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PEREMPTORY CHALLENGES IN MILITARY CRIMINAL JUSTICE PRACTICE: IT IS TIME TO CHALLENGE THEM OFF

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[The peremptory challenge] functions as a repository of the unexamined fears, suspicions, and hatreds held by attorneys and their clients.[2]

Peremptory challenges provide opportunities for game playing and the exercise of pseudo-expertise by trial lawyers, but it seems doubtful that they accomplish much more.[3]

I. Introduction

In the crucible of a contested court-martial with members, the facts are elicited in a search for the truth and assessment of criminal liability,

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[2] Judge Raymond J. Broderick, *Why Peremptory Challenges Should Be Abolished*, 65 TEMP. L. REV. 369, 418 (1992).

[3] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 203 (1989).

if any, of an accused.[4] In that crucible, the most important actors are thefinders of fact,[5] for in their collective judgment lies the fate of the accused—his life, liberty, and property. When the accused chooses trial by a panel, he has no control over which specific persons initially sit as finders of fact. Rather, the convening authority, the same person who decided to send the accused's case to be tried by court-martial in the first place,[6] personally selects persons to sit as court members pursuant to Article 25, Uniform Code of Military Justice (UCMJ)[7] and Rule for Courts-Martial (RCM) 503.[8] The only way an accused can shape a panel after the convening authority has selected it is through the exercise of either challenges for cause[9] or peremptory challenges.[10]

Critics regularly compare the military criminal justice system with the civilian criminal justice system, often times with the military system allegedly coming up short.[11] Nowhere is this more pronounced than with comparisons between the civilian jury system and court-martial panels. For example, unlike a civilian criminal defendant, a servicemember is not entitled to a court-martial panel that is cross-representative of the community.[12] Military personnel are not entitled to a "jury of their peers" composed of a fair cross-section of the community as a matter of Sixth Amendment right.[13] Military personnel are, however, entitled to a panel composed of fair and impartial members,[14] who are, in the mind of

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[4] As in any other criminal trial, the finder of fact must find the accused guilty beyond a reasonable doubt. MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL (R.C.M.) 920(e)(5)(A) (2002) [hereinafter MCM].

[5] The accused may elect to be tried by a panel composed of at least one-third enlisted members pursuant to RCM 903(a)(1) or, in noncapital cases, by military judge alone pursuant to RCM 903(a)(2). In the absence of a timely election, the accused will be tried by a panel of officers pursuant to RCM 903(c)(3). *Id*.

[6] *See id*. R.C.M. 601.

[7] UCMJ art. 25 (2002).

[8] MCM, *supra* note 4, R.C.M. 503.

[9] *See id*. R.C.M. 912(f); *see also* UCMJ art. 41(a)(1) (stating in pertinent part, "The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court").

[10] *See* MCM, *supra* note 4, R.C.M. 912(g); *see also* UCMJ art. 41(b)(1) (stating in pertinent part, "Each accused and trial counsel are entitled to one peremptory challenge of the members of the court").

[11] *See*, *e.g.*, Edward T. Pound et al., *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19.

[12] *See* United States v. Roland, 50 M.J. 66, 68 (1999) (citing United States v. Lewis, 46 M.J. 338, 341 (1997)).

[13] *See* United States v. Loving, 41 M.J. 213, 285 (1994) (citations omitted).

[14] *See Roland*, 50 M.J. at 68.

the convening authority, "best qualified."[15] This aspect is a key difference from state and federal courts. In the civilian system, the convening authority is unknown and jury selection is entirely different.[16] The criminal civilian jury need not be a "true" cross-section of the community, but it must be fair and impartial.[17] Thus, "[t]he logical, and desirable, way to impanel an impartial and representative jury . . . is to put together a complete list of eligible jurors and select randomly from it, on the assumption that the laws of statistics will produce representative juries most of the time."[18] Such juries "will be impartial in the sense that they will reflect the range of the community's attitudes."[19]

Procedurally, most jurisdictions use random selection in an effort to meet the Sixth Amendment's requirement for an impartial jury.[20] After winnowing the prospective list of jurors because of various excuses or exemptions,[21] the venire is then subjected to questioning by the parties to determine their "impartiality" and fitness to sit as a juror. "The purpose of challenges is to eliminate jurors who may be biased about the

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[15] UCMJ art. 25(d)(2) (2002). In selecting members, the convening authority "shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." *Id*. This particular aspect of military criminal justice practice is one source of great concern to many. *See, e.g.*, Hon. Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (2001) ("There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."), *available at* http://www.badc.org/html/militarylaw_cox.html; Major Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for his Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 103 (1998) (advocating random selection of panel members); Pound et. al., *supra* note 11, at 19 (noting that convening authority selection is the weakness of the system). An excellent article that discusses the various points of view on this issue is by Major Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003).

[16] *See* JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS (1977) (offering an extensive survey on jury selection procedures in the fifty states and the federal system).

[17] *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 346-48 (1982). A "true" cross-section would require jurors of every group, including consideration of factors such as racial, ethnic, economic, or religious.

[18] VAN DYKE, *supra* note 16, at 20.

[19] *Id*.

[20] *See id*. at 258-62.

[21] *See generally id*. at 111-37 (discussing the various reasons jurors are able to escape jury duty).

defendant, the prosecution, or the case, and who thus might threaten the jury's impartiality."[22] The function of the challenge system, both causal and peremptory challenges, is "to eliminate those who are sympathetic to the other side, hopefully leaving only those biased *for* [the litigant]."[23] A party's ability to impanel a jury it wants is generally limited by two factors: (1) for causal challenges, success in proving a juror's bias to the judge's satisfaction; and (2) the number of peremptory challenges available and how they are exercised.[24]

Military criminal practice also features both challenges for cause and peremptory challenges.[25] Peremptory challenges are, by definition, challenges for which no cause or basis need be stated.[26] Each party is entitled to one peremptory challenge.[27] Challenges for cause, by contrast, are unlimited in number.[28] Given the preselection of a panel by the convening authority, the exercise of for-cause challenges and the peremptory challenge is the only means left to the parties to shape a panel. Some argue that by virtue of being able to select the members *ab initio*, the convening authority has already shaped the composition of the panel and, very likely, the outcome of the trial.[29] Unlike jury selection in

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[22] *Id*. at 139.

[23] Barbara Allen Babcock, "*Voir Dire: Preserving 'Its Wonderful Power*,'" 27 STAN. L. REV. 545, 551 (1975).

[24] VAN DYKE, *supra* note 16, at 140.

[25] MCM, *supra* note 4, R.C.M. 912(f), R.C.M. 912(g).

[26] *See id*. R.C.M. 912(g)(1), discussion.

[27] *See* UCMJ art. 41(b)(1) (2002).

[28] UCMJ art. 41(a)(1) and MCM, *supra* note 4, R.C.M. 912. Because neither of these provisions has an explicit limitation on the number of for-cause challenges, the inference is that there is none. Further, RCM 912(f)(1) makes it clear that "a member shall be excused for cause" when the evidences bias. *Id*. R.C.M. 912(f)(1)(M), (N).

[29] *See* United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring). In *United States v. Carter*, Judge Cox opined that the government "has the functional equivalent of an unlimited number of peremptory challenges" when selecting members in accordance with Article 25, UCMJ. *See id.* Almost ten years after Judge Cox's opinion in *Carter*, Judge Effron opined that given the structural differences between civilian trials and trials by court-martial, "the ability of an accused to shape the composition of a court-martial is relatively insignificant compared to the influence of the convening authority and trial counsel." United States v. Witham, 47 M.J. 297, 304 (1997) (Effron, J., concurring). This argument assumes that the convening authority selects panels with an outcome in mind and does so in a *prosecutorial* function, rather than in a *justice* function; that is, to determine what occurred *beyond a reasonable doubt*, and to assess criminal liability, if any. This opinion also assumes that the outcome is predetermined and that a trial is merely one stop on the railroad of convicting an accused. The convening authority *must* select members in accordance with Article 25, but is further confined by custom and

the civilian sector, with its typically larger number of available peremptory challenges,[30] the process of seating a panel is more akin to member deselection than member selection.[31] Using the tools provided by the *Manual for Courts-Martial* (MCM), the parties attempt to shape the "impartial" fact finders into a panel *partial to their respective cases*.

This article focuses on the exercise of peremptory challenges to answer the question of whether the military peremptory challenge should be abolished. To that end, this article analyzes the genesis of peremptory challenges in civilian practice and how that practice influences the establishment and practice of peremptory challenges in the military court-martial system. Specifically, this article examines the following issues:

1. The historical development of the peremptory challenge, as inherited from the common law,[32] into today's modified peremptory challenge[33] and how that history informs the modern practice in courts-martial practice;

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practicality. *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, 2 COURT-MARTIAL PROCEDURE § 15-55.10 (2d ed. 1999).

[30] *See* VAN DYKE, *supra* note 16, at 282-84 (listing all states' number of peremptory challenges for each party and type of case).

[31] *See id*. Even in the civilian system, as recognized in *Pointer v. United States*, 151 U.S. 396, 412 (1894), "The right of peremptory challenge, this court said in *United States v. Marchant*, and in *Hayes v. Missouri*, is not itself a right to select, but a right to reject jurors" (internal citations omitted). This difference in method was recognized in *United States v. Moore*:

> In reality, "petit jury" selection for trial by court-martial is done by the convening authority. He is provided a "jury venire" by the Army, composed of personnel assigned to this command. He selects the "jury" from his "venire" by a reverse striking, i.e. by selecting a given number rather than striking all over the given number. The single peremptory challenge therefore may be used to finally form the court-martial panel, but, it is not a jury selection method as exists . . . in civilian jurisdictions.

26 M.J. 692, 699 n.7 (A.C.M.R. 1988).

[32] *See generally* 4 WILLIAM BLACKSTONE, THE COMMENTARIES ON THE LAWS OF ENGLAND 352-54 (New York, Harper & Brothers 1852) (discussing the procedure, reasons for, and number of peremptory challenges); Swain v. Alabama, 380 U.S. 202, 212-19 (1965) (discussing the long history of the peremptory challenge at common law and as implemented in the American judicial system).

[33] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994) (holding that peremptory challenge must be gender-neutral); Batson v. Kentucky, 476 U.S. 79, 84 (1986) (holding that peremptory challenge must be race-neutral).

2. The development of the peremptory challenge in the military justice system, paying particular attention to the parameters of the challenge as developed in case law, with further attention focused on the clear distinction between the federal and military practice of peremptory challenges (curative peremptory challenges); and

3. The roles of the jury as an institution[34] and whether those roles are translated into courts-martial practice.

This article concludes that the right to exercise peremptory challenges should be removed from Article 41, UCMJ. The peremptory challenge, once a challenge not requiring *any* explanation as to its exercise, is now a psuedo-causal challenge that must be justified in all but the most limited circumstances. Therefore, the "peremptory" nature of the challenge is no more. Further, as any judge advocate experienced in military justice knows, the use of peremptory challenges has devolved into an unseemly "numbers game," detracting from the solemnity of the process and giving the parties more power than should be permitted.[35] From a practical standpoint, as a result of the impact of *Batson* and its progeny, the challenge has been emasculated and serves no particularly useful function. From an aspirational point of view, the challenge should be abolished to ensure that discrimination, which has no place in a courtroom, does not occur.

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[34] *See* Nancy S. Marder, *Beyond Gender: Peremptory Challenges and the Roles of the Jury*, 73 TEX. L. REV. 1041, 1052-1086 (1995) (discussing the roles of the jury in society).

[35] *See* ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES (1956); GILLIGAN & LEDERER, *supra* note 29, at § 15-58.00 ("Many counsel have been playing the 'numbers game' for years."). The appendix to this article provides a chart to display graphically the competing interests of the numbers game. *Contra* United States v. Newson, 29 M.J. 17, 21 (C.M.A. 1989) ("We do not subscribe to the myth of the numbers game."). It cannot be gainsaid that such considerations play a role in tactical decisions at trial. Each side attempts to shape a panel it believes will favor its case. As part of that strategy, if the opportunity presents itself (and there is no real need to exercise a peremptory for any other reason), it is very likely that a defense counsel, who routinely decides whether to exercise his right to a peremptory *after* the government does, will make a determination whether it will be statistically easier to have to convince one or two more members of his case to achieve a "not guilty" verdict.

II. Historical Background

A. The Common Law History of Peremptory Challenges

At their origin in English law,[36] juries were "presentment" juries, meaning their function was to investigate and accuse;[37] the concept of impartiality did not have a place. There were only three recognized challenges for cause: being related to the defendant by blood, being related to the defendant by marriage, or having an economic interest.[38] As juries were called upon to make findings of guilt, they evolved into fact-finders; and thus, correspondingly, the need for impartiality also evolved.[39] "By the end of the fifteenth century, the notion that jurors had to be impartial was firmly entrenched in the English common law."[40]

Since their inception and until the English parliament reacted, the King effectively handpicked juries.[41] By virtue of having picked the jurors, the Crown could remove someone deemed unacceptable, thus claiming for itself an unlimited number of peremptory challenges.[42] "In 1305, the English Parliament decided that this type of jury—which was not impartial but rather biased toward the prosecution—was obnoxious to their idea of justice."[43] Parliament, therefore, passed a statute that limited challenges by the Crown to causal challenges, eliminating the Crown's peremptory challenges altogether,[44] and giving criminal

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[36] For a survey of the history of jury trials *see, e.g.*, Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 812-19 (1997).

[37] *See* William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1407 (2001) (citing LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY 14 (2d ed. 1988)).

[38] *See id.* at 1406.

[39] *See id*. at 1407.

[40] *Id*. at 1407-08.

[41] *See id*. 1408.

[42] *See* VAN DYKE, *supra* note 16, at 147. Peremptory challenges appeared in England between 1250 and 1300. *See* Pizzi & Hoffman, s*upra* note 37, at 1412.

[43] VAN DYKE, *supra* note 16, at 147 (footnote omitted).

[44] *See id*. (citing Statute of 33 Edw. I, Stat. 4 (1305)). The language of the statute is of some interest in disclosing the challenge's nature:

> That from henceforth, notwithstanding it be *alleged by them that sue for the King, that the Jurors of those Inquests, or some of them, be not indifferent for the King*, yet such Inquests shall not remain untaken; but if they that sue for the King will challenge any of those jurors, they shall assign of their Challenge a Cause Certain and the

defendants the right to challenge jurors peremptorily.[45] The accused was permitted to exercise thirty-five peremptory challenges; that number was reduced to twenty except in cases of treason in 1530.[46] Some believe that the peremptory challenge was actually a disguised for-cause challenge.[47] In the ancestral home of the peremptory challenge, its use was extremely rare for hundreds of years.[48] Notwithstanding its rare use, William Blackstone, in his *Commentaries on the Laws of England*, called the defendant's right to peremptory challenges "a provision full of that tenderness and humanity to prisoner's [sic] for which our English laws are justly famous."[49] Unlike the causal challenge, the peremptory challenge is "an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all."[50] The challenge exists because:

> As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, that want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike.[51]

> truth of the same Challenge shall be enquired of according to the custom of the court . . . .

Quoted in Hoffman, *supra* note 36, at 846 (emphasis added). Hoffman posits that this language "corroborates the idea that the King's unlimited peremptories were actually unarticulated challenges for cause." *Id*.

[45] *See* VAN DYKE, *supra* note 16, at 147.

[46] *See id*. Hoffman notes the decreasing number of peremptory challenges in England through the years until 1989, peremptory challenges were discarded entirely. *See* Hoffman, *supra* note 36, at 822.

[47] *See infra* note 48 and accompanying text.

[48] *See* Hoffman, *supra* note 36, at 820-21. Hoffman notes that because English communities were so small, the lawyers, judges, and jurors knew each other well, so when a juror was unfit for service, all participants recognized that the juror was disqualified for cause. *See id*. at 846. Most interestingly, Hoffman also believes that when Parliament failed to kill this remnant of royal infallibility, it passed "the defective gene" to the American version of the peremptory challenge—that gene being a corollary to the axiom of royal infallibility. *See id*.

[49] 4 BLACKSTONE, *supra* note 32, at 353.

[50] *Id*. at 352-53.

[51] *Id*. at 353.

Blackstone also assigned a second reason for the challenge: "Because upon challenges for cause shown, if the reason assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which, the prisoner is still at liberty, if he pleases peremptorily to set him aside."[52] As will be shown, these same arguments are advanced to this day to maintain the peremptory challenge.

