his fate. *See id.* Under the Uniform Code of Military Justice (UCMJ), if one-third or more of the panel members vote for a finding of not guilty of an offense, the accused is acquitted of that offense—regardless of the evidence, the law, or any jury instructions. *See* UCMJ art. 52(a)(2). While the Constitution protects a civilian criminal defendant from double jeopardy (or retrial) for an offense, the military accused enjoys the same protection under Article 44, UCMJ. *Compare* CONST. amend. V, *with* UCMJ art. 44. Finally, similar to their civilian counterparts on juries, members on court-martial panels may not be punished for the verdicts they render. *See* UCMJ art. 37; United States v. Hardy, 46 M.J. 67, 73 (1997).

6. *See, e.g.*, Major Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, ARMY LAW., Apr. 1986, at 3. In *Equitable Acquittals*, Major Smythers, then a military judge stationed in Nuernberg, Germany, described four factual case scenarios that resulted in "equitable acquittals;" that is, in jury nullification. *See id.*; *see also infra* app. A-B (two factual case scenarios that resulted in jury nullification in findings and sentencing, respectively).

his unit, the commander wants to "up the ante" to jail time and a federal criminal conviction.

At trial, the panel members learn that the accused has served honorably for nineteen years. She earned combat parachutist wings in Panama, and she fought bravely in the deserts of Iraq. In the last four years, she has had seven miscarriages. Military doctors believe these miscarriages might be symptoms of "Gulf War Syndrome" related to her service in Operations Desert Shield and Desert Storm. The accused testifies that she loves being a soldier, but believes the anthrax program is dangerous and may hurt her ability to conceive a child. Through tears, she says she would rather face the humiliation of a court-martial for disobeying an order than take an anthrax shot.

The military judge instructs the members that they each have the responsibility to "impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with law, the evidence admitted in court, and [their] own conscience."[7] After deliberating for nearly three hours, the members return to the courtroom and ask, "If we find that all the elements of disobeying an order are present, does that necessarily mean that we still have to find the accused guilty as charged?"[8] How should the judge answer?

Similarly, imagine a case in which a soldier is charged with rape, oral sodomy, and adultery. The accused and the self-proclaimed victim ended their date at the accused's quarters with late-night drinks and sexual activity. The complaining witness testifies that she consented to oral sex, but then said "no" to any other sexual activity. The accused testifies that although he is technically married, he and his wife are legally separated. He describes the sexual activity in question in detail, focusing on the complaining witness's willing participation. The accused steadfastly maintains that both the oral and vaginal sex were consensual.

During closing argument, the defense counsel says the evidence clearly proves that no rape occurred. The defense argues that, under the circumstances, the accused should be found innocent of the rape charge

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7. *See* U.S. DEP'T OF ARMY, PAM. 27-9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK 53 (1 Apr. 2001) [hereinafter BENCHBOOK].

8. *See, e.g.*, *Hardy*, 46 M.J. at 68. In *Hardy*, a panel returned from deliberations to ask: "If we find that both—that all the elements of the charge are present, that does not necessarily mean that we still have to find the defendant guilty of that charge, is that correct?" *Id.*

and, in addition, not guilty of the adultery and sodomy charges.[9] The trial counsel objects, asserting that "because the accused admitted to committing adultery and oral sodomy, the military judge should instruct the members that the government has proven each and every element beyond a reasonable doubt, and therefore the panel must find the accused guilty." The defense requests an instruction telling the members that "even if the prosecution met its burden of proof, no member may be forced to convict against his or her own good conscience." What should the military judge do?

In most criminal jurisdictions, including the military, the bench and bar remain silent about the jury members' power to nullify the law.[10] The Court of Appeals for the Armed Forces (CAAF) directly addressed the issue of jury nullification for the first time in *United States v. Hardy.*[11] In *Hardy*, counsel requested instructions at trial similar to those requested in the latter scenario above. The CAAF held that the military judge properly refused the trial counsel's request to direct the panel to return a verdict of guilty. The CAAF also stated, however, that no right of jury nullification exists; it held that the military judge did not err in declining to give a nullification instruction requested by the defense.[12] Although the CAAF answered whether military judges are required to give a jury nullification instruction, the court left unanswered the proper content of such instructions, if trial judges elect to give them. The CAAF also left unanswered whether counsel can argue for jury nullification.

The CAAF's reasoning and holding in *Hardy* reflect the overwhelming majority of jurisdictions that distinguish between the jury's duty to adhere to judicial instructions and its raw power to acquit in the face of those instructions.[13] This article offers an alternative solution: candor from the bench and bar. After reviewing the history and competing policies behind the concept of jury nullification, this article advocates allowing military counsel to argue the concept directly to the panel. When trial judges prohibit explicit argument, they simply drive arguments for nullification "underground." Faced with this situation, counsel can, do, and, in appropriate cases, should make veiled arguments to communicate jury nullification concepts to the members. This underground method of advocat-

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9. *See, e.g.*, *infra* app. A (a recent court-martial with similar facts that resulted in a full acquittal).

10. *See, e.g.*, *Hardy*, 46 M.J. at 67.

11. *Id.* at 75.

12. *Id.*

13. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972).

ing nullification, however, leads to an unpredictable administration of justice.

An alternative to court-imposed silence is to permit counsel to argue for nullification overtly and trigger a tightly worded, legally restrictive pattern nullification instruction. This honest, candid approach is a better way to address the tension between panel members' unreviewable power to acquit and their duty to follow instructions from the bench.[14] This article concludes that the integrity of the justice system demands nothing less than complete frankness and candor from the bench and bar.

II. The History and Policies Behind Jury Nullification

Courts in England and the United States have wrestled with the concept of jury nullification for hundreds of years. The official reports are sporadic, with courts and lawmakers attempting a variety of approaches to resolve the tension between jury power and judicial authority. This distinction between the jury's raw power to acquit and its duty to follow the instructions of the trial judge is the basis for the current state of American law.[15]

Criminal trials by jury began in England around the year 1200 A.D.[16] In these trials, judges retained great power over the jurors. Even after the jurors announced their decision, the judge could force them to reconsider an "incorrect" verdict.[17] If the jury failed to follow judicial instructions, the trial judge could fine the members or bring them before a Star Chamber for violating their oaths as jurors.[18]

The first well-known jury nullification occurred at an English trial in 1649.[19] Mr. John Lilburne, who opposed the rule of Oliver Cromwell, published pamphlets critical of the English government.[20] English authorities prosecuted Mr. Lilburne for high treason, which then included the offense of expression of an opinion critical of the government.[21] Mr. Lilburne did not deny that his pamphlets and opinions were critical of the government; rather, he argued that the statute prohibiting his conduct was

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14. *See* Horning v. District of Columbia, 254 U.S. 135, 138 (1920).

15. *See Dougherty*, 473 F.2d at 1132.

16. *See* P.G. Lawson, *Lawless Juries? The Composition and Behavior of Hertfordshire Juries, 1573-1624*, *in* TWELVE GOOD MEN AND TRUE: THE CRIMINAL TRIAL JURY IN ENGLAND 1200-1800, at 137 (J.S. Cockburn & Thomas A. Green eds., 1988).

17. *Id.*

unlawful. During summation, he boldly argued that an English jury had the right to judge the law itself.[22] Although no basis in law supported Mr. Lilburne's argument, the jury nevertheless acquitted him.[23]

In another English trial twenty-one years later, *Bushel's Case*,[24] Chief Justice Vaughan announced the principle of non-coercion of jurors. Justice Vaughan based this principal on his holding that judges may not punish or threaten to punish jurors for their verdicts.[25] Vaughan's landmark opinion concluded a series of cases surrounding the prosecution of William Penn and William Mead for unlawful assembly and disturbing the peace.[26] After authorities closed their London meeting house, Penn and Mead assembled with their Quaker congregation to preach and pray on the street. Admitting these facts, but maintaining his innocence, Mr. Penn argued, "The question is not whether I am guilty of the indictment, but whether this indictment be legal."[27]

Edward Bushel was a juror in this trial. He and his fellow jurors returned a verdict of not guilty. The angry trial judge fined Bushel and the other jury members for failing to fulfill their duty as jurors. Bushel and three others refused to pay the fine and were jailed. They remained in jail for more than two months, and they petitioned the Court of Common Pleas for a writ of habeas corpus. Chief Justice Vaughan released the prisoners, holding that judges may not fine or imprison jurors for their verdicts.[28]

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18. *Id.* at 137-38. The Star Chamber was

> an ancient court of England that received its name because the ceiling was covered with stars; it sat with no jury and could administer any penalty but death. The Star Chamber was abolished when its jurisdiction was expanded to such an extent that it became too onerous for the people of England . . . . The abuses of the star chamber [sic] were a principle reason for the incorporation in the federal constitution of the privilege against self-incrimination.

STEVEN H. GIFTS, LAW DICTIONARY 451 (Barron's 1984) (internal citations omitted).

19. *See* THOMAS A. GREEN, VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY 1200-1800, at 153 (1985).

20. *Id.* at 168.

21. *Id.* at 170.

22. *Id.* at 173 (stating "the jury by law are not only judges of fact, but of law also").

23. *Id.* at 175.

24. 124 Eng. Rep. 1006 (C.P. 1670).

25. *Id.* at 1012-13.

26. *See* GREEN, *supra* note 19, at 200.

27. *Id.*

After *Bushel's Case*, English jurors could exercise their power to ignore judges' instructions to follow the law without fear of punishment.

Jurors in colonial America, as subjects of the Crown, also enjoyed the protection of the principle of non-coercion of jurors announced in *Bushel's Case*. These colonial jurists played a central role in opposing tyrannical English rule in the period leading up to American independence. They did so, in part, by commonly refusing to convict their fellow Americans, accused by English authorities, of smuggling and seditious libel.[29] The power of American juries to nullify the law went beyond their English cousins, extending to their right to decide questions of law.[30] As such, American counsel had the right to argue their personal interpretations of the validity of the law directly to the jury.[31]

One of the most famous of these trials occurred in 1735, when Andrew Hamilton defended John Peter Zenger against the charge of seditious libel. Hamilton argued that his client was innocent because the pamphlets Zenger published critical of the Royal Governor of New York were true. The judge properly instructed the jury that truth was not a recognized defense to seditious libel.[32] Although the judge prevented Hamilton from introducing evidence supporting the truth of the offending newspaper articles, he did allow nullification argument to the jury. Mr. Hamilton, citing *Bushel's Case* and the acquittals of William Penn and William Mead, argued that "it is very plain that the jury are by law at liberty . . . to find both the law and the fact in our case."[33] Despite the judge's instruction to the contrary, the jury accepted Mr. Hamilton's argument and found Mr. Zenger not guilty.[34]

During this period, the fear of jury nullification acted as a brake on statutes that empowered English customs inspectors to inspect American cargo ships. For example, in 1768, John Hancock refused to allow inspec-

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28. *Id.*

29. *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 874 (1994).

