Good Staff Work: Achieving Efficiency with Candid Panel Selection Advice

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We have a criminal jury system which is superior to any in the world; and its efficiency is only marred by the difficulty of finding twelve men every day who don't know anything and can't read.[1]

I. Introduction

You are the new chief of military justice (CoJ) at Fort Bayonet. Your general court-martial convening authority (GCMCA) uses a standing panel to hear courts-martial.[2] It is time to select a new panel to relieve the current members of this extra duty, and to account for several transferring personnel. You know the basics of Article 25 of the Uniform Code of Military Justice (UCMJ)[3]: the boss must select whom he believes is "best qualified by reason of age, education, training, experience, length of service, and judicial temperament."[4] While preparing the documents to select the new panel,[5] you recall a warning from your predecessor. She told you to ensure you have a system to deal with loss of quorum.[6] She states, "With the Military Police (MP) Brigade and the Criminal Investigation Command (CID) Group here,[7] we always have at least one panel member who may as well not even show up because they never make it through voir dire.[8] Between cops and the Victim Advocates (VAs),[9] we busted quorum three times last year.[10]"

After researching the issue more, you find that your predecessor had a point. Implied bias is a low standard to grant challenges in courts-martial. The legal standard for "implied bias" is when, despite a disclaimer, most people similarly situated to the court member would be prejudiced *or* when an objective observer would have substantial doubt about the fairness of the accused's court-martial panel.[11] The member may have no bias whatsoever, but if their background raises reasonable concerns, the judge must grant a challenge for cause.[12] Further complicating matters, military judges are required to "liberally grant" challenges raised by the accused in "close cases."[13] Panel members have more education and training than Mark Twain's illiterate ideal juror,[14] but those credentials may decrease the likelihood they can serve on a panel.[15] Without accounting for implied bias, the convening authority (CA) may inadvertently detail personnel whose

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[1] Mark Twain, Address to a Gathering of Americans in London (July 4, 1872), *in* MILTON MELTZER, MARK TWAIN HIMSELF: A PICTORIAL BIOGRAPHY 205 (2002).

[2] 2 Francis A. Gilligan & Frederic I. Lederer, Court-Martial Procedure § 15-32.00 (3d ed. 2006). Common practice in the Army, a "standing panel" is one that is assembled for the general purpose of hearing all cases referred for trial for a period of time, typically between six months and a year. *Id.*

[3] 10 U.S.C. §§ 801–946 (2012).

[4] UCMJ art. 25 (2012).

[5] These documents typically include the written advice to nominees from subordinate commanders, and an alpha roster listing each member of the command. *See infra* Appendix A for an example of the written advice.

[6] UCMJ art. 16 (2012). The minimum quorum for a general court-martial is five members; special courts-martial require only three members. *Id.* When panel membership falls below quorum following voir dire, staff members must find additional available personnel detailed to the case. *See infra* note 68 and accompanying text (discussing the potential additional requirements when challenges break quorum).

[7] *See infra* Part III.C.1 for further discussion regarding military police (MP) duties. The Army component charged with investigating serious crimes is Criminal Investigation Command (CID). U.S. DEP'T OF ARMY, REG. 195-2, CRIMINAL INVESTIGATION ACTIVITIES app. B (9 June 2014).

[8] A recent survey indicates *most* jurisdictions have at least one panel member whose background could give rise to implied bias challenges. *See infra* Appendix D. Some even have members whose service on a panel is proscribed by case law. *See infra* note 170.

[9] The acronym VA is an abbreviation for "victim advocate." U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 8-3 (6 Nov. 2014) [hereinafter AR 600-20].

[10] The minimum quorum for a general court-martial is five members; special courts-martial require only three members. UCMJ art. 16 (2012).

[11] U.S. DEP'T' OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK para. 2-5-3 (9 Sept. 2014) [hereinafter DA PAM. 27-9].

[12] *Id.*

[13] *Id.* What constitutes a "close case" can be extremely difficult for a trial judge to discern, as evidenced by two of the most recent cases on implied bias. *Compare* United States v. Peters, No. 14-0289, 2015 CAAF LEXIS 143 (C.A.A.F. Feb. 12, 2015) (finding error based on trial judge denying implied bias challenge raised by professional relationship between trial counsel and panel member), *with* United States v. Castillo, No. 14-0457, 2015 CAAF LEXIS 142 (C.A.A.F. Feb. 12, 2015) (finding no error for similar relationship).

[14] *See* Twain, *supra* note 1.

[15] *See infra* Part III.A.

occupations require training and experience that can easily rise above the low standard.[16]

But can your staff judge advocate (SJA) advise the CA on these matters without raising appellate issues? What are the boundaries of the panel selection advice? You know some panel errors can be jurisdictional.[17] While you would love for your SJA to brag about your bright idea when hitting the links in Charlottesville next fall,[18] creativity in the panel selection advice seems like playing with fire—particularly when looking at potential members' military duties.[19] After all, military courts already condemned panel duty exemptions by branch, right?[20]

Fortunately, you can do something about this concern. Your SJA's candid advice may even eliminate the scenario where a detailed panel member dutifully shows up for service only to await an inevitable challenge for cause.[21] Through careful analysis of panel selection case law, this article proposes direct, meaningful advice that can achieve greater efficiency. By discouraging selecting panel members whose occupations present clear concerns of implied bias and have greater potential for conflicts with professional duties, SJAs can promote a more efficient application of Article 25. To address representativeness concerns raised with this approach, this article also advocates resurrecting a once-novel panel selection technique originally designed to address critiques of Article 25. The appendices include a proposed SJA advice and CA action memoranda to implement in order to yield a more efficient and fair panel, all the while confident she will not create new case law.

II. Judicial Review of Panel "Screening Criteria"—Predictably Unpredictable

Civilian jury impartiality is protected, in part, by the requirement that venires be drawn from a "representative cross-section" of the community.[22] In contrast, a military accused's jury protections begin with the CA's application of Article 25 criteria to select the "best qualified" personnel.[23] Commanding large organizations, a CA likely knows only a small percentage of the personnel eligible to serve on panels.[24] Accordingly, military courts have recognized the necessity of subordinates assisting the CA during panel selection.[25] A closer look at courts' jurisprudence on this assistance, however, gives the military justice practitioner pause when contemplating advice on any criteria not enumerated in Article 25.

Aside from "packing" a panel in violation of Article 37,[26] military courts generally characterize panel selection irregularities into two categories: administrative errors or systematic inclusion or exclusion of qualified personnel.[27] Advising the CA on implied bias and related efficiency issues requires analysis of what military courts have held to be a proper exclusion of otherwise qualified personnel. Unfortunately, this area of the law is murky. For example, the critical analysis of one early case on this issue begins: "In some situations, the legality of an action depends on its impact—regardless of the intent with which the act is performed . . . . In other situations, legality hinges on the presence or absence of a specific intent."[28] Building on this precedential truism, the Court of Appeals for the Armed

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[16] *Id.*

[17] *See, e.g.*, United States v. Ryan, 5 M.J. 97, 103 (C.M.A. 1978) (finding the convening authority's (CA's) failure to personally select the members of a panel deprived the court-martial of jurisdiction).

[18] Senior Leaders from the Army's Judge Advocate General's Corps return to central Virginia every fall for a leadership and continuing legal education conference. Fred L. Borch, *Military Legal Education in Virginia: The Early Years of the Judge Advocate General's School in Charlottesville*, ARMY LAW., Aug. 2011, at 1, 4.

[19] *See infra* Part II for discussion of case law regarding subordinates applying screening criteria to reduce the number of nominees considered by the CA when selecting a panel.

[20] See *infra* note 51 and accompanying text for a common misconception about the holding of United States v. Bartlett, 66 M.J. 426 (C.A.A.F. 2008).

[21] Generally, a panel member will remain in the deliberation room or in the court until the judge has ruled on all challenges. DA PAM. 27-9, *supra* note 11, para. 2-5-3. Accordingly, a challenged panel member must remain at the court for the entire duration of voir dire which generally takes more than three hours. *See* Appendix D.

[22] Taylor v. Louisiana, 419 U.S. 522, 528 (1975). Theoretically, a diverse background facilitates impartiality by fairly representing group differences arising from race, gender, religion, and ethnic background. *See* JEFFREY ABRAMSON, WE, THE JURY ch. 3 (1994).

[23] United States v. Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing United States v. Roland, 50 M.J. 66, 68 (C.A.A.F. 1999)). The same court also noted that the right to an impartial jury is "the cornerstone of the military justice system." *Id.* (quoting United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991)). The "representative cross-section" requirement does not apply to the accused at a court-martial. *Id.* (citing Ex Parte Quirin, 317 U.S. 1, 39-41 (1942); United States v. Tulloch, 47 M.J. 283, 285 (C.A.A.F. 1997); United States v. Smith, 27 M.J. 242, 248 (C.M.A. 1988)). Article 25 and voir dire are the Uniform Code of Military Justice (UCMJ) procedural safeguards of impartiality. United States v. Gooch, 69 M.J. 353, 357 (C.A.A.F. 2011).

[24] As of January 2014, the 500,000 active Army personnel were divided into 85 General Court-Martial Convening Authorities (GCMCAs). BARBARA S. JONES ET AL., REPORT OF THE ROLE OF THE COMMANDER SUBCOMMITTEE TO THE RESPONSE SYSTEMS TO ADULT SEXUAL CRIMES PANEL 23 (May 2014).

[25] United States v. Kemp, 46 C.M.R. 152, 155 (U.S.C.M.A. 1973). The CA must personally select members, but also "must have assistance in the preparation of a panel . . . [and] must necessarily rely on his staff and subordinate commanders for the compilation of some eligible names." *Id.*

[26] *See Dowty*, 60 M.J. at 167 (C.A.A.F. 2004). Article 37 of the UCMJ proscribes, among other things, a commander using his rank or position to influence the outcome of a trial. UCMJ art. 37 (2012). In the context of panel selection, this is commonly referred to as "court-packing." *Id.*

[27] United States v. Bartlett, 66 M.J. 426, 430 (C.A.A.F. 2008). The text of Article 25 appears clear on its face, but practical application has proven complicated, evidenced by litigation over "criteria" not enumerated in Article 25. *See infra* Part II.A.

[28] United States v. McClain, 22 M.J. 124, 130 (C.M.A. 1986).