Although the Crown was not, by statute, permitted to exercise peremptory challenges, the Crown's advocates devised a method, approved by the courts, of "standing aside," a practice whereby courts allowed the Crown's attorneys to ask potential jurors to stand aside without giving reason as to why.[53] In cases where a jury was impaneled from the remaining jurors, those standing aside were permanently dismissed.[54] "Court practice thus allowed the [C]rown to continue a procedure that Parliament had explicitly eliminated."[55]

B. The American Peremptory Challenge Experience

The practice of peremptory challenges by an accused was carried over to the British Colonies in North America as part of the common law.[56] Even the practice of standing aside continued in some states and some others permitted the prosecution to exercise peremptory challenges.[57] As states permitted the prosecution peremptory challenges, the practice of standing aside jurors fell into obsolescence.[58] For federal courts, Congress codified the practice of peremptory challenges in 1790, granting a federal criminal defendant thirty-five peremptories in treason cases and twenty in all capital cases.[59] In the nineteenth century, the government's exercise of the peremptory challenge was the rule rather than the exception.[60] State courts tracked the development of the

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[52] *Id*. This language can be read to support an argument that the challenge is, at least in one of its roots, curative. *See infra* Part IV.C.
[53] *See* VAN DYKE, *supra* note 16, at 148.
[54] *See id*.
[55] *Id*.
[56] *See id*.
[57] *See id*. at 149.
[58] *See id*. at 150.
[59] *See* Hoffman, *supra* note 36, at 825 (citing 1 Stat. 119 (1790)).
[60] *See* VAN DYKE, *supra* note 16, at 150. Hoffman notes that in 1865, Congress gave a federal criminal defendant in non-capital cases ten peremptory challenges and the

challenge along the same lines as in federal court. "By 1790, most states recognized by statute a defendant's right to some peremptory challenges" and most states shared the view of Congress that a government's right to peremptory challenges was founded in common law.[61] By the twentieth century, both the defendant's and the government's right to peremptory challenges were firmly established.[62]

The government's right to peremptory challenge, however, brought with it the specter of discrimination. That discrimination, however, was not immediately in use: "Until Reconstruction, the peremptory challenge does not appear to have been used extensively to exclude disfavored racial or ethnic groups, probably for the simple reason that . . . those groups were excluded quite effectively at the front end by restrictive laws on juror qualification."[63] With the Civil War and Reconstruction, however, the prosecution's use of the peremptory challenge took a more ominous turn and became "an incredibly efficient final racial filter."[64] Justice Goldberg noted in dissent in *Swain v. Alabama*[65] that no African-American had sat on any Talladega County jury, civil or criminal, in living memory.[66] Peremptory challenges thus have a pernicious history of being used discriminatorily, that history rectified only through the pronouncements of the U.S. Supreme Court (Court). The "right" of the peremptory challenge, not founded in the Constitution,[67] was going to get

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prosecution two. The same statute decreased the number of peremptory challenges to a capital defendant from thirty-five to twenty and granted the prosecution five. The numbers varied throughout the next several years until the adoption of the Federal Rules of Criminal Procedure (FRCP). Rule 24(b) equalized the number for each side at twenty in capital cases. *See* Hoffman, *supra* note 36, at 826; *see also* FED. R. CRIM. P. 24(b).

[61] Hoffman, *supra* note 36, at 827.

[62] *See* VAN DYKE, *supra* note 16, at 150.

[63] Hoffman, *supra* note 36, at 827.

[64] *Id*. at 829. For example, "For almost a century after the Civil War, blacks rarely appeared on jury lists at all in the South, and when—after years of litigation—they were finally included on the qualified list, the prosecution frequently used its peremptory challenges to exclude them from the jury box." VAN DYKE, *supra* note 16, at 150 (footnote omitted). Hoffman notes a parallel between the use of the peremptory challenge and the rise of civil rights: "While the English version of the peremptory challenge was withering from disuse, the American version was vigorously and comprehensively being applied in attempts to stem the inevitable tide of civil rights." Hoffman, *supra* note 36, at 827.

[65] 380 U.S. 202 (1965)

[66] *See id.* at 231-32 (Goldberg, J., dissenting).

[67] *See generally* Ross v. Oklahoma, 487 U.S. 81, 89 (1988) (reaffirming that "[b]ecause peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and the manner of their exercise" (citations omitted)).

an overhaul, to the point in the military context, of hardly being recognizable as a peremptory challenge at all.

III. The Rise of the Modified Peremptory Challenge

Because the peremptory challenge was used in a discriminatory fashion in civilian criminal trials, the Court stepped in to rid jury trials of any specter of racial or gender discrimination, because such discrimination violated the Equal Protection Clause of the Fourteenth Amendment and due process under the Fifth Amendment.[68] As a result of the Court's forays into the previously unexplained peremptory challenge, the challenge is a shell of its former self. Before the Court's efforts, the peremptory challenge served as a vehicle for trial lawyers' experience, who, relying on that experience, attempted to discern which jurors were inclined to view their cases unfavorably. Because the peremptory challenge was outside judicial scrutiny, litigants avoided having to express that which was often unexplainable. Equally important, however, is the clear empirical evidence in criminal cases that the peremptory challenge was being used not as a means to serve a lawyer's intuition, but as a means of outright discrimination.[69] The Court has held that group identifiers, by themselves, are not sufficient indicia as to jurors' ability to sit as fair and impartial finders of fact.[70] The first step toward correcting the problem of discriminatory peremptory challenges came in *Swain v. Alabama*[71] in 1965. By the time of *Swain*, "the peremptory challenge was well entrenched as the last line of defense against the increasing pressures for desegregation in the venire."[72] In

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[68] "No state shall deny any person equal protection of the laws nor deny due process of law." U.S. CONST. amend. XIV, § 1. The Fifth Amendment provides in pertinent part that no person shall "be deprived of life, liberty, or property without due process of law." *Id.* amend. V.

[69] As an example of such evidence, Hoffman quotes the Alabama Supreme Court in its opinion in *Swain v. State*, 156 So. 2d 368, 375 (Ala. 1963), *aff'd*, 380 U.S. 202 (1965): "Negroes are commonly on trial venires but are always struck by attorneys in selecting the trial jury." Hoffman, *supra* note 36, at 829; *see also* Miller-El v. Cockrell, 537 U.S. 322, 335 (2003) (noting, for example, that up until 1976, the Dallas County District Attorney's Office used a 1963 manual instructing its attorneys to use peremptory challenges to strike minority members).

[70] *See*, *e.g.*, J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 137 (1994) ("[W]e consider whether peremptory challenges based on gender stereotypes provide substantial aid to a litigant's effort to secure a fair and impartial jury.").

[71] 380 U.S. 202 (1965).

[72] Hoffman, *supra* note 36, at 831.

upholding the lower court's ruling on the case, the Court specified limits–if only theoretical–on the use of the peremptory challenge.[73]

A. *Swain v. Alabama*

The state of Alabama tried Robert Swain, an African-American, for rape; the jury convicted him and sentenced him to death.[74] At the beginning the trial, the petit venire had eight African-Americans.[75] During the process of jury selection, the judge excused two African-American jurors and the prosecution struck the remaining six using peremptory challenges.[76] Alabama asserted "its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."[77]

As a starting point, the majority noted, "Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."[78] The Court, however, stated, "purposeful discrimination may not be assumed or merely asserted. It must be proven . . . ."[79] After reviewing the history of the peremptory challenge as exercised both by the prosecution and defendant at both the federal and state levels,[80] the Court concluded that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury."[81] The majority then opined that the function of the peremptory challenge:

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[73] *See* VAN DYKE, *supra* note 16, at 150.
[74] *See Swain*, 380 U.S. at 203.
[75] *See id*. at 205.
[76] *See id*.
[77] *Id.* at 211-12.
[78] *Id.* at 203-04.
[79] *Id.* at 205 (citations omitted).
[80] *See id.* at 212-18.
[81] *Id*. at 219. Such reasoning appears dubious. Merely noting the long practice and pervasiveness of a practice is not persuasive when considering the practice's *necessity*.

> is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the *voir dire* and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause.[82]

The language of the Court on this point harkens directly back to the thoughts of Blackstone in his analysis of the justification for the practice.[83]

Understanding that the peremptory challenge is "exercised without a reason stated, without inquiry and without being subject to the court's control," the Court acknowledged that peremptory challenges were "frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned."[84] The Court concluded:

> With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. *To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge*. The challenge, *pro tanto*, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards.[85]

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[82] *Id.* at 219-20.
[83] *See supra* text accompanying notes 49-52.
[84] *Swain*, 380 U.S. at 220.
[85] *Id.* at 221-22 (emphasis added).

Thus determining that the peremptory challenge should be exercised without scrutiny, the Court held that the Constitution does not require an examination into the prosecutor's reason for exercising peremptory challenges. Further,

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it.[86]

The majority placed a heavy burden on a criminal defendant to show improper discrimination in the use of peremptory challenges. The burden on the defendant was to show a systematic striking of minority members from the venire over a period of time.[87] Any Fourteenth Amendment claim, the Court noted, would take on significance if a defendant could show that no African-Americans ever served on petit juries, even when selected as qualified jurors and who have survived challenges for cause.[88] In these circumstances, the Court conceded that "[s]uch proof might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of a particular case on trial and that the peremptory system is being used to

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[86] *Id*. at 222.

[87] *See id*. at 227. It must be borne in mind that proof that minorities were never selected to sit as members of the venire is distinct from the exercise of peremptory challenges. The majority addressed this distinction noting that

> Total exclusion of Negroes by the state officers responsible for selecting names of jurors gives rise to a fair inference of discrimination on their part, an inference which is determinative absent sufficient rebuttal evidence. But this rule of proof cannot be woodenly applied to cases where the discrimination is said to occur during the process of peremptory challenge of persons called for jury service.

Id. at 226-27.

[88] *See id*. at 223.

deny" African-Americans the right to sit as jurors.[89] It is this use of peremptory challenges that "the peremptory challenge is not designed to facilitate or justify."[90]

The Court, although standing squarely in favor of the unfettered peremptory challenge, perhaps without even realizing it, struck a significant blow against the peremptory challenge. The majority starkly demonstrated the tension between the unfettered exercise of the peremptory challenge and the dictates of the Fourteenth Amendment. Given the right facts, the peremptory challenge, as commonly understood, would have to stand aside. Quite clearly, the peremptory challenge was used as a vehicle for discrimination, depriving African-Americans of "the same right and opportunity to participate in the administration of justice" enjoyed by others.[91] The *Swain* Court, however, was loath to change the challenge on the facts of the case. The majority noted, "[W]e think it is readily apparent that the record in this case is not sufficient to demonstrate that the rule has been violated by the peremptory system as it operates in Talladega County."[92] The Court lacked the courage to modify the long-established tradition of using peremptory challenges. This case was, however, a harbinger of things to come. For discrimination to end, the nature of the challenge had to change.

B. *Batson v. Kentucky*[93]—The End of Racial Discrimination in Jury Selection?

Twenty-one years later, the Court re-examined its holding in *Swain* in the case of *Batson v. Kentucky*. The Court plainly framed the issue as that of examining "the evidentiary burden placed on a criminal defendant who claims that he has been denied equal protection through the State's use of peremptory challenges to exclude members of his race from the petit jury."[94] With twenty-one years of history as evidence, the Court determined that *Swain*'s burden of showing repeated striking of blacks over a number of cases on a defendant was "crippling," resulting in the

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[89] *Id.* at 224.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] 476 U.S. 79 (1986).
[94] *Id.* at 82.

prosecutor's peremptory challenges being "immune from constitutional scrutiny."[95] No more.

The state of Kentucky indicted the petitioner, an African-American, on charges of second-degree burglary and receipt of stolen goods.[96] After the judge conducted *voir dire* and challenges for cause were exercised, the prosecutor exercised his four peremptory challenges against the remaining four African-Americans on the venire, resulting in an all white jury.[97] The petitioner's defense counsel moved to discharge the jury.[98] He argued that the prosecutor's exercise of his peremptory challenges against the African-American venire men violated his client's Sixth and Fourteenth Amendment right "to a jury drawn from a cross section of the community."[99] Denying the petitioner's motion, the trial judge ruled that the parties could exercise their peremptory challenges to "strike anybody they want to."[100] The jury convicted petitioner on both counts.[101] Pressing his claim in the Kentucky court, the petitioner argued that the facts showed that the prosecutor engaged in a pattern of discriminatory challenges, violating his Sixth Amendment and state constitutional rights.[102] The Kentucky Court affirmed the conviction.[103]

In deciding the issue before it, the majority made a number of important points regarding peremptory challenges and a defendant's right to a fair and impartial jury. The Court recognized "that the peremptory challenge occupies an important position in our trial procedures,"[104] though the peremptory challenge is confined by the "mandate of equal protection."[105] Just where the balance was between a challenge not subject to judicial scrutiny and the selection of a jury free from

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[95] *Id*. at 92-93.
[96] *See id*. at 82.
[97] *See id*. at 82-83.
[98] *See id*. at 83.
[99] *Id.*
[100] *Id*. (quoting the trial judge).
[101] *Id*.
[102] *See id*. at 83. Batson argued that the prosecutor's conduct violated his rights under the Sixth Amendment and § 11 of the Kentucky Constitution to a jury drawn from a cross-section of the community. *See id.* He also contended that the facts showed that the prosecutor engaged in a patter of discriminatory challenges in violation of equal protection. *See id*. at 83-84. Before the Supreme Court, however, he did not press a claim under the Equal Protection Clause because of the Court's decision in *Swain*. *See id*. at 84-85 n.4.
[103] *See id.* at 84.
[104] *Id*. at 98.
[105] *Id*. at 99.

discrimination was decided in favor of the latter. The *Batson* Court recognized that in prior cases, "[t]he Court sought to accommodate the prosecutor's historical privilege of peremptory challenge free of judicial control, and the constitutional prohibition on exclusion of persons from jury service on account of race."[106] The Court noted that "the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury."[107] Notwithstanding the apparent historical importance of the peremptory challenge to the maintenance of the criminal justice system, the Court struck a decisive blow against the traditional practice of peremptory challenges.

The 7-2 majority expressly overruled *Swain* insofar as it placed a "crippling" burden on the defendant to show purposeful discrimination in the use of peremptory challenges over a period of time.[108] The Court laid out a three-part test. First, a defendant must make a *prima facie* case that a peremptory challenge was based on race.[109] Second, if that showing is made, the burden of proof switches to the prosecution, which must show a race-neutral reason for the exercise of the peremptory challenge.[110] Third, the trial court must then determine "if the defendant has established purposeful discrimination."[111]

The first two parts of the test have their own particular points that merit discussion. Recalling the prior "crippling burden" on the defendant, the Court held that to make a *prima facie* case, the defendant need only show "purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial"[112] rather than the much heavier burden of showing strikes over a period of time. In meeting his burden, the defendant is required to show that he is a member of a cognizable racial group and that the prosecutor exercised a peremptory challenge against a venire member of the defendant's race.[113] The defendant then "is entitled to rely on the fact . . . that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a

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[106] *Id*. at 91 (internal citations omitted).
[107] *Id*. (internal citations omitted).
[108] *See id*. at 100 n.25.
[109] *See id.* at 96.
[110] *See id*. at 97.
[111] *Id*. at 98.
[112] *Id*. at 96.
[113] *See id*.

mind to discriminate.'"[114] The defendant then "must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race."[115] The Court then declared that this combination of facts "raises the necessary inference of purposeful discrimination."[116] With respect to the requirement that the State proffer a neutral explanation for the challenge, the Court recognized that the requirement "imposes a limitation in some cases on the full peremptory character of the historic challenge," but noted that that the explanation "need not rise to the level justifying exercise of a challenge for cause."[117] The Court then noted two points that a prosecutor could not use in support of a neutral explanation: that a juror would be partial because of shared race and an affirmation of his good faith.[118] The bottom line for the Court and for the peremptory challenge was a lightening of the defendant's burden and a large step toward taking the peremptory challenge as an arrow of discrimination out of the state's quiver.

