HE DID IT, BUT SO WHAT? WHY PERMITTING NULLIFICATION AT COURT-MARTIAL RIGHTFULLY ALLOWS MEMBERS TO USE THEIR CONSCIENCES IN DELIBERATIONS

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I. Introduction

Lieutenant Colonel (LTC) John Smith sits nervously at the table, wiping beads of sweat off his forehead. His mind is racing. His hands are shaking. Dreading what may happen to him; his twenty-year military career is on the line. Lieutenant Colonel Smith is the accused at a General Court-Martial, sitting next to his military defense counsel, who appears equally concerned. Evidence has been introduced, witnesses have testified, and arguments have been made. The military judge instructed the members, who just completed three hours of deliberations. The bailiff abruptly yells "all rise!" and an eerie silence fills the courtroom. Lieutenant Colonel Smith fears that everyone in the courtroom can hear the pounding of his rapidly beating heart as the members file in to announce his fate. After hours of trial testimony, the question remains: Could they really convict him simply for breaking curfew by ten minutes?

Momentarily, LTC Smith flashed back to the events that led him to this perilous position. Assigned to the 65th Medical Brigade,[1] he was the

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[1] The 65th Medical Brigade is a subordinate command of Eighth Army. United States

Officer-in-Charge of a medical clinic located on Camp Walker, Republic of Korea. Three months ago, LTC Smith was alone in his clinic conducting a brigade-directed 100% supply inventory late into the night. It was 2345, and he was to give a status brief to the Brigade Commander at 0600. While finishing up, LTC Smith accidentally knocked over a poorly-secured container of hydrogen peroxide, which fell on him and ruined his only clean uniform. He quickly completed the inventory and hurried to an off-post laundry facility at 0030 to ensure he had a clean uniform for his early morning briefing. He lost track of time, and at approximately 0110, members of the courtesy patrol spotted LTC Smith at the facility and contacted the military police, who coordinated with the Korean police, who detained him. He was in violation of the United States Forces-Korea (USFK) Curfew Policy,[2] a punitive general order, which places all servicemembers in Korea on a curfew, prohibiting them from being off-installation between 0100 and 0500 unless they are inside a private residence or in their approved place of lodging for the evening.[3] Wanting to make an example out of a senior officer to curb the rise of unit indiscipline,[4] LTC Smith's chain of command took his ten-minute curfew violation and set it on a path towards a general court-martial (GCM), opting against several traditional, lower-level dispositions.[5] Now LTC Smith waits to find out if his poor time-management will result in a criminal conviction. He waits to find out if he will become a felon.

Back at the defense table, LTC Smith's counsel prepares to stand with

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Forces–Korea (USFK) has administrative jurisdiction over all Eighth Army units.

[2] Memorandum from USFK Commanding General to USFK personnel, subject: General Order Regarding Off-Installation Curfew (14 Jan. 2013).

[3] *Id*. para. 7. The memorandum states it is a punitive general order and that "[s]ervice members who fail to comply with the provisions of this general order are subject to punishment under the UCMJ, as well as adverse administrative action authorized by applicable laws and regulations." Thus though unstated in the memorandum, a violation of this order could be punishable under Article 92, Uniform Code of Military Justice (UCMJ), as a failure to obey a lawful general order. *Id.*

[4] Curfew violations in Korea had recently spiked and the timing of Lieutenant Colonel (LTC) Smith's curfew violation coincided with a rash of off-post criminal activity by young Soldiers, which had angered local Korean citizens and caused tension within the USFK/Korean alliance.

[5] Lower-level dispositions include non-judicial punishment in accordance with Article 15 or a General Officer Memorandum of Reprimand (GOMOR), pursuant to U.S. DEP'T OF ARMY, REG. 600-37, UNFAVORABLE INFORMATION paras. 3-4(a)(2)(c), 4 (19 Dec. 1986) [hereinafter AR 600-37] (any general officer who is senior to the recipient of a letter of reprimand has the authority to issue and direct the filing in the recipient's military personnel records jacket).

his client as the military judge reviews the findings. The frustration of having his most senior client face the most severe forum for disposition in the military for mere carelessness was matched only by his feeling of helplessness in defending him.[6] Lieutenant Colonel Smith's counsel knew he had neither the facts nor the law on his side, and the prosecution's case met the elements of Article 92, Uniform Code of Military Justice (UCMJ), as charged.[7] After failing for months to convince the Staff Judge Advocate to recommend to the Commanding General a less severe disposition, LTC Smith's counsel struggled to craft his defense. Ultimately the defense counsel determined that the only way to defend his client was to ignore the facts and attack the curfew policy as unreasonable when applied to LTC Smith's late-night laundry.

Unfortunately for LTC Smith, his counsel was prohibited from employing this strategy, which is known as "nullification." Simply put, nullification is not a recognized defense to a charged offense. Rather, nullification is "a mechanism that permits a jury, as community conscience, to disregard the strict requirements of law where it finds that those requirements cannot justly be applied in a particular case."[8] During voir dire, the military judge prevented counsel from asking the members whether they would be able to acquit LTC Smith if they disagreed with the curfew policy or how it applied to LTC Smith's actions. Efforts to argue that LTC Smith should be acquitted of violating a lawful general order because he lacked criminal intent were quickly met with government objections, which the military judge sustained, adding a judicial instruction to the members that LTC Smith's intent was irrelevant. Later, the military judge rejected the defense-requested findings instructions regarding the panel's ability to acquit if they had a reasonable doubt as to the wisdom of the curfew policy, stating that there was no right to a nullification defense.[9] Finally, when the members

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[6] The USFK Curfew Policy no doubt applied to LTC Smith and required that he be home by 0100. He was found and detained at the laundry facility at 0110.

[7] Under the UCMJ art. 92 (2012), the government must prove three elements: (1) that there was in effect a certain lawful general order or regulation; (2) that the accused had a duty to obey it; and (3) that the accused violated or failed to obey the order or regulation. *Id*.

[8] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972) (Bazelon, C.J., concurring in part and dissenting in part).

[9] United States v. Hardy, 46 M.J. 67, 75 (C.A.A.F. 1997). *See infra* Part III. The determination of lawfulness is an issue for the military judge, not the panel, and consequently even that avenue of argument is foreclosed. *United States v. New*, 55 M.J. 95, 105 (C.A.A.F. 2001) (concluding that lawfulness of an order is a question of law for the military judge to determine).

returned to court during deliberations to ask if they were obligated to render a guilty verdict if all elements were proved, the judge instructed them in the affirmative.

The members struggled in deliberations for three hours. They agreed that LTC Smith violated the USFK Curfew Policy. However, they also believed that the policy was not intended to criminalize LTC Smith's actions but to prevent serious crimes within Korea that historically occurred during the night by junior Soldiers. Further, after discussions, the members believed that a criminal conviction at a GCM was too severe a consequence.

Though it may appear excessive to convene *United States v. Smith* for a ten-minute curfew violation, the scenario of a factually-guilty accused who lacks specific intent is not uncommon in the military-justice system. If strictly interpreting the facts and law necessarily leads to a decision to convict, but the thought of convicting LTC Smith conflicts with their consciences, how should the panel members resolve this case?

In such cases, military judges should grant defense counsel latitude to advocate by confronting the law underlying the case, and panel members should be told that they may use their common sense and that their conscience may guide them along with the law and the evidence admitted at court-martial. The history of jury trials is rich with individual examples of nullification, a practice meant to bring about a just result or signal a change in the community conscience. Over time, the practice has become disfavored; civilian and military judges have prohibited nullification tactics in voir dire,[10] arguments,[11] and instructions.[12] Yet present panel guidance tells members to decide cases through consideration of the law, the evidence, and each members own conscience. And consequently, despite the military's emphasis on strict obedience to the law, discretion exists within its justice system to allow members to hear arguments on the merits of both the facts and laws charged. Military judges should use this discretion and allow

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[10] United States v. Smith, 27 M.J. 25, 29 (C.M.A. 1988) (affirming Army Court decision supporting judge's prohibition of defense voir dire questions that were "obviously designed to induce 'jury nullification'").

[11] United States v. Trujillo, 714 F.2d 102 (11th Cir. 1983); *Smith*, 27 M.J. at 29. *But see Dougherty*, 473 F.2d at 1139–40 (Bazelon, C.J., concurring in part and dissenting in part) (finding considerable harm in the "deliberate lack of candor" in barring defense counsel from alerting the jury of their nullification power).

[12] *Hardy*, 46 M.J. at 75.

nullification in appropriate cases, such as LTC Smith's.

To explore the present-day dilemma that exists in LTC Smith's case, and others, where members are forced to choose between applying a strictly judge-defined law or the dictates of their consciences, the next section will discuss nullification through the evolution of the jury.[13] Part II explores the civilian criminal-justice system, which has transitioned the role of the jury from that of a "community conscience," which is tasked to judge both the facts and the law to a group whose considerations are limited by judicial interpretation of applicable law. With that transition, overt nullification has been all but eliminated in trial practice; nullification is now carried out secretly in the deliberation room.

Following a look at the evolution of the jury, Part III views the unique attributes of the military-justice system to determine the extent to which the military can allow nullification argumentation and instruction at court-martial. The military's selection process for panel members who determine the findings and the sentence, and the present standard instructions that support the conscience-based philosophy are among the differences that justify arguments in Part IV that nullification arguments and instructions should be a growing practice. The arguments in Part IV supporting increased use of the nullification doctrine also define the scope of its appropriate use; the type of case, the phase of trial, and the extent of the use of nullification are case-specific and will be delineated to ensure consistency with both legal precedent and justice.

After making the argument for expanded use of nullification in military-justice practice, the appendices provide the necessary guidance for implementation in trial practice. Specifically, Appendix A contains sample voir dire questions; Appendix B contains a sample instruction; and Appendix C contains a sample consent form. Implementation will include guidance to modify military-justice doctrine, accounting for the general, practical, judicial, ethical, and military-specific concerns of nullification opponents, with LTC Smith's hypothetical serving as a guide.

The ultimate issue is not how LTC Smith's curfew-related court-martial should end. More significant is how to repair a military-justice system that prevents a defense counsel from asking the fact-finder and

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[13] *See infra* Part II.

sentencing authority the only question available to mount a winning defense: "He did it, but so what?"

II. Nullification Throughout the History of the Trial by Jury

> *The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge.*[14]

Today we review the doctrine of nullification "as a mechanism that permits a jury . . . to disregard the strict requirements of law where it finds that those requirements cannot be justly applied . . ."[15] Jurors in early American history, however, did not apply nullification routinely, formally, or deliberately. Rather, in particular cases one or more jurors, acting as a "community conscience," applied moral judgments that superseded those of strict judgments based on the application of facts presented to law as charged. Early history contains several famous examples of juries leveraging their plenary powers to decide cases, often to their detriment. Though history is rife with anecdotal examples of such juries, beginning the late 19th century, judicial opinions have consistently refused to encourage or permit nullification, arguing that such a practice is incompatible with the concept of an impartial jury. Ultimately, federal judges have settled on an uneasy truce; Judges acknowledge juries' power to covertly[16] disregard their lawful instructions while refusing to allow overt observance of nullification – or even open acknowledgment of its existence. Consequently, anecdotal evidence exists to indicate that nullification is occurring in secret, as jurors, acting on their own conscience, occasionally hang juries or return not-guilty verdicts.

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[14] *Dougherty*, 473 F.2d at 1140.

[15] *Id.*

[16] With few exceptions, what happens in the deliberation room stays in the deliberation room. *See, e.g.*, FED. R. EVID. 606(b) (prohibiting inquiry into the validity of a verdict or indictment through juror testimony regarding statements or incidents occurring during the jury's deliberations); MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 606(b) (2012) (containing substantially the same protections for the secrecy of court-martial panel deliberations).

A. The High Cost of Pre-Constitution Not Guilty Verdicts

Modern juries were not always able to decide cases according to their beliefs, at least without personal cost. In 1554, a jury acquitted Sir Nicholas Throckmorton on treason charges,[17] and the jury was punished by the court.[18] Later in what is commonly referred to as "Bushel's Case" in 1670,[19] jurors in a criminal trial were punished for their verdict.

In Bushel's case, William Mead and William Penn[20] faced trial for violating the Conventicle Act by holding a religious gathering among Quakers (and not the government-approved Church of England).[21] Before deliberations, the jury instructions amounted to a summary of the facts that supported the court's view of Mead and Penn's guilt, calling on the jury to "keep to" the facts and reminding them of the "peril" they faced as a sworn juror.[22] Unmoved by this apparent threat, the jury failed to return a guilty verdict.[23]

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[17] ANNABEL PATTERSON, THE TRIAL OF NICHOLAS THROCKMORTON 81 (1998). Despite being found not guilty, Throckmorton was taken away rather than be discharged because there were "other matters to charge him with." *Id.*

[18] *Id.* at 82. The prosecuting attorney sought a five-hundred pound fine for each juror, who had "strangely acquitted the prisoner of his treasons." Juror Whetston pleaded: "I pray you, my lords, be good to us, and let us not be molested for discharging our consciences truly." *Id.*

[19] *Bushell's Case*, (1670) 124 Eng. Rep. 1006.

[20] Penn, a Quaker, often wrote on the topic of the need for religious freedom and was consequently persecuted through imprisonment and trials, where rights afforded to others were routinely denied to him. *See, e.g.*, Alex Holtzman, *Freedom Through Compromise: William Penn's Experiment in Religious Freedom*, HERODOTUS J. OF HIST. (2012).

[21] *See, e.g.*, BONNELYN YOUNG KUNZE, MARGARET FELL AND THE RISE OF QUAKERISM 179 (1994). The Conventicle Act sought to destroy Quaker meetings in the area by fining and imprisoning those who gathered to practice their faith.

[22] The bench instructed the jury:

> You have heard what the Indictment is, it is for preaching to the people, and drawing a tumultuous company after them, and Mr. Penn was speaking; if they should not be disturbed, you see they will go on; there are three or four witnesses that *have proved this*, that he did preach there; that Mr. Mead did allow of it: . . . now *we are upon the matter of fact, which you are to keep to*, and observe, as what hath been fully sworn *at your peril*.

JEFFREY B. ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 71 (1994) (emphasis added).

