A JURY OF ONE'S PEERS: AN EMPIRICAL ANALYSIS OF THE CHOICE OF MEMBERS IN CONTESTED MILITARY COURTS-MARTIAL

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This article explores the question of panel choice in a contested military court-martial. In the military system an accused can choose one of three options: trial by judge alone, trial by officer panel members or trial by officer panel members with at least 1/3 enlisted representation. A common assumption among many military practitioners is that an enlisted accused will fare better when tried by a members' panel (the military term for jury) that is composed of both officers and enlisted members as opposed to trial by judge alone or by officers only. Using statistical analysis of cases occurring in the US Marine Corps between 1 January 2011 and 1 July 2011, this article shows there is no marked difference in outcomes between the three sorts of fact finders allowed at trial. Furthermore, the evidence suggests that following a contested court-martial member panels composed of at least 1/3 enlisted members tend to award confinement sentences that are longer in time than trial by judge alone or officer only panels.

I. Introduction

Does a jury of one's peers always offer the best outcome for a defendant? This article sheds light on the effects of having enlisted members on a court-martial "panel" (the military name for a jury) during contested trials and during sentencing.[1] Data was collected from all

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[1] MANUAL FOR COURTS MARTIAL, UNITED STATES, R.C.M. 907(2)(C)(i) (2008) [hereinafter MCM] ("The role of members in a military has become somewhat more analogous to that of a jury."). *See, e.g.*, UCMJ art. 39(a) (2008). *See also infra* note 5 (visiting the composition of courts-martial panels).

cases in the Marine Corps from 1 January to 1 July 2011. Information on each case came from the United States Marine Corps (USMC) Trial Counsel Assistance Project weekly case reports during this time period.[2] These reports offer a brief description of each special and general court-martial, totaling 218 cases during the six month time period.[3] A statistical analysis was conducted using this data. Results from this sample of cases suggest that there is no significant difference between the outcomes of cases decided by a judge alone, officer member panels or panels with enlisted representation.[4] Finally, a regression analysis was employed to test the hypothesis that panels with enlisted representation give lower sentences as compared to sentencing by a judge alone or a members' panel of officers. Findings indicate that members' panels composed of at least 1/3 enlisted members tended to give higher sentences at a statistically significant rate.

II. Enlisted Representation and Military Juries

A. Juries in the Military

Juries are difficult.[5] Whether a litigator is attempting to pick the right jurors, decide how to phrase voir dire questions or whether to choose a jury trial, it all comes down to a complex set of calculations that the trial lawyer must make.[6] Oftentimes, there are certain variables that a lawyer can know at the outset of a case.[7] For example, a good defense counsel might take into account the skill level of the prosecutor they are facing, the strength of the evidence against their client, or whether the

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[2] Trial Counsel Assistance Project, *available at* http://www/marines.mil/unit/judgeadvocate/Pages/JAM/JAM_home/TCAP.aspx (The Marine Corps Trial Counsel Assistance Project's mission is to "develop and provide litigation training, develop and maintain litigation support resources, and provide military justice advice for prosecutors").

[3] Each weekly report provided the name, judge, type, Uniform Code of Military Justice (UCMJ) article violated, sentence and place of court martial.

[4] UCMJ art. 25 (2008) (As explored further in the article, there are three different trial options within special and general courts-martial: judge alone, officer only panel, and officer and enlisted panel.).

[5] James K. Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 30–31 (1994) (purporting the unpredictability of member panels).

[6] Voir dire is the French word for "speaking the truth."

[7] *See, e.g.*, GEORGE R. DECKLE, PROSECUTION PRINCIPLES: A CLINICAL HANDBOOK (Thomas West Publishing, 2007) (describing the initial analysis of a case done by any lawyer preparing to be in court).

trial judge has a history of being "defense friendly."[8] However, when it comes to jurors, it is much more difficult for litigators to make strategic calculations.[9] A litigator can never really know how a juror will react once presented the evidence in a criminal trial.[10] Some of the inherent difficulties in jury assessment stem from the varied nature of the individual jurors, and similarities or dissimilarities with the accused.[11] Namely, how will a jury more closely resembling the accused, carrying with it the perspectives and diversity of the community from which it was derived, view a particular case?

The notion a "jury of one's peers," though not constitutional, was first formally introduced by the Magna Carta in 1215.[12] It is premised on the concept that one's peers will provide a more equitable and just legal venue than that provided by members of a disassociated aristocracy.[13] From this logic it can be further inferred that an intrinsic understanding of the dynamics of an individual's particular community-standing and

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[8] *Id.*

[9] *See* Lovejoy, *supra* note 5, at 30–31 (purports unpredictability of member panels). *See also* Megan N. Schmid. *This Court-Martial Hereby (Arbitrarily) Sentences You: Problems with Court Martial Sentencing in the Military and Proposed Solutions*, 67 A.F. L. REV. 245, 254–55 (2011) (describing difficulty in predicting jury behavior).

[10] *See* Lovejoy, *supra* note 5, at 30–32. *See also* Schmid, *supra* note 9, at 254–55 (Both visit the general unpredictability in member sentencing and greater disparity between member sentencing and judge-alone decisions within similar cases.).

[11] MATTHEW L. FERRARA THE PSYCHOLOGY OF VOIR DIRE 137 (2011) (Ferrara asserts that a jury does not deliberate on the facts and arguments, but rather the juror's subjective perception of facts and arguments. Further positing that perception is inherently based on belief systems, those belief systems can be excessively advantageous or disadvantageous to an accused, particularly if they reflect or do not reflect those evident in the accused.).