Forces (CAAF) provided more clarity when deciding *United States v. Dowty*.[29]

A. The *Dowty* Factors—A Loose Framework

In *Dowty*, the CAAF reviewed a novel panel selection issue where the CA selected from a pool of nominees consisting of volunteers.[30] After a thorough review of case law on what the court terms "screening" by subordinates, the court announced—with a significant disclaimer—a list of factors to evaluate the propriety screening criteria:

> First, we will not tolerate an improper motive to pack the member pool. Second, systematic exclusion of otherwise qualified members based on an impermissible variable such as rank is improper. Third, this Court will be deferential to good faith attempts to be inclusive and to require representativeness so that court-martial service is open to all segments of the military community.[31]

Immediately after announcing these factors, the CAAF determined that none actually implicated volunteering.[32] The court further concluded that volunteering was an irrelevant variable to use for screening because it was a "substantial variable, not contemplated by [Article 25]."[33] Despite condemning the use of volunteer panel members as error,[34] the court ultimately affirmed the conviction.[35] The rationale for affirming is particularly instructive on the relationship between staff screening and the CA's role in selection. Specifically, the court upheld the conviction because "the CA personally selected and applied the criteria of Article 25(d), thereby curing any error arising from screening . . . [by] using the impermissible variable of volunteer."[36] Stating that a CA's "proper and personal selection of members" would not "cure all impermissible screening,"[37] the opinion emphasized the importance that the record contained "no showing of an improper motive by anyone involved in the nomination or selection process."[38] Disclaimers notwithstanding, the *Dowty* opinion provides instructive factors to evaluate screening variables and perspective on the importance of a CA's personal application of Article 25 criteria.[39] The *Dowty* opinion did little, however, to assist the practitioner in discerning what constitutes an "impermissible" variable, a concept the CAAF and lower courts addressed later.

B. Occupation—An "Impermissible Variable"?

1. The Test Case That Never Got Tested: United States v. McKinney

In 2002, a U.S. Air Force SJA advised a CA at least three times regarding implied bias related to occupation during panel selection.[40] As detailed in *United States v. McKinney*, the SJA brought the CA a list of officers from which the SJA had "eliminated . . . all officers who would likely be challenged if selected as court members (i.e., [judge advocates] JAGs, chaplains, [Inspectors General] IGs or officers in the accused's unit)."[41] The Air Force Court of Criminal Appeals (AFCCA) affirmed, noting that (1) the SJA's elimination of these personnel from the pool did not constitute "court stacking" because there was no evidence of an intent to influence the outcome,[42] and (2) the CA was capable of personally detailing a panel of qualified members despite the SJA's omission of these personnel.[43] Critically, the AFCCA relied on the general principle that "it is proper

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[29] Each Service has its own appellate court, which is the first level of appellate review. UCMJ art. 66. The next level is the Court of Appeals for the Armed Forces (CAAF), which is the highest appellate court to review military cases other than the United States Supreme Court. UCMJ art. 67 (2012).

[30] *Dowty*, 60 M.J. at 171. The Court reviewed three errors in the original panel selection advice: erroneously omitting two of the Article 25 criteria (education and experience), supplying only volunteers to select from, and failing to advise the CA that all original nominees were volunteers. *Id.* at 166-67.

[31] *Id.* at 171 (citations omitted). In the paragraph introducing these "factors," the opinion makes clear that the list is "not exhaustive, nor a checklist, but merely a starting point for evaluating a challenge alleging an impermissible members selection process" and goes on to say that a criterion may be improper even if it is not covered by the stated factors. *Id.*

[32] *Id.*

[33] *Id.* at 173 (citing United States v. Kennedy, 548 F.2d 608 (5th Cir. 1977)).

[34] *Id.* at 172.

[35] *Id.* at 176.

[36] *Id.* at 175.

[37] *Id.*

[38] *Id.* at 173.

[39] The opinion notes that its rationale was limited to "the unique facts of this case." *Id.* at 175.

[40] *See* United States v. McKinney, 61 M.J. 767 (A.F. Ct. Crim. App. 2005), *review denied*, 62 M.J. 396 (C.A.A.F. 2005); United States v. Carr, 2005 CCA LEXIS 278 (A.F.C.C.A. Aug. 25, 2005), *review denied*, 64 M.J. 78 (C.A.A.F. 2006); United States v. Brooks, 2005 CCA LEXIS 277 (A.F.C.C.A. Aug. 30, 2005), *rev'd on other grounds*, 64 M.J. 325 (C.A.A.F. 2007).

[41] *McKinney*, 61 M.J. at 769.

[42] *Id.* at 769-70. Interestingly, the court noted that lawyers and personnel from the same unit as the accused serving as members had been historically discouraged by military courts. *Id.*

[43] *Id.* at 770-71. Importantly, the SJA in *McKinney* formally advised the CA of the screening, unlike the advice in *Dowty*. *Id.* at 769. Presumably, such advice raises the issue for the CA so that he can detail personnel who have been "screened" if he believes they are truly best qualified. *See infra* note 132 for the rationale and value of supplying the CA with an alpha roster at the time of selection.

to assume that a [CA] is aware of his duties, powers and responsibilities and that he performs them satisfactorily."[44]

The CAAF denied review of *McKinney*[45] and of a later case reviewing the same issue in 2005.[46] In 2006, however, the CAAF granted review of this issue in *United States v. Brooks*.[47] Fortunately for the accused in *Brooks* but unfortunately for practitioners hoping for clarity on this issue, the CAAF reversed *Brooks* on other grounds without reaching the question of whether the SJA's screening violated Article 25.[48] Interestingly, the SJA recommendation at issue appears to have remained common practice in the Air Force until 2008 when the CAAF decided *United States v. Bartlett*.[49]

2. Regulatory Occupational Exemptions: United States v. Bartlett

For nearly thirty years, the Secretary of the Army proscribed panel membership for certain personnel: chaplains, nurses, inspectors general and officers in the medical, dental, veterinary, and medical service corps.[50] Often incorrectly viewed as a ban on these occupational exemptions,[51] the *Bartlett* holding clearly rests on the lack of authority for Service Secretaries to implement such a policy.[52] Specifically, the CAAF held that the Secretary of the Army lacked the statutory authority to limit the pool of members eligible under Article 25.[53] The case was decided on principles of statutory construction, ultimately holding that the Secretary of the Army's general grant of authority to run the Army could not "trump Article 25, UCMJ, which is narrowly tailored legislation dealing with the precise question in issue."[54]

Although the *Bartlett* holding is simply that the Service Secretaries lack authority to restrict who is available for panel selection, some dicta is instructive on how the CAAF might view the occupation-based screening from *McKinney* if it came to the court today. First, the opinion notes that Congress cast panel eligibility as "broad and inclusive," noting that Article 25 does not contain "any limitations on court-martial service by any branch, corps, or occupational specialty."[55] Second, the court found no error partly because the factual record established that the "panel was well-balanced across gender, racial, staff, command, *and branch lines*."[56] Although dicta, this language indicates that the CAAF reads Article 25 to be extremely inclusive and does not condone efforts to reduce the pool of available members using any criteria not articulated in Article 25. At first blush, that emphasis on inclusion indicates that the CAAF may find occupation to be a substantial (and therefore impermissible) variable as described in *Dowty*.[57] A key difference, however, is that *Bartlett* was about the scope of the Secretary of the Army's authority and not a CA's application of Article 25 criteria.[58] A more recent case, *United States v. Gooch*, provides more material to analyze the permissibility of a staff screening variable in the context of a CA's panel selection.[59]

3. "Impermissible Variables" Revisited: United States v. Gooch

In *Gooch*, the CAAF reviewed a case where the CA's legal office limited the pool of nominees to those who would be available on the prospective trial dates and arrived at the installation after the accused had departed for a deployment.[60] The aim was to avoid selecting personnel for panel service who may have known the accused or learned about the case during their service at the installation.[61] The court noted that availability is a permissible screening factor[62] but decried "possible personal knowledge of the case" and "possible personal knowledge of the accused" as inappropriate for screening.[63] The holding relied on the notion that voir dire is the appropriate mechanism to address whether someone has possible knowledge of the case or the accused.[64] By emphasizing voir dire as "the codal method for . . . screening

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[44] *Id.* at 771 (quoting United States v. Townsend, 12 M.J. 861, 862 (A.F.C.M.R. 1981)).

[45] United States v. McKinney, 62 M.J. 396 (C.A.A.F. 2005).

[46] United States v. Carr, 64 M.J. 78 (C.A.A.F. 2006).

[47] United States v. Brooks, 64 M.J. 325 (C.A.A.F. 2007).

[48] *Id.* at 325.

[49] Lieutenant Colonel Eric F. Mejia & Major Andrew J. Turner, *Eligible to Serve: Chaplains on Court-Martial Panels*, 36 REPORTER, no. 2, 2009, at 9, 10.

[50] U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 8-2 to 8-8 (26 Nov. 1968) (C18, 1 Jan. 1979) [hereinafter AR 27-10]. Medical Specialist Corps and Army Nurse Corps officers could be detailed to proceedings involving members of those corps. *Id.* paras. 8-6, 8-7.

[51] *See, e.g.*, CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, PRACTICING MILITARY JUSTICE 21-29 (Apr. 2013) (stating "CAAF held that convening authorities must consider officers in these special branches when applying Article 25 to select panel members.")

[52] United States v. Bartlett, 66 M.J. 426, 429 (C.A.A.F. 2008).

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *Id.* at 430 (emphasis added).

[57] *See supra* notes 30-33 and accompanying text.

[58] *See Bartlett*, 66 M.J. at 429.

[59] United States v. Gooch, 69 M.J. 353, 356 (C.A.A.F. 2011).

[60] *Id.*

[61] *Id.* at 356.

[62] *Id.* at 358.

[63] *Id.* at 359.

[64] *Id.*

members based on potential bias," the CAAF indicated it would closely scrutinize any attempt to screen members on possible bias.[65]

The *Gooch* holding leaves some room for screening beyond availability. The majority notes that "[i]t is intuitive that other relationships might similarly disqualify an otherwise eligible officer during the screening process."[66] While this language keeps the door open for staff to screen out personnel whose presence at a panel would clearly be problematic, it is far from a bright line. As noted by the dissent, the scope of relationships that the majority labels "intuitive" is actually quite broad.[67] The dissent also highlighted the inherent tension between a CA's duty to detail the "best qualified" personnel with significant limitations on practical staff screening efforts and the CA's responsibility to efficiently run a large military organization.