Answering the state's arguments regarding the "vital importance" of the historical peremptory challenge, the Court denied that the change it made to the peremptory challenge practice would "eviscerate the fair trial values served by the peremptory challenge."[119] The Court, in strong terms, reaffirmed the principle from *Swain*: "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors

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[114] *Id*. (citation omitted).
[115] *Id.*
[116] *Id*.
[117] *Id*. at 97.
[118] *See id*. at 97-98.
[119] *Id.* at 98. Chief Justice Burger in dissent, joined by Justice Rehnquist, argued that "the Court sets aside the peremptory challenge, a procedure which has been part of the common law for many centuries and part of our jury system for nearly 200 years." *Id*. at 112 (Burger, C.J., dissenting). It should be noted that the Chief Justice dissented primarily on procedural grounds. In the petitioner's brief and argument, Batson disclaimed any reliance on the Fourteenth Amendment as a basis for reversal, relying instead on a Sixth Amendment argument. *See id*. at 99. Arguing that since the petitioner did not raise an equal protection argument either at the state supreme court level or before the Court, the Chief Justice called the majority's decision in the case on such a basis "truly extraordinary." *Id*. at 112. Drawing a distinction between discrimination in a venire summons and a venire at a particular trial, he also noted, however, that an "unadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right.'" *Id*. at 123-24.

in the administration of justice violates the Equal Protection Clause."[120] The Court placed the inherent tension between the unfettered peremptory challenge and the Equal Protection Clause before the world to see and came down firmly on the side of removing discrimination from the courtroom. The reality of *Batson* is that the peremptory challenge, which previously needed no explanation, now was subject to judicial scrutiny for evidence of prejudice to protect a juror's right to participate in the administration of justice—and concomitantly the defendant's right to a fair trial—under the Fourteenth Amendment.[121] This case represents a radical overhaul.

C. *Powers v. Ohio*[122] and the Expansion of *Batson*

The boundaries of *Batson*, in which the Court limited its analysis and holding to cases involving the exclusion of members of venire of the same racial group as the defendant,[123] were expanded five years later in *Powers v. Ohio* when the Court addressed whether the exclusion of African-American veniremen by peremptory challenge in the trial of a white man violated the Equal Protection Clause of the Fourteenth Amendment. Powers stood trial for two counts of aggravated murder and one count of attempted aggravated murder.[124] Each time the prosecutor peremptorily challenged an African-American member of the venire the defense objected, each time citing *Batson*.[125] Each time, the trial judge overruled his objections.[126] The jury convicted Powers of murder, aggravated murder, and attempted aggravated murder.[127] Powers appealed his conviction on both Sixth Amendment (Ohio violated his right to a jury composed of a fair cross-section of the community) and Fourteenth Amendment grounds.[128] The state courts affirmed his conviction.[129]

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[120] *Id.* at 84 (quoting Swain v. Alabama, 380 U.S. 202, 203-04 (1965)).
[121] The majority noted that the "Fourteenth Amendment protects an accused throughout the proceedings bringing him to justice." *Id*. at 88.
[122] 499 U.S. 400 (1991).
[123] *See Batson*, 476 U.S. at 96.
[124] *See Powers*, 499 U.S. at 402.
[125] *See id.* at 403.
[126] *See id*. Of interest, the record apparently neither disclosed whether there were any remaining African-Americans on Powers' petit jury, nor whether Powers exercised his peremptory challenges against any African-Americans. *See id*.
[127] *See id*.
[128] *See id*.
[129] *See id*.

The Court held:

> [T]he Equal Protection Clause prohibits a prosecutor from using the State's peremptory challenges to exclude otherwise qualified and unbiased persons from the petit jury solely by reason of their race, a practice that forecloses a significant opportunity to participate in civic life. An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race.[130]

The Court, therefore, took a logical step in determining the extent to which the Fourteenth Amendment prohibits the exclusion of a member of a petit jury on the basis of race. If race is not be considered in the selection of members of petit jury, it should not make any difference if the defendant is a member of the same racial group as the excluded juror. In response to the argument from the government that, as a white man, Powers could not object to the exclusion of prospective African-American jurors, the Court stated, "This limitation on a defendant's right to object conforms neither with our accepted rules of standing to raise a constitutional claim nor with the substantive guarantees of the Equal Protection Clause and the policies underlying federal statutory law."[131] The harm the Court sought to redress was "racial discrimination in the qualification or selection of jurors" that "offends the dignity of persons and the integrity of the courts."[132] As a matter of traditional peremptory challenge practice, Justice Scalia, in dissent, was correct in noting that the Court's decision in *Powers* "[t]o affirm that the Equal Protection Clause applies to strikes of individual jurors is effectively to abolish the peremptory challenge."[133] To date, however, the Court has not gone that far.

D. *J.E.B. v. Alabama* ex rel. *T.B.*[134] and the Further Expansion of *Batson*

In *J.E.B.*, the Court extended the reasoning of *Batson* to the area of gender discrimination in jury selection. This case involved the use of

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[130] *Id.* at 409.
[131] *Id.* at 406.
[132] *Id.* at 402.
[133] *Id.* at 425 (Scalia, J., dissenting).
[134] 511 U.S. 127 (1994).

nine out of ten peremptory challenges by the State of Alabama to exclude male jurors from sitting on a paternity case.[135] The petitioner J.E.B., used all but one of his peremptory challenges to exclude female jurors.[136] Clearly, both sides were engaging in the "trafficking of stereotypes,"[137] with each side using stereotypes to justify its conclusions that women presumably would be more favorable toward the State's case and the men would be more favorably inclined toward the petitioner's case.[138] The majority refused to conclude that "gender alone is an accurate predictor of juror's attitudes,"[139] instead holding that "gender, like race, is an unconstitutional proxy for juror competence and impartiality."[140] Connecting the case to *Batson*, the Court observed, "Failing to provide jurors the same protection against gender discrimination as race discrimination could frustrate the purpose of *Batson* itself" because peremptory challenges were used often against minority women.[141] And as in *Batson*, the Court created a procedure for judicial review of a peremptory challenge based on gender, which is identical in practice to *Batson* challenges.[142]

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[135] *See id.* at 129 (emphasis added). Of interest, and as pointed out by Justice Scalia in his dissenting opinion, the majority spilled much ink regarding the exclusion of *women* from jury duty, although the issue before the Court was the propriety of excluding *men* from the jury based solely on gender. *See id*. at 156-63 (Scalia, J., dissenting).

[136] *See id*. at 129.

[137] Babcock, *supra* note 23, at 553.

[138] *See J.E.B.*, 511 U.S. at 129. The Court made note of the Respondent's argument on this point quoting from his brief:

> Far from proffering an exceptionally persuasive justification for its gender-based peremptory challenges, respondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

Id. at 137-38.

[139] *Id*. at 139.

[140] *Id*. at 129.

[141] *Id*. at 145.

[142] *See id*. at 144-45. The party alleging gender-based discrimination in the use of a peremptory challenge must make a *prima facie* case, which once made, requires the challenging party to offer a gender-neutral reason for the peremptory challenge. *Id.*

The Court struck a powerful blow in favor of the jury as an institution designed to promote democratic values writing, "All persons, when granted the opportunity to serve on a jury, have the right not to be excluded summarily because of discriminatory and stereotypical presumptions that reflect and reinforce patterns of historical discrimination."[143] The majority also addressed the likely effect of the holding on peremptory challenges generally. Concluding that the holding would not "imply the elimination of all peremptory challenges," the majority held that parties could still remove jurors thought to be partial to one side, but parties could not use gender "as a proxy for bias."[144] The Court also noted,

> If conducted properly, *voir dire* can inform litigants about potential jurors, making reliance upon stereotypical and pejorative notions about a particular gender or race both unnecessary and unwise. *Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.[145]

Of interest is Justice O'Connor's concurring opinion. She agreed with the Court that the Equal Protection Clause forbids "the government from excluding a person from jury service on account of that person's gender" but stated that the holding should be limited to the *government's* use of gender-based peremptory challenges.[146] With respect to the reach of the Equal Protection Clause, she wrote that the Clause only prohibits state actors from acting discriminatorily.[147]

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[143] *Id.* at 141-42.
[144] *Id*. at 143.
[145] *Id*. at 143-44.
[146] *Id*. at 147 (O'Connor, J., concurring) (emphasis in original).
[147] *See id*. at 150 (O'Connor, J., concurring). Justice O'Connor also believed that the cases *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (observing that litigants in a civil trial were state actors for purpose of Equal Protection analysis and thus cannot exercise peremptory challenges in a racially discriminatory manner) and *Georgia v. McCollum*, 505 U.S. 42 (1992) (extending *Batson*'s prohibition of racially discriminatory use of peremptory challenges to criminal defendants, who are also state actors for Equal Protection purposes) were wrongly decided. A review of both of these cases cited by Justice O'Connor clearly shows that the Court places a high value on the jury as an institution and the importance of the perception of justice. Indeed, as Justice Thomas noted in his concurrence in *McCollum*, "[W]e have exalted the rights of citizens to sit on juries over the rights of the criminal defendant, even though it is the defendant, not the jurors, who faces imprisonment or even death." *Id*. at 62 (Thomas, J., concurring). Promotion of the jury at the expense of a defendant's rights has a tremendous impact on

Justice O'Connor touched on the gender-based peremptory challenge issue as well. She understood the argument that the peremptory challenge's primary purpose is to assist in the selection of an impartial jury.[148] She noted,

> Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge. But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often inarticulable.[149]

She minced no words in explaining that gender *does* matter:

> Today's decision severely limits a litigant's ability to act on this intuition, for the import of our holding is that any correlation between a juror's gender and attitudes is irrelevant as a matter of constitutional law. But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.[150]

She concluded that extending *Batson* to gender was to take a step closer to eliminating the peremptory challenge and diminishing "the ability of litigants to act on sometimes accurate gender-based assumptions about juror attitudes."[151] If one remembers how Blackstone used and extolled the challenge,[152] it is hard to square the notion of a peremptory challenge and judicial scrutiny for its use. By definition, a peremptory challenge should be free of such scrutiny. As interpreted by the Court, however, due process and equal protection *vis-à-vis* potential jurors outweigh the peremptory challenge as inherited from the common

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the peremptory challenge. If the value of the jury as an institution takes priority over the rights of an accused to "choose" his jury, the peremptory challenge necessarily suffers.

[148] *See J.E.B.*, 511 U.S. at 148 (O'Connor, J., concurring) ("Because I believe the peremptory remains an important litigator's tool and a fundamental part of the process of selecting impartial juries, our increasing limitation of it gives me pause.").

[149] *Id*.

[150] *Id.* at 149.

[151] *Id*. at 149-50.

[152] *See supra* text accompanying notes 49-52.

law. In practice, the peremptory challenge has become another species of causal challenge, the propriety of which is to be decided by a trial judge and subject to scrutiny by appellate courts. That the peremptory challenge has changed is the price for ensuring that all persons are able to participate as equals in the administration of justice.

E. The Meaning of It All

As a matter of normative judgment, due process and equal protection cannot countenance purposeful discrimination in the selection of juries. The Court balanced the peremptory challenge as practiced since the early days of the common law with the notions of what potential jurors and the parties to a case are entitled to as a matter of right. Underlying *Batson* and its progeny is an assumption that the jury system is fundamentally a public institution whose purpose is to further democratic governance. *Swain*, *Batson*, *Powers*, *McCollum*, and *J.E.B*. all stand, in progression, for the proposition that "[d]iscrimination in jury selection . . . causes harm to the litigants, *the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.*"[153] From the early days of *Strauder v. West Virginia*,[154] the Court took steps to protect individuals coming before juries and, more importantly, those answering a jury summons, to be free from the effects of discrimination. The Court has placed the rights of *potential jurors* against racial or gender discrimination above the rights of an individual accused to shape the jury to his liking.[155] The pressing issue was just how far that juxtaposition went. As can be deduced, the concepts of due process and equal protection with respect to potential jurors have not found their outer limits.

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[153] *J.E.B.*, 511 U.S. at 140 (emphasis added). The Court has gone to great lengths to explain the harm to the potential juror and the system as a whole, but less time on the harm to the litigants.

[154] 100 U.S. 303 (1879). This case involved a former slave tried in West Virginia for murder. *See id.* at 304. Under West Virginia law, no one but a white man could sit on a grand or petit jury; thus, the jury that convicted Strauder was composed of only white men. *See id.* Declaring that the "very idea of a jury is a body of men composed of the peers or equals of the person whose rights it is selected or summoned to determine," the Court reversed the conviction. *Id*. at 308.

[155] *McCollum* is the best example of the subordination of the individual defendant to the interest of a potential juror. *McCollum*, 505 U.S. 42 (1992).

IV. The History and Practice of Peremptory Challenges in Courts-Martial

The foundation for the peremptory challenge in military practice is in Article 41, UCMJ and RCM 912 rather than the Constitution. The military peremptory challenge is a creature of statute, a right afforded the accused as a matter of due process. Unlike its civilian counterpart, the peremptory challenge in courts-martial practice is of relatively recent vintage.

A. The Genesis of the Uniform Code of Military Justice—The Articles of War

Military disciplinary codes generally developed from unwritten codes that trace their lineage back to the Greeks and Romans.[156] Throughout early English history, kings promulgated codes of conduct upon which the British Articles of War were eventually based.[157] An American version of the Articles of War, which appeared on June 30, 1775, was based on the then-effective British Articles of War.[158] The American Articles 32-53 covered many procedural aspects of courts-martial, oaths, and assembly of courts-martial,[159] but contained no provision for challenges, despite their existence in civilian law. The American Articles of War of June 30, 1775,[160] the additional Articles of November 7, 1775,[161] and the American Articles of War of September 20, 1776,[162] as amended by Articles enacted on May 31, 1786,[163] maintained the silence on challenges of any sort. Congress did not grant the right to challenge a member until the American Articles of War of April 10, 1806.[164] Article 71 provided, "[w]hen a member shall be challenged by a prisoner, he must state his cause of challenge, of which

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[156] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 17-19 (2d ed. 1920 reprint).
[157] *See id*. at 18-19.
[158] *See id*. at 22.
[159] 1 Jour. Cong. 90, *reprinted in* WINTHROP, *supra* note 156, at 956-57.
[160] *Id.* at 90, *reprinted in* WINTHROP, *supra* note 156, at 953-59.
[161] *Id.* at 959-60.
[162] *Id.* at 961-71.
[163] 4 Journals 649, *reprinted in* WINTHROP, *supra* note 156, at 972-75. The amendments repealed Section 14 of the September 20, 1776, Articles of War governing the Administration of Justice.
[164] Act of Apr. 10, 1806, 2 Stat. 359 (1806), *reprinted in* WINTHROP, *supra* note 156, at 976-85.

the court shall, after due deliberation, determine the relevancy or validity, and decide accordingly; and no challenge to more than one member at a time shall be received by the court."[165] Article 88 of the Articles of War of June 22, 1874[166] stated, "[m]embers of a court-martial may be challenged by a prisoner, but only for cause stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time."[167] The Article was silent with respect to the government's ability to exercise challenges for cause. Winthrop noted that "[i]t is uniformly held, however, by the authorities that the same right may, and in a proper case should, be exercised by the prosecution . . . [r]esting, as such action really does, on long-continued *usage*, it is now too late to dispute its authority."[168] The system of casual challenges was maintained through the Articles of War of August 29, 1916: "[m]embers of a general or special court-martial may be challenged by the accused, but only for cause stated to the court."[169]

The June 4, 1920 Articles of War[170] evidenced a significant shift in the nature of challenges in military practice. Maintaining the existing language regarding challenges for cause,[171] Article 18 stated, "[e]ach side shall be entitled to one peremptory challenge; but the law member of the court shall not be challenged except for cause."[172] It is noteworthy that the proposed Article 23 gave the accused two peremptory challenges if before a general court-martial and one peremptory challenge if before a special court-martial.[173] The 1928 *MCM* for the Army indicated that the peremptory challenge "does not require any reason or ground therefore to

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[165] *Id*. at 982-83.

[166] Articles of War, 14 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 156, at 986-96.

[167] *Id*. at 993.

[168] *Id*. at 206.

[169] Article of War 18, Act of August 29, 1916, Pub. L. No. 64-242, 39 Stat. 653 (1916).

[170] Article of War 18, Act of June 4, 1920, Pub. L. No. 66-242, 41 Stat. 787 (1920).

[171] Article 18 did add language stating that challenges for cause from the trial judge advocate should be "presented and decided before those by the accused are offered." *Id*. That practice continues today. *See* MCM, *supra* note 4, R.C.M. 912(g)(1).

[172] *Id*.

