THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

April 24, 2023

MEMORANDUM FOR THE JUDGE ADVOCATES GENERAL
THE STAFF JUDGE ADVOCATE TO THE COMMANDANT

SUBJECT: Request for Information Regarding Article 25, UCMJ, Selection Criteria

1. The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) is reviewing Article 25, UCMJ, court-martial panel member selection criteria and selection processes.

2. I respectfully ask your staffs to provide our staff with the responses specified in the Request for Information by the date requested (Encl).

3. Thank you for your support of this important project. The POC for questions about the RFI is Ms. Terry Gallagher, Project Lead, at theresa.a.gallagher2.civ@mail.mil. The POC for receipt of responses is Mr. Chuck Mason, Data Lead, at robert.c.mason2.civ@mail.mil.

JEFF A. BOVARNICK
Colonel, Judge Advocate
United States Army

Encl
As stated

cc:
Mr. Dwight Sullivan (DoD OGC)
Service Representatives

Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD)

Request for Information

RFI Set 2.9, Narrative Questions

Topics: Article 25, UCMJ, Criteria and Panel Member Selection Processes

Date of Request: April 24, 2023

I. Purpose

At the February 21-22, 2023 DAC-IPAD public meeting, the DAC-IPAD assigned the Policy Subcommittee to review Article 25, UCMJ, panel member selection criteria and panel member selection processes.

The information provided will inform the following research questions:

1. Whether each Article 25 criterion provides a qualification necessary to perform court-martial panel member duties as specified in R.C.M. 502.

2. Whether there is a military purpose for requiring different qualifications than required for federal and state jurors. If so, what is the military purpose and how do the criteria assist in meeting the military purpose?

3. Whether other qualifications are militarily necessary to perform panel member duties. For example, race/ethnicity/gender/pending disciplinary action.

4. What are the best methods for random selection of qualified court-martial members?

II. Authority

1. The DAC-IPAD is a federal advisory committee established by the Secretary of Defense pursuant to section 546 of the National Defense Authorization Act for Fiscal Year 2015, as amended.

2. The DAC-IPAD's mission is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of rape, forcible sodomy, sexual assault, and other sexual misconduct involving members of the Armed Forces.

3. The DAC-IPAD requests the assistance of the Military Services to provide the requested information by the suspense date indicated below.

III. Summary of Requested Response Dates

Suspense	Question(s)	Proponent
24 May 23	Sect IV: Narrative Questions	Services – The identified groups provide narrative responses to the questions in Section IV of this RFI

IV. Narrative Questions

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

4. Should there be an option for an all enlisted panel? Why or why not?

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Request for Information Set 2.9, Narrative Questions
Service OTJAG/Criminal Law Responses

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined and they have not changed since 1950, when military judges did not preside over courts-martial and panel members determined an appropriate sentence. Except in death penalty cases, in December 2023, panel members will no longer serve as the sentencing authority, and beginning in December 2024, randomized selection processes will be used, to the maximum extent possible, in the selection of panel members.

The qualifications to serve as potential juror in the federal and state systems include: (a) U.S. citizenship, (b) be at least18 years old, (c) be a resident for 12 months, (d) have English proficiency, (e) have no disqualifying mental or physical condition, (f) have never been convicted of a felony (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

Questions. Responses to the following questions are requested from each of the Services' criminal law/military justice organization chiefs, trial defense organization chiefs, Office of Special Trial Counsel leads, and victims' counsel program managers.

Army Office of the Judge Advocate General (OTJAG) Initial Notes:

Thank you for the opportunity to respond. The U.S. Army Office of The Judge Advocate General has two initial notes relevant to our responses to your questions.

US v. Jeter: Recommendations to amend Article 25, UCMJ, or the policy and process for selecting panel members, may be premature in advance of an opinion in *United States v. Jeter*, currently pending before the Court of Appeals for the Armed Forces. A decision in *United States v. Jeter* may provide additional valuable guidance for any amendments to the panel selection criteria and process.

