VOIR DIRE, VOIR DIRE, EVERYWHERE, BUT NOT A STRIKE TO SPARE: A DEFENSE-FOCUSED PROPOSAL TO INCREASE PEREMPTORY CHALLENGES IN MILITARY CAPITAL CASES

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> *[D]eath is different in kind from any other punishment imposed under our system of criminal justice.*[1]

I. Introduction

Article 41(b)(1) of the Uniform Code of Military Justice (UCMJ) affords the accused and the prosecution each a sole peremptory challenge in any court-martial with members, making no distinction between capital and non-capital cases.[2] Notwithstanding decades of debate over the future of peremptory challenges in the United States legal system writ large, the peremptory challenge is critical to ensure a fair trial in capital courts-martial. In order to ensure that a military accused in a capital case fully benefits from such an important mechanism and to enhance the legitimacy and fairness of those proceedings, Congress should increase the number of peremptory challenges in capital courts-martial by providing every

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[1] Gregg v. Georgia, 428 U.S. 153, 188 (1976).

[2] UCMJ art. 41 (2016).

capital accused with ten peremptory challenges and the prosecution with five peremptory challenges per accused. This proposed increase will ensure military capital accused can leverage modern capital voir dire methods to shape panels that will fairly consider the question of life or death. By providing the accused twice as many peremptory challenges as the prosecution, the asymmetric increase will guard against discriminatory government challenges, the paramount concern of those seeking to abolish peremptory challenges entirely, while having little practical impact on the overall length of a capital case and the efficiency in the military justice system.

Notwithstanding the 1950 extension of this right to each accused in a joint trial[3] and the 1990 addition of a single additional peremptory in limited circumstances requiring additional members after initial challenges,[4] the single peremptory challenge persists unchanged in American military justice practice since first enacted by Congress for the Army within the 1920 amendments to the Articles of War.[5] This standard has resisted calls for expansion over the ensuing decades primarily due to concerns over the operational impact of detailing additional members to courts-martial to accommodate more peremptory challenges.[6] Concurrently, military justice reforms in general and increased constitutional requirements for imposing the death penalty, in particular, have resulted in a system in which capital courts-martial are far more complex, lengthy, and resource-intensive compared to general courts-martial under the 1920 Articles of War.[7]

The military justice system's single peremptory challenge is strikingly low compared to capital jurisdictions throughout the United States. Federal capital defendants have been entitled to twenty peremptory challenges since 1865, with the prosecution receiving the same amount.[8]

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[3] UCMJ art. 41(b) (1950).

[4] *Compare* UCMJ art. 41 (1950) *with* UCMJ art. 41 (1990).

[5] Article of War 18, Act of June 4, 1920 (Volume II), Pub. L. No. 66-242, 41 Stat. 759, 790. The pre-UCMJ Articles of War governed military justice only within the Army. Prior to the 1950 enactment of the UCMJ, members of the Navy facing court-martial had no right to a peremptory challenge under the Articles for the Government of the United States Navy, even in capital cases. *See* H.R. REP. NO. 81-491, at 22 (1949).

[6] *See infra* Part VI.

[7] *See infra* Part IX.

[8] *See* Act of March 3, 1865, sec. 2, 13 Stat. 500, 500 (providing twenty peremptory challenges to a capital defendant and providing the government five); FED. R. CRIM. P.

The twenty-seven states with extant capital punishment systems vary significantly in terms of the number of peremptory challenges permitted but afford the defense an average of 12.2 in single-defendant capital cases.[9] Although many states (and the federal government) previously

24(b)(1) (providing each side in a federal capital case with twenty peremptory challenges); *see also* An Act To Codify, revise, and Amend the Laws Relating to the Judiciary, Pub. L. No. 61-475, ch. 231, sec. 287, 36 Stat. 1087, 1166 (1911) (pre-Federal Rules of Criminal Procedure legislation increasing the number of government peremptory challenges from five to six in federal capital cases while leaving the number for defense at twenty).

[9] As of March 2023, this includes three states with gubernatorial or court-imposed execution moratoriums. States vary widely in peremptory challenge procedures applied in joint trials. Some states require joint defendants to join in (share) the peremptory challenges, while most states provide the same number to each defendant as if he or she was being tried individually. Other variations exist, as well, with varying complexity and amounts of judicial discretion. Accordingly, the number cited below for each state is for single-defendant capital cases. *See*, *e.g.*, ALA. CODE § 12-16-100 (2023) (Alabama utilizes a "strike list" system under which the defendant and the state alternate in striking prospective jurors following voir dire and causal challenges. The minimum number of jurors on the "strike list" in a capital felony case is 36, meaning that the defendant and state would each be able to exercise a minimum of twelve "strikes." The Supreme Court has treated these strikes as peremptory challenges for analytical purposes, as does this Article. *See* J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994)); ARIZ. R. CRIM. PROC. 18.4 (2023) (no peremptory challenges); ARK. CODE ANN. § 16-33-305 (2023) (defendant permitted twelve challenges, prosecution permitted ten peremptory challenges); CAL. CRIM. PROC. CODE § 231 (West 2023) (both sides permitted twenty peremptory challenges); FLA. STAT. ANN. § 913.08 (West 2023) (both sides permitted ten peremptory challenges); GA. CODE ANN. § 15-12-165 (2023) (both sides permitted fifteen peremptory challenges); IDAHO CODE § 19-2016 (2023) (both sides permitted ten peremptory challenges); IND. CODE § 35-37-1-3 to -4 (2022) (both sides permitted twenty peremptory challenges); KAN. STAT. ANN. § 22-3412 (West 2023) (both sides permitted twelve peremptory challenges); KY. R. CRIM. PROC. 9.40 (West 2023) (both sides permitted eight peremptory challenges); LA. CODE CRIM. PROC. ANN. art. 799 (2023) (both sides permitted twelve peremptory challenges); MISS. CODE ANN. § 99-17-3 (2023) (both sides permitted twelve peremptory challenges); MO. ANN. STAT. § 494.480 (West 2023) (both sides permitted nine peremptory challenges); MONT. CODE ANN. § 46-16-116 (West 2023) (both sides permitted eight peremptory challenges); NEB. REV. STAT. § 29-2005 (2022) (both sides permitted twelve peremptory challenges); NEV. REV. STAT. ANN. § 175.051 (Lexis 2023) (both sides permitted eight peremptory challenges); N.C. GEN. STAT. § 15A-1217 (2023) (both sides permitted fourteen peremptory challenges); OHIO REV. CODE ANN. § 2945.21 (West 2022) (both sides permitted twelve peremptory challenges); OKLA. STAT. ANN. tit. 22, S. 655 (West 2023) (both sides permitted nine peremptory challenges); OR. REV. STAT. ANN. § 136.230 (West 2022) (both sides permitted twelve peremptory challenges); PA. R. CRIM. PROC. 634 (West 2023) (both sides permitted twenty peremptory challenges); S.C. CODE ANN. § 14-7-1110 (2022) (defendant permitted ten challenges, prosecution permitted five); S.D. CODIFIED LAWS S. 23A-20-20 (2023) (both sides permitted twenty peremptory challenges); TENN.

afforded a capital defendant more peremptory challenges than the prosecution,[10] all but two of the remaining death penalty states now provide an equal number to each side.[11] Except for Arizona, whose state supreme court abolished peremptory challenges in 2021,[12] no judicial system in the United States besides the military provides a capital defendant with fewer than eight peremptory challenges.[13]

With these disparities in mind, Congress should amend Article 41 of the UCMJ to provide each accused in a capital court-martial with ten peremptory challenges and to provide the trial counsel with five peremptory challenges per accused. This expansion will allow military capital counsel to fully utilize information gained from the advanced voir dire methods required of capital defenders. As this article shows, the historical military efficiency arguments against expanding peremptory challenges are inapposite for capital cases, given the already-considerable rarity, length, and complexity of these cases in modern practice.

After introducing the larger debate over peremptory challenges in the American legal system, the following section explores capital sentencing procedures in the military. Theory and practice show these procedures simultaneously provide individual panel members substantial power to

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CODE. ANN. § 40-18-118 (2022) (both sides permitted fifteen peremptory challenges); TEX. CODE CRIM. PROC. ANN. art. 35.15 (West 2021) (both sides permitted fifteen peremptory challenges); UTAH R. CRIM. PROC. 18(d) (West 2023) (both sides permitted ten peremptory challenges); WYO. STAT. ANN. § 7-11-103 (2022) (both sides permitted twelve peremptory challenges).

[10] *See* David C. Baldus et al., *The Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis*, 3 U. PA. J. CONS. L. 3, 14 & n.19 (2001).

[11] *See* ARK. CODE ANN. *supra* note 9 (citing Arkansas Code, which provides the defense and the government with twelve and ten peremptory challenges, respectively), and S.C. CODE ANN. *supra* note 9 (which provides the defense and the government with ten and five peremptory challenges, respectively (in single-defendant capital cases for both states)).

[12] Hassan Kanu, *Arizona Breaks New Ground in Nixing Peremptory Challenges*, REUTERS (Sept. 1, 2021, 2:52 PM), https://www.reuters.com/legal/legalindustry/arizona-breaks-new-ground-nixing-peremptory-challenges-2021-09-01/. Arizona has continued to conduct capital trials since eliminating peremptory challenges. *See*, *e.g.*, Kevin Dayton, *An Arizona Jury Fails to Agree on Death Sentence for a Hawaii Inmate*, HONOLULU CIVIL BEAT (Feb. 16, 2023), https://www.civilbeat.org/beat/an-arizona-jury-fails-to-agree-on-death-sentence-for-a-hawaii-inmate/ (hung jury during 2023 capital sentencing proceeding); *Inmates on Death Row in Arizona*, USA TODAY (Feb. 3, 2023, 2:05 PM), https://www.usatoday.com/picture-gallery/news/local/arizona/2014/02/25/inmates-on-death-row-in-arizona/1854012/ (one death row inmate convicted and sentenced to death in 2022). The author is unaware of any Arizona capital case conducted without peremptory challenge yet reaching appellate review.

[13] *See supra* text accompanying note 9.

prevent a death sentence but also create conditions in which group dynamics place tremendous pressure on minority-view members to conform with the majority. The following section explores the particular importance of jury selection and voir dire in capital cases, examining the development of advanced voir dire methods in capital practice and the learned counsel standard, which requires counsel to consider implementing these voir dire strategies. These advanced methods all share the common thread of gathering as much information as possible about the attitudes and beliefs of prospective jurors. That information is then operationalized through challenges—with peremptory challenges providing a crucial stopgap for improperly denied challenges for cause, for deployment against jurors who sense the "right" answer and quickly rehabilitate, and in a variety of other scenarios.

In light of the factors favoring increased numbers of defense peremptory challenges in capital cases, this article investigates the legislative history surrounding the military's single peremptory challenge, both its creation in 1920 and later debates about its expansion, in order to determine whether historical rationales weigh against the proposal. The next sections demonstrate that increasing the number of peremptory challenges would continue the general trend towards alignment between military and federal civilian capital procedure and that an asymmetrical increase of these challenges is justified in the military system. Finally, analysis of the voir dire process in a recent capital court-martial demonstrates this proposed increase will lengthen a capital case by only three to four days, a truly *de minimis* amount in light of the rarity of capital cases, and the already lengthy investigation, trial, and appellate processes.[14] Increasing the number of peremptory challenges in capital cases will preserve the legitimacy of the military capital system by arming defense counsel with the tools necessary to shape a panel that will fairly decide the fate of the accused.

[14] *See infra* part IX.

II. Background Principles and the Post-Batson Debate

Like many aspects of criminal procedure, the Constitution does not require peremptory challenges.[15] Rather, "[t]hey are a means to achieve the end of an impartial jury."[16] As a right afforded by statute or court rule, federal and state governments have broad discretion regarding both the number of peremptory challenges and the procedures through which parties exercise these challenges.[17] Indeed, federal or state governments could eliminate peremptory challenges altogether without running afoul of the Constitution.[18] The right to peremptory challenges is only violated if a court deprives a defendant of what he or she is entitled to by statute or court rule[19] or if a peremptory challenge is used to exclude a protected class in contravention of the Fourteenth Amendment's Equal Protection Clause under *Batson v. Kentucky* and its progeny.[20] Nonetheless, the Supreme Court has long recognized that peremptory challenges are among "the most important of the rights secured to the accused"[21] and help "reinforc[e] a defendant's right to trial by an impartial jury."[22]

In recent decades, the legal community has engaged in sharp debate over the future of peremptory challenges, with "equally passionate" arguments for and against abolition.[23] Many of these arguments emerged

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[15] United States v. Martinez-Salazar, 528 U.S. 304, 317 (2000) (conducting analysis under the Fifth Amendment); Ross v. Oklahoma, 487 U.S. 81, 88 (1988) (citing, Gray v. Mississippi, 481 U.S. 648 (1987) (conducting analysis under the Sixth Amendment)).

[16] *Ross*, 487 U.S. at 88.

[17] *Id.*

[18] Rivera v. Illinois, 556 U.S. 148, 157 (2009).