[23] The jury angered the court by initially finding Penn "Guilty of speaking in Gracechurch-street," which stopped short of answering the ultimate question of whether he committed the act of unlawful assembly as charged. *Id.*

Perhaps predictably, the bench disagreed. After the verdict was read, a judge orally attacked juror Edward Bushel for his conduct.[24] Further, the court ordered that the jury be imprisoned without food, water, heat, or tobacco until it reached a "proper verdict."[25] After spending two nights imprisoned, the jury rendered "not guilty" verdicts against both Penn and Mead, and the court fined them for rendering a decision contrary to the evidence and their instructions.[26] Juror Bushel refused to pay the fine, and Sir John Vaughan, Chief Justice of the Court of Common Pleas, ruled against such jury coercion, holding that a juror could not be punished based solely on returning a proper verdict.[27]

Perhaps *Bushel's Case* was instructive not only because it illuminated the coercive relationship between judges and juries in the 17th century, but also because it was an early example of jury-nullification advocacy. William Penn invited the jury to assess for themselves the law he was being charged with violating, imploring them to use their consciences.[28] They ultimately did.

In 1649, another historical case of jury nullification occurred as John Lilburne was on trial for high treason for his role in inciting a rebellion against Oliver Cromwell, Lord Protector of the Commonwealth of England, Scotland, and Ireland.[29] The popular Lilburne defended

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[24] John Robinson, judge, was reported to have told Edward Bushel: "Mr. Bushel, I have known you near this 14 years; you have thrust yourself upon this jury, because you think there is some service for you: I tell you, you deserve to be indicted more than any man that hath been brought to the bar this day." Lloyd Duhaime, *1670: The Jury Earns its Independence (*Bushel's Case*)*, DUHAIME (Oct. 19, 2011), http://www.duhaime.org/LawMuseum/LawArticle-1335/1670-The-Jury-Earns-Its-Independence-Bushels- case.aspx (last visited Nov. 25, 2013).

[25] ABRAMSON, *supra* note 22, at 71–72.

[26] *Id.* at 72.

[27] *See generally* JOHN HOSTETTLER, CRIMINAL JURY OLD AND NEW: JURY POWER FROM EARLY TIMES TO THE PRESENT DAY 72 (2004).

[28] ABRAMSON, *supra* note 22, at 70. After asking the court "to 'produce' for the jury the law upon which the indictment was based, so that the jury could judge for itself whether Quaker meetings constituted unlawful assemblies," the court responded that "common law" formed the lawful basis for the charges against him. Penn's responses – "Where is that common law?" and "for if it be common, it should not be so hard to produce" – highlighted his defense, which he was later prohibited to make: namely, that he was not guilty because the law was unjust.

[29] EDUARD BERNSTEIN, SOZIALISMUS UND DEMOKRATIE IN DER GROSSEN ENGLISCHEN REVOLUTION (1895), *translated in* H. J. STENNING, CROMWELL AND COMMUNISM: SOCIALISM AND DEMOCRACY IN THE GREAT ENGLISH REVOLUTION 154–56 (1963), *available at* https://www.marxists.org/reference/archive/bernstein/works/1895/cromwell/

himself, despite evidence that he offered to pay others to overthrow Cromwell, and the jury acquitted him; each of the jurors were immediately and separately examined about their "not guilty" verdict, but all stood by their decision.[30] Lilburne invoked nullification when he spoke to the jury, reportedly advising them of their roles as "judges of law as well as fact" and raising their importance relative to the court, which he referred to as "only the pronouncers of their [jury's] sentence, will, and mind."[31]

A tradition of jury independence came to the shores of the New World. In 1734, John Peter Zenger used his paper, the *New York Weekly Journal*, to print materials negative to the Governor, resulting in criminal charges of seditious libel. Imprisoned and represented at trial by Andrew Hamilton, Zenger had public opinion on his side, but not the law – at the time, truth was no defense.[32] Hamilton argued against the law itself, without denying the underlying facts of the case against Zenger.[33] Hamilton argued that the facts in the newspaper were truth and that only publishing *false* information should be libelous;[34] Peter Zenger was found not guilty.[35]

11-levellers.htm).

[30] BERNSTEIN, *supra* note 29, at 156. Afterwards, the "Little Parliament" that adjudged him was dissolved and a new constitution was created that expanded Cromwell's powers to near King levels. Lilburne, who the jury had just acquitted, was not free; he was kept jailed for the "seditious" statements made in the course of his defense at trial. *Id.*

[31] Lilburne's argument was interrupted by Lord Keble, a member of the court, who told Lilburne that the jurors were judges of fact only and that the opinion of the court was that they were not judges of matters of law. NORMAN J. FINKEL, COMMONSENSE JUSTICE: JUROR'S NOTIONS OF THE LAW 26 (2001). *Commonsense Justice* details the Lilburne trial and questions whether the outcome was an act of nullification based on disdain for the law or for the punishment if a guilty verdict was rendered. *Id.*

[32] "But it has been said already, that it may be a Libel, notwithstanding it may be true." LIVINGSTON RUTHERFURD, JOHN PETER ZENGER: HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 79 (1904).

[33] *Id.* at 69. In relation to the libel charge, Andrew Hamilton told the court: "I cannot think it proper for me to deny the Publication of a Complaint, which I think is the Right of every free-born Subject to make, when the Matters so published can be supported with Truth . . . ." *Id.*

[34] *Id.* at 206 (The prosecuting attorney maintained that precedents made no distinction between controversial and negative works that were true or false. The Chief Justice concurred that truth was not a defense: "a Libel is not to be justified; for it is nevertheless a Libel that it is true.").

[35] *Id.* at 241.

B. The Constitutional Protections of the Modern U.S. Jury

These cases of judicial coercion and retribution against jurors whose verdicts run counter to their learned opinions represent the type of abuses of authority that led to the Revolution and subsequent Constitution and Bill of Rights. The Sixth Amendment to the Constitution, ratified in 1791, established the right to a trial by an impartial jury in all criminal prosecutions.[36] The Fourteenth Amendment later ensured the jury trial is applicable in state courts.[37] A jury trial removes the possibility of conviction and subsequent loss of life or liberty by judicial determination, historically feared as biased towards and beholden to the government prosecuting the defendant. The Fifth Amendment contains a prohibition against double jeopardy, which protects an individual from being subjected to trial and possible conviction more than once for an alleged offense.[38] This prevents an accused from being prosecuted by the State repeatedly as a measure to ensure (eventual) conviction.[39] But

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[36] U.S. CONST. art. VI; Patton v. United States, 281 U.S. 276, 288 (1930) ("A trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted."); Williams v. Florida, 399 U.S. 78, 86–92 (1970) (examining the historical rule, which is no longer required under the interpretations of the Sixth Amendment, requiring a twelve-person panel). Impartiality in common law meant that jurors had no *direct* ties to the case; it was assumed that because they came from the same area, that they knew about either the case or the participants of the case. *See* Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1618–19 (2011) (citing Steven A. Engel, *The Public's Vicinage Right: A Constitutional Argument*, 75 N.Y.U. L. REV. 1658, 1674 (2000)) (describing the scope of "impartiality" throughout history); *see also* Duncan v. State of La., 391 U.S. 145, 154 (1968) (noting the jury trial's strong support, inclusion in all states as a right for serious criminal cases, and lack of State efforts to eliminate the right).

[37] *See, e.g.*, *Duncan*, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.").

[38] As described by the Court in *Crist v. Bretz*, Article V provides, in part

> No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb"; The guarantee against double jeopardy "derived from English common law, which followed then, as it does now, the relatively simple rule that a defendant has but put in jeopardy only when there has been a conviction or an acquittal-after a complete trial.

437 U.S. 28, 33 (1978).

[39] Unfortunately, the prohibition against double jeopardy would not have benefitted John Lilburne, who was acquitted for treason but immediately kept detained for seditious comments made during his own trial. BERNSTEIN *supra* note 29, at 156.

despite the strong constitutional basis of the jury, the role of the jury has been progressively narrowed.

C. The Limited Role of Present-Day Juries to Decide Facts

In 1828, a "jury" was defined as a group empanelled and sworn to inquire into and try any matter of fact, and to declare the truth on the evidence given them in the case.[40] In criminal prosecutions, these juries consisted of twelve men who decided both the law and the facts.[41] But by 2009, the criminal "jury" definition was that of a "group of persons selected according to law and given the power to decide questions of fact and return a verdict in the case submitted to them."[42]

The removal of any mention of juries deciding the law at trial may be a reflection of case law that (re-)defined the roles of the juries as they related to judges. In 1794, U.S. Supreme Court Justice John Jay told a jury "[Y]ou have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy."[43] But later post-revolution judges, independent and learned, have used instructions to assert themselves into the process, resulting in a departure from the jury right to judge the law along with the case facts.[44]

One of the crucial features of the modern criminal jury is the rule requiring a general verdict when the jury decides which party prevails on each charge without listing specific findings on disputed issues. This grants juries a "general veto power" that is not influenced or hindered by a judicial requirement to "answer in writing a detailed list of questions or explain its reasons" for their verdict.[45] The general-verdict requirement

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[40] The word "jury" comes from the Latin word "juro" meaning "to swear." *Jury*, NOAH WEBSTER, 1828 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (2013), *available at* http://1828.mshaffer.com/d/word/jury.

[41] *Id.*

[42] BLACK'S LAW DICTIONARY Jury (9th ed. 2009).

[43] Georgia v. Brailsford, 3 U.S. 1, 4 (1794); *see, e.g.*, Christopher C. Schwan, *Right Up to the Line: The Ethics of Advancing Nullification Arguments to the Jury*, 29 J. LEGAL PROF. 293, 294 (2005).

[44] *See, e.g.*, United States v. Moylan, 417 F.2d 1002, 1005–06 (4th Cir. 1969).

[45] United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980). "In general, special verdicts are not favored [in criminal cases] and 'may in fact be more productive of confusion than of clarity.'" *Id.* at 444; *see also* United States v. Reed, 147 F.3d 1178, 1180 (9th Cir.1998) ("This rule is fashioned to protect the rights of the criminal defendants by preventing the court from pressuring the jury to convict.").

originates from the string of egregious cases of judicial abuse of power over juries during English rule, when jury verdicts differing from the judge's views resulted in interrogations, threats, fines, and even imprisonment.[46] The general verdict safeguards the modern jury because juries that return not-guilty verdicts may not be compelled to explain why.[47]

In 1895, the U.S. Supreme Court in *Sparf v. United States* set forth the relative roles of juries and the judge in a criminal trial,[48] and in so doing, the Court also described how the general verdict conceals whether juries properly found the facts in accordance with the instructed law.[49] To be sure, the Court stated that juries find the case's facts using the law as the judge instructs them.[50] But the Court also noted that, in a limited sense, the jury *does* have a power and legal right to "pass upon both the law and the fact." It reasoned that: (1) "[t]he law authorizes the jury to

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[46] "In other words, the rule against special verdicts seemingly stems from the common law right of the jury to nullify without being reversed by the king's judges." United States v. Blackwell, 459 F.3d 739, 766 (6th Cir. 2006) (citing *Wilson*, 629 F.2d at 443).

[47] *Cf.* State v. Collier, 90 N.J. 117, 121–22 (1982) (trial court committed reversible error in directing through instructions a verdict of guilty on charge of contributing to the delinquency of a minor in violation of defendant's constitutional rights).

[48] 156 U.S. 51, 68–69 (1895). In a murder trial where the defendants were denied a manslaughter instruction due to the judge's view that the evidence was insufficient, the jury returned with questions. After a juror asked in multiple ways whether they could consider a finding of guilt for manslaughter rather than murder as charged, and the judge answered in the negative, the following dialogue ensued:

> Juror: If we bring in a verdict of guilty, that is capital punishment?
> Court: Yes.
> Juror: Then there is no other verdict we can bring in except guilty or not guilty?
> Court: In a proper case, a verdict for manslaughter may be rendered, as the district attorney has stated, and even in this case you have the physical power to do so; but, as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court.

Id.

[49] *Id.*at 69. The Court acknowledged of the existence of jury nullification, noting that a general verdict either to convict or acquit embodies the result of both law and fact, and that there is no way to ascertain whether the jury passed their judgment on the law, or only on the evidence. *Id.*

[50] *Id.* at 69; *see also* United States v. Carr, 424 F.3d 213 (2d Cir. 2005) (finding no error in judge's instruction to the jury that it has a duty to find a guilty verdict if it concludes the government has proven its case beyond a reasonable doubt); United States v. Pierre, 974 F.2d 1355 (D.C. Cir. 1992).

adjudicate definitively on the evidence;" (2) "the law presumes that they acted upon correct rules of law given then by the judge;" and therefore (3) "[t]he verdict . . . stands conclusive and unquestionable, in point both of law and fact."[51] This interpretation recognizes how the jury can use the facts *in conjunction with the law. Sparf* did not discuss whether the jury can be made aware of its power to disregard the law and nullify lawful instructions.

D. Jurors as Fact-finders; Overt Nullification Barred

Modern courts have rejected the practice of nullification in many forms. Counsel are prohibited from arguing jury nullification during their closing arguments.[52] There, in arguing the law to the jury before findings deliberations, arguments are limited to "principles that will later be incorporated and charged to the jury."[53] Courts and counsel are required to refrain from encouraging jurors to violate their oaths.[54]

The primary justification for the downfall of nullification came in a D.C. Circuit Court of Appeals decision *United States v. Dougherty*. Again appreciating nullification's significant purpose in defeating distrusted judges, who were appointed and removable by the king, it was

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[51] *Id.* at 80. The Court quotes Justice Samuel Chase, whose position was that while it was the criminal courts duty to state the law arising on the facts, the jury's duty was to decide "both the law and facts, on their consideration of the whole case." *Id.*

[52] United States v. Dougherty, 473 F.2d 1113, 1130–37 (D.C. Cir. 1972); *see also* United States v. Moylan, 417 F.2d 1002, 1005–09 (4th Cir. 1969). The dissenting opinion in *Dougherty* understands that some criminal prohibitions lack specific criminal intent. These "faultless crimes" make difficult cases and require juries to use their status as the final check on the community conscience to determine whether the accused should be found guilty, regardless of whether the facts demonstrate guilt on the charge. *Id. at 1142.* Courts have used numerous terms to instruct on guilt and blameworthiness, including 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'willfulness,' and 'scienter'. *See* Morissette v. United States, 342 U.S. 246, 252 (1952). However, some criminal offenses have a *mens rea* requirement that falls well below mental culpability or "evil purpose." Nullification, contemplated and carried out by deliberating juries, is often employed to deny a criminal label for a defendant whose conduct runs afoul of the plain language of the charged offense but occurred in the absence of the criminal intent that makes the guilty truly guilty.