> Convening authorities are also very busy people. If, because of challenges, a court-martial panel falls below quorum after voir dire, the trial must be continued while the convening authority's staff looks for eligible members who are present and whose primary duties are such that they are available to sit on the court-martial. The convening authority must then interrupt his other duties to consider the nominations and select additional members. If, as the majority demands, the convening authority's staff is prohibited from rejecting persons who could not or most likely would not survive the voir dire and challenge process, convening authorities will have to refer cases to larger court panels—taking more members away from their primary duty—or face the prospect of more interruptions, in both the trial and his schedule, to select additional court members.[68]

As noted in this dissent, the primary benefit of staff efforts to screen panel members who are unlikely to serve is efficiency. Tracing the CAAF's interpretation from *Dowty* to *Gooch* draws some boundaries for staff screening and recommendations designed to facilitate selecting an efficient panel.

C. Viability of Occupational Screening Under Current Case Law

These cases highlight three important principles regarding panel selection. First, the CA may rely on assistance from subordinate commanders and staff in preparing panel selection.[69] Second, that assistance may include factors beyond the six Article 25 criteria in preparing nominees for the CA's consideration (e.g., to ensure selected members will be available[70] and senior to the accused[71] or to promote a representative panel).[72] Subordinates screening otherwise eligible personnel from consideration, however, is strongly discouraged.[73] The CA must personally select the members,[74] applying the proper Article 25 criteria with a proper motive.[75] When the intent of additional criteria is benign, the key distinction is whether the CA makes an independent decision regarding who serves on the panel or whether the staff screening amounts to a *fait accompli*.[76] Ultimately, the difference between problematic and satisfactory panel selection depends more on the motive behind and effect of applying any screening criteria than the substance of that additional variable.[77]

It appears the CAAF would uphold *McKinney* at some point in the future but would find error if decided today. First and most importantly, the SJA's actions in *McKinney* of "eliminating" certain personnel from the pool was an "exclusion of otherwise qualified personnel," which is subject to an "impermissible variable" analysis per *Dowty*. Second, the CAAF indicated, in *Bartlett*, a strong preference against excluding individuals based on branch or military occupational specialty. Most recently, the CAAF declared voir dire to be the appropriate method for screening for "possible" biases in *Gooch*, casting further doubt on whether the CAAF would deem it proper for an SJA to screen personnel for implied bias concerns. Following these

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[65] *Id.* at 360.

[66] *Id.* at 357.

[67] *Id.* at 364 (Stucky, J., dissenting).

[68] *Id.*

[69] *See* United States v. Kemp, 46 C.M.R. 152, 155 (U.S.C.M.A. 1973) (stating the CA "must necessarily" rely on subordinates to compile a list of eligible names); United States v. Benedict, 55 M.J. 451, 455 (C.A.A.F. 2001) (holding the CA may rely on staff to nominate members).

[70] United States v. Gooch, 69 M.J. 353, 358 (C.A.A.F. 2011).

[71] *See id.* ("Screening potential members of junior rank or grade is not only proper; it is required . . . .").

[72] United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004) (citing United States v. White, 48 M.J. 251, 254 (C.A.A.F. 1998); United States v. Crawford, 35 C.M.R. 3, 35 (U.S. C.M.A. 1964)).

[73] *See supra* Parts II.B.1, II.B.3 for staff screening efforts found to constitute error.

[74] United States v. Ryan, 5 M.J. 97, 103 (C.M.A. 1978) (holding the CA's responsibility to select members may not be delegated).

[75] *See Dowty*, 60 M.J. at 173.

[76] United States v. Upshaw, 49 M.J. 111, 113 (C.A.A.F. 1998). More accurately, the *Upshaw* holding refers to a CA's intent (as opposed to staff screening). *See also* United States v. Bertie, 50 MJ 489, 492 (C.A.A.F. 1999) ("[T]he intent or purpose of the convening authority in [panel selection] is an essential factor in determining compliance with Article 25.").

[77] *See* United States v Dowty 63 M.J. 163, 173 (C.A.A.F. 2004).

guideposts indicates the CAAF would condemn the SJA's screening in *McKinney*.[78]

But does that mean the CA must pick blindly from nominations and an alpha roster—perhaps unknowingly detailing members who are extremely unlikely to actually hear a case?[79] The answer is no. The SJA, as a good staff officer, can—and should—provide some analysis with her recommendation. [80] Encouraging a thoughtful, rather than mechanical, application of Article 25 yields a fair but efficient panel to hear cases.[81]

III. Tuning up *McKinney*: Recommending, Not Screening

The problem with a CA mechanically selecting from a list of nominees or the alpha roster is efficiency. Absent any other advice, the CA may detail personnel who have very low odds of making it through voir dire to serve on a panel.[82] Detailing a member whose background makes him ripe for challenge can waste significant time—certainly for the challenged member and the military justice system.[83] You and your SJA can reduce or even eliminate this wasted time by providing a specific panel selection advice implemented in a manner that avoids *McKinney*'s problematic screening. Additional techniques can reinforce the panel's legitimacy by emphasizing the CA's application of Article 25 criteria and desire for a more representative panel. Before discussing *how* to implement this advice, the threshold question is to whom should it apply?

A. Who's out? Pre-*Bartlett* Exemptions Reconsidered

As noted above, Army policy formerly excluded officers assigned to the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, and those detailed to Inspector General duties from panel service.[84] The SJA in *McKinney*, however, only included chaplains and IGs from this group while adding judge advocates (JAs) and officers from the accused's unit.[85] Focusing on Article 25 criteria as an analytical framework, SJAs should adopt the *McKinney* cohorts and add MPs and VAs.[86] This combination minimizes implied bias concerns by identifying those whose training and experience provide significant insight to military justice matters and those for whom panel service poses potential conflict with professional duties.

1. Those Who (Might) Know Too Much: Training and Experience

Personnel with implied bias concerns are identified after careful consideration of the Article 25 criteria of training and experience. Some occupations encounter significant overlap with common military justice issues. With the low and somewhat unpredictable standards created by implied bias

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[78] However, the court would likely uphold the result because the CA was aware of the SJA's screening (it was in the written advice) and personally selected those who served. *See supra* notes 41-43 and accompanying text. If the CA knows the SJA eliminated a person the CA believes is "best qualified," he is still free to select the screened person for service even though the SJA has removed him from the list of nominees.

[79] A recent survey indicates *most* jurisdictions have at least one panel member whose background could give rise to an implied bias challenge. *See infra* Appendix D and note 170.

[80] *See* U.S. DEP'T OF ARMY, FIELD MANUAL 6-0, COMMANDER AND STAFF ORGANIZATION AND OPERATIONS para. 2-11–2-12 (5 May 2014). Staff officers apply critical thinking and use previous similar experiences and innovative approaches to assist the commander in decision-making. *See also* U.S. DEP'T OF ARMY, DOCTRINE PUB 6-0, MISSION COMMAND para. 3-41 (5 May 2014) (noting that the staff officer's "most important function" is to advise the commander by providing analysis within their area of expertise).

[81] A Staff Judge Advocate's advice for panel selection is often vague and little more than a recitation of Article 25. *See infra* Appendix A for an example of common panel selection advice.

[82] Interestingly, the likely challenge is due to Article 25 criteria—specifically, the member's training and experience may support an implied bias challenge. For example, MP officers are frequently nominated and selected for panel service despite training and experience that raise implied bias concerns. *See infra* Appendix D. See *infra* Part III.A.1 for a discussion regarding MPs and panel service.

[83] *See supra* text accompanying note 21. In the event their challenge results in a loss of quorum, significant staff work may be required to locate the replacement panel members—resulting in an ultimately longer trial and more time spent away from duties for all involved. *See infra* Appendix A for common practice to address panels falling below quorum.

[84] AR 27-10, *supra* note 50. The rationale for excluding medical, dental, and veterinary personnel is unclear, but likely due to their professional and training requirements and concerns over proper utilization. The language from the original regulation forbidding detailing these personnel indicates an intent to preserve their time to allow focus on professional duties, requiring "every effort consistent with due process" to utilize means other than in-person testimony to present evidence to courts-martial, boards, or committees. *Id.* para. 8-3. In other words, these personnel were considered too specialized and too rare to spend time away from duties on panel service. *See Id.* This rationale is consistent with the traditional justification of occupational exemptions. HON. GREGORY E. MIZE ET. AL., STATE OF THE STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 14 (Apr. 2007). *See also* Captain Jeffery L. Harris, The Military "Jury," A Palladium of Justice 27 (Apr. 1984) (unpublished LL.M. thesis, The Judge Advocate Gen.'s Legal Ctr. & Sch.) (on file with The Judge Advocate General's School Library).

[85] United States v. McKinney, 61 M.J. 767, 769 (A.F. Ct. Crim. App. 2005).

[86] The idea to analyze VAs in this article came from correspondence with two Chiefs of Justice (CoJs) when collecting the data in Appendix D noting high numbers of VAs selected for panel service with a high rate of successful challenges for cause granted against them. Email from Major Christian Deichert, Chief of Military Justice, Army Fires Center of Excellence and Fort Sill, to author (Dec. 11, 2014, 17:55 CST) (on file with author); email from Captain Timothy Olliges, Acting Chief of Military Justice, Fort Polk, to author (Dec. 11, 2014, 18:20 CST) (on file with author).

and the liberal grant mandate, SJAs should caution against selecting significant numbers of MPs and VAs.[87]

Generally, MPs are suspect panel members for many reasons related to one underlying theme: familiarity with law enforcement and criminal justice processes. Combine this familiarity with the assumption that MPs take pride in their work and take it seriously and several potential bias concerns become apparent.[88] As panel members, MPs may give too much weight to law enforcement witnesses or may unfairly scrutinize the witness's testimony and work based on personal experience. Perhaps most importantly, an accused who has been the subject of a criminal investigation would feel uneasy at the prospect of a police officer sitting in his judgment.[89] For these and other reasons, several jurisdictions exempt law enforcement personnel from jury service.[90] The Army appellate court has discouraged the practice of MPs serving on panels[91] and even proscribed service by an installation's chief law enforcement officer.[92]

Some jurisdictions, by nature of their tenant units, may not have the luxury of the CA disregarding the MP population during panel selection.[93] Fortunately for those jurisdictions, MP doctrine includes several non-law enforcement functions.[94] An MP could conceivably serve primarily in non-law enforcement duties, reducing the concerns addressed above. That member's training, however, would still include law enforcement fundamentals, similarly reducing their odds of surviving a defense challenge for cause.[95] Given the appellate court's significant discouragement of detailing MPs, ample opportunity for an accused's counsel to develop a challenge for cause, and the appearance issues related to these concerns, the SJA should recommend against selecting MPs when practicable.