[19] Ross, 487 U.S. at 89.

[20] Batson v. Kentucky, 476 U.S. 79 (1986) (prohibiting race-based peremptory challenges); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994) (extending *Batson* by prohibiting gender-based peremptory challenges). *Batson* applies to both the prosecution and defense. Georgia v. McCollum, 505 U.S. 42 (1992). The Court of Appeals for the Armed Forces has ruled that *Batson* and its progeny apply at courts-martial. United States v. Witham, 47 M.J. 297, 300 (C.A.A.F. 1997).

[21] Ross, 487 U.S. at 96 (quoting Pointer v. United States, 151 U.S. 396, 408 (1894) and Batson v. Kentucky, 476 U.S. 79, 99 n.22 (1986)).

[22] United States v. Martinez-Salazar, 528 U.S. 304, 311 (2000) (citations omitted).

[23] Baldus et al., *supra* note 10, at 36–38 & nn. 111–13 (summarizing the debate and citing several pre-2001 articles for and against abolition). For more recent debate, *see*, *e.g.*, Payton Pope, Note, *Black Lives Matter in the Jury Box: Abolishing the Peremptory Strike*, 74 FLA. L. REV. 671 (2022) (calling for abolition); Laurel Johnson, Note, *The Peremptory Paradox: A Look at Peremptory Challenges and the Advantageous Possibilities They*

in the early years after *Batson*, discussing how *Batson*—and related cases—drastically restrict parties' abilities to use peremptory challenges[24] or arguing whether the *Batson* framework sufficiently addresses their discriminatory use.[25] Others propose reforms to the use of peremptory challenges while also arguing for their retention.[26] A post-*Batson* survey shows most litigators oppose abolition.[27] The debate has extended to the court-martial system as well.[28] Indeed, as decades of post-*Batson* debate suggest, peremptory challenges are an imperfect tool. This article neither seeks to resolve this debate nor proposes the expansion of peremptory challenges in courts-martial generally. In capital courts-martial, however, the peremptory challenge is particularly crucial in ensuring a fair trial for the accused.

Provide, U. DEN. CRIM. L. REV. 215 (2015) (arguing for retention); Brian W. Wais, Note, *Actions Speak Louder Than Words: Revisions to the* Batson *Doctrine and Peremptory Challenges in the Wake of* Johnson v. California *and* Miller-El v. Dretke, 45 BRANDEIS L.J. 437 (2007) (arguing for retention of peremptory challenges despite flaws in preventing discriminatory use).

[24] *See*, *e.g.*, Major Robert W. Best, *Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off*, 183 MIL. L. REV. 1 (2005) (proposal to eliminate peremptory challenges at court-martial entirely, primarily based on post-*Batson* concerns as well as concerns over gamesmanship related to fluctuating panel sizes (writing prior to Congress's decision to establish fixed panel sizes for all courts-martial in 2016)).

[25] See, e.g., Laura I. Appleman, *Reports of* Batson*'s Death Have Been Greatly Exaggerated: How the* Batson *Doctrine Enforces a Normative Framework of Legal Ethics*, 78 TEMP. L. REV. 607 (2005).

[26] *See*, *e.g.*, Caren M. Morrison, *Negotiating Peremptory Challenges*, 104 J. CRIM. L. & CRIMINOLOGY 1 (2014) (proposing a consent-negotiation framework in which the parties could exercise peremptory challenges only through agreement); Jeb C. Griebat, *Peremptory Challenge by Blind Questionnaire: The Most Practical Solution for Ending the Problem of Racial and Gender Discrimination in Kansas Courts While Preserving the Necessary Function of the Peremptory* Challenge, 12 KAN. J.L. & PUB. POL'Y 323 (2002); Charles J. Ogletree, *Just Say No: A Proposal to Eliminate Racially Discriminatory Use of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099 (1994) (proposing additional restrictions on prosecution use of peremptory challenges to curb discrimination while also arguing for the retention of defense challenges on a number of grounds).

[27] *See* Jean Montoya, *The Future of the Post*-Batson *Peremptory Challenge: Voir Dire by Questionnaire and "Blind" Peremptory*, 29 U. MICH. J.L. REFORM 981, 998–1003 (1996) (discussing results of 1994 survey of government and defense practitioners at the California state and federal levels).

[28] *See*, *e.g.*, Colonel (ret.) Norman G. Cooper & Major Eugene R. Milhizer, *Should Peremptory Challenges Be Retained in the Military Justice System in Light of* Batson v. Kentucky *and its Progeny*, ARMY LAW., Oct. 1992, at 10 (discussing the arguments for and against abolishing peremptory challenges at court-martial); Best, *supra* note 24.

III. Individual Members, Decreased Anonymity, and Group Dynamics in Capital Court-Martial Sentencing

Since peremptory challenges shape court-martial panels, any argument for increasing their numbers necessarily begins with consideration of the role of the panel in a capital case. As shown below, capital sentencing procedures produce three interrelated phenomena in the panel room compared to panel deliberations on the merits in non-capital cases[29]: an individual panel member's outsized influence on the outcome, deliberation and voting procedures less conducive to anonymity, and a higher probability that group dynamics and social conformity will influence the outcome. Due to the relative rarity of capital courts-martial, many civilian and military practitioners may be unfamiliar with these procedures.[30]

Like all modern capital punishment systems in the United States, the military's capital sentencing procedures underwent substantial reform after a series of landmark Supreme Court decisions in the 1970s.[31] Although at least 35 states and the federal government revised their capital systems by 1976,[32] the military continued conducting capital courts-martial under legacy procedures until the Court of Military Appeals

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[29] *See* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 912 (2019) [hereinafter 2019 MCM] (governing deliberations and voting on findings during the merits portion of a case). In current non-capital courts-martial, the military judge determines the sentence unless the accused is convicted by members and elects sentencing by members. UCMJ art. 53 (2017). Since December 27, 2023, the military judge will determine the sentence for future non-capital courts-martial in which all offenses occur on or after December 27, 2023. National Defense Authorization Act for Fiscal Year 2022 § 539E, Pub. L. No. 117-81, 135 Stat. 1541, 1700 (2021) (modifying UCMJ art. 53, effective two years after enactment); MANUAL FOR COURTS-MARTIAL, UNITED STATES, Art. 53 (2024) [hereinafter 2024 MCM].

[30] *See* United States v. Akbar, 74 M.J. 364, 422 (C.A.A.F. 2015) (Baker, J., dissenting) (arguing the low number of capital cases coupled with relative short tours for military defense counsel results in few opportunities for military litigators to develop capital expertise).

[31] In 1972, the Supreme Court invalidated the capital punishment systems of Texas and Georgia based on Eighth Amendment concerns, triggering a *de facto* nationwide moratorium on executions until jurisdictions reformed their systems. Furman v. Georgia, 408 U.S. 238 (1972). In 1976, the Supreme Court upheld a death sentence based on a revised Georgia statute which addressed Eighth Amendment concerns about "capricious and arbitrary" death sentences by allowing for particularized analysis by the jury of the aggravating or mitigating circumstances specific to an individual case. Gregg v. Georgia, 428 U.S. 153, 197 (1976).

[32] *Gregg*, 428 U.S. at 179–80.

invalidated the existing system in 1983.[33] Less than four months later, President Reagan established new death penalty procedures by executive order that went into effect as Rule for Courts-Martial (RCM) 1004 in the 1984 *Manual for Courts-Martial*.[34] This began the modern era of capital punishment in the United States military. Modified several times thereafter, RCM 1004 and related UCMJ provisions continue to govern capital courts-martial.[35]

Under current rules, a capital court-martial remains death-eligible at sentencing only upon conviction of a death-eligible offense, either by unanimous vote of a twelve-member panel or by a military judge pursuant to a guilty plea.[36] RCM 1004 incorporates the general presentencing procedures from RCM 1001, which governs matters presented by the prosecution (including aggravating evidence), crime victims, and the defense (including extenuating and mitigating circumstances).[37] In capital cases, the court must allow the accused "broad latitude" in presenting extenuating and mitigating evidence.[38] The Government must also prove beyond a reasonable doubt at least one aggravating factor enumerated by RCM 1004, using evidence from either or both the merits and sentencing portion of the case.[39]

After the presentation of evidence, sentencing arguments, and instructions, the members deliberate in a closed session and vote by secret

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[33] *See* United States v. Matthews, 16 M.J. 354, 382 (1983) (striking down a death sentence and allowing a rehearing involving a capital sentence only "if constitutionally valid procedures are provided by the President or Congress.").

[34] *See* Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 7–8 (2006) (discussing the historical development of RCM 1004).

[35] *See id.* at 9–10 (discussing legislative and executive modifications to R.C.M. 1004 and related military capital provisions).

[36] 2019 MCM, *supra* note 29, R.C.M. 1004(a); *see* UCMJ art. 25a (2016) (requiring a fixed panel size of twelve members for capital cases). In the event of non-unanimous vote on the merits that still meets the three-fourths threshold necessary for a regular court-martial conviction, the case becomes non-capital for sentencing purposes. *See* UCMJ art. 52 (2016). Prior to a 2016 amendment to Article 45, an accused could not plead guilty to a death-eligible offense in a capital case. *See* Military Justice Act of 2016, § 5227, Pub. L. No. 114-328, 130 Stat. 2000, 2911 (modifying Article 45, UCMJ). No such death-eligible guilty plea appears to have occurred since the 2016 modification.

[37] 2019 MCM, *supra* note 29, R.C.M. 1004(b) (incorporating R.C.M. 1001).

[38] *Id.* R.C.M. 1004(b)(3).

[39] *Id.* R.C.M. 1004(b)(4), 1004(c). The Government must generally provide notice to the accused prior to arraignment of the aggravating factors it will pursue at sentencing. R.C.M. 1004(b)(1).

ballot on a series of issues.[40] Imposing a death sentence requires three unanimous findings by the panel (in addition to a unanimous finding of guilt at the earlier merits stage if contested).[41] First, the panel members vote on each aggravating factor at issue in the case and must concur unanimously on at least one of the factors.[42] Second, the members must find unanimously "that the extenuating and mitigating circumstances are substantially outweighed by any aggravating circumstances."[43] Both of these votes occur before the members vote on a sentence itself.[44] Third, the members must vote unanimously to impose a death sentence under the procedures for proposing and voting on sentences set forth in RCM 1006.[45] These three inquiries closely mirror those posed to a federal capital jury, which must reach unanimous findings on each of the three to impose a death sentence.[46]

Under RCM 1006, any panel member may propose a complete sentence; the panel only votes on a given sentence if a member proposes it.[47] The panel votes on the proposed sentences in order of severity, starting with the least severe.[48] In a premeditated murder case, for example, this means the members could, in many cases, vote on a sentence of life without parole before voting on a death sentence (provided a member proposed each sentence).[49] Of course, if only one of these two sentences were proposed by a member, the panel would only vote on that sentence. Sentences other than death require the concurrence of three-fourths of the members, whereas a death sentence must be unanimous.[50] The process of proposing and voting on sentences continues until the panel adopts one, unless they are unable to do so.[51] This means that a panel could vote on the death penalty multiple times, even if the initial votes are non-unanimous, so long as no other sentence (such as life in prison) receives

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[40] *Id.* R.C.M. 1001, 1004, and 1006.
[41] *Id.* R.C.M. 1004(b)(7).
[42] *Id.* R.C.M. 1004(b)(7).
[43] *Id*.
[44] *Id.*
[45] *Id.* (incorporating R.C.M. 1006).
[46] *See* 18 U.S.C. §§ 3593–94 (federal capital sentencing procedures).
[47] 2019 MCM, *supra* note 29, R.C.M. 1006(d).
[48] *Id.*
[49] *See id.* at pt. IV, ¶ 56(d) (presidentially prescribed mandatory minimum of life without parole for premeditated murder).
[50] *Id.* R.C.M. 1006(d).
[51] *Id.* R.C.M. 1006(d)(3)(A).

the required concurrence.[52] Once a sentence receives the required concurrence in a secret vote, the panel does not vote on other sentences unless the panel subsequently votes to reconsider the sentence.[53] Unlike at findings—where a failure to reach the required concurrence for a conviction results in an acquittal—a panel can deadlock at sentencing, resulting in a mistrial.[54] In a premeditated murder case, for example, this could occur if one member kept proposing and voting for life without parole and eleven members kept proposing and voting for death.

At any time until a sentence is announced in court, any panel member may propose reconsideration of any of the three types of votes at issue during capital sentencing: that an aggravating factor exists, that the aggravating evidence substantially outweighs the circumstances in extenuation and mitigation, and the sentence itself.[55] When a member proposes reconsideration of a non-unanimous vote on either of the first two questions, or reconsideration with a view towards increasing the sentence, a majority of the members must vote by secret ballot to reconsider the issue.[56] By contrast, the vote of a single member triggers reconsideration of a unanimous vote that found an aggravating factor was proven, that the aggravating circumstances substantially outweighed the

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[52] *See* United States v. Hennis, 75 M.J. 796, 847–48 (A. Ct. Crim. App. 2016), *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (finding that a panel can vote multiple times on a death sentence so long as no other sentence (life imprisonment) has received the required concurrence, and noting that a then-existing provision to the contrary in the Military Judges' Benchbook "is incorrect as a matter of law."). The Benchbook no longer includes the incorrect provision. *See* DEP'T OF THE ARMY, PAMPHLET 27–9, LEGAL SERVICES: MILITARY JUDGES' BENCHBOOK, Electronic Version 2.21, para. 2-7-18 n.1 (May 1, 2023).