[12] *The Magna Carta*, affirmed by King John in 1215, is generally accepted as the first written guarantee of trial by jury and is still acknowledged for this virtue. LLOYD E. MOORE, THE JURY 49 (1973). The 39th clause purports that "[n]o freeman shall be seized, or imprisoned, or dispossessed, or outlawed, or in any way ruined; nor will we condemn him, nor will we commit him to prison, excepting by the legal judgment of his peers. . . ." MAGNA CARTA para. 39 (Eng. 1215), *reprinted in* J.C. HOLT, MAGNA CARTA 461 (2d ed. 1992).

[13] *See* Charles L. Wells, *Early Opposition to the Petty Jury in Criminal Cases*, 30 L.Q. REV. 97, 105 (1914) (stating that jury's representative character was most important because jury used members of community with knowledge of parties and dispute.). *See also* Jefferson Edward Howeth, Holland v. Illinois*: The Supreme Court Narrows the Scope of Protection Against Discriminatory Jury Procedures*, WASH. & LEE REV. 579, 588, 592–96 (1991) (reviewing the roots of the employment of trial by jury in early Anglo-Saxon England, Howeth states: "By enlisting neighbors of an individual who had knowledge of the facts in issue to return an accusation or resolve a dispute, these progenitors of the jury provided a more certain source of knowledge than that available to a distant government official.").

circumstances is a necessary condition to just findings and sentencing.[14] This notion supports the concept that one's peers *should* provide a more just, and potentially, fair forum for a trial when compared to one composed strictly of members of a different socio-economic class.[15] Subsequent generations, to include the authors of the United States Constitution, came to regard this provision within the Magna Carta as one of the principal guarantees of liberty under the common law.[16] They felt the phrase "but by lawful judgment of his peers" ensured a fair trial by a community cross-section—safeguarding the subject against unwarranted interference in an individual's intrinsic rights and liberties.[17]

The sixth amendment governs jury composition within the United States.[18] It requires that juries be "impartial" and composed of a fair

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[14] *See* Howeth, *supra* note 13, at 588; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (The primary assertion here is the importance granted to the community cross-section requirement of jury venire. Being members of the same community in which a crime was committed grants jury members provide/grant/bring/have/possess a privileged perspective on the effect of that crime within the community.).

[15] *See* Wells, *supra* note 13, at 105; Howeth, *supra* note 13, at 92. For an example within the U.S. civilian legal system, see *Duncan v. Louisiana*). 391 U.S. 145, 149 (1968) (In *Duncan,* a Louisiana court tried and convicted the defendant, Gary Duncan, of simple battery without a jury in accordance with Louisiana law.). *Id.* at 156 (As noted by Howeth, "the *Duncan* Court noted that trial by a jury of peers gives the accused an "inestimable safeguard" against a corrupt or overzealous prosecutor or a biased judge by substituting the common sense judgment of the jury for the professional, but possibly less sympathetic, reaction of the judge.").

[16] *See* Toni M. Massaro, *Peremptories or Peers? Rethinking Sixth Amendment Doctrine, Images, and Procedures,* 64 N.C. L. REV. 508 (1986) (stating one of the principal reasons that colonists valued the right to jury trial was their belief that juries of laymen would prevent the arbitrary exercise of government authority). *See also* J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 6 (1977) (American colonists considering the right to jury trial fundamental to an individual).

[17] *See supra* notes 13, 14 and 17. *See also* Smith v. Texas, 311 U. S. 128, 130 (1940). A unanimous Court stated that '[i]t is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.' In this particular instance it was stated that racial group exclusion from jury duty was 'at war with our basic concepts of a democratic society and a representative government.'"), *see also* Peters v. Kiff, 407 U.S. 493 503–04 (1972) (stating that the deliberate exclusion of particular cognizable groups of people "deprives the jury of a perspective on human events").

[18] The U.S. Constitution, Amendment VI states that

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the

cross section of the community in which the crime took place.[19] Legal doctrine in the United States is premised on the notion that impartial juries are necessary for a fair trial.[20] A common idea being that "impartiality" is at least in part dependent on proportional demographic representation over time within the jury venire.[21] The Supreme Court has ruled that when demographic qualifiers like race or sex are a determining factor in jury selection, a defendant's right to equal protection under the law has been violated.[22] The logic follows that proportionally representative diversity over time in race, sex, creed and socioeconomic class amongst jury members, should increase the potential for impartiality, and subsequent just rulings.[23] This notion is also implicit in the Sixth Amendment, which requires that juries be representative of the community in which the crime was committed or, more informally stated: a jury of one's peers.[24] With such focus on the importance of nondiscriminatory community representation in jury venire, it can only be assumed that the sixth amendment's community

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> nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

[19] *See* Howeth, *supra* note 13, at 594–95. *See also infra* note 26 (In *Taylor v. Louisiana* the Court interpreted that the Sixth Amendment's guarantee of trial by an impartial jury requires that the jury be derived from a representative cross-section of the community.).

[20] Examples of the extent that courts have gone to preserve the necessary cross-section community representation and subsequent impartiality requirement are rife throughout U.S. legal history. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968); Howeth, *supra* note 13, at 598–99, 604; Ballard v. United States, 329 U.S. 187, 193–94 (1946).