[173] *Establishment of Military Justice*, Hearing on S.64 *Before the Senate Subcommittee of the Committee on Military Affairs*: 66th Cong. First Session 591 (1919) (Brigadier General Walter A. Bethel, USA, who had served as a Judge Advocate for sixteen years when he testified before the Senate Committee on Military Justice, said "I think it is very important that the accused feel that he is getting justice, and there are frequently members of the court against whom no challenge for cause can be made, but whom the accused would like to have removed from the court as not fair-minded.").

exist or to be stated and may be used before, after, or during the challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member, but can not be used against the law member."[174] While the Army took a considerable step toward mirroring challenge practice in the civilian criminal justice system, the Articles Governing the Navy did not contain a similar provision.[175]

The Uniform Code of Military Justice passed in 1950[176] unified military practice by giving the right to one peremptory challenge to the accused and government. Article 41(b) stated, "Each accused and trial counsel shall be entitled to one peremptory challenge, but the law officer shall not be challenged except for cause."[177] The explanation in the 1951 *MCM* regarding the exercise of peremptory challenges tracked the language from the Army 1928 MCM.[178] Paragraph 62*e* of the 1969 *MCM* provided:

> A peremptory challenge does not require any reason or ground therefor to exist or be stated. It may be used before, during, or after challenges for cause, or against a member unsuccessfully challenged for cause, or against a new member if not previously utilized in the trial. It cannot be used against the military judge. A member challenged peremptorily will be excused forthwith. In a joint or common trial each accused is entitled to one peremptory challenge.[179]

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[174] A MANUAL FOR COURTS-MARTIAL, U.S. ARMY ¶ 58d (1928). Of particular interest regarding challenges for cause, the *1928 Manual* notes:

> Courts should be liberal in passing upon challenges, but need not sustain a challenge upon the mere assertion of the challenger. The burden of maintaining a challenge rests on the challenging party. A failure to sustain a challenge where good ground is shown may require a disapproval on jurisdictional grounds or cause a rehearing because of error injuriously affecting the substantial rights of an accused.

Id. ¶ 58f.

[175] S. REP. NO. 486, at 2242 (1950).

[176] Pub. L. No. 81-506, 64 Stat. 108.

[177] *Id.* at 123.

[178] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62a (1951).

[179] MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 62*e* (1969) [hereinafter 1969 MCM].

The 1984 version of RCM 912(g)(1) provided:

> Each party may challenge one member peremptorily. Any member so challenged shall be excused. No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed. Ordinarily the trial counsel shall enter any peremptory challenges before the defense.[180]

The discussion noted that "[n]o reason is necessary for a peremptory challenge."[181] The current *Manual*'s provision regarding the exercise of the challenge in RCM 912(g)(1) maintains the same language.[182] Notwithstanding the unambiguous language regarding the range of the challenge, the discussion notes, "Generally, no reason is necessary for a peremptory challenge," but does cite *Batson* as a limit on the exercise of the peremptory challenge.[183]

B. Early Military Case Law and Exercise of the Peremptory Challenge

Military case law surrounding the peremptory challenge remained stagnant until *Batson*, which injected additional litigation into the field. The early cases were framed in terms of having to use a peremptory challenge to remove a member who was subject to a causal challenge, which the law officer or military judge denied (also known as a curative peremptory challenge). In the case of *United States v. Shaffer*,[184] for example, the law officer ruled on a challenge for cause in violation of then Articles 41(a) and 51(a), UCMJ, which required that the court-martial vote by secret written ballot without the law officer and the challenged member being present.[185] The law officer denied the challenge for cause and the court-martial approved that decision.[186] The accused then exercised his "curative peremptory challenge."[187] The

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[180] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912(g)(1) (1984) [hereinafter 1984 MCM].
[181] *Id*. at discussion.
[182] MCM, *supra* note 4, R.C.M. 912(g)(1).
[183] *Id*. at discussion.
[184] 6 C.M.R. 75 (C.M.A. 1952).
[185] *See id.* at 76-77.
[186] *See id.* at 76.
[187] *See id*. at 77.

Court of Military Appeals (COMA) found error, but the error did not materially prejudice a substantial right of the accused: "In the record of this trial there is no hint of material injury to substantial rights. The officer [whom] defense counsel sought to avoid by challenge for cause was in fact excused through exercise of a peremptory challenge."[188] The defense counsel's apparent error was the failure to note that he would have exercised his peremptory challenge against another member, but for the denial of his challenge for cause: "Defense has not at all contended that its cause was embarrassed or prejudiced by the fact that it was required to exercise its single peremptory challenge."[189]

The issue of preservation of error for appellate review arose in *United States v. Harris*.[190] In *Harris*, the COMA granted review to determine whether the trial judge abused her discretion when she disallowed a challenge for cause "compel[ing] trial defense counsel to use his peremptory challenge" against that same member.[191] Defense counsel sought to challenge the president of the panel because he wrote or endorsed three other members' evaluation reports and he wrote or endorsed the effectiveness reports on two of the victims in the case.[192] The panel president was also a member on the base resources protection committee, which surveyed areas of the base that experienced personal or government property losses, presumptively relevant because the government charged the accused with larceny.[193] The majority of the court was concerned not only with actual bias on the part of the member, but with implied bias as well.[194] The COMA focused on three findings made by the Air Force Court of Military Review: (1) the challenged member, the president of the panel, was in a position to improperly influence other members of the panel because he wrote or endorsed three other members' fitness reports; (2) he had a personal relationship with two of the alleged victims; (3) he had a professional interest in

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188 *Id*.
189 *Id*.
190 13 M.J. 288 (C.M.A. 1982).
191 *See id*. at 289.
192 *See id*.
193 *See id*. at 290.
194 *See id*. at 291. Implied bias is defined in RCM 912(f)(1)(N), which provides that "[a] member shall be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." MCM, *supra* note 4, R.C.M. 912(f)(1)(N). Whether such bias exists is reviewed under an objective standard as viewed through the eyes of the public. *See* United States v. Reynolds, 23 M.J. 292, 294 (C.M.A. 1987).

discouraging the type of larcenies of which the accused was charged.[195] Given these issues, the majority concluded that "[t]he military judge was not free as a matter of military law to ignore these facts . . . in reaching her decisions simply because she found the member's disclaimer sincere."[196] The majority determined that the military judge should have granted the challenge for cause, but found no prejudice.[197] The majority also noted that the challenged member did not sit on the court because he was removed by a peremptory challenge: "In view of this fact, we are convinced that appellant was sentenced by a fair and impartial court-martial."[198] Although the majority believed the right to a peremptory challenge was "an important codal right," it did not find prejudice "because of the lack of any evidence in the record that appellant otherwise desired to exercise this right [against another member]."[199] The court deemed the accused's exercise of his peremptory challenge cured any error *if the record was devoid of any evidence that the accused would have otherwise used his right to a peremptory challenge against another member*.[200] This ruling, along with *Shaffer*, seemingly left an accused without a remedy for the improper denial of a causal challenge. Chief Judge Everett's dissent in *Harris*, however, put the issue squarely before the COMA for future resolution.

While he agreed with the majority's conclusion that the challenge for cause was improperly denied, Chief Judge Everett drew a different conclusion as to its meaning with respect to the peremptory challenge.[201] Chief Judge Everett noted that the "clear lesson" drawn from the principal opinion was that an accused, in order to preserve that challenge on appeal, "should exhaust his peremptory challenge and then 'evidence' in some way that he still would wish to exercise another peremptory challenge if it were available."[202] Thus was introduced the requirement of a "but for" challenge. Such a requirement was written into the governing RCM, amended in 1990.[203] The amended RCM 912(f)(4) states:

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[195] *See Harris*, 13 M.J. at 292.
[196] *Id*.
[197] *See id*.
[198] *Id*.
[199] *Id*.
[200] *See id.*
[201] *See id.* at 293 (Everett, C.J., dissenting).
[202] *Id*. at 294.
[203] GILLIGAN & LEDERER, s*upra* note 29, § 15-57.00.

> [W]hen a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.[204]

C. The Curative Peremptory Challenge

Aside from the hot controversies that arise because of *Batson* and its progeny,[205] there is a simmering controversy concerning the apparent difference between civilian courts and military courts in the effect of using a curative peremptory challenge. The Court addressed the issue of a denial of a causal challenge and a subsequent curative peremptory challenge against that same juror in *Ross v. Oklahoma*[206] and more recently in *United States v. Martinez-Salazar*.[207] In general terms, the Court concluded that the exercise of a curative peremptory challenge, whether required by law or not, did not prejudice the defendant.[208]

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[204] 1984 MCM, *supra* note 180, R.C.M. 914(f)(2). The current *Manual* maintains the same language. MCM, *supra* note 4, R.C.M. 912(h)(4). The *1969 Manual* did not contain any similar language. 1969 MCM, *supra* note 179, ¶ 62. Why the language regarding the ability to exercise a peremptory against *any other member* should preserve the issue for appeal is mysterious, given the usual waiver provisions that appellate courts apply to trials. If an accused chooses to permit a member who should have been challenged for cause to remain on the panel, she should not be heard to complain the panel that tried her case was not impartial. Pizzi and Hoffman suggest a defendant, who does not elect to remove a biased juror peremptorily participates in their seating as much as a trial judge who erroneously fails to remove them for cause. *See* Pizzi & Hoffman, *supra* note 37, at 1437.

[205] *See supra* Parts III.B-D.

[206] 487 U.S. 81 (1988).

[207] 528 U.S. 304 (2000).

[208] *See Ross*, 487 U.S. at 88; *Martinez-Salazar*, 528 U.S. at 307. In *Ross*, the Court concluded, "[p]etitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error. But we reject the notion that the loss of a peremptory challenge constitutes a violation of the constitutional right to an impartial jury." *Ross*, 487 U.S. at 88. Oklahoma state law required the defendant to exercise his "right" to a peremptory challenge. *See id.* at 89-90. The Court did not address the broader question of whether "in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been

Against the backdrop of these two cases, the reasoning in the applicable military case law is not persuasive, as it ignores the history of the peremptory challenge.[209]

In *Ross*, the Court first looked at the implication of the Sixth Amendment's guarantee of an impartial jury when a trial judge denied a challenge for cause, whereupon the defendant exercised a peremptory challenge against that potential juror.[210] Oklahoma law required a defendant to exercise his peremptory challenge against a juror who was subject to a denied causal challenge to preserve a claim that the ruling deprived him of a fair trial.[211] With respect to the Oklahoma statute, the Court observed "there is nothing arbitrary or irrational about such a requirement, *which subordinates the absolute freedom to use a peremptory challenge as one wishes to the goal of empaneling an impartial jury*."[212] Thus, the Court found no violation of the Sixth Amendment. The Court then denied a Fourteenth Amendment due process argument. Noting that the peremptory challenge is a creature of statute,[213] the Court concluded, "[a]s required by Oklahoma law, petitioner exercised one of his peremptory challenges to rectify the trial court's error, and consequently he retained only eight peremptory

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excused for cause." *Id*. at 91 n.4. *Martinez-Salazar* extended the reasoning of *Ross*, addressing the question *Ross* left open:

> We hold . . . that if the defendant elects to cure such an error [that is, a trial court's erroneous refusal to grant a challenge for cause] by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.

Martinez-Salazar, 528 U.S. at 307. As Justice Souter points out, however, Martinez-Salazar did not indicate he would have used his peremptory challenge against another juror. *See id*. at 318. Thus, this case is distinguishable on the facts from cases that routinely come through the court-martial system. *See, e.g.*, United States v. Wiesen, 56 M.J. 172, 174 (2001) (noting that appellant preserved a denied for-cause challenge for appeal when he stated that but for the military judge's denial of the challenge for cause, he would have exercised his peremptory challenge against another member).

[209] *See infra* text accompanying notes 229-64.

[210] *See Ross*, 487 U.S. at 85.

[211] *See id.* at 89. This statute is much like the implementation of Article 41 by RCM 912(f)(4). MCM, *supra* note 4, R.C.M. 912(f)(4); UCMJ art. 41 (2002).

[212] *Ross*, 487 U.S. at 90 (emphasis added).

[213] *See id.* at 89 ("Because peremptory challenges are a creature of statute and are not required by the Constitution, it is for the State to determine the number of peremptory challenges allowed and to define their purpose and manner of their exercise." (citations omitted)).

challenges to use in his unfettered discretion. But he received all that Oklahoma law allowed him, and therefore his [Fourteenth Amendment] due process challenge fails."[214] *Ross* took place in a state law environment. The next case, *Martinez-Salazar*, took up a similar issue in a federal context.

In *Martinez-Salazar*, during *voir dire*, a juror indicated that he would be more inclined to favor the prosecution.[215] During a discussion with the trial judge he stated, "[a]ll things being equal, I would probably tend to favor the prosecution."[216] Quite understandably, Martinez-Salazar challenged the juror for cause.[217] Quite inexplicably, however, the trial judge *denied* the challenge.[218] The defendant then used a peremptory challenge to remove the juror, giving him, in effect, one less peremptory challenge.[219] The Ninth Circuit Court of Appeals held that automatic reversal was required in these circumstances.[220] Noting that because the jury that heard the case was impartial and there was, therefore, no Sixth Amendment violation, the Court of Appeals determined that the district court improperly denied the challenge for cause.[221] The court observed that the trial judge's abuse of discretion "forced" the petitioner to use a

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[214] *Id*. at 90-91 (footnote omitted).
[215] *See Martinez-Salazar*, 528 U.S. at 308.
[216] *See id*. (internal quotation marks omitted).
[217] *Id*. at 309.
[218] *See id*.
[219] *See id.* at 309-10. Federal Rule of Criminal Procedure 24(b) is the rule that governs the exercise of peremptory challenges in civilian federal criminal cases. The rule states:

> (b) Peremptory Challenges. Each side is entitled to the number of peremptory challenges to prospective jurors specified below. The court may allow additional peremptory challenges to multiple defendants, and may allow the defendants to exercise those challenges separately or jointly.
>
> (1) Capital Case. Each side has 20 peremptory challenges when the government seeks the death penalty.
>
> (2) Other Felony Case. The government has 6 peremptory challenges and the defendant or defendants jointly have 10 peremptory challenges when the defendant is charged with a crime punishable by imprisonment of more than one year.
>
> (3) Misdemeanor Case. Each side has peremptory challenges when the defendant is charged with a crime punishable by fine, imprisonment of one year or less, or both.

FED. R. CRIM. P. 24(b).
[220] *See Martinez-Salazar*, 528 U.S. at 310.
[221] *See id.* at 309.

peremptory challenge to cure the error, which, in turn, impaired his right to the full complement of peremptory challenges.[222]

The Court found that the Ninth Circuit "erred in concluding that the District Court's for-cause mistake compelled Martinez-Salazar to challenge [the juror] peremptorily, thereby reducing his allotment of peremptory challenges by one."[223] The Court rejected the government's contention that Federal Rule of Criminal Procedure 24(b) *required* the petitioner to exercise his peremptory challenge to cure the District Court's error to preserve the claim that the causal challenge ruling impaired his right to a fair trial.[224] The Court did agree with the government, however, that the petitioner received all the peremptories to which he was entitled under the rule.[225] The Court posited that "[a] hard choice is not the same as no choice."[226] Ignoring the usual rules regarding waiver, the Court determined that the petitioner "had the option of letting Gilbert sit on the petit jury and, upon conviction, pursuing a Sixth Amendment challenge on appeal. Instead, Martinez-Salazar elected to use a challenge to remove [the juror] because he did not want [the juror] to sit on his jury. This was Martinez-Salazar's choice."[227] Tying in the purpose behind peremptory challenges, the Court noted, "in choosing to remove [the juror] rather than taking his chances on appeal, Martinez-Salazar *did not* lose a peremptory challenge. Rather, he used the challenge in line with a principal reason for peremptories: to help secure the constitutional guarantee of trial by an impartial jury."[228]

A military case discussing the effect of a curative peremptory challenge is *United States v. Jobson*.[229] The COMA construed RCM 912(f)(4) in the context of an accused who had a challenge for cause denied by the trial judge against a member who was aware that the accused had a pretrial agreement.[230] The accused exercised his one

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[222] *See id*. at 309-10 (citing United States v. Martinez-Salazar, 146 F.3d 653, 659 (9th Cir. 1998)). The Ninth Circuit concluded that the denial of the full complement of peremptory challenges violated the Fifth Amendment's due process clause because Martinez-Salazar did not receive what federal law entitled him. *See id.* at 310.
[223] *Id*. at 315 (citation omitted).
[224] *See id*. at 314-15.
[225] *See id*. at 315.
[226] *Id*.
[227] *Id.* (footnote omitted).
[228] *Id*. at 315-16 (citations omitted).
[229] 31 M.J. 117 (C.M.A. 1990).
[230] *See id.* at 118-19.

peremptory challenge against the member whom the judge denied as a causal challenge, noting that he would have used his peremptory against another member of the panel.[231] Adopting the Army Court of Military Review's (ACMR) position,[232] the COMA concluded that the plain language of RCM 912(f)(4) permitted the accused to preserve for appeal a denied for-cause challenge when he peremptorily challenged that same member.[233] The COMA expressly rejected the approach taken by the Air Force Court of Military Review that if the accused elects to remove the member, any error would be tested for harmlessness.[234] "To so hold," wrote Judge Cox, "would render the language of RCM 912(f)(4) meaningless and, in every case, would require an accused, *at his peril*, to leave the objectionable member on the panel in order to obtain review of the military judge's ruling on his challenge for cause."[235]

The Air Force court did not say that any alleged error in refusing to grant a for-cause challenge could not be preserved in accordance with RCM 912(f)(4). Rather, the Air Force court said that any alleged error is not *per se* harmful to the accused. To make that determination, the trial judge's alleged error must be tested for any prejudicial effect on the substantial rights of the accused. The Air Force court, in accord with *Harris* and *Ross*, argued for a functional analysis of the challenge denial. This argument is similar to the analysis appellate courts routinely undertake in the face of allegations of trial court error.