[53] United States v. Trujillo, 714 F.2d 102, 106 (11th Cir.1983) (citing United States v. Sawyer, 443 F.2d 712, 714 & n.11 (D.C. Cir. 1971) ("Before stating a legal principle, counsel should be sure that it will in fact be included in the charge.")).

[54] *Id.* The court simultaneously recognized that a jury may render a verdict at odds with the evidence or the law.

actually the strength of the new republic that halted nullification.[55] The D.C. circuit court pointed to an 1835 opinion in *Battiste* as the crucial case that marked the turning point from juries that decided facts and made its own law to accepting that the democratic process outside the courtroom was the better avenue for changing the law.[56]

Later federal courts dispensed with this careful nostalgia for nullification before rejecting its modern-day application.[57] The jury retained its role as a "buffer between the accused and the state," however it was important to distinguish between a jury's right to reach verdicts that are not aligned with the law and a court's duty to impartially apply and uphold the law.[58] Following that duty, courts have upheld judicial decisions to remove jurors who stated that they did not have to follow the law and refused to engage in deliberations, or whose actions raised doubts as to whether the juror would follow the law after specific instructions.[59]

Efforts to argue for nullification based on the potential for an unjust sentence, such as state-imposed mandatory minimums or severe collateral consequences, are also prohibited. Courts have consistently held that barring argument regarding potential sentences is appropriate "when a jury has no sentencing function" so that the jury can "reach its verdict without regard to what sentence might be imposed."[60] This prohibition and the secrecy regarding the sentencing consequences of a

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[55] *Dougherty*, 473 F.2d at 1132.

[56] United States v. Battiste, 24 F.Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (holding that the jury must accept the law as given by the judge). *Battiste* differed significantly from *United States v. Wilson*, 28 F. Cas. 699, 708 (CC ED Pa 1830) ("[Y]ou will distinctly understand that you are the judges of both of the law and the fact in a criminal case, and are not bound by the opinion of the court.").

[57] "To have given an instruction on nullification would have undermined the impartial determination of justice based on law." United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988) (holding that "[a] jury's 'right' to reach any verdict it wishes does not, however, infringe on the duty of the court to instruct the jury only as to the correct law applicable to the particular case).

[58] *Id.*

[59] United States v. Abbell, 271 F.3d 1286 (11th Cir. 2001) (removal proper when jurors reported to judge that one juror outwardly rejected the law and was generally abrasive); *see also* People v. Williams, 21 P.3d 1209 (Cal. 2001) (juror properly removed after refusal to participate in deliberations in statutory rape case because he believed the law was wrong; record demonstrated the juror was "unable or unwilling to follow the court's instructions").

[60] Shannon v. United States, 512 U.S. 573, 579 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40 (1975)).

guilty verdict is based on relevancy grounds, as the disposition of the defendant "tend[s] to draw the attention of the jury away from their chief function as sole judges of the facts, open the door to compromise verdicts and to confuse the issue or issues to be decided."[61] This rationale also explains a key function of the jury system: after the jury has arrived at a guilty verdict, the *judge* imposes a sentence.[62]

Though nullification has been barred in federal courts, state courts in Maryland and Indiana provide criminal juries with the constitutional right to decide both law and fact, though this right is not absolute.[63] New Hampshire courts provide juries with the equivalent of a jury-nullification instruction through its "*Wentworth* instruction", which specifically instructs that juries *must* find the defendant not guilty if they have a reasonable doubt but *should* find the defendant guilty if there is no reasonable doubt.[64] The effect of the word "should" in the instruction is nullification because it allows for a scenario when the jury finds all elements of the charge have been proven beyond a reasonable doubt but acquits the defendant anyway.[65]

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[61] Pope v. United States, 298 F.2d 507, 508 (5th Cir. 1962) (barring evidence related to statutory sentences, availability or likelihood of future probation, parole eligibility, or other matters).

[62] *Shannon*, 512 U.S. at 579. "Providing jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities and creates a strong possibility of confusion." *Id. See also* Rogers v. United States, 422 U.S. 35, 40 (1975) (judges should admonish juries that they have no sentencing function, and that they should reach their verdict without regard to what sentence might be imposed as a result of a conviction).

[63] *See* IND. CONST. art. 1, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts."); MD. CONST. DECL. OF RIGHTS art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."). Indiana has limited this right, stating in *Critchlow v. State*, 346 N.E. 2d 591, 596 (Ind. 1976), that while the jury judges facts and law, "this does not mean that a jury is free to disregard existing law of the state and legislate on its own in each case." Maryland, in *Hebron v. State*, 627 A.2d 1029, 1036 (Md. 1993), limited the jury's role in finding the law to "resolving conflicting interpretations of the law of the crime and determining whether that law should be applied in dubious factual situations."

[64] State v. Wentworth, 395 A.2d 858 (N.H. 1978). The New Hampshire Supreme Court later stated that "jury nullification is neither a right of the defendant, nor a defense recognized by law" but simultaneously held that the decision to provide nullification instructions beyond the *Wentworth* instruction "lies within the sound discretion of the trial court." *State v. Paul*, 104 A.3d 39, 45 (2014); *see also* State v. Sanchez, 883 A.2d 292 (N.H. 2005) (finding no abuse of discretion in rejection of defense-requested nullification instructions where general *Wentworth* instruction was sufficient).

[65] *Sanchez*, 883 A.2d at 296.

E. Nullification Carried out Secretly in the Deliberation Room

Courts of various jurisdictions have weighed in negatively on the issue of nullification argument, instruction, and practice. Many of those courts also acknowledge, however, that significant but anecdotal evidence exists that the practice is carried out on behind the closed doors in the deliberation room.[66] Because juries do not have to reveal their analysis or support for their verdicts, it is difficult to determine when or how often an acquittal is based on the nullification of an unpopular law or a law unjustly applied to the particular defendant, or when true reasonable doubt as to guilt exists. Nonetheless, nullification occurs – likely as a hidden factor in deliberation. While courts refuse to actively support it, nullification likely continues, especially when the defendant lacks malicious intent for the actions that run afoul of the law as charged.

Though reasonable minds can disagree over whether jury nullification in the modern era is an express right or an implied or technical right, the *ability* of a jury to nullify has never been in dispute.[67] The Supreme Court admitted as much in *Morissette v. United States* in which the Court stated that "juries are not bound by what seems inescapable logic to judges," understanding apparently that they could have acquitted the defendant simply because they did not want to "brand" the accused "as a thief."[68] In *United States v. Wilson*, the Sixth Circuit stated that in criminal cases, "a jury is entitled to acquit the defendant because it has no sympathy for the government's position."[69] In *United States v. Moylan*, the Fourth Circuit recognized that the requirement for a general verdict necessarily results in a power to acquit a defendant through

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[66] *See generally* PAULA L. HANNAFORD-AGOR & VALERIE P. HANS, *Nullfication at Work? A Glimpse from the National Center for State Courts Study of Hung Juries*, 78 CHI.-KENT L. REV. 1249 (2003) (analyzing the theory that nullification is increasing through mistrials via deadlocked juries, as highlighted through high-profile cases, while undergoing the difficult task of reviewing methodologies of studies that purport to determine when jury nullification has taken place).

[67] Recent court opinions regarding the jury power to nullify mirror that of the 1794 Supreme Court in *Georgia v. Brailsford*, 3 U.S. 1, 4 (1794) ("It is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of law. But still both objects are lawfully, within your power of decision.").

[68] 342 U.S. 246, 276 (1952) ("Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges . . . . They might have refused to brand Morissette as a thief. Had they done so, that too would have been the end of the matter.").

[69] United States v. Wilson, 629 F.2d 439, 443 (6th Cir. 1980).

nullification:[70] "[i]f the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion," the court must abide by their decision.[71]

These cases tend to support the argument that acquittals are an acceptable outcome, even where the government has the facts and law on its side, if the jury disagrees that the defendant should be convicted of the crime as charged. This is known as "the power to bring in a verdict in the teeth of both law and facts," or a "technical right" to decide against the law and the facts, overriding the judge's duty-bound instructions on both.[72] The dissenting view in *Doughtery* continues to power this jury-nullification argument.[73] In it, the Chief Judge looks at the jury and the legislature in their complimentary roles as community consciences:

> The legislative function is to define and proscribe certain behavior that is generally considered blameworthy. That leaves to the jury the responsibility of deciding whether special factors present in the particular case compel the conclusion that the defendant's conduct was not blameworthy.[74]

The 1974 trial of the "Camden 28" demonstrated nullification in action during the tumultuous Vietnam era.[75] The twenty-eight defendants, a group of Vietnam War opponents, were charged with breaking into a Camden, New Jersey building to destroy draft records from the local draft board.[76] They defended themselves through two separate nullification arguments. First, they argued for acquittals

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[70] General verdicts prevent the court from "search[ing] the minds of the jurors to find the basis upon which they judge." United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969). However, the court simultaneously rejected the argument that the jury should be instructed and made aware of its power to nullify. *Id.*

[71] *Id.*

[72] Horning v. D.C., 254 U.S. 135, 139 (1920).

[73] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972).

[74] *Id.*

[75] United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973); J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 239–40 (1977) (containing the "Camden 28" defense attorney's closing statement, which is a direct and explicit call for nullification based on government overreaching and opposition to the unpopular Vietnam War).

[76] MARK EDWARD LENDER, THIS HONORABLE COURT: THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 1789–2000, at 230 (2006).

because the government used an inside informant to plan and perpetrate the break-in, arguing "overreaching government participation" in their admitted acts.[77] The informant provided roughly ninety percent of the break-in tools, taught others to use them safely, used a vehicle with FBI-provided gasoline, and had food expenses for himself and the group paid for by the FBI.[78] Second, the "Camden 28" pled for sympathy from the jury based on the defendants' popular antiwar positions.[79] The district court judge made an uncharacteristically supportive invitation to jury nullification,[80] telling the jury that they had no power to ignore the law when deciding on a verdict but that juries had done so anyway and that verdicts were "entirely up to" them.[81] All defendants, who made no attempts to deny the facts of their involvement in the crimes, were acquitted despite clear factual guilt.[82]

Later history also contains positive examples of juries in the United States applying nullification by acquitting in cases involving obvious guilt of unpopular laws. Many juries acquitted defendants who helped slaves in violation of the Fugitive Slave Law,[83] though history also contains unfortunate instances of nullification involving cases with unpopular victims (e.g., lynching cases where whites acquitted by juries unsympathetic to black victims).[84] More recently, a jury-nullification appeal was seen in the closing arguments of the double-murder trial of O.J. Simpson. In the midst of a reasonable-doubt argument, defense

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[77] *Id.*

[78] Hardy Aff. 4, Feb. 28, 1972; United States v. Anderson, 356 F. Supp. 1311 (D.N.J. 1973).

[79] LENDER, *supra* note 76, at 230.

[80] District Judge Clarkson S. Fisher, as an Army veteran appointed by President Richard Nixon who sat during several years of the Vietnam War, would not have been the defendants' likely first choice as judge for their trial. *Fisher, Clarkson Sherman*, FED. JUDICIAL CTR, http://www.fjc.gov/servlet/nGetInfo?jid=758&cid=999&ctype=na&instate=na (last visited May 8, 2015).

[81] LENDER, *supra* note 76, at 230.

[82] *Id.*

[83] *See, e.g.*, H. ROBERT BAKER**,** THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR (2006). This book describes civilian resistance to the Fugitive Slave Law of 1850. After the capture of escaped runaway slave Joshua Glover in 1854, citizens formed a mob, rescued Glover from jail, and assisted him in fleeing to Canada. Members who freed him were then tried criminally. Ruby West Jackson & Walter T. McDonald, *Finding Freedom: The Untold Story of Joshua Glover, Runaway Slave*, 90 WIS. MAG. OF HIST. 48–52 (providing excellent background on the Joshua Glover capture that led to civil unrest).

[84] *See generally* KIMBERLY HOLT BARRETT & WILLIAM H. GEORGE, RACE, CULTURE, PSYCHOLOGY, AND LAW (2005).

attorney Johnny Cochran sprinkled nullification terminology throughout his closing arguments, calling for the jury to acquit his client of murder in part because of alleged police misconduct during the investigation.[85] Referring to lead police detective Mark Fuhrman's use of racial slurs, Cochran told the jury that "in the jury room" they should find attitudes condoning racial slurs as "not acceptable as the conscience of this community," and he "empowered" them to send a message about police misconduct through their verdict.[86] Mr. Simpson was acquitted, though at no point did any juror claim that the acquittal was an act of nullification.

A nullification argument usually results in a sustained objection when counsel overtly argues it. Despite this, nullification occurs across the country as a means for juries to reach just results.[87] Because it is impossible to determine how often it occurs,[88] the practice is allowed to continue virtually unnoticed, in both the civilian and military justice systems.

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[85] VINCENT BUGLIOSI, OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER 253 (1996). The nullification theme of finding an accused not guilty to send a message is not new. Referring to specific allegations of police misconduct, Cochran implored the jury: "Who then police the police? You police the police. You police them by your verdict. You are the ones to send a message. Nobody else is going to do it in our society . . . nobody has the courage. . . . Maybe you are the right people at the right time at the right place to say no more. We are not going to have this." *Id.*

[86] *Id.* at 253–54. "You are empowered to say we are not going to take that anymore. I'm sure you will do the right thing about that." The author notes that the prosecution failed to object to this argument. Additionally, the prosecution discussed the police misconduct nullification argument in their rebuttal argument; the jury was told that they would not resolve racism through a not-guilty verdict. This tactic failed to inform the jury that they had no right to find Mr. Simpson not guilty in order to "send a message" if they believed the evidence supporting conviction beyond reasonable doubt. *Id.*

[87] JOHN WESLEY HALL, JR., PUTTING ON A JURY NULLIFICATION DEFENSE AND GETTING AWAY WITH IT, 8 FULLY INFORMED JURY ASS'N (2003). "Often, jurors may not even realize they are nullifying—they may simply rationalize reasonable doubts into a fully proven case, if they are convinced 'not guilty' is the only reasonable verdict." *Id.*

[88] HARRY KALVEN, JR., & HANS ZEISEL, THE AMERICAN JURY 55–62 (1966) (finding that jury research believe that 3%–4% of criminal jury trials result in nullification-based verdicts); *see also* CLAY CONRAD, USING THEORIES AND THEMES TO ACQUIT THE GUILTY (1998). According to Conrad, "prosecutors tend to believe that jury nullification occurs far more frequently than it does. This is because defense lawyers want to believe that they have created objectively reasonable doubts in the minds of the jurors; prosecutors want to believe that they have proven their case beyond any objectively reasonable doubt." *Id.*

III. The Military Justice System and Nullification

The principles of jury nullification that have existed throughout history remain applicable in the military-justice system today. Several types of cases, similar to those in the civilian system, warrant consideration for nullification. Military courts have followed the civilian courts' prohibition on overt or judicially-assisted nullification practices. The most significant case involving nullification in military law, *United States v. Hardy*,[89] nearly closed the issue permanently by stating that there was no right to nullification. The differences between the civilian and military systems, from the selection of panel members, how they are instructed, what they deliberate and vote on, and the number of members required for a conviction, all affect the nullification debate. Military defense counsel's latitude to advocate for nullification ultimately rests on judicial discretion.