Another population with potentially problematic training are VAs. Current Army policy requires commanders to ensure victims of sexual assault have access to a "well-coordinated, highly responsive" victim advocacy program.[96] Army VAs must receive training on several topics that would give concern to their presence on a panel hearing a sexual assault case: "criminal investigative process; evidentiary requirements; secondary victimization, intimidation, and types of sexual offenders."[97] A Soldier or officer certainly could undergo this training and still serve as an impartial, thoughtful panel member. However, the likelihood of VAs surviving a defense challenge for cause is extremely low—particularly in cases involving sexual assault allegations.[98] A reasonable person could easily conclude a VA's extensive training would make it unfair for him to sit in judgment of someone accused of a sexual assault allegation—particularly in light of their presumed dedication[99] and Army leaders' emphasis on VAs' roles in the Army's sexual assault prevention efforts.[100] When ample other panel members are

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[87] *See supra* note 13 and accompanying text (discussing implied bias standards).

[88] Army doctrine regarding warrior and service ethos encourages enthusiasm and pride in one's work and skills. *See* U.S. DEP'T OF ARMY, DOCTRINE REFERENCE PUB. 6-22, ARMY LEADERSHIP para. 3-21 (1 Aug. 2012) (C1, 10 Sept. 2012).

[89] Although the accused's perception of a member's implied bias is not explicitly included in the CAAF's espoused implied bias analysis, language from a recent case suggests its importance. United States v. Peters, No. 14-0289, 2015 CAAF LEXIS 143, *8 (C.A.A.F. Feb. 12, 2015).

[90] In U.S. federal courts, police are exempt from jury service. 28 U.S.C. §1863(b)(6). Under similar military codes, Canada and the United Kingdom do not allow MPs or lawyers to serve on court-martial panels. National Defence Act, R.S.C. 1985, c N-5 (Can.); Armed Forces Act 2006, c. 1, § 156 (UK).

[91] United States v. Brown, 13 M.J. 890 (A.C.M.R. 1982). The court in *Brown* strongly discouraged empaneling "policeman" at courts-martial stating it "is not generally a good practice and should be avoided where possible." *Id.* at 892.

[92] United States v. Swagger, 16 M.J. 759 (A.C.M.R. 1983). In *Swagger*, the court prohibited panel service by "[t]hose who are the principal law enforcement officers at an installation." *Id.* at 760. Notably, the court reiterated its discomfort with those serving in any police function serving on a panel: "At the risk of being redundant—we say again—individuals assigned to MP duties should not be appointed as members of courts-martial." *Id.*

[93] *Brown*, 13 M.J. 892. The *Brown* court stated it stopped short of a *per se* prohibition on these personnel's panel membership "largely to accommodate" commands where the practice may be difficult to avoid. *Id.*

[94] U.S. DEP'T OF ARMY, FIELD MANUAL 3-39, MILITARY POLICE OPERATIONS para. 1-1–1-3, fig.1-1 (26 Aug. 2013). Army doctrine states four MP core competencies: soldiering, policing, investigations, and corrections. *Id.* Conceivably, an MP could serve long enough to meet Article 25 criteria and spend most, or all, of his or her time performing MP functions not related to law enforcement. However, it seems extremely unlikely that any MP could meet Article 25 criteria without receiving a fairly significant amount of law enforcement training as a core competency requirement. Such training gives rise to a successful challenge for cause, particularly in light of the liberal grant mandate.

[95] For example, current Army policy indicates even the most junior MP Soldiers "maintain law enforcement experience" while working in operational assignments. U.S. DEP'T OF PAM 600-25, U.S. ARMY NONCOMMISSIONED OFFICER PROFESSIONAL DEVELOPMENT GUIDE para. 13-4(c)(1)(b) (28 July 2008).

[96] AR 600-20, *supra* note 9, para. 8-3. The Army's Victim Advocacy Program has three tiers: one Sexual Assault Response Coordinator at the installation level, an Installation Victim Advocate, and Unit Victim Advocates (UVAs). Army policy mandates two UVAs per battalion. *Id.*

[97] *Id.* para. H-3.

[98] *See supra* note 86 and accompanying text.

[99] AR 600-20 supra note 9, para. 8-6 (listing VA selection criteria requiring, among other things, recommendation by the chain of command and outstanding duty performance for all those nominated to serve as VAs).

[100] Army leadership has repeatedly emphasized that addressing sexual assault is a top priority. *See* Memorandum from Sec'y of the Army, subject: Sec'y of the Army Top Priorities (30 Oct. 2014). More recently, the Chief of Staff of the Army and Sergeant Major of the Army visited VA training to convey and emphasis the importance of the program. Scott Gibson, *Odierno, Dailey Emphasize Trust at Army's SHARP Academy*, ARMY.MIL (Feb. 26, 2015), http://www.army.mil/article/143546/Odierno__Dailey_emphasize_trust_at_Army_s_SHARP_Academy/.

available, the time of all involved is better served by recommending against selecting personnel who have served as VAs.

2. Potential Professional Conflicts with Panel Service

Military Police and VAs are not the only personnel who regularly encounter military justice issues in their normal duties. Chaplains, IGs, and JAs regularly deal with military justice actions[101] or personnel[102] and tangential issues related to the proceedings.[103] In most cases, these personnel are less likely to represent implied bias concerns because their education, training, and experience favor impartiality.[104] Nonetheless, SJAs selecting these personnel for panel service in order to avoid the potential conflicts between panel service and their professional duties.

Chaplains exist, in part, to provide religious services to military personnel.[105] Their service on panels has been discouraged since the Civil War period.[106] Although the historical rationale for excluding chaplains is unclear, a review of modern Army policy regarding chaplains reveals both formal and informal professional conflicts that frustrate their participation as panel members.

Formally, Army policy prohibits detailing chaplains and chaplain assistants to serve in any capacity that may require the revelation of privileged or sensitive information.[107] Voir dire, in some circumstances, may place a chaplain in this bind. Consider a case where the chaplain provided counseling to either the victim, the accused, or even one of the counsel involved.[108] The chaplain would likely indicate affirmatively that he knew or had dealings with someone in the trial but ultimately refuse to disclose with whom or the extent of the dealings, establishing a challenge for cause.[109]

Informally, panel service frustrates a core practice of chaplains by placing them in the position of passing judgment and issuing punishment. A Soldier witnessing a chaplain serve on a panel may view that chaplain (or all chaplains) as having the same disciplinary authority as any other senior officer.[110] Chaplains are commissioned officers, but they do not hold positions of command.[111] Army policy is to address them as "chaplain," regardless of rank, in an effort to reduce any gap or divide between them and the Soldiers they serve.[112] While a chaplain's training and experience likely counsels against any biases, panel service has significant potential to frustrate the primary professional requirements of his duties. Accordingly, the SJA should recommend against selecting chaplains for panel service.

Similar to the issues arising with chaplains providing pastoral care, IG responsibilities can easily overlap with court-martial issues.[113] A relatively small population, IGs are rare in most GCMCAs.[114] Often described as an extension of a commander's eyes, all IGs serve as "confidential advisers and fact-finders to the commander."[115] Officers are temporarily detailed for IG duty and are chosen for their impartiality and "impeccable ethics."[116] These traits appear to make IGs excellent candidates for panel membership, but a closer look at their duties and small numbers indicates otherwise.

Courts-martial often generate collateral issues involving requests for assistance from the IG's office.[117] An IG's

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[101] *See infra* note 124.

[102] *See infra* note 108 and accompanying text.

[103] *See infra* note 117.

[104] Personnel in these assignments are generally selected or trained in impartiality. *See infra* notes 116 and 121 and accompanying text.

[105] U.S. DEP'T OF ARMY, REG. 165-1, ARMY CHAPLAIN CORPS ACTIVITIES para. 1-7(b) (3 Dec. 2009) [hereinafter AR 165-1].

[106] WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 70 (2d ed. 1920).

[107] AR 165-1, *supra* note 105, para. 3-4(c)(3). For this purpose, "sensitive information" is defined as "any non-privileged communications that would be an inappropriate subject for general dissemination to a third party (for example, attendance at substance abuse clinics, treatment by counselors, prior arrests)." *Id.* para. 16-2(e). Notably, this definition is much broader than communications protected by Military Rule of Evidence 503. MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 503 (2012).

[108] Pastoral care and counseling is a stated religious support activity required of all chaplains in the Army. AR 165-1, *supra* note 105, para. 2-3. The standard trial script includes asking each panel member whether they know or have had dealings with the accused, anyone named in a specification, or any of the counsel. DA PAM. 27-9 *supra* note 11, para. 2-5-1.

[109] E-mail from Major David Beavers, Chaplain, The Judge Advocate Gen.'s Legal Ctr. & Sch., to author (Mar. 11, 2015, 11:54 EDT) (on file with author).

[110] Guardlaw West, Comment to *CAAF Invalidates Army Reg's Prohibition Against Certain Staff Corps' Officers Sitting on Courts-Martial*, CAAFLOG (July 8, 2008, 2:12 PM), http://www.caaflog.com/2008/07/08/caaf-invalidates-army-regs-prohibition-against-certain-staff-corps-officers-sitting-on-courts-martial/.

[111] 10 U.S.C. § 8581 (2012).

[112] AR 600-20, *supra* note 9, para. 1-6(d).

[113] Inspectors general perform four core functions: inspections, investigations, assistance, and training. U.S. DEP'T OF ARMY, REG. 20-1, INSPECTOR GENERAL ACTIVITIES AND PROCEDURES, at preface (29 Nov. 2010) (RAR 3 July 2012) [hereinafter AR 20-1].

[114] Army policy is that only general officer commanders have a command IG. *Id.* para. 2-1.

[115] *Id.* para. 1-6(f).

[116] *Id.* para. 1-6(a).

