ACHIEVING TRANSPARENCY IN THE MILITARY PANEL SELECTION PROCESS WITH THE PRESELECTION METHOD

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I. Introduction

In 2004, Sergeant (SGT) Ryan Weemer and SGT Jose Luis Nazario allegedly participated in the murder of four Iraqi detainees in Fallujah, Iraq.[1] The allegations did not surface until approximately two years later, resulting in criminal charges against both of the Soldiers.[2] The key difference between the two cases was the status of SGT Nazario, who was a civilian at the time the charges surfaced, placing his offense solely within the jurisdiction of a United States district court.[3] While fortuitous, the chain of events in both criminal justice systems resulted in protections for Mr. Nazario that were unavailable to SGT Weemer during his court-martial. In particular, Mr. Nazario's jury was selected by random.[4] By virtue of this selection process, Mr. Nazario had the means to analyze the random procedures used to select his jury and compare them with the standards proscribed by Federal statute to ensure

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[1] Rick Rodgers, *Marine's Trial Begins in '04 Slaying in Iraq*, SAN DIEGO UNION-TRIB., Apr. 1, 2009, at B1.

[2] *Id.*

[3] *Id.*

[4] The Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1821–1869 (2006), mandates federal courts implement random jury selection processes. *Id.* § 1861. The law requires the jury pool be established by an unspecified random process, *id.* § 1863(b)(2), but specifically mandates the jury venire be selected by jury wheel or random lot process. *Id.* § 1863(b)(4).

his jury was lawfully constituted.[5] By contrast, in SGT Weemer's military case, a convening authority (CA)[6] with the discretion to refer the charges to trial, hand-selected his panel members after their nomination by subordinate members of the same command.[7] Because of the peculiarities of the current military panel selection process, in contrast to Mr. Nazario, SGT Weemer had no way of verifying his panel was selected in compliance with the applicable statutory requirements.[8]

While the military justice system is a different animal than the civilian one, the drafters of the 1950 Uniform Code of Military Justice (UCMJ) were intent on creating a system more aligned with civilian notions of justice than its predecessor.[9] Thus, while the UCMJ retained command control over the administration of the system,[10] this authority came with a heightened requirement to root out sources of undue influence to bring the system in line with civilian practice. For example, the 1950 code prohibited the practice of CAs admonishing court members for executing their duties.[11] In subsequent reforms, Congress created a military judiciary and strengthened the independence of military judges to more closely mirror their civilian counterparts.[12] Yet, Congress has not

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[5] *See* discussion *infra* Part II.A.

[6] With limited exception, all service branches utilize a panel selection method whereby convening authorities' (CA) subordinate staff or commanders nominate candidates for the CA's consideration in selecting a panel. *See generally* JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL apps. E–I (1999) [hereinafter JSC REPORT] (summarizing the predominant panel selection procedures used in each of the military services and the Coast Guard) (on file with Office of The Judge Advocate General, U.S. Army).

[7] Article 25(d)(2), Uniform Code of Military Justice (UCMJ), merely requires that the CA detail members for panel duty whom are best qualified "by reason of age, education, training, experience, length of service, and judicial temperament. UCMJ art. 25 (2008) (codified at 10 U.S.C. § 825 (2006)). However, all military service branches use a panel selection method whereby the CA hand-selects panel members to be detailed to a court-martial panel. *See generally* JSC REPORT, *supra* note 6, apps. E–I.

[8] *See* discussion *infra* Part II.A–B.

[9] *See* Major Fansu Ku, *From Law Member to Military Judge: The Continuing Evolution of an Independent Judiciary in the Twenty-First Century*, 199 MIL. L. REV. 49, 54 (2009).

[10] *See infra* note 57 and accompanying text.

[11] Uniform Code of Military Justice of 1950, art. 37, Pub. L. No. 81-506 (codified as amended at 10 U.S.C. §§ 801–946) ("No authority . . . shall censure, reprimand, or admonish such court of any member . . . with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. ").

[12] *See generally* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. The 1968 act created the military judge position to replace the law officer, and required that

enacted reform to address what has become the most glaring disparity between the two systems—the lack of transparency in military panel selection when compared to civilian juror selection.

This disparity engenders a sense of unfairness, especially given the greater number of cases in which individuals accused of committing crimes on active duty are prosecuted in federal court under the Military Extraterritorial Jurisdiction Act.[13] The more evident the disparity becomes, the greater the attendant risk that Congress will perceive a need to close the gap and simply adopt a process akin to the federal one, which remains, "virtually inconceivable in a military setting."[14] If implemented in a wholesale manner, the federal jury selection process would be incompatible with military demographics—making panels disproportionally junior[15] and requiring judgment by members junior in rank to an accused under a "purist" random scheme.[16]

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military judges be assigned to organizations directly responsible to the Judge Advocate General or his designee. *See id.* § 2(9) (amending Article 26, UCMJ). *See also* Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393. The 1983 act sought to increase the independence of the military judge by prohibiting CAs and members of their staff from preparing "any report concerning the effectiveness, fitness, or efficiency of the military judge . . . which relates to his performance as a military judge." *See* Military Justice Act of 1983 § 3(c)(1) (amending Article 26, UCMJ).

[13] *See* First Lieutenant James E. Hartney, *A Call for Change: The Military Extraterritorial Jurisdiction Act*, 13 GONZ. J. INT'L L. 2 (2009–2010), http://www.gonzagajil.org/content/view/198/1/ (discussing two cases in which former service members have been tried under the Military Extraterritorial Jurisdiction Act); *see also* Press Release, Dep't of Justice, Retired Military Official Pleads Guilty to Bribery and Conspiracy Related to Defense Contracts in Afghanistan (July 1, 2009), *available at* http://www.justice.gov/atr/public/press_ releases/2009/247621.htm (discussing four cases in which service members have been charged in federal court with crimes committed while on active duty).

[14] Major Christopher 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, 255 (2003).

[15] JSC REPORT, *supra* note 6, at 22 ("A system using random nomination is likely to select service members predominately from the enlisted grades of E-3 to E-6 and the officer grades of O-3 and O-4.").

[16] *See* Behan, *supra* note 14, at 256 ("To be a purist [random selection scheme] . . . one would have to be willing to discard . . . the tradition that one's actions will never be judged by someone junior in rank or experience . . . ."); *see also* UCMJ art. 25(d)(1) (2008) ("When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade.").

Although sweeping reform of military justice practices may seem improbable due to longstanding acceptance of the status quo, reforms to the military justice systems of Canada and the United Kingdom illustrate this possibility. Until fairly recently, both nations utilized panel selection procedures similar to those still implemented in the United States but were forced to implement random systems.[17] The proverbial straw that broke the camel's back in both countries was their civil courts' determinations that commanders' roles in the processes violated soldiers' rights to independent and impartial tribunals.[18] While change in the United States would likely not come from the courts,[19] the same underlying concerns could eventually motivate similar congressional reforms.

Prior to the exercise of civilian oversight, the military services can, and should, implement internal reforms to the panel selection process that achieve transparency on par with federal jury selection. Part II.A explains that transparency benefits the military by eliminating appearances CAs routinely stack courts-martial panels.[20] Part II.B further underscores how transparency eliminates the potential for unlawful command influence (UCI) existing in the subordinate nominating process. Part II.C demonstrates the risk that Congress will legislate reforms to UCMJ Article 25(d)(2), which governs panel

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[17] *See* JSC REPORT, *supra* note 6, app. M, at 4.

[18] *See* R. v. Genereux [1992] S.C.R. 259 (holding the commander's role in the court-martial process a violation of the Canadian Charter of Rights and Freedoms guarantee to an independent and impartial tribunal); Findlay v. United Kingdom, 24 Eur. H.R. Rep. 221 (1997) (holding the commander's role in the court-martial process a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantee to an independent and impartial tribunal).