Federal Criminal Juror Selection Process: All of the questions below appear to use the federal criminal jury process as a starting point for analysis of the Article 25, UCMJ, requirements. Any comparison between the federal criminal justice system and military justice system, particularly with regard to juror selection, should acknowledge the substantive differences between the two systems.

Authorized by separate Articles of the Constitution, the federal criminal justice system and military justice system serve different purposes. According to www.uscourts.gov, the federal criminal courts were created under Article III of the Constitution to administer justice fairly and impartially. The military justice system, authorized under Article I of the Constitution, derives jurisdiction from International Law, the law of war, and the inherent authority of military commanders. The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

The two systems draw potential jurors from distinct populations. The DoD total military force in 2020 was 40.6% ages 17-25; 20.3% ages 26-30; 15.2% ages 31-35; 11.9% ages 36-40; and 12% ages 41 years or older.[1] In contrast, the U.S. population in the 2022 census is substantially older, with only 13% of the population aged 15-24; 39% ages 25-54, 12% ages 55-64; and 16.8% ages 65 and over.[2] The use of voter registration or driver's license lists and the average 12% nationwide rate of jury summons that are returned undelivered, typically in urban areas, further skews the federal criminal available juror pool toward an older, socio-economically stable population. Purely random juror selection in both systems would produce substantially different-looking jury pools.

Finally, the use of juries/panels in the two systems varies widely. A 2019 Pew research Study concluded that only 2% of federal criminal defendants go to trial, while 90% pleaded guilty, and 8% had charges dismissed.[3] Specific data for 2022 adult sexual assault cases from the Department of Justice indicates that 22 cases total for all U.S. District Courts during the preceding 12-month period went to a contested jury trial, in which six defendants were acquitted by the jury and 16 defendants were convicted by the jury (see attached).

In contrast, the Army has a much larger percentage of cases in which the accused pleads not guilty and elects a panel. The Army alone tries more than three times the number of contested panel adult sexual assault cases than all the U.S. District Courts combined. In FY22, the Army, which typically represents about half of the total Department of Defense courts-martial, tried 483 cases to completion, with 375 (88%) electing a judge alone guilty plea or bench trial and 108 (22%) contested panel trials. For cases involving a sexual assault with an adult victim, the Army completed 80 judge alone guilty pleas and 71 contested panel trials, more than three times the number of cases from the U.S. District Courts combined (see attached).

Given these differences, the federal juror selection process may not be the best model for analyzing Article 25, UCMJ.

Navy Criminal Law Division Initial Notes: As a baseline in these responses I would highlight that Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening authority in the selection process while maintaining the fundamental fairness of the military justice system. I agree with this inclusive system of determining eligibility for courts-martial service. Systemic exclusion based on specific minimums (e.g. must have 4 years of service) in otherwise qualified potential members does not support the fair administration of justice.

Air Force Office of the Judge Advocate General Initial Notes: AF/JA would highlight the importance of ensuring that your committee review feedback from all parties who are engaged in the system; to include prosecutors, representatives of the Office of Special Trial Counsel, defense counsel, and victim's counsel, as well as expert military policy advisors from each Service. They all have equities based on their client base and an understanding of additional effects of continuing to evolve military justice in the midst of what are already historic changes that have yet to fully take place or be assessed.

[1] 2020 Demographics, Profile of the Military Community, Department of Defense, Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy.
[2] https://www.census.gov/data/tables/time-series/demo/popest/2020s-national-detail.html
[3] https://www.pewresearch.org/short-reads/2019/06/11/only-2-of-federal-criminal-defendants-go-to-trial-and-most-who-do-are-found-guilty/

Coast Guard Office of Military Justice Initial Notes: We would like to express our appreciation for the Committee's interest in Article 25, UCMJ. As a preliminary matter, we note that the military justice system is designed to safeguard the due process of the accused while effectively addressing the unique demands of discipline and efficiency within the military. The Coast Guard's insights on potential amendments of Article 25 are therefore offered with a sincere appreciation of the complexities inherent in the issue.[4] We fully recognize the authority of Congress to establish rules for the governance of the armed forces, and, as such, we approach this matter with utmost respect for their legislative judgment including for the provisions of Article 25 they saw fit to pass and retain over the years.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