[21] *See* Howeth, *supra* note 13, at 594–96.

[22] *See* Taylor v. Louisiana, 419 U.S. 522, 524 (1975) (stating that "[t]he Court has unambiguously declared that the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community. *See also Ballard*, 329 U.S. at 193–94 (ruling that both sexes contribute "a flavor, a distinct quality" requisite and valuable to jury deliberations.); Batson v. Kentucky, 476 U.S. 79 (1986) (A prosecutor used peremptory challenges after the completion of voir dire to remove all members of color from a jury that convicted a black defendant. On appeal, the U.S. Supreme Court held that a state denies a black defendant equal protection under the fourteenth amendment when it puts him on trial before a jury from which members of his race have been purposefully excluded.)

[23] *See* Howeth, *supra* note 13, at 598–99 & 607–08.

[24] Richard Re, *Re-Justifying the Fair Cross Section Requirement: Equal Representation and Enfranchisement in the American Criminal Jury*, 116 YALE L.J. (2007) (This community participation is a guarantee to the defendant under the Sixth Amendment). *See also* Beavers v. Henkel, 194 U.S. 73, 77 (1904) (ruling that that the place where the offense is charged to have occurred determines the trial's location).

cross-section requirement is meant to facilitate more just, and potentially more advantageous, outcomes for the defendant.[25]

Courts-martial panels within the military legal system are vastly different compared to civilian juries.[26] In a typical criminal case in the civilian legal system, the accused can elect one of two trial options; trial by judge alone, or trial by a jury of randomly selected members of the community.[27] However, the military system introduces additional panel compositions: one composed entirely of officers, or one composed of officers with 1/3 enlisted representation; the last type hereinafter referred to as an "enlisted panel."[28] The military is unique in its systematic inclusion of enlisted members to a panel.[29] In no United States civilian system—state or Federal—is there a trial option that actively reserves a portion of the jury for a particular faction of the represented community.[30] The civilian legal system only requires that the venire from which a jury is derived is not adjusted in scope to the particular excessive inclusion or exclusion of a cognizable group of people; with disregard for the eventual composition of jurors in any individual case.[31] The uniqueness of the military system of the choice of inclusion of enlisted members in courts-martial panels naturally elicits curiosity in the effect of that bloc within proceedings.

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[25] *See* Howeth, *supra* note 13, at 598–99 & 604.

> The exclusion of distinct groups from the jury undermines the fair cross-section requirement and distorts the common sense judgment of the jury, causing the defendant injury in fact by denying the defendant a decision reflecting the common sense judgment of the community. The defendant also is the proper proponent of the right asserted because the right to trial by a jury drawn from a cross-section of the community is a personal right of the defendant guaranteed by the Sixth Amendment.

[26] Discussions within the *Manual for Courts-Martial* (*MCM*) often provide explanations of military deviations from the civilian legal system.

[27] *See supra* note 19 and accompanying text.

[28] *See supra* note 5 & *infra* note 33.

[29] *See* MCM, *supra* note 1, R.C.M. 903 (Accused election of compositions of courts-martial).

[30] *See* Re, *supra* note 24, at 6–12 (providing examples for exceptions to the individual case assertion, as well as elaborates on the cross sectionality requirement of the venire and not necessarily the resultant jury).

[31] *Id.* Also, *Venire* is a Latin word meaning "cause to come." Its common legal usage refers to the summoned pool of potential jurors for trial.

There is a common conception amongst many military justice practitioners of both the defense and prosecution bars that enlisted panel members are more deferential to an enlisted accused. Some practitioners have made the argument that enlisted panel members have a higher threshold of reasonable doubt and are harder to convince of guilt.[32] Others have verbalized a belief that enlisted panel members connect more to an enlisted accused and can more easily see his or her perspective. All justifications for these beliefs have been based on anecdotal evidence from the litigator's experience during their career as a prosecutor or defense counsel. Ultimately, this common conception raises the question of whether there is empirical evidence that enlisted members are in fact deferential to an enlisted accused?

B. The Military System & Its Uniform Code

The Uniform Code of Military Justice (UCMJ) drives the military justice process.[33] It prescribes that the commander of an accused's parent unit is the convening authority, or the authority that refers an investigation to a prosecutor for charges and potentially trial.[34] Once a request for legal services is made by a convening authority (the unit commander), the military prosecutor then assumes an obligation to ensure that the case is tried in a fair manner[35]. The convening authority is not allowed to be involved in the prosecution, but should maintain a neutral disposition in regards to the case in order to give the accused service member the benefit of the doubt and allow the military justice process to go forth unencumbered by the command's influence.[36] While it is the convening authority who might initiate proceedings, or investigate a potential crime, the convening authority also has an obligation to treat the accused in a fair manner that gives him the benefit of the doubt until proven guilty through the justice system.[37]

The military justice process begins once charges are brought against the accused.[38] By law, the UCMJ grants the accused a defense counsel

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[32] *See infra* note 60.
[33] *See* MCM, *supra* note 1, app. 2.
[34] *See id.* R.C.M. 504 (who may convene courts-martial).
[35] *See id.* R.C.M. 502 (obligations of the trial counsel).
[36] *See id.* R. C. M. 104 (unlawful command influence and convening authority disposition within the court-martial process).
[37] *Id.*
[38] *See id.* R.C.M. 301–08 (initiation of charges, apprehension, and pretrial restraint).