[19] It is well settled that the Sixth Amendment right to trial by jury, the primary legal principal that would otherwise be at issue in collaterally attacking panel selection, is not applicable to trial by courts-martial. *See, e.g.*, Whelchel v. McDonald, 340 U.S. 122, 127 (1950) ("The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial . . . ."); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988) ("The right of trial by jury has no application to the appointment of members of courts-martial.").

[20] In the military justice context, the verb "to stack" is sometimes used to describe unlawful command influence (UCI) in the panel selection process. United States v. Hilow, 32 M.J. 439, 440 (C.M.A. 1991) ("We hold that the deliberate stacking of the pool of potential members . . . violated Article 37, UCMJ, 10 USC. § 837."). Court-stacking can occur when panel members are selected using criteria that are inconsistent with Article 25. United States v. Loving, 41 M.J. 213, 321 (C.A.A.F. 1994) ("Court stacking . . . on the basis of race or gender violates . . . Article 25 . . . .") (internal quotation marks omitted).

selection, in the absence of a military solution.[21] Part III.A then explores alternative ways of achieving transparency, beginning with random selection methods used in two experiments. Part III.B concludes this article by proposing specific internal reforms that will achieve transparency without the drawbacks of random selection.

II. The Need for Transparent Panel Selection Procedures

A. Eliminating the Appearance of UCI in the Convening Authority Member-Selection Process

Implementing transparent panel selection procedures would benefit the military justice system in the long-term by eliminating perceptions—however unwarranted—that CAs routinely stack panels.[22] Such procedures would consequently reduce a tide of litigation currently generated by the perception of UCI in the selection of panel members.[23] To this end, a brief explanation of the transparency involved in selecting Mr. Nazario's jury helps to illustrate the problems that remain unsolved in the military justice arena.

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[21] *See* 10 U.S.C. § 825 (2006) (codifying UCMJ Article 25).

[22] *See, e.g.*, Colonel James A. Young, III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 107 (2000) ("As long as the person responsible for sending a case to trial is the same person who selects the court members, the perception of unfairness will not abate."); 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, 4 (1998) ("The [panel selection] process naturally breeds unlawful command influence and its mien . . . [court-stacking] is consistently achieved, suspected, or both."); JSC REPORT, *supra* note 6, at 18 ("To the extent that there is a possibility of abuse in the current system, there will always be a perception that that convening authorities and their subordinates may abandon their responsibilities and improperly attempt to influence the outcome of a court-martial.").

[23] *See, e.g.*, United States v. White, 48 M.J. 251 (C.A.A.F. 1998) (holding that no panel stacking occurred where commanders were 7.8% of the installation's officer population but constituted 80% of the panel membership); United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) (finding insufficient evidence of systematic exclusion based on statistical evidence comparing the race and gender composition of the panel to the military installation); United States v. Gooch, No. 37303, 2009 WL 4110962, at *3 (A.F. Ct. Crim. App. Nov. 24, 2009) (unpublished) (**"**[T]he fact that there were no members of the appellant's race on the panel does not establish a systematic exclusion of members of his race, or any race, from the court-martial panel."); United States v. Hodge, 26 M.J. 596, 600 (A.C.M.R. 1988) ("The absence of a black member from the panel detailed to hear appellant's case bespeaks random chance as much as it does discriminatory intent.").

First, Mr. Nazario's attorneys could access on-line the random jury selection plan used to pool his jury[24] and compare that plan to the federal statute[25] to ensure those procedures were lawful. Second, federal statute provided Mr. Nazario's attorneys a process through which they could obtain "any relevant records," such as voting rolls or driver license records, used to pool the jury to ensure compliance with the published plan.[26] In summary, Mr. Nazario's attorneys could rest assured that, regardless of the racial, gender, or class composition of his jury, his jury was not stacked if the objectively verifiable statutory procedures were followed.

Service members like SGT Weemer find themselves in an entirely different situation. The standard method of panel selection[27] provides them no way of verifying their CAs are complying with the provisions of Article 25(d)(2).[28] More pointedly, while that statute requires CAs to select members who are best qualified "by reason of age, education, training, experience, length of service, and judicial temperament,"[29] a CA could unlawfully exclude or include prospective panel members based on race, gender, or other illegal criteria, and easily conceal such unlawful intentions.[30]

The inability to verify CAs are complying with Article 25(d)(2) naturally leads to perceptions that CAs are unlawfully influencing the composition of panels.[31] In turn this perception encourages litigation

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[24] *See* Plan of the United States District Court, Central District of California for the Random Selection of Grand and Petit Jurors (U.S. Dist. Court for the Central Dist. of California), *available at* http://www.cacd.uscourts.gov/ (last visited Jan. 12, 2011) (follow "General Orders" hyperlink; then follow "07-10" hyperlink).

[25] *See supra* note 4 (discussing the Jury Selection and Service Act of 1968).

[26] *See* 28 U.S.C. §1867(d) (2006).

[27] For purposes of this article, the terms "standard selection method" and "standard method" refer to the predominant panel selection method used throughout the military services. That method consists of two steps. First, subordinates to the CA nominate prospective members. *See supra* note 6 and accompanying text. Second, the CA selects the panel members from among these nominees based on her subjective determination that they meet the statutory criteria in Article 25(d)(2). *See supra* note 7 and accompanying text.

[28] *See* UCMJ art. 25(d)(2) (2008).

[29] *Id.*

[30] There are no mechanisms built into the standard panel selection method to allow an accused to verify the CA complied with Article 25(d)(2). *See generally* JSC REPORT *supra* note 6, apps. E–I (summarizing the predominant panel selection procedures used in each of the military services and the Coast Guard).

[31] *See supra* note 22.

which in many cases may miss the mark and target panels selected in accordance with Article 25(d)(2).[32] The best way to reduce perceptions of UCI and the corresponding litigation the perception encourages is to "publish the truth about the situation"[33] by putting the accused on the same footing as his counterpart in federal court—and to provide him with the ability to analyze direct evidence his CA complied with Article 25(d)(2).

B. Eliminating UCI in the Subordinate Member-Nomination Process

Along with aspects of the CA's panel selection process, transparency can only be achieved by addressing the subordinate nominating procedure involved in the selection process. Beyond the inability to challenge the CA's unwritten decision process, SGT Weemer could not have known, let alone have challenged, the validity of the process used by subordinate commanders to nominate the members of his panel pool.[34]

The facts in *United States v. Smith*[35] and *United States v. Hilow*[36] illustrate how subordinate nominating renders the panel selection process vulnerable to UCI. In *Smith*, the trial counsel ordered a paralegal specialist to compile a list of "hard core" female nominees.[37] The paralegal specialist complied and the CA eventually selected two of the women for panel duty.[38] Similarly, in *Hilow*, the CA selected nineteen individuals nominated by the adjutant general for panel duty because they were "commanders and supporters of a command policy of discipline."[39] In both *Smith* and *Hilow*, the CAs were unaware of their subordinates' illegality and acted in good faith.[40] Nonetheless, in both

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[32] *See supra* note 23.
[33] United States v. Cruz, 20 M.J. 873, 890 (A.C.M.R. 1985) ("It is axiomatic that the best way to dispel the appearance of evil is to publish the truth about the situation.").
[34] Subordinates involved in the nominating process must also comply with Article 25(d)(2). United States v. Dowty, 57 M.J. 707, 712 (N-M. Ct. Crim. App. 2002) ("A subordinate's improper selection of a member pool may taint the convening authority's selection, even if the convening authority has no knowledge of the impropriety.") (citation omitted).
[35] 27 M.J. 242 (C.M.A. 1988).
[36] 32 M.J. 439 (C.M.A. 1991).
[37] *Smith*, 27 M.J. at 245.
[38] *Id.* at 248.
[39] *Hilow*, 32 M.J. at 441.
[40] *Id.* at 442; *Smith*, 27 M.J. at 248.

cases, UCI seeped into the selection process, and the Court of Military Appeals (COMA) resultantly granted relief in each case.[41]

The military's subordinate nominating procedures are similar to those once used in many federal courts—Congress prohibited their continued use with the passage of the Federal Jury Selection and Service Act of 1968.[42] Prior to this legislation, it was common for federal courts to nominate jurors using the "key-man" system, a process whereby a juror commissioner would request prominent members of the community to nominate individuals for jury duty.[43] During hearings on the legislation, the chair of the committee charged with examining this legislation, Judge Irving Kaufmann, explained, "[l]ong experience with subjective requirements . . . provide a fertile ground for discrimination and arbitrariness, even when the jury officials act in good faith."[44] Accordingly, Congress ultimately closed this avenue of abuse by implementing a random selection scheme,[45] perhaps indicating how a reform-minded Congress would resolve the lack of transparency in military panel selection.