1) Federal criminal juries require jurors to be 18 or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Army OTJAG: There should not be a minimum age or age range for potential military panel members. Article 25, UCMJ allows convening authorities to consider age, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the youngest servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Given that there are a small number of military members under the age of 18, the military too has a de facto minimum age of 18 to serve as a panel member. Current criteria for selection as a panel member do not establish an alternative age limit and I would not recommend establishing one. Any military member should continue to remain eligible for possible service as a panel member.

Marine Corps Military Justice Branch: While convening authorities consider age among other criteria when identifying those best qualified to serve as court-martial members, there is no age minimum or age range. This maximizes the pool of potential court-martial members and the exercise of discretion by the convening authority. Since military members are over the age of 18 (with limited exception), it is not necessary or advisable to establish an age minimum or range for service as a court-martial member, particularly in light of the holistic assessment of other criteria.

[4] For a general discussion of Article 25 and case law, see Chapter 9, Section III of The Judge Advocate General's Legal Center and School, Criminal Desk Book, Practicing Military Justice, https://tile.loc.gov/storage-services/service/ll/llmlp/Crim-Law-Deskbook_January-2019/Crim-Law-Deskbook_January-2019.pdf. For additional such discussion including proposed amendments, see David A. Schulter, Military Criminal Justice § 8-3(C) (9th ed. 2015). For the Congressional discussion of Article 25 during the 1949 amendments to the UCMJ, see UCMJ: Hearings on H.R. 2498 Before Subcomm. Of House Comm. On Armed Forces, 81st Cong. 1st Sess. 1114 (1949), https://tile.loc.gov/storage-services/service/ll/llmlp/hearings_01/hearings_01.pdf.

Air Force Military Justice Law and Policy: There should not be a different minimum age for military panel members.

Coast Guard Office of Military Justice: The inclusion of a minimum age requirement does not appear necessary. The existing enlistment, appointment, and induction criteria means that the vast majority of members in the military are eighteen years of age or older.[5] An additional minimum age restriction would be redundant since Article 25, UCMJ directs the convening authority to generally consider "age" under the "best qualified" criteria. A general consideration of the age of panel members could become important in reflecting the military's diversity, especially dealing with cases with younger servicemembers. In appropriate cases, it could ensure servicemembers are not solely judged by older individuals and that panels appropriately consider the dynamics and relations specific to different generations in the military community.

2) Under the current rules, panel members must be senior in rank and grade to the accused. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Army OTJAG: The military is a hierarchical organization in which rank is the fundamental source of command authority and good order and discipline. Good order and discipline, including obedience to the lawful orders of a superior, are at the core of readiness. The importance of rank cannot be ignored in the military justice system.

The long-standing statutory requirement, originating in the 1951 Manual for Courts-Martial, for, when it can be avoided, having no member of the panel be junior to the accused in rank or grade was intended to protect both the accused and the panel members. Accused Soldiers should not perceive or fear that panel members junior in rank, over whom the accused could exercise authority or issue lawful orders, are deliberating without prejudice or impermissible motives. Just as importantly, the use of panel members junior in rank to the accused could have a chilling effect on those panel members to vote their conscience.

Navy Criminal Law Division: Of note, panel members may be junior in rank to the accused and serve as a panel member when it cannot be avoided. That said, the military is an inherently hierarchical organization of authority and responsibility designed to enhance its functioning – individuals are led, supervised, and at times disciplined by those senior in grade to them. No other disciplinary tool is, or even can be, imposed by a junior member on a more senior member. As such, it would be inconsistent with the organizational structure, and the nature of good order and discipline within the military to normally allow those junior in rank or grade to the accused to sit in judgment and in some cases decide on an appropriate punishment.