[53] 2019 MCM, *supra* note 29, R.C.M. 1006 (discussion).

[54] *Id.* R.C.M. 1006(d)(7).

[55] *Id.* R.C.M. 1006 (discussion).

[56] *Id.* R.C.M. 1006(e). Prior to the 2019 version of the *Rules for Courts-Martial*, a panel could not reconsider votes on the aggravating factors and whether the aggravating factors substantially outweighed mitigation and extenuation, meaning that a single member's anonymous vote on one of those questions would irrevocably take death off the table for the panel. *Compare* 2019 MCM, *supra* note 29, R.C.M. 1006(e) *with* MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 1006(e) (2016) [hereinafter 2016 MCM]; *see also* Lieutenant Colonel Eric R. Carpenter, *An Overview of the Capital Jury Project for Practitioners: Jury Dynamics, Juror Confusion, and Juror Responsibility*, ARMY LAW., May 2011, at 6, 10–11 (discussing capital reconsideration procedures under the more defense-friendly former rule).

circumstances in extenuation and mitigation, or a unanimous vote imposing a death sentence.[57]

Reconsideration often seems theoretical in military practice—merits deliberations end with a single vote, guilty or not guilty, so reconsideration would only occur if several panel members were displeased enough with the outcome that they were willing to hold the panel back from announcing the verdict.[58] Yet, reconsideration is a real possibility during capital sentencing. For example, suppose a single panel member votes that the aggravating circumstances do not substantially outweigh the extenuating and mitigating circumstances. In that case, the panel cannot vote to impose a death sentence. However, a subsequent vote on mandatory life without parole may fail to garner the necessary three-quarters agreement because the other eleven members favor death. A majority vote could then force reconsideration of the earlier "weighing" vote, leaving it up to the life-favoring member to either hold fast or abandon their position. Given that the members continue to deliberate, propose, and vote on sentences until a sentence reaches the required concurrence,[59] a reconsideration vote is much more likely during capital sentencing than during a non-capital trial on the merits.

These presentencing rules fuel three interrelated phenomena unique to panel deliberations during capital sentencing compared to panel deliberations in the merits phase of a non-capital court-martial. First, an individual panel member can have a decisive impact on deliberations and the outcome. A single member's vote on any of the three primary questions can prevent a death sentence. Second, despite secret voting, anonymity necessarily breaks down during the iterative process of proposing, voting, re-proposing, and re-voting on sentences.[60] Using the earlier example, in which one member consistently proposes and votes for a life sentence while eleven members consistently propose and vote for death, the life-favoring member could not remain anonymous because he or she would need to keep proposing the life sentence. Subsequent deliberations would then inevitably focus on this minority-view panel member.[61] Of course,

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[57] 2019 MCM, *supra* note 29, R.C.M. 1009(e).
[58] *See id.* R.C.M. 924.
[59] *Id.* R.C.M. 1006(d)(3)(A).
[60] *See* Carpenter, *supra* note 56, at 11–12.
[61] *See id.*

anonymity may likely have already broken down during earlier deliberations.[62]

The third phenomenon in capital sentencing is that group dynamics in general, and pressures towards social conformity in particular, have a much greater likelihood of impacting panel decision-making during the sentencing phase of a capital courts-martial relative to the merits phase, in which the panel members vote once in secret on the merits, resulting in either a conviction or acquittal.[63] The influence of group dynamics and social conformity builds in part on the first two phenomena, the critical role of individual panel members and the breakdown of anonymity during capital sentencing. More generally, as discussed below, it reflects a fundamental reality of human interaction—that many people will change their stance on an issue when they find themselves merely *amongst* a group holding the opposite stance, even in the *absence* of overt pressure from the group.

Social psychologist Solomon Asch demonstrated this fundamental reality through research in the 1950s examining how individuals respond when they find themselves holding a minority position on an apparently objective fact amidst a group unanimously holding the opposing position.[64] In what has been described as "the classic conformity study,"[65] Asch conducted a series of experiments in which a researcher showed a group of eight individuals a series of cards with three reference lines of varying lengths as well as a fourth separate line, which was the same length as one of the three reference lines.[66] For each card, the researcher asked each member to state publicly which of the three reference lines

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[62] *See id.* at 13; *see also* SCOTT E. SUNDBY, A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY 83 (2005) (noting based on interviews with civilian capital jurors that "while some jurors reported that their juries had used secret ballots and that they had guessed incorrectly for several ballots as to a holdout's identity, the very nature of a jury's decision-making process necessitates that a juror's position ultimately will come into the open").

[63] *See* Carpenter, *supra* note 56, at 8–9.

[64] Solomon E. Asch, *Effects of Group Pressure Upon the Modification and Distortion of Judgments*, *in* GROUPS, LEADERSHIP AND MEN: RESEARCH IN HUMAN RELATIONS 177 (Guetzkow ed. 1951) [hereinafter Asch, *Effects of Group Pressure*]; *see also* Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against A Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS, no. 9, 1956, at 1 (a comprehensive seventy-page discussion of the earlier study's methodologies and results).

[65] PHILIP G. ZIMBARDO & MICHAEL R. LEIPPE, THE PSYCHOLOGY OF ATTITUDE CHANGE AND SOCIAL INFLUENCE 56 (1991).

[66] Asch, *Effects of Group Pressure*, *supra* note 64, at 178–79.

correctly matched the fourth.[67] Unbeknownst to one of the group members, last in the order for questioning, the other members had been instructed to answer incorrectly for some of the cards.[68]

When this occurred, it suddenly placed the subject "in the position of a minority of one in the midst of a unanimous majority."[69] Objectively, the correct answer was clear; subjects rarely made errors during control experiments in which they were unaware of the other members' answers.[70] However, subjects facing the unanimously incorrect majority joined the majority's incorrect answer nearly one-third of the time without any discussion or prodding from either the group members or the facilitator.[71] This finding demonstrates the impact of social conformity on decision-making, even in what otherwise appears to be a non-coercive environment (and removed from the emotionally charged environment of jury room in a capital case).[72]

Subsequent interviews of the conforming subjects revealed most answered incorrectly after concluding (wrongly) that their own perceptions were inaccurate based on the answers of the rest of the group.[73] By contrast, other conforming subjects did not doubt their own perceptions but joined the group's incorrect response out of a desire not to appear different from the group.[74] Variations on the experiment in which just one other group member answered correctly prior to the test subject significantly reduced the likelihood the test subject would yield to the majority's incorrect position (but did not erase the effect entirely).[75] However, in another variation in which this "partner" would "desert" the subject after a few rounds and start answering incorrectly with the majority, the impact of social conformity on the test subject returned to almost the same level as in the original experiment.[76]

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[67] *Id.*
[68] *Id.*
[69] *Id.* at 179.
[70] *Id.* at 181.
[71] *Id.* at 180–82.
[72] *See* SUNDBY, *supra* note 62, at 163–65 (discussing conditions and personality conflicts in capital juries).
[73] *Id.* at 183–84.
[74] *Id.* A third category consisting of "very few" of the conforming subjects came to perceive the majority's answer as correct without awareness that their own perception had been "displaced or distorted." *Id.*
[75] *Id.* at 184–87.
[76] *Id.*

Research by several legal scholars demonstrates that group dynamics such as those revealed in the Asch conformity experiments have a clear impact on juries.[77] In-depth research interviews with capital jurors who unanimously imposed a death sentence in one California case revealed how the confidence of the last holdout for life quickly eroded after the penultimate holdout changed his vote, mirroring the Asch findings regarding the impact of a partner defecting to the majority position.[78] In at least one respect, the impact of social conformity is even greater in capital juries than in the Asch experiments, in which the majority effect decreased dramatically where a single other person gave the right answer (creating a minority of two). By contrast, interviews of hundreds of actual capital jurors across over a dozen states conducted as part of the Capital Jury Project show that a death sentence "almost always" results when 25% or fewer jurors vote for life on the first vote, indicating that life-favoring minorities of even two or three jurors frequently give way to majority pressure.[79]

Conversely, life-favoring minorities of at least 33% (at least four jurors) "almost always" maintain their position, resulting in life verdicts.[80] These findings are especially important in light of another Capital Jury Project finding: "most juries start deliberations with at least some jurors who support a life sentence."[81] In this manner, the group dynamics and social conformity pressure illustrated by the Asch studies profoundly impact capital jury decision-making.

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[77] *See*, *e.g.*, Sophie E. Honeyman, *Escaping Death: The Colorado Method of Jury Selection*, 54 U. ILL. CHI. JOHN MARSHALL L. REV. 247 (2021) (discussing how the Asch conformity studies impacted the development of the Colorado Method of capital voir dire); Scott E. Sundby, *War and Peace in the Jury Room: How Capital Juries Reach Unanimity*, 62 HASTINGS L.J. 103 (2010); Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. Mich. J. L. Reform 569 (2007).

[78] SUNDBY, *supra* note 62, at 80–84 (discussing both the juror's experience and the Asch conformity findings).

[79] *See* Carpenter, *supra* note 56, at 8 (citing John H. Blume et al., *Lessons from the Capital Jury Project*, *in* BEYOND REPAIR? AMERICA'S DEATH PENALTY 144, 173 (Stephen P. Garvey ed. 2003) (emphasis omitted)). Started in 1991, the Capital Jury Project was a decades-long multidisciplinary study sponsored by the National Science Foundation in which trained interviewers conducted interviews from over a thousand jurors who sat on over three capital trials in at least fourteen states. Empirical analysis of the information generated by these interviews forms the basis of dozens of articles and books. *See* Carpenter, *supra* note 56, at 7.

[80] Carpenter, *supra* note 56, at 8 (emphasis omitted).

[81] *Id.* at 22.

The impact of these three interrelated phenomena on capital courts-martial is not just theoretical. Indeed, a key analysis of capital courts-martial identified two modern-era cases resulting in death sentences in which at least one member voted consistent with life at some point in the deliberations and a third in which facts strongly suggest the same.[82] Put another way, despite secret ballot voting, life-favoring panel members in these cases abandoned their positions in the face of a death-favoring majority.[83] In two of these cases, the record on appeal regarding the panel presidents suggests that rank may also have influenced deliberations, at least on an unintentional or subconscious level.[84] Under court-martial sentencing procedure then, both theory and practice show the critical importance of panel composition in a capital case. In this war of inches, designed to vest an individual panel member with the ability to preserve life but in which the pressure to conform is tremendous, the make-up of a capital panel takes on outsized importance.

IV. Panel Selection, Voir Dire, and Challenges in Capital Cases

With the dynamics of a capital panel in mind, peremptory challenges are best understood in the broader context of their role in shaping a panel or jury. At its core, jury selection is a process through which the court and the parties first gather information about potential jurors and then use procedural tools, such as excusals and challenges, to shape the final jury.

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[82] *Id.* at 13–16 (concluding that group dynamics and social conformity likely impacted the outcome of three capital courts-martial: United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) (panel member affidavits indicating initial vote on death sentence of seven in favor and one opposed), United States v. Thomas, 39 M.J. 626 (N.M.C.M.R. 1993) (panel member affidavits indicating panel voted multiple times on the finding of guilty (in contravention of the rules prohibiting re-voting on merits findings to obtain an unanimous result and preserve death eligibility) with one to two members voting not guilty on initial vote), and United States v. Hennis, 75 M.J. 796 (A. Ct. Crim. App. 2016) (panel question to military judge during sentencing deliberations strongly indicated at least one member had already voted against a death sentence; panel deliberated for six more hours before imposing death sentence)). Then-Lieutenant Colonel Carpenter analyzed *Hennis* based on news reports at the time, as appellate review had not yet occurred. The Army Court of Criminal Appeals (ACCA) appears to have neither received nor reviewed panel member affidavits when denying relief in the case, including on the deliberations issue. 75 M.J. at 847–51, *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021)).

[83] Carpenter, *supra* note 56, at 13–16.

[84] Carpenter, *supra* note 56, at 14-15 (discussing United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) and United States v. Thomas, 39 M.J. 626 (N.M.C.M.R. 1993)).