C. Shielding the Panel Selection Process from Immediate and Sweeping Legislative Reform

Though the panel selection process needs change, that change should be sought without a legislative overhaul of Article 25(d)(2). Foremost, Article 25(d)(2) is not the reason the military panel selection process lacks transparency. Transparency is lacking because of the manner in which Article 25(d)(2) is implemented. Additionally, Article 25(d)(2) possesses a mission essential attribute which must be retained—it is

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[41] *Hilow*, 32 M.J. at 444 (setting aside the sentence); *Smith*, 27 M.J. at 251 (setting aside the findings and sentence).

[42] *See supra* note 4 (discussing the Jury Selection and Service Act of 1968).

[43] *See* Major General (Ret.) Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51, 62 (1972–1973) ("Until the enactment of the Federal Jury Selection [and Service] Act, it was common for federal jurors to be selected by the key-man system, whereby the jury commissioner would contact the local banker, the local minister, the local businessman, and perhaps the local superintendant of schools and ask them to nominate people for jury duty.").

[44] *Federal Jury Selection: Hearings on S. 1319 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong. 49, 255 (1967) (statement of Judge Irving K. Kaufmann, Chair, Committee on the Operation of the Jury System).

[45] *See supra* note 4 (discussing the Jury Selection and Service Act of 1968).

flexible, dictating no particular method of selection, ensuring courts-martial can be conducted anywhere and under virtually any conditions.[46] Finally, Article 25(d)(2)'s mandate for the "best qualified" members[47] additionally ensures that panels possess the requisite level of competence to carry out their unique military justice function when they are selected in accordance with the statute.[48]

By framing the issue as one of implementation rather than substance of the law, the military may retain the ability to make necessary modifications while there is still time. However, lack of action could inevitably lead to undesired and sweeping change. An analogous example exists in the recent legislative revisions to the sexual assault statute, UCMJ Article 120.[49] There, Congress revised Article 120 despite the position of judge advocates from all the military branches who opined that the revision was unnecessary.[50] Political pressure became untenable after several high profile cases, a congressional task force, and an independent commission focused public criticism on how the military was addressing sexual assaults.[51]

It is conceivable that similar attacks on the military panel selection process could also motivate congressional action. As recently as May 2001, the Cox Commission released a report which contained this scathing rebuke of the panel selection process:

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[46] JSC REPORT, *supra* note 6, at 46 ("To maintain an effective uniform military justice system, military justice procedures, such as the court-martial member selection process, must be sufficiently flexible to be applied in all units, locations, and operational conditions and across all five Armed Forces.").

[47] UCMJ art. 25 (2008).

[48] Panel member competency has critical import as military panels carry out a judicial function for which civilian juries generally do not—sentence adjudication. JSC REPORT, *supra* note 6, at 8 n.22. Sentence adjudication requires panel members to assess the crime's impact on mission, unit discipline, and the efficiency of command, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1001(b)(4) (2008) [hereinafter MCM], necessitating a base level of military experience beyond even what counsel are likely to possess. Young, *supra* note 22, at 118 ("Junior judge advocates are often prosecutors, defense counsel, or subordinate to the staff judge advocate whose office is prosecuting the case.").

[49] The new Article 120 went into effect 1 October 2007. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 552, 119 Stat. 3136; *see also* UCMJ art. 120 (2008).

[50] Major Jennifer S. Knies, *Two Steps Forward, One Step Back: Why the New UCMJ's Rape Law Missed the Mark, and How an Affirmative Consent Statute Will Put It Back on Target*, ARMY LAW., Aug. 2007, at 1, 20.

[51] *See id.* at 17–18.

> There is no aspect of the military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence that the antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed requires—a convening authority to choose the persons responsible for determining guilt or innocence of a service member who has been investigated and prosecuted at the order of that same authority. [52]

A similar sentiment was reflected in a *U.S. News & World Report* cover story, published in December 2002.[53] There, the author asserted court-martial panels were "stacked to convict"[54] and questioned "[w]hy is it . . . that these men and women are governed by a system of justice that provides a standard of fairness inferior to that guaranteed to even the most hardened criminals who appear each day in America's civilian courts?"[55] Even from within the military legal community there have been calls to reform the panel selection process going back to at least to 1972.[56]

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[52] HONORABLE WALTER T. COX III ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001).

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

[54] *Id.*

[55] *Id*.

[56] *See, e.g.*, Hodson, *supra* note 43, at 64 (recommending removing the commander from panel selection and implementing a random panel selection process); Major Rex R. Brookshire, II, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71 (1972) (advocating a random selection process within the confines of Article 25(d)(2)); Major Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103, 160–61 (1992) (advocating the amendment of Article 25(d)(2) and the implementation of a random panel selection process); Glazier, *supra* note 22, at 67–73 (advocating abolishing Article 25(d)(2) and implementing a random panel selection system); Young, *supra* note 22, at 108–09 (proposing the abolition of Article 25(d)(2), the removal military panels from sentence adjudication, and the implementation of a random panel selection process). *But see* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 25 (1998) (defending current panel selection practice and arguing random selection would be too administratively burdensome); Behan, *supra* note 14, at 255–57 (arguing advocates of random panel selection elevate form over substance and defending the status quo).

Congress too, on occasion, has turned its attention to the panel selection process. In 1949, during the legislative hearings to the UCMJ, when the "most troublesome question" of command control over the panel selection process was a focus of debate, drafters ultimately determined that any alternative to command selection would not be "practicable."[57] Then, in 1971, there were various bills introduced in Congress calling for random selection, none of which were ever enacted.[58] Next, in 1999, Congress directed the Joint Service Committee on Military Justice (JSC) to study alternatives to standard panel selection practices, including random selecting, that were consistent with Article 25(d)(2).[59] The JSC examined the different methods of panel selection employed throughout the service branches, analyzed past random court-martial selection experiments, and analyzed the reformed Canadian and United Kingdom systems.[60] The Committee concluded that Article 25(d)(2) is incompatible with random selection,[61] and found that the standard selection method best applies Article 25(d)(2)'s best qualified mandate.[62] Thereafter, Congress took no action, and the status quo remained.

It would be unwise to take recent Congressional silence as a sign that Article 25(d)(2) is safe from reform. Rather, history reveals that the military's failure to make the selection process transparent periodically provokes Congress to consider its own reforms of Article 25(d)(2). Plausibly, the military could break that cycle by making the process transparent, thereby preserving the flexibility to use the standard selection methods as the mission requires. At a minimum, the JSC Report illustrates how the military can potentially influence the path of reform by experimenting with alternatives consistent with the mandates of Article 25(d)(2).

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[57] *Hearings on H.R. 2498 Before a Subcomm. of the House Comm. on Armed Services*, 81st Cong. 10 (1949) (statement of Rep. Carl Vinson), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/congr-floor-debate.pdf.

[58] *See* S. 4169, 91st Cong. § 825 (1970); S. 1127, 92d Cong. (1971); H.R. 6901, 92d Cong. § 825 (1971); *see also* Behan, *supra* note 14, at 16 (discussing the details of the random proposals in each bill).

[59] Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920.

[60] JSC REPORT, *supra* note 6, at 3.

[61] *Id.* at 22 ("Random nomination of court-martial members will not ensure the selection of court-martial members 'best qualified' under Article 25(d)(2).").