[117] Although unsurprising to the experienced practitioner, it bears noting that the commanders of Soldiers involved in the court-martial process (either as an accused or as a victim) has several additional responsibilities tangentially related to the court-martial. Some examples include the Army's requirement of Soldiers to pay spousal support and the role allegations of domestic violence play in a Soldier's ability to handle weapons and ammunition. *See* U.S. DEP'T OF ARMY, REG. 608-99, FAMILY

requirement to provide assistance and serve as a fact-finder may ultimately expose the IG to facts about the case before opening statements even begin. These concerns are magnified given the relative small population of IGs (approximately one per GCMCA).[118] While the CAAF condemned "possible knowledge" of a case as screening criteria,[119] such knowledge undoubtedly decreases the likelihood an IG officer would survive a challenge for cause.[120] Given their very limited numbers, the SJA should recommend against selecting IGs in order to avoid wasting the time of such a scarce resource.

While IGs have greater potential to encounter issues related to a trial in their professional duties, JAs are far more likely to know some of the issues and parties involved in any given court-martial. Lawyers' service as jurors is a topic rife with debate. Many argue that with extra training and experience in logic and reasoning, lawyers make ideal panel members.[121] Who better to identify strengths and weaknesses of arguments than one whose job it is to do just that? However, critics argue that lawyers may know too much about the system, or even if entirely unbiased, receive too much deference from fellow jurors and end up as a jury of one.[122] Merits of this debate notwithstanding, selection of JAs should be discouraged due to the numbers involved.

If not in high demand, JAs are in relatively short supply. There are approximately 1900 JAs on active duty in the entire United States Army.[123] Several JAs will be involved in the court-martial and thereby disqualified from service.[124] Judge Advocates may serve as the military judge, trial counsel, defense counsel,[125] the SJA,[126] and now, the Article 32 Preliminary Hearing Officer.[127] Because the community is so small, a JA detailed as a panel member will almost certainly know one or more of the JAs detailed to the case. Such knowledge alone is likely a sufficient basis to grant a defense challenge for cause.[128] To avoid wasting time, JAs should not be detailed to panels.

B. Keys to Success

The most important aspect of any written advice discouraging selection of otherwise eligible personnel is clearly distinguishing Article 25's legal *requirements* from the SJA's *recommendations.* Critically, the advice must emphasize that recommendations regarding the selection of certain personnel are provided only for consideration (i.e., are non-binding).[129] The advice should also clearly state that the CA's sole mandate is to select the best-qualified personnel using Article 25 criteria. In this way, the panel selection advice would parallel the advice required by Article 34, UCMJ.[130] Specifically, this advice would articulate the legal requirements for panel selection (Article 25 criteria) and make recommendations on both implementation (e.g., how many to select) *and* application of those requirements (i.e., discourage selecting those likely to be challenged). Unambiguous distinction between requirements and recommendations avoids questions over whether the CA could conflate efficiency recommendations with Article 25 criteria.

SUPPORT, CHILD CUSTODY, AND PATERNITY para. 1-4(g) (29 Oct. 2003); *see also* AR 600-20, *supra* note 9, para. 8-5(o) (specifying thirty-seven distinct requirements of unit commanders for a victim or subject of a sexual assault allegation). Any person who believes a commander has failed to meet his regulatory obligations in these or other matters may complain to an inspector general office, whose "assistance" function requires fact-finding about the matter. *See generally* AR 20-1, *supra* note 113, ch. 6.

[118] *See* AR 20-1, *supra* note 113, para. 1-6(f).

[119] United States v. Gooch, 69 M.J. 353, 359 (C.A.A.F. 2011). Critically, this article advocates a non-binding recommendation in lieu of the screening condemned in *Gooch*.

[120] *See supra* notes 11-13 and accompanying text (discussing low and unpredictable standard of implied bias).

[121] *See* Molly McDonough, *Would You Pick a Lawyer to Serve on a Jury?*, ABA JOURNAL (Sept. 6, 2007, 3:15 PM), http://www.abajournal.com/news/article/would_you_pick_a_lawyer_to_serve_on_a_jury; Peter Lattman, *Lawyers as Jurors. Discuss*, THE WALL STREET JOURNAL LAW BLOG (Aug. 23, 2007, 4:25 PM), http://blogs.wsj.com/law/2007/08/23/lawyers-as-jurors-discuss/tab/comments/.

[122] Phil Anthony, comment to *Lawyers as Jurors. Discuss*, THE WALL STREET JOURNAL LAW BLOG (Aug. 24, 2007, 10:02 AM), http://blogs.wsj.com/law/2007/08/23/lawyers-as-jurors-discuss/tab/comments/. *See also* JOEL COHEN AND KATHERINE HELM, WHEN LAWYERS GET SUMMONED TO JURY DUTY (2012).

[123] The Army's Judge Advocate General's Corps publishes an internal roster of all active component members. JUDGE ADVOCATE GEN.'S CORPS, CONSOLIDATED DATE OF RANK ROSTER OF ACTIVE COMPONENT JUDGE ADVOCATES (2014) (on file with author). As of September 2, 2014, the Judge Advocate General's Corps contained 1931 officers. *Id.*

[124] Article 25 disqualifies all who have "acted as investigating officer or counsel in the same case." UCMJ art. 25(d)(2) (2012).

[125] Article 38 permits a military accused to elect representation by civilian counsel. UCMJ art. 38(b) (2012). In practice, at least one military counsel typically remains detailed to the case. This assertion is based on the author's recent professional experiences as a Trial Counsel at I Corps and 7th Infantry Division from December 1, 2011, to June 14, 2013, and Senior Trial Counsel at I Corps from June 15, 2013, to June 20, 2014 [hereinafter Professional Experience]. Panels are typically only involved in contested cases with at least four counsel involved (two trial counsel and two defense counsel). *Id.*

[126] MCM, *supra* note 107, R.C.M. 912(f).

[127] When practicable, judge advocates must preside over Article 32 preliminary hearings. National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672 (2013).

[128] *See* DA PAM. 27-9 *supra* note 11, para. 2-5-3.

[129] *See infra* Appendix B for a sample written SJA advice implementing this article's proposals.

[130] UCMJ art. 34 (2012). Article 34 requires the SJA to advise the CA on the legal requirements of referring any case to trial, to provide legal analysis on those requirements for each specification of all charges, and to provide a non-binding recommendation regarding the disposition of those charges. *Id.*

When recommending against selecting any particular personnel, the SJA must ensure those names remain available for the CA during panel selection. As noted earlier, virtually all "screening" cases involve staff members *eliminating* eligible personnel from the CA's consideration.[131] Presenting these names along with all other nominees and the alpha roster ensures the CA can consider all eligible personnel when making his selection.[132] More importantly, this practice avoids the appearance that the SJA has preemptively applied her own judgment to a "first round" of screening. Highlighting, *but not removing* the names identifies the issue for the CA but stops short of the screening found problematic in *Gooch.*

C. Additional Safeguards

The prudent SJA considering this article's recommendation may desire greater assurance the advice would survive trial and appellate scrutiny. Fortunately, several options exist to avoid any appearance of impropriety in the selection process and even enhance the fairness of the panel. Appellate courts analyzing panel selection irregularities have emphasized the importance of the CA's personal application of Article 25 criteria with a proper intent,[133] while affording deference to efforts to be inclusive.[134] Accordingly, efforts to refine panel selection are best focused in these areas.

Perhaps the simplest measure to emphasize the CA's application of Article 25 criteria can be accomplished in a letter from the CA to subordinate commanders prior to soliciting nominees. Such a letter reinforces the importance of subordinate commanders considering all members of the command and applying *only* Article 25 criteria when making nominations.[135] Efficiency considerations, then, are only addressed when the SJA advises the CA, eliminating concern that subordinate commanders confuse these considerations with Article 25 criteria during the nomination process.

The SJA's written advice can also address concerns related to the CA's intent by briefly articulating the rationale for her recommendations. Explaining the logical reasoning behind the recommendation clarifies its benign intent: to achieve efficiency.[136] The SJA can qualify her advice, too, by acknowledging the recommendation relies on certain generalizations not applicable in every case.[137] The SJA could further hedge and only recommend against selecting "a significant number" of those personnel, virtually eliminating any meaningful argument that the selection was tainted by any intended outcome other than an efficient panel. If adopted by the CA, the SJA's well-crafted recommendation can serve as circumstantial evidence of the CA's intent to seat a fair but efficient panel.[138]

More persuasive, direct evidence of the CA's intent for fairness and efficiency is to design the panel to be more inclusive. Originally implemented as early as 1973,[139] and approved by appellate courts in 1979,[140] previous GCMCAs have applied a variety of random selection methods to court-martial panels to promote fairness and inclusiveness.[141] The process begins by the CA selecting a large number of members using Article 25 criteria.[142] A small number of personnel are then randomly detailed on a case-by-case basis.[143] Enacting this method is strong evidence that the CA does not intend to influence the outcome of trials in general because the larger field of eligible members reduces the likelihood the CA personally knows all of them.[144] The same is true for individual cases because it surrenders the specific detailing for each case to a random number generator, further reducing the CA's control over who will hear and decide a case.[145] With the CA's focus on achieving a representative, fair panel, random selection may be the most powerful tool to

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131 *See supra* Part II.

132 Theoretically, including the alpha roster as described above helps cure issues with any improper screening of nominees because it facilitates the CA making a personal selection from all available, qualified personnel. *See* CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., U.S. ARMY, MILITARY JUSTICE MANAGER'S COURSE BOOK F-11 (Aug. 2009) [hereinafter MJM COURSE BOOK].

133 *See supra* note 76 and accompanying text.

134 United States v. Dowty, 60 M.J. 163, 171 (C.A.A.F. 2004).

135 The practice is not unusual while soliciting nominees. *See* MJM COURSE BOOK, *supra* note 132, at F-73.

136 *See supra* note 76 and accompanying text for discussion about the importance of a benign intent when appellate courts analyze the propriety of panel selection variables.

137 For example, the advice may point out that some cases may have little to no law enforcement evidence (such as absent without leave or urinalysis cases), making it likely an MP could sit on the panel because the concerns typically associated with MP membership on panels are not present. *See supra* note 89 and accompanying text.

138 While the SJA's advice would only be circumstantial evidence of the CA's intent, the proposed CA selection document "approves" the SJA's recommendations. *See* Appendix C. Such "approval," it could be argued, amounts to a concurrence with the underlying rationale.