Information gathering begins before trial as parties conduct independent investigations of prospective jurors and through the use of tools like pretrial questionnaires, where permitted.[85] Information gathering continues through voir dire, the "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified to serve on a jury."[86] In the United States, judges generally have wide latitude in determining the scope and managing the voir dire process.[87] The stakes are high because, as the Supreme Court has recognized, "[*v*]*oir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored."[88]

The parties operationalize the information learned during voir dire through the exercise of challenges. A military accused can challenge a member on a number of grounds, most frequently for bias (either actual or implied).[89] Actual bias is "any bias . . . 'that . . . will not yield to the evidence presented and the judge's instructions.'"[90] In addition to actual bias, military courts apply a specialized test for implied bias, which calls for the excusal of a prospective panel member if "most people in the same position as the court member would be prejudiced."[91] Pursuant to the concept referred to as the liberal grant mandate, military judges further must "liberally grant" defense challenges for cause (but not government challenges).[92] Despite the implied bias standard and liberal grant mandate,

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[85] *See* 2019 MCM, *supra* note 29, R.C.M. 912(a).
[86] *Voir Dire*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[87] *See*, *e.g.*, FED. R. CRIM. P. 24(a); 2019 MCM, *supra* note 29, R.C.M. 912(d).
[88] Morgan v. Illinois, 504 U.S. 719, 729 (1992) (quoting Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).
[89] *See* United States v. Armstrong, 54 M.J. 51, 53-55 (C.A.A.F. 2000) (noting how R.C.M. 912(f)(1)(N) "encompasses both actual and implied biases" and that these biases "are separate legal tests, not separate grounds for challenge"). R.C.M. 912(f) contains several other grounds for challenge unrelated to bias that are more concrete in nature, such as whether a member will be a witness at trial. 2019 MCM, *supra* note 29, R.C.M. 912.
[90] United States v. Terry, 64 M.J. 295, 302 (C.A.A.F. 2007) (quoting United States v. Napoleon, 46 M.J. 279, 283 (C.A.A.F. 2007)).
[91] United States v. Elfayoumi, 66 M.J. 354, 356 (C.A.A.F. 2008) (citation omitted) (discussing the legal tests based on R.C.M. 912(f)(1)(N). Implied bias is evaluated "objectively, through the eyes of the public, reviewing the perception or appearance of fairness of the military justice system." *Id.* (internal quotations and citations omitted). The Supreme Court has interpreted the Sixth Amendment to prohibit only actual bias, declining to embrace a Constitutional theory of implied bias. Smith v. Phillips, 455 U.S. 209 (1982).
[92] United States v. James, 61 M.J. 132, 139 (C.A.A.F. 2005) (quoting United States v. Downing, 56 M.J. 419, 422 (C.A.A.F.2002)) (discussing how military appellate courts

military appellate courts routinely rule that judges improperly denied defense challenges in courts-martial.[93]

To the extent a court rejects a party's causal challenge based on actual or implied bias, peremptory challenges are the last mechanism available to shape the final jury. In addition to providing a fail-safe for denied challenges, parties also use peremptory challenges to strike prospective jurors whom they view as problematic but for whom they do not have an articulable basis for a causal challenge.[94] In this manner, voir dire is inextricably linked to peremptory challenges, and "lack of adequate *voir dire* impairs the defendant's right to exercise peremptory challenges where provided by statute or rule."[95]

In capital cases, *voir dire* takes on an additional dimension because the parties must gather information on prospective jurors' attitudes and perspectives on the death penalty. The inquiry is both constitutional and prudential in nature. The Supreme Court has recognized limits on both ends of the spectrum of juror death penalty views. On one end, the Supreme Court requires courts to exclude jurors who oppose the death penalty to such an extent that their views would "prevent or substantially impair the performance of [their] duties."[96] On the other end of the spectrum, courts must remove jurors "who will automatically vote for the death penalty irrespective of the facts or the trial court's instructions of

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developed the "liberal grant" mandate to address unique features of the military system, such as the selection of members by the convening authority and the limited number of peremptory challenges relative to civilian practice).

[93] *See*, *e.g.*, United States v. Rogers, 75 M.J. 270 (C.A.A.F. 2016); United States v. Woods, 74 M.J. 238 (C.A.A.F. 2015); United States v. Peters, 74 M.J. 31 (C.A.A.F. 2015); United States v. Briggs, 64 M.J. 285 (C.A.A.F. 2007); United States v. Wiesen, 56 M.J. 172 (C.A.A.F. 2001); United States v. Covitz, 2022 CCA Lexis 563 (A.F. Ct. Crim. App. Sept. 30, 2022); United States v. Kashin, 2022 CCA Lexis 194 (A. Ct. Crim. App. March 28, 2022); United States v. Pyron, 81 M.J. 637 (N.-M. Ct. Crim. App. 2021); United States v. Leathorn, 2020 CCA Lexis 450 (A. Ct. Crim. App. Dec. 11, 2020).

[94] *See generally* Jim Goodwin, Note, *Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

[95] Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981). As discussed *infra*, the Supreme Court has ruled that there is no absolute constitutional right to peremptory challenges and that the right is instead a creature of statute or court rule. United States v. Martinez-Salazar, 528 U.S. 304 (2000); Ross v. Oklahoma, 487 U.S. 81, 88 (1988).

[96] Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980)) (refining the standard first set forth in *Witherspoon v. Illinois*, 291 U.S. 510 (1968)).

laws."[97] Similarly, a capital juror must be willing "in good faith" to consider mitigating circumstances and evidence during sentencing.[98] A juror unwilling to consider mitigation evidence, such as one already set on the death penalty after finding the accused guilty of premeditated murder and before hearing the defense sentencing case, is known in practice as "mitigation impaired."[99] Under all of these standards, capital voir dire necessarily involves questioning both to "death qualify" and to "life qualify" potential jurors.[100]

Due to the confluence of these constitutional requirements, the aggravated facts at issue in most capital cases, and the heightened scrutiny regarding potential ineffective assistance of counsel, the capital defense bar has developed advanced jury selection methods specific to capital practice (by contrast, prosecutors have largely tended to apply methods more common to complex litigation in general).[101] These methods vary significantly but share the common thread of gathering extensive information from panel members for use in challenges.

However, the military's single peremptory challenge handicaps capital defense counsel from fully leveraging these strategies at court-martial. Instead, well-executed capital voir dire methods will invariably leave military defense counsel with a large amount of information about the attitudes and beliefs of prospective panel members, but limited ability to shape the panel by removing those members for whom the information does not justify a challenge for cause or for whom a challenge for cause is denied. A brief exploration of two of the advanced voir dire methods illustrates the magnitude of information they can produce (and, implicitly, the corresponding extent the single peremptory challenge hinders the use of this information in capital courts-martial).

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[97] Morgan v. Illinois, 504 U.S. 719, 725–26 (1992).

[98] *Id.* at 729; *see also* Lockett v. Ohio, 438 U.S. 586 (1978) (striking down Ohio death penalty statute because it limited mitigation evidence to a specific list of factors).

[99] John H. Blume, Sheri Lynn Johnson & A. Brian Threlkeld, *Probing Life Qualification through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209 ,1211-1212 (2001).

[100] United States v. Johnson, 366 F.Supp.2d 822, 826–27 (N.D. Iowa 2005) (using the quoted terminology while extensively analyzing the scope of constitutionally-required questions during capital voir dire). For an in-depth analysis of the framework for hypothetical questions developed in *Johnson* and its application in courts-martial, *see* Major Janae M. Lepir, *Hypothetically Speaking: The Constitutional Parameters of Capital Voir Dire in the Military after Morgan v. Illinois*, 225 MIL. L. REV. 375 (2017).

[101] Lepir, *supra* note 100, at 394–95.

The Colorado Method is perhaps the most well-known of capital voir dire methods.[102] Developed by Colorado litigator David Wymore, this method involves two concurrent strategies: first, eliciting jurors' views on capital punishment and mitigation on the record to use in challenges for cause and in prioritizing peremptory challenges; second, educating jurors to respect the individual moral views of other jurors during deliberations and, for life-leaning jurors, to remain firm in their convictions even if they are in the minority.[103] Writing in a publication for the National Association of Criminal Defense Lawyers, Matthew Rubenstein summarizes the Colorado Method's key principles:

> (1) jurors are selected based on their life and death views only; (2) pro-death jurors (jurors who will vote for a death sentence) are removed utilizing cause challenges, and attempts are made to retain potential life-giving jurors; (3) pro-death jurors are questioned about their ability to respect the decisions of the other jurors, and potential life-giving jurors are questioned about their ability to bring a life result out of the jury room; and (4) peremptory challenges are prioritized based on the prospective jurors' views on punishment.[104]

The Colorado Method recognizes that many prospective jurors have pro-death penalty inclinations that do not rise to the level of constitutional impairment justifying a challenge for cause under *Morgan v. Illinois*.[105] For example, there is likely no constitutional impairment for a juror who

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[102] *Id.* at 395.

[103] Carpenter, *supra* note 56, at 22–23. Colorado abolished the death penalty in 2020. *See* Act Concerning The Repeal of the Death Penalty, 2020 Colo. Sess. Laws Ch. 61, 204. The state and defendant were each entitled to ten peremptory challenges in Colorado single-defendant capital cases. COLO. REV. STAT. § 16-10-104 (2022) (this relict provision persists in Colorado state law despite the abolition).

[104] Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, THE CHAMPION, Nov. 2010, at 18; *see also* Sophie E. Honeyman, *Escaping Death: The Colorado Method of Jury Selection*, 54 U. ILL. CHI. JOHN MARSHALL L. REV. 247 (2021) (providing a comprehensive overview of the Colorado Method, its advantages and disadvantages, and proposing incremental changes to increase effectiveness of the method in future cases).

[105] *See* Rubenstein, *supra* note 104, at 18–19 (describing the seven categories used in the Colorado Method to rank jurors based on their views of capital punishment, four of which involve death penalty-inclined jurors who nonetheless would escape a for-cause challenge under *Morgan*).

articulates life-long support for the death penalty in general but agrees he or she will follow the court's instructions and consider evidence in mitigation and other available sentences.[106] The Colorado Method seeks to gather as much information as possible to identify these types of jurors and prioritize them for peremptory challenges if causal challenges are unsuccessful.[107] The educational component of the Colorado Method recognizes that some of these pro-death penalty jurors will likely end up on the jury.[108] Accordingly, this component seeks to address the group dynamics that cause minority-view jurors to cede ground to pro-death penalty jurors and change their vote (even though, according to a major research study, most capital sentencing deliberations begin "with at least some jurors who support a life sentence").[109]

Put differently, under the Colorado Method, educating death-inclined jurors is the latter part of a belt-and-suspenders approach in which challenges are the first line of defense.[110] However, as one military commentator has recognized, military capital defense counsel cannot fully operationalize the Colorado Method because they are limited to a single peremptory challenge (and thus, instead, must focus on challenges for cause and educating the panel).[111] Nonetheless, according to the same commentator, "training in the Colorado [M]ethod is the most important capital-specific training" for capital defense counsel.[112]

Of course, jurors are more than their views on the death penalty. Samuel Newton, a law professor and capital litigator, recommends capital defense counsel expand upon the Colorado Method through a more holistic voir dire and ranking process.[113] Professor Newton argues attorneys should conduct case-specific and juror-specific inquiries into factors influencing how individual jurors will interact with other jurors in the deliberation room and how jurors may empathize with either the victim

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[106] Rubenstein, *supra* note 104, at 18–19.
[107] *Id.*
[108] *See* Carpenter, *supra* note 56, at 22 (discussing the Colorado Method in light of the intersection between the findings of the Capital Jury Project and findings from general behavioral studies regarding social conformity).
[109] *See id.*
[110] *See* Rubenstein, *supra* note 104, at 18–19
[111] *See* Carpenter, *supra* note 56, at 22-23 & n.217.
[112] *Id.* at 23.
[113] Samuel P. Newton, *Getting to Know You: An Expanded Approach to Capital Jury Selection*, 96 TUL. L. REV. 131 (2021).

or the defendant.[114] In cases involving theories of actual innocence or expert testimony, Professor Newton recommends evaluating jurors on how they are likely to respond to these arguments and evidence.[115] In short, under Professor Newton's proposed method, capital litigators gather extensive information on broad aspects of jurors' views and beliefs to better inform for-cause and peremptory challenges, with an even wider focus than the Colorado Method.

Modern capital practice and the learned counsel standard all but require these forms of robust voir dire, for which a single defense peremptory challenge is ill-suited.[116] Instead, the military's single peremptory challenge leaves practitioners unable to use robust voir dire to shape the panel. This incongruity is fundamentally unfair for the military capital accused—they are entitled to defense counsel who will conduct robust, piercing voir dire but not to the additional peremptory challenges that allow defense counsel to fully act on the information from voir dire to shape the panel.

V. Peremptory Challenges Fill Important Gaps in Capital Cases

Perhaps the most crucial role of the peremptory challenge in a capital case is as a backstop to eliminate constitutionally-impaired panel members who evade challenges for cause. Empirical evidence demonstrates that constitutionally-impaired pro-death penalty jurors frequently serve on capital juries. One broad study of Capital Jury Project ("CJP") data

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[114] *See id.*; *see also* Honeyman, *supra* note 104 (recommending increased implementation of cultural factors when utilizing the Colorado Method).

[115] Newton, *supra* note 113, at 182–83.