[62] *Id.* at 3 ("[C]urrent practice best applies the criteria of Article 25(d), UCMJ . . . .").

III. Alternative Selection Methods Consistent with Article 25(d)(2)

A. Lessons from Past Experiments in Random Selection

Panel selection experiments are hardly unprecedented in the Army's history. Experiments occurred at Fort Riley in 1974 and, later, at V Corps in 2005. Both experiments sought to rectify Article 25(d)(2) with random procedures and both were motivated out of concern that Congress might impose uninvited reforms.[63] Despite the inherent limitations of both experiments, their analysis is noteworthy for the lessons they provide today.

The Fort Riley experiment sought transparency by eliminating the nominating procedure and the CA's hand-selection of nominated members for panel duty.[64] Consequently, the experiment disregarded Article 25(d)(2)'s best qualified mandate.[65] Under the experimental procedures, randomly-drawn candidates had to possess only four qualifications preselected by the CA—be older than twenty-one; have one year of active duty service; have three months assignment history at the installation; and have a minimum pay grade of E3.[66] Administrators identified personnel who matched these qualifications by querying a personnel database called the Standard Installation Division Personnel System (SIDPERS).[67] Identified personnel were subsequently disqualified if they answered "yes" to several questionnaire questions

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[63] While there are no documents that suggest the precise reason for the Fort Riley experiment, the project officer for the experiment indicated, in an after-action review, one reason was to determine the feasibility of Congress reforming the process. *See* Letter from Major Rex Brookshire, Project Officer and Colonel Charles P. Dribben, Staff Judge Advocate, Fort Riley, Kan. (Mar. 10, 1975) [hereinafter Fort Riley After Action Review], *reprinted in* JSC REPORT, *supra* note 6, app. K ("[T]he [threshold] question [of the experiment] concerns the extent to which Congress should impose upon the Armed Forces the requirements which prevail in most civilian communities concerning jury trials."). Similarly, the project officer for the V Corps experiment indicated in a published article that experiment was motivated by the desire to provide a workable alternative in the event Congress decided to reform the panel selection process. Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial Panel*, ARMY LAW., Oct. 2006, at 22, 26 ("It was feared that turning a blind eye to the issues related to panel selection and seating might result in drastic changes forced upon the military without the luxury of fine-tuning the random selection process incrementally over time.").

[64] *See generally* JSC REPORT, *supra* note 6, app. J, at 1–4.

[65] *See* UCMJ art. 25 (2008).

[66] JSC REPORT, *supra* note 6, app. J, at 2–3.

[67] *Id.*

regarding criminal history, non-citizenship status, projected duty and leave schedules, and other issues.[68] Those who survived this less-than-rigorous screening process ultimately formed the random candidate pool.[69] Members were thereafter detailed to the panel if the number they had been pre-assigned corresponded to a number drawn randomly.[70]

The V Corps method, on the other hand, had a more rigorous candidate screening process but did nothing to resolve the underlying problems with the standard selection method.[71] Specifically, it retained the standard method's subordinate nominating and CA hand-selecting procedures to establish a large pool of random candidates.[72] Those individuals consisting of this candidate pool were then assigned a number, and were detailed to the panel if their assigned number was chosen pursuant to a random number sequence obtained from the website www.random.org. In essence, a random mechanism was merely grafted over existing procedures, giving the process an air of transparency while not actually achieving it.[73]

Both experiments possessed the same inherent flaw—they reduced panel competency, a point illustrated by anecdotal observations from both Fort Riley[74] and V Corps.[75] Ironically, one possible reason the

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[68] *See id.* at 3–4.
[69] *Id.* app. J, at 4.
[70] *Id.*
[71] From a procedural stand point, the V Corps' random selection method contained four steps. The first was identical to the standard method, entailing subordinate commanders nominating individuals for panel duty. Huestis, *supra* note 63, at 27. The second step was also identical to the standard method, entailing the CA hand selecting one-hundred of the nominated individuals pursuant to Article 25(d)(2)'s best qualified mandate. *Id.* Third, the CA assigned each individual in this selectee pool a number. *Id.* Finally, individuals were detailed to panel duty depending on whether their assigned number was chosen pursuant to a random number sequence obtained from www.random.org. *Id.*
[72] *See supra* note 71.
[73] *Id*.
[74] *See* Letter from Captain Peter W. Garretson, Chief Trial Counsel, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kan. 6 (Feb. 20, 1975), *reprinted in* JSC REPORT, *supra* note 6, app. K. ("The primary objection of this office [to random selection] . . . is the inexperience and lack of maturity of the lower enlisted men. These soldiers do not have a sufficient amount of knowledge of the military community or of the way of the world to sit in judgment of their fellow soldiers."); *see also* Letter from Colonel Robert L. Wood, Military Judge, to Major Rex Brookshire, Deputy Staff Judge Advocate, Fort Riley, Kan. 6 (Dec. 13, 1974), *reprinted in* JSC REPORT, *supra* note 6, app. K ("So far as I know, no one has ever contended that jurors should be immature, uneducated, inexperienced, have no familiarity with the military service, and have no

experiments reduced competence resides in the promise of randomness. Specifically, in contrast to the standard selection method where the CA details the "best qualified" to a panel, random methods give both the best and least qualified in any candidate pools an equal opportunity for random selection.[76]

Though the Fort Riley and V Corps methods did not comply with the spirit of Article 25(d)(2), they appear to have complied with its letter. In *United States v. Yager*, the COMA, while not directly addressing the issue, indicated in a footnote that the Fort Riley method complied with Article 25(d)(2).[77] They reasoned that the CA personally approved the members selected via random method pursuant to Article 25(d)(2).[78] Similarly, in *United States v. Beatty*, the trial judge upheld the V Corps method after determining that the CA had personally selected the panel members.[79]

While the V Corps and Fort Riley experiments did not uncover a viable alternative to the standard selection method they did establish a crucial lesson necessary for the development of one today: Article 25(d)(2) is not beholden to any particular method of selection. Therefore, it is time to take advantage of this precedent and build upon the lessons learned from these experiments; it is time for the military to develop and institute a panel selection method that achieves transparency without sacrificing panel competence.

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judicial temperament . . . . I therefore recommend that . . . a new program be devised which . . . will not lower the qualifications of jurors.").

[75] Two attorneys who tried cases before V Corps' random panels complained they were "too junior." Huestis, *supra* note 63, at 31. Another attorney who observed the experiment posited "[a]ny time you have a first lieutenant as the board president, the government should be concerned . . . ." *Id.*

[76] *See* JSC REPORT, *supra* note 6, at 32 (explaining random court-martial selection methods undermine competence because the best and least qualified within a given group have an equal chance of being selected).

[77] United States v. Yager, 7 M.J. 171, 171 n.1 (C.M.A. 1979) ("[S]election of court-martial members was subject to the approval of the convening authority. This exception was necessary to ensure compliance with Article 25(d)(2) . . . ."); *see also* United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) ("[I]t would appear that . . . [random] selection is permissible, if the convening authority . . . personally appoints the court members who have been randomly selected.").

[78] 7 M.J. at 171 n.1.

[79] Huestis, *supra* note 63, at 29–30 (discussing the trial judge's decision to uphold selection method).

B. Preselection of Article 25(d)(2) Qualifications as the Solution for Transparency

1. The Preselection Concept

Within the boundaries of Article 25(d)(2), there is a method that would bring transparency to the selection process without sacrificing panel member quality. Similar to the Fort Riley experiment, the CA would preselect the panel's qualifications; dissimilar to the Fort Riley experiment however, the new method would not involve randomness. Further, instead of using the SIDPERS database to query for individuals matching the selected qualifications, the proposed method would utilize its successor database, the Electronic Military Personnel Office (eMILPO).[80] Then, with the aid of a numerical point system established by the CA, members meeting the preselected qualifications would be automatically detailed to the panel.