30. *Id. But see* Stanton D. Krauss, *An Inquiry into the Right of Criminal Juries to Determine the Law in Colonial America*, 89 J. CRIM. L. & CRIM. 111 (1998) (stating that whether colonial juries had the right to determine the law and facts in criminal cases is unknown).

31. Alschuler & Deiss, *supra* note 29, at 874.

32. JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF THE NEW YORK WEEKLY JOURNAL 71 (Stanley Katz ed., 2d ed. 1972).

33. *Id.* at 92.

34. *Id.*

tors aboard his cargo ship, the *Lydia*. The attorney general refused to prosecute the case because he felt that no colonial jury would indict or convict Hancock.[35]

The threat of jury nullification during this time also led to changes in the mandatory application of the death penalty. According to Professor Lawrence M. Friedman, "Capital punishment was ineffective because it was not, and could not be, consistently applied. Its deadly severity distorted the working of criminal justice. A jury, trapped between two distasteful choices, death or acquittal, often acquitted the guilty."[36] To bring the system back into alignment, government authorities had no choice but to eliminate unduly harsh punishments. By 1800, state legislatures began abolishing or restricting the death penalty to cases of murder or treason. [37] At the end of the 19th century, Congress followed suit by replacing mandatory death sentences with discretionary jury sentencing. The Supreme Court noted in *Andres v. United States*[38] that Congress's decision was prompted by "[d]issatisfaction over the harshness and antiquity of the federal criminal laws."[39] In his concurring opinion, Justice Frankfurter observed that the movement leading to the legislation providing for discretionary sentencing in capital cases "was impelled both by ethical and humanitarian arguments against capital punishment, as well as by the practical consideration that jurors were reluctant to bring in verdicts which inevitably called for its infliction."[40]

In 1828, petty juries in America "consist[ed] usually of twelve men, [whose role was to] attend courts to try matters of fact in civil causes, and to decide *both the law and the fact* in criminal prosecutions. The decision of a petty jury [was] called a verdict."[41] As the United States grew and industrialized, however, the right to pass judgment on the law began to shift from lay jurors to legally trained judges, and "the jury's right to

35. JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 24 (1994).

36. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 283 (2d ed. 1985).

37. *Id.*

38. 333 U.S. 740 (1948).

39. *Id.* at 748 n.11.

40. *Id.* at 753 (Frankfurter, J., concurring). In a similar vein, the military justice system struggled with the issue of mandatory minimum life sentences. *See generally* United States v. Jefferson, 22 M.J. 315 (C.M.A. 1986) (ruling that to impress the members with the seriousness of the case, military judges must allow defense counsel to inform panel members about mandatory minimum life sentences during the findings portion of trial).

41. NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (emphasis added).

decide questions of law . . . was lost."[42] In 1835, Justice Story, then a judge in the Commonwealth of Massachusetts, made a crucial legal ruling when he stated flatly that the jury's function lay in accepting the law given to it by the court and applying the law to the facts.[43] Christopher Columbus Langdell, who became the Dean of the Harvard Law School in 1870, believed that law was a process of adjudication by logical reasoning that called for rigorous formal training. In his view, law was distinct from politics, legislation, and the opinion of laymen. As such, his teaching reflected his belief that the task of finding the correct rule to apply to a given case was beyond the ability and training of ordinary jurors.[44]

In 1895, the Supreme Court followed the trend established by Justice Story and Dean Langdell when it decided *Sparf v. United States*.[45] Sparf and Hansen were crewmen on the *Hesper.* They were accused of killing their second mate on the high seas and throwing his body overboard. Sparf and Hansen were tried, found guilty of murder, and sentenced to death. In affirming the trial judge's refusal to instruct the jury to consider the lesser offenses of manslaughter, attempted murder, and attempted manslaughter, the Court stated:

> The general question as to the duty of the jury to receive the law from the court, is not concluded by any direct decision of this court. But it has been often considered by other courts and by judges of high authority, and, where its determination has not been controlled by specific constitutional or statutory provisions expressly empowering the jury to determine both law and facts, the principle by which courts and juries are to be guided in the exercise of their respective functions has become firmly established.[46]

Twenty-five years later, in *Horning v. District of Columbia*,[47] the Supreme Court reviewed a pawnbroker's conviction for illegally operating a shop in Washington, D.C. At the trial judge's urging, the jury convicted the pawnbroker, despite the fact that the pawnbroker received all applications for loans and made all examinations of pledges at his Virginia office.

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42. Note, *The Changing Role of the Jury in the Nineteenth Century*, 74 YALE L.J. 170, 170 (1964).

43. United States v. Battiste, 2 Sum. 240 (C.C.D. Mass. 1835).

44. FRIEDMAN, *supra* note 36, at 612-18.

45. 156 U.S. 51 (1895).

46. *Id.* at 64.

47. 254 U.S. 135 (1920).

The Court held that the trial judge did not commit reversible error by telling the jury, in effect, to find the defendant guilty because the facts were undisputed and the jury was allowed the *technical right* to decide against the law and the facts.[48] Although the Court upheld the trial judge's instructions, the language from the majority and minority opinions validated the jury's power to acquit.

Justice Holmes, writing for the majority in *Horning*, stated, "The judge cannot direct a verdict it is true, and the jury has the power to bring in a verdict in the teeth of both law and facts."[49] Justice Brandeis, in dissent, added:

> Since *Sparf v. United States*, it is settled that, even in criminal cases, it is the duty of the jury to apply the law given them by the presiding judge to the facts which they find. But it is still the rule of the federal courts that the jury in criminal cases renders a general verdict on the law and the facts; and that the judge is without power to direct a verdict of guilty although no fact is in dispute.[50]

To this day, the issue of jury nullification remains in motion between the Supreme Court's holdings in *Sparf* and *Horning*. Jury members have a judge-made legal duty to follow instructions of law from the bench, but also retain the power to "bring in a verdict in the teeth of both law and facts."[51]

Protests against the Vietnam War during the 1960s revitalized interest in the jury's power, as the conscience of the community, to pass judgment on the law. In *United States v. Dougherty*,[52] the defendants admitted to breaking into and vandalizing a Dow Chemical Company office. They did this to protest the firm's manufacture of napalm bombs for use in Vietnam. Pleading not guilty, the defendants raised a defense of "sincere religious motives" or a belief in "some higher law."[53] The trial court refused a

48. *Id.* at 138 (emphasis added).
49. *Id.*
50. *Id.* at 139 (Brandeis, J., dissenting) (citations omitted).
51. *Id.* at 138.
52. United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972).
53. *Id.* at 1140 (Bazelon, C.J., dissenting).

defense request for a jury nullification instruction, and the defendants were convicted.[54]

The D.C. Court of Appeals upheld the convictions, noting that "[t]he existence of an unreviewable and unreversible power in the jury, to acquit in disregard of the instructions on the law given by the trial judge, has for many years co-existed with legal practice and precedent upholding instructions to the jury that they are required to follow the instructions of the court on all matters of law."[55] In affirming the trial judge's refusal to give the requested jury nullification instruction, the court observed, "The jury system has worked out reasonably well overall, providing 'play in the joints' that imparts flexibility and avoids undue rigidity. An equilibrium has evolved—an often marvelous balance—with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."[56] In dissent, Chief Judge Bazelon explained that the nullification power is a "necessary counter to case-hardened judges and arbitrary prosecutors."[57] The Chief Judge felt there was no justification for, and considerable harm in, the trial judge's lack of candor in denying a requested instruction on nullification and barring the defense counsel from raising the issue in argument before the jury.[58]

In 1997, the California Court of Appeal, Second District, reviewed *People v. Sanchez*,[59] in which the jury asked during deliberations if it could find a participant in a robbery, who did not directly participate in a killing, guilty of second-degree murder and robbery, rather than first-degree murder. The trial judge explained that the defendant was not charged with robbery and re-explained the concept of felony-murder, which California law classifies as first-degree murder and carries a mandatory life sentence. The judge then threatened to remove jurors who could not follow his instructions. The jury convicted the accused of first-degree murder.[60]

On appeal, the majority held that the trial judge may instruct jurors that the law does not leave open the possibility of a lesser offense. The court also held that the judge does not need to instruct jurors on their power of nullification. Finally, it ruled that judges may tell jurors they will be

54. *Id.* at 1117.
55. *Id.* at 1132.
56. *Id.* at 1134.
57. *Id.* at 1140 (Bazelon, C.J., dissenting).
58. *Id.*
59. 58 Cal. App. 4th 1435 (Cal. App. 2d 1997).
60. *Id.* at 1438.

removed if they cannot follow the law.[61] The dissent argued that jurors do have the power to nullify, and that any instruction indicating otherwise is erroneous and should not be given.[62]

In *United States v. Thomas*,[63] a federal judge went one step further than the facts of *Sanchez* by dismissing a juror during deliberations. In *Thomas*, five black defendants were accused of drug offenses. On the third day of deliberations, the jury informed the judge that it could not reach a verdict because Juror Number Five had a "predisposed disposition" to acquit "his people."[64] The judge interviewed the jurors individually and found that Juror Number Five was purposefully disregarding the court's instructions on the law and intended to vote for an acquittal, regardless of the evidence. After making this finding, the judge dismissed Juror Number Five from the trial. The remaining jurors then convicted the five defendants.[65]

The Court of Appeals for the Second Circuit stated that the district court judge's removal of a juror could be correct, but vacated the defendants' convictions. The court found that the trial judge "dismissed Juror [Number Five] largely on the ground that the juror was acting in purposeful disregard of the court's instructions on the law, when the record evidence raises a possibility that the juror was simply unpersuaded by the Government's case against the defendants."[66]

Before hearing *United States v. Hardy*, the military's highest court had not ruled directly on the issue of whether a court-martial panel should be instructed about its power to disregard instructions from the bench;[67] however, the predecessor to the CAAF, the Court of Military Appeals (COMA), had touched on the general topic of jury nullification, in dicta of four cases.