[116] *See* United States v. Akbar, 74 M.J. 364, 384–85 (C.A.A.F. 2015) (analyzing whether capital defense counsel's military-specific "Ace of Hearts" voir dire strategy amounted to ineffective assistance of counsel); *see id.* at 421–26 (Baker, J., dissenting) (criticizing the defense counsel's voir dire strategy and discussing the extensive and advanced voir dire methods utilized by experienced defense attorneys in civilian capital cases). Under the "Aces of Hearts" strategy, capital defense counsel would avoid conducting robust voir dire or challenging members to preserve as large of a panel as possible, under the theory that each additional panel member beyond twelve could be the "ace of hearts" who would vote against the death penalty. *See id.* at 384–85 (there was no maximum number of panel members for capital cases at the time). Congress rendered this head-in-the-sand-style strategy obsolete in 2016 by establishing a fixed panel size of twelve for capital courts-martial. *See* Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25(a), UCMJ).

showed that many capital jurors make premature pro-death decisions before hearing sentencing evidence, sentencing arguments, or the judge's instructions on sentencing, indicating "a substantial failure to purge capital sentencing of jurors who are predisposed to death as punishment" and unwilling to consider constitutionally-required mitigation factors.[117] The study's authors identified "no easy or obvious remedy."[118] While recognizing the limits of what voir dire can accomplish, they noted that when effective voir dire reveals a constitutionally-impaired juror, practitioners "often must use peremptory challenges as a fail safe."[119]

A subsequent analysis of CJP interviews across several states similarly identified an abundance of automatic death penalty, burden-shifting, and mitigation-impaired jurors on capital juries.[120] One underlying cause of this phenomenon is the impact of the phrasing of voir dire questions, which leads many jurors to "sense" the supposed correct answer to questions regarding automatic imposition of the death penalty and willingness to consider mitigation evidence and respond accordingly, often without intent to lie.[121]

Importantly, it appears that jurors whose initial responses indicate a death-favoring constitutional impairment (such as automatically imposing the death penalty upon conviction) are more often successfully rehabilitated compared to jurors whose initial responses indicate life-favoring constitutional impairment (unwilling to consider imposing the death penalty in the case).[122] In either instance, the record would not reflect an adequate basis for a challenge for cause (amplified by the fact that "[t]he adequacy of *voir dire* is not easily the subject of appellate review.").[123] Nonetheless, a juror's demeanor, pattern of speech, and overall behavior may give a party pause about the reliability of that juror's statements during voir dire.[124] In such a scenario, peremptory challenges

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[117] William J. Bowers, Marla Sandys & Benjamin D. Steiner, *Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions Guilt-Trial Experience and Premature Decision Making*, 83 CORNELL L. REV. 1476, 1477 (1997-1998).
[118] *Id.* at 1546.
[119] *Id.* at 1537.
[120] Blume, Johnson & Threlkeld, *supra* note 99, at 1219–31.
[121] *See id.* at 1233–39.
[122] *See id.* at 1238.
[123] Morgan v. Illinois, 504 U.S. 719, 730 (1992) (citing Rosales-Lopez v. United States, 451 U.S. 182, 188 (1981)).
[124] *See generally* Jim Goodwin, Symposium, Securities Litigation: *The Fundamental Issues, Note, Articulating the Inarticulable: Relying on Nonverbal Behavioral Cues to Deception to Strike Jurors During Voir Dire*, 38 ARIZ. L. REV. 739 (1996).

provide an essential safeguard, especially in light of how death-favoring jurors are more easily rehabilitated than life-favoring jurors and how each additional death-favoring juror amongst a death-leaning majority increases the likelihood that group dynamics will work to overwhelm a life-favoring minority of three or fewer jurors.[125]

In addition to providing a fail-safe for capital defense counsel to eliminate constitutionally-impaired panel members, peremptory challenges also provide an important backstop, allowing defense counsel to benefit from the robust voir dire they are effectively required to undertake.[126] A capital defense counsel conducting voir dire under either the Colorado Method or an expanded method must necessarily sometimes engage in deeply personal questioning to bring forth a prospective member's true beliefs and values.[127] If voir dire becomes contentious with a particular member, but the member's responses do not justify a challenge for cause, a peremptory challenge allows the defense counsel to remove a member who the attorney feels they have alienated.[128] In either of these scenarios—a denied challenge for cause, lingering suspicions about a rehabilitated panel member, or alienation during voir dire—peremptory challenges are essential to preserve a fair capital panel or jury.

VI. Historical Rationales for the Single Peremptory Challenge Do Not Justify Its Retention in Capital Cases

Given the critical roles peremptory challenges perform in a capital case, why does the UCMJ afford the capital accused only one? When examined, the background of the single peremptory challenge in the military reveals that it persists in modern military capital trials primarily due to inertia and arguments promoting deference to military efficiency rather than an intentional procedural choice for trying cases with the highest stakes under law—life or death of the accused.

A. Challenges Under the Articles of War Prior to World War I

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[125] *See supra* text accompanying notes 80–82.
[126] *See* Johnson, *supra* note 23, at 224.
[127] *See* Section IV, *supra*.
[128] Cooper & Milhizer, *supra* note 28, at 11 (discussing this principle in court-martial practice).

In June 1775, the second Continental Congress implemented the first American Articles of War governing justice in the Continental Army, less than three weeks after resolving to raise that force.[129] Congress derived these rules primarily (and for many provisions entirely) from the British Articles of War of the same period.[130] An accused had no right to challenge these members, peremptorily or for cause, either in the 1775 Articles or in subsequent versions adopted in 1776 and 1786.[131] Congress first afforded the accused (but not the government) the right to challenge members for cause in the Articles of War of 1806.[132] The lack of any peremptory challenge at courts-martial continued throughout the nineteenth century, including in the next major revision to the Articles in 1874,[133] even though federal law and most states at the time provided peremptory challenges in some form.[134]

In 1912, the House of Representatives considered, without passage, a substantial revision to the Articles of War supported by the War Department.[135] At a House hearing on the bill, multiple members of the Committee on Military Affairs pressed the Judge Advocate General at the time, then-Brigadier General Enoch H. Crowder, regarding whether Congress should implement peremptory challenges for court-martial (citing their use in civilian practice).[136] General Crowder demurred, maintaining that such addition would be "unwise" and "fraught with grave consequences," while acknowledging that the omission of peremptory challenges in the military system "is a concession to the summary character of the military jurisdiction."[137]

Efforts to enact a substantial revision of the Articles of War continued through 1916, when Congress passed the most significant revision to the

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[129] *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 21 (2d ed. 1920). The June 30, 1775 Articles of War are reprinted in WINTHROP at 953–960.
[130] WINTHROP, *supra* note 129, at 21–22.
[131] *See* WINTHROP, *supra* note 129, at 205.
[132] Article 71, Articles of War, 2 Stat. 359, 368 (1806), *reprinted in* WINTHROP, *supra* note 129, at 976, 982–83. The 1806 Articles constituted a "complete revision of the code" and persisted with only minor amendments until 1874. *Id.* at 23.
[133] *See* Articles of War, 18 Stat. 228 (1874), *reprinted in* WINTHROP, *supra* note 129, at 986. Article 88 of the 1874 Articles contained the causal challenge provision. *Id.*
[134] *See* WINTHROP, *supra* note 129, at 206.
[135] H.R. 23628, 62nd Cong. (1912).
[136] Hearing on H.R. 23628 Being a Project for the Revision of the Articles of War before the H. Comm. on Mil. Affairs, 62nd Cong. 30–32 (1912) (statement of Brigadier General Enoch H. Crowder, Judge Advocate General).
[137] *Id.*

Articles since 1874.[138] Despite many structural reforms, the bill made no change to the challenges provision from 1874 except to renumber it.[139] At a Senate hearing on the bill, General Crowder maintained his opposition to introducing a peremptory challenge, citing concerns regarding the impact of peremptory challenges in wartime courts-martial and an apparent "absence of complaint" regarding the historical lack of peremptory challenges in courts-martial.[140]

B. Post-World War I Creation of the Single Peremptory Challenge

The next major reforms to the Articles of War, including the adoption of the single peremptory challenge, occurred in the immediate aftermath of World War I. The dramatic expansion of the armed forces attendant to this conflict brought military life—and military justice—into the public eye of American citizens in a manner not experienced since the American Civil War.[141] For military justice in particular, two resulting dynamics spurred drives for reform: (1) the incorporation of a large number of lawyers with substantial experience in civilian practice and academia into the JAG Department, and (2) the significant multiplication of courts-martial often being carried out by (and enforcing discipline amongst) populations inexperienced with military customs and life.[142] Substantial debate occurred within the War Department regarding the extent of reform

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[138] Articles of War, Act of August 29, 1916, Pub. L. No. 62-242, 39 Stat. 619, 650–70.
[139] *See id.* at art. 18, 39 Stat. at 653.
[140] *Hearing on S. 3191, Being A Project for the Revision of the Articles of War before the S. Subcomm. on Mil. Affairs*, 64th Cong. (1916), *printed in* S. REP. NO. 64-130, at 43 (statement of Brigadier General Enoch H. Crowder, Judge Advocate General).
[141] JONATHAN LURIE, ARMING MILITARY JUSTICE 46 (1992).
[142] *See id.* at 46–47. Some of the distinguished lawyers and legal scholars who served in the JAG Department during World War I include future Supreme Court Justice Felix Frankfurter, Harvard law professors Eugene Waumbaugh and Edmund Morgan, and John H. Wigmore, who served as Dean of Northwestern University Law School both before and after the conflict. *Id.* at 46 & n.3. Of note, although the raw number of courts-martial increased significantly during World War I, the relative number of courts-martial compared to the number of soldiers in the Army actually decreased. *See* William C. Rigby, *Military Penal Law: A Brief Survey of the 1920 Revision of the Articles of War*, 12 J. AM. INST. CRIM. L. & CRIMINOLOGY 84, 88 (1921).

called for by these experiences, [143] including over whether to introduce peremptory challenges to the military justice system.

As set forth in the introduction, the single peremptory challenge under the UCMJ originated in the 1920 amendments to the Articles of War.[144] However, the original Senate bill introduced in May 1919 actually called for the accused to receive *two* peremptory challenges at all general courts-martial (the only level of court-martial authorized to impose the death penalty).[145] The reforms in this bill originated with General Crowder's principal assistant, Brigadier General Samuel Ansell, who prepared the bill at the request of Senator George Chamberlain (the Ansell-Chamberlain bill). [146] These reforms quickly sparked opposition from others within the War Department. In July 1919, a Special War Department Board released a report on court-martial procedure characterizing the Ansell-Chamberlain bill in general as a "radical change."[147] This report proposed a more modest set of reforms, including the introduction of one peremptory challenge for each side, rather than two.[148]

Later that same summer, Senate hearings on the Ansell-Chamberlain bill began and continued over several months, featuring testimony by several witnesses for and against introducing peremptory challenges to the court-martial process. In August 1919, former General Ansell testified in favor of adding peremptory challenges, citing concerns of convening

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[143] Rigby, *supra* note 142. This included acrimonious public strife between the aforementioned General Crowder and his more reform-minded principal assistant, Brigadier General Samuel Ansell. *See, e.g.*, *Ansell Sends Reply to Crowder Charge*, N.Y. TIMES, Mar. 12, 1919, at 11; *Gen. Crowder Denies Ansell's Accusation*, N.Y. TIMES, Oct. 26, 1919, at 2; LURIE, *supra* note 141, at 46–126.

[144] Article of War 18, Act of June 4, 1920 (Chapter II), Pub. L. No. 66–242, 41 Stat. 759, 790.

[145] A Bill to Establish Military Justice, S. 64, 66th Cong. at Article 23 (as introduced on May 20, 1919).

[146] *Hearing on S. 64 A Bill to Establish Military Justice before the S. Comm. On Mil. Affairs*, 66th Cong. 37 (1919) (comment by Senator Chamberlain during testimony on August 2, 1919).

[147] U.S. DEP'T OF WAR, PROCEEDINGS AND REPORT OF THE SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 5–6 (1919).