The eMILPO system has four attributes that are ideal for military panel selection. First, it can be accessed anywhere in the world as it is Web-based.[81] Second, the system contains a myriad of personnel information on every Soldier, which a CA could access to conduct an Article 25(d)(2) analysis.[82] Third, eMILPO is continually updated at the unit level to account for personnel loses and gains in combat and peacetime.[83] Fourth, eMILPO allows the user to conduct an "ad hoc query" of its source data by using multiple search criteria.[84] Thus, for

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[80] Press Release, Army Europe Pub. Affairs, eMILPO to Replace SIDPERS: New System Will Save Soldiers' Time (May 23, 2002), *available at* http://www.hqusareur.army.mil/html inks/Press_Releases/2002 /May2002/23May2002-02.htm.

[81] U.S. DEP'T OF ARMY, FIELD MANUAL 1-0, HUMAN RESOURCES SUPPORT para. C20 (21 Feb. 2007) [hereinafter FM 1-0].

[82] *See* FIELD SYSTEMS DIV., U.S. ARMY HUMAN RESOURCES COMMAND, THE ELECTRONIC MILITARY PERSONNEL OFFICE FUNCTIONAL GUIDANCE 180–83 (ver. 4.1 2006) [hereinafter FUNCTIONAL GUIDANCE], *available at* http://www.hqda.army.mil/MPSC/Docs/emilpo_functional_guidance.doc (listing reports eMILPO is capable of generating, including officer record briefs (ORBs), enlisted record briefs (ERBs) and an ad hoc query report); *see also* FIELD SYSTEMS DIV., U.S. ARMY HUMAN RESOURCES COMMAND, AD HOC QUERY SPREADSHEET (n.d.) [hereinafter QUERY SPREADSHEET], *available at* http://www.hqda.army.mil/MPSC/Docs/emilpo_functional_guidance.doc (scroll down to page 182, then follow "Ad Hoc Query" hyperlinked Excel Spreadsheet) (listing an excel spreadsheet containing 894 searchable data elements that allow the electronic Military Personnel Officer (eMILPO) user to query education, age, awards, deployments, skills, race, religion, marital status, and other personal data of Soldiers).

[83] FM 1-0, *supra* note 81, at 4-4 to 4-6.

[84] *See supra* note 82.

panel selection, CAs could preselect their Article 25(d)(2) qualifications and appoint a subordinate to run an ad hoc query,[85] thereby narrowing prospective panel members to only those who meet desired qualifications.

The eMILPO system is not without drawbacks. The ad hoc query function, for example, is not as simple as an Internet search engine.[86] Rather, the system's data elements that coincide with Article 25(d)(2) criteria would require some learning and familiarity on the part of advising staff judge advocates (SJAs).[87] Another limitation is that ad hoc query function does not contain a data element that allows users to search for a subject's assignment history,[88] which is undoubtedly an important factor in evaluating the "experience" criterion of Article 25(d)(2).[89] None of these issues is insurmountable or outweighs the benefits of identifying technical compromises.

The eMILPO's inability to search assignment history could be remedied with the institution of a numerical point system. Here, as a mechanism to automatically detail prospective members to the panel, the CA could predesignate desirable categories of past assignments for qualified panel members. Then, among the pool of prospective members, those identified by the ad hoc query would receive one point per assignment in each of these pre-designated categories. Accordingly, members would be automatically detailed to the panel in order of their point scores.[90]

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[85] Many of eMILPO's data elements require the user know specific codes that correspond to particular criteria or qualifications being screened for. *See generally* QUERY SPREADSHEET, *supra* note 82. Consequently, someone with training and experience using the system would likely need to be involved in conducting the query.

[86] In fact, the eMILPO Function Guidance advises, "successful queries require an understanding of the basic query principles, familiarity within the data elements available, forethought in the query design, patience, and practice." FUNCTIONAL GUIDANCE, *supra* note 82, at 182.

[87] As an example, if while preselecting her Article 25(d)(2) criteria the CA decided enlisted members should have at least "two years of college," the Staff Judge Advocate (SJA) would need to advise that the system is only searchable by semester hours. *See generally* QUERY SPREADSHEET, *supra* note 82. Similarly, if the CA wanted the members to have "ten years of military service," the SJA would need to know eMILPO is searchable by either the "initial military entry date" or the "military entrance active duty date." *Id.*

[88] *Id.*

[89] *See* UCMJ art. 25 (2008).

[90] When using this point system, it is useful to think of the eMILPIO preselection method in three steps. The first involves querying eMILPO's existing data elements with the

2. The Mechanics of Preselection

The mechanics of the proposed preselection method are actually similar to standard practice.[91] The first step entails the SJA advising the CA of her statutory responsibilities pursuant to Article 25(d)(2). During the advice, the SJA explains the mechanics of preselection, differences from the current practice, and reasons why preselection is desirable as a reform measure. A memorandum containing the written portion of the advice appears at Appendix A.[92] Appendix B contains the document that the CA would sign to implement the SJA's recommendations.

During this meeting, the CA would also memorialize her Article 25(d)(2) qualification selections—separately for officers and enlisted personnel—on Article 25(d)(2) worksheets like the one appearing at Appendix C.[93] This worksheet provides blank spaces where the CA can write her primary and alternate criteria to establish the minimum "age, education, training, experience, length of service" a qualifying member should have. Paragraph 3a and 3b of Appendix C to explain the manner and order in which alternate qualifications would automatically replace primary ones. Finally, the CA would use the worksheets to identify any individuals she determines, because of operational necessity, should not

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qualifications the CA has preselected. Several queries may be necessary, using progressively less strict qualifications the CA also preselected, until the number of candidates identified by the query is at least equal to the number of alternates and primary members needed. The second step involves a subordinate manually querying each individual's ORB or ERB and tallying points based on experience designated by the CA. Third, these individuals are automatically detailed as primary or alternate members according to their respective points. For example, for a twelve member officer panel, the twelve members identified by the ad hoc query with the highest points would be detailed to the panel. The remaining officers would be alternates. The member with the highest points would be detailed first in the event alternates are needed. The CA would also need to designate how to resolve the order of detailing in the event two prospective members have an equal number of points. A possible solution is to prioritize the older individual, or the one who has a longer length of service.

[91] *See generally* Major Craig S. Schwender, *One Potato, Two Potato . . . : A Method to Select Court Members*, ARMY LAW., Apr. 1989, at 12 (explaining a step-by-step method of appointing panel members using the standard selection method).

[92] *Compare infra* Appendix A, *with id.* apps. 20–21 (offering a sample memorandum that advises the CA on panel selection using the standard method).

[93] *Compare infra* Appendix C, *with* Schwender, *supra* note 91, app. 22 (providing a sample worksheet in which a CA uses the standard selection method and writes the names of the primary and alternate panel members).

serve panel duty based on recommendations from her subordinate commanders.[94]

The final step in preselection involves a second appointment with the CA, in which the SJA advises the CA in a manner consistent with the memorandum appearing at Appendix D. Here, the SJA presents a separate officer and enlisted candidate list, each numerically prioritized by point score. The CA reviews the qualifications of these individuals to affirm they are "best qualified" in her opinion "by reason of age, education, training, experience, length of service, and judicial temperament."[95] As a final act, she signs an action memorandum, similar to Appendix B, implementing the automatic primary and alternate detailing procedures. This would set the stage to convene courts-martial under the preselection method.

3. The Legal Viability of the Preselection Method

a. Safeguards Against Systematic Exclusion

Though a military accused would now know exactly what qualifications resulted in his panel being selected, this transparency would also create a legal vulnerability. Specifically, as Article 25(d)(2) does not define its criteria,[96] fertile ground would exist to attack the CA's selected qualifications by arguing they are inconsistent with the statute. More to the point, defense counsel could argue those qualifications resulted in otherwise qualified individuals being systematically excluded from panel duty.[97] But two cases provide insight on how CAs implementing the pre-selection method can effectively guard against

[94] While the preselection method eliminates the subordinate nominating process, it is still necessary to coordinate with subordinate commanders to determine personnel they believe should not serve panel duty for reasons of operational necessity. The CA would review the list of these individuals assembled by the SJA office in deciding who, if anyone, should not serve panel duty. This mechanism is designed to ensure that commanders retain complete control over the disposition of their personnel to meet mission requirements. *See* Behan, *supra* note 14, at 257 (criticizing random selection for withdrawing "from commanders the ability to direct the disposition of their personnel").