The military is a "specialized community governed by a separate discipline,"[90] which relies on obedience and the imposition of discipline.[91] Courts have held these necessities allow for the curtailment of certain rights afforded to the civilian accused.[92] The Army, as the Supreme Court held, is "an executive arm" and "not a deliberative body."[93] Further, "[i]ts law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."[94]

The military, therefore, is governed by different procedures for selecting those who judge the accused at courts-martial, how they vote, how many votes are needed for conviction, and what may be asked of them after the verdict is rendered.

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[89] 46 M.J. 67 (C.A.A.F. 1999).
[90] Able v. United States, 155 F.3d 628, 633 (2d Cir. 1998); Orloff v. Willoughby, 345 U.S. 83, 94 (1953); Parker v. Levy, 417 U.S. 733, 744 (1974).
[91] Toth v. Quarles, 350 U.S. 11, 17 (1955).
[92] Parker v. Levy, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); Greer v. Spock, 424 U.S. 828 (1976) (finding no generalized constitutional right to make political speeches or distribute leaflets on military reservation).
[93] United States v. Grimley, 137 U.S. 147, 153 (1890).
[94] *Id.*

A. By Statute, Court-Martial Panels Are Composed of the Best Qualified

Being selected to sit on a military court-martial panel is significantly different from that of a civilian jury. In civilian courts, jury pools of citizens are selected at random,[95] and juries themselves must be "reasonably representative" of the community or a "cross-section of the community."[96] Military panel members are personally selected by the convening authority, acting under the advice of the staff judge advocate, in accordance with the criteria of Article 25.

Article 25(d)(2) statutorily mandates that the convening authority detail members of the armed forces who are, in the convening authority's opinion, best qualified "by reason of age, education, training, experience, length of service, and judicial temperament."[97] There is no right "to a trial by a jury of one's peers."[98] The requirement for members to have a positive "judicial temperament" is a critical difference between the military and civilian systems,[99] yet it has not been formally defined or discussed in military case law. The term has been defined in legal arenas outside of criminal jurisprudence as "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law."[100] The most fundamental protection that an accused has from unfounded charges is the convening authority's duty to nominate only fair and impartial members.[101] The members, by nature of

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[95] 28 U.S.C.A. §§ 1861 (West 2014). According to the U.S. policy on jury selection in federal courts, all citizens are initially considered for the random jury selection; this jury pool is limited by removing exempted public employees (§ 1863(b)(6)), illiterates (§ 1865(b)(2–3)), those with mental or physical infirmities (§1865(b)(4)), and those with certain criminal convictions or those pending similar charges (§1865(b)(5)).

[96] Taylor v. Louisiana, 419 U.S. 522 (1975).

[97] UCMJ art. 25(d)(2) (2012); *see also* MCM, *supra* note 16, R.C.M. 502(a) (2012) [hereinafter MCM]. This rule, along with Article 25(d)(1), requires that the accused be junior in rank or grade to each sitting court-martial panel member, essentially ensures that the members are *not* reasonably representative of the (military) community.

[98] *See, e.g.*, Kahn v. Anderson, 255 U.S. 1, 8–9 (1921).

[99] *See infra* Part IV.A.

[100] AM. BAR ASS'N, STANDING COMM. ON THE FED. JUDICIARY, WHAT IT IS AND HOW IT WORKS 3 (2009), *available at* http://www.americanbar.org/content/dam/aba/migrated/scfed jud/federal_judiciary09.authcheckdam.pdf. This reference discusses the evaluation criteria used by the American Bar Association's Standing Committee on the Federal Judiciary for prospective Federal Judiciary nominees.

[101] United States v. Smith, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring); *see also* United States v. Dowty, 60 M.J. 163, 170 (C.A.A.F. 2004). The selection of fair and impartial panel members extends not only to the convening authority who selects the

the judicial temperament and other qualities which formed the basis for their selection, are well suited to judge the justice of the law that they are tasked to apply in the more extreme cases.

B. Panel Instructions Allow for Common Sense and Conscience-based Findings

Deciding cases and weighing evidence in military courts-martial involves more than just strict adherence to the rules of evidence and the law as military judges instruct. Both the initial oath that panel members swear to before being seated and the military judge's closing instructions before deliberation on findings refer to trying the case according to a members' conscience. The panel oath creates three foundations for the panel to base their decisions on and impartially try the case of the accused before them: (1) the evidence; (2) their conscience; and (3) the laws applicable to trials by court-martial.[102] The inclusion of a member's conscience is unique to the military-justice system when compared to the civilian system.[103] In the military judge's closing substantive instructions on findings, members are instructed that they "must impartially decide whether the accused is guilty or not guilty according to the law [the judge has] given you, the evidence admitted in court, and your own conscience."[104]

Despite complex and lengthy judicial instructions, panel members at court-martial may also rely on their common sense in their deliberations. While cautioning that members should only consider matters properly before the court, members are instructed before they deliberate on findings that they "are expected to use" their own common sense and

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members from the pool of servicemembers in his or her command; the subordinates of the commander, to include the staff judge advocate, must assist in the screening of members to protect the judicial integrity of a court-martial.

[102] U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ¶ 2-5, at 84 (1 Jan. 2010) [hereinafter DA PAM. 27-9]. Panel members, in their oath, must swear or affirm that they will "faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trials by court-martial, the case of the accused now before this court . . . ." *Id.*

[103] *See, e.g.*, State v. McClanahan, 212 Kan. 208, 216 (1973) (disapproving nullification instructions because "[t]he administration of justice cannot be left to community standards or community conscience but must depend upon the protections afforded by the rule of law.").

[104] DA PAM. 27-9, *supra* note 102, ¶ 2-5-12, at 53.

"knowledge of human nature and the ways of the world."[105] This use of common sense is not a substitute for the standard of proof for a criminal conviction.[106]

The military judge's responsibilities include instructing the members on questions of law and procedure that may arise.[107] The *Military Judge's Benchbook* (*Benchbook*) is used to "assist military judges . . . in the drafting of necessary instructions to courts. Since instructional requirements vary in each case, the pattern instructions are intended only as guides."[108] A military judge is required to tailor instructions to fit the facts of the case.[109] The *Benchbook* specifically instructs judges to go beyond the pattern instructions for the offenses and definitions when instructing panels before their deliberations.[110]

Court members "are presumed to follow the military judge's instructions,"[111] but like the civilian jury, members do not always follow them or render verdicts aligned with them.[112]

C. Deliberations, Voting, and Findings Procedures

After the military judge instructs the panel, the panel conducts two critical phases of trial: findings and sentencing, each of which contains

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[105] *Id.* ¶ 8-3-11, at 1129.

[106] *See also* United States v. Catano, 65 F.3d 219, 228 (1st Cir. 1995), *supplemented*, 66 F.3d 306 (1st Cir. 1995) (finding proper instructions that the jury use its common sense in deliberations where instructions draw "a distinction between common sense, as methodology, and the beyond-a-reasonable-doubt standard, as a quantum of proof."); *see also* United States v. DeMasi, 40 F.3d 1306, 1317–18 (1st Cir. 1994); United States v. Ocampo–Guarin, 968 F.2d 1406, 1412 (1st Cir. 1992).

[107] MCM, *supra* note 16, R.C.M. 801(a)(5) ("Preliminary instructions to the members concerning their duties and the duties of other trial participants and other matters are normally appropriate."); *id.* R.C.M. 801(e)(1)(A) (stating that "any ruling by the military judge upon a question of law, including a motion for a finding of not guilty, or upon any interlocutory question is final")

[108] DA PAM. 27-9, *supra* note 102, ¶ 1-1b, at 3.

[109] MCM, *supra* note 16, R.C.M. 920(a); United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002); United States v. Jackson, 6 M.J. 261, 263 n.5 (C.M.A. 1979); United States v. Groce, 3 M.J. 369, 370–71 (C.M.A. 1977); United States v. Martinez, 40 M.J. 426 (C.M.A. 1994).

[110] DA PAM. 27-9, *supra* note 102, ¶ 1-2, at 4.

[111] United States v. Holt, 33 M.J. 400, 408 (C.M.A. 1991); United States v. Taylor, 53 M.J. 195, 198 (C.A.A.F. 2000).

[112] Morissette v. United States, 342 U.S. 246, 276 (1952).

deliberations, voting, and announcement.[113] The rules for these phases generally mirror federal rules, but some are modified for military application. Consequently, like the federal system, there is room for panel nullification.

The military provides for substantially the same protections for the secrecy of court-martial panel deliberations as the federal system. Deliberations during courts-martial are to be kept secret, with very limited exceptions.[114] This ensures open discussion among the members and maintains the integrity of the process.[115] Military Rule of Evidence (MRE) 606(b) is a "blanket prohibition on juror testimony to impeach a verdict."[116] The military rule on secrecy in deliberations, however, provides additional protections for the accused which allow inquiry into whether there was unlawful command influence into the findings or sentence of a court-martial panel.[117]

In *United States v. Loving*, the Court of Appeals of the Armed Forces (CAAF) held the deliberative secrecy rule applies equally to matters of voting. In *Loving*, the panel convicted the accused of premeditated murder, felony murder, attempted murder, and five specifications of robbery.[118] The members entered sentencing deliberations, selecting between either life imprisonment or death.[119] Post-trial affidavits from three members, to include the panel president, revealed the possibility that the members failed to follow many of the required voting

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[113] If the panel votes to acquit the accused of all charges and their specifications, and the accused had not previously pled guilty to any charges or specifications, the court-martial is terminated without further proceedings.

[114] MCM, *supra* note 16, MIL. R. EVID. 509.

[115] *Id.* MIL. R. EVID. 606(b). This military rule of evidence strikes a balance "between the necessity for accurately resolving criminal trials in accordance with rules of law on the one hand, and the desirability of promoting finality in litigation and of protecting members from harassment and second-guessing on the other hand." United States v. Hardy, 46 M.J. 67, 73 (C.A.A.F. 1997) (quoting S. SALTZBURG, L. SCHINASI & D. SCHLUETER, MILITARY RULES OF EVIDENCE MANUAL 633 (3d ed. 1991)).

[116] United States v. Loving, 41 M.J. 213, 237 (C.A.A.F. 1994), *opinion modified on reconsideration*, 42 M.J. 109 (C.A.A.F. 1995), *aff'd*, 517 U.S. 748 (1996) (quoting Tanner v. United States, 483 U.S. 107 (1987)); MCM, *supra* note 16, R.C.M. 923.

[117] Members may be questioned about whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. MCM, *supra* note 6, MIL. R. EVID. 606(b).

[118] *Loving*, 41 M.J. at 229.

[119] UCMJ art. 118(1). Premeditated murder requires a death resulting from an act or omission of the accused, an unlawful killing, and a premeditated design to kill.

procedures.[120] After reviewing MRE 606(b) and its federal counterpart, the CAAF held that affidavits or testimony relating to voting will not be reviewed by the appeals courts even if it is alleged that the members or jurors failed to follow voting procedure instructions.[121]

In addition, while the civilian criminal courts require unanimous verdicts,[122] no servicemember may be convicted of an offense in a court-martial without two-thirds concurrence of the members present when the vote is taken.[123] An acquittal cannot be withdrawn or disapproved even if it is deemed "mistaken or wrong".[124] The military requirement for a two-thirds vote to convict a servicemember precludes the need for post-announcement individual member polling present in the civilian system.[125] Post-announcement polling to determine whether members concur with the verdict is prohibited, and members may not be

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[120] *Loving*, 41 M.J. at 232. It was alleged that the members (1) failed to vote on all aggravating factors; (2) failed to follow the correct procedures for proposing specific sentences, (3) failed to vote first on the least severe sentence proposal; (4) voted on proposals for life imprisonment and the death sentence simultaneously; and (5) reconsidered a less than unanimous vote to impose the death penalty without following proper reconsideration procedures.

[121] *Id.* at 237; United States v. Ortiz, 942 F.2d 903, 913 (5th Cir. 1991) (holding that that voting was a component of deliberation such that it rejected an affidavit of a juror alleging that the jurors improperly voted orally and voted on all counts together rather than voting on each count presented against each defendant as instructed), *cert. denied*, 504 U.S. 985 (1992); United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988) (refusing to inquire into the jury's deliberative process, to include votes, in the absence of a claim of external influence, despite allegation that votes were taken before all evidence was reviewed and that votes were cast verbally); *see also* United States v. Bishop, 11 M.J. 7, 9 (C.M.A. 1981); United States v. West, 48 C.M.R. 548 (C.M.A. 1974) (finding that "that the great weight of authority is that a verdict cannot be impeached by a member of the jury who claims that the jury failed to follow the court's procedural or substantive instructions").

[122] FED. R. CRIM. P. 31(a).

[123] UCMJ art. 52(a)(2) (2012). For offenses for which the death penalty is made mandatory by law, any conviction must be supported by all of the members of the court-martial present at the time the vote is taken. *Id.* art. 52(a)(1); MCM, *supra* note 16, R.C.M. 921(c)(2)(B).

[124] United States v. Hitchcock, 6 M.J. 188, 189 (C.M.A. 1979); Fong Foo v. United States, 369 U.S. 141, 143 (1962).