In *United States v. Mead*,[68] a judicial notice case, the COMA observed that although "civilian juries and court-martial members always have had the power to disregard instructions on matters of law given them by the

61. *Id.* at 1443-47.
62. *Id.* at 1452 (Johnson, J., dissenting).
63. 116 F.3d 606 (2d Cir. 1997).
64. *Id.* at 624.
65. *Id.* at 612.
66. *Id.* at 624.
67. *See* United States v. Hardy, 46 M.J. 67, 69-70 (1997).
68. 16 M.J. 270 (C.M.A. 1983).

judge, generally it has been held that they need not be advised as to this power, even upon request by a defendant."[69] In *United States v. Jefferson*,[70] the COMA reviewed a case in which the trial judge told the defense to refrain from informing the members during closing argument on findings that the mandatory minimum sentence for the offense in question was confinement for life.[71] In *Jefferson*, the COMA held that military judges must allow defense counsel to inform the panel about mandatory minimum life sentences to stress the seriousness of the case.[72]

In *United States v. Smith*,[73] the COMA held that the military judge's refusal to allow the defense to question prospective court members about their views on mandatory life sentences during voir dire did not provide a basis for overturning a premeditated murder conviction.[74] The court stated that jury nullification would have been an unacceptable basis for voir dire questions.[75] Finally, in *United States v. Schroeder*,[76] the COMA held that when the Uniform Code of Military Justice (UCMJ) provides for a mandatory minimum sentence, any sentence not conforming to mandatory minimums would be subject to reconsideration or rehearing.[77] Since deciding *Hardy* in 1997, the CAAF has not revisited the controversial issue of jury nullification.

United States v. Hardy[78] was a contested general court-martial at Fort Hood, Texas. An officer and enlisted panel convicted Specialist (SPC)

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69. *Id.* at 275.

70. 22 M.J. 315 (C.M.A. 1986).

71. *Id.* at 318.

72. *Id.* at 329.

73. 27 M.J. 25 (C.M.A. 1988).

74. *Id.* at 28-29 (limited to cases involving a mandatory minimum sentence, and arguably not applicable when the panel must use independent judgment to adjudge a sentence that best meets the needs of the soldier, the military service and society).

75. *Id.*

76. 27 M.J. 87 (C.M.A. 1988).

77. *Id.* at 90 n.1. This opinion, however, is not applicable to most offenses in which the panel may sentence the accused to no punishment. In this latter scenario, does little or no punishment constitute *jury nullification*? Strictly speaking, no. *But see* Interview by Major Walter Hudson with Senior Judge Robinson O. Everett, Court of Appeals for the Armed Forces, at Duke University Law School (Feb. 20-21, 2000) [hereinafter Everett Interview], *quoted in* Major Walter Hudson, *Senior Judges Look Back & Look Ahead*, 165 MIL. L. REV. 89 (2000). In discussing whether the military should do away with panel member sentencing in favor of judges imposing more predictable punishments, Judge Everett said, "I'm inclined to leave it as it is. I think probably the more unusual sentences by courts-martial are those that are too light, almost [a] type of *jury nullification*." *Id.* (emphasis added).

Hardy of forcible oral sodomy, but acquitted him of rape and attempted forcible anal sodomy. All charges grew out of a single incident. The panel sentenced SPC Hardy to a dishonorable discharge, confinement for five years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved these results, and the Army Court of Criminal Appeals affirmed without a written opinion. When the case reached the CAAF, the court focused squarely on the issue of instructions.[79]

At SPC Hardy's trial, the military judge instructed on the issues of consent, intoxication of the victim (as it might have affected her ability to consent), mistake of fact (as to the victim's consent), and the appellant's voluntary intoxication. The military judge also instructed the members that they had the responsibility to "impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with law, the evidence admitted in court, and [their] own conscience."[80] After deliberating for just under three hours, the members returned to the courtroom and asked, "If we find . . . all the elements of the charge are present, that does not necessarily mean that we still have to find the defendant guilty of that charge, is that correct?"[81] The military judge responded by telling the panel to consider "all the instructions" previously given on the elements of the offense and applicable defenses, and discussed an example involving the mistake of fact defense.[82]

After addressing the panel's question, the military judge held an Article 39(a), UCMJ, session to discuss the instructions he had given.[83] During this session, the trial counsel asked the military judge to provide the following instruction to the members: "If the government has proven each and every element beyond a reasonable doubt, and if there's no defense to that (sic), then they must find the individual guilty."[84] The military judge

78. 46 M.J. 67 (1997). For another synopsis of *United States v. Hardy*, see Donna M. Wright & Lawrence M. Cuculic, *Annual Review of Developments in Instructions–1997*, ARMY LAW., July 1998, at 47-50.

79. *Hardy*, 46 M.J. at 68.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* Article 39(a), UCMJ, provides statutory authority for the military judge to "call the court into session without the presence of the members." UCMJ art. 39(a) (2000).

84. *Hardy*, 46 M.J. at 68.

responded, "Well, I think that's pretty much what I said. How would you want me to say it differently?"[85]

After the judge declined the trial counsel's request to direct the panel to return a verdict of guilty, SPC Hardy's civilian defense counsel asked for an instruction that the members, "in their exercise of their peer discretion, . . . they may find him not guilty, notwithstanding findings that there is evidence beyond a reasonable doubt to sustain each and every element of the offense, and finding expressly that there are no affirmative defenses." [86] The trial judge declined this request stating, "Well, I disagree with you completely on that."[87]

On appeal, the CAAF reasoned that the military judge's response to the trial counsel's request expressed only general agreement and was not adopting it verbatim. The court pointed out that the actual instruction given to the members was "If, on whole evidence, you're satisfied beyond a reasonable doubt of the truth of each and every element, you *should* find the accused guilty."[88] The CAAF observed that neither the military judge's instructions before findings, nor his response to the members' subsequent questions stated that the members *must* return a finding of guilty. Commenting on the instructions given to the panel in *Hardy*, the CAAF stated that the correct instruction is that the panel *should* find the accused guilty when all of the elements had been proven and the defenses had been rebutted.[89]

In analyzing whether the trial judge erred by refusing to give a jury nullification instruction, the CAAF noted that the power of nullification does exist.[90] The court then considered the source of the power; that is, whether the power exists because the panel has the right to disregard the law, or as a collateral consequence of other policies, such as the requirement of a general verdict,[91] the absence of a directed guilty verdict,[92] the

85. *Id.*
86. *Id.* at 69.
87. *Id.*
88. *Id.* at 69 n.5. *See also* BENCHBOOK, *supra* note 7, at 53 n.1.
89. *Hardy*, 46 M.J. at 69 n.5.
90. *Id.* at 69.
91. *See* UCMJ art. 52 (2000) (setting the number of votes required for conviction).
92. *See id*. art. 37 (prohibiting any person subject to the UCMJ from attempting to coerce or influence a court-martial in reaching findings).

ban on double jeopardy,[93] and rules that protect the deliberative process of a court-martial.[94]

After discussing the origins of the power to nullify, the court turned its attention to the reasons why the power exists. In doing so, the CAAF reviewed federal case law and examined the arguments for and against jury nullification. In *United States v. Krzyske*,[95] the Court of Appeals for the Sixth Circuit rejected the idea that juries should be instructed on the power of jury nullification at the request of the defense. In *Krzyske*, a tax evasion case, the trial judge refused a defense request to instruct on jury nullification, but allowed the defense to use the term in argument. When the jury interrupted their deliberations to ask about the term, the judge instructed them that there was "no such thing as valid jury nullification."[96] Distinguishing between the jury's right to reach a verdict and the court's duty to instruct on the correct law, the *Krzyske* court recognized the power of jury nullification, but rejected the defense's contention that jurors must be advised of their power.[97]

Similarly, in *United States v. Moylan*,[98] the Court of Appeals for the Fourth Circuit also rejected the defense request for a jury nullification instruction. The *Moylan* court held that the power to nullify is inherent and the jury need not be further informed of a power that is obvious to them.[99]

After discussing *Krzyske* and *Moylan*, the CAAF then mentioned that the First, Seventh, Eighth, Ninth, Eleventh, and D.C. Circuits have also rejected the idea of explicit jury instructions on the jury's inherent power to nullify the law.[100] Quoting a law review article, the CAAF noted that

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93. *See id.* art. 44 (stating that no person, without his consent, may be tried a second time for the same offense).

94. *See, e.g.*, *id.* art. 51 (stating voting shall be by secret written ballot).

95. 836 F.2d 1013 (6th Cir. 1988).

96. *Id.* at 1020.

97. *Id.* at 1021.

98. 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

99. *Id.* at 1006.

100. United States v. Hardy, 46 M.J. 67, 71-72 (1997) (citing United States v. Anderson, 716 F.2d 446, 449-50 (7th Cir. 1983); United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983); United States v. Wiley, 503 F.2d 106, 107 (8th Cir. 1974); United States v. Simpson, 460 F.2d 515, 518-20 (9th Cir. 1972)); *see* United States v. Dougherty, 473 F.2d 1113, 1133 (D.C. Cir. 1972); United States v. Boardman, 419 F.2d 110, 116 (1st Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

only Maryland and Indiana recognize or encourage the power of jury nullification.[101]

The CAAF briefly acknowledged the argument that jury nullification is necessary to provide a check against overzealous prosecutors and to provide a way for the public in a democracy to register discontent with unpopular laws.[102] The CAAF stated that existing rules provide a means for limiting overzealous prosecutions, and therefore found the positive aspects of jury nullification did not require an instruction advising panel members about their power to nullify the law. Furthermore, the CAAF observed the dangers of over-emphasizing the jury's inherent power of jury nullification. The court reasoned that the jury that disregards the law could just as easily convict rather than acquit, and might render a decision based on fear, prejudice, or mistake. Dismissing the contention of some who insist that jury nullification exists to excuse crimes involving deeply held moral views, the CAAF pointed out that jury nullification could be exercised to excuse other conduct, such as sexual harassment, civil rights violations, and tax fraud.[103]

The CAAF then compared the military and civilian criminal justice systems. In both systems, the judge and jurors have distinct roles—the judge decides interlocutory questions of law, and the jurors decide questions of fact. Panel and jury deliberations are both privileged to a great extent. Neither military judges nor their civilian counterparts may direct a jury to return a guilty verdict; members or jurors return only with general verdicts. Military and civilian accused alike are protected by double jeopardy rules from a retrial, once they have been acquitted. The CAAF stated that despite the fact that civilian juries and military panels both have the power of jury nullification, such a right would be inappropriate for the military justice system because permitting panel members to disregard the law might lead them to ignore unpopular laws. The CAAF reasoned that free exercise of this right to nullify might violate the principle of civilian con-

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101. *Hardy*, 46 M.J. at 72 (quoting Lieutenant Commander Robert E. Korroch & Major Michael J. Davidson, *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, 139 MIL. L. REV. 131, 139 (1993)). However, Georgia also recognizes its jurors as the judges of both the law and the facts in a criminal case. *See* GA. CONST. art. I, § I, para. XI(a). In addition, South Dakota will vote on whether to amend the state constitution to allow jurors in criminal cases to judge the law as well as the facts. *See* Molly McDonough, *Jury Nullification on the Ballot*, Oct. 4, 2002, ABA J. REP., *at* http://www.abanet.org/journal/ereport/oct4jury.html.