139 Gilligan & Lederer, *supra* note 2, § 15-31.00.

140 United States v. Yager, 7 M.J. 171 (C.M.A. 1979).

141 Early methods involved almost entirely random selection by drawing a random pool and screening it with "eligibility requirements." U.S. Gov't Accountability Office, Rep. No. GAO/FPCD-76-48, Military Jury System Needs Safeguards Found in Civilian Federal Courts 27-28 (1977). A more modern approach combines the traditional process of nomination and selection of the best qualified with random detailing from a large pool of those designated "best qualified." *See* Lieutenant Colonel Bradley J. Huestis, *Anatomy of a Random Court-Martial,* ARMY LAW., Oct. 2006 at 22. This article advocates implementing the latter technique as an additional safeguard.

142 *See* Huestis *supra* note 141, at 27.

143 *Id.*

144 *See supra* note 24 for information related to the number of personnel assigned to a GCMCA.

145 Huestis *supra* note 141, at 27.

combine with the efficiency recommendations advocated here to insulate against trial and appellate scrutiny.

IV. Prudential Concerns—Just Because We Can, Should We?

Although case law appears to lend support for the non-binding recommendation advocated in this article, the prudent practitioner (or CA) raises additional concerns warranting attention. First, would this advice further complicate the already-scrutinized dual role of the CA as the person who decides both whether a case will go to trial and if so, who will decide the merits of the case?[146] From a public perception perspective, how does this advice affect the "spirit" or purpose of representative cross-section jury venires, even if such a requirement does not explicitly apply to courts-martial? These concerns implicate larger issues that warrant (and have received) much deeper discussion.[147] In the narrow context of the SJA's non-binding recommendation encouraged by this article, however, proper implementation as described above will allay these concerns.

A. The CA's Dual Role

The CA's role in personally selecting panel members to hear cases has endured significant criticism over the last several decades.[148] The criticism generally decries the CA's quasi-prosecutorial role as the person with the ultimate authority to decide whether a case will go to trial,[149] and the CA's responsibility to select the members who will hear and decide the facts of the case.[150] This "dual role," critics argue, creates "an invitation to mischief"[151] with the appearance of a rigged court at best and the opportunity to rig at worst.[152]

The SJA's advice recommended in this article cannot completely allay this concern however minor it may actually be.[153] The issue will remain as long as the UCMJ requires the CA's personal action both to refer cases to trial and to designate those people who will decide the merits of the case. However, when employed with the additional safeguards described above this concern is reduced. Randomly detailing members from a large pool eliminates the CA's ability to "hand-pick" a panel for any given case and further reduces any perception that the CA selected the members specifically to achieve a particular result.[154]

B. Impact on Representative Cross-Section

Article 25 is inherently in tension with the representative cross-section ideal. Implicit in detailing the "best qualified" members of the command is the notion that some group of personnel is better suited than others to hear the case and impartially decide its merits; that this group is more educated, more temperate, and more impartial. Conversely, the representative cross-section ideal eschews the notion of a truly impartial jury member, seeking instead to find impartiality with a jury selected from people with a variety of backgrounds.[155] Proponents of the cross-section ideal argue that individuals carry diverse perspectives influenced by "their race, religion, gender, and ethnic background."[156] In part to support this notion, civilian jurisdictions are trending away from exemptions from jury service based on professional occupation.[157] While science will probably never prove the theoretical foundations of either side of this argument, the civilian mandate of a representative cross-section shows its dominance in the modern American rule of law.[158]

The selection advice advocated here has little impact on the representativeness of the panel. Intuitively, a person's occupation appears less important to panel diversity as race, gender, religion, and ethnicity. As with the "dual role" issue described above, a large panel with randomized detailing would reduce these concerns. The larger panel necessarily includes more diversity, albeit with slightly fewer occupations represented.

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146 *See infra* Part IV.A.

147 Article 25 has proven to be an attractive target. *See, e.g.*, Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972-1973); Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998); Colonel James A. Young III, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000) (advocating the use of random selection of panel members in lieu of selection by the CA).

148 *See* MJM COURSE BOOK, *supra* note 132, at F-73.

149 UCMJ art. 34.

150 *See* MJM COURSE BOOK, *supra* note 132, at F-73.

151 NATIONAL INSTITUTE OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 7 (2001).

152 Gilligan & Lederer, *supra* note 2, § 15-31.00.

153 *See* Brigadier General John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1 (1998) (advocating that in spite of its critics, the current system and its safeguards provide fair trials).

154 With these procedural safeguards, a CA could only "pack" a panel by selecting a very large number of personnel he believed would vote a certain way based on his personal knowledge of them or their reputation. Practically speaking, such a task would be extremely difficult without generating other evidence of the improper intent, given the size of most GCMCAs. *See supra* note 24 for discussion regarding the number of personnel assigned to GCMCAs.

155 Abramson, *supra* note 22, at 100-01.

156 *Id.*

157 MIZE ET. AL., *supra* note 88, at 14.

158 Taylor v. Louisiana, 419 U.S. 522, 534 (1975).

V. Conclusion

Like all jury selection systems, Article 25 is imperfect.[159] In its current form, the statute has the potential for abuse.[160] Additionally, the uncertain nature of appellate review of panel selection—sometimes with jurisdictional consequences—can discourage candid or creative SJA advice.[161] The result is too often a mechanical, inefficient application of Article 25 by a CA.[162] Good staff work, however, can improve this process and its result.

The suggestions here are designed to facilitate fair, efficient trials before panels. With analytical advice, an SJA can appropriately raise efficiency issues to the CA. The CA can then more completely consider detailing those with implied bias concerns or potential professional conflicts with greater caution, selecting them only when he is confident that the member is unlikely to be challenged for cause. The result is less time wasted for prospective panel selectees, the military justice system, and perhaps even the CA.[163] The benefits of this advice are maximized when combined with the additional safeguards of large panels with random detailing. These techniques improve the appearance of fairness with structural limits to the CA's ability to influence results. The result is a fully-informed CA, equipped to select a more efficient panel, which is implemented in a manner to improve perceived fairness of the process.

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[159] Even the current federal system requiring a representative cross-section has critics. *See, e.g.*, Sanjay K. Chhablani, *Re-Framing the "Fair Cross-Section" Requirement*, 13 U. PA. J. CONST. L. 931, 945-46 (2011) (arguing current Supreme Court jurisprudence undermines the representative cross-section requirement espoused in earlier case law).

[160] *See supra* Part IV and note 148.

[161] *See supra* Part II.

[162] Professional Experience, *supra* note 125.

[163] *See* United States v. Gooch, 69 M.J. 353, 364 (C.A.A.F. 2011) (Stucky, J., dissenting).

Appendix A. Standard Panel Selection Advice[164]

MEMORANDUM FOR Commanding General, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. Purpose. To select new members for general and special courts-martial panels.

2. Discussion.

a. The current panel has been serving since 1 July 20XX.

b. Rule for Court-Martial (R.C.M.) 805 precludes a court-martial from proceeding without a specified number of court members. General and special courts-martial require a minimum of five and three members, respectively. Under R.C.M. 912, any member may be challenged and removed for cause. Also, each party may challenge one member peremptorily, that is, without cause. When requested by an accused who is an enlisted member, at least one-third of the members must be enlisted members. Because of losses from the current court-martial panel, resulting from retirements and Permanent Change of Station (PCS) moves, a new court-martial panel must be selected to meet the requirements of R.C.M. 805.

c. In accordance with Article 25, Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), individuals selected as panel members must be those who, in your opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament.

d. A list of nominees has been provided by the brigades and is included in enclosure B. All personnel on the list of nominees should be given equal consideration in light of the above factors and those factors only. In addition, you were provided the alpha roster for the entire command. You may select anyone under your command whom you feel is "best qualified" under the criteria in Article 25, UCMJ, to serve on a court-martial panel. Military grade by itself is not a permissible criterion for selection of court-martial panel members. It is also not appropriate to select members to achieve a particular result on findings or sentence.

3. Recommendation: Select a new court-martial panel of officers and enlisted personnel to hear cases at Fort Stumpy.

a. Place your initials beside ten officers' names on the roster in enclosure B to serve on a general courts-martial. Further, select five of the ten officers to be excused from the panel when enlisted members are requested by circling your initials. Select five enlisted personnel from the roster in enclosure B to be detailed to the general court-martial panel when the accused requests enlisted members by placing your initials beside their names.

b. Place an "SP" next to eight officers' names on the roster in enclosure B to serve on a special courts-martial panel. Further, select four of the eight officers to be excused from the panel when enlisted members are requested by circling the "SP." Select four enlisted personnel from the roster

[164] MJM COURSE BOOK, *supra* note 132, F-73. Appendix A is derived from material contained in the Military Justice Manual. *Id.*

in enclosure B to be detailed to the special court-martial panel when the accused requests enlisted members by placing a “SP” beside their names.

c. Select eight additional officers to serve as alternate court members for both general and special courts-martial by placing the numbers “O1” through “O8” beside their names on the roster at enclosure B. Select eight additional enlisted personnel to serve as alternate court members for both general and special courts-martial by placing the numbers “E1” through “E8” beside their names on the roster at enclosure B.

d. Direct that the alternate court members be automatically detailed to the court as follows:

(1) When, before trial, a primary member is excused, the primary member will be replaced for the period of time the primary member is excused by an alternate member of the same rank as the primary member. If all alternates of the same rank have been excused, an alternate member of the next junior rank will be detailed. If all alternates of the same or junior rank have been excused, then an alternate member of the next senior rank will be detailed. Within each rank, the replacement members will be notified in the order selected.

(2) When, at trial, the membership of an officer panel (for which enlisted members have not been requested) falls below the minimum number required by R.C.M. 805, the first three officer alternate members who have not been excused, in the order selected, will be detailed. If the accused has requested enlisted members and the number of enlisted members is otherwise sufficient for a quorum but the number of officer members falls below the number required for a quorum, then the first three officer alternate members who have not been excused, in the order selected, will be detailed.

(3) At trial, if the membership of any enlisted panel falls below the minimum number of enlisted members required by R.C.M. 805, the first three alternate enlisted members who have not been excused, in the order selected, will be detailed.

(4) Designate that all alternates will be detailed to either general or special courts-martial pursuant to the directions above.

e. You delegate to the Staff Judge Advocate, 54th Infantry Division, Fort Stumpy, to excuse individual members from a court-martial without cause shown pursuant to R.C.M. 505 (c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused by the Staff Judge Advocate.

f. Any court member who was a signatory on a transmittal memorandum forwarding the case for trial or who conducted an Article 32 preliminary hearing in the case should be automatically excused for that case only. Any enlisted member who is in the same company-sized unit as the accused or who is not senior in rank to the accused should be automatically excused for that case only.

g. Direct that all general courts-martial scheduled for trial on or after 1 July 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the general court-

martial convened by this memorandum. Similarly, direct that all special courts-martial scheduled for trial on or after 10 June 20XX which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the special court-martial convened by this memorandum.