Marine Corps Military Justice Branch: Yes. The requirement of Article 25(e)(1)—"When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade"—is "an ancient provision of military law." *United States v. Crawford*, 35 C.M.R.3, 19(C.M.A. 1964) (Kilday, J., concurring). Citing various authorities, the Court of Appeals for the Armed Forces (C.A.A.F.) has recognized, "Historically, the seniority requirement was established to remove any temptation on the part of the members to convict the accused and thus perhaps create an opportunity for personal promotion." *United States v. Schneider*, 38 M.J. 387, 394(C.A.A.F. 1993)(citations and internal quotation marks

[5] *See* 10 U.S.C. § 505.

omitted). Regardless of whether this particular justification retains validity, the seniority requirement remains an essential aspect of courts-martial given the hierarchical organization of the military. Servicemembers are generally subject to the supervision, direction, and evaluation of more senior servicemembers. Subordinates sitting in judgement of superiors is antithetical, imperiling the independence, objectivity, and the appearance thereof required of courts-martial members.

Air Force Military Justice Law and Policy: The requirement that court-martial panel members be senior in rank and grade serves to further the good order and discipline of the service; this requirement ensures those who make decisions in a case are at least as experienced (in a broad military sense) as the accused.

Coast Guard Office of Military Justice: The purposes of the military justice system include promoting discipline and efficiency in the armed forces, in times of peace, war, and national emergency. A hierarchical structure, represented by rank, plays an integral role in maintaining this discipline and efficiency. Congress, with due consideration, has incorporated the requirement that panel members of a court-martial be higher in rank than the accused in Article 25 "when it can be avoided."[6] Despite amending other parts, Congress has preserved this provision, apparently highlighting its ongoing importance and relevance in achieving the system's objectives. Moreover, it is noteworthy that at least one court has acknowledged the validity of a commander's observation that the consideration of rank in panel members may correspond to good judgment and experience necessary to handle serious and complex cases.[7]

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Army OTJAG: There should not be a minimum length of service or range for potential military panel members. Article 25, UCMJ allows convening authorities to consider length of service, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the newest servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

[6] See Article 25(e)(1), UCMJ.
[7] *See United States v. Melson*, No. ACM 36523, 2007 WL 2791708, at *1 (A.F. Ct. Crim. App. Sept. 14, 2007), *certified question answered and remanded*, 66 M.J. 346 (C.A.A.F. 2008) (where five of the ten members were colonels, the convening authority testimony indicated "that he wanted to pick members whom he knew had the best judgment and experience . . . . [and] this was the most serious case he had ever handled.").

Navy Criminal Law Division: No, I do not favor establishing a specific minimum length of service criteria – again, to do so would result in the systematic exclusion of some percentage of the force at the less experienced and more junior levels. Given the demographics of the military in general, longer serving individuals tend to be higher in grade, male, and less demographically diverse, than the service as a whole. To exclude individuals systematically based upon their length of service increases the likelihood of resulting panels that do not reflect a good faith effort to be open to all segments of the military community. I do not support such a proposition.

Marine Corps Military Justice Branch: No, there should not be a minimum length of service requirement. Any such requirement would be arbitrary and unnecessarily limit the pool of potential court-martial members and the discretion of convening authorities. "Indeed, the authors of the Uniform Code expressly eliminated in Code, supra, Article 25, the proviso contained in its predecessor legislation, which prohibited members with less than two years' service from being appointed to hear general and special court-martial cases. See Public Law 759, 80th Congress, 62 Stat 604, 628." *United States v. Crawford*, 35 C.M.R. 3, 26 (C.M.A. 1964) (Ferguson, J., dissenting).

Air Force Military Justice Law and Policy: There should not be a minimum length of service required to serve on a court-martial panel. The nexus between length of service and experience is satisfied by the requirement that members of a court-martial panel be senior in rank and grade to the accused.