[95] UCMJ art. 25(d)(2) (2008).

[96] *See generally id.*

[97] *See, e.g.*, United States v. McLaughlin, 27 M.J. 685 (A.C.M.R. 1988) (holding the exclusion of "junior" officers from panel duty was consistent with Article 25(d)(2) and therefore did not amount to systematic exclusion of otherwise qualified personnel).

such arguments—*United States v. Crawford*[98] and *United States v. Yager*.[99]

In *Crawford*, the COMA upheld an SJA's admitted limitation of enlisted membership on the appellant's panel to "senior enlisted."[100] Before so holding, the court established the applicable rule: Standards are acceptable when qualifications are "reasonably and rationally calculated to obtain jurors meeting the statutory requirements [of Article 25(d)(2)]."[101] The court found no improper exclusion even though qualified personnel were "undeniably" excluded;[102] it reasoned that the "seniority" qualification fell within the confines of Article 25.[103]

In *Yager*, the COMA was again confronted with the issue of whether an improper criterion was used to select a panel—a panel randomly selected during the Fort Riley experiment.[104] Specifically, the criterion at issue was one of the pre-selected screening criteria—that panel members have a minimum pay grade of E3.[105] The specific issue was whether this qualification amounted to an unlawful systematic exclusion of even lower-ranking personnel.[106] The COMA determined it was not, stating the exclusion was the "embodiment" of Article 25(d)(2), in that there was a "demonstrable relationship" between it and the statutory criteria.[107]

Taken together, *Crawford's* "reasonably and rationally calculated" test and *Yager's* "demonstrable relationship" test provide insight how

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[98] 35 C.M.R. 3 (C.M.A. 1964). For cases either citing or following this precedent, see Gosa v. Mayden, 413 U.S. 665, 688 (1973) (Douglas, J., concurring) (citation); United States. v. Bertie, 50 M.J. 489, 1999 (C.A.A.F. 1999) (same); United States v. Roland, 50 M.J. 66 (C.A.A.F. 1999) (same); United States v. Morrison, 66 M.J. 508, 508 (N-M. Ct. Crim. App. 2008) (same); United States v. Dowty, 60 M.J. 163, 170 (C.A.A.F. 2004) (following).

[99] 7 M.J. 171 (C.M.A. 1979). For cases construing or citing this case, see United States. v. Autrey, 20 M.J. 912, 916 (A.C.M.R. 1985) (construing); United States v. McClain**,** 22 M.J. 124, 130 (C.M.A. 1986) (citing with approval); *McLaughlin*, 27 M.J. at 688 (same); United States v. Lewis**,** 46 M.J. 338, 342 (C.A.A.F. 1997) (same); United States v. Benson, 48 M.J. 734, 739 (A.F. Ct. Crim. App. 1998) (same); *Roland***,** 50 M.J. at 68, *Dowty***,** 60 M.J. at 170 (Cox, J., concurring) (citing).

[100] *Crawford*, 35 C.M.R. at 35–36.

[101] *Id.* at 39.

[102] *Id.* at 39–40.

[103] *Id.* at 40.

[104] United States v. Yager, 7 M.J. 171, 171–72 (C.M.A. 1979).

[105] *Id.*

[106] *Id.*

[107] *Id.* at 172–73.

panels selected using the preselection method can withstand systematic exclusion arguments—CAs should select qualifications that have a logical nexus to the plain meaning of the Article 25(d)(2) criteria.

b. Exempting Potential Panel Members for Operational Necessity

Documenting what individuals are exempted from panel duty for reasons of operational necessity could create another legal vulnerability; but only by exposing a decision now masked by the standard selection method. For example, if in implementing the status quo, a CA believes operational necessity dictates that her chief of staff should focus on mission planning instead of panel duty, the CA could simply not select that officer, leaving the defense forever unaware. The preselection method would merely require that the CA now disclose that decision. Unfortunately, there is no case law precisely on point discussing the scope of the CA's power to exempt individuals from panel duty for operational necessity. The lack of case law is likely a consequence of the heretofore hidden nature of that decision and underscores the risk in now disclosing it.

On the other hand, some authorities do support the CA's authority to exempt individuals from panel duty in such circumstances. In *United States v. Weisen*,[108] the Court of Appeals for the Armed Forces (CAAF) stated that "national security exigencies or operational necessities" could have justified what was otherwise error in the trial judge's retention of a panel member tainted by implied bias.[109] It logically follows that operational necessity could have also justified the CA's exemption of that same individual from service as a panel member in the first place. This interpretation is also consistent with the legislative history of Article 25(d)(2), whose authors were careful not to dictate a panel selection process that could interfere with military missions.[110] Further, an expansive view of CA's authority is supported by *United States v. Bartlett*, where the CAAF found that not even the Secretary of the Army

[108] 57 M.J. 48 (C.A.A.F. 2002).
[109] *Id.*
[110] *See supra* note 57 and accompanying text.

had the power to infringe upon a CA's Article 25(d)(2) discretionary powers.[111]

c. Other Concerns Over Preselection

Two additional aspects of preselection may appear, to be problematic from a legal perspective. First, preselection does not at first glance appear to account for the subjective Article 25(d)(2) criterion of "judicial temperament." Second, the method does not simultaneously weigh all the Article 25(d)(2) qualifications. For example, assignment history is considered only after the other qualifications, perceivably resulting in the exclusion of individuals that otherwise would be selected using the standard selection method. A closer analysis ultimately reveals that neither issue constitutes a statutory violation.

Preselection, in all actuality, accounts for members' "judicial temperament" in two distinct ways. First, the system requires the CA to select the "age, education, training, experience, and length of service" that she believes a panel member with appropriate "judicial temperament" should have.[112] Additionally, under the method, the CA excludes categories of individuals whom she believes do not have "judicial temperament"—those with criminal histories or who are under investigation.[113] As Article 25(d)(2) does not specify how its criteria must be applied, nothing prohibits the CA from addressing "judicial temperament" in these ways.[114] There is also no requirement that CAs simultaneously weigh all the Article 25(d)(2) criteria.[115] Any perceived exclusion of qualified personnel is, therefore, illusory because it requires

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[111] 66 M.J. 426 (C.A.A.F. 2008) (holding that the Secretary of the Army lacked the authority to implement a regulation prohibiting a CA from selecting officers for panel duty whom were assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, and those detailed to Inspector General duties).

[112] *See infra* Appendix A, para. 2

[113] For example, Appendix A, para. 3d, contains boiler plate language that categorically excuses individuals who are flagged pursuant to Army Regulation (AR) 600-37. The CA could of course expand this categorical excusal to include other areas such as those who recently received non-judicial punishment. *See also* Schwender, *supra* note 91, at 13 (explaining factors, such as criminal history, that a CA could use to disqualify prospective panel members from duty).

[114] *See* UCMJ art. 25 (2008).

[115] *Id.*

a comparison with the standard method of selection, a method the statute does not proscribe.[116]

Even if these two issues were somehow problematic, the pre-selection method's final panel review and detailing process would likely vitiate any legal vulnerability. In *Yager*, for example, facts were before the court that the CA pre-selected minimum panel member qualifications—with no indication "judicial temperament" was even considered—yet the court never mentioned this procedure could have resulted in noncompliance with Article 25(d)(2).[117] Rather, the court glossed over Fort Riley's complete disregard for the Article 25(d)(2) criteria of "education" and "training," and the statute's best qualified mandate.[118] In the end, the court stated that the random process complied with Article 25(d)(2) because the CA personally detailed the members.[119]

4. Addressing Practical Considerations in Preselection

Legal considerations aside, practical concerns must also be factored into the decision to implement the preselection method. Several potential criticisms exist. First, while the preselection method achieves a level of transparency beyond the status quo, CAs could still misuse the process to influence the outcome of a particular case. Second, while the preselection method eliminates some administrative burdens, it creates new ones. Third, though the preselection method may restrict the CA's ability to illegally discriminate, it could also undermine her ability to ensure that women and minorities are represented on a panel.[120] Each of these issues is discussed in turn.