[125] FED. R. CRIM. P. 31(d) ("After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury."). The right for a party to request for and receive permission to have the jury polled is an "undoubted right." Humphries v. D.C., 174 U.S. 190, 194 (1899). The purpose of jury polling is to determine with certainty that "each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent." *Id.*

questioned about their deliberations and voting.[126] The prohibition on, essentially, any inquiry into a panel's decision – outside of the issues of command influence or extraneous information – further insulates a military panel, creating room for nullification.

D. Nullification Law in the Military Justice System

Military courts have treated the issue of nullification similar to that of their civilian counterparts, rejecting it as a valid defense and refusing to instruct while also acknowledging its existence and acquiescing to its use in courts-martial in unique cases. Cases have raised issues covering nullification opportunities throughout the period trial, from its use at voir dire to member instructions. Overall, while appellate courts disfavor the practice, its rationale mirrors that of the civilian system of yielding to the discretion of the trial court.

1. General Nullification Law in the Military

Generally, nullification is disfavored in military courts-martial. The CAAF has held that while "court-martial members always have had the power to disregard instructions on matters of law given them by the judge, *generally* it has been held that they need not be advised as to this power, even upon request by a defendant."[127]

2. Military Judges May Decline to Give Nullification Instructions

Similar to the tradition of not advising court-martial panels of their power to acquit an accused despite sufficient evidence to convict, military courts have deferred to the discretion of the trial judges when it comes to legal instructions relating to nullification.[128]

In *United States v. Hardy*, the court resolved the issue of nullification

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[126] MCM, *supra* note 16, R.C.M. 922(e).

[127] United States v. Hardy, 46 M.J. 67, 70 (C.A.A.F. 1997) (quoting United States v. Mead, 16 M.J. 270, 275 (CMA 1983)) (emphasis added). At issue in *Mead* was whether a military judge could take judicial notice of a general service regulation in a revision proceeding. It was not a case that advocated for, nor fully discussed, panel nullification as a military justice concept.

[128] *Id.* at 74.

instructions by firmly declaring that there is no "right" of jury nullification, and therefore, the military judge did not err by declining to give a nullification instruction or instruct the panel on their power to nullify his instructions.[129] In that case, the panel asked the military judge after hours of deliberations whether they necessarily had to find the accused guilty of the charge if they found all of the elements were present.[130] The defense contended that the panel's question asked for guidance on jury nullification and requested the judge instruct the panel that they could "review the wisdom of the charges" in using their discretion to find the accused not guilty.[131] The military judge disagreed, declined to give further instructions, and sent the panel back where they deliberated and found the accused guilty of forcible oral sodomy.[132] On appeal, the CAAF reviewed whether the military judge erred to the deprivation of the appellant's due process right to a fair trial, and found no error.

Military appellate courts distinguish between (1) a panel's right to reach any verdict, guilty or not guilty, which may seem counter to clear law; and (2) the court's duty to instruct the jury with only the correct and applicable law.[133] This distinction ensures the court, through its instructions, does not promote deliberate disregard of its instructions. The CAAF held in *Hardy* that nullification occurs as a collateral consequence of the rule protecting the secrecy of deliberations, the requirement for a general verdict, the prohibition against a directed guilty verdict, and the protection against double jeopardy.[134] These protections of the panel members and the accused, however, do not create a legally-recognized right to engage in panel nullification such that a court must

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[129] *Id.* at 75; United States v. Wagner, No. 20111064, 2013 WL 3946239 (A. Ct. Crim. App. July 29, 2013) ("Appellant has no right to a compromise verdict or any instruction that is tantamount to a request for jury nullification."); *see, e.g.*, United States v. Thomas, 116 F.3d 606, 615 (2d Cir. 1997) ("[I]n language originally employed by Judge Learned Hand, the power of juries to 'nullify' or exercise a power of lenity is just that—a power; it is by no means a right or something that a judge should encourage or permit if it is within his authority to prevent.").

[130] *Hardy*, 46 M.J. at 68.

[131] *Id.* at 69.

[132] *Id.*

[133] *Id.* at 70; United States v. Krzyske, 836 F.2d 1013, 1021 (6th Cir. 1988); *see also* United States v. Boardman, 419 F.2d 110, 116 (1969) ("Today jurors may have the power to ignore the law, but their duty is to apply the law as interpreted by the court, and they should be so instructed.").

[134] *Hardy*, 46 M.J. at 75.

provide legal instructions that include the concept of nullification.[135]

What *Hardy* does not conclude, however, may provide sufficient room for defense counsel to successfully argue for acquittals despite factual guilt, even receiving judicial cooperation in the form of explanatory instructions. The unwillingness to outright prohibit nullification advocacy and instructions from trial by courts-martial or apply military-specific prohibitions may and should provide opportunities to convince future courts to grant the latitude for advocacy.

3. Military Judges May Prohibit Nullification-Inducing Voir Dire *Questions*

The Court of Military Appeals (CMA) partially closed the door to nullification advocacy in voir dire in *United States v. Smith.*[136] The purpose of voir dire is to enable the court to select an impartial jury.[137] In support of that purpose, voir dire is utilized to lay a foundation so that challenges can be wisely exercised.[138] Members, when being examined with a view to challenge, may be asked any pertinent question tending to establish a disqualification for court duty.[139] These disqualifications include statutory disqualifications, implied bias, actual bias, or other matters which have "some substantial and direct bearing on an accused's right to an impartial court."[140] Counsel should not purposefully use voir dire to present factual matter that will not be admissible or to argue the case.[141]

In *Smith*, the accused was facing a contested trial for premeditated murder;[142] the defense petitioned the court for permission to advise members of the panel that a premeditated murder conviction carried with it a mandatory life sentence.[143] Thus the defense sought to inquire into

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[135] It remains unclear whether the military judge can deny the existence of nullification, if asked.

[136] 27 M.J. 25, 27 (C.M.A. 1988).

[137] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

[138] *Smith*, 27 M.J. at 29; United States v. Nixon, 30 M.J. 501, 504 (A.F.C.M.R. 1989); *see also* United States v. Parker, 19 C.M.R. 400, 405 (1955) (for challenges to be exercised, the accused should be allowed considerable latitude in examining members).

[139] *Smith*, 27 M.J. at 29 (quoting United States v. Parker, 19 C.M.R. 400, 405 (1955)).

[140] *Id.*

[141] MCM, *supra* note 16, R.C.M. 912(d) discussion.

[142] UCMJ art. 118 (2012).

[143] *Smith*, 27 M.J. at 26.

members' position on punishments while specifically informing them that if the accused was convicted, a mandatory life sentence would be enforced.[144] Defense counsel specifically wished to "place them on notice . . . of their responsibility" of this mandatory sentence, reasoning that, for members unaware of the requirement, it may "affect their judgment."[145]

The military judge ruled that he would not inform the members that a conviction would result in a mandatory life sentence and stated that he would ask counsel to refrain from informing the members of the fact in voir dire and arguments.[146] The CMA, in affirming the military judge's decision, agreed with the service court that the defense request was an attempt to advocate for nullification and rejected it as "totally unacceptable" and inconsistent with case law.[147]

4. Relevancy Rules Limit Nullification Evidence and Arguments

Opening and closing arguments are counsel's best opportunities to advocate their case to a court-martial panel. Similarly, the defense case-in-chief serves as the opportunity to introduce evidence and testimony that serves as the basis for the panel decision and the foundation for the counsel arguments. Therefore, opposing counsel and military judges, through objections and rulings, ensure that testimony offered and evidence admitted at trial meets the standards of relevancy.[148]

Evidence that is not relevant is not admissible.[149] Witness opinions presented at trial that a law or policy was widely unpopular or should not be enforced against a military accused would be unlikely to withstand an objection. For that reason, nullification advocacy rarely occurs during the evidence-gathering phase of trial.

There is no requirement that the military judge allow arguments

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144 *Id.*
145 *Id.*
146 *Id.* at 27.
147 *Id.* at 29.
148 MCM, *supra* note 16, MIL. R. EVID. 401. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Id.*
149 *Id.* MIL. R. EVID. 402.

"obviously designed to induce jury nullification."[150] Closing arguments are not evidence; rather, they are "an exposition of the *facts* by counsel for both sides as they view them."[151] Arguments are made to assist the panel in understanding and evaluating the evidence.[152] Courts find implied advocacy of deliberate disregard of the law unacceptable but have been amenable to advocacy designed to promote serious and thoughtful consideration of guilt or innocence.[153]

IV. He Did It, But So What? The Case for Expanded Nullification Use

Nullification, which occurs when a panel acquits an accused despite sufficient guilt to convict, is not a practice that occurs or should occur frequently. However, nullification is not only within the inherent power of the court-martial panel, but it can and should occur when the members' conscience compels it and when justice demands it.[154]

In the limited circumstances of the factually guilty but morally blameless accused,[155] nullification is an appropriate exercise of the discretion and trust entrusted to a panel comprised of those the convening authority hand-selected for their judicial temperament and experience. A power that is undiscovered is rarely exercised. Thus, in limited circumstances when nullification is appropriate[156] the military judge should candidly and appropriately explain the contours of the panel power to acquit and military defense counsel should advocate for members to vote in accordance with their conscience.

Court precedents on nullification supply military judges with the legal cover to deny nullification in their courtrooms while also acknowledging their discretion to allow it. The purposeful decision to avoid an outright

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[150] *Smith*, 27 M.J. at 29 (Everett, C.J., concurring).

[151] DA PAM. 27-9, *supra* note 102, ¶ 2-5-13 (emphasis added).

[152] *Id.*

[153] *Smith*, 27 M.J. at 29; United States v. Jefferson, 22 M.J. 315, 329 (C.M.A.1986).

[154] Duncan v. State of La., 391 U.S. 145, 157 (1968) (citing HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY (1966) ("[W]hen juries differ with the result at which the judge would have arrived, it is usually because they are serving some of the very purposes for which they were created and for which they are now employed.").

[155] Offenses such as violations of punitive policies or lawful regulations can occur without malicious intent.

[156] The D.C. Circuit Court in *United States v. Dougherty*, 473 F.2d 1113, 1136 (D.C. Cir. 1972), cautioned against the widespread use of nullification, stating that "[w]hat makes for health as an occasional medicine would be disastrous as a daily diet." *Id.*

prohibition on nullification advocacy, coupled with the express language in their standard instructions that charge members to use their conscience along with the evidence and instructions in their deliberations, provide the opening for today's military judges to allow significant latitude for advocacy. Where the panel *must* acquit if they have reasonable doubt but *should* convict if they have no reasonable doubts, nullification is implicitly built into the military justice system. Military judges can provide latitude to advocate for verdicts which contemplate an important question for a panel charged with reaching both a verdict and an appropriate sentence: He did it, but so what?

A. Judicial Temperament Requirement Promotes Independent Judgment

Military court-martial panels are different than civilian juries. Court-martial panel members, selected personally by the convening authority by virtue of their age, education, training, experience, length of service, and judicial temperament, are given special authority to judge on behalf of the military commander.[157] The difference between the randomly-selected civilian juror and the panel member hand-picked by the commander for their special skills and traits under Article 25 is the most crucial argument supporting a panel's ability to engage in nullification where appropriate.

The civilian courts' position that nullification arguments or instructions could lead to rampant nullification and virtual chaos,[158] when viewed in light of the Article 25 qualifications of a court-martial panelist, is dubiously applied to the military. The military panel member is presumably more intelligent, older, fairer, and more knowledgeable on the issues relevant to both the convening authority and the military accused in the case before them. Article 25 heightens the responsibilities of panel members and their authority to carry out their duties based on the high hurdle of being among the chosen few from a large military unit who are capable of serving in the role.

Of the required traits for a panel member that do not exist in the more paternalistic and judge-controlled civilian system is that of "judicial

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[157] UCMJ art. 25(d)(2) (2012).

[158] United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969) ("To encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos.").

temperament." The term is without a firm legal definition, but those with the right judicial temperament are often characterized as compassionate, open-minded, free from bias, and decisive. Comparing those characteristics with the civilian jury, selected from a pool of random non-felon citizens, the military court-martial panel member is in a special position to fairly judge a criminal case. Simply put, the court-martial panel member is better qualified to properly weigh evidence. This fact alone diminishes the argument popularized in civilian opinions that nullification advocacy or judicial instructions would lead to "anarchy" or "chaos" within the justice system.

B. Judicial Discretion and Nullification Instructions

United States v. Hardy is one of the most cited military nullification opinions.[159] Specifically regarding nullification instructions, the court held that the "fact that a jury has the power to acquit . . . by disregarding the instruction of the judge on matters of law does not mean that the panel *must* be told that it is permissible for them to ignore the law."[160] But the language used in this holding, when carefully construed, does not prohibit a military judge from giving nullification instructions. Rather, it concludes that the military judge is not obligated to give the instructions even if the defense requests them. The distinction between not being obligated to instruct on nullification and not being permitted to instruct on nullification is crucial to the argument that military judges have the discretion to give nullification instructions if they deem it reasonable. Knowing judges have this discretion, counsel must convince military judges on a case-by-case basis that nullification instructions are appropriate, and that the judge should tailor instructions accordingly.[161]

C. The Case for Nullification Instructions in Response to Specific Questions

While the military judge is under no obligation to provide instructions that encourage nullification, the power to acquit a military accused

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[159] 46 M.J. 67 (C.A.A.F. 1997).
[160] *Id.* at 74 (emphasis added).
[161] Military judges are required to tailor instructions to the particular facts and issues in a case. United States v. Baker, 57 M.J. 330, 333 (C.A.A.F. 2002); United States v. Jackson, 6 M.J. 261, 263 n.5 (C.M.A. 1979); United States v. Groce, 3 M.J. 369, 370–71 (C.M.A. 1977).

despite a belief that they committed the offense remains. Occasionally during deliberations, panel members will have questions about their role vis-à-vis the military judge's instructions, which hint at their desire to engage in nullification. To maintain panel impartiality, the standard *Benchbook* instructions given before findings deliberations should remain intact, implicitly allowing nullification but avoiding an explicit mention or encouragement of the practice. However, if members ask for clarification regarding whether they *must convict* or *may acquit*, military judges should rely on a standard *Benchbook* response that adequately and honestly explains the issue. This is a middle ground between a policy of "hiding the ball" on nullification and judicial promotion and encouragement of the power to disregard the facts and law of a case.