once charges are brought against him.[39] At this time, a military judge is given authority over a case in order to hear motions by the prosecutor or the defense counsel, and to make the court available for a court-martial.[40] For their part the defense counsel and the prosecutor develop a case timeline and set a trial date.[41] The prosecutor can either seek to refer the charges to a special court-martial or a general court-martial.[42] The primary difference between a special and general court-martial is that a special court-martial caps the potential sentence for the accused at one year.[43] Therefore, major crimes (e.g., capital offenses) are most commonly associated with a general court-martial; lesser crimes with a special court-martial.[44] Under the UCMJ, if the case proceeds to a contested court-martial, and if the accused is an enlisted military member, they are granted the option of choosing the finder of fact for the trial.[45] Each option available to an accused offers potential advantages. Judge alone trials offer the defense an informed and intellectual fact finder who might be less swayed by emotional evidence.[46] A panel of officer only members ensures that each fact finder usually maintains at least a baccalaureate-level education.[47] Finally, a panel of at least 1/3 enlisted representation offers increased potential for representation of a faction with similar characteristics and professional experience.[48]

If the accused chooses a members' panel, the members are from the same unit as the accused.[49] The unit might be as large as 5,000 military personnel for a general court-martial, or as small as 800 military

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[39] *See id.* R.C.M. 405 (right to defense counsel during pretrial investigations).
[40] *See id.* R.C.M. 401–07 (forwarding and disposition of cases).
[41] *See id.* R.C.M. 502 (duties of personnel of courts-martial).
[42] *See id.* R.C.M. 504 (convening courts-martial).
[43] *See id.* R.C.M. 201 (general jurisdiction).
[44] *Id. See also id.* R.C.M. 103 (3) (definition of capital offense).
[45] *See id.* R.CM. 805 (selection of members to court-martial panel); *id.* R.C.M. 903 (accused election of court-martial composition); UCMJ art. 25(d) (2008) (who may serve on courts-martial).
[46] Lovejoy, *supra* note 5, at 50, 63 (discussing that judges maintain a higher level of objectivity amongst the various panel types).
[47] 10 U.S.C. § 532 (2013) (qualifications for original appointment as a commissioned officer). (The baccalaureate education standard usually does not extend to include warrant officers.).
[48] As discussed above, electing this representation is analogous to the implicit community cross-section provision within the sixth amendment; except that this option guarantees that at least one-third of the panel all share very specific characteristics.
[49] "Unit" is defined as anybody larger than "company, squadron, ship's crew, or body composing one of them". UCMJ art. 25(b)(2) (2008).

personnel for a special court-martial.[50] A "general" court-martial is called such because a commanding general is the convening authority.[51] Normally, a special court-martial will have a Lieutenant Colonel or Colonel as its convening authority, commanding a battalion or regiment, respectively.[52]

C. Why Empirical Analysis of Military Justice?

The question of whether to choose enlisted representation is an important feature of any contested trial with an enlisted accused.[53] A statistical analysis is an appropriate investigative tool to explore this question because it gives the researcher the ability to compare the way fact finders decided trials across many types of violations, judges and jurisdictions, while controlling for variables that might affect the outcome.

Military justice practitioners can benefit from empirical legal research. The empirical legal studies discipline has exploded over the last decade.[54] The approach offers a way to statistically test hypotheses

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[50] These numbers generally represent U.S. Marine Corps division and battalion sizes respectively.

[51] *See* MCM, *supra* note 1, R.C.M. 504 (b)(1) & UCMJ art. 22 (2008) (overview of general courts-martial convening and composition).

[52] *See* UCMJ art. 23 (special courts-martial convening requirements).

[53] *See* Lovejoy, *supra* note 5, at 29–30 (panel options becoming so disparate in their rulings as to cause forum shopping amongst litigators.). *See also* Major Guy P. Glazier *He Called for His Pipe, 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, 102–03 (1998) (In Major Glazier's proposal for a modified random selection process for courts-martial panel members, he identifies a problem that can arise when a minority fraction demographically representative of the accused becomes a part of the court-martial panel: "Further, unlike purposefully engineering a jury to achieve proportional race or gender representation, members who are selected under this (random selection) model are unlikely to view themselves as advocates or voting blocks for a particular cognizable group." (Though Major Glazier does not directly state the presence of such voting block identification or advocacy within the enlisted component of a court-martial panel, the logic can be extended to its inclusion.)).

[54] *See* Shari Seidman Diamond & Pam Mueller, *Empirical Scholarship in Law Reviews*, 6 ANN. REV. LAW SOC. SCI. 581, 587 (2010) (45.85 of a sample of law review articles from 1998 to 2008 included some empirical content); Michael Heise, *An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009*, 2011 U. ILL. L. REV. 1739, 1743(2011) (Figure 2 (showing substantial growth in empirical legal scholarship from 2000 to 2009)). Univ. of Wisconsin Law Sch., Inst. for Legal Stud., *The New Legal Realism Project*, http://www.law.wisc.edu/ils/newlegal.htm (last visited Oct. 9, 2013);

developed by litigators, military policy makers and legal academics.[55] There have been few, if any, statistical reviews or empirical military law articles published in academic journals to date.[56] Traditionally, military legal researchers have relied on analysis of single cases, or comparisons of important cases to find answers to important legal questions. This more conventional legal analysis has always been and likely will always be the cornerstone of solid legal scholarship. The use of statistical analysis is a way to complement conventional legal studies with different research tools.[57] Empirical legal examinations requires researchers to aggregate and synthesize large amounts of information about military justice cases and draw conclusions based on potentially hundreds of observations.