[148] *Id.* at 23. One member of the Special Board, Major General F.J. Kernan, opposed the introduction of peremptory challenges altogether. General Kernan asserted that they, like many proposed reforms, were primarily supported by lawyers from civilian practice in uniform only for World War I, who had "the erroneous assumption that what [was] necessary or useful in [civilian] practice must, as a matter of course, be desirable in the military practice." *Id.* at 23–24.

authority prejudice.[149] Mr. Ansell also noted in oral testimony and a written exhibit that General Crowder had historically opposed their introduction.[150] Brigadier General Walter Bethel of the JAG Department testified that he "heartily" supported two peremptory challenges for the accused, noting that they would increase the accused's perception of justice by allowing the removal of members viewed by the accused as unfair but against whom a challenge for cause would fail.[151] In addition, then-Yale and future Harvard professor Edmund M. Morgan testified in support of an unspecified number of peremptory challenges, while expressing doubt as to whether that number should be the same as in civilian practice.[152] In supporting added peremptory challenges, Professor Morgan cited in part to concerns about biased members evading challenge through less-than-forthcoming responses during voir dire (a phenomenon common enough in civilian practice that he presumed the subcommittee members were "undoubtedly" already aware of it).[153]

By contrast, a member of the Special *War* Department Board[154] and the Inspector General of the Army[155] both appeared before the subcommittee opposing the introduction of any peremptory challenge without much discussion. In addition, General Crowder appeared before the Subcommittee over several days.[156] Amidst a broadside of allegations regarding Mr. Ansell's purported misrepresentations of General Crowder's prior positions, the latter attempted to clarify his opposition to peremptory challenges earlier in the decade, maintaining he was generally not opposed to adopting more procedural protections from civilian courts.[157]

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[149] Hearing on S. 64 A Bill to Establish Military Justice before the S. Comm. On Mil. Affairs, 66th Cong. 267 (1919) (statement by Mr. Anselm on August 29, 1919).
[150] *Id.* at 249 (Ansell Exhibit A-2); 256–57 (statement by Mr. Anselm on August 29, 1919).
[151] *Id.* at 591 (statement by Brigadier General Bethel on September 25, 1919).
[152] *Id.* at 1373–74 (statement by Edmund M. Morgan on November 8, 1919). Professor Morgan had also served as an officer in the JAG Department from September 1918 to May 1919. *Id.* at 1371–72.
[153] *Id.* at 1374 (statement by Professor Morgan).
[154] *Id.* at 442 (statement by General Kernan on September 24, 1919) (General Kernan did not elaborate on his opposition to peremptory challenges during the Senate subcommittee hearing, but likely maintained the same rationale he expressed earlier that year in the Special War Department Board report, quoted in note 148, *supra*).
[155] *Id.* at 724 (statement by Major General John L. Chamberlain on October 23, 1919).
[156] *Id.* at 1133–338 (statements and submissions by General Crowder on October 24, 25, 28, and 29 of 1919).
[157] *Id.* at 1291–92 (submission by General Crowder on October 29, 1919).

Following the conclusion of the hearings, the Senate subcommittee changed course regarding many of the Ansell-Chamberlain reforms, including the proposal for two peremptory challenges, and towards the more limited reforms proposed by the Special War Department Board and now supported by General Crowder's JAG Department.[158] Although emerging from the subcommittee as ostensibly the same bill, the subcommittee had amended it by striking the original provisions in their entirety and adding instead most of the Special War Department's proposed reforms, including the introduction of one peremptory challenge, rather than two.[159] The House of Representatives adopted this version within a larger defense authorization bill,[160] which ultimately emerged from Congress as the enacted 1920 Articles of War.[161]

C. Peremptory Challenges Under the Uniform Code of Military Justice.

Like World War I before it, World War II spurred another wave of substantial military justice reform. This resulted in the Uniform Code of Military Justice, which standardized military statutory law across all branches for the first time and established civilian appellate review of courts-martial via the creation of the United States Court of Military Appeals.[162] However, one aspect that remained unchanged was the single peremptory challenge (at least for single-defendant cases), which simply moved to Article 41(b) where it remains to this day.[163] Notwithstanding public support for an increase to two peremptory challenges from the

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[158] *See* Rigby, *supra* note 142, at 84–85.
[159] *Compare* A Bill to Establish Military Justice, S. 64, 66th Cong. (as reported with amendment on April 15, 1920) *with* U.S. DEP'T OF WAR, PROCEEDINGS AND REPORT OF THE SPECIAL WAR DEPARTMENT BOARD ON COURTS-MARTIAL AND THEIR PROCEDURE 5–6 (1919).
[160] *Compare* A Bill to Establish Military Justice, S. 64, 66th Cong. (as reported with amendment on April 15, 1920) *with* H.R. 12775 (Chapter II), 66th Cong. (as reported with amendment on April 20, 1920).
[161] Articles of War, Act of June 4, 1920 (Chapter II), Pub. L. No. 66-242, 41 Stat. 759, 787.
[162] *See* Fred L. Borch, *The United States Court of Military Appeals: The First Year (1951–1952)*, ARMY LAW., Feb. 2018, at 1 (discussing the historical context of the establishment of the Court of Military Appeals).
[163] *Compare* UCMJ art. 41 (1950) *with* UCMJ art. 41 (2016).

Veterans of Foreign Wars,[164] most discussions regarding these challenges during the development of the UCMJ revolved around whether to provide a peremptory challenge to each accused in a joint trial.[165]

During this period, a Navy report acknowledged the likelihood that the eventual UCMJ would adopt the single peremptory challenge from the Articles of War (thereby expanding it to naval practice) but generally opposed any increase beyond one peremptory.[166] One Navy captain who testified at House hearings in 1949 opposed multiple peremptory challenges in joint trials primarily out of concerns that an increase would divert more officers from their primary duties during the voir dire portion of a court-martial.[167] These concerns echoed the debate from the development of the 1920 Articles of War. Further, any potential differentiation in the number of peremptory challenges between capital and non-capital general courts-martial is absent in the key hearings leading up to the 1951 UCMJ.[168]

Debate regarding the number of peremptory challenges was relatively silent throughout subsequent rounds of major UCMJ reform during the

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[164] *Hearing on Sundry Legislation Affecting the Naval and Military Establishment Before the H. Comm. On Armed Services*, 80th Cong. 1947, 2115 (1947) (statement of Hon. Donald E. Long, Chairman of the Veterans of Foreign Wars Special Committee on Military Service).

[165] *See*, *e.g.*, H.R. REP. NO. 81-491, at 22 (1949); *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 821, 1026–28 (1949).

[166] *See* DEP'T OF THE NAVY, REPORT OF NAVY GENERAL COURT-MARTIAL SENTENCE REVIEW BOARD 136 (1947) (describing opposition to more than one peremptory "because the number of members is usually small compared with a civil jury panel"). In addition to several naval officer members, the board was chaired by Arthur J. Keeffe, a Cornell Law professor, and co-chaired by Felix E. Larkin, future Assistant General Counsel for the Office of the Secretary of Defense, both of whom would later testify at House hearings on military justice reform. *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 837, 846 (1949).

[167] *Hearings on H.R. 2498* [a UCMJ precursor] *Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. 1027 (testimony by Captain Woods, who responded to questions frequently throughout the larger testimony of Felix E. Larkin, then-Assistant General Counsel for the Office of the Secretary of Defense; Captain Woods' first name is omitted from the Hearing records).

[168] See generally H.R. REP. NO. 81-491 (1949); Hearings on H.R. 2498 [a UCMJ precursor] Before a Subcomm. of the H. Comm. On Armed Services, 81st Cong. (1949); Hearings on S. 857 and H.R. 4080 [later enacted as the UCMJ] Before a Subcomm. of the S. Comm. On Armed Services, 81st Congress (1949).

Vietnam War.[169] Serious discussions about providing additional peremptory challenges began again in 1982 when the Senate conducted hearings on a military justice reform bill that would have increased the number to three for each accused (as well as for the trial counsel).[170] That fall, the General Counsel of the Department of Defense and The Judge Advocate General of the Air Force both testified against increasing the number of peremptory challenges.[171] Both based their opposition almost entirely on concerns about taking more panel members temporarily away from their primary military duties to accommodate the additional challenges.[172] Neither discussed capital cases when setting forth these concerns.[173]

By contrast, a leader from the American Bar Association testified in favor of increasing the number of peremptory challenges in general.[174] However, he noted the Association only went so far as to support two but not three, citing a "grave concern" regarding small installations in which it may be difficult to obtain the "as many as 15 to 18" prospective members required to accommodate three peremptory challenges.[175] The American Veterans Committee submitted a statement supporting the increase to three and proposed a mechanism to conduct some peremptory challenges before trial as a way to reduce the number of members who would be taken from their duties.[176]

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[169] One exception occurred in 1966, when a former Air Force trial lawyer testified before a joint Congressional hearing in favor of expanding the number of peremptories to four or five (while discussing concerns with selection of panel members by the convening authority). *Joint Hearings on Bills to Improve the Administration of Justice in the Armed Services Before a Subcomm. on Const. Rts. of the S. Jud. Comm. and a Special Subcomm. of the Comm. on Armed Serv*., 89th Cong. 224, 231 (1966) (statement of Mr. Herbert Marks).

[170] S. 2521, 97th Cong. § 3(l) (1982).

[171] *Hearings on S. 2521 Before a Subcomm. on Manpower and Pers. of the S. Comm. on Armed Serv.*, 97th Cong. (1982) (statements of the Hon. William H. Taft and Maj. Gen. Thomas B. Bruton).

[172] *Id.* at 42 (Mr. Taft) and 49–50 (Maj. Gen. Bruton).

[173] *See id.* at 42 (Mr. Taft) and 49–50 (Maj. Gen. Bruton).

[174] *Id.* at 184 (statement of Mr. Ernest H. Fremont, Jr., Chairman of the American Bar Association's Standing Committee on Military Law). Mr. Fremont did not discuss the underlying rationale for his support of increased peremptory challenges.

[175] *Id.* at 184 (statement of Mr. Ernest H. Fremont, Jr., Chairman of the American Bar Association's Standing Committee on Military Law).

[176] *Id.* at 286 (statement of the American Veterans Committee Concerning Military Justice Legislation).

The three civilian judges of the Court of Military Appeals also expressed support for a theoretical future increase in the number of peremptory challenges, noting that it may reduce litigation of denied causal challenges on appeal.[177] However, the judges ultimately did not recommend immediate expansion due to concerns about workforce implications.[178] In this manner, consideration of the impact on command efficiency formed a common thread across all these statements, both for and against the increase in peremptory challenges. Ultimately, no further action was taken on the 1982 Senate bill. Congress enacted major reforms the next year, but this round of revisions left the single peremptory challenge unchanged.[179]

The issue of increasing the baseline number of peremptory challenges at courts-martial has remained largely dormant ever since. Congress did modify the peremptory provision in 1990 by providing the accused and the government each an extra peremptory in the limited circumstances in which additional members are detailed to the court (which would only occur if challenges or excusals reduce the pool of members to below the statutory minimum required).[180] In 2006, Congress also adopted the single peremptory challenge standard for trials of alien unlawful enemy combatants tried before military commissions.[181] Congress later modified the military commissions' peremptory provision by clarifying that the standard does not prohibit the military judge from granting additional challenges "as may be required in the interest of justice" (a provision absent from the UCMJ).[182]

In 2015, a comprehensive review of the military justice system by the Department of Defense acknowledged the disparity in the number of peremptory challenges between the military and civilian systems but neither discussed arguments for or against the disparity nor recommended

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[177] *Id.* at 99, 118 (statement of the Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals, who was accompanied by the Court's two associate judges).
[178] *Id.* (statement of Chief Judge Everett).
[179] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393 (codified in 10 U.S.C. § 801 *et seq*.).
[180] National Defense Authorization Act for Fiscal Year 1991 § 541, Pub. L. No. 101-510, 104 Stat. 1485, 1565 (1990) (modifying UCMJ, art. 41).
[181] Military Commissions Act of 2006 § 3, Pub. L. No. 109-366, 120 Stat. 2600, 2613 (codified at 10 U.S.C. § 948a *et seq.*).
[182] *Compare* 10 U.S.C. § 949f(b) *with* UCMJ, art. 41 (2016).

any increase or decrease.[183] Based in part on this comprehensive review, Congress adopted substantial military justice reforms in the Military Justice Act of 2016, which did not modify the number of peremptory challenges.[184] Notwithstanding over a century of military justice reform, the single peremptory challenge persists to the present, substantially unchanged.

VII. Providing Additional Peremptory Challenges is Consistent with the Trend Towards Increased Procedural Alignment with the Federal System for Military Capital Litigation.

Over time, military capital procedure has grown more closely aligned with federal civilian capital procedure. For example, Congress codified the right to at least one defense counsel "learned in the law applicable to capital cases" in 2016.[185] This was over two decades after Congress established the same standard for federal capital defendants in 1994[186] and seven years after Congress applied the standard for alien unlawful enemy combatants being tried before military commissions.[187] The Court of Appeals for the Armed Forces and the Military Justice Working Group had both publicly noted this deficiency.[188]

Another significant 21st-century alignment occurred in 2001 when Congress enacted Article 25(a),[189] which raised the minimum number of

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[183] DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 377–80 (2015). The review did recommend minor conforming amendments to Article 41 to align the provision's language with other proposed UCMJ amendments. *Id.*

[184] Military Justice Act of 2016, Pub. L. No. 114-328, 130 Stat. 2000, 2894 (2016).

[185] Military Justice Act of 2016, § 5186, Pub. L. No. 114-328, 130 Stat. 2000, 2902 (2016) (amending UCMJ art. 27).

[186] 18 U.S.C. § 3005. The Federal Death Penalty Act of 1994 replaced the earlier standard that required the appointment only of counsel "learned in the law." Pub. L. No. 103-322, § 60026, 108 Stat. 1796, 1982.

[187] 10 U.S.C. § 949a(b)(2)(C)(ii).

[188] United States v. Akbar, 74 M.J. 364, 399–400 (C.A.A.F. 2015) (holding that the court could not impose the learned counsel standard without congressional authorization); *see id.* at 421–26 (Baker, J., dissenting) (noting the lack of a death qualified bar in the military and recommending reform); DEP'T OF DEF., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 275–80 (2015).