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[231] *See id.* at 120.

[232] United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987); United States v. Anderson, 23 M.J. 894 (A.C.M.R. 1987). In *Moyar*, the Army court complained "some trial judges have at best only grudgingly granted challenges for cause and others frustrate the rule with *pro forma* questions to rehabilitate challenged members." *Moyar*, 24 M.J. at 638. In both cases, the challenges for cause were denied (the members were peremptorily removed) and the Army court found an abuse of discretion in both cases. *See id*. at 636; *Anderson*, 23 M.J. at 896.

[233] *See Jobson*, 31 M.J. at 121.

[234] *See id*. The Air Force court, citing *Harris* and other cases, determined that "use of the peremptory challenge, forced or otherwise, purges any resulting error." United States v. Jobson, 28 M.J. 844, 849 (A.F.C.M.R. 1989), *aff'd*, 31 M.J. 117 (C.M.A. 1990). It also took note of the Supreme Court's *Ross* decision for support of its contention that any review must be conducted for harmlessness. *See id.* The Air Force court determined that analyzing these type cases as if the member sat "fails to concentrate on the real issue: Whether there was prejudice to the appellant from the members who did sit." *Id*. Rule for Court-Martial 912(f)(4) did not, in the court's opinion, overturn existing case law, but merely "made clear the procedural requirement for preserving an issue." *Id*.

[235] *Jobson*, 31 M.J. at 121 (citation omitted).

In *United States v. Armstrong*,[236] the Court of Appeals for the Armed Forces (CAAF) examined the effect, if any, of *Martinez-Salazar* on the military justice system. At issue in this case was the trial court's denial of a challenge for cause against a member for actual bias.[237] After the trial court denied the defense's for-cause challenge, the defense peremptorily challenged the same member, thus preserving the issue for review.[238] The court concluded that *Martinez-Salazar* was distinguishable based on the rule at issue—RCM 912(f)(4) establishes a procedure for preserving a for-cause challenge issue while Rule 24(b) of the FRCP does not.[239] Because RCM 912(f)(4) gives greater rights with respect to his right to a peremptory challenge, the military accused is not faced with "the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."[240] This ruling functionally places the right to a peremptory challenge on a pedestal. Clearly, RCM 912(f)(4) is a procedural rule that spells out exactly how to preserve an error regarding a for-cause challenge. The rule does not confer a substantive right on the parties at trial—Article 41, UCMJ[241] as promulgated in RCM 912(g)[242] does that. The Court's reading of RCM 912(f)(4) gives the aggrieved party an absolute functional right that cannot be read into Article 41. This decision should have been the end of the matter. A year later, however, the CAAF faced a similar issue yet again.

The Court of Appeals for the Armed Forces tackled the issue of implied bias and peremptory challenges in *United States v. Wiesen*.[243] This case illustrates the interplay between a military judge's ruling on a challenge for cause, the subsequent exercise of a peremptory challenge, and the preservation of error on a for-cause challenge ruling. In this case, the president of the panel maintained some form of supervisory authority over six other panel members.[244] As a result, the president and these six other members were sufficient to form the two-thirds majority

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[236] 54 M.J. 51 (2000).
[237] *See id.* at 52.
[238] *See id.* at 53.
[239] *See id*. at 54-55.
[240] *Id*. at 55 (citation omitted). The federal rule merely governs the number of peremptory challenges each side has. FED. R. CRIM. P. 24(b); *see also supra* note 219 (providing the text of the rule).
[241] UCMJ art. 41 (2002).
[242] MCM, *supra* note 4, R.C.M. 912(g).
[243] 56 M.J. 172 (2001).
[244] *See id.* at 175.

required to convict the appellant.[245] According to the majority, "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."[246] As in *Armstrong*, the accused exercised a curative peremptory challenge against the president, who subsequently did not sit at trial.[247] Nonetheless, the CAAF determined that the appellant was prejudiced because he did not have a peremptory challenge against another member *of his choice*.[248] "To say that appellant cured any error by exercising his one peremptory challenge against the offending member is reasoning that, if accepted, would reduce the right to a peremptory challenge from one of substance to one of illusion only."[249] The nonbinding analysis of RCM 912(f)(4) sheds light on the intent behind the rule: "Because the right to peremptory challenge is independent to the right to challenge members for cause, *see* Article 41, that right should not be forfeited when a challenge for cause has been erroneously denied."[250] This reasoning is clearly in favor at the CAAF.

In *United States v. Miles*,[251] the most recent military case involving the exercise of peremptory challenge, the CAAF held that "the right to

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[245] *See id*.
[246] *Id*.
[247] *See id.* at 174.
[248] *See id*. at 177.
[249] *Id*. Pizzi and Hoffman suggest that to cause a defendant to use her peremptory against someone who should have been removed for cause surely is to reduce their peremptory challenge by one. *See* Pizzi & Hoffman, *supra* note 37, at 1430. They go on, however, and suggest that while it is surely error (although not constitutional error because a defendant does not have a constitutional right to peremptory challenges), it is harmless error because there has been no adverse affect on the defendant's right to a impartial jury. *See id*. at 1431. This reasoning is persuasive as an analytical matter because the right of the accused is to a trial by an impartial panel, not an error free trial. *See* United States v. Brooks, 26 M.J. 28, 29 (C.M.A. 1988) (observing that appellant is entitled to a fair trial, not an error-free, perfect trial) (relying on United States v. Owens, 21 M.J. 117, 126 (C.M.A. 1985)). Where is the prejudice to a *substantial right of the accused*? If the allegedly biased member does not sit on a panel, there is no persuasive argument to be made that the accused suffered a constitutional prejudice or other prejudice sufficient to overturn an otherwise proper verdict. Naturally, because the accused only has one peremptory challenge, the deprivation of the only peremptory challenge is not to be regarded lightly. If the primary purpose of a peremptory challenge is to enhance the impartiality of a panel, however, how can an accused complain when he took *the step* to make it so?
[250] MCM, *supra* note 4, R.C.M. 912 analysis, at A21-61.
[251] 58 M.J. 192 (2003).

save his single peremptory challenge for use against a member not subject to challenge for cause . . . was violated . . . when Appellant was forced to use his peremptory challenge" against a member the military judge did not remove for implied bias.[252] During *voir dire*, a member disclosed that his nephew was born with a form of epilepsy resulting from his mother's cocaine use, and that as a result, the nephew died when ten years old.[253] The member indicated that the case would trigger memories of his nephew's death and illness and remind him of an article he authored for the base newspaper about the effects of drug use.[254] The accused, charged with use of cocaine,[255] made a challenge for cause against the member.[256] The military judge denied a causal challenge for implied bias.[257] The CAAF determined that the member's experience coupled with the newspaper article would create serious doubts in the minds of a reasonable observer about the fairness of the trial.[258] The CAAF, therefore, found that the military judge abused his "limited discretion" and "violated the liberal-grant mandate" and set aside the sentence.[259] Chief Judge Crawford, in dissent, found that "[e]ven if the military judge clearly abused his discretion . . . that error was rendered harmless when Appellant used his peremptory challenge to remove [the member]."[260] Picking up the fallen standard from the Air Force Court of Military Review's decision in *United States v. Jobson*,[261] Chief Judge Crawford wrote that she did not "believe that anything in R.C.M. 912(f)(4) precludes a constitutional and statutory harmless error analysis" in this situation.[262] In support of her position, she cited *Ross* and *Martinez-Salazar*, calling these two cases "dispositive" in appellant's case.[263] She rightly concluded that nothing in the language of RCM 912(f)(4) "precludes a harmless error analysis of the denied challenge for cause. When the requirements of RCM 912(f)(4) are met,

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[252] *Id.* at 195.
[253] *See id*. at 193.
[254] *See id*.
[255] *See id*.
[256] *See id*. at 194.
[257] *See id*.
[258] *See id.* at 195.
[259] *See id*.
[260] *Id*. at 195-96 (Crawford, C.J., dissenting).
[261] United States v. Jobson, 28 M.J. 844, 849 (A.F.C.M.R. 1989), *aff'd on other grounds*, 31 M.J. 117 (C.M.A. 1990) (determining that "use of the peremptory challenge, forced or otherwise, purges any resulting error").
[262] *Miles*, 58 M.J. at 196 (Crawford, C.J., dissenting).
[263] *See id*. at 197; *see also supra* text and accompanying notes 206-87.

an accused is guaranteed one thing only: that we will not apply waiver."[264]

Using Chief Judge Crawford's analysis a question arises as to when, if ever, there would be harm to the accused if he exercises his one peremptory challenge against a member against whom the military judge denied a causal challenge. Unless the accused could point to another member who should not have sat because of bias, there would never be error if the one challenged member does not sit and there are no other biased members. Such a result is more in keeping with the dictates of the right to an impartial panel than reversing a case where there were no biased members sitting in judgment. Fundamentally, the CAAF and *Manual* exalt the right to *exercise* the peremptory challenge over the more elemental justification for the challenge—to secure an impartial finder of fact.

With respect to the issue of the curative peremptory challenge, the CAAF and the *Manual* are clear in seeking to protect a party's right to exercise a peremptory challenge against a member of *his choice*.[265] When a trial court improperly denies a challenge for cause, the CAAF will not abide by the notion that an accused suffer the loss of his right to peremptorily challenge a member of his choice.[266] As long as trial judges refuse to grant challenges for cause liberally, it seems that CAAF will do its utmost to give the accused the implied benefit of Article 41—the right to challenge peremptorily a member of his choice. It is also clear that the CAAF is using the preservation of error procedure and the refusal to apply a harmless error analysis as a means of keeping trial courts in line. Without such a reading of RCM 912(f)(4), the appellate courts would find it very difficult to serve as a check on erroneous rulings on for-cause challenges.

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[264] *Miles*, 58 M.J. at 198 (Crawford, C.J., dissenting).

[265] This stance is somewhat curious given that an accused only has a right to trial by members who are fair and impartial, and not a panel of one's choosing. This ordering of rights is also curious when one considers the court's rulings applying *Batson* and its progeny to trials by court-martial. In those cases, as will be seen, the right of the panel member to sit is what is at stake. *See infra* Part IV.D.

[266] Pizzi and Hoffman suggest that if peremptory challenges have little to do with ensuring impartiality of a jury, then error that results in a compromise of an defendant's right to a peremptory challenge "will almost always be harmless." *See* Pizzi & Hoffman, *supra* note 37, at 1428. The CAAF, however, seems to suggest that peremptory challenges have everything to do with ensuring impartiality, thus harmless error analysis does not apply.

Unlike the Court, the CAAF either apparently doubts trial judges' ability to rule properly on for-cause challenges or the court is trying to balance the peremptory challenge against Article 25.[267] If the former is true, the issue then turns not on whether the accused had the opportunity to use his peremptory challenge against a member of his choice, but rather on whether the peremptory challenge, as used, produced a fair and impartial jury. If the emphasis were on the production of a fair and impartial jury, the exercise of the peremptory challenge, by itself, would be a sufficient exercise of the accused's right. Fundamentally, however, "[w]hen a criminal defendant uses a peremptory challenge to remove a prospective juror whom the trial court should have removed for cause, the defendant is using peremptory challenges in precisely the curative manner for which they were intended."[268] An interesting question arises in cases where the accused alleges the military judge erroneously ruled on more than one challenge for cause. In such a case, the accused would "run out" of peremptory challenges sufficient to cure any alleged error, thus inviting an appellate court to overturn the case. Assuming the trial judge abused his discretion in denying at least one of the challenges for cause, the error would be clearly reversible. The appellate court should, however, conduct a harmless error analysis. As a measure of the clear lack of persuasiveness of the CAAF's argument, the Joint Service Committee on Military Justice took action.

On 15 August 2003, the Joint Service Committee on Military Justice proposed a change to RCM 912(f)(4), which would eliminate much of the appellate litigation regarding the use of peremptory challenges to

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[267] UCMJ art. 25(d)(2) (2002) (providing for panel member selection by the convening authority, who is to select members based on "age, education, training, experience, length of service, and judicial temperament").

[268] Pizzi & Hoffman, *supra* note 37, at 1440 (citing Justice Scalia's concurrence in *Martinez-Salazar*). In his concurrence, Justice Scalia wrote,

> The resolution of juror-bias questions is never clear cut, and it may well be regarded as one of the very purposes of peremptory challenges to enable the defendant to correct judicial error on the point. Indeed, that *must* have been one of their primary purposes in earlier years, when there was *no appeal* from a criminal conviction, so that if the defendant did not correct the error by using one of his peremptories, the error would not be corrected at all.

United States v. Martinez-Salazar, 528 U.S. 304, 319 (2000) (Scalia, J., concurring) (internal citation omitted).

cure denied casual challenge.[269] The rule with the proposed amendment is as follows:

> When a challenge for cause is denied, the successful use of a peremptory challenge by either party, excusing the challenged member from further participation in the court-martial, shall preclude further consideration of the challenge of that excused member upon later review. Further, failure by the challenging party to exercise a peremptory challenge against any member shall constitute waiver of further consideration of the challenge upon later review. ~~However, when a challenge for cause is denied, a peremptory challenge by the challenging party against any member shall preserve the issue for later review, provided that when the member who was unsuccessfully challenged for cause is peremptorily challenged by the same party, that party must state that it would have exercised its peremptory challenge against another member if the challenge for cause had been granted.~~[270]

The articulated reason in support of the amendment is "to conform military practice to federal practice and limit appellate litigation when the challenged member could have been peremptorily challenged or actually did not participate in the trial due to a peremptory challenge by either party."[271] Interestingly, the analysis directly references the Court's opinion in *Martinez-Salazar*: "This amendment would result in placing before the accused the hard choice faced by defendants in federal district courts—to let the challenged juror sit on the case and challenge the ruling on appeal or use a peremptory challenge to remove the juror and ensure an impartial jury."[272] The amendment clearly adopts the reasoning of well-established court case law and Chief Judge Crawford's

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[269] Manual for Courts-Martial; Proposed Amendments, 68 Fed. Reg. 48,886, 48,887 (Aug. 15, 2003) (Notice of Proposed Amendments to the Manual for Courts-Martial, United States (2002 ed.) and Notice of Public Meeting). To date, the proposal has not been adopted by the President.

[270] *Id*.

[271] *Id*.

[272] *Id*. For the language in the Supreme Court opinion, *see supra* text accompanying note 226.

points in *Miles*. At least with respect to the Joint Service Committee, the answer to whether the CAAF is getting it right is emphatically no.[273]

If the CAAF is seeking to balance the right of the peremptory challenge against the convening authority's panel selection, which as noted above can be seen as the exercise of an unlimited number of peremptory challenges,[274] the path chosen by the court is appropriate an attempt to equalize the relative disparity in shaping the panel. Assuming that this disparity does in fact exist, it would seem appropriate to either remove the authority of the commander to select panel members or give more peremptory challenges to the defense. The exercise of only one challenge seems a poor compromise.

D. Discriminatory Use of Peremptory Challenges in Military Court-Martial

Like for-cause challenges and trial courts' ruling on them, the area of the discriminatory use of peremptory challenges has proven fertile ground for judicial scrutiny. In the case of *United States v. Santiago-Davila*,[275] the COMA addressed for the first time whether the decision of the Court in *Batson* applied to trials by court-martial. At the time of Santiago-Davila's, who was Hispanic,[276] trial in Germany, the Court had not decided *Batson*. Relying on state court decisions that held that peremptory challenges could not be used in a racially discriminatory way, the accused's defense counsel asked that the trial court to inquire into the reason for the trial counsel's exercise of a peremptory challenge

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[273] After a period of public comment on the proposed amendment, the Joint Service Committee published a summary of comments made. On 24 March 2004, the Committee published the substance of the comments and the Committee's reaction to them in the *Federal Register*. Manual for Courts-Martial; Proposed Amendments, 69 Fed. Reg. 13,816 (Mar. 24, 2004) (Notice of Summary of Public Comment Received Regarding Proposed Amendments to the Manual for Courts-Martial, United States (2002 ed.). The Committee noted that the comments argued that the change would reduce confidence in the military justice system and "are only being made in response to perceived adverse decisions of the various courts." *Id*. at 13,817. The argument was also made that modeling the military justice system after the federal system is "not valid" because the federal system offers more peremptory challenges. *See id*. The Committee "determined that is proposed amendment to the R.C.M. 912 is proper and consistent with the rationale in the amended analysis." *Id*.