102. *Hardy*, 46 M.J. at 72.

103. *Id.*

trol over the military. Unrestrained exercise of the panel's power to nullify the law might also countermand discipline and foster disrespect for the law.[104]

Concluding its opinion, the CAAF acknowledged a panel's inherent power to nullify the law, but held there is no right to jury nullification because the power to nullify exists due to the "collateral consequence of the rules concerning the requirement for a general verdict, the prohibition against double jeopardy, and the rules that protect the deliberative process of a court-martial panel."[105] It held, "[B]ecause there is no 'right' of jury nullification, the military judge in this case did not err either in declining to give a nullification instruction or in declining otherwise to instruct the members that they had the power to nullify his instructions on matters of law."[106]

Old Chief v. United States,[107] like *Hardy*, was decided in 1997. In *Old Chief*, the Supreme Court acknowledged the power of jury nullification. Old Chief was convicted of possession of a firearm by a person with a prior felony conviction. At trial, Old Chief offered to stipulate to his prior conviction, arguing that his offer made evidence of the name and nature of his prior offense inadmissible.[108] The prosecution refused to join the stipulation and insisted on its right to present its own evidence of the prior conviction. The Supreme Court held it was an abuse of discretion for the trial judge to admit the record of conviction when the defendant's stipulation was available. In a footnote, the Court explicitly discussed the impact of jury nullification on these types of cases:

> [A]n extremely old conviction for a relatively minor felony that nevertheless qualifies under the statute might strike many jurors as a foolish basis for convicting an otherwise upstanding member of the community of otherwise legal gun possession. Since the Government could not, of course, compel the defendant to admit formally the existence of the prior conviction, the Government would have to bear the risk of jury nullification, a fact that might properly drive the Government's charging decision.[109]

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104. *Id.*
105. *Id.*
106. *Id.*
107. 519 U.S. 172 (1997).
108. *Id.* at 175. Old Chief's prior felony conviction was for an assault causing serious bodily injury. *Id.*
109. *Id.* at 185 n.8.

The quotation from *Old Chief* illustrates that the United States' highest court recognizes that jury nullification may, in appropriate cases, play a powerful role in charging, trying, and deciding cases.[110]

Opinions differ over the future role of juries in criminal trials. Some, citing the acquittals of O.J. Simpson, Mayor Barry, and the police officers that beat Rodney King, want the role of the jury controlled tightly.[111] Others, citing the acquittal of Dr. Kevorkian, maintain that modern juries continue to serve a valuable role as the conscience of the community and the last refuge for protection against overreaching by the government.[112] More radical commentators even call for race-based jury nullification.[113]

Federal District Court Judge Jack Weinstein, discussing jury nullification instructions wrote, "Such an instruction is like telling children not to put beans in their noses. Most of them would not have thought of it had it not been suggested."[114] On the other hand, Judge Dann of Arizona, a leading proponent of jury reform, argued, "It is that power and control of the trial process, jealously guarded by many judges and lawyers, that harms the jury, a key democratic institution."[115] In this democratic spirit, the state constitutions of Indiana, Maryland, and Georgia protect the cen-

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110. *See also infra* apps. A and B (demonstrating the successful use of jury nullification themes in recent courts-martial).

111. *See* Douglas R. Litowitz, *Jury Nullification: Setting Reasonable Limits*, 11 CBA RECORD 16 (Sept. 1997).

112. *Id.* This argument, however, is by no means modern. In a 1789 letter to Thomas Paine, Thomas Jefferson wrote, "Another apprehension [about the French Revolution] is a majority cannot be induced to adopt the trial by jury; and I consider that as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 7 WRITINGS OF THOMAS JEFFERSON 408 (Albert Ellery Bergh ed., 1907).

113. *See, e.g.*, Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677, 696 (1995) (calling for the African-American community to use jury nullification to acquit nonviolent African-American lawbreakers).

114. Jack Weinstein, *Considering Jury Nullification: When, May and Should a Jury Reject the Law to Do Justice?*, 30 AMER. CRIM. L. REV. 239, 250 (1993).

115. Michael Dann, *"Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries*, 68 INDIANA L.J. 1229 (1993) (speaking of juries generally, not jury nullification specifically).

tral role of juries by making them the finders of fact and law in criminal cases.[116]

Juries are unique. No other institution places so much power directly in the hands of such a small group of ordinary citizens. Jury nullification represents both the best and the worst of the jury system, as jurors struggle to deal justly with the liberty of their fellow citizens. The performance of juries in the post-Civil War era best illustrate this dichotomy. Faced with incredible power and responsibility, nineteenth century juries in the North chose to shelter fugitive slaves and the abolitionists.[117] In contrast, juries in the South chose to free vigilantes who lynched African-Americans[118] and to wrongly convict and sentence African-American defendants to death.[119]

Douglas Litowitz put his finger on the volatile nature of the nullification debate in his article, *Jury Nullification: Setting Reasonable Limits*.[120] He wrote:

> [The] distinction between principle and policy . . . is crucial because it explains why jury nullification strikes us as morally permissible in *Bushel's Case*, the Zenger case and the Fugitive Slave Cases, but not in the Simpson case . . . . Thinking about the problem in this way helps explain why most lawyers were not troubled by the Kevorkian acquittal, but were enraged by the O.J. Simpson verdict. The Kevorkian acquittal seemed consistent with the judgment of many lawyers that the Michigan statute [prohibiting physician-assisted suicide] unduly restricted a fundamental "right to die," a right based on Constitutional guarantees of liberty and privacy . . . . In contrast, the Simpson verdict did not affirm any fundamental rights—it seemed more akin to an act of revenge.[121]

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116. IND. CONST. art. I, § 19 ("In all criminal cases whatsoever, the jury shall have the right to determine the law and the facts."); MD. CONST. art. XXIII ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."); GA. CONST. art. I, § I, para. XI(a) ("The jurors are the judges of both the law and the facts in a criminal case.").

117. *See* ABRAMSON, *supra* note 35, at 80-82.

118. *Id.* at 61-63.

119. *See, e.g.*, DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969) (a historical account of eight black youths falsely convicted and sentenced to die; the Supreme Court reversed the convictions on the ground of racial discrimination).

120. Litowitz, *supra* note 111.

121. *Id.* at 20-21.

Distinctions aside, the central issue remains how to best maintain a "marvelous balance, with the jury acting as a 'safety valve' for exceptional cases, without being a wildcat or runaway institution."[122]

III. Why So Little Case Law?

Given the controversial nature of jury nullification, the amount of case law on the subject is surprisingly small. The dearth of cases may give an inaccurate impression that jury nullification issues at trial are very rare. One reason for the limited case law, however, is that an acquittal does not result in a reported decision. For example, there are no official reported decisions of the criminal cases against John Lilburne, William Penn and William Mead, or John Peter Zenger. Likewise, no appellate records exist of more recent acquittals allegedly driven by jury nullification, including the trials of former Washington D.C. Mayor, Marion Barry;[123] football and film star, O.J. Simpson;[124] Iran-contra cohort, Lieutenant Colonel Oliver North;[125] or the champion of physician-assisted suicide, Dr. Jack Kevorkian.[126] Similarly, in cases in which a trial judge gives requested nullification instructions, and the outcome is a conviction, nullification will not be an issue on appeal. The "records" of nullification cases in which the defense prevails exist only in popular media and legal legend. Some of these are quite humorous,[127] but provide counsel with little value as precedent for arguing the finer points of the law in court.

The only reported decisions, therefore, are cases in which the judge refused to give the defense-requested instructions and the accused was convicted. This helps explain why the concept of jury nullification, which goes to the very core of the American jury system, appears to receive less attention from the legal community than it deserves. Mr. Timothy Lynch, an associate director of the Cato Institute's project on criminal justice, argued that this absence of pro-nullification case law places the defense bar

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122. United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

123. *See generally* Saundra Torry, *Court Hears Defense of Judge's Bans*, WASH. POST, July 4, 1990, at A2, A12 (successful defense appeal of trial judge's order to exclude Minister Louis Farrakhan and Reverend George Stallings from the trial gallery to prevent "impermissible message" of African-American support of Marion Barry's public plan to seek jury nullification).

124. *See* Butler, *supra* note 113, at 696.

125. *See* ABRAMSON, *supra* note 35, at 66-67.

126. *See* ALEXANDER, *supra* note 32, at 65.

at a distinct disadvantage because counsel do not have reported authority to cite when requesting jury nullification instructions from the bench.[128]

IV. Allowing Jury Nullification Argument

United States v. Hardy reaffirmed that military members have the raw power to nullify the law.[129] *Hardy* did not address, however, whether counsel may argue jury nullification to the panel.[130] Therefore, this issue

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127. Take, for example, this story about country juries:

> The classic story of a [country] jury [is about] a man who was on trial for stealing some heifers. When the jury returned with their verdict, the Associate said, "Do you find the accused guilty or not guilty of cattle stealing?" To which the foreman replied "Not guilty, if he returns the cows." The judge read the jury the riot act and concluded by saying, "Go out and reconsider your verdict. You swore that you would try the issue . . . and find a true verdict according to the evidence." The jury retired again, and when they returned they had a belligerent air about them. The associate said, "Have you decided on your verdict?" The foreman said, "Yes, we have. We find the accused not guilty—and he doesn't have to return the cows."