First, while a CA conceivably could select the qualifications with the intent to achieve a particular result, the preselection method could easily eliminate this potential for UCI. For example, CAs could replicate what

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[116] *Id.*

[117] *See generally* United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

[118] *See* UCMJ art. 25; *see also supra* Part III.A (analyzing the exact preselected qualifications used to screen the Fort Riley random panels).

[119] *Yager*, 7 M.J. at 171 n.1.

[120] *See* United States v. Crawford, 35 C.M.R. 3, 41 (C.M.A. 1964) ("[T]here was no error in the deliberate selection of a Negro to serve on the accuser's court-martial."); United States v. Smith, 27 M.J. 242, 249 (C.M.A. 1988) ("[A] commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels.").

the federal juror statute does by institutionalizing the juror qualifications so that they cannot be manipulated to fit the peculiarities of any case.[121] There is nothing prohibiting CAs from replicating this aspect of the federal statute by institutionalizing their Article 25(d)(2) qualifications in a local regulation.[122] The CAs' successors, in the interest of transparency, could simply affirm the pre-existing published qualifications. As a result, all future human decision-making would be removed from the selecting decision, leaving just a computer to select the members.[123] In this respect, the preselection method could achieve transparency on par with federal random juror selection.

Second, any additional administrative burdens created by preselection are offset by the ones it eliminates. For example, the preselection method requires subordinate commanders to identify personnel who should not serve for reasons of operational necessity; but the elimination of the nominating procedure compensates for this burden.[124] Further, while preselection requires two CA appointments to select a panel,[125] these appointments would be cumulatively less labor-intensive than the single appointment now required by the standard method.[126] Moreover, if the CA institutionalizes her Article 25(d)(2)

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[121] *See* 28 U.S.C. § 1865(b) (2006) (establishing minimum federal juror qualifications with regard to age, residency, criminal history, English proficiency, and physical and mental health).

[122] "Institutionalizing" the Article 25(d)(2) criteria in this manner was proposed during the Fort Riley experiment. Fort Riley After Action Review, *supra* note 63, at 9.

[123] The idea that transparency in panel selection could be achieved by allowing a computer to identify the members based on inputted Article 25(d)(2) criteria is not new. *See, e.g.*, David M. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 20 (1991) ("[A] computer could be programmed to turn out a cross-section of officers and enlisted members based upon the language of article 25 . . . . I cannot believe that the same ingenuity that coordinated the massive air strikes in the Middle East could not be used to select court members for a court-martial . . . . ").

[124] *See* discussion *supra* Part III.B.2.

[125] *Id.*

[126] While the standard selection method requires one appointment with the CA to select the panel, that appointment is labor intensive, generally requiring the SJA to prepare and the CA to review hard copy data files in making selection decisions. *See* Schwender, *supra* note 91, at 13, 15–16. By contrast, during the first CA appointment using the preselection method, the CA would pre-select her qualifications based on her own personal experience, see discussion *supra* Part III.B.2, a selection she need not make again during her tenure as CA. *See supra* Part III.B.4 (discussing institutionalizing Article 25(d)(2) qualifications). The second appointment would be even less labor intensive, merely requiring the CA's review and detail those selected matching the pre-selected criteria. *See* discussion *supra* Part III.B.2.

qualifications, the process is further streamlined, eliminating the need for a CA to preselect those qualifications at later appointments.[127]

Third, preselection can be just as inclusive of racial minorities and women as the status quo.[128] The eMILPO system has specific race and gender data elements that allow the CA to pre-designate a certain number of officers and enlisted on every panel to be women and minorities.[129]

III. Conclusion

At its core, transparency in military panel selection requires a technical and practical solution rather than statutory revision. If the military continues to ignore the practical component, however, it risks congressional abolition of Article 25(d)(2)'s statutory framework and possibly an untenable alternative. That risk should not be tolerated given the availability of personnel databases like eMILPO that offer the possibility to implement a flexible and transparent panel selection process that does not sacrifice panel competence. Commanders should, therefore, harness this technology, thereby reducing litigation costs, increasing fairness, and ensuring the long-term viability of CA member selection.

Two steps should be taken immediately to protect the panel selection process from unnecessary legislative reform. First, SJAs should seek to implement pilot programs in their jurisdictions using the preselection method outlined in this article; afterwards they should publish the lessons learned for dissemination to all jurisdictions and for use in future JSC studies.[130] Second, judge advocate leadership from all the services should advocate for the creation of user-friendly panel selection applications within their service-specific personnel databases. By taking these two steps, judge advocates can do their part to ensure the long-term health of the military justice system.

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[127] *See supra* notes 121–23 and accompanying text.

[128] The memorandum at Appendix D could be amended to require that in the event the preselection process results in the absence of any women or minorities, a certain number of woman and minorities would be automatically detailed to the panel. More specifically, Appendix D could be amended to require that a designated number of members that would otherwise be on the panel to be automatically excused and then replaced by the first female or minority alternate with the highest points.

[129] *See supra* note 82.

[130] *See, e.g.*, Huestis, *supra* note 63 (discussing the results of the V Corps experiment).

Appendix A

ABCD-SJA Date

MEMORANDUM FOR Commander, 99th Infantry Division

SUBJECT: Selection of Courts-Martial Panel Members

1. OBJECTIVE. To select members for the primary and alternate General and Bad Conduct Discharge Special Courts-Martial Panels for courts convened by this headquarters during the next 120 days, or until relieved.

2. DISCUSSION.

a. Article 25(d)(2), UCMJ, provides, "when convening a court-martial, the convening authority shall detail as members thereof such members of the Armed Forces as, in his opinion, are best qualified for the duty be reason of age, education, training, experience, length of service, and judicial temperament."

b. Historically, General Court-Martial Convening Authorities (GCMCA) have selected members of their command for panel duty who had been nominated for their consideration by subordinate leaders. Since the inception of the UCMJ, attorneys have attacked this panel selection for its lack of transparency. To improve the perception of the system and remedy this concern, a transparent selection process could be implemented whereby the GCMCA preselects her Article 25 criteria. Discussed below is a three-step process by which panel members could be selected and detailed to a court-martial panel in this manner.

c. The first step in the process is establishing the panel pool by listing the qualifications you have selected in the eMILPO personnel database. Select qualifications that have a logical nexus to the plain meaning of the following criteria: age, education, training, experience, and length of service. Base these criteria on qualities you desire in a panel member with the appropriate judicial temperament and whom you believe is best qualified to serve.

d. At the second step, applying these same principles, designate points based on the type of assignment history that you feel resembles the best-qualified panel member with appropriate judicial temperament. After you complete step one and two, one point will be assigned for assignments you have indicated upon comparison with all queried Officer and Enlisted Record Briefs.

e. At the third step, primary and alternate members will be designated based on their respective points. Those in the pool with the more points will be prioritized over those with less.