[189] UCMJ art. 25(a) (2001). From 1786 to 1920, general courts-martial could consist of five to thirteen members, but not less than thirteen when thirteen could "be convened without manifest injury to the service." *E.g.* Article 6, Articles of War (1786), *reprinted in*

members in a capital case from five to twelve (although the services had utilized panels larger than five in some earlier capital cases).[190] Nonetheless, the new Article 25(a) reflected continued deference to military efficiency by leaving open the possibility of utilizing less than twelve members if members were not reasonably available due to physical conditions or military exigencies.[191] Congress did not eliminate the physical conditions and military exigencies exceptions until the Military Justice Act of 2016.[192] This legislation also established a fixed number of twelve panel members for capital cases.[193] By contrast, twelve jurors have been required under the federal rules since their genesis.[194]

The undercurrent of these developments is the implied recognition that, for modern capital cases, military efficiency concerns are increasingly less important than providing robust procedural protections. Concurrently, peremptory challenges are increasingly critical for capital defense counsel to fully benefit from robust capital voir dire processes (which reflect modern research into group dynamics in capital juries) and to address situations where challenges for cause are inadequate. Given that opposition to increased peremptory challenges was rooted in military efficiency arguments, Congress should continue to align military capital

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WINTHROP, *supra* note 129, at 972; Article of War 5, Pub. L. No. 64-242, 39 Stat. 619, 651 (1916). The 1920 revision to the articles imposed a simple minimum of five members (and no maximum), which persisted in the UCMJ until the Military Justice Act of 2016 fixed the number of members impaneled at eight for non-capital general courts-martial. *E.g.* Article of War 5, Act of June 4, 1920 (Chapter II), Pub. L. No. 66-242, 41 Stat. 759, 788; Military Justice Act of 2016, § 5161, Pub. L. No. 114-328, 130 Stat. 2000, 2897 (modifying Article 16, UCMJ).

[190] *See*, *e.g.*, United States v. Kreutzer, 61 M.J. 2005 (C.A.A.F. 2005) (1995 capital trial with twelve members); United States v. Loving, 41 M.J. 213 (C.A.A.F. 1994) (1989 capital trial with eight members); United States v. Curtis, 32 M.J. 252 (C.M.A. 1991) (1987 capital trial with nine members).

[191] UCMJ art. 25(a) (2001); see also Jonathan Choa, Note, *Civilians, Service-Members, and the Death Penalty: The Failure of Article 25A to Require Twelve-Member Panels in Capital Trials for Non-Military Crimes*, 70 FORDHAM L. REV. 2065 (2002) (discussing the historical evolution of panel size in the court-martial system, criticizing Congress's 2001 decision to allow a military exigency exception to the twelve-member requirement in light of this history).

[192] Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25a, UCMJ).

[193] *Id.* By setting a fixed, rather than minimum number, Congress eliminated the "ace of hearts" strategy discussed in note 116, *supra*.

[194] *See* FED. R. CRIM. P. 23(b)(1).

procedure with civilian practice by providing military accused with ten peremptory challenges in capital cases.

VIII. An Asymmetric Increase in Peremptory Challenges is Appropriate in the Military System.

Expanding the number of peremptory challenges for each military capital accused to ten would generally increase conformity with civilian capital procedures across the country. By contrast, providing the prosecution with only half as many peremptory challenges—five per accused—would not. Indeed, all but two of the remaining U.S. death penalty jurisdictions provide an equal number of peremptory challenges to each side in single-defendant cases,[195] even though many previously afforded a capital defendant more than the prosecution (including five states that have abolished the death penalty since 2001).[196] At first blush, this proposal's departure from the trend away from asymmetrical peremptory challenges in civilian practice may seem at odds with this approach. However, while conforming with civilian procedures in part supports expanding defense peremptory challenges in military capital cases, the nature of panel selection in the military and continued concerns about discriminatory peremptory challenges in the American legal system both justify providing a lower number for the prosecution.

Throughout the American criminal justice system, standing courts draw a pool of prospective jurors randomly from the local population (typically using databases of voter registration, driver's licenses, and tax records).[197] By contrast, in the military justice system the "convening authority" personally selects prospective panel members to detail to a

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[195] *See* ARK. CODE ANN. § 16-33-305 (2023); S.C. CODE ANN. § 14-7-1110 (2022) (citing Arkansas Code, which provides the defense and the government with twelve and ten peremptory challenges, respectively, and to South Carolina Code, which provides the defense ten and the government five peremptory challenges respectively (in single-defendant capital cases for both states)).

[196] *See* Baldus et al., *supra* note 10, at 13–14 & nn.18–19 (discussing historical practice generally and citing then-existing asymmetrical capital peremptory procedures in Arkansas, Delaware, Massachusetts, New Hampshire, New Jersey, New Mexico, and South Carolina).

[197] *See*, *e.g.*, 28 U.S.C. § 1863 (requiring random selection procedures in U.S. district court); MINN. R. CRIM. P. 26.02 (random selection "from a fair cross-section of qualified county residents"); TEX. GOV'T CODE ANN. §§ 62.001 (random selection from current voter registration, driver's license, and personal identification card lists).

court-martial.[198] The convening authority, generally a flag officer, is typically the commander of the accused's unit at a high echelon.[199] At times, modern courts-martial panels may still include members of a convening authority's immediate staff or his or her immediate subordinate commanders.[200]

Historically and through the present, Article 25 of the UCMJ has largely precluded a randomized selection process, instead requiring the convening authority to select, based on his or her "opinion," those who are "best qualified" under a series of factors.[201] For courts-martial convened after December 23, 2024, a recent modification to Article 25 will require convening authorities to utilize a forthcoming randomization procedure when detailing members.[202] The President has not yet prescribed the randomization procedure in question. However, the modification to Article 25 leaves intact the "best qualified" in the "opinion" of the convening authority requirement.[203] This means that any resulting randomization procedure would still involve the personal discretion of the convening authority in identifying the pool from which panel members are

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[198] UCMJ art. 25 (2016).

[199] UCMJ art. 22 (2021). The convening authority cannot delegate this personal responsibility. United States v. Ryan, 5 M.J. 97, 100–01 (C.M.A. 1978).

[200] *See e.g.,* United States v. Badders, 2021 CCA Lexis 510 (A. Ct. Crim. App. Sept. 30, 2021) (convening authority's Public Affairs Officer served as a panel member in a sexual assault case; the member's primary duties around the time of trial included preparing press releases for the unit, including on ongoing efforts to eliminate sexual assault, and assisting the convening authority with statements to the public).

[201] UCMJ art. 25(e)(2) (2016) (specifically directing the convening authority to consider age, education, training, experience, length of service, and judicial temperament). The Army has conducted at least two experiments in court-martial panel selection with varying levels of convening authority involvement. A 1974 experiment at Fort Riley, KS involved random selection from a pool of candidates derived on four screening criteria prescribed by the convening authority and a records review (rather than hand-selection). A 2005 experiment by V Corps involved random selection from a pool of candidates nominated by subordinates and hand-selected by the convening authority. *See* Major James T. Hill, *Achieving Transparency in the Military Panel Selection Process with the Preselection Method*, 205 MIL. L. REV. 117, 128–29 (2010).

[202] James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 543 (2022) [hereinafter FY2023 NDAA] (amending Art. 25(e), UCMJ effective two years after the December 23, 2022, enactment of the Act); 2024 MCM, *supra* note 29, art. 25.

[203] *See id.* (amending Art. 25 only by adding the subparagraph regarding randomization, without striking any language from the Article).

randomly drawn (or, at the very least, the convening authority's personal discretion in setting screening criteria for the development of the pool).[204]

These same convening authorities—who will still exercise some level of personal discretion in panel selection—also bear other substantial military justice responsibilities. Traditionally, and for all offenses occurring prior to December 27, 2023, the convening authority is also the same individual responsible for ordering ("referring") charges in a specific case to be tried at a court-martial created ("convened") by the convening authority.[205] For some serious offenses occurring after December 27, 2023 ("covered offenses"), including all murder offenses, military prosecutors from the Office of Special Trial Counsel, independent of the chain of command, have sole discretion over referral decisions.[206] This reform does not deprive commanders of authority over other capital cases—they retain discretion and referral authority over all thirteen non-murder capital offenses under the UCMJ, such as espionage (at least when such offense is unrelated to a murder offense or other "covered offense").[207]

Regardless of who refers a capital case, the courts-martial trying such a case will still consist of members selected in part based on the convening

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[204] *Compare* UCMJ art. 25(e) (2016), *with* FY2023 NDAA, *supra* note 202, sec. 543.

[205] UCMJ art. 22 (2021); UCMJ art. 34(d) (2021). For felony-level cases, Article 34 requires the convening authority to obtain the advice of a senior attorney prior to referring charges to court-martial.

[206] UCMJ art. 24(a) (2022). Article 24a, which creates the "special trial counsel" system (independent military prosecutors), and the related procedural reforms enacted in the 2021 National Defense Authorization Act did not take effect until December 27, 2023. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, §539C, 135 Stat. 1541, 1699 (2021); 2024 MCM, *supra* note 29, art. 24(a).

[207] *See id.* (defining "covered offenses" and the special trial counsel's authority over known and related offenses). The thirteen non-murder capital offenses are UCMJ art. 85 (1956) (desertion, in time of war); UCMJ art. 89 (2016) (assault of a superior commissioned officer in execution of office, in time of war); UCMJ art. 90 (2016) (willfully disobeying superior commissioned officer, in time of war); UCMJ art. 94 (1956) (mutiny, sedition, or failure to suppress or report a mutiny or sedition); UCMJ art. 95 (2016) (drunk on post, sleeping on post, or leaving post before being relieved, in time of war); UCMJ art. 99 (1956) (misbehavior before the enemy (defining nine subcategories of misbehavior)); UCMJ art. 100 (1956) (subordinate compelling surrender); UCMJ art. 101 (1956) (improper use of countersign); UCMJ art. 102 (forcing a safeguard); UCMJ art. 103 (2016) (spies); UCMJ art. 103a (2016) (espionage); UCMJ art. 103b (2016) (aiding the enemy); UCMJ art. 110 (2016) (improper hazarding of vessel or aircraft, when done willfully and wrongfully). The United States has not executed a Soldier for an offense other than murder or rape since World War II. *See* Colonel French L. MacLean, *The Seventh Annual George S. Prugh Lecture in Military Legal History*, 219 MIL. L. REV. 262, 269 (2014) (summarizing World War II executions).

authority's opinion (the independent military prosecutors cannot themselves convene courts-martial).[208] Moreover, although commanders serving as convening authorities will no longer decide to send most capital cases to trial, they nonetheless remain responsible for maintaining good order and discipline in their commands.[209] Regardless of how randomization is implemented under the amended Article 25, the convening authority's integral role in panel selection will still raise the question of why the prosecution must continue shaping the panel at trial. As one appellate judge has remarked, the convening authority's role in detailing panel members gives the Government "the functional equivalent of an unlimited number of peremptory challenges."[210] This feature of the system has contributed to previous calls for peremptory reform in the military justice system.[211]

There are limits to the "functional equivalent" argument, especially in light of the role randomization will play in future cases. Moreover, convening authorities are not lawyers and neither conduct *voir dire* nor try cases. A convening authority cannot possibly envision all potential grounds for a Government challenge to a panel member *ex ante*. For example, a panel member might disclose information during voir dire that could form the basis for a Government challenge (in a capital case, this could include a belief that the death penalty should never be applied). The military judge may improperly deny some of the trial counsel's for-cause challenges, and the trial counsel may desire to use a peremptory challenge in this situation, just as would the accused.

Nonetheless, the fact remains that the Government, through the convening authority, already possesses substantial ability to shape the panel *ex ante* to avoid members who do not possess adequate judicial temperament. Judicial temperament—the ability and desire to follow the

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[208] *Compare* 2024 MCM, *supra* note 29, art 24 (a) (establishing the special trial counsel's responsibilities and limiting command authority over "covered offenses") *with* UCMJ art. 22 (2021) (not including the special trial counsel in the list of those who may convene general courts-martial).

[209] *See* 2019 MCM, *supra* note 29, pt. V, ¶ 1.d.(1).

[210] United States v. Carter, 25 M.J. 471, 478 (C.M.A. 1988) (Cox, J., concurring).

[211] *See* Victor Hansen, *Avoiding the Extremes: A Proposal for Modifying Court Member Selection in the Military*, 44 CREIGHTON L. REV. 911 (2011) (proposal to increase the number of defense peremptory challenges to three for all general courts-martial (two for special courts-martial) and to eliminate the prosecution's peremptory challenge entirely); Robert William Best, *Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off*, 183 MIL. L. REV. 1 (2005) (proposal to eliminate peremptories at court-martial entirely).

law impartially—should, after all, be a prosecutor's main desired trait in a prospective member. Given this feature of the military justice system, increasing peremptory challenges to ten for each capital accused but only to five for the prosecution is appropriate, even if it departs from the more general trend in civilian jurisdictions to provide the prosecution and defense with an equal number of challenges.