Coast Guard Office of Military Justice: It is again worth emphasizing that the military justice system is supposed to promote efficiency and effectiveness in the military, whether in times of war, peace, or national emergency. In times of war or emergency, the terms and length of service can vary significantly, particularly considering the activation of the draft, the calling of volunteers, the activation of reserves, and the integration of national guardsmen. As a result, enforcing a minimum "length of service" requirement could prove impractical when considering the unpredictable nature of preserving national security and the military's corresponding role. Additionally, during times of normal operations, there appears to be little benefit in mandating a minimum length of service.

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be and what is the military justification supporting the requirement?

Army OTJAG: There are minimum educational requirements for military service, including a high school degree or equivalent for enlisted personnel and a college degree for commissioned officers. However, there should not be additional minimum educational requirements for potential military panel members. Article 25, UCMJ allows convening authorities to consider education, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the least educated servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Minimum standards established for entry into military service is a sufficient baseline and an additional minimum education level is not necessary for military panels.

Marine Corps Military Justice Branch: Education is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members, though there are no, nor should there be, any specific educational requirements. Prior to joining the military, officer and enlisted servicemembers must meet baseline educational requirements. Additionally, servicemembers have a wide variety of military and civilian educational backgrounds. Convening authorities should retain discretion in considering the education of potential court-martial members—without arbitrary minimums—holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional education requirement to be qualified to serve as a court-martial panel member. At a minimum, service members are required to have at least a high school diploma (or have passed the General Education Development (GED) test) in order to serve in the DAF. Further, under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of education, among other factors. There is no justification for providing an additional education requirement beyond this statutory mandate.

Coast Guard Office of Military Justice: Convening authorities are indeed mandated to consider the education of potential panel members, as a general requirement. It is important to note that the military recognizes a broad spectrum of educational avenues, as reflected in its diverse professional military education programs for both officers and enlisted personnel. This expansive view not only fosters critical thinking skills but also cultivates an appreciation of unique demands faced by the armed forces, especially those involving military-specific offenses or errors in operational settings. Therefore, altering this standard does not appear to be necessary, particularly as a specific requirement might exclude individuals with diverse or non-traditional educational backgrounds, limiting perspectives within the panel.

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Army OTJAG: There should not be a minimum experience requirement for potential military panel members. Article 25, UCMJ allows convening authorities to consider experience, which provides a better understanding of the mission and readiness, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified. This supports the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the least experienced servicemembers may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: Creating a minimum level of experience for service on a panel could again result in the systematic exclusion of less experienced and lower ranking service members. For the reasons detailed above with respect to length of service I do not support the establishment of such a criterion.

Marine Corps Military Justice Branch: Experience is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members, though there are no, nor should there be, any specific experience requirements. However, the U.S. Court of Military Appeals (C.A.A.F.'s predecessor) has clarified that "*military* experience was what [the drafters of Article 25] contemplated." *United States v. Smith*, 27 M.J. 242, 249(C.M.A. 1988) (emphasis added). This is sufficiently specific. Convening authorities should retain discretion in considering the experience of potential court-martial members—without arbitrary minimums—holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional experience requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of experience, among other factors. Further, Article 25(e)(1) requires court-martial panel members be senior in rank and grade to the accused, thereby ensuring those who make decisions in a case are at least as experienced (in a broad military sense) as the accused. There is no justification for providing an additional experience requirement beyond these statutory mandates.

Coast Guard Office of Military Justice: There does not seem to be good reason to change the requirement for convening authorities to consider the experience of potential court-martial members. To begin, this requirement is not inconsistent with the practice in federal criminal instructions which call upon jurors to consider their "reason, experience, and common sense" when evaluating evidence.[8] Furthermore, the requirement highlights the important role that experience plays in promoting efficiency and discipline in the Armed Forces. Panel members' experience may enable them to effectively judge cases against a backdrop of the realities of the military and its specific needs. For instance, while sexual harassment may not be a crime in civilian life, such conduct may be punishable by courts-martial due to its detrimental effect on good order and discipline. The nuances of such wrongful behavior itself and the impact upon a unit might not be readily grasped by individuals lacking experience at military units or in operations comparable to the case's factual background. Moreover, the members' experience may become crucial in cases involving warfighting or military operations. For example, one court found it appropriate for a commander to select panel members with "significant sea-going experience" in a case concerning the grounding and loss of a ship.[9]