3. RECOMMENDATIONS.

a. Select the minimum age, education, training, experience, and length of service panel members should have on the enclosed officer and enlisted worksheets. Further, select first, second, and third alternate qualifications for each of these primary qualifications on the worksheets. Selecting these alternate qualifications will negate the need for a follow-up appointment in the event the first ad hoc query using your first selections does not produce the requisite number of panel members needed in Para 3c below. The order in which each primary qualification will be substituted by its alternative will be determined by you, by placing a number in the box directly over each primary qualification on the attached enlisted and officer worksheets.

b. Direct the alternate qualifications be utilized as follows. If the first query does not produce the requisite number of panel members listed in Para 3c below, a second query will be conducted. In conducting this second query, direct that the first primary qualification be replaced with its first alternate—the qualification in which you wrote the number "1" over its corresponding box. If there are still insufficient panel members after this second query, a third query will be conducted, replacing another primary qualification—the qualification with the number "2" written in its corresponding box—with its first alternate. The process will continue as many times as necessary using the 2nd and 3rd alternates if necessary to each primary qualification until the minimum number of personnel listed in Para 3c are identified.

c. Mandate that the officer pool list contain at least 30 personnel and the enlisted pool list contain at least 20 personnel after the individuals listed in Para 3d are removed.

d. Declare the following individuals unavailable to serve on court-martial panels and direct that they not be counted against the number of personnel required as listed in Para 3c: (1) individuals who are flagged or should be flagged pursuant to Army Regulation (AR) 600-37; (2) individuals who have relocated, deployed, or retired; (3) individuals who have been separated from the service. Also, identify on the attached worksheets any individuals whom you determine, for reasons of operational necessity, should not serve panel duty.

e. Establish what priority the primary and alternate members identified by eMILPO should serve based on Article 25, UCMJ, by implementing the point system discussed in Para 2. List separately the assignments history that you believe a best qualified officer and enlisted panel member would have on the attached worksheets. Assign one point per assignment and direct that

individuals with more points be prioritized in rank order over those with fewer points. Designate how priority would be resolved in the event two individuals have the same number of points. Also be cognizant of defining the assignment history either too broadly or too narrowly. For example, apportioning points based on panel members having occupied "leadership positions" or "positions of trust" would leave doubt as to your intentions. Conversely, apportioning points based on members having been "82nd Airborne infantry commanders during the Gulf War" would likely apply to too few individuals. An example of a sufficiently narrow but not overly broad criterion would be to assign points based on a member having been "a commander at any level." To encompass those with other leadership experience, you could assign points based on those who have been "primary or special staff head at brigade level or higher." Similarly, for enlisted personnel, you could assign points to those who have been "squad leaders," "platoon sergeants," "first sergeants," or "command sergeants major."

f. After accomplishing the recommendations in Para 3a–e, select a new panel of officers and enlisted personnel to hear General Courts-Martial and Special Courts-Martial cases in your GCMCA jurisdiction.

4. The POC for this memorandum is the undersigned.

2 Encls
1. Enlisted Article 25 Worksheet
2. Officer Article 25 Worksheet

JOE SMEDLAP
COL, JA
Staff Judge Advocate

Appendix B

ABCD-CG Date

MEMORANDUM FOR Staff Judge Advocate, 99th Infantry Division

SUBJECT: Selection of Courts-Martial Panel Members

1. Your recommendations are approved.

2. The POC for this memo is the SJA.

Encls
as

DOIT YESTERDAY
Major General, USA
Commanding

Appendix C

Article 25(d)(2) Worksheet

1. **STEP 1**—Establish baseline Article 25 criteria.

a. **Age** ☐

(1) Primary_____
(2) 1st alt _____
(3) 2d alt _____
(4) 3d alt _____

b. **Education** ☐ ☐ ☐

(1) Primary_____	(1) Primary_____	(1) Primary_____
(2) 1st alt _____	(2) 1st alt _____	(2) 1st alt _____
(3) 2d alt _____	(3) 2d alt _____	(3) 2d alt _____
(4) 3d alt _____	(4) 3d alt _____	(4) 3d alt _____

c. **Training** ☐ ☐ ☐

(1) Primary_____	(1) Primary_____	(1) Primary_____
(2) 1st alt _____	(2) 1st alt _____	(2) 1st alt _____
(3) 2d alt _____	(3) 2d alt _____	(3) 2d alt _____
(4) 3d alt _____	(4) 3d alt _____	(4) 3d alt _____

d. **Length of service**

☐

(1) Primary_____
(2) 1st alt _____
(3) 2d alt _____
(4) 3d alt _____

e. **Experience (non-assignment history) (e.g., deployments, awards, badges)**

☐ ☐ ☐

(1) Primary_____	(1) Primary_____	(1) Primary_____
(2) 1st alt _____	(2) 1st alt _____	(2) 1st alt _____
(3) 2d alt _____	(3) 2d alt _____	(3) 2d alt _____
(4) 3d alt _____	(4) 3d alt _____	(4) 3d alt _____

2. **STEP 2—**In the boxes provided above, designate the rank order you want the alternate qualifications to be utilized.

3. **STEP 3—**List present and past duty positions which will be eligible for one point per assignment. Also designate how priority would be resolved in the event two individuals have the same number of points (e.g. age, length of service).

_____
_____
_____
_____
_____
_____
_____
_____
_____

4. **STEP 4**—Identify any specific individuals whom you determine because of operational necessity should not serve panel duty.

_____
_____
_____
_____
_____
_____
_____
_____
_____

Appendix D

ABCD-SJA Date

MEMORANDUM FOR Commander, 99th Infantry Division

SUBJECT: Selection of Court-Martial Panel Members

1. REFERENCES:

a. The Manual for Courts-Martial, United States (2008 edition) (MCM).

b. The Uniform Code of Military Justice (UCMJ).

c. Army Regulation 27-10, Military Justice.

2. PURPOSE: To select General Court-Martial (GCM) and Special Court-Martial (SPCM) Panel Members.

3. BACKGROUND.

a. Attached at enclosure 1 is the list of the top enlisted personnel who meet the Article 25 criteria you preselected, numbered sequentially according to the point system you established, beginning with the individuals with the greatest number of points. The second enclosure consists of the officers who meet the Article 25 criteria you preselected, prioritized in the same manner as the enlisted list.

b. Per your directive, individuals meeting the following criteria were removed from the lists: (1) individuals who are flagged or should be flagged pursuant to AR 600-8-2; (2) individuals who have relocated, deployed, or retired; (3) individuals who have been separated from the service.

4. RECOMMENDATIONS.

a. Review the officer list at enclosure 1 and the enlisted list at enclosure 2 to ensure the individuals listed therein are best qualified pursuant to Article 25 (d)(2), UCMJ. That is, that the individuals, in your opinion, are best qualified for duty by reason of age, education, training, experience, length of service, and judicial temperament.

b. Designate the top twelve (12) officers, numbered from 1–12 on the officer list, to be detailed to both the General Court-Martial and Special Court-Martial panels. Furthermore, select the bottom five (5) of these officers, numbered 8–12 on the officer pool list, to be excused from the panels when enlisted members are requested.

c. Designate the top five (5) enlisted personnel, numbered 1–5 on the enlisted pool list, be detailed to both General Courts-Martial and Special Courts-Martial.

d. Designate the next (12) officers, numbered 13-24 on the officer pool list, be detailed as alternate members to both GCMs and SPCMs, to be detailed in priority of their point scores as directed in Para 4g.

e. Designate twelve (12) enlisted personnel, numbered 12–24 on the enlisted pool list, to be detailed as alternate members to both GCMs and SPCMs and to be detailed in rank order according to their point score as directed in Para 4h.

f. Direct that officer alternates will be used to replace primary officer members and enlisted alternates will be used to replace primary enlisted members.

g. Direct three alternate officer members be detailed automatically according to their point score under the following circumstances:

(1) If before trial, the number of members of a general court-martial falls below seven;

(2) If before trial, the number of members of a special court-martial falls below five;

(3) If at trial an officer panel falls below quorum.

h. Direct three alternate enlisted members be detailed automatically according to their point score if a panel with enlisted members falls below a quorum because of too few enlisted members.

i. Direct the court-martial panel members serve from the date selected until 31 May 2011 or until relieved.

j. That those cases currently referred to trial on or after the date of this memorandum, in which the court has not been assembled, be tried by the court members newly selected.

5. The point of contact for this memorandum is the undersigned.

3 Encls
1. Officer list
2. Enlisted list
3. ORBs/ERBs

JOE SMEDLAP
COL, JA
Staff Judge Advocate