1. United States versus Hardy *As Poor Test Case for Military Nullification Law*

Before the introduction of new *Benchbook* instructions for clarifying the nullification issue for a panel that requests guidance, we must first examine the origin of the current posture. As noted above, *United States v. Hardy* is relied upon as a significant case in military nullification law, but it is an unfortunate example of the age-old axiom that "bad facts make bad law."[162] Scrutiny of the facts and circumstances in *Hardy* reveals that it was never a nullification case; analyzing *Hardy* as a nullification case was detrimental to the cause, as the analysis and conclusions have served as precedent for military courts.

The nature of the charged offenses against Specialist Hardy (SPC), the evidence provided in the defense case-in-chief, and the defense theory was inconsistent with nullification. The trial judge's denial of the defense-proposed instructions was inevitable given the case facts, as were the appellate court decisions upholding the judge's ruling. To properly lay the foundation for a true test case on the nullification argument, a case must possess certain factors that move the nullification argument thoughtfully.

First, the right test case should contain one or more specifications where nullification is a reasonable argument. As nullification is the intentional disregard of strong evidence supporting a charge, a strong test

[162] United States v. Sanders, 66 M.J. 529, 532 (A.F. Ct. Crim. App. 2008) (upholding appellant's conviction based on the doctrine of inevitable discovery despite questionable tactics used by government investigators to obtain evidence against the accused).

case should contain a charge that leads the panel to ask, "He did it, but so what?" Cases involving only universally accepted criminal charges are ill-advised for nullification argumentation.[163]

Second, the evidence presented either through the defense presentation of the evidence or testimony gleaned on cross-examination must support an eventual nullification argument. Because instructions serve as legal guidance based on evidence admitted at trial, counsel should not expect special nullification instructions where the defense strategy at trial focuses solely on raising reasonable doubt as to guilt.

Finally, to properly build a case that would lead to a balanced court discussion on nullification, the defense argument itself must contain the hallmarks of a nullification argument.[164] These arguments include explicit appeals to the members' conscience, reminders of the direct consequences of conviction (felony conviction in a federal court), and open questioning of the law or policy charged.

Applying these factors to SPC Hardy leads to a conclusion that it was never a nullification case. First, SPC Hardy faced court-martial for rape,[165] forcible sodomy,[166] and attempted sodomy,[167] all allegedly committed on February 26, 1994.[168] None of these charges, by themselves, are of a nature to bring about panel nullification. These charges require a level of *mens rea* that, absent other circumstances, support a criminal conviction. Completed or attempted rape and forcible sodomy contain viable legal defenses that could be employed, such as consent or mistake of fact as to consent. They rarely raise a "he did it, but so what?" argument – at least not a particularly compelling one. Second, the defense evidence in *Hardy* failed to raise the issue of nullification. In fact, the defense rested its case-in-chief without calling a single witness or presenting any evidence to counter the accuser's

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[163] For example, the O.J. Simpson double-murder trial may have appeared to be an acquittal based on jury nullification, but it could not be said that the not guilty verdict was based on dissatisfaction of the law against murder or that the law was being twisted and misapplied to O.J. Simpson.

[164] *See e.g.*, Major Bradley J. Huestis, *Jury Nullification: Calling for Candor from the Bench and Bar*, 173 MIL. L. REV. 68, 98 (2002).

[165] UCMJ art.120 (2012).

[166] *Id.* art. 125.

[167] *Id.* art. 80.

[168] The defense did cross-examine government witnesses. United States v. Hardy, 46 M.J. 67 (C.A.A.F. 1997); Specialist Hardy was convicted of forcible sodomy, and found not guilty of rape and attempted sodomy. *Id.*

statement that she was raped.[169] Finally, the defense argument on findings failed to contain elements of a nullification argument. Instead, the lengthy closing argument focused on raising reasonable doubt, highlighted by the argument that "[t]he prosecution hasn't proven their case . . . ."[170] Hardy's defense counsel discredited the alleged victim's character, [171] noted the lack of physical evidence,[172] and specifically alleged victim fabrication.[173] The members subsequently found the appellant guilty of Charge II, forcible sodomy, and not guilty of rape and attempted sodomy.

The significance of the case facts to the holding in *Hardy* cannot be underestimated: the CAAF in this case held that there is no right to instructions on nullification, in part, because at no point did the facts of the case warrant such an instruction.[174] The military judge properly refused to give additional nullification instructions because nullification was never introduced at trial in any way. The record in *United States v. Hardy* lacked the nullification theories or concepts necessary to bring forth an opposing viewpoint; this deficiency inevitably led to the one-sided analysis and holding. *Hardy* failed to spur a balanced nullification discussion; three decades later the argument lays virtually dormant.

2. Additional Standard Nullification Instructions Unnecessary

Assuming *arguendo* that the facts of *United States v. Hardy* had built

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[169] *Id.*

[170] *Id.*

[171] *Id.* at 267. Defense counsel described the victim to the panel as "[a] 19 year old soldier, sexually active and very adventuresome; one who obviously doesn't discriminate at all. At all. An individual who brings so much psychological baggage to the witness stand, that she's not only not credible of belief, she doesn't even know what reality is or is not."

[172] *Id.* at 268.

[173] *Id.* at 272. "She's making this up because she's compromised the hell out of herself as a human being. She's compromised her dignity and it's hard to live with, guys"; Counsel further argued that "she came up with this thing because she was trying to manipulate the audience, the crowd that basically was going to label her as a slut, a girl that will screw anybody. Excuse my French." *Id.* at 277.

[174] The lack of discussion during trial relating to nullification also raises the clear question of whether the panel member question to the military judge concerning whether they necessarily had to find the defendant guilty if they found all of the elements present was actually a nullification question or one about deliberation and findings procedures. This is yet another reason why *United States v. Hardy* was not a helpful test case factually for the nullification issue.

a solid foundation for a full legal analysis on nullification as a legitimate defense tactic, the resulting opinion might not hold that nullification instructions beyond the current standard *Benchbook* instructions were necessary. Instructions, both during the oath and before closing arguments on findings, mandate that members try the accused in accordance with their own consciences. This directive, by itself, is a quasi-nullification argument in that it demands that members make a judgment call based on their own view of what is it the proper outcome (and go beyond the law and evidence of the case). Military judges, even those sympathetic to nullification as a practice, may find the instructions already sufficient because they include "conscience" as a factor in impartially trying a case. Further, the standard instructions state that members *must* acquit if they have a reasonable doubt as to guilt but only *should c*onvict if they have no reasonable doubt as to guilt.[175] With these current instructions, counsel are free to argue to panel members that they need to vote their conscience and that they are not forced to convict the accused even if they believed he committed the offense.[176]

3. Nullification Instructions as a Response to Questions Are Necessary

In some instances, panels need and seek clarification on the legal instructions that the military judge has given them. Where their questions relate directly or indirectly to nullification (i.e., their ability to acquit no matter what the circumstances of the case), the military judge should be ready, willing, and able to provide an answer in response that is both honest and accurate.

The dissenting opinion in *United States v. Dougherty* noted a "deliberate lack of candor" when the trial judge refused to instruct on or allow mention of nullification at trial.[177] The opinion found considerable

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[175] DA PAM. 27-9, *supra* note 102, ¶ 2-5-12, at 53. The state of New Hampshire has a similar instruction. State v. Wentworth, 395 A.2d 858 (N.H. 1978) (holding that the effect of 'should' in the "*Wentworth* instruction" provides the equivalent of a jury nullification instruction that even if the jurors found that the State proved beyond a reasonable doubt all the elements of the offense charged, they could still acquit the defendant).

[176] In this strategy, counsel would be wise to not mention to the panel arguments regarding the strength of the evidence in the case or the laws and elements of the charges as instructed to them.

[177] United States v. Dougherty, 473 F.2d 1113, 1140 (D.C. Cir. 1972).

harm in not telling the jury of its power to nullify the law in this particular case, especially because at trial "the defendants made no effort to deny that they had committed the acts charged" and their defense was "obviously designed to persuade the jury that it would be unconscionable to convict them of violating a statute whose *general* validity and applicability they did not challenge."[178]

A power given to a jury is of little value when: (1) the jurors are ignorant of the power; and (2) the legally-trained parties to the case either refuse to inform them or are restricted from doing so. Conceding only that courts are not eager to encourage nullification, when a panel member asks the military judge about nullification, the military judge should respond rather than evade or deny its existence.[179] The standard answer in response to a nullification question, to balance the requirement for candor and the desire to not encourage nullification, should (1) succinctly answer the question asked; (2) repeat the guidance contained in the oath and pre-deliberation instructions about the need to use their consciences to guide deliberations along with admitted evidence and law as instructed; (3) reiterate the judge's role to inform on all matters of law; and (4) ensure the panel has no further questions regarding the standards or their role before sending them back to continue deliberations.

D. The Case for Nullification in Voir Dire After Anti-Nullification Questions

Trial advocacy does not begin at closing arguments; the strongest advocacy begins early. Judge advocates may agree that voir dire is the first opportunity counsel has to "make their case" to the panel. The Rules for Court-Martial (RCM), case law, and military judges look negatively on the use of voir dire to advocate on behalf of a military accused. Expansion of nullification-related questions in the voir dire phase, however, would, in limited situations comport, with both policy and law, ultimately increasing fairness in courts-martial practice.

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[178] *Id.* (emphasis added). The defendants were convicted of malicious destruction and unlawful entry after breaking into the offices of Dow Chemical Company and vandalizing them. They were not arguing that the law against malicious destruction or unlawful entry was morally or legally questionable; rather that it would be unconscionable to convict them. *Id.* at 1118.

[179] Military judges sitting as the fact-finders know of their power to nullify, even if most by temperament and judicial training do not use it.

1. Voir Dire Phase Not (Typically) Appropriate for Nullification Advocacy

The CAAF in *United States v. Smith* only partially closed the door on defense-requested nullification questions during voir dire. The appellate court upheld the military judge's decision to restrict counsel from discussing the mandatory life sentence *if* the accused was convicted of premeditated murder.[180] Because there is no requirement for the military judge to allow questions or arguments obviously designed to induce jury nullification, it was not legal error to restrict the questions. A lack of a requirement to allow is not the same as a blanket prohibition; the trial judge in *Smith* may have lawfully used his discretion to allow questions or commentary during voir dire relating to issues that touch upon nullification.

Chief Judge Everett's concurring opinion in *Smith* made a careful distinction based on counsel intent to advocate for nullification, reaffirming the permissibility of referring to mandatory sentences for particular crimes when counsel has a non-nullification purpose.[181] Courts have held that "to the extent that such an argument may impress on the members the seriousness of their decision on findings, it is not inappropriate."[182]

Voir dire is a trial phase utilized to lay foundations for wisely exercised challenges,[183] ensuring the court selects an impartial jury.[184] The discussion to RCM 912(d) cautions against counsel purposefully using voir dire to argue their case.[185] Voir dire is preceded by the military judge's preliminary instructions,[186] which inform the members

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[180] United States v. Smith, 27 M.J. 25, 27 (C.M.A. 1988). The restrictions were placed because the court believed counsel was seeking to make a nullification argument during voir dire and closing arguments, based on counsel's justification that he wished to "place them on notice" of the sentence, which may "affect their judgment." *Id.* The court held that nullification efforts in voir dire were "totally unacceptable" and inconsistent with case law. *Id.*

[181] *Id.* at 28 (Everett, C.J., concurring).

[182] United States v. Jefferson, 22 M.J. 315, 329 (C.M.A. 1986); State v. Walters, 240 S.E. 2d 628, 630 (N.C. 1978).

[183] *Smith*, 27 M,J. 25, 29; United States v. Nixon, 30 M.J. 501, 504 (A.F.C.M.R. 1989); *see also* United States v. Parker, 19 C.M.R. 400, 405 (1955) (for challenges to be exercised, the accused should be allowed considerable latitude in examining members).

[184] Mu'Min v. Virginia, 500 U.S. 415, 431 (1991).

[185] MCM, *supra* note 16, R.C.M. 912(d) discussion.

[186] DA PAM. 27-9, *supra* note 102, ¶ 2-6-1, at 85–88.

that they "must keep an open mind throughout the trial." This instruction is made more difficult to follow if counsel, before the substantive portions of trial begin, seeks to inform the members of their power to disregard the law as instructed. Although with careful phrasing and a secondary (unspoken) non-nullification purpose, it is possible to weave nullification concepts into voir dire;[187] as a whole, it is not an appropriate place for nullification advocacy.

If not restricted, a voir dire that is rife with nullification themes could confuse members as to their role vis-à-vis the military judge and their instructions before evidence is admitted and witness testimony is provided. This has the effect of debilitating the impartiality of the panel. If nullification is to be embraced, a far more appropriate venue for it would be findings arguments, where zealous counsel can fulfill their role as advocates.[188]

2. Proposal: Allow Nullification Voir Dire Questions to Counter Opposition

The analysis on nullification in voir dire, however, does not end with a blanket prohibition on counsel using nullification-themes. Voir dire

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[187] *See* JOHN WESLEY HALL, JR., PUTTING ON A JURY NULLIFICATION DEFENSE AND GETTING AWAY WITH IT, 12 FULLY INFORMED JURY ASS'N (2003). Where courts are hostile to the practice of nullification questions in voir dire, the author provides tips and quotes from *Taylor v. La.*, 419 U.S. 522, 530 (1975):

> Courts will not generally allow the defense to raise the issue of nullification directly, so the defense must find permissible or protected ways to get this information before the venire. One of the least objectionable techniques may be to quote the Supreme Court's decisions describing the role of the criminal trial jury and to get the venire members talking about them. For example, counsel may inform the venire that 'a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community, as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.

Id.

[188] DA PAM. 27-9, *supra* note 102, ¶ 2-5-13. The military judge instructs the members before findings arguments by counsel, which are "an exposition of the facts by counsel for both sides as they view them." The judge further instructs that "the arguments of counsel are not evidence" and that arguments are "made by counsel to assist you in understanding and evaluating the evidence . . . ." *Id.*

questions that touch upon nullification are widely accepted—by the government—and are already included as acceptable and even recommended in Judge Advocate General's Corps doctrine.[189] One such question, proposed for trial counsel on behalf of the government, asks "Will you follow the law as the judge instructs you, even if you disagree?"[190] Another question may ask whether panel members could convict the accused of an offense where there was no named victim. Government voir dire questions that implicitly attack the notion of nullification should open the door to defense questions that invoke nullification themes, such as using common sense when evaluating a case and following one's conscience before findings.