THE OXFORD BOOK OF LEGAL ANECDOTES 11-12 (Michael Gilbert ed., Oxford University Press 1989).

Another good example is the story about a Welsh jury:

> At the annual dinner of a Welsh Society in London, where he was the principal guest, Cassels declared that Judges had to be extremely careful when they were on circuit in Wales. He recalled the case of the judge who was asked by the defendant's counsel if he could say a few words in Welsh to the jury at the end of his closing speech. The judge, anxious that there should be no appearance of even a linguistic bias, agreed. The counsel spoke for only twenty seconds in Welsh, thanked the judge and sat down. The judge summed up and the weight of the evidence was dead against the prisoner but, without leaving the jury box, the jury found him not guilty. Back in his private room the judge puzzled for some minutes, then sent for a court attendant and asked him what the defense counsel had said. It was, "The prosecutor is English, the prosecution counsel is English, the judge is English. But the prisoner is Welsh, I'm Welsh, and you're Welsh. Do your duty."

Id. at 61.

128. Timothy Lynch, *Practice Pointer*, THE CHAMPION, Jan./Feb. 2000, at 32.

129. 46 M.J. 67 (1997).

remains an open question of law.[131] Should members be left to learn of their power through non-legal sources, such as books, Hollywood dramas, and the news media? Or, should counsel be allowed to echo the teachings of Alexander Hamilton,[132] John Adams,[133] or Thomas Jefferson[134] and argue jury nullification concepts directly to the members?

The only military case that comes close to addressing whether counsel may openly argue jury nullification to the panel members is *United States v. Jefferson*.[135] In *Jefferson*, the government argued that the mandatory minimum sentence for murder was irrelevant during arguments for findings. The COMA rebuked this argument, holding that the defense should have been permitted to impress the panel members with the seriousness of the accusations during the findings portion of the trial.[136] As such, the government must factor in the threat of jury nullification when making its charging decisions because military panels forced to choose between mandatory confinement for life or acquittal may feel compelled to acquit to avoid an unduly harsh punishment.[137]

Other jurisdictions have case law addressing the issue of arguing nullification. In *United States v. Krzyske*,[138] a tax evasion case, the trial judge refused a defense request to instruct on jury nullification, but allowed the

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130. *Hardy* centers on the military judge's failure to give a requested instruction. Therefore, the CAAF did not go beyond the issue of instructions. *See generally id.*

131. *See id.* at 67.

132. Alexander Hamilton noted that jury trials would prevent "[a]rbitrary impeachments, arbitrary methods of prosecuting offenses, and arbitrary punishments upon arbitrary convictions." THE FEDERALIST NO. 83, at 499 (Clinton Rossiter ed., 1961).

133. "It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." 1 LEGAL PAPERS OF JOHN ADAMS 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

134. In 1782 Mr. Jefferson explained,

> [I]t is usual for the jurors to decide the fact, and to refer the law arising on it to the decision of the judges. But this division of the subject lies with their discretion only. And if the question relates to any point of public liberty, or if it be one of those in which the judges may be suspected of bias, the jury undertake to decide both law and fact.

THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 140 (J.W. Randolph ed., 1853).

135. 22 M.J. 315 (C.M.A. 1986).

136. *Id. But see* United States v. Smith, 27 M.J. 25, 29 (1988) (stating in dicta that jury nullification is an unacceptable basis for voir dire questions; Chief Judge Everett, however, noted in his concurring opinion that *Smith* does not overturn *Jefferson*).

defense to use the term in argument.[139] Similarly, in *New Hampshire v. Elvin Mayo, Jr.*,[140] the New Hampshire Supreme Court found that the trial court did not abuse its discretion in denying a defense request for a jury nullification instruction, in part because the trial judge allowed the defense counsel to argue jury nullification in closing arguments. In *Mayo*, the trial judge allowed counsel to argue to the jury,

> If you find that the prosecution has proven beyond a reasonable doubt each and every element, you may, or should, find [the defendant] guilty. You are not required to. You must find him not guilty if each and every element has not been proven; you may, or should, find him guilty if each and every element has been proven. You don't have to.[141]

Two other cases also on point, both from the Court of Appeals for the Eleventh Circuit, explicitly hold that defense counsel may not argue jury nullification. In *United States v. Trujillo*,[142] a drug trafficking case, the defense counsel wanted to argue that his client's cooperation with the authorities entitled him to a not guilty verdict. While recognizing that a jury may "render a verdict at odds with the evidence and the law," the Eleventh Circuit held that "neither the court nor counsel should encourage the jurors to violate their oath."[143]

In *United States v. Funches*,[144] Mr. Funches, a convicted felon, was charged with possessing a firearm.[145] He claimed that a government offi-

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137. *See, e.g.*, FRIEDMAN, *supra* note 36, at 283 (discussing nullification acting as a brake in death penalty cases). The recent trial of two brothers in Florida for killing their father clearly demonstrates this dynamic. A Florida jury found thirteen-year old Alex King and his fourteen-year old brother, Derek, guilty of second-degree murder without a weapon in the beating death of their father, Terry. In Florida, a conviction for first-degree murder carries a minimum sentence of life without parole. Because the jury ignored the evidence that Terry King's murderer wielded a bat, convicting the brothers of a lesser offense, the brothers face only twenty-two years to life without parole, and the judge may go below the minimum. Commenting on the verdict, the assistant state attorney who prosecuted the case said, "[The jurors] knew good and well [Terry King] was killed with a weapon. That's a jury pardon. That's okay, I don't have a problem with that." Bill Kaczor, *Murder Verdicts Stun Fla. Jurors, Prosecutor*, WASH. POST, Sept. 8, 2002, at A8.

138. 836 F.2d 1013 (6th Cir. 1988).

139. *Id.* at 1020.

140. 125 N.H. 200 (N.H. 1984).

141. *Id.* at 204.

142. 714 F.2d 102 (11th Cir. 1983).

143. *Id.* at 106.

144. 135 F.3d 1405 (1998), *cert. denied*, 524 U.S. 962 (1998).

cial told him that after he completed his sentence, his civil rights would be restored and he could possess a firearm. Funches claimed he relied in good faith on this government official's advice.[146] Funches appealed his conviction based on the fact that he was not allowed to testify or argue about his mistaken beliefs at trial. The appellate court noted, "Piercing through the form of Funches' arguments, it appears that his real contention is that he had a due process right to present evidence the only relevance of which is to inspire a jury to exercise its power of nullification."[147] Citing *Trujillo*, the court held, "No reversible error is committed when evidence otherwise inadmissible under Rule 402 of the Federal Rules of Evidence [relevance], is excluded, even if the evidence might have encouraged the jury to disregard the law and acquit the defendant."[148]

When military counsel argue findings, they may properly include reasonable comment on the evidence in the case, including inferences drawn in support of their theory of the case.[149] In doing so counsel may make reference to applicable law, but their references must be accurate.[150] They may not directly cite legal authority to panel members.[151] But, counsel routinely refer to instructions members will hear or have heard from the bench.

When confronted with improper arguments, military judges have four options: they can sua sponte stop the argument;[152] give a curative instruction;[153] order counsel to make a retraction;[154] or they can declare a mistrial.[155] If the military judge stops counsel during argument, the most

145. *Id.* at 1406 (allegedly violating 18 U.S.C. § 922(g)(1)).

146. *Id.* at 1407.

147. *Id.* at 1408.

148. *Id.* at 1409 (citing United States v. Trujillo, 714 F.2d 102, 105-06 (11th Cir. 1983)).

149. *See* MCM, *supra* note 5, R.C.M. 919(b).

150. *See* United States v. Turner, 38 M.J. 1183 (A.F.C.M.R. 1990).

151. *See* United States v. McCauley, 25 C.M.R. 327 (C.M.A. 1958).

152. *See, e.g.*, United States v. Grady, 15 M.J. 275 (C.M.A. 1983); United States v. Nelson, 1 M.J. 235 (C.M.A. 1975).

153. *See, e.g.*, United States v. Horn, 9 M.J. 429 (C.M.A. 1980); United States v. Carpenter, 29 C.M.R. 234 (C.M.A. 1960).

154. *See, e.g.*, United States v. Lackey, 25 C.M.R. 222 (C.M.A. 1958).

155. *See, e.g.*, United States v. McPhaul, 22 M.J. 808 (C.M.R. 1986), *cert. denied*, 23 M.J. 266 (C.M.A. 1986); United States v. O'Neill, 36 C.M.R. 189 (C.M.A. 1966).

likely result will be a short out-of-court session to discuss whether the argument was proper and whether a curative instruction is necessary.

Some would argue that jury nullification is not relevant to findings, and therefore defense counsel should be prohibited from arguing the concept. This article takes the position that the accused, the members, and the integrity of the military justice system deserve nothing less than unfettered candor about the jury's power to render a just verdict. Counsel should be allowed to comment on the members' power to determine not only the facts of the case, but also to render individualized justice—despite instructions to the contrary.

The military should decline to follow the lead of *Trujillo* and *Funches*. Instead of criticizing and ignoring the members' power to nullify the law, the best defense against misuse of jury nullification is the selection of a fair panel. One commentator argues that courts should work to reduce the likelihood of misuse of jury nullification through stronger *Batson*-type jury selection rules, better and more honest guidance concerning the jury's powers, and more liberal voir dire.[156] In addition, reports of sensational historical and modern cases fly in the face of the argument that the Republic will fall if attorneys are allowed to argue that a particular application of a law in a specific case is unjust. While it is true that nullification arguments were so successful in the Fugitive Slave Cases that in 1850 Congress drafted federal legislation to deny slaves the right to trial by jury,[157] history has shown that the courageous abolitionist counsel and jurors who effectively nullified pro-slavery laws were morally correct in doing so.

Clearly, under *Hardy*, there is no right to an instruction on jury nullification from the bench.[158] Court-martial panels give general findings,[159] however, and members may not be polled about their deliberations and voting.[160] Therefore, they continue to have the power to render an unreviewable decision that does not necessarily follow the military judge's instructions. Whether military defense counsel may openly argue for jury nullification remains an open question of law. When military judges

156. *See* Clay S. Conrad, *Scapegoating the Jury*, 7 CORNELL J.L. & PUB. POL'Y 7 (1997).