4. A memorandum to accomplish the foregoing is provided in enclosure A for your signature.

Encls
as

BUTCH BEGONIA
COL, JA
Staff Judge Advocate

Appendix B. Proposed Panel Selection Advice[165]

MEMORANDUM FOR Commanding General, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. Purpose. To select new members for general and special courts-martial panels.

2. Discussion.

a. The current panel has been serving since 1 July 20XX.

b. Rule for Court-Martial (R.C.M.) 805 precludes a court-martial from proceeding without a specified number of court members. General and special courts-martial require a minimum of five and three members, respectively. Under R.C.M. 912, any member may be challenged and removed for cause. Also, each party may challenge one member peremptorily, that is, without cause. When requested by an accused who is an enlisted member, at least one-third of the members must be enlisted members. Because of losses from the current court-martial panel, resulting from retirements and Permanent Change of Station (PCS) moves, a new court-martial panel must be selected to meet the requirements of R.C.M. 805.

c. In accordance with Article 25, Uniform Code of Military Justice (UCMJ), and R.C.M. 502(a)(1), individuals selected as panel members must be those who, in your opinion, are best qualified for the duty by reason of their age, education, training, experience, length of service, and judicial temperament.

d. A list of nominees has been provided from the brigades in enclosure B. All personnel on the list of nominees should be given equal consideration in light of the above factors and those factors only. In addition, you have been provided the alpha-roster for the entire command. You are free to select anyone under your command whom you feel is "best qualified" under the Article 25, UCMJ, criteria to serve on the court-martial panel. Military grade by itself is not a permissible criterion for selection of court-martial panel members. It is also not appropriate to select members to achieve a particular result on findings or sentence.

3. Recommendation: Select a new court-martial panel of officers and enlisted personnel to hear cases at Fort Stumpy.

a. Place the number "1" through "50" beside fifty officers' names on the roster in enclosure B to serve for general and special courts-martial. Select fifty enlisted personnel, from the roster in enclosure B, to be detailed to general or special court-martial panels when the accused requests enlisted members by placing "51" through "100" beside their names.

b. Direct that members be detailed to the court from the pool of 100 through a random number sequence (RNS). The RNS will be uniquely generated for each case prior to presenting for a referral decision pursuant to Article 34, UCMJ. Detail ten members to serve on general courts-martial and 8 members for special courts-martial. If the accused elects trial by an enlisted panel, the composition will be half officers and half enlisted members.

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[165] Huestis, *supra* note 141. Appendix B is derived largely from Huestis. *Id.*

c. Direct that the alternate court members be automatically detailed to the court as follows:

(1) When, before trial, a primary member is excused, that primary member will be replaced for the period of time the primary member is excused by an alternate member of the same rank as the primary member. If all alternates of the same rank have been excused, an alternate member of the next junior rank will be detailed. If all alternates of the same or junior rank have been excused, then an alternate member of the next senior rank will be detailed. Within each rank, the replacement members will be notified in the order selected.

(2) When, at trial, the membership of an officer panel (for which enlisted members have not been requested) falls below the minimum number required by R.C.M. 805, the first three officer alternate members who have not been excused, in the order selected, will be detailed. If the accused has requested enlisted members and the number of enlisted members is otherwise sufficient for a quorum but the number of officer members falls below the number required for a quorum, then the first three officer alternate members who have not been excused, in the order selected, will be detailed.

(3) At trial, if the membership of any enlisted panel falls below the minimum number of enlisted members required by R.C.M. 805, then the first three alternate enlisted members who have not been excused, in the order selected, will be detailed.

(4) Designate that all alternates will be detailed to either general or special courts-martial pursuant to the directions above.

d. You delegate to the Staff Judge Advocate, 54th Infantry Division, Fort Stumpy, to excuse individual members from a court-martial without cause shown pursuant to R.C.M. 505 (c)(1)(B). This authority shall be limited so that no more than one-third of the total members detailed to a court-martial may be excused by the Staff Judge Advocate.

e. Any court member who was a signatory on a transmittal memorandum forwarding the case for trial or who conducted an Article 32 preliminary hearing in the case should be automatically excused for that case only. Any enlisted member who is in the same company-sized unit as the accused or who is not senior in rank to the accused should be automatically excused for that case only.

f. Direct that all general courts-martial scheduled for trial on or after 1 July 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced), are hereby withdrawn and referred to trial by the general court-martial convened by this memorandum. Similarly, direct that all special courts-martial scheduled for trial on or after 10 June 20XX, which have been previously referred to the panel convened on 1 July 20XX-1 year (and in which proceedings have not already commenced) are hereby withdrawn and referred to trial by the special court-martial convened by this memorandum.

4. Additional Considerations. Article 25, UCMJ, is the only criteria you should use when selecting the best qualified members. The recommendations below are provided solely for your

consideration and are designed to ensure panels are both fair and efficient. The recommendations are based on generalizations and would not apply to every person in these situations. Based on my experience, however, these are often accurate.

a. The training and experience associated with some personnel makes it likely they will be challenged and removed before trial pursuant to R.C.M. 912(f). Those who have performed law enforcement duties or have specific training or experience with crime victims are particularly susceptible to a challenge for cause. Military police in enclosure B are highlighted in blue.[166] Personnel who are or have served as a UVA are highlighted in green. I recommend against selecting these personnel in significant numbers.

b. Other personnel have professional responsibilities requiring impartiality that may appear to be undermined by panel service. Similarly, these personnel are frequently exposed to collateral issues related to courts-martial in their normal duties. Chaplains and those serving in inspector general positions are highlighted in yellow and orange, respectively, in enclosure B. I recommend against selecting these personnel.

c. Many judge advocates (JAs) may be disqualified by their role in the process per the UCMJ. Virtually every JA at Fort Stumpy knows all other JAs due to the relatively small community. Judge advocates' knowledge of the process and counsel involved make them likely to be challenged for cause. Judge advocates are highlighted in red at enclosure B. I recommend against selecting these personnel.

5. A memorandum to accomplish the foregoing is in enclosure A for your signature.

Encls
as

BUTCH BEGONIA
COL, JA
Staff Judge Advocate

[166] While panel nomination paperwork frequently contains nominees' branches, this article recommends highlighting the paperwork for clarity and to ensure others with non-branch-specific concerns are identified (VAs and IGs).

Appendix C. Proposed Convening Authority Selection Document[167]

MEMORANDUM FOR Staff Judge Advocate, 54th Infantry Division (Mechanized), Fort Stumpy, Indiana 46124-9000

SUBJECT: Selection of Court-Martial Panel Members

1. The recommendations of the Staff Judge Advocate (SJA) are approved/disapproved.

2. I note that before selecting panel members, I had before me for my consideration the ORBs and ERBs of all panel member nominees as well as the alpha roster from 54th Infantry Division (ID). I have selected these members using the selection criteria of Article 25, Uniform Code of Military Justice (UCMJ). I selected panel members who were, in my opinion, best qualified for the duty based on their age, education, training, experience, length of service, and judicial temperament, and no other criteria. I did not exclude Soldiers of particular ranks from consideration nor did I exclude anyone based upon gender or ethnic background.

3. I selected a large pool of panel members, both officer and enlisted, from which panels for particular courts-martial will be randomly selected. This large pool of panel members ensures that more Soldiers are actively involved in the military justice system and that the military justice system in 54th ID is representative of the community, while still adhering to the high standards of having the best qualified panel members under Article 25, UCMJ.

4. I assigned each of the members that I have personally selected a number; officer members (1-50) and enlisted members (51-100). Before I review a case for possible referral to either a general or special court-martial, the SJA will provide me a unique, case-specific random number sequence (RNS). This 100 number RNS will be attached to the SJA's Article 34, UCMJ, pretrial advice. General courts-martial (GCMs) will be assembled with ten members and special courts-martial (SPCMs) will be assembled with eight members. The first ten or eight officer members randomly selected by RNS order will sit as panel members unless they are excused. The remaining officers will be available in RNS order as alternate members.

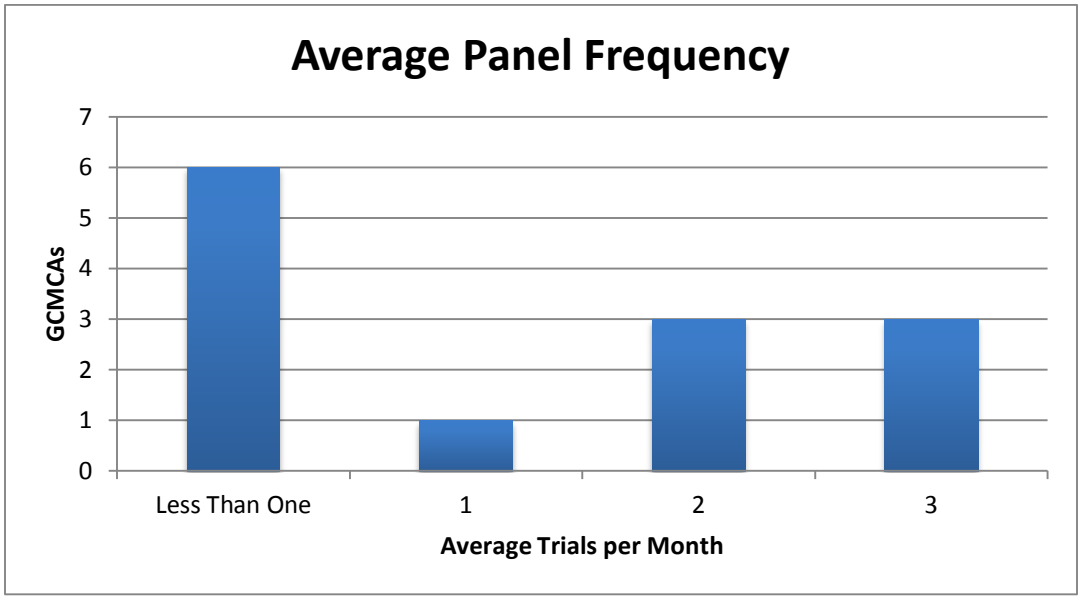
5. If enlisted members are required for a court-martial, the same process outlined above will be utilized with the following variations: Using RNS order, the first five officer members and the first five enlisted members will sit as panel members for GCMs; the first four officer members and the first four enlisted members will sit as panel members for SPCMs, unless they are excused. All other officer and enlisted members will be available in RNS order as alternate members.