In the hypothetical trial of LTC Smith for his unfortunate laundry-related curfew violation, the playing field should be level. During voir dire, if the trial counsel probes the members by asking whether they can convict LTC Smith even if they do not personally agree with the command's curfew policy, defense counsel should be permitted to ask the members whether they are willing to use their consciences to reach a verdict after deliberations at a GCM.[191] Those unable or unwilling to use their consciences should be subject to a challenge for cause, similar to those members who intend to disregard instructions before trial.

Further, to adequately counter a trial counsel voir dire question that asks whether the panel could convict LTC Smith if the government proved its case beyond reasonable doubt, the defense counsel should be permitted to: (1) inform the panel that they *must* acquit LTC Smith if they have reasonable doubts as to his guilt but that they *should* convict him if they have no reasonable doubts as to his guilt; and (2) ask whether they agree with the different standards that do not allow them to convict if there is reasonable doubt but do not require them to convict LTC Smith even if there is no reasonable doubt as to guilt.

Allowing nullification-type voir dire questions as a counter to

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[189] THE ADVOCACY TRAINER: A MANUAL FOR SUPERVISORS, ARMY (1999).

[190] *Id.* at C-1-52. A panel member who answers in the negative would be subject to a causal challenge for admitting an unwillingness to follow instructions at trial. *Id.*

[191] *See infra* Appendix A (sample defense voir dire nullification questions). Specifically mentioning "General Court-Martial" in this voir dire question is a subtle reminder that the government has elected to forgo multiple lower-levels of disposition in order to bring LTC Smith before the highest level of military discipline, a reminder which becomes important when the panel learns that LTC Smith simply lost track of time while doing emergency laundry.

government anti-nullification questions promotes fairness in the system and is consistent with case law.[192] Absent a defense counter to a government voir dire question about convicting despite disagreement with the underlying law or policy, if faced with that scenario, the panel would rightfully believe that they were "boxed in." This would undermine the directive to use their consciences, along with the evidence and instructions, in reaching a verdict.

E. The Case for Latitude to Advocate Nullification in Closing Arguments

1. Nullification Is Not Prohibited by Law; Use Subject to Judicial Discretion

The federal court opinions on nullification that do not support increased use of nullification advocacy have many similarities, which are outlined in *United States v. Trujillo*.[193] First, they acknowledge that juries may reach a verdict at odds with the evidence or the law.[194] Second, they look to the role of the judge and counsel and determine that they should not encourage jurors to violate their oath to follow the law as instructed.[195] Finally, they conclude that defense counsel may not argue jury nullification.[196]

There is no argument that juries sometimes reach verdicts that appear to be acts of nullification because those verdicts are squarely against the great weight of the evidence and law. The problem with the *Trujillo* analysis comes from the conclusion that because counsel *should* not encourage nullification, they *may not* do so. The use of the word "should" speaks to a commonly-applied belief that the practice is disfavored. Though appellate judges disfavor nullification for the

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[192] A military judge's use of discretion to grant latitude for advocacy would not run afoul of *Smith*. In *Smith*, the defense was the first to introduce the notion of a mandatory life sentence, with an obvious aim to raise nullification for those who object to the mandatory sentence. If, however, the *government* had first asked the panel about their personal views on mandatory life sentences for premeditated murder as a way to challenge those who expressed disagreement with the rule, the defense could have then discussed the concepts of conscience and commonsense to ensure the panel would also consider them, as they are required to do.

[193] 714 F.2d 102, 105-06 (11th Cir.1983).

[194] *Id.*

[195] *Id.*

[196] *Id.*

obvious reason that it puts juries in a role to overrule the legal instructions of judges, an appellate court's caution against nullification advocacy should not be confused with a legal mandate that prohibits it.

2. Conscience as the Key to Nullification-Based Acquittal

Even if the opinion in *Trujillo* had stated that neither the court nor counsel *may* encourage jurors to violate their oaths in making a jury nullification argument, counsel in military courts-martial would still be able to make nullification arguments that appeal to members' consciences because panels in the military must try cases according to their consciences. Before each member hears evidence in a case, their oath requires them to swear that they *will* faithfully try the case according to his or her conscience.[197] Before the panel leaves the courtroom to deliberate on findings, they are instructed that they are to use their own consciences, along with the law and admitted evidence, to impartially decide whether the accused is guilty.[198]

3. Must versus Should; How Current Instructions Support Nullification

As discussed, anti-nullification court opinions denounce nullification by defining it as the deliberate disregard of the law. The military judge's standard *Benchbook* instructions, however, allow panels the opportunity to acquit even when there is no reasonable doubt as to guilt. This opportunity is written into the standard instructions relating to the instructions on findings.[199] These instructions state that where there is reasonable doubt as to the guilt of the accused, "that doubt *must* be resolved in favor of the accused, and (he) (she) *must* be acquitted . . ."[200]

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[197] DA PAM. 27-9, *supra* note 102, ¶ 2; United States v. Hardy, 46 M.J. 67, 68 (C.A.A.F. 1997) ("The military judge also instructed the members that they had the responsibility to 'impartially resolve the ultimate issue as to whether the accused is guilty or not guilty in accordance with the law, the evidence admitted in court, and your own conscience.'").

[198] DA PAM. 27-9, *supra* note 102, ¶ 8-3-11, at 1129. Panel members are also expected to use their own common sense and knowledge of human nature and the ways of the world. This is a departure from civilian criminal courts, which mandate that jurors follow only the evidence admitted and law as instructed. *Id.*

[199] *Id.* ¶ 2-5-12.

[200] *Id.* (emphasis added); *see, e.g.*, State v. Wentworth, 395 A.2d 858 (N.H. 1978) (The court reaffirmed the holding that the effect of "should" in the "*Wentworth* instruction" provides the equivalent of a jury nullification instruction that even if the jurors found that

The instructions continue, describing the alternate scenario: "However, if on the whole evidence you are satisfied beyond a reasonable doubt of the truth of each and every element, then you *should* find the accused guilty."[201]

The significance of the differing standards cannot be understated. The rules for courts-martial protect the accused by mandating a "not guilty" verdict when more than one-third of the panel members have reasonable doubts as to guilt.[202] The same rules, as delineated in the standard *Benchbook* instructions, do not expressly require a "guilty" verdict when the members have no reasonable doubt as to guilt. Thus, panel members who find that the government has met the elements beyond reasonable doubt have latitude to find the accused "not guilty" because the members merely *should* find the accused guilty. This deliberate language allows for nullification in the limited cases where the panel members find that the accused committed the offense, but they do not wish to convict. These instructions are not inconsistent with Article 51(c), which does not specifically require instructions on panel obligations where all elements are met, opting instead for a clear instruction that the accused is presumed innocent until guilt is established by evidence beyond reasonable doubt.[203]

4. LTC Smith's Counsel, and Others, Should Be Given Latitude to Advocate

The military judge retains discretion to allow or disallow nullification arguments. As demonstrated by the determinate language that counsel "should not" encourage nullification and that panels "should" find an accused guilty if the government has proved all elements, there is room

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the State proved beyond a reasonable doubt all the elements of the offense charged, they could still acquit the defendant.); State v. Brown, 567 A.2d 544 (N.H. 1989).

[201] *Id.* (emphasis added). The trial judge in *United States v. Hardy* used the standard language of the *Benchbook* instructions by stating that the members "should" return a finding of guilty if the elements were proved, specifically refusing to give the instructions that trial counsel proposed stating that the members "must" return a guilty verdict if the elements were proved. *Hardy*, 46 M.J. at 69. *But see* United States v. Sanchez, 50 M.J. 506, 509 (A.F. Ct. Crim. App. 1999) (no legal error where the accused failed to object to military judge's findings instructions that the panel must find the accused guilty if they were firmly convinced that the accused was guilty of the offense charged, counter to the standard instruction that states they *should* convict).

[202] UCMJ art. 52(a)(2) (2012).

[203] *Id.* art. 51(c).

for counsel to argue nullification and for panels to acquit an otherwise guilty accused if their consciences dictate the result. While courts will uphold a judge's decision to limit or prohibit nullification arguments, the trial judge is free to provide latitude for counsel to carefully advocate for nullification in closing arguments.

Lieutenant Colonel Smith, facing a hypothetical contested general court-martial for his violation of the commanding general's curfew policy, should be permitted to have his counsel argue for an acquittal for any reason. This latitude includes arguing that LTC Smith may have been off-post after 0100 in a place other than his residence, but he should not be convicted because it is unconscionable to make a felon out of a highly decorated officer who merely lost track of time while preparing for his early meeting with his supervisor. Judicial discretion is key: the military judge has the option to allow this argument. If the military judge refuses to allow counsel to argue nullification, the appellate courts will not interfere with that decision. However, nothing prohibits the trial judge from permitting the argument, and the panel from finding LTC Smith and any other accused not guilty after deliberating on the evidence, the law, and their own consciences.

In situations such as LTC Smith's, it is clear that an acquittal would only result if a panel decided based on their consciences. The military judge does not require an equal one-third balance of panel member considerations between the evidence, the law, and their consciences. It would be appropriate and logical that the panels' primary consideration in LTC Smith's case would be that finding him guilty of a criminal offense in this case would violate their consciences. Even if he violated a punitive policy, he was not criminally culpable.

F. The Effect of Nullification on Member Oaths, Impartiality, and Respect

1. The Panel Oath

A key concern is determining whether a panel member who votes to acquit based on nullification is violating their oath as a court-member. An addition concern asks whether a panel engaging in nullification remains an impartial panel. A reading of the oath itself, along with the plain language of the instructions they are given, leads to the conclusion that acquitting based on nullification is not a violation of the panel

oath.[204] Further, so long as the panel does not enter the case with prejudice either through personal knowledge of the case, personal biases for or against the accused, or strong feelings about the type of the case such that they cannot separate their beliefs from the case before them, there is a diminished risk that nullification interferes with panel impartiality.

Article 42(a) contains the requirement that court-martial members take an oath "to perform their duties faithfully."[205] The oath each member is to swear to before a contested panel case requires only that they will faithfully and impartially try, according to the evidence, their consciences, and the laws applicable to trials by court-martial, the case of the accused. The CMA in *United States v. Miller*[206] believed this was an obligation to "undertake to administer justice, not according to his own private views of justice or his personal opinion as to what the law should be, but in strict compliance with" the law and on the basis of the evidence duly laid before the court.[207] This interpretation, however, is in clear conflict with the plain language of the instructions, which requires faithful adherence to their consciences as well as evidence and court-martial procedures.

2. Impartiality and Respect for the Rule of Law

The requirement for impartiality connotes an assurance that the member discloses any personal interests the member may have in the case. It does not require a panel member, selected to sit by virtue of his positive reputation for judicial temperament in accordance with Article 25, to have the same personal views of justice as the military judge who instructs them, the trial counsel who advocate to them, or the convening authority who placed them on the panel.

The argument that a military judge's nullification instruction "might breed disrespect for the rule of law"[208] is unconvincing on its face.

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[204] In the civilian criminal justice system, where conscience is not a delineated factor in deliberations, one can reasonably argue that a juror engaging in nullification by ignoring the law and facts is violating his or her oath.

[205] 10 U.S.C.A. § 842(a) (West 2014).

[206] United States v. Miller, 19 M.J. 159, 164 (C.M.A. 1985).

[207] *Id.* (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 233–34 (2d ed. 1920 Reprint)).

[208] United States v. Hardy, 46 M.J. 67, 74 (C.A.A.F. 1997).

Hardy does not state that nullification itself threatens to breed disrespect for the rule of law.[209] A consequence of disrespect for the rule of law would be to disregard some or all instructions a military judge provides *out of a belief that the process is illegitimate*. A court-martial panel member who hears, processes, and follows a nullification instruction from the military judge is actually *respecting* the rule of law, regardless of her or his vote on findings.

Consider two scenarios: (1) a member inclined to acquit for reasons of conscience votes to acquit after hearing a nullification instruction; or (2) a member inclined to acquit for reasons of conscience, unaware of his power to nullify, votes to convict out of a feeling of obligation to follow the instructions to the letter. After the conclusion of trial, in which scenario is the panel member more likely to feel contempt for the rule of law? The former would allow for a verdict applicable to the present case that is aligned with the member's conscience, while the latter would substitute conscience for strict application of elements. Surely, being compelled to act against one's conscience in a case creates significant tension, especially when a conviction results in significant consequences for the accused.

The *Hardy* opinion further states that military personnel are trained to obey the law, which includes judge's instructions, and links instructions to the protections of individual rights for servicemembers.[210] This attempt by the court to equate following instructions with protecting servicemembers is less persuasive given the purpose of nullification to acquit factually guilty servicemembers out of a sense of fairness or justice. In *United States v. Moylan*, Judge Sobeloff opined that "[t]o encourage individuals to make their own determinations as to which laws they will obey and which they will permit themselves as a matter of conscience to disobey is to invite chaos."[211] This rationale is flawed because a jury sitting in judgment of a defendant is not determining which laws to obey but instead are determining which laws to enforce criminally against an accused in a particular case with a particular set of

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[209] If the court believes that instructing on nullification breeds disrespect for the rule of law, the actual practice of nullification would be a demonstration of a panel's disrespect for the law.

[210] *Hardy*, 46 M.J. at 74.

[211] 417 F.2d 1002, 1009 (4th Cir. 1969). *United States v. Hardy* relies on *Moylan*, among other cases, in its holding that nullification is not a right. *Hardy*, 46 M.J. at 73–76.

facts and circumstances.[212]

G. The Ethics of Making a Nullification Defense

Nullification is a permissible act by a military panel; despite the volumes of case law opinions, military judges have the discretion to allow nullification in limited forms in various phases of courts-martial. For the military-justice practitioner, questions may arise as to the ethics of nullification. First, is it ethical to make a nullification defense? Second, what are the ethical issues surrounding the attorney/client relationship and nullification advocacy?

1. Is It Unethical to Make a Nullification Argument?

An advocate may have reservations about making a nullification argument in a court-martial. The ethical debate regarding the decision to make a nullification argument pits the defense counsel's duty to the client to provide zealous representation against the duty of the military defense counsel to perform as a military officer, sworn to uphold the law. Would defense counsel violate their oaths as officers by making a deliberate attempt to prevent the UCMJ from being enforced? Panel nullification is not designed to eradicate the law or command policies but rather to selectively apply it to the facts of particular cases.[213] For that reason, counsel arguing nullification are not in danger of explicitly violating their oaths as military officers.