157. *See* ABRAMSON, *supra* note 35, at 80-82 (noting that in the Fugitive Slave Cases, attorneys from the North asked juries to acquit abolitionists prosecuted for helping slaves escape, and encouraged them to refuse to send runaway slaves back to the South).

158. *See* United States v. Hardy, 46 M.J. 67 (1997).

159. UCMJ art. 51 (2000) (member voting by secret written ballot).

160. MCM, *supra* note 5, R.C.M. 922(e).

choose to limit or prohibit argument, they may inadvertently drive nullification arguments underground. No commander would send his troops into battle before ensuring they know how to use *all* the weapons in their arsenal. Similarly, no military judge should send a panel into deliberations before accurately and fully informing them of *all* their powers under the law. Rather than prohibiting argument, military judges should allow argument, and then provide the members with definitive guidance on their role by giving them a tightly worded, legally restrictive pattern instruction on nullification.

V. The Unavoidable Issue of Veiled Jury Nullification Arguments

When military judges prohibit counsel from arguing jury nullification directly to the members, resourceful counsel can still communicate the power of nullification indirectly.[161] Counsel accomplish this by focusing on language in the member's oath and instructions[162] or by linking a nullification theme to a recognized legal defense.[163] For this reason, a military panel nullification instruction is necessary regardless of the permissibility of nullification argument.

A. Oath and Instructions

The panel members' oath includes a directive that the members decide the case according to their own conscience. Counsel can communicate a nullification theme by emphasizing this directive, arguing that each member's duty is to find the accused guilty or not guilty in accordance with the law, the evidence admitted in court, and *their own conscience*.[164] Counsel can also stress in argument the military justice system's expectation that the members use their own "common sense, knowledge of human nature and the ways of the world" in reaching a just verdict.[165] Moreover, the military judge instructs the panel that it *must* acquit if the prosecution fails to meet its burden of proof, but only *should*

161. See Appendix A of this article for an example of a jury nullification argument at a general court-martial that drew no objections from the prosecution or questions from the bench. At this court-martial, no jury nullification instructions were requested or given; no jury nullification evidence was admitted in the case-in-chief, outside of a good soldier defense and the accused's testimony; and the case ended with a complete acquittal of the accused. *See infra* app. A.

162. BENCHBOOK, *supra* note 7, at 36.

163. *See generally* MCM, *supra* note 5, R.C.M. 916 (listing defenses).

convict if the prosecution meets its burden. Finally, the members are told it is their responsibility alone to decide whether or not to convict.[166]

In addition to focusing on specific language contained in the member's oath and certain instructions, counsel can remind the members that they will meet in secret session and cast secret written ballots. The knowledge that their vote is secret may give individual members the confidence to cast their votes in a manner that rejects or refuses to apply the law.[167] The instructions the military judge gives the members before their deliberations on findings supports this type of argument.[168] Finally, counsel can vigorously argue to the members that one of the primary goals of the UCMJ is to achieve justice on a case-by-case basis, and that "some social issue . . . is larger than the case itself" or that the "result dictated by law is contrary to . . . justice, morality, or fairness."[169]

Clearly, jury nullification advocacy includes varying degrees of implicit and explicit approaches. For example, a defense counsel might try to reference explicitly greater societal goals and fundamental fairness. The defense counsel may be more effective, however, by arguing that each case is different, and that members must use their own independent judgment, conscience, and common sense in reaching a just verdict. Certainly, the latter approach is not objectionable, regardless of the emphasis placed upon the particular instructions.[170] In contrast, the former, explicit argu-

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164. *See* BENCHBOOK, *supra* note 7, at 36. The member's oath states:

> Do you swear or affirm that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, *your conscience*, and the laws applicable to trials by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court upon a challenge or upon the findings or sentence unless required to do so in the due course of law, so help you God?

Id. (emphasis added).

165. *Id.* at 52-53. The military judge advises the panel as follows:

> In weighing and evaluating the evidence *you are expected to utilize your own common sense, your knowledge of human nature and the ways of the world* . . . . The final determination as to weight or significance of the evidence and the credibility of the witnesses in this case rests solely upon you.

Id. (emphasis added).

ment might draw an objection from the trial counsel or from the military judge, reducing its effectiveness.

B. Linking Argument to Legal Defenses

Jury nullification is not recognized as a legal defense; however, "[t]he nullification doctrine derives from the same moral principles as the mens rea or responsibility defense."[171] Defense counsel may attempt to strengthen their call for jury nullification in a given case by linking their arguments to recognized legal defenses.[172] In other words, counsel can strive to give the panel members something to "hang their hats on" if they choose to acquit.

Jury nullification themes are embedded in compatible defenses such as justification, obedience to orders, self-defense, accident, entrapment, coercion or duress, inability, ignorance or mistake of fact, and lack of men-

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166. *See id.* at 53.

> You must disregard any comment or statement or expression made by me during the course of the trial that might seem to indicate any opinion on my part as to whether the accused is guilty or not guilty since *you alone have the responsibility to make that determination*. Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and *your own conscience.*

Id. (emphasis added). The instructions the military judge gives the members before counsel begin the presentation of their cases, however, includes language inconsistent with the idea that jury nullification is proper:

> Members of the court, it is appropriate that I give you some preliminary instructions. My duty is to ensure the trial is conducted a fair, orderly and impartial manner in accordance with the law. I preside over open sessions, rule upon objections, and instruct you on the law applicable to this case. *You are required to follow my instructions on the law* and may not consult any other source as to the law pertaining to this case unless it is admitted into evidence. This rule applies throughout the trial including closed sessions and periods of recess and adjournment. Any questions you have for me should be asked in open court. As court members, it is your duty to hear the evidence and determine whether the accused is guilty or not guilty and if you find (him) (her) guilty, to adjudge an appropriate sentence.

Id. at 36-37 (emphasis added).

tal responsibility.[173] For example, in *Hardy*, the trial judge instructed the

167. In *To Be a Trial Lawyer*, F. Lee Bailey effectively demonstrated how to stress jury deliberation secrecy and the finality of the jury's verdict during argument:

> You have probably noticed that throughout the trial, no one has uttered a sound except when our very able court reporter, Ms. Roberts here, has been seated at her stenograph. She has taken down literally every word that has been spoken by the court, the lawyers, the witnesses, and even the questions about schedule that you, Madam Foreperson, asked of the judge. But when you go into your jury room to deliberate this case, Ms. Roberts will not be going with you. None of what you say will be recorded. If you reach a verdict, we will learn only what that verdict is, not how you reached it. The law conclusively presumes that you remember all of the evidence that the record contains, that you have listened carefully to the arguments of counsel, that you heard and understood every word and every concept of the court's instructions on the law, and that you correctly applied that law to the facts you found to be true. The law so conclusively presumes all these things to be true that we are not even permitted to inquire into the process that led to the verdict . . . . [I]f you wrongly hang a conviction around Mr. Daniels neck, he must wear it like a yoke for the rest of his life.

F. LEE BAILEY, TO BE A TRIAL LAWYER 175-77 (2d ed. 1994).

168. BENCHBOOK, *supra* note 7, at 53.

> The following procedural rules will apply to your deliberations and must be observed: The influence of superiority of rank will not be employed in any manner in an attempt to control the independence of the members in *the exercise of their own personal judgment*. Your deliberations should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then *voting on your findings must be accomplished by secret, written ballot*, and all members of the court are required to vote.

Id. (emphasis added).

169. BLACK'S LAW DICTIONARY 862 (7th ed. 1999) (defining jury nullification).

170. BENCHBOOK, *supra* note 7, at 53 (stating that if any inconsistency exists between instructions referred to by counsel in argument and those instructions given by the bench, the panel must accept the instructions from the military judge as correct).

171. United States v. Dougherty, 473 F.2d 1113, 1142 (D.C. Cir. 1972) (Bazelon, C.J., dissenting).

172. *See* MCM, *supra* note 5, R.C.M. 916 (providing a non-exclusive list of defenses recognized by the military justice system).

173. *See generally id.* Interestingly, the only two concepts the Rules for Courts-Martial expressly exclude as defenses are ignorance or mistake of law and voluntary intoxication. *See id*. R.C.M. 916(*l*). These concepts are both frequently presented during sentencing, however, as evidence of extenuating circumstances under the authority of RCM 1001(a)(1)(B).

members on consent, intoxication of the victim as it might have affected her ability to consent, mistake of fact as to the victim's consent, and the accused's voluntary intoxication. After deliberating for more than two hours, the panel itself raised the issue of jury nullification.[174]

Some offenses lend themselves better to jury nullification-type arguments than others. For example, Article 134 offenses include the element that the act or omission in question discredited the service or was prejudicial to good order and discipline, which must be proven to the members beyond a reasonable doubt.[175] Similarly, some defenses seem tailor-made for an equitable acquittal argument. For example, the good soldier defense standing alone may result in a not guilty verdict.[176] Because members are instructed that their votes must comport with their conscience, they clearly have great power and discretion to return a just verdict.

Of course, argument is not the only opportunity for counsel to bring the concept of jury nullification to the panel's attention. If counsel intend to argue for jury nullification, they should weave nullification concepts into their case during voir dire, opening statement, witness examination, and by raising certain defenses, such as the good soldier defense or lack of mens rea.

The discussion following Rule for Courts-Martial (RCM) 912 states, "The opportunity for voir dire should be used to obtain information for the intelligent exercise of challenges; counsel should not purposely use voir dire to present factual matter which will not be admissible or to argue the case."[177] Because "intelligent" exercise of challenges may not be made in a vacuum, counsel may have room to weave jury nullification-type themes into thoughtful and legitimate voir dire questions. Counsel could stress the

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174. United States v. Hardy, 46 M.J. 67, 68 (1997).

175. UCMJ art. 134 (2000). Some would argue that an acquittal of an Article 134 offense never amounts to jury nullification because the offense includes the element "discredited the service or was prejudicial to good order and discipline." *Id.* According to this argument, when an accused is acquitted of an Article 134 offense, the members merely found that the government did not prove the "discredit/prejudice" element, rather than chose not to enforce the statute. See Appendix A of this article, however, for an example of a panel finding an accused not guilty of both Article 134 and enumerated offenses the accused admitted to committing.

176. *See, e.g.*, Randall D. Katz & Lawrence D. Sloan, *In Defense of the Good Soldier Defense*, 170 MIL. L. REV. 117, 119 (2001) ("although the good soldier defense is not an affirmative defense, the accused may rely solely on good character evidence for his defense").