[274] *See supra* note 29.

[275] 26 M.J. 380 (C.M.A. 1988).

[276] *See id.* at 385.

against a member of Hispanic origin.[277] The military judge refused to require the trial counsel to articulate a reason for his challenge.[278] The COMA declared that even if it were not bound by *Batson*, decided after appellant's trial but before his appeal,[279] the principle espoused by *Batson* "should be followed in the administration of military justice."[280] Further, the COMA stated, "we are sure that Congress never intended to condone the use of a *government* peremptory challenge for the purpose of excluding a 'cognizable racial group'" and held that "where the accused makes a *prima facie* showing that the Government has used a peremptory challenge to purposefully exclude 'a member of a cognizable racial group,'"[281] the trial counsel "must articulate a neutral explanation related to the particular case to be tried."[282]

The ACMR in *United States v. Moore*[283] offered an analytical framework for implementing the requirements of *Batson*.[284] Premising its framework on the idea that "there is no logic in permitting the prosecutor, through the use of his peremptory challenge, to do what the convening authority, in the selection of panel members, cannot," the Army court declared that the basic principles of *Batson* were fully applicable to trials by court-martial.[285] Believing that the specific procedural application of *Batson* was "neither required nor practicable"

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[277] *See id*.
[278] *See id*. at 386.
[279] *See id*. at 389.
[280] *Id*.
[281] *Id*. at 392 (emphasis added). On this line of reasoning, it would be hard to see that Congress envisioned *either* party using its peremptory challenges in a discriminatory manner.
[282] *Id*. (citation omitted).
[283] 26 M.J. 692 (A.C.M.R. 1988), *rev'd*, 28 M.J. 366 (C.M.A. 1989).
[284] The U.S. Court of Military Appeals (COMA) opinion in *Santiago-Davila* had not been released when the Army court released its opinion. The court released *Santiago-Davila* on 29 August 1988, and released *Moore* on 26 May 1988. *See id.* Because the framework set out in *Moore* was articulated by the Army court, its reasoning did not apply necessarily to the other services.
[285] *Moore*, 26 M.J. at 698. The court, however, did not find that the court-martial system had been victim of purposeful discrimination that gave rise to *Batson* in the first place: "[T]here has been no showing or history of systemic subversion of the system or exclusion of members of minority races from court-martial panels, as has occurred in civilian trials." *Id*. at 699-700. Given this backdrop, one has to wonder, as did Judge Crawford in her dissent in *United States v. Tulloch*, 47 M.J. 283, 290 (1997), why the Army court, and subsequently its superior court, adopted a more *stringent* standard than the civilian system, where discrimination was a historical fact.

to trials by court-martial,[286] the Army court modified accused's *prima facie* burden. Rather than having to articulate specific reasons to raise an inference of the improper exercise of peremptory challenge, the Army court required only that the accused make a timely objection to the trial counsel's peremptory challenge of a member of a cognizable racial group to which the accused also belonged.[287] The Army court created the procedural difference because each party is entitled to one peremptory challenge; therefore, the burden of making the *prima facie* case required in the civilian context, would be "intolerably high."[288] After a timely objection by the accused, the burden of persuasion shifts to the trial counsel to provide a race-neutral reason for the challenge.[289] When evaluating the reason(s) offered by the government, "the military judge must give due deference to the government representative as an officer of the court," without "rubberstamping" the proffered reasons.[290] The military judge must ensure that the reasons are stated for the record, must make specific findings of fact and rule on the issue, and must disallow the peremptory challenge if no race-neutral reason is offered.[291]

When the COMA received the case, it adopted the *per se* rule as articulated by the Army court for all services.[292] The COMA also

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[286] *Moore*, 26 M.J. at 699. Those differences included that courts-martial are not subject to the jury trial requirements of the Constitution, that a military accused is tried by a panel of superiors chosen by the convening authority, military counsel are provided only one peremptory challenge as distinguished from their civilian counterparts who have many, and peremptory challenges are used in the military context not to select jurors as in the civilian context, but to eliminate those already selected by the convening authority. *See id.*

[287] *See id*. at 700. The Army court believed that the peremptory challenge is functionally different in military practice: "In courts-martial, counsel use their single peremptory challenge not to select a jury, but to preserve or to enforce a challenge for cause or to remove a member that counsel suspects, intuitively or otherwise, will be sympathetic to the opponent's case." *Id*. (citations omitted). At bottom, however, is the fundamental purpose of the peremptory challenge, whether in the civilian or military context, i.e., to ensure a fair and impartial fact finder. *See* United States v. Witham, 47 M.J. 297, 302 (1997). Thus the Army court's functional analysis may be seen as a distinction without a difference.

[288] *See Moore*, 26 M.J. at 700.

[289] *See id*. at 700-01.

[290] *Id*. at 701.

[291] *See id*.

[292] United States v. Moore, 28 M.J. 366 (1989). The COMA reasoned that in adopting the rule, they were simplifying the court-martial process and making it fairer to the accused given the difficulty of showing a "pattern" of discrimination that might obtain in a civilian trial where there are more peremptory challenges available to the litigants. *See id*. at 368.

clarified the standard for trial counsel: "Although the reasons [for exercising a peremptory challenge] need not rise to the level justifying a challenge for cause, trial counsel cannot assume or intuit that race makes the member partial to the accused and cannot merely affirm his good faith or deny bad faith in the use of his challenge."[293] The CAAF had an opportunity to clarify the standard for reviewing trial counsel's reason for exercising his peremptory in *United States v. Tulloch*.[294] The CAAF held that once the convening authority has designated members as "best qualified" under Article 25, UCMJ, "trial counsel may not strike that person on the basis of a proffered reason under *Batson* and *Moore*, that is unreasonable, implausible, or that otherwise makes no sense."[295]

In *United States v. Witham*,[296] the CAAF faced the question of the applicability of *J.E.B.* to trials by court-martial. Finding "no military exigency or necessity which requires that a military accused's right to a peremptory challenge be unfettered by . . . equal protection concerns,"[297] the CAAF held "that gender, like race, is an impermissible basis for the exercise of a peremptory challenge by either the prosecution or the military accused."[298] The facts of the case are unusual because the accused attempted to exercise his peremptory against a female member of the panel,[299] but was challenged by the trial counsel, relying on *McCollum*.[300] The military judge inquired into the basis for the defense

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[293] *Id.* at 369.
[294] 47 M.J. 283 (1997).
[295] *Id.* at 298 (declining to apply *Purkett v. Elem*, 514 U.S. 765 (1995) (holding that a prosecutor is not required to offer an explanation that is persuasive or plausible, but only a race-neutral reason for the exercise of peremptory challenge) to the military context). The CAAF premised its decision on the convening authority's assertion by virtue of the members' selection that they are "best qualified." Therefore, the trial counsel must articulate a reason that essentially overcomes the convening authority's imprimatur on the abilities of members to sit.

> Given the select nature of the pool of court-martial members chosen by the convening authority and the presumption that those members are the 'best qualified' to serve on the court-martial, the statement by trial counsel that a member 'seemed uncomfortable' does not, without further explanation, provide a sufficiently articulated reason to sustain a challenge under *Moore*.

Id. at 288.
[296] 47 M.J. 297 (1997).
[297] *Id.* at 302.
[298] *Id*. at 298.
[299] The case involved allegations of rape and kidnapping. *See id.* at 298-99.
[300] *See id.* at 299.

counsel's challenge; the answer was gender.[301] The military judge denied the challenge for cause.[302] Judge Effron noted in a concurring opinion that the procedural requirements *Tulloch* placed on the trial counsel in responding to a *Batson* challenge are not applicable to peremptory challenges made by the defense counsel.[303] He did not, however, elaborate on the difference in these requirements.[304]

As a result *Batson* and its progeny, an opposing party may question the exercise of a peremptory challenge based on race or gender with no requirement that the accused be the same race or gender.[305] Further, the scrutiny of a peremptory challenge whether race- or gender-based will follow the opposing party's timely objection.[306] The CAAF's handling of these cases, however, is not without controversy. Of interest in recent the CAAF cases concerning *Batson* and its progeny is a running dispute between Judges Cox, Gierke, and Effron, on one side, and Judge Crawford and Judge Sullivan on the other.[307] Chief Judge Crawford and Judge Sullivan believed that their brethren refused to follow the

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[301] *See id*.

[302] *See id.*

[303] *See id.* at 304 (Effron, J., concurring).

[304] *See id*. at 303-04 (Effron, J., concurring). As a practical matter, it is hard to see a difference between what would be required of the trial counsel and of the defense counsel in articulating a neutral reason for a challenge. Perhaps, the Army Court of Criminal Appeals in *United States v. Cruse*, 50 M.J. 592 (Army Ct. Crim. App. 1999) sheds light on how the CAAF might address the problem—apply *Purkett v. Elem*, 514 U.S. 765 (1995) to the defense counsel and not to the trial counsel.

[305] *See* United States v. Ruiz, 49 M.J. 340, 343 (1998) ("[U]nder *J.E.B.*, it is irrelevant whether the accused and the person challenged are of the same gender, since not only the accused's right is involved, but also the Fourteenth Amendment right of jury members to 'equal opportunity to participate in the fair administration of justice.'")(citations omitted); *see also* United States v. Norfleet, 53 M.J. 262, 271 (2000) ("The right to challenge discriminatory use of peremptory challenges exists whether or not an accused is of the same race as the challenged juror . . . .").

[306] *Ruiz*, 49 M.J. at 343-44. The Air Force Court of Criminal Appeals in *United States v. Powell*, 55 M.J. 633 (A.F. Ct. Crim. App. 2001) had occasion to question the wisdom of the *per se* rule. Noting that the *per se* rule does not require that counsel show any evidence of discrimination, the Air Force court opined that the rule is subject to abuse. *See id*. at 644. They also concluded that the *per se* rule "is not a weapon to be employed in order to frustrate the legitimate use of the single peremptory challenge guaranteed each side." *Id*. at 645 (citation omitted). The Air Force court stated, "In our opinion, it would be a better practice to allow the judge to decide when an explanation for the challenge is required. After hearing counsel's explanation, opposing counsel must either accept the reason or present evidence of unlawful discrimination." *Id*.

[307] Judges Cox and Sullivan are no longer on the CAAF, having been replaced by Judges Baker and Erdmann. As to where Judges Baker and Erdman would fall on this issue remains to be seen.

procedural aspects of the Court's holding in *Purkett v. Elem*.[308] A short review of some of the cases demonstrates the controversy.

In *Tulloch*,[309] Judge Crawford took exception to the majority's framework for assessing the reasons for the government's peremptory challenge. She did so not only because the CAAF did not follow Court precedent, but also because "[t]he majority advocates holding peremptory challenges valid only when there is objective evidence of a race-neutral reason."[310] Judge Sullivan agreed with Judge Crawford, but also ventured the opinion that "in reality only a total ban on peremptory challenges will eliminate the possibility of racial and gender discrimination in the use of such challenges."[311]

In *United States v. Ruiz*,[312] the CAAF extended *Moore*'s *per se* rule to gender-based peremptory challenges, thus furthering, in the eyes of Judge Crawford, the CAAF's refusal to follow Court precedent. In her dissent, Judge Crawford wrote that "the Court is interested in refining the peremptory challenge to conform with the Equal Protection Clause of the Fourteenth Amendment, while maintaining the challenge as separate from the challenge for cause,"[313] and suggested that the CAAF majority is doing just the opposite. Judge Crawford argued that the CAAF majority expanded the narrow confines of the Court's cases to include occupation.[314] Further, she concluded, "[b]y extending the *Moore per se* rule to cases of potential gender-based discrimination, the majority requires the Government to explain nearly every peremptory challenge. Essentially, the Court's pursuit of a vastly restricted peremptory challenge rule eliminates such challenges for the prosecution

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[308] 514 U.S. 765 (1995) (determining that any race-neutral explanation will be deemed acceptable unless discriminatory intent is inherent in a prosecutor's explanation; focusing on the genuineness, as opposed to the reasonableness, of the explanation).

[309] 47 M.J. 283 (1997). The court decided this case on the same day as *Witham*. *Witham*, 47 M.J. 297 (1997).

[310] *Id*. at 294 (Crawford, J., dissenting). She also notes that "[m]any military trial attorneys will make a decision based on body language, tone of voice, hair style, and dress. Generally, these attorneys are not motivated to eliminate a person from the jury because of race, ethnicity, or gender." *Id*.

[311] *Id*. at 289 n.* (Sullivan, J., dissenting). He ventured the same point of view in the majority opinion in *Witham*. *Witham*, 47 M.J. at 303 n.3.

[312] 49 M.J. 340 (1998).

[313] *Ruiz*, 49 M.J. at 350 (Crawford, J., dissenting).

[314] *See id.* ("The occupation, especially of a court member, does make a difference."); *see also infra* notes 319-25 and accompanying text for a discussion of this issue.

altogether."[315] In Judge Crawford's opinion, "[s]o radical a change to the Code should be enacted by Congress or the President."[316]

In *United States v. Norfleet*,[317] Chief Judge Crawford and Judge Sullivan, both concurring in part and in the result, again voiced their displeasure with the CAAF majority's refusal to analyze the proffered reason for the government's exercise of its peremptory challenge under the more generous auspices of *Purkett*.[318] They concurred in the result, it seems, only because the majority came to the conclusion that the trial counsel's explanation was gender-neutral. In *United States v. Chaney*,[319] the CAAF reviewed an issue with a trial counsel who exercised his peremptory challenge against the only female panel member. When asked by the military judge to offer a gender-neutral reason, the trial counsel stated that he struck her because of her occupation as a nurse.[320] The majority opined that the "occupation of the challenged member may or may not provide an acceptable race or gender neutral reason for a peremptory challenge, depending on the facts of the case."[321] Citing as support the Court's opinion in *J.E.B.*, the CAAF stated,

> [O]ccupation could provide a sufficient basis for a peremptory challenge if the proffered reason is not used as pretext for an improper race or gender based challenge. Absent a showing of such pretext, the Supreme Court suggested that occupation-based peremptory challenges could be appropriate, even in fields that are predominately associated with one gender, such as nursing or military service.[322]

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[315] *Id*. at 351-52 (Crawford, J., dissenting).
[316] *Id*. at 352.
[317] 53 M.J. 262 (2000). This case involved an issue of whether the government advanced valid reasons for a peremptory challenge of the only female members detailed to the court-martial. Those reasons were: (1) that because of the member's prior court-martial experience, the trial counsel was concerned with "the members using that experience to dominate the panel;" and (2) the member was involved with the legal office in a dispute and the trial counsel was concerned about spill-over. *See id*. at 272. The CAAF found both reasons to be nondiscriminatory. *See id*.
[318] *Id*. at 273 (Crawford, C.J., concurring in part and in result) (Sullivan, J., concurring in part and in result).
[319] 53 M.J. 383 (2000).
[320] *See id.* at 384.
[321] *Id*. at 385.
[322] *Id*.