There are many different topics that an empirical legal analysis can explore. Some examples of topics that academic researchers have looked into include: appellate judge voting patterns, the effect of political ideology on U.S. Federal Court decisions and the effects of elected versus appointed judges on judicial decision making.[58] Empirical legal research topics tend to center on questions that require comparisons across a breadth of observations or over the span of many years. The military justice field could possibly benefit from the application of these research ideas and statistical tools. Some possible research questions

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Mark C. Suchman & Elizabeth Mertz, *Toward a New Legal Empiricism: Empirical Legal Studies and New Legal Realism*, 6 ANN. REV. LAW SOC. SCI. 555 (2010) (noting the return of interest in empirical legal research within the U.S. legal academy).

[55] *E.g.*, Leslie A. Gordon, *The Empiricists: Legal Scholars at the Forefront of Data-Based Research*, 82 STAN. LAW. (May 11, 2010), *available at* http://stanfordlawyer.law.stanford.edu/2010/05/the-empiricists/ (last visited Oct. 9, 2013); Linda Brandt Myers, *The Journal of Empirical Legal Studies: Finding the Facts that Challenge Our Assumptions about the World*, 34 CORNELL L. FORUM 10 (Spring 2008), *available at* http://www.lawschool.cornell.edu/research/upload/Spring2008LawForum2.pdf.

[56] A Boolean query using the Westlaw Legal Research Search Engine, revealed no military justice articles with the words "Empirical" in their title (search conducted on April 17, 2012).

[57] *Id.*

[58] *E.g.*, Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. R. 831 (2008) (noting the different types of hypotheses tested by empirical legal research); Christopher Zorn & Jennifer Barnes Bowie, *Ideological Influences on Decision Making in the Federal Judicial Hierarchy: An Empirical Assessment*, 72 J. OF POL. 1212 (2010) (exploring the effects of political ideology on judicial decision making); John A. Sautter & Kari Twaite, *A Fractured Climate? The Political Economy of Public Utility Commissions in an Age of Climate Change*, 22 ELECTRICITY J. 68 (2009) (testing the effects of appointed versus elected judges in public service board decisions).

include: the effect of pretrial agreements on sentence outcomes, how rank effects sentences or the factors that make an acquittal more likely.

D. The Data Set and Cases

The cases used in this analysis occurred between 1 January and 1 July 2011. Case summaries were collected from the USMC Trial Counsel Assistance Project (TCAP) Weekly Case Updates. At the end of each week during the time period in question, TCAP requested case summaries from each trial counsel that prosecuted a case during the previous week. In most cases, these summaries include descriptions such as the judge, the military base where the court-martial occurred, charges, rank of the accused, sentence given, type of fact finder chosen by the accused and whether there was a pretrial agreement (PTA). TCAP publishes this data to prosecutors to give them information on various cases throughout the USMC trial circuit.

There were a total of 218 cases that occurred between 1 January and 1 July 2011 that were prosecuted by Marine Corps Trial Counsel. These cases included 58 general courts-martial and 160 special courts-martial. Of these, a total of 28% of cases during this period were contested and went to trial; 17 general and 44 special courts-martial. The remaining 72% of cases had PTAs, which allowed the accused to plead guilty to some or all of the charges in exchange for negotiated provisions such as a sentencing cap, disallowance of fines or the characterization of the service member's discharge. There was only one officer case during the entire six month period, where the accused decided to negotiate a pretrial agreement. Therefore, the entire sample of contested cases consisted of enlisted accused.

The 61 total contested cases were the only cases examined in this analysis of outcomes and sentencing. Table 1 displays the break down between special and general courts-martial for each type of fact finder. First, the table indicates that there was a preference among accused to choose the option of having at least 1/3 of the panel made up of enlisted members. Out of 61 contested cases, defendants chose enlisted panels 41 times, or 67% of the time. This supports the general contention posited at the outset of this investigation: accused and defense counsel tend to believe that enlisted representation will be more favorable to the enlisted

accused when compared to judge alone or officer only panels.[59] Second, the table indicates that there is a proportional amount of general court-martials for each of the three types of fact finders. General court-martials accounted for 20% to 30% of contested cases for each panel type.

Contested Courts-Martial: Special versus General, 1 January to 1 July 2011				
	Special	General	Total	Percent GCM
Enlisted Representation	29	12	41	29%
Officer Members	7	3	10	30%
Judge Alone	8	2	10	20%
Totals	**44**	**17**	**61**	**28%**

Table 1

Table 1 displays the number of contested general and special court-martial cases per type of fact finder occurring in the sample. "Enlisted Representation" means all contested cases where the member's panel consisted of at least 1/3 enlisted members. "Officer Members" means all contested cases where the member's panel consisted of entirely officers. "Judge Alone" means all contested cases tried before a judge alone as fact finder. All accused in these contested cases were enlisted U.S. Marines in either special or general courts-martial.