177. MCM, *supra* note 5, R.C.M. 912 discussion.

language of the members' oath[178] or the military judge's preliminary instructions on the burdens of proof[179] to invoke in the members' minds their power to nullify the law.

For example, counsel could ask the panel questions such as: "You have taken an oath to impartially try, according to the evidence, the law, and *your conscience*, SGT Smith's court-martial—is there any member who cannot, for whatever reason, freely exercise their conscience in deciding SGT Smith's case?;" or "Does each member understand the military judge's instruction that if there is reasonable doubt as to the guilt of SGT Smith, that doubt *must* be resolved in his favor? Do each of you understand that, if the prosecution fails to prove its case, the law requires you to acquit SGT Smith?" Counsel could finish voir dire by asking, "Does any member feel the rule that the prosecution *must* prove its case, before you *may* use your discretion to find SGT Smith guilty, is unfair? Does any member feel it is unfair that you have no discretion and must acquit, if the prosecution fails to prove its case?"[180]

With regard to opening statements, the discussion following RCM 913(b) states, "Counsel should confine their remarks to evidence they expect to be offered which they believe in good faith will be available and admissible and a brief statement of the issues in the case."[181] Issues in the case may include equities that members may consider in arriving at a finding, such as the "good soldier" defense, selective prosecution of the accused, or the fundamental unfairness or pettiness of the prosecution. Defense counsel may properly ask the members to render individualized justice in each case. Counsel may choose to use their opening statement as a vehicle to bring these, and other issues, to the panel's attention as early in the case as possible. The COMA endorsed the front-loading of this type of information in *United States v. Jefferson*,[182] in which the court held that the defense should have been permitted to inform the members of a man-

178. *See supra* note 164 and accompanying text.

179. *See supra* notes 165-66 and accompanying text.

180. For an example of a jury nullification theme communicated during voir dire in a recent court-martial, see Appendix B, *infra*.

181. MCM, *supra* note 5, R.C.M. 913(b) discussion.

182. 22 M.J. 315 (C.M.A. 1986).

datory minimum life sentence in the findings portion of trial to impress the panel members with the seriousness of the case.[183]

Witness examination is another area in which counsel can sow the seeds of jury nullification before closing argument. The discussion following RCM 913(c)(4) states, "The military judge should not exclude evidence which is not objected to by a party except in extraordinary circumstances. Counsel should be permitted to try the case and present the evidence without unnecessary interference by the military judge."[184] Therefore, absent an objection from the prosecution sustained by the military judge, counsel can bolster their jury nullification theme through selective direct and cross-examination.

If all else fails, jury nullification themes can be carried over into the sentencing phase of trial.[185] Rule for Courts-Martial 1001 states that "[a]fter findings of guilty have been announced, the prosecution and defense may present matter pursuant to this rule to aid the court-martial in determining an appropriate sentence."[186] This includes the defense presenting "evidence in extenuation or mitigation or both." [187]

Of course, prosecutors may, and in appropriate cases should, argue that jury nullification is not relevant to findings or sentencing. Although this relevance argument carries some weight regarding findings, as discussed above, it carries less weight with sentencing. While sentencing evidence offered by the prosecution under RCM 1001(b) is somewhat limited in scope, evidence offered by the defense under RCM 1001(c) is not as limited. In fact, the CAAF has interpreted the scope of acceptable content of an accused's unsworn statement, offered under RCM 1001(c)(2)(C), as very broad.[188] Furthermore, the rules expressly allow the military judge to

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183. *Id.* at 329.

184. MCM, *supra* note 5, R.C.M. 913(c)(4) discussion.

185. Appendix B of this article details a recent court-martial in which the defense carried its jury nullification strategy from voir dire through sentencing. The case ended with the panel convicting the accused, but imposing only a one-grade reduction and reprimand. *See infra* app. B.

186. MCM, *supra* note 5, R.C.M. 1001(a)(1).

187. *Id.* R.C.M. 1001(a)(1)(B).

188. *See, e.g.*, United States v. Britt, 48 M.J. 233 (1998); United States v. Jeffery, 48 M.J. 229 (1998); United States v. Grill, 48 M.J. 131 (1998). The defense may not present evidence or argument that impeaches the prior guilty findings of the court, however. *See* United States v. Teeter, 16 M.J. 68 (C.M.A. 1983).

relax the rules of evidence during presentation of evidence in extenuation or mitigation.[189]

Some may contend that if a case reaches the sentencing phase, then by definition the panel did not invoke its power of jury nullification because in the military justice system, the members, not the judge, sentence the accused. Although "no punishment" is an authorized sentence in most cases, the sentences for specific offenses usually fall within certain ranges.[190] Therefore, a panel that recognizes that some degree of punishment is expected, but wishes to invoke jury nullification, may render an unusually light sentence. As such, counsel who fail to persuade one-third or more of the panel to acquit should continue to press jury nullification themes in sentencing. This tactic might persuade the panel members to bring back an "unusual" sentence that is "too light, almost [a] type of jury nullification."[191]

VI. Jury Nullification Instructions—Analysis of Options

Military judges have a sua sponte duty to instruct on special defenses reasonably raised by the evidence.[192] Moreover, military judges are required to give a requested instruction if the issue is reasonably raised by the evidence, is not adequately covered elsewhere in anticipated instructions, and the proposed instruction accurately states the law concerning the facts of the case.[193] As discussed above, however, jury nullification is not a defense. Furthermore, under current case law, military judges do not err when they decline to give a jury nullification instruction.[194] Thus, military judges clearly are not required, sua sponte or otherwise, to instruct on jury nullification. Essentially, current case law permits courts-martial to ignore or look the other way, instead of directly addressing this power historically and inherently held by the panel.

Military judges have a number of options if counsel or the panel asks for an instruction about jury nullification: first, judges may tell the mem-

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189. *See* MCM, *supra* note 5, R.C.M. 1001(c)(3).

190. *See generally* United States v. Rolle, 53 M.J. 187 (2000) (holding that although all parties, including the defense, expected some punishment, a predisposition to impose some punishment is not automatically disqualifying).

191. Everett Interview, *supra* note 77.

192. *See* United States v. Jones, 7 M.J. 441 (C.M.A. 1979).

193. United States v. Briggs, 42 M.J. 367 (1995).

194. *See* United States v. Hardy, 46 M.J. 67, 75 (1997).

bers they have already been instructed on the matter, and say nothing further; second, judges may repeat the instructions previously given; third, they can provide the instructions proposed by counsel; fourth, judges can coerce members into avoiding "incorrect" verdicts, as endorsed by English courts before 1640;[195] or fifth, the military judge can give a legally correct, restrictive pattern jury nullification instruction. As explained below, the latter option, though currently nonexistent, is the best of the five.

A. Say Nothing Further

Judicial, rather than jury, nullification supports the position that the best policy for military judges is to refuse to instruct the members about their power to nullify the law. Judicial nullification is the theory that if judges give confusing instructions that lay jurors cannot understand, these instructions effectively nullify the law.[196] Fear of judicial nullification drives attempts to simplify and reduce the number of instructions given from the bench. Taken to its extreme, however, the concept could lead to over-simplified, vague instructions that do not accurately communicate the state of the law. Jury nullification instructions must take into account legitimate concerns, be clear and concise, and state the law accurately.

In *United States v. Hardy*,[197] discussed in detail above, the trial judge, when asked by the panel members about their power to nullify the law, told them to consider all the instructions previously given. He elected not to instruct further about the panel's power to nullify the law.[198] Under the CAAF ruling that upheld this action, judges may simply refuse to instruct on jury nullification. Although trial judges will not err by choosing this option, it leaves the members to their own devices in deciding how to properly decide the case, which may lead to arbitrary, unpredictable delibera-

195. Bushel's Case, 124 Eng. Rep. 1006 (C.P. 1670).

196. *See* Michael J. Saks, *Judicial Nullification*, 68 IND. L.J. 1281 (1993). Judicial nullification gives defense counsel an alternative reason why they might seek to link jury nullification-type themes with legal defenses—to increase the number and complexity of instructions the panel will receive from the bench.

197. 46 M.J. 67 (1997).

198. *Id.* at 68. Apparently, the trial judge felt, and the CAAF agreed, that the general findings instructions adequately advised the members on their duties and powers.

tions that turn on the members' best guesses about the limits of their authority.

B. Repeat Previous Instructions

Another possible response to panel inquiries or counsel requests about jury nullification is for the judge to repeat previous instructions. For example, the military judge in *Hardy* would have accurately responded to the panel's question by simply repeating the following *Benchbook* instructions:

> I . . . instruct you on the law applicable to this case. You are required to follow [these] instructions . . . . This rule applies throughout the trial including closed sessions and periods of recess and adjournment . . . . [I]t is your duty to hear the evidence and determine whether the accused is guilty or not guilty . . . .[199]
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> . . . .
>
> [T]he accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evidence beyond a reasonable doubt; . . . if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he) (she) must be acquitted; and Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government . . . . However, if, on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty . . . . Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and your own conscience.[200]

The first paragraph clearly lays out the duties of the military judge and the panel members. The "must/should" language, and the last four words of the second paragraph, go to the heart of the panel's power to find a criminal defendant not guilty despite the law and evidence of the case. Before counsel raised the issue of jury nullification in *Hardy*, the trial judge appar-

199. BENCHBOOK, *supra* note 7, at 36-37.
200. *Id.* at 52-53.

ently gave the members findings instructions, including those set forth above.[201] Hence, one can consider *Hardy* as supporting the position that the correct response for the military judge is to simply repeat correct findings instructions.

In any case, a military judge may, in response to panel inquiries, set forth instructions previously given to the members.[202] Care must be given, however, not to over-emphasize some parts of the instructions. Practically speaking, absent the adoption of a pattern instruction as discussed below, re-instruction is the best method for everyone concerned (members, judge, counsel, and the accused) to address jury nullification issues.

C. Give an Instruction Proposed by Counsel

Under current case law, the final possible response to a jury nullification issue is for counsel to submit an instruction for the military judge to give to the panel. The *Manual for Courts-Martial* states that any party may request that the military judge instruct the members on the law as set forth in the request.[203] The military judge's decision to give requested instructions is based on the issues raised during trial. Ordinarily, the military judge must give a requested instruction, but he is not required to give the specific instruction submitted by counsel.[204]

Notably, the CAAF did not hold in *Hardy* that it is error for military judges to give jury nullification instructions. It simply held that because no "right" to jury nullification exists; the military judge did not err in declining to give such an instruction.[205] Therefore, it remains proper for defense counsel to request a nullification instruction, and in appropriate cases, a military judge might elect to give such an instruction. The most significant hurdle facing counsel seeking an instruction is that opposing

201. *See Hardy*, 46 M.J. at 68.