Chief Judge Crawford, again, took issue with the majority's refusal to apply *Purkett*, stating, "[t]he focus should be on the genuineness of the asserted non-racial/non-gender motive, not the reasonableness of the trial advocate's explanation."[323] Judge Sullivan adopted the same reasoning as Chief Judge Crawford, repeating his suggestion that "the military justice system should eliminate the peremptory challenge."[324] Analyzing the challenge in the military justice context, he wrote:

> The peremptory challenge in the military, as it stands in the current of present Supreme Court and our Court's case law, may have outlived its usefulness and benefit. Congress and the President should relook this long established right to strike off a jury, a juror without a judicially sanctioned cause. Real and perceived racial and gender abuses lie beneath the surface of the sea of peremptory challenges.[325]

Finally, the case of *United States v. Hurn*[326] offers an example of second-guessing the exercise of a peremptory challenge. The facts suggest that the challenge was supported by a racial-neutral reason, but the CAAF determined otherwise, inferring a racial motive to the trial counsel's exercise of a peremptory challenge when there was *no evidence* of such a purpose. In this case, a trial counsel struck the only Hispanic on the panel.[327] When questioned by the military judge pursuant to a defense request, the trial counsel indicated he struck the member "to protect the panel for quorum."[328] The military judge deemed that reason to be race-neutral and permitted the challenge.[329] The CAAF held that the reason offered by the trial counsel "does not satisfy the underlying purpose of *Batson*, *Moore*, and *Tulloch*, which protects participants in judicial proceedings from racial discrimination."[330] The CAAF reasoned that if the purpose of the challenge was to protect

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[323] *Id*. at 386 (Crawford, C.J., concurring in the result).
[324] *Id*. (Sullivan, J., concurring in the result).
[325] *Id*.
[326] 55 M.J. 446 (2001), *aff'd per curiam*, 58 M.J. 199, *cert. denied*, 540 U.S. 949 (2003).
[327] *See id.* at 447.
[328] *Hurn*, 55 M.J. at 448. The court noted that "[a]fter challenges for cause, the panel consisted of five officers and three enlisted members. *See Hurn*, 58 M.J. at 200 n.3. If the defense were to exercise a peremptory against an enlisted member, the court would fall below quorum. *See Hurn*, 55 M.J. at 448. The trial counsel, therefore, struck an officer to ensure that quorum would be met. *See id*.
[329] *See id*.
[330] *Id.*

quorum, the trial counsel "could have accomplished that by challenging any other officer member."[331] In the face of the *prima facie* case made by the defense counsel (by timely posing an objection), the trial counsel did not "explain why he challenged the only non-Caucasian officer instead of any of the Caucasian officers."[332] It should be noted that the defense counsel did *not* interpose another objection to the military judge's conclusion that the proffered reason was race-neutral.[333]

Chief Judge Crawford and Judge Sullivan took the majority to task for again failing to follow the controlling Court precedent on the issue of assessing the proffered reason for the challenge. Chief Judge Crawford called the reason given by the trial counsel "legitimate, reasonable," and facially valid.[334] Judge Sullivan again noted his recommendation that the peremptory challenge be eliminated in the military justice system.[335] Most problematic in this particular case is CAAF's substitution of its judgment for that of the military judge and its determination that because the trial counsel had other options, *he, without more, must be presumed to have exercised his peremptory challenge in a discriminatory manner*. There can be little doubt that the reason offered was facially-neutral and, as any trial counsel could say, a valid concern with any enlisted panel. Ultimately, after a fact-finding inquiry to resolve several issues of fact, the CAAF upheld the military judge's determination that the challenge was indeed racially-neutral,[336] noting that "[t]he military judge's determination that the trial counsel's peremptory challenge was race-neutral is entitled to 'great deference' and will not be overturned absent 'clear error.'"[337]

Part of the problem is that by imposing the *per se* rule,[338] the CAAF implies that counsel are not acting as officers of the court, but rather, are

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[331] *Id*. at 449.
[332] *Id*.
[333] *Id.*
[334] *Id*. at 450 (Crawford, C.J., dissenting).
[335] *See id*. (Sullivan, J., dissenting).
[336] United States v. Hurn, 58 M.J. 199, 201 (2003).
[337] *Id.* (quoting United States v. Williams, 44 M.J. 482, 485 (1996)).
[338] It is true that because the parties only have one peremptory challenge, making a *prima facie* case as understood in the civilian context (that is the showing of a pattern of discriminatory use of peremptory challenges) would be extremely difficult. *See* United States v. Moore, 28 M.J. 366, 368 (C.M.A. 1989) (observing that "it would be difficult to show a 'pattern' of discrimination form the use of one peremptory challenge in each court-martial"). According to the COMA, that difficulty is the primary reason for using the *per se* rule in the military. *See id*.

acting to fix panels, although there is *no* evidence that the government or defense has used peremptory challenges to further invidious discrimination. Judge Crawford stated as much in *Ruiz* when she wrote, "I am still bothered by the fact that what began as a presumption in *Swain* that prosecutors act faithfully in fulfilling their duties as officers of the court has become a presumption that military prosecutors act as part of a conspiracy to pack court panels or fix courts-martial."[339] The CAAF's justification for their position, resting as it does on the "differences" between the civilian and military trial, is a thin reed indeed. A vehicle for discrimination, in whichever forum it is used, is still a vehicle for discrimination. A defense counsel's discriminatory use of a peremptory challenge is just as pernicious to justice as that of a trial counsel, because justice cannot tolerate discrimination from either side. A majority at the CAAF is not following reason to its logical conclusion. This question still must be asked and answered: Are peremptory challenges fulfilling their role as part of the larger goal of ensuring that an accused receives a fair trial?

V. Role of the Jury and Court-Martial Panel and Peremptory Challenges

To the extent that the military justice system became more "civilianized" over time with the addition of layers of protection for an accused,[340] a review of the role of civilian juries in the criminal justice system is instructive. Depending on the jury's role, the relative importance of the peremptory challenge follows. As a normative matter, juries and court-martial panels occupy two competing roles. For both, the first role is to act as a public institution furthering the administration of justice.[341] The second role is to protect a party's rights.[342] In both these roles, juries and panels have important value decisions to make, and depending on the prevailing role of the jury and panel, the peremptory challenge furthers or hinders these functions.

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[339] United States v. Ruiz, 49 M.J. 340, 351 (1998).

[340] *See generally* Captain John S. Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43, 45-49 (1977) (reviewing the historical development of the military justice system and noting that "it has gradually been recognized that servicemembers are entitled to a panoply of rights similar, if not identical, to that enjoyed by civilians").

[341] *See* Marder, *supra* note 34, at 1046.

[342] *See id*.

A. The Jury and Court-Martial Panel as a Public Institution

The civilian jury furthers democratic values by: making public value decisions that reflect the community; rendering accurate verdicts; appearing fair; and educating citizens about the justice system.[343] Such a view concludes that peremptory challenges work to undermine these values by excluding a "range of values and perspectives;" by impeding accuracy "by systemically eliminating jurors with a range of perspectives who might have challenged erroneous or mistaken ideas;" by compromising the fairness of the jury because of the suggestion "that jury composition can be manipulated and that discrimination has a place in the judicial process;" and, most importantly, by denying access to a civic duty.[344] Further, "[j]ury service provides citizens with the only opportunity, other than voting, to participate directly in their own governance."[345] Being a public institution, the "jury should be accessible; stereotypical notions about group identity, which often form the basis for peremptory challenges, should not be permitted to bar access to the jury."[346]

The civilian jury and a court-martial panel should embody the values of the community from which they are drawn, and by their verdicts, articulate public values. When either body renders a verdict in a particular case, it is stating a public value, the result of which of which could be trial and imprisonment. In cases of a not guilty finding, the public judgment is that the government failed to prove its case beyond a reasonable doubt; therefore, even if possibly guilty, the accused must go free. In cases of a guilty finding, the panel in very real terms tells the accused and the community that the conduct committed will not be tolerated. Any court-martial panel speaks not only to the service members at any given camp, post, base, or station, but particularly in high-profile cases, speaks to the larger civilian community, articulating its public value of the importance of maintaining good order and discipline. The courts-martial of members of the training cadre at Aberdeen Proving Ground are excellent examples of panels speaking not only to the Army community, but also to the public at large.[347]

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[343] *See id*. at 1045.
[344] *Id*.
[345] *Id*. at 1084.
[346] *Id*.
[347] *See, e.g.*, Warren Richey, *Aberdeen Rape Trial Tests Army's Credibility*, CHRISTIAN SCI. MONITOR, Apr. 11, 1997, at 3 (noting that if Staff Sergeant Delmar Simpson were to receive "a light sentence, the case will send a powerful message that the Army isn't

To the extent that juries and panels are tasked to decide public values, the exclusion of points of view based on group identity is as detrimental to articulating that public value. "[D]eliberate exclusion is detrimental to the jury because, if a range of views is lost to the jury, then the verdict is less likely to reflect public values . . . ."[348] This particular role of the jury is most compelling. As much as a legislature regulates morality, a jury articulates the public's morality on the canvass of the case it decides If a jury or panel does not reflect larger community values, its decisions will be met with derision and unacceptance.

A jury or panel's role as fact finder is one of its most important functions. Fact-finding is the jury and panel's *raison d'etre*. In this role, the jury or panel must determine what happened and reach an accurate verdict based on the facts it finds.[349] The purposeful exclusion of prospective jurors injures this process to the extent that a certain juror might bring a different frame of reference. To the extent that peremptory challenges may exclude diversity, the ability of the group to determine what happened is arguably impaired.[350] An excellent example of embracing differing frames of reference in the court-martial context is the *inclusion* of enlisted members at the request of the accused.[351] When an accused selects an enlisted panel, conventional wisdom is that he does

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serious about protecting female soldiers from sexual harassment and even rape"); Paul Richter, *Drill Sergeant Guilty of 18 Charges of Rape*, L.A. TIMES, Apr. 30, 1997, at A1 (stating that the "verdicts were a sorely needed victory for the Army"); Elaine Sciolino, *Sergeant Convicted of 18 Counts of Raping Female Subordinates*, N.Y. TIMES, Apr. 30, 1997, at A1 (observing that guilty verdict sent "a clear signal throughout the armed forces that sexual misconduct will not be tolerated"); *see also* United States v. Simpson, 55 M.J. 674 (Army Ct. Crim. App. 2001), *aff'd*, 58 M.J. 368 (2003). In *Simpson*, a general court-martial, composed of officer and enlisted members, convicted Staff Sergeant (SSG) Delmar Simpson, a drill sergeant at Aberdeen Proving Ground, Maryland, of maltreatment of subordinates, rape, sodomy, assault, and indecent assault involving trainees, sentencing him to a dishonorable discharge, forfeiture of all pay and allowances, reduction to Private E1, and confinement for twenty-five years. *See id.* at 678. The case began as an investigation into sexual activity between cadre personnel and trainees with the instigating complaint being lodged against SSG Simpson. *See id.* at 680. In the course of the investigation, other allegations involving others cadre members came to light, ultimately involving allegations against twenty cadre members. *See id*. In response to the investigation, the commander of Aberdeen Proving Ground held a press conference announcing the investigation. *See id*. A media blitz ensued, along with strong congressional interest in the case. *See id*. at 682.

[348] Marder, *supra* note 34, at 1064.

[349] *See id*. at 1067 (noting how a jury's function developed and evolved through time).

[350] *See generally id*. at 1070.

[351] MCM, *supra* note 4, R.C.M. 903(a)(1).

so because he wants their viewpoints and collective life-experiences, which may be different from those of officers.

The third public institutional role played by a jury and a panel is to be a fair decision maker. This particular role underlies many of the Court's decisions discussed previously. A jury or panel must appear fair to maintain its elevated standing in our society. Both the accused and the government have an interest in the appearance of jury actions. For the accused, if the jury or panel appears predisposed either for or against him, he was either convicted at a "kangaroo court" or acquitted but still deemed guilty.[352] For the government, if a jury appears to be unfair, the tenability of the justice system would be at risk. Arguably, *Batson* and its progeny are the results of the appearance of unfairness by excluding prospective jurors. The Court stepped in to ensure a semblance of fairness in jury selection by striking down the discriminatory use of peremptory challenges. It did so because it is intolerable for discriminatory peremptory challenges to take place in public with the seeming approval of a court of law.[353]

The problem with peremptory challenges in this context of appearing fair is that "[j]ury selection should not perpetuate stereotypes, but peremptory challenges exercised on the basis of group membership necessarily do."[354] In panel selection, very little information is given to the parties with respect to who is each individual member. Rule for

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[352] A well-known example of a widely-believed-to-be guilty defendant being acquitted is O.J. Simpson. The jury's not guilty verdict was generally met with derision:

> Race-based jury nullification, of course, describes the hypothesis–catapulted to public prominence by the swift acquittal of O.J. Simpson by a mostly black jury at his criminal trial–that jurors sometimes become so affected by a sense of racial solidarity for a defendant, or a sense of racial hostility toward a prosecution witness, that they vote to acquit a defendant notwithstanding their belief that he has been proven guilty beyond a reasonable doubt.

Roger Parloff, *Race And Juries: If It Ain't Broke . . .*, AM. LAW., June 1997, at 5.

[353] *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 140 (1994) ("The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."); *see also* Marder, *supra* note 34, at 1078 ("Peremptory challenges permit discrimination in a setting that should be free from all discrimination.").

[354] *See id*.

Court-Martial 912(a)(1) permits questionnaires to be given to the members before trial to expedite *voir dire* and to promote the informed exercise of challenges.[355] The typical questionnaire, however, will have little information that may bear on a member's bias.[356] Rule for Courts-Martial 912(d)—in an effort to assist the parties exercise of informed challenges—permits, but does not require, the military judge to allow parties to examine the members.[357] Assuming a party is able to develop information in the questioning of the members that permits him to articulate a challenge for cause, the party may make such a challenge after *voir dire*.[358] Absent a developed ground for challenge, the party is left only with its peremptory challenge. At bottom (assuming no error by the trial judge in refusing to grant a challenge for cause) either party is most likely to exercise its peremptory challenge, not based on any specific information, but on intuition or on group membership because of the paucity of information available. In the case of the defense, the senior panel member is most likely to be challenged peremptorily under the idea that, as a group, senior officers are more likely to be disciplinarians.[359] This group identification makes sense only on the premise that, if the services reward conformity and leadership, those most senior have acceded to the services' values. By seeking to exclude the senior-most member, the challenging party is losing the breadth of experience and wisdom that comes with long experience in a military organization at an unknown cost to the case at bar. As an example, many

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[355] *See* MCM, *supra* note 4, R.C.M. 912 analysis, at A21-60.

[356] Rule for Courts-Martial 912(a)(1) permits the questionnaire to contain a member's date of birth, sex, race, marital status, home of record, educational information, current unit of assignment, past duty assignments, awards and decorations, date of rank, and information concerning whether the member acted as an accuser, counsel, investigating officer, convening authority, legal officer or staff judge advocate for the convening authority that forwarded the charges, or whether the member has forwarded the charges with a recommendation as to disposition. *See* MCM, *supra* note 4, R.C.M. 912(a)(1). In practice, the questionnaire will question a member's experience with nonjudicial punishment under Article 15, experience as a summary court-martial officer, experience with the court-martial system as a witness either for the prosecution or the accused, and any information regarding being victim or related to anyone who has been a victim of a crime. *See, e.g.*, Memorandum, Court-Martial Members, to Commander, Eighth U.S. Army, subject: Court Member Questionnaire (undated) (on file with author).

[357] *See id.* MCM, *supra* note 4, R.C.M. 912(d) discussion.

[358] *See id*. R.C.M. 912(f)(3).

[359] *See* COMPTROLLER GENERAL OF THE UNITED STATES, MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS, REPORT TO THE CONGRESS 41 (1977) (noting that, "[s]everal defense counsels told us that juries drawn from the higher grades may be more severe. This is apparently why in the 244 records of trial for special and general courts we reviewed, the defense used 82 percent of their peremptory challenges . . . to remove higher grade officers.").

senior leaders may, precisely because of their long experience in the military, give an accused the benefit of the doubt and not be persuaded by passion or prejudice. The elimination of such a perspective may, therefore, actually result in more convictions.

The fourth role played by a jury and court-martial panel is to educate the citizens and servicemembers.[360] The Court recognized this principle in *J.E.B.* when Justice Blackmun wrote,

> Equal opportunity to participate in the fair administration of justice is fundamental to our democratic system. It not only furthers the goals of the jury system. If reaffirms the promise of equality under the law—that all citizens regardless of race, ethnicity, or gender, have the chance to take part directly in our democracy. When persons are excluded from participation in our democratic processes solely because of race or gender, this promise of equality dims, and the integrity of our judicial system is jeopardized.[361]

The military justice system teaches some of the same lessons with a difference; namely, that maintaining good order and discipline is paramount. There should be no mistake that the military justice system depends on the maintenance of fairness for its lifeblood. The presumption of innocence is the most important value taught in a justice system routinely derided because it seemingly lacks fairness and seemingly reeks of railroading its members.[362] That service as a member is deemed important and instructive for potential panel members is reflected in memoranda routinely given to new members when selected for court-martial duty.[363] In this role of the panel, the peremptory challenge conveys harmful message about who can and who cannot serve:

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[360] *See* Marder, *supra* note 34, at 1083 ("The jury plays an important role as educator of the citizenry in the lessons of democracy.").

[361] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 145-46 (1994) (footnote, citation, and parenthetical omitted).