Implicated in this discussion is the American Bar Association (ABA) *Rules of Professional Conduct* regarding diligence and zeal,[214]

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[212] Judge Sobeloff is correct in the real-world sense. Outside the courtroom, to encourage individuals to decide for themselves which laws to obey *would* invite chaos. Allowing panels to act as a conscience of the community belies "chaos"; they are actually and directly regulating the power of the sovereign.

[213] *See, e.g.*, W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996).

[214] MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. (2013) ("A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."). This rule is mirrored in U.S. DEP'T OF ARMY, REG. 27-26, RULES OF PROFESSIONAL CONDUCT FOR LAWYERS ¶ 1.3 (1 May 1992) [hereinafter AR 27-26].

meritorious claims,[215] and candor toward the tribunal.[216] The Sixth Amendment guarantees criminal defendants a right to trial by jury and the assistance of counsel.[217] Concomitant with the right to counsel is the minimal performance standard of "reasonable competence"[218] and ethical standard of "zealous representation."

The DC Bar weighed in on the issue of nullification arguments in criminal law advocacy, holding that good-faith arguments with incidental nullification effects do not violate the *Rules of Professional Conduct*.[219] Finding that defense counsel defending a criminal case are "authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules," the opinion leans on the requirement for zealous representation and assurance that a defendant may present a defense.[220] Similarly, military opinions on nullification decry the practice, citing opinions that equate encouraging the disregarding of laws as an invitation for chaos.[221] But military courts stopped short of alleging that the practice is in violation of the *Rules for Professional Conduct*.

The DC Circuit held that in some cases, mounting a defense aimed at seeking jury nullification is reasonable where no other defense exists, and may help avoid claims of ineffective assistance of counsel.[222] This

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[215] MODEL RULES, *supra* note 214, R. 3.1 ("A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."). This provision is consistent with its Army equivalent, AR 27-26, *supra* note 214, ¶ 3.1.

[216] MODEL RULES, *supra* note 214, at R. 3.3 ("A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."); AR 27-26, *supra* note 214, ¶ 3.3.

[217] U.S. CONST. art. VI.

[218] United States v. Strickland, 466 U.S. 668, 687 (1984).

[219] D.C. Bar, Formal Op. 320 (May 2003), *available at* http://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion320.cfm (last visited Dec. 15, 2014). This is a general discussion and opinion. Whether a particular jury nullification argument violates ethical rules requires a case-specific analysis.

[220] *Id.* The D.C. Bar, acknowledging its rules are more permissive than other jurisdictions, notes that resolution of the underlying question regarding nullification advocacy would be the same in other jurisdictions.

[221] United States v. Hardy, 46 M.J. 67, 71 (C.A.A.F. 1997) (quoting United States v. Moylan, 417 F.2d 1002, 1009 (4th Cir. 1969)).

[222] United States v. Sams, 104 F.3d 1407 (D.C. Cir. 1996) ("[I]t may be possible for a defense lawyer to satisfy the *Strickland* standard while using a defense with little or no basis in the law if this constitutes a reasonable strategy of seeking jury nullification when no valid or practicable defense exists.").

may be a step too far. Under the *Strickland* standard, the attorney's performance must be so deficient that his or her errors constituted a deprivation of a fair trial the results of which are reliable.[223] Given the fact that nullification is generally not recognized as a defense, failing to argue nullification would not likely constitute ineffective assistance. Indeed, standing ethical guidelines require zeal in advocacy but do not require pressing for every advantage that might be realized.[224] A decision to *refrain* from arguing nullification is reasonable in light of the infrequency of nullification in trial advocacy and its relative disdain among the judiciary. Defense attorneys, however, are not prohibited from using nullification advocacy for the benefit of the client and case.

2. Ethical Concerns Raised by Making Nullification Arguments

Even if nullification arguments in general are not *per se* unethical, some concerns still remain vis-à-vis the attorney/client relationship. Many contested courts-martial are defended with little hope for an acquittal, but counsel defend them without telling the panel that. The most notable concern when deciding whether a nullification argument *should* be employed is whether the client consents to the increased conviction risk.[225] The risk exists because to make a true nullification argument, the members must be led to ask the question, "He did it, but so what?" In this case, therefore, *an attorney must first admit their clients' factual guilt*. To concede factual guilt without the client making a knowing, informed, and voluntary waiver would place defense counsel in an ethically perilous position. Thus, the ethical issues triggered by a nullification argument involve the scope of representation[226] and communication.[227]

The first question in the analysis is whether the decision to make a nullification argument is a client or attorney decision. The second question is whether an attorney must inform the client along the way. Generally, ABA Model Rule 1.2 provides that lawyers "shall abide by a

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[223] *Strickland*, 466 U.S. at 687; United States v. Marshall, 45 M.J. 268, 269 (C.A.A.F. 1996).
[224] AR 27-26, *supra* note 214, ¶ 1.3.
[225] Note that nullification is an *argument*, and not a recognized defense. Nullification is employed in the absence of a qualified, recognized, legal defense to an offense.
[226] MODEL RULES, *supra* note 214, R.1.2; AR 27-26, *supra* note 214, ¶ 1.2.
[227] MODEL RULES, *supra* note 214, R. 1.4 (2013); AR 27-26, *supra* note 214, ¶ 1.4.

client's decisions concerning the objectives of representation".[228] The rule also notes the basic communication requirement to "consult with the client as to the means by which they are to be pursued." Ultimately, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation, and the only mandatory client decisions relate to the plea to be entered, whether to waive jury trial and whether the client will testify."[229]

A decision to make a particular argument typically is implicitly authorized in a decision to carry out the representation of a criminal accused. Nullification, however, presents the unique problem of conceding factual guilt. If the court-martial members decline to participate in panel nullification, they enter deliberations with the government arguing guilt and the defense conceding guilt. This, in effect, is the equivalent of a guilty plea – carried out by the defense counsel on behalf of the client. If the attorney has not communicated her or his intent to the client and received consent to make a nullification argument to the panel that concedes some or all of the facts at issue, it could be argued that counsel has violated Rule 1.2 by unilaterally making a client decision as to the plea.[230]

American Bar Association Rule 1.4(b) requires that a lawyer explain a matter to permit the client to make informed decisions about the representation. The client should have information sufficient to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued.[231] In litigation, a lawyer "should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that might injure or coerce others."[232] In the context of a strategy to argue nullification, the attorney should advise on the risks: the strategy has a low probability of success and that by making it, the defense is implicitly conceding the factual issues the government must prove.[233] This advice

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[228] MODEL RULES, *supra* note 214, R. 1.2.
[229] *Id.*
[230] *See, e.g.*, *In re* Garnett, 603 S.E.2d 281 (Ga. 2004) (disciplining a lawyer who refused his client's instructions to enter a guilty plea).
[231] MODEL RULES, *supra* note 214, R. 1.4(b) cmt.
[232] *Id.*
[233] *See infra* Appendix C. Appendix C contains a sample Defense Counsel Assistance Program (DCAP) nullification waiver, whereby the accused, after discussions with the attorney, agrees to allow his defense to argue nullification at trial if the attorney believes it is appropriate for the case. The knowing, intelligent, and voluntary waiver also

would reasonably fulfill client expectations for information and ensure that the attorney is acting in the client's best interests.

3. The Ethics of Arguing Nullification for LTC Smith

In the hypothetical case of LTC Smith, facing court-martial for a violation of the commander's punitive curfew policy, arguing for nullification would be counsel's last best hope for an acquittal. The policy memorandum language was explicit, and the facts of his violation were uncontroverted. His counsel would want to argue the following to the panel: LTC Smith should not be convicted because (1) the curfew policy was intended to deter off-post criminal activity, not outlaw late-night laundry; (2) a conviction would effectively end LTC Smith's lengthy and exemplary military career; and (3) ending LTC Smith's military career over his relatively minor curfew violation would be grossly excessive and unjust.

Before making this argument, counsel should take steps to ensure this strategy fits within the ethical guidelines. First, even if nullification is the intended strategy, counsel should confront witnesses and challenge government evidence to ensure LTC Smith's rights are being protected and that the government fully makes their case. Waiver of such rights could constitute a concession of guilt and open counsel up to claims of ineffective assistance of counsel.[234] Second, counsel should get client consent from LTC Smith to argue nullification. This example nullification argument, standing alone, is an implicit concession of guilt,[235] as it fails to deny that the government's evidence establishes all of the elements necessary to convict LTC Smith.[236] If LTC Smith signed

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explicitly permits counsel to admit facts which ordinarily the trial counsel would have had to be prove in the course of the government case. *Id.*

[234] *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 6 (1966) (conviction reversed where defendant failed to intelligently and knowingly waive his right to confront and cross-examine witnesses in trial which served as practical equivalent of guilty plea).

[235] *See, e.g.*, Peter A. Joy & Kevin C. McMunigal, *Conceding Guilt*, 23 CRIM. JUST. (Fall 2008), *available at* http://www.americanbar.org/content/dam/aba/ publishing/ criminal_ section_newsletter/crimjust_cjmag_23_3_joy.authcheckdam.pdf. .

[236] It would not be possible, by virtue of the language of the curfew policy language, to argue that the policy did not apply directly to LTC Smith because it was formed as a result of rampant off-post misconduct occurring in the late hours by junior enlisted Soldiers. Any attempt to argue that the policy was not applicable to the accused would likely meet with both sustained government objections and verbal instructions from the military judge to the panel that the policy applied to all Soldiers assigned or on duty in

a statement knowingly, intelligently, and voluntarily waiving his rights, counsel could freely and directly utilize the nullification argument instead of making vague allusions to it under the guise of reasonable doubt. The rights that LTC Smith would practically relinquish include having his defense counsel challenge government-introduced facts, cross-examine witnesses against him, or otherwise attempt to advocate for an acquittal based on an established legal defense or a showing that the government failed to prove its case.

V. Conclusion

Since the 1895 Supreme Court opinion in *Sparf v. United States*, courts in the civilian criminal justice system have discouraged nullification in every phase of trial. Though the military followed the rationale of civilian courts in its discouragement of nullification, the differences between the two systems provide an opportunity for nullification. Hiding in plain sight, language in the standard instructions for panel members already allows nullification and requires members to vote with their conscience.

In voir dire, the defense should be permitted to utilize nullification advocacy in a limited form: not to advocate for a deliberate disregard of the law but to counter any government voir dire question aimed at strict adherence to following the instructions and law that fail to account for the requirement that the members use their conscience and common sense throughout deliberations. In arguments, counsel should be given significant latitude to advocate nullification; counsel should maximize present opportunities by emphasizing the role of the members' consciences in deliberations. Regarding instructions, military judges should understand that they have the discretion to give nullification instructions, and do so if appropriate for the case. Further, where panels request clarification, judges should prepare an accurate and neutral standard instruction to respond to nullification questions.

When military judges utilize their discretion to permit nullification advocacy and counsel use the opportunity to present conscience-based arguments to advocate for their clients, the system is better served. The proposed moderate changes in the practice of judicial discretion increase the use of nullification advocacy. They revert back to our nation's

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the Republic of Korea.

historical practice, comport with current military law and current instructions, and allow counsel to raise the simple but essential issue in the defense of their clients: He did it, but so what?

Appendix A

Sample Nullification *Voir Dire* Questions

Q: Does any member feel that as a panel member your conscience should never play a role in deliberations?

Q: If the military judge instructs you to use your conscience, along with the evidence in the case and the law the military judge gives you, will all members consider their consciences before making a finding of guilty or not guilty?

Q: The military judge will instruct you that you *must* acquit the accused if you have a reasonable doubt as to guilt. Does any member feel that they should be able to convict the accused if they believe he is *probably* guilty?

Appendix B

Adding Conscience to "Findings Argument" Instruction

To maintain consistency of instructions, this modification of instruction at DA PAM 27-9, ¶ 2-5-13 adds the language "in accordance with your conscience" to the instructions given to the panel before counsel arguments. This language maintains the consistency of the panel oath and findings deliberations instructions, which direct members to use their conscience along with the evidence admitted and law as instructed in their deliberations. In addition to maintaining consistency between the instructions, placing this language in the findings argument section allows the members to take in the findings arguments in its proper context.

2-5-13. FINDINGS ARGUMENT

MJ: At this time you will hear argument by counsel, which is an exposition of the facts by counsel for both sides as they view them. Bear in mind that the arguments of counsel are not evidence. Argument is made by counsel to assist you in understanding and evaluating the evidence, but you must base the determination of the issues in the case on the evidence as you remember it and apply the law as I instruct you *in accordance with your conscience*. As the government has the burden of proof, Trial Counsel you may open and close.

Appendix C

DCAP Nullification Waiver, United States v. LTC Smith

Date: 1 January 2015

1. I am LTC John Smith, the accused in United States v. LTC Smith, which has been referred to a General Court-Martial. Having consulted with my attorney, MAJ Michael Korte, on the law, the facts of my case, and court-martial procedures, I authorize MAJ Korte and his defense team to employ a "panel nullification" strategy as part of my defense trial strategy if they believe it is in my legal interest.

2. **Nullification**. Panel nullification results when the military panel acquits an accused even though they believe the accused has committed the act(s) forming the basis for the offense(s) charged. Defense counsel argues for an acquittal based on nullification when, based on the circumstances, a vote to convict would go against the members' consciences.

3. **Risks**. An attorney arguing for panel nullification on behalf of an accused necessarily admits factual guilt – that the accused committed the acts that form the basis for the charged offense(s). Such an admission provides the government with a tactical advantage because the government is required to prove all elements of each offense beyond a reasonable doubt.

4. **Waiver**. Having discussed panel nullification with my attorney and the risks of employing nullification as a defense strategy, I authorize my defense counsel and my defense team to make nullification arguments on my behalf at trial in support of my defense if they feel it necessary. Along with this authorization is explicit permission to concede some or all facts of the case that the government would otherwise have to prove in support of its case against me. I understand that nullification is not a legally recognized defense, and that a panel will be instructed to follow the law.

JOHN H. SMITH
LTC, USA
Accused

On 1 January 2015, I advised the accused, LTC John Smith, about panel nullification as a court-martial defense strategy. This discussion included the risks of conceding facts that form elements of the offenses the government must prove. I agree that nullification argumentation will only be used if it is determined to be in the best interests of the accused.

MICHAEL E. KORTE
MAJ, JA
Defense Counsel