STEVEN E. NICKS
MG, U.S. Army
Commanding

[167] Huestis, *supra* note 141. Appendix B is derived largely from Huestis. *Id.*

Appendix D. Survey Results

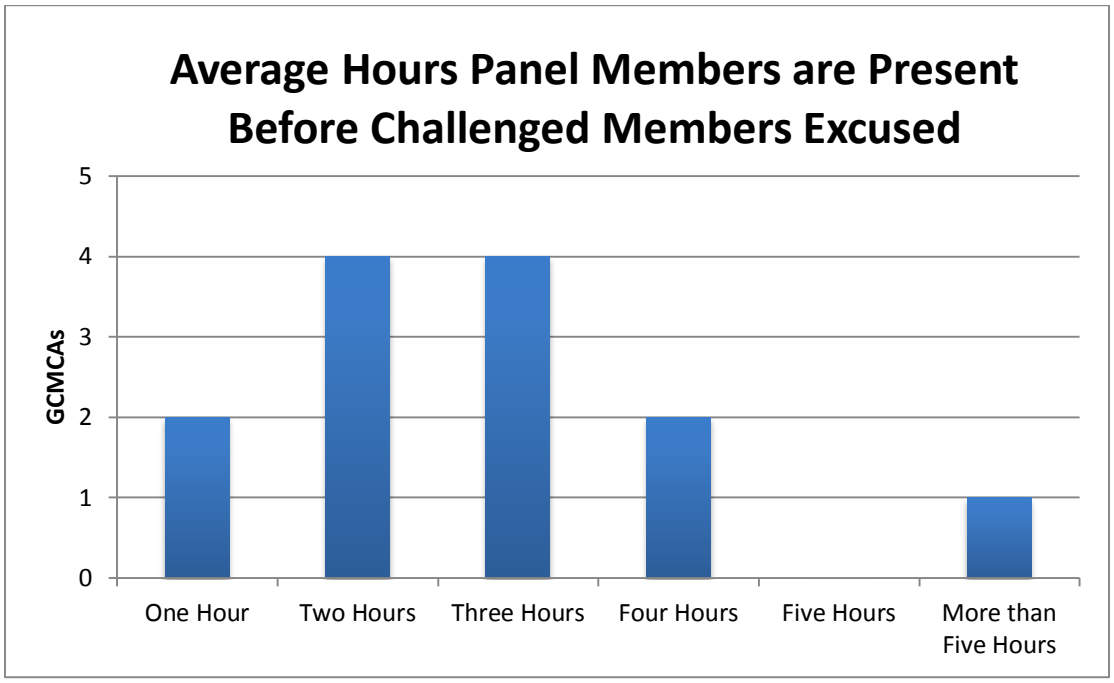
Thirteen General Courts-Martial Convening Authorities (GCMCAs) in the Army participated in a survey for this article. Responses were voluntary and anonymous. Responses came from jurisdictions with varying courts-martial frequency. The chart below illustrates the responses indicating six GCMCAs convene less than one panel case per month on average while six other respondents average two or three in that period.



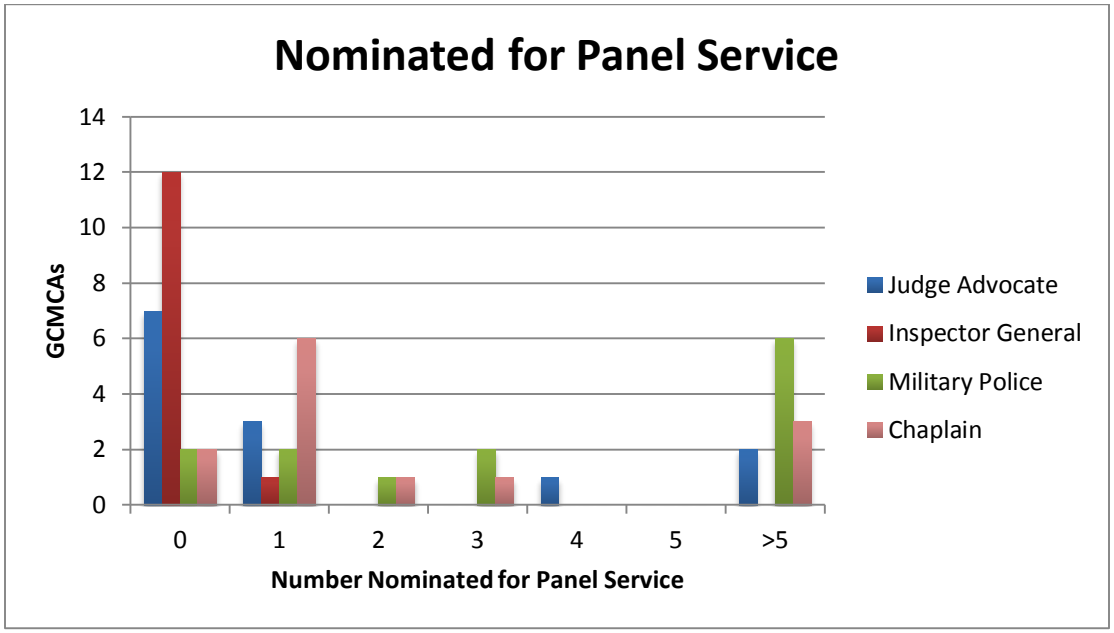
One of the goals of this study was to estimate the amount of time wasted for one member who is detailed to panel duty but does not actually sit due to an inevitable challenge.[168] The chart on the next page illustrates the minimum amount of time an individual panel member spends awaiting notification on any challenge for cause. Respondents were asked to round to the nearest hour. The average length of time is 3.25 hours across the thirteen responding GCMCAs. Two of the GCMCAs indicated that one time in the past year, their panel fell below quorum due to challenges necessitating detailing new members.[169]

[168] *See supra* note 21 and accompanying text.

[169] *See supra* note 6 and accompanying text.



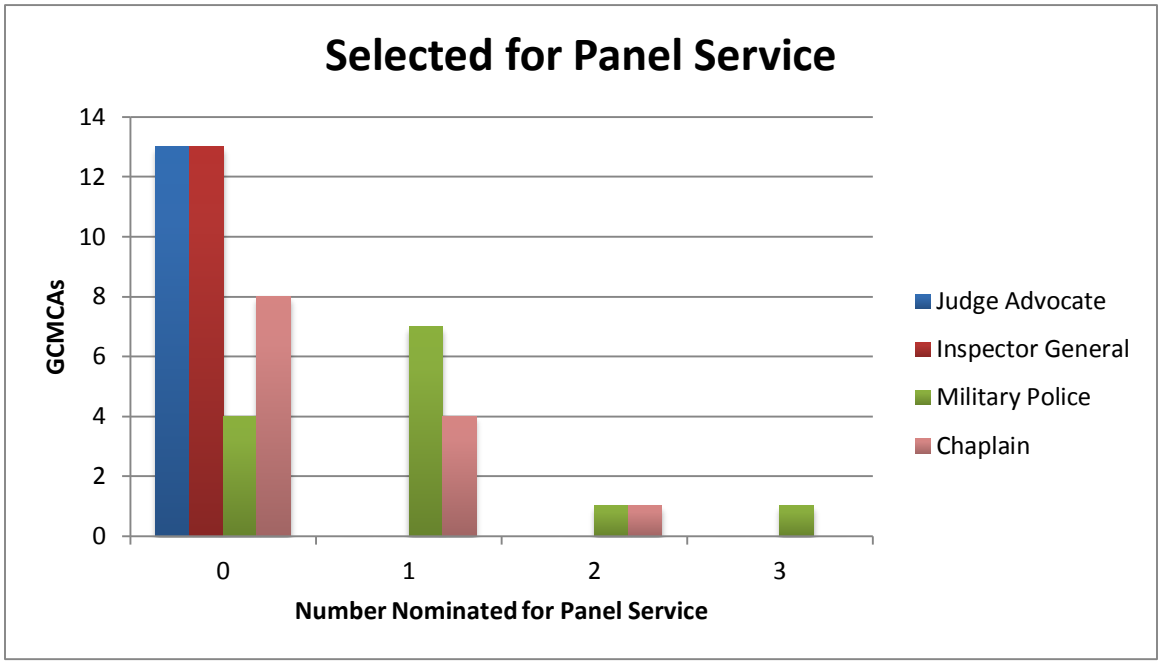
Perhaps most importantly, the survey sought the frequency that members described above were nominated and selected for panel service. As seen in the chart below, the issue may be more common than thought: two GCMCAs reported nominating more than five judge advocates for panel service and three GCMCAs had more than five chaplains nominated for service. Data regarding the Department of Veteran Affairs training was unavailable.



The rate some officers are selected is also cause for concern. The chart below shows nine of the thirteen responding GCMCAs had military police officers as primary or alternate panel members.[170] Five GCMCAs had chaplains on their panels, with one

[170] While ten respondents self-reported the quantity of special branch officers nominated and selected, three GCMCAs: I Corps, III Corps, and 8th Army provided panel selection documents for review. A closer review of these selection documents indicated that one GCMCA contained a primary panel member whose previous duty assignment was the senior agent in charge of the local CID detachment (supervising Army detectives) and another panel had the unit's provost marshal officer as a primary member (a practice specifically proscribed for decades). *See* case cited *supra* note 92 and accompanying text.

GCMCA reporting two chaplains. Again, these numbers could not account for personnel with Victim Advocates or similar training which Chiefs of Justice anecdotally reported to be a very common basis for implied bias challenges.[171]



Most panels contain at least one member who is unlikely to survive an implied bias challenge.[172] If using the typical panel of ten members as indicated in Appendix A, the panel's starting membership is practically reduced to eight when accounting for the likely implied bias and defense peremptory challenges.[173] This means an average loss of more than six work hours in the day for these two members and a greater likelihood of a broken quorum.[174] The potential time wasted grows significantly when detailing multiple members with implied bias challenge concerns.[175]

[171] *See supra* note 86.

[172] *See supra* Part III.A.

[173] UCMJ art. 41 (2012).

[174] Calculated using the average voir dire length of 3.25 hours noted above.

[175] *See generally supra* Part III.A. The greater likelihood a member will be successfully challenged, the greater likelihood the panel will drop below quorum.