[362] *See*, *e.g.*, Pound et. al., *supra* note 11, at 19 (observing that the military justice system is a system that denies justice).

[363] As one convening authority put it, "I believe that service as a court-martial is a singularly important duty." Memorandum for Lieutenant General Daniel R. Zanini, to panel members, subject: Selection of Courts-Martial Panel Members for Area II (Sept. 15, 2001) (on file with author).

> Those who witness the improper exclusion of prospective jurors based on peremptories are also taught harmful lessons. They learn that exclusion based on stereotype and discrimination, which is unacceptable in other walks of public life, is acceptable in the courtroom. They may also conclude that there is a hierarchy, rather than equality, among citizens, with those who are permitted to serve on juries being more highly valued citizens than those who are denied the opportunity.[364]

If our system of justice is to vindicate the rule of law and equality, courtrooms should not be the examples of legalized discrimination.

B. The Jury and Court-Martial Panel as a Protector of Rights

A competing viewpoint paints the jury as an institution designed to protect a party's rights. "According to this view, the peremptory [challenge] is a valued mechanism because it ensures that parties believe that fair juries have tried their cases."[365] The Court noted in 1948 that the right to peremptory challenge was given "in aid of the party's interest to secure a fair and impartial jury."[366] As noted, Blackstone called the peremptory challenge "a provision full of that tenderness and humanity to prisoner's for which our English laws are justly famous."[367] Given the decisions of the Court in *Batson* and its progeny, the argument can be successfully made that the role of the jury as a protector of rights has been in decline.

The peremptory challenge has, as it was understood for hundreds of years in the common law and for almost two hundred years since this country's founding, been stripped bare and sacrificed on the altar of the equal protection and due process. As a weapon in the arsenal of the litigant, the peremptory challenge gave a party unparalleled ability to shape a jury to its liking without judicial oversight. Given the judicial scrutiny that follows whenever a prospective juror is struck peremptorily, a party is forced to create a neutral reason for something that in many cases cannot be fashioned into words that would pass judicial muster.

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[364] Marder, *supra* note 34, at 1084-85.
[365] *Id*. at 1046.
[366] Frazier v. United States, 335 U.S. 497, 505 (1948).
[367] 4 BLACKSTONE, *supra* note 32, at 353.

This idea is more pronounced in the military justice context because of the CAAF's imposition of the *per se* rule. With this rule in its kitbag, the CAAF is free to second-guess any trial counsel's peremptory challenge (assuming an objection is made), even when facially-neutral.

VI. The Future of the Peremptory Challenge in Courts-Martial

The constant theme regarding the use of peremptory challenges is that the peremptory challenge is one means to secure an impartial finder of fact. In the usual case

> attorneys have less than perfect information about the predispositions and hidden biases of prospective jurors. Thus, they naturally have tended to rely on stereotypes, common sense judgments, and even common prejudice in deciding whether a juror with a given age, race, sex, religion, ethnic background, and occupation will act partially toward a particular defendant.[368]

What does a party's *dislike* of a member have to do with an inference of partiality? In the military context, where the panel members tend to be "blue ribbon" panels,[369] the argument that peremptories assist in the search for impartiality is unpersuasive indeed. Certainly over time, and given that trial and defense counsel have personal and professional relationships with many members,[370] the members of a standing panel become more experienced and become known quantities to the counsel.

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[368] Saltzburg & Powers, *supra* note 17, at 342.

[369] *See* United States v. Rome, 47 M.J. 467, 471 (1998) (Crawford, J., dissenting) (observing that a military panel "has often been called a 'blue ribbon' panel due to the quality of its members").

[370] *See* Colonel (Ret.) Norman G. Cooper & Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of* Batson v. Kentucky *and Its Progeny?*, ARMY LAW., Oct. 1992, at 14. The Army Court of Military Appeals also supports this idea:

> Military trial attorneys see their court members frequently—both in and outside the courtroom. Undergirding the law of peremptory challenges . . . is the use to which a defense counsel can put the information he has gleaned from, or about, court members in past courts-martial in order to challenge them peremptorily in the case about to be tried.

United States v. Cruse, 50 M.J. 592, 595-96 (1999).

Thus, the need to rely on stereotypes diminishes.[371] At the same time, however, with that knowledge, counsel should be able to articulate a basis for a challenge for cause if that member is known to be partial and thus not fit for continued service. Detractors may argue that because the convening authority selects the panel, there must exist partiality toward the prosecution. In this case, so the could argument run, the peremptory challenge serves as a check. The reality, however, is that the convening authority may likely only know a few, if any, of the members personally. Further, if we believe that convening authorities act with integrity and understanding the gravity of the roles they have to play in the system, the likelihood that the convening authority selects members with a result in mind is very small. Further, at least in the Army, a panel is chosen to sit for a period of time, and not for a particular case.[372] The instant reaction that peremptory challenges further the interest of impaneling an impartial fact-finder has been taken at face value for too long.[373]

Another point in favor of the challenge is that the peremptory challenge protects the parties in cases when, notwithstanding extensive *voir dire*, a member cannot be challenged for cause, but, for whatever reason, should not sit.[374] As Justice Scalia noted in his *J.E.B.* dissent, "there really is no substitute for the peremptory. *Voir dire* cannot fill the gap. The biases that go along with group characteristics tend to be biases that the juror himself does not perceive, so that it is no use asking about

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[371] *But see* Cooper & Milhizer, *supra* note 370, at 14 ("The knowledge and insight an attorney gains from this familiarity sometimes will provide the attorney with a sound reason to exclude a potential member.").

[372] Memorandum, Staff Judge Advocate, to Lieutenant General Daniel R. Zanini, subject: Selection of Courts-Martial Panel Members for Area II (15 Sept. 2001) (on file with author).

[373] *See* Hoffman, *supra* note 36, at 847-48. The peremptory challenge has nothing to do with juror impartiality, which is grounded in two institutional commitments: (1) the commitment to include broad segments of the population as jurors and (2) the commitment to exclude those who simply cannot be fair. As to the first commitment, peremptory challenges do not help. In the military context, this commitment does not transfer well, except insofar as the convening authority seeks to include members of differing ranks, races, genders, duties, and military occupational specialties. As to the second commitment, if the parties cannot ferret out the reason that a member would be unfair, should they have the right to exclude as "unfair" someone whom the convening authority deems to comport with Article 25 with little or no explanation? The answer seems to be no, given that Army cases are, like those in the civilian context, premised on the right of a panel member to sit unless there is good cause to doubt their impartiality.

[374] *See* Saltzburg & Powers, *supra* note 17, at 356 (observing that a peremptory challenge can remove a juror whom a party has alienated through extensive *voir dire* or whom a party believes cannot be neutral).

them."[375] That point coupled with the combination of restrictive *voir dire* and narrow grounds for causal challenges creates a potent argument for maintaining the peremptory challenge as a functional matter.[376]

Justice Scalia's point has great merit in the civilian system, but is less persuasive in the military context, where members are already deemed qualified for court-martial duty by the convening authority. Further, an answer to this issue is to force military judges to liberally grant challenges for cause. How to accomplish this goal, assuming there is no other error, is a difficult issue. Although military judges are already under a mandate to grant causal challenges liberally,[377] the existence of a peremptory challenge may play a subtle role in the judge's inclination to be less liberal in granting causal challenges. The solution to this problem is to have the military judge conduct the entire process of *voir dire* of prospective members, to eliminate potential alienation of the members by the parties. The practice of judge-directed *voir dire* is not without precedent. In federal civilian practice, the FRCP have given judges exclusive control to conduct *voir dire* since 1944.[378] Rule for Courts-Martial 912(d) already gives military judges the authority to control the method and manner of *voir dire*,[379] but the Rule could be amended mandating that military judges conduct the questioning of members, with either party having the right to submit questions it would like asked. The value of *voir dire* is not reduced because the military judge asks the questions when one remembers *voir dire*'s purpose—to

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[375] J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 162 (1994) (Scalia, J., dissenting).

[376] *See* Saltzburg & Powers, *supra* note 17, at 340 (arguing that subconscious biases are difficult to discover and even more difficult to prove with restrictive *voir dire* procedures).

[377] United States v. Miles, 58 M.J. 192, 195 (2003) (noting the trial judge's error by failing to apply a liberal grant mandate for causal challenges).

[378] *See* VAN DYKE, *supra* note 16, at 164 (citing Rule 24(a) of the FRCP). Van Dyke also explores briefly the reasons commonly given in support of attorney conducting *voir dire*, to include building rapport with jurors, their superior knowledge of the cases, and the preservation of the adversarial system. *See id.* at 164. He also looks at the common reasons for shifting responsibility of *voir dire* to the judge. *See id*. at 164-65. Those reasons include that lawyers take too much time, ask inappropriate questions, and "[a]ttorneys frequently attempt to explain elements of their case in a sympathetic manner to the prospective jurors or to influence the jurors on questions of law while they are trying to establish 'rapport' . . . ." *Id*.

[379] *See* MCM, *supra* note 4, R.C.M. 912(d) (providing that the "military judge *may* permit the parties to conduct the examination of members or *may* personally conduct the examination" (emphasis added)).

uncover bias in members.[380] Having the military judge conduct the examination of members means that the trial and defense counsel must forego an opportunity to place their case personally before the panel. There is some merit in the point that counsel should have that right, but it misses the purpose of *voir dire*. Although it has become so, *voir dire* is, by rule, not a free shot at the panel to educate the panel about one's case[381] or to establish "rapport" with the members. *Voir dire*'s purpose is to discover relevant biases that serve as a basis for a causal challenge.[382] Finally, the least persuasive argument in favor of maintaining the challenge is based on tradition. Tradition carries the justice system only so far. When values change, the system must change. Clinging to tradition for tradition's sake does not permit the recognition that times, and needs of justice, change and develop.

Harkening back to the days of Blackstone, an argument for maintaining the peremptory challenge is that an accused should feel good about who is trying his case.[383] In the military context, this argument is less persuasive given the selection of the members by the convening authority. There are probably few military accused who, when looking at the panel, are going to have positive feelings about those members. If an accused, for whatever reason, suspects a member is against him, he should have the right to eliminate that member from sitting in judgment. This argument runs against the rocks of stereotypical thinking. Given the current stance of CAAF, such an argument, at least as it extends to the government, is not likely to find many adherents.

The most persuasive functional argument in favor of eliminating the peremptory challenge from military practice is that its exercise is not aimed at securing an impartial panel. Given *Batson* and its progeny, the

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[380] There are doubtless many advocates who think otherwise, particularly given that the judge does not have the same familiarity with the facts of the case as do the lawyers. The suggestion that parties have the right to submit questions for the judge to ask potential members is sufficient to rebut that argument. The merits of those arguments are outside the scope of this article.

[381] To the extent that a case requires educating the member's about the case to uncover bias, such a practice conforms with the rule. For example, a defense counsel might have to tell the members that the case involves alcohol in order to probe the members' biases about alcohol's use. In most cases, however, the "education" can be accomplished by asking general questions about the issue rather than telling members specific facts about the case.

[382] *See* MCM, *supra* note 4, R.C.M. 912(d) discussion. Rule for Courts-Martial 912(f)(1) lists the specific grounds for challenge against a member. *Id*. R.C.M. 912(f)(1).

[383] 4 BLACKSTONE, *supra* note 32, at 353.

core function of the challenge ("to avoid trafficking in the core of truth in most common stereotypes"[384]) no longer exists—it has become a shell of its former self. The elimination of the peremptory challenge could result in military judges carrying out the CAAF's requirement to liberally grant challenges for cause. If military judges know that the parties no longer have a peremptory challenge, perhaps they may be more willing to grant causal challenges in close cases, rather than deny them. Eliminating the numbers game and acknowledging that the peremptory challenge is no longer what it used to be would enhance the solemnity of the trial process. Further, removing the only vehicle left for discrimination *by the parties*, thus ensuring the elimination of any suspicion of race or gender playing any adverse role in the function of the panel, could only enhance the public's perception of military justice.

VII. Conclusions

The peremptory challenge is under assault. With *Batson*, *Powers*, *J.E.B.*, *McCollum*, *Moore*, and *Tulloch*, the peremptory challenge is no more. It is a shadow of its former self and given the courts' belief that the peremptory challenge is still a vehicle for discrimination,[385] there is only one choice left to the Congress and the President. The value of enforcing the ideal that a court-martial is to be free of discrimination means eliminating the method of discrimination. It is true that if the challenge is eliminated and a military judge makes an erroneous ruling on a challenge for cause, there will be no vehicle to correct the error at the trial level and much time would be lost. The argument has merit at least until proposed amendment to RCM 912(f)(4) is promulgated.[386] On a more basic level, however, why should a trial judge's ruling on a causal challenge be any different than any other ruling he makes? In the usual case, the military judge's ruling is not subject to an "on-the-spot" correction. The decisions made by the military judge are subject to review by appellate courts and, in that arena, such review is appropriate. In a military courtroom without a peremptory challenge, any ruling on a causal challenge would make its way through the usual appellate process.

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[384] Babcock, *supra* note 23, at 553.

[385] *See* Alschuler, *supra* note 3, at 208 ("Preserving the peremptory challenge as a face-saving device in cases close to the line of appropriate exclusion for cause guarantees irrational and invidious discrimination in countless cases far from the line.").

[386] *See supra* text accompanying notes 269-73.

Functionally, the peremptory challenge is only a step below a for-cause challenge. It is subject to being used, not to ensure the impaneling of a fair and impartial fact finder, but to change the numbers to favor one side[387] or remove, without any justification, experience and perspective from the panel's deliberative process. What's more, the challenge, in reality, does not live up to its billing: "Trial lawyers frequently observe that they use their peremptory challenges, not to secure impartial juries, but to secure juries likely to favor their positions. Nevertheless, the available evidence suggests that they fall short of their partisan goals. Their folk wisdom, trial experiences, mystic intuitions, and crude group stereotypes do not in fact enable them to predict which jurors will favor their positions."[388]

As for the argument that peremptory challenges assist the parties to shape the panel, that is marginally true, given that each side has only one challenge. There is some argument to be made that removing the challenge will also remove from the defense's kitbag the ability to reduce a panel below quorum, perhaps the heaviest weapon in its arsenal. The peremptory challenge, however, was never envisioned to give the defense that kind power over a panel and is another species of the numbers game, which detracts from the solemnity of the proceeding.

If, as the CAAF articulated in *Tulloch*, a trial counsel cannot strike a *single* member without a reason tied to the member's ability to execute her duties faithfully (because it will be remembered the convening authority has certified them qualified to serve), why should a defense counsel be able to reduce a panel below quorum without a similar showing? Or why should a defense counsel be able to reduce a panel below quorum arbitrarily at all? Consider also the fundamental issue that must be considered: "If a prospective juror has a right not to be excluded for constitutionally impermissible reasons, does he or she not also have the right not to be excluded for reasons which, by definition, cannot be *rationally* articulated?"[389] Stated another way, "The Equal Protection Clause says in essence, 'When the government treats people differently, it has to have a reason.' The peremptory challenge says in essence, 'No,

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[387] *See infra* Appendix for a table of how the "numbers game" would favor one side or the other.

[388] Alschuler, *supra* note 3, at 203.

[389] Hoffman, *supra* note 36, at 835 (emphasis added). He also posits that it is an "odd constitutional right indeed which cannot be taken away for certain reasons, but which can freely be taken away for a universe of other unstated and unstatable reasons." *Id*. (footnote omitted).

it doesn't.'"[390] That kind of sentiment is intolerable in a system of justice. Peremptory challenges show that we do not trust jurors or members to tell the truth. Members are told that they should be fair and the counsel and military judge conduct *voir dire* to find out if they can be fair. At the same time, however, counsel and judges then suggest that the mechanism is flawed because the parties are still unable to detect hidden biases with their "fancy questions."[391] Peremptories also simply do not advance the goal of securing an impartial fact-finder. Peremptory challenges are simply a vehicle for "insulting stereotypes"[392] with the hope that those stereotypes work in a party's favor. Should those who wear the uniform and brass of legal professionals strive for more? The answer is self-evident.

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[390] Alschuler, *supra* note 3, at 203.
[391] *Id*.
[392] *See id.* at 170.

Appendix

The Numbers Game

Number of Members	Better for	Number needed to convict	TC must persuade	DC must persuade
3	**Gov't**	2	67%	2
4		3	75%	2
5	Acc'd	4	80%	2
6	**Gov't**	4	67%	3
7		5	71%	3
8	Acc'd	6	75%	3
9	**Gov't**	6	67%	4
10		7	70%	4
11	Acc'd	8	73%	4
12	**Gov't**	8	67%	5
13		9	69%	5