III. Do Members Make a Difference?

A. Acquittals versus Convictions: Enlisted Members Are No Different

There is no evidence that enlisted members give any sort of advantage to an accused when looking at acquittals. Table 2 displays the outcomes of cases broken down by the number of acquittals versus the number of convictions for cases. In total there were 25 acquittals during the six month period in question. This accounted for 41% of all contested cases. Acquittal rates for each type of judicial fact finder are

[59] *See* Lovejoy, *supra* note 5, at 28–29 (stating that it is a general consensus among defense counsel that a member's panel has a higher likelihood of acquitting the accused).

relatively proportional, falling roughly between 40% to 50%. Indeed, cases with enlisted representation demonstrated the lowest acquittal rate of all three types of fact finders at 39%. This evidence contradicts the assertion that enlisted representation leads to better outcomes for the accused. In fact, there is no evidence that there is much difference between the three types of fact finders across all cases, even when controlling for other variables—e.g., judge trying case, type of crime and whether the case was a general or special court-martial—across all contested cases.[60]

Contested Case Outcomes and Acquittal Percentages				
	Acquittals	Convictions	Total	Acquittal Rate
Enlisted Representation	16	25	41	39%
Officer Members	4	6	10	40%
Judge Alone	5	5	10	50%
Totals	**25**	**36**	**61**	**41%**

Table 2

Table 2 displays the number of contested case outcomes per type of fact finder occurring in the sample. "Enlisted Representation" means all contested cases where the member's panel consisted of at least 1/3 enlisted members. "Officer Members" means all contested cases where the member's panel consisted of entirely officers. "Judge Alone" means all contested cases tried before a judge alone as fact finder. All accused in these contested cases were enlisted U.S. Marines in either special or general courts-martial.

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[60] In order to rule out the possibility that the choice of fact finder could be a significant variable in acquittals when controlling for other variables not presented in Table 1, a dichotomous logistic regression was estimated with the following equation:

$$Acquit(0,1) = \sum_{i}^{n} UCMJ\ Article_i + CP + Drug\ Distro + \sum_{j}^{n} Judge_j + GCM + Total\ Charges + Enlisted\ Rep$$

Enlisted representation was not a statistically significant predictor of whether an accused would receive an acquittal or conviction at a contested trial. The control variables used in this regression are identical to those explained in Part III.C, below.

B. Enlisted Members & Sentencing: Are Peers Harder on Their Own?

If member panels with enlisted representation do not acquit enlisted defendants at a higher rate, do they at least give them more lenient sentences? Extending the logic that a jury of one's peers will be more likely to represent the interests of the accused it follows that they shouldn't grant harsher sentences if they do convict. Figure 1 shows the results of a comparison of means analysis between panels with enlisted representation and panels with officer members only and judge alone. The cases counted in this analysis were only contested sentencing cases. The first column in the graph shows that the average number of days awarded during sentencing for a trial with a jury of enlisted representation is 830 days. For officer member only panels and judge alone, the average is approximately 85 days. The comparison of means test is significant at the $p<.05$ level.

A "p value" is a probability value between 0 and 1.[61] It measures the probability that the relationship being observed would at least stay consistent (or become stronger) if more random sampling was done. In this case, it measures the certainty of how different the two means are in this comparison. The test allows us to conclude that if 100 different samples of cases were taken, 95 of those samples would have at least the same difference in means as the difference in means reported here.

This comparison of means test conveys a couple of important points. First, judging by this graph alone enlisted members would seem to award sentences on average about 10 times larger than officer members or judge alone. The second important point to take away from Figure 1 is that it supports the argument that defense counsel tend to advise their clients to choose enlisted representation during the most pressing cases. When the stakes are high, for example during a rape or murder trial, enlisted defendants choose enlisted panels. As a result, this graph most likely shows higher sentences because a panel with enlisted representation is being chosen when higher sentences are on the table.

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[61] Mark J. Schervish, *P Values: What They Are and What They Are Not*, 50 AM. STATISTICIAN 203 (1996).

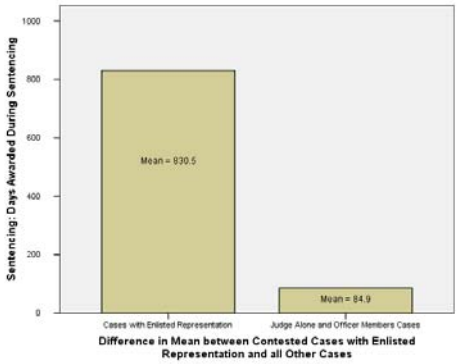

Figure 1. Difference in Mean between Contested Cases with Enlisted Representation and all Other Cases

Figure 1. Difference in means test between cases with Enlisted Representation. Judge Alone cases mean sentencing = 92.3 days. Officer members mean sentencing = 77.5 days. The chart shows that the difference in means is statistically significant at the $p<.05$ level. $t = 2.34$, $p < .05$.

Essentially, the graph suggests that enlisted representation on a panel is always present during trials where more serious crimes are charged. Therefore, it might not be that enlisted representation on a panel leads to higher sentences, but that the cases which panels with enlisted representation are asked to decide warrant more confinement. For example, it could be that officer only panels are more frequently chosen for illegal drug use cases, whereas accused choose enlisted representation for sexual assault and murder cases. Statisticians call this "correlation without causation." Two variables tend to share a pattern, but for reasons that are not related to each other. In this case, without testing the data in order to control for variables that could account for the higher sentences, there is no way to identify whether there is a cause and effect relationship between higher sentences and panels with enlisted representation.