202. *See* MCM, *supra* note 5, R.C.M. 920(b).

203. *See id.* R.C.M. 920(c).

204. *Id.* R.C.M. 920(c) discussion.

205. *Hardy*, 46 M.J. at 75. Judicial discretion in this area is not unique to the military criminal justice system. In *United States v. Powell*, 955 F.2d 1206, 1213 (9th Cir. 1991), the Court of Appeals for the Ninth Circuit expressly ruled that jury nullification instructions are a discretionary matter for the trial judge. *Id.* at 1213. *But see* United States v. Cooley, 787 F. Supp. 977, 992 (D. Kan. 1992) (holding nullification instructions should not be issued to the jury).

counsel and the bench will likely never agree on an appropriate instruction to give.[206]

D. Mislead or Coerce Panel Members

Both civilian and military courts recognize the power of jury nullification. To deny that this power exists through contrary instructions is misleading. Ordering a panel to find an accused guilty, despite the fact the members' own conscience is leading them toward a finding of not guilty, is impermissibly coercive.[207]

To propose that judges in modern American courts give misleading instructions to the jury sounds preposterous. Yet, that is exactly what the trial judges did in *United States v. Sanchez*[208] and *United States v. Thomas*.[209] As previously discussed,[210] the trial judge in *Sanchez* refused to answer the jury's direct question about their ability to ignore the law, and threatened the removal of any juror who failed to follow the law.[211] In

206. An example of such an instruction appears in Korroch and Davidson's article *Jury Nullification: A Call for Justice or an Invitation to Anarchy?*, *supra* note 101, at 148. Their instruction reads:

> To reach a verdict you believe is just, each of you may consider the evidence presented on your own common sense, your knowledge of human nature and the ways of the world. If you determine that the accused has committed an offense, but you cannot in good conscience support a guilty verdict, you cannot be required to do so. However, you should exercise with great caution your power to acquit an accused you believe has committed an offense.

Id.

207. *Id*. at 69 n.5; *see also* BENCHBOOK, *supra* note 7, at 53 n.1.

208. 58 Cal. App. 4th 1435 (Cal. App. 2d 1997).

209. 116 F.3d 606 (2d Cir. 1997).

210. *See supra* notes 59–62 and accompanying text.

211. *Sanchez*, 58 Cal. App., 4th at 1447.

Thomas, the federal district court judge dismissed a juror because the juror stated that he would not follow the judge's instructions.[212]

Sanchez and *Thomas* are not far removed from the English trials held between 1200 and 1600 A.D.—a time when English judges could and did force jurors to reconsider their "incorrect" verdicts.[213] Threatening to remove individual jurors from a jury is similar to threatening to fine jurors because both acts are coercive. Furthermore, the judicial act of interviewing jurors individually to investigate if a particular member is predisposed to disregard the court's instructions on the law creates a modern American Star Chamber.[214] In this Star Chamber, judges conduct in camera investigations of jurors that may violate their oaths by daring to nullify the law. The military justice system must avoid sliding down this slippery slope by heeding Chief Justice Vaughan's time-honored principal of non-coercion of jurors.[215]

E. Give a Pattern Jury Nullification Instruction

The best solution to address the jury nullification dilemma is a tightly worded, restrictive pattern instruction. This is by no means a novel solution—Chief Justice John Jay adopted this approach over two hundred years ago.[216] Case law, the Rules for Courts-Martial, the Military Rules of Evidence, and model instructions from state and federal criminal courts are among the many proper sources for instructions. Most instructions given in military practice, however, come from the *Military Judges' Benchbook*.[217] The *Benchbook* is used to "assist military judges . . . in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides . . . ."[218]

The absence of a pattern *Benchbook* instruction regarding jury nullification creates an atmosphere in which justice may turn on a panel's arbitrary acts taken without explicit guidance from the bench. As the District

212. *Thomas*, 116 F.3d at 624. *United States v. Hardy*, 46 M.J. 67 (1997), in which the CAAF affirmed the trial judge's decision not to direct the members to vote for a finding of guilty, *id.* at 69 n.5, supports the position that the trial judge's instructions in *Thomas* were coercive.

213. *See* Lawson, *supra* note 16, at 137.

214. *See generally id.* at 137-38.

215. *See generally* Bushel's Case, 124 Eng. Rep. 1006 (C.P. 1670) (discussed *supra* notes 24-28 and accompanying text).

of Columbia Circuit noted, "The right to equal justice under the law inures to the public as well as to individual parties to specific litigation, and that right is debased when juries at their caprice ignore the dictates of established precedent and procedure."[219] Military panels cannot be expected to adhere to the "dictates" of established precedent and procedure if they are not advised, or are ill-advised, about an important legal issue that may decide the case.

A starting point for a possible pattern instruction, below, draws from the *Benchbook*, a suggested instruction from a law review article,[220] and from the CAAF's opinion in *United States v. Hardy.*[221]

> [There is a division of responsibilities at a trial by court-martial.] I . . . instruct you on the law applicable to this case[, and y]ou are required to follow my instructions on the law [in deciding whether the accused is guilty or not guilty] . . . .[222] A court-martial panel does not have the right to nullify [or ignore] the lawful instructions of a military judge.[223]
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> [As I told you earlier,] the accused is presumed to be innocent until (his) (her) guilt is established by legal and competent evi-

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216. *See* Georgia v. Brailsford, 3 U.S. (1 Dall.) 1 (1794). In *Brailsford*, Chief Justice Jay, presiding over a rare jury trial before the Supreme Court, instructed the jury:

> It may not be amiss, here, Gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy. On this, and on every other occasion, however, we have no doubt, you will pay the respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.

Id. at 4.

217. BENCHBOOK, *supra* note 7.

218. *Id.* para. 1-1(b).

219. *See* United States v. Gorham, 523 F.2d 1088, 1098 (D.C. Cir. 1975).

220. Korroch & Davidson, *supra* note 101.

221. 46 M.J. 67 (1997).

222. *Id.* at 36.

223. *Id.* at 75.

> dence beyond a reasonable doubt; . . . if there is reasonable doubt as to the guilt of the accused, that doubt must be resolved in favor of the accused, and (he) (she) must be acquitted; and . . . the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government . . . . However, if, on the whole of the evidence, you are satisfied beyond a reasonable doubt of the truth of each and every element, then you should find the accused guilty . . . . Each of you must impartially decide whether the accused is guilty or not guilty in accordance with the law I have given you, the evidence admitted in court, and your own conscience.[224]
>
> If you determine that the accused has committed an offense, but you cannot in good conscience support a guilty verdict, you cannot be required to do so. However, you should exercise with great caution your power to acquit an accused you believe has committed an offense.[225]

This instruction is legally accurate and sufficiently restrictive to respond to the reality that jury nullification exists as a safety valve for unusual cases. It does not strip away the panel's ability to render individualized justice, but does caution the members to be extremely selective about when to take the law into their own hands. This type of instruction would act as a brake on the defense's use of a jury nullification theory in routine cases, while still allowing the panel the knowledge that they have the power to make exceptional findings in exceptional cases. As such, by keeping the court-martial system intellectually honest, this instruction has the dual benefits of safeguarding the accused's right to a fair trial and ensuring greater predictability in the administration of justice.

VII. Conclusion

The military legal community has no choice but to trust panel members with their power to nullify the law, a power they inherently and obvi-

224. BENCHBOOK, *supra* note 7, at 52-53.
225. Korroch & Davidson, *supra* note 101.

ously hold. But, the tougher issue remains how and what do we tell the members about their power?

Unlike randomly selected jurors, military members are personally selected by the convening authority as "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."[226] The military's blue ribbon court-martial panels should be treated as professionals and be informed about their broad power to render justice. The bench and bar should have the confidence to trust members to exercise their nullification power in a responsible way, without undermining the good order and discipline of the military services.

Whether defense counsel may argue jury nullification directly to a panel remains an open question of law.[227] Some argue that informing military members about their power to nullify might countermand discipline and foster disrespect for the law.[228] But, the law recognizes the inherent power of a jury to nullify. Law does not exist in a vacuum; courts-martial consider the facts and circumstances of each case individually. If Congress felt nullification was a true threat to military discipline, it would pass legislation to limit, restrict, or remove a panel's power to do justice in "the teeth of both law and facts."[229]

In practice, even when counsel are barred from explicitly referring to jury nullification, they can implicitly communicate nullification concepts to the panel throughout the case. Counsel can most notably accomplish this by focusing on the language in the panel's oath and in the military judge's instructions. Whether or not counsel are allowed to explicitly argue nullification concepts, military judges should use their discretion and instruct the members about their nullification power in appropriate cases, rather than remain silent and deny them this information. In fact, trial judges may be motivated, in rare cases, to give jury nullification instructions sua sponte if they perceive the accused was overcharged, gov-

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226. UCMJ art. 26(d)(2) (2000).

227. *See Hardy*, 46 M.J. at 67.

228. *See, e.g.*, *id.* at 72.

229. Horning v. District of Columbia, 254 U.S. 135, 138 (1920). For example, in theory Congress could give military judges the power to direct guilty verdicts.

ernment agents committed misconduct, or the prosecution over-relied on unsavory or unreliable informants.[230]

The most common jury nullification scenarios, however, occur when the defense raises the issue though argument, the panel asks about its power to nullify, or counsel request instructions. In these instances, clear guidance should be available to all military justice practitioners in the form of a pattern nullification instruction. Such an instruction would best correspond with the reality that the military justice system is flexible; it allows panels to render individualized justice in every case.

This solution best serves the administration of justice because it places the bench and bar on the "same sheet of music" and keeps the court-martial system intellectually honest. Further, providing the panel with full knowledge about their powers and responsibilities best allows the members to carry out their duties. A restrictive, but legally correct, instruction prevents the defense from raising jury nullification issues in routine cases. It would force the defense to raise the issue only in exceptional cases in which jury nullification would truly serve the ends of justice.

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230. *See generally* Lynch, *supra* note 128.