An asymmetrical increase would also address concerns regarding prosecutors' discriminatory use of challenges, a central argument fueling calls to eliminate peremptory challenges altogether.[212] One study of 317 capital murder cases in Philadelphia in the 1980s and 1990s identified widespread discriminatory use of peremptory challenges on the basis of race and gender (in which prosecutors' peremptory challenges tended to result in less diverse panels, while defense challenges tended to preserve minority representation).[213] When the researchers applied a hypothetical restriction of peremptory challenges to real-world cases, five for the prosecution and ten for the defense, they found that such a balance "would have significantly reduced race and gender discrimination and limited its adverse impact on the jury decision making system."[214] In this manner, an asymmetrical balance of peremptory challenges would help preserve both fairness and the perception of fairness for capital accused.[215]

IX. De Minimis Impact on Command Efficiency and Length of Future Capital Cases

This article's proposed increase in peremptory challenges for military capital cases would have limited overall impact on command efficiency, the chief concern of most historical opposition to increasing the number available at a court-martial.[216] Certainly, thirteen additional peremptory challenges (beyond the current two) may require convening authorities to detail up to thirteen more panel members to capital cases. This will

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[212] *See supra* text accompanying notes 22–29.
[213] Baldus et al., *supra* note 10, at 127–30.
[214] *Id.* at 130.
[215] *See* Savanna R. Leak, *Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution*, 111 J. CRIM. L. & CRIMINOLOGY 273 (2001) (arguing that the remaining jurisdictions that provide criminal defendants with more peremptory challenges than the prosecution should continue to do so to preserve both actual and perceived fairness).
[216] *See supra* section VI.

admittedly take those thirteen extra panel members away from their primary duties for the time needed for panel selection (but not for trial, which will still require only twelve members). However, capital cases are rare in the military and becoming rarer. From 1984 to 2006, the first twenty years of the modern military death penalty system, the military tried 47 capital cases across all services.[217] Of those cases, a significant majority occurred early in this period; only three capital courts-martial occurred from 1997 to 2006.[218]

The services tried five more capital cases in the next fifteen years, from 2007 to 2022 (including one capital resentencing hearing and not including cases referred as capital cases that did not remain death-eligible at trial).[219] This means that in the past twenty-five years only eight panels actually sat to hear a military capital case, an average of roughly one every three years across all services. Detailing thirteen additional members for voir dire this infrequently would create a virtually imperceptible change in overall readiness relative to the aggregate number of members who routinely sit non-capital courts-martial each week across the military.

The additional members required for this proposal will not impact ongoing combat operations or hinder small units. Unlike in World War II,

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[217] Sullivan, *supra* note 34, at 11–13 (analyzing known military courts-martial that remained capital-eligible cases at trial).

[218] *Id.* at 14–17 (attributing the decline in military capital trials to multiple factors, including opposition from European allies to capital courts-martial for crimes in Europe, increased complexity of capital litigation (deterring capital referrals and lengthening case time), and the availability for the first time of life without parole as an authorized punishment for offenses committed after November 1997). Another factor likely contributing to the decline is the post-Cold War reduction in the active duty military population, which fell approximately 35% between 1984 and 2006, with most of the decline occurring between 1990 and 1998 (end strength stabilized somewhat thereafter). *See* DEP'T OF DEF., POPULATION REPRESENTATION IN THE MILITARY SERVICES 2017, APPENDIX D, TABLE D-39 (2017).

[219] United States v. Witt, 2021 CCA Lexis 625 (A.F. Ct. Crim. App. Nov. 19, 2021) (2018 Air Force capital resentencing proceeding in which panel declined to impose a death sentence for Airman whose previous 2004 death sentence was set aside on appeal); United States v. Wilson, 2021 CCA Lexis 284 (A.F. Ct. Crim. App. June 10, 2021), *rev. denied*, 2021 CAAF Lexis 1075 (C.A.A.F. Dec. 21, 2021) (2017 Air Force capital court-martial in which panel declined to impose a death sentence); United States v. Hasan, 80 M.J. 682 (Army Ct. Crim. App. 2020), *mand. rev. pending* (2015 Army capital court-martial in which panel imposed a death sentence); United States v. Hennis, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (2010 Army capital court-martial in which panel imposed a death sentence); Paul von Zeilbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES (Feb. 20, 2009), https://www.nytimes.com/2009/02/21/nyregion/21frag.html (2008 Army capital court-martial ending in an acquittal).

in which the military rapidly tried capital cases in theater (in part for an immediate deterrent effect),[220] it is nearly unimaginable the military would do so today. Take, for example, two prominent instances of soldier-on-superior killings from the Iraq war. In the March 2003 build-up to the invasion, Sergeant Hasan Akbar killed two officers from his unit and wounded fourteen others.[221] The Army did not try Sergeant Akbar in Iraq; his capital court-martial began over two years later, in April 2005, at Fort Bragg, North Carolina.[222] In June 2005, a different sergeant was alleged to have killed two officers from his unit while deployed to Iraq.[223] The Army sought the death penalty in a December 2008 trial at Fort Bragg, which resulted in an acquittal.[224] Both of these capital trials occurred over two years after the underlying incidents.[225] Far from being carried out at a small installation at which prospective panel members are scarce (a historical concern of some who opposed increased peremptory challenges),[226] they occurred on the single largest Army post in terms of active duty personnel.[227]

Just as the proposed increase in peremptory challenges will have little impact on command efficiency or combat operations in general, it will also have little practical impact on the already lengthy court-martial process.

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[220] *See* UNITED STATES ARMY, THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775–1975 at 192–99 (1975) (relating how Private Eddie Slovik deserted his forward-deployed infantry unit in October 1944, was sentenced to death in a two-hour court-martial in November 1944, had his death sentence confirmed by General Eisenhower in December 1944 during the Battle of the Bulge, and was executed in theater by firing squad in January 1945).

[221] United States v. Akbar, 74 M.J. 364, 372 (C.A.A.F. 2015).

[222] *Id.* at 375.

[223] Paul von Zeilbauer, *After Guilty Plea Offer, G.I. Cleared of Iraq Deaths*, N.Y. TIMES (Feb. 20, 2009), https://www.nytimes.com/2009/02/21/nyregion/21frag.html.

[224] *Id.*

[225] Two years is the current average time between an offense and a capital trial in the military justice system. By contrast, in the 1950s the military still tried multiple capital cases within two months of the underlying offenses. *See* Lieutenant Commander Stephen C. Reyes, *Dusty Gallows: The Execution of Private Bennett and the Modern Capital Court-Martial*, 62 NAVAL L. REV. 103, 119–20 (2013).

[226] *See supra* text accompanying note 175.

[227] *See* Michael Levenson, *These Are the 10 U.S. Installations Named for Confederates*, N.Y. TIMES (June 11, 2020), https://www.nytimes.com/2020/06/11/us/military-bases-confederates.html (noting Fort Bragg has 57,000 active duty members).

Trial-level litigation in *United States v. Hennis* illustrates this point. [228] Over three years elapsed between when the Army arraigned Master Sergeant Hennis on September 18, 2007, to when the panel announced the death sentence on April 15, 2010, a process involving court sessions on forty-five separate days.[229] A total of thirty-nine members sat for voir dire over the course of 9.5 days of voir dire and challenges before the court arrived at a final panel of fourteen members. [230] During voir dire, prospective members generally had leave of court to go about their duties except on days needed for individual voir dire.[231] Although the length of voir dire varied for each individual member, panel selection progressed at an overall rate of just over four panel members per court day.[232] *Hennis* provides a useful rubric for the potential impact of voir dire for additional members on the length of future capital cases in part because defense counsel implemented the Colorado method for voir dire.[233] Utilizing the rate from *Hennis*, this Article's proposed increase of thirteen additional peremptory challenges would likely lengthen a future capital trial by just three to four days. Compared to the years of appellate litigation in capital

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[228] United States v. Hennis, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021). *Hennis* is the most recent Army capital court-martial in which the defense exercised challenges. In *United States v. Hasan,* a subsequent capital court-martial, the accused insisted on proceeding *pro se* and did not challenge any members (either peremptorily or for cause). 80 M.J. 682, 715–716 (A. Ct. Crim. App. 2020), *mand. rev. pending*.

[229] Transcript of Record of Trial, United States v. Hennis, No. 20100304 (Headquarters, XVIII Airborne Corps and Fort Bragg, Fort Bragg, N.C., April 15, 2010) at i–iii (hereinafter *Hennis*, Tr. of R.)

[230] *Id.* at 1709–3799. After voir dire, trial on the merits and sentencing required twenty days of court sessions. *Id.* at i–iii. The court-martial occurred before Congress established a fixed panel size of twelve for capital courts-martial. *See* Military Justice Act of 2016, § 5183, Pub. L. No. 114-328, 130 Stat. 2000, 2900 (modifying Article 25a, UCMJ). No capital court-martial has occurred under the new standard.

[231] *See Hennis*, Tr. of R., *supra* note 231, at 1709–3799.

[232] *See id*.

[233] On direct appeal, Hennis argued that various rulings by the trial judge restricted his counsel's ability to fully implement the Colorado method. The Army Court of Criminal Appeals rejected this claim, finding that "when we compare roughly 2,000 pages of voir dire transcript in this case to the method's principles, . . . it is difficult to imagine a defense voir dire more strictly adherent to the Colorado Method." The Court of Appeals for the Armed Forces (CAAF) did not consider the claim. United States v. Hennis, 75 M.J. 796, 828–29 (Army Ct. Crim. App. 2016), *aff'd*, 79 M.J. 370 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021).

cases, three to four extra days at the trial constitutes a truly *de minimis* impact on the overall length of the capital process.[234]

Moreover, as one former Chief Judge of the Court of Military Appeals recognized, an increased number of peremptory challenges may actually decrease litigation over denied challenges for cause.[235] Such a decrease may offset the three to four extra days incurred by increased challenges. To preserve appellate review of an improperly denied challenge for cause, a court-martial accused cannot use a peremptory challenge on the challenged member and instead must exercise their peremptory on a different member.[236] Put differently, using a peremptory challenge on a member for which the judge denied a causal challenge waives the issue of improper denial.[237] This presents the accused with "the hard choice" of whether "to let the challenged juror sit on the case and challenge the ruling on appeal or to use a peremptory challenge to remove the juror and ensure an impartial jury."[238] With life or death on the line, this is a "hard choice" indeed for a capital accused armed with only a single peremptory challenge. By contrast, a capital accused with ten peremptory challenges would likely be more willing (and able) to use a peremptory on a member for whom a challenge for cause was denied, thereby seeking to increase the likelihood of prevailing at the trial level, even it means not preserving the issue of improper denial for appeal. A capital accused would most likely do so on edge cases, the close calls that end up the subject of litigation on appeal.[239] In this manner, increased peremptory challenges may reduce litigation over denied challenges for cause.

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[234] *Cf.* Sullivan, *supra* note 34, at 3 (2006) ("Military death penalty cases average more than eight years between sentencing and resolution of the direct appeal.").

[235] *Hearings on S. 2521 Before a Subcomm. on Manpower and Pers. of the S. Comm. on Armed Serv.*, 97th Cong. 118 (1982) (statement of the Hon. Robinson O. Everett, Chief Judge, Court of Military Appeals) ("Indeed, if [increased peremptories] were adopted, we might have fewer appeals to consider with respect to denials of challenges for cause.").

[236] 2019 MCM, *supra* note 29, R.C.M. 912(f)(4).

[237] *See id.*

[238] 2016 MCM, *supra* note 29, Appendix 21, Analysis of R.C.M. 912(f) (discussing the 2005 amendment implementing the restrictive standard).

[239] *See* United States v. Hennis, 79 M.J. 370, 383–88 (C.A.A.F. 2020), *cert. denied*, 141 S.Ct. 1052 (2021) (court considering and denying appellant's claim that the trial judge improperly denied three challenges for cause).

X. Conclusion

While the larger debate over peremptory challenges continues, Congress should amend the UCMJ to provide each military capital accused with ten peremptory challenges and to provide the prosecution with five for each accused. Until Congress does so, capital defense counsel must continue to utilize advanced voir dire strategies. Capital defense counsel should also continue to consider requesting the court provide additional defense peremptory challenges and potentially limit government peremptory challenges, as one practitioner has recommended.[240] This asymmetrical increase will allow capital defense counsel to shape panels based on the information gained from advanced voir dire strategies like the Colorado Method. Peremptory challenges guard against flaws in the voir dire and challenge for cause processes, which result in many constitutionally-impaired jurors sitting on capital juries. These jurors then form part of the death-leaning majorities, which, intentionally or unintentionally, exert substantial pressure on life-leaning jurors to conform with the majority. Additional peremptory challenges are necessary to reduce this risk. Indeed, "[a]s is often said, death is different. It is different in kind. It is different in finality."[241] In a capital court-martial, peremptory challenges should be different, too.

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[240] Carpenter, *supra* note 56, at 23.
[241] United States v. Akbar, 74 M.J. 364, 425 (C.A.A.F. 2015) (Baker, J., dissenting).