C. Sentencing: Showing Causation

Does the presence of enlisted members lead to higher sentences when controlling for other explanatory variables? In order to explore this question a regression model was developed with control variables to

eliminate the possible effect these variables might have on sentencing. Some of these control variables include controlling for the judge that presided over the trial, the UCMJ article that the accused was convicted of violating and the total number of charges levied against the accused.

A regression model is a statistical estimation that calculates the significance of a relationship between a dependent variable and one or more independent variables.[62] The independent variables are those factors that explain changes in the dependent variable. In this investigation the amount of confinement awarded is the dependent variable. Independent variables can be added to the regression equation in order to control for variation that is expected to occur as a result of that particular variable. For example, in this analysis it is important to control for the type of UCMJ violation that an individual has been convicted because each article in the UCMJ proscribes differing amounts of maximum confinement. If the particular UCMJ article that the accused was convicted of was not controlled for, it leaves open the possibility that changes in which article is being charged could explain resulting changes in the dependent variable, or confinement. Therefore, by controlling for the variable it eliminates the possibility that this variable is causing the changes seen in the dependent variable.

The following regression model was developed with control variables:

$$Sentence = \sum_i^n \ UCMJ\ Article\ i\_i + CP + Drug\ Distro + \sum\_j\^n Judge\ i\_j + GCM + Total\ Charges + Enlisted\ Rep$$

1. Dependent Variable

The dependent variable in this case is the number of days awarded by a fact finder during the sentencing phase of a contested case. This sample does not include sentencing cases where the accused pled guilty under a PTA and then was sentenced by a judge alone. Only contested cases were included in the regression estimation.

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[62] *See, e.g.*, JACOB COHEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES (Psychology Press 2003); JOHN FOX, APPLIED REGRESSION ANALYSIS, LINEAR MODELS AND RELATED METHODS (Sage Publishing 1997).

2. UCMJ Article Violated

The first variable in this equation represents each UCMJ Article controlled for in the equation. The UCMJ Articles for which there were control variables include: Article 86 (Absent Without Leave), Article 92 (Violation of a Lawful Order), Article 107 (False Official Statement), Article 112a (use or distribution of a controlled substance), Article 120 (sexual assault), Article 121 (Larceny), Article 128 (Assault) and Article 134 (Conduct Unbecoming). The regression equation also has two more variables to control for charges of drug distribution (Drug Distro) and child pornography (CP); which were added because they are common, and each typically elicits a higher sentencing from violation of Articles 112a and 134 respectively as compared to other forms of these charges.[63]

3. Judges

Judges can also make a difference. An individual judge's philosophy can affect pre-trial motion rulings, sentencing motions and the overall atmosphere of a court. A control variable for each judge in the Marine Corps trial judiciary was created in order to eliminate the possibility that individual differences between judges are not causing the differences in sentencing amongst the two panel types and judge alone decisions. If judges did not try a contested case that ended with a conviction, then the variable for that judge was dropped from the model.

4. Control Variables

Next, the regression model included variables that reflect the general disposition of the case, including a control variable for whether the case was a general court-martial and for the number of charges the accused faced during trial. Unlike a general court martial, which can potentially levy the maximum penalty during the sentencing phase of a trial, a special court-martial caps its confinement sentences at twelve months. Therefore the choice of court-martial type can directly affect sentencing. The model also controlled for the number of total charges that the

[63] *See, e..g.*, UCMJ art. 112(a) (2008). The maximum sentence for distribution of a controlled substance is fifteen years as opposed to possession of a controlled substance, which is five years.

accused was charged with. A larger quantity of charges can be an indication of a more serious crime that could lead to a higher sentence.

5. Enlisted Representation

The final variable in the equation is a dichotomous (0,1) variable denoting that the contested case had a members' panel with enlisted representation. In this regression estimation, the cases with enlisted representation on their panels are being compared to those with no enlisted representation. Ultimately, the hypothesis tested here is that the variable denoting enlisted representation will have a statistically significant positive correlation with higher sentences, even when controlling for all of the other independent variables that could explain differences in sentencing outcomes. In other words, based on the previous comparison of means tests, it is expected that a members' panel with enlisted representation would award higher sentences.

IV. Sentencing: Enlisted Members Give Higher Sentences

The regression results are displayed in Table 3. Over all, the results are what might be anticipated. First, the model was able to explain 49.9 % of the variation in the dependent variable, which is reported by the adjusted R^2 measurement in Table 3. The coefficient for the general court-martial, GCM, variable was positive and statistically significant at the $p<.05$ level.[64] This indicates that a general court-martial tended to have higher sentences as compared to special court-martials at a statistically significant level. On the other hand, the variable for the number of charges (Number Charges) against the accused is not significant at all. The variables for Judges Daugherty and Richardson both had coefficients that were negative and significant at the $p<.05$ level.

[64] In a regression equation the coefficient of a variable is the slope of a regression line describing the relationship between the independent variable and its effect on the dependent variable. For example, if ($y = ax + b$) is the regression equation, the regression coefficient is the constant (a) that represents the rate of change of the dependent variable (y) as a function of changes in the dependent variable (x). The closer the slope is to 1, the more significant the relationship between the dependent variable (y) and.200 the dependent variable (x).

Next, the variable denoting a conviction for violating UCMJ Article 107 (false official statement) is the only UCMJ Article variable that was statistically significant. The UCMJ Article 107 variable was positive and significant at the p<.01 level. In other words, if an accused was convicted of committing a false official statement he was very likely to have had a higher sentence than in cases where the accused was not convicted of a false official statement. Both the variables for child pornography and drug distribution, specific crimes as opposed to Articles violations, were also statistically significant at the p<.05 level.

OLS Regression of Sentence Awarded at Contested Trials		
OLS Regression—Dependent Variable: Sentence Awarded		
Variables	**Beta Coefficient (Stand)**	**p-value**
(Constant)		.672
Art 86 Conviction	.007	.962
Art 86 Conviction	.174	.454
Art 107 Conviction	.679	.002
Art 112a Conviction	.251	.361
Art 120 Conviction	-.346	.111
Art 121 Conviction	.077	.703
Art 128 Conviction	-.026	.889
Art 134 Conviction	.230	.236
Child Porn Case	.627	.015
Drug Distribution Case	-.517	.031
Judge Daugherty	-.606	.002
Judge Hale	-.109	.468
Judge Jones	-.170	.436
Judge Keane	-.086	.584
Judge Miracle	.012	.940
Judge Mori	.019	.883
Judge Palmer	-.231	.200
Judge Plummer	.033	.826
Judge Richardson	-.368	.041
Judge Riggs	.018	.898
Unknown Judge	-.240	.152
GCM	.742	.020
Number Charges	-.191	.342
Enlisted Members	**.465**	**.011**
Adj. R-squ.	**.499**	
N	**39**	

Table 3. OLS Regression of Sentence Awarded at Contested Trials

Dependent variable is the total number of days awarded by the finder of fact during the sentencing portion of the accused's trial. Analysis was run on SPSS 13.[65] This analysis only used contested cases that resulted in a conviction. All guilty pleas and acquittals and were dropped from the analysis.

Finally, the results of the regression estimation show that even when controlling for other variables that may explain differences in sentencing after a contested trial, enlisted members on a panel were still a statistically significant factor in predicting higher sentences as compared to judge alone or officer only sentencing. The coefficient for the enlisted representation variable was positively correlated with higher sentences and significant at $p<.05$ level. In other words, if we were to take another 100 samples of cases from the USMC trial circuit at least 95% of them would have the same or stronger relationship between enlisted member panels and higher sentences. We can safely conclude that if an enlisted accused chose to have enlisted representation on a court-martial panel and was convicted, they were likely to have had a higher sentence than if they had chosen trial by judge alone or officer only panels.

V. Discussion

Military defense counsels have many calculations that they make when advising their clients. Pending charges, the accused's personal history, and disposition of the evidence in the case all factor into the decision on whether to elect enlisted representation on a panel. The analysis conducted here suggests that when making this decision defense counsel should not view it as a hard and fast rule that enlisted members will always produce better results for the enlisted accused. To the contrary, enlisted panels may prove disadvantageous to an enlisted accused.

The results shown here do not mean that in every case enlisted representation on a panel should not be sought. Empirical analysis is about the aggregation of data, pattern analysis, and hypotheses testing. These results should be viewed as suggestive in nature. The results

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[65] Statistical Package for the Social Sciences (SPSS) 13 is the thirteenth version of a computer program used by social scientists to conduct statistical analysis. For the most current specifications, see http://www-01.ibm.com/software/analytics/spss/. For history, background and use, see G. ARGYROUS, STATISTICS FOR RESEARCH: WITH A GUIDE TO SPSS (3d ed., SAGE Publishing, London, 2011).

offered here, while persuasive, are not all encompassing. They suggest that on average there are general trends reflected in contested trials that enlisted members may not be a good choice for an enlisted accused at all times.

The results show that a judge sitting alone or an officer only panel tended to have as many or more acquittals than panels with enlisted members. The higher frequency of choosing an enlisted panel is demonstrated by the data. In the sample cases of the data set used in the analysis 67% (41/61) of all contested cases had enlisted representation. However, though there existed a generalized preference by enlisted accused for other enlisted service members on their court-martial panel, there was no clear benefit. Each of the other two fact finders acquitted accused service members at a higher rate. This analysis also showed that once convicted, enlisted members tend to award a more severe confinement sentence. The results paint a potentially ominous picture for an enlisted accused who chooses a panel with enlisted representation: In these cases, enlisted members chose an enlisted panel intuiting that selection would present a higher likelihood of acquittal. However paradoxically, the accused receives no statistical benefit towards a higher chance of acquittal, and actually statistically increases the chance of a higher sentence if convicted.

It is also important to note the limitations of the conclusions being drawn here. The analysis only covers cases from a six month period. Furthermore, the cases are only from the United States Marine Corps, and are not indicative of how military justice actors perform in other service branches. While there is no reason to believe that this sample is biased or not indicative of trends across all cases, further investigations should attempt to verify these findings as more trial data becomes available. Ideally, more data will become available from other service branches that will allow for confirmation or rejection of the findings presented here. Indeed, the insights of empirical legal analysis will always be confined by the constraints of limited data. The collection of data and the testing of other hypotheses will add to the military's understanding of the military justice process.

VI. Conclusion

This article began with the question of whether a jury of one's peers always offers the best outcome for a defendant. In order to answer this

question data used was collected from all cases in the Marine Corps from 1 January to 1 July 2011. Using statistical analysis, this article concludes that: no, a court-martial panel including one's peers does not produce better outcomes in terms of acquittals or confinement periods for an enlisted accused.