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

[8] *See* United States Court for the Ninth Circuit, Manual of Model Criminal Jury Instructions, page 6 – 7, https://www.ce9.uscourts.gov/jury-instructions/model-criminal (last accessed May 23, 2023).
[9] *United States v. Lynch*, 35 M.J. 579, 587 (C.G.C.M.R. 1992), *decision set aside on other grounds*, 39 M.J. 223 (C.M.A. 1994)

Army OTJAG: There should not be a minimum training requirement for potential military panel members. Article 25, UCMJ allows convening authorities to consider training, which provides a better understanding of the mission and readiness, holistically along with the other criteria, when selecting members who are best qualified, as opposed to minimally qualified. This supports the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States. While the servicemembers with the least training may not be best qualified to support the purposes of military law, there should not be an arbitrary rule to exclude them.

Navy Criminal Law Division: I do not favor establishing a specific minimum level of training to serve as a court-martial panel member. I believe commanders and convening authorities are best positioned to select and detail court-martial members who have sufficient training and are prepared to sit in judgment of their fellow service members in a manner that is consistent with the fair administration of justice.

Marine Corps Military Justice Branch: Training is among the criteria convening authorities must consider when identifying those best qualified for duty as courts martial members, though there are no, nor should there be, any specific training requirements. Servicemembers receive a significant amount of training on various topics throughout their careers , and each service member has different training accomplishments. Convening authorities should retain discretion in considering the training of potential court martial members without arbitrary minimums holistically with other criteria.

Air Force Military Justice Law and Policy: There should not be an additional training requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of training, among other factors. There is no justification for providing an additional training requirement beyond this statutory mandate.

Coast Guard Office of Military Justice: There appears to be insufficient justification to change the requirement for convening authorities to consider the training of panel members in general. Comparable to the reasons for considering education and experience, the requirement for a convening authority to consider members' training aligns with the military justice system's aim of promoting efficiency and discipline in the armed forces, especially in cases involving operational, deployed, or warfighting scenarios. Training of all different sorts (e.g., leadership, technical, etc.) is an obvious and integral part of equipping individuals for the challenges they and their peers may encounter. Imposing a specific training requirement would likely disregard the range of functions performed by military units and missions. The requirement to consider the training of panel members remains a sensible practice that accounts for the multifaceted nature of the military and supports the effective administration of justice.

Also, removing training as a consideration could inadvertently exclude panel members who have developed critical thinking skills through extensive professional training, even if they lack more traditional education paths. This could limit the benefit of inclusive perspectives, particularly among enlisted personnel.

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Army OTJAG: Judicial temperament is an appropriate factor for convening authorities to consider when determining who is best qualified, as opposed to minimally qualified, to support the purposes of military law—to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.

While there is no uniform definition of judicial temperament, caselaw and policy have discussed the term. United States v. Smith provides, "While neither experience nor judicial temperament are explicitly defined by the statute, regulation, or case law, this court finds that both criteria contain elements of judgment and respect for good order and discipline…"[10]

DA PAM 27-9 (Feb 2020) provides additional guidance on judicial temperament. "However, the mantle of responsibility which goes with the judge does not mean the judge must be aloof to human relations. The judge's individual character, warmth, and human qualities should not be adversely affected by judicial status but should be developed fully as necessary ingredients of a proper judicial temperament. A military judge must have a deep sense of justice and an abiding faith in the law. The judge must possess honesty and courage; wisdom and learning; courtesy and patience; thoroughness and decisiveness; understanding and social consciousness; and independence and impartiality."

Navy Criminal Law Division: Although the UCMJ and Manual for Courts-Martial do not define the term "judicial temperament", the American Bar Association, has previously defined the term as "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice." I am aware of no uniquely military justification for such qualities in a court member, but I do think all jurors, military or civilian should possess such qualities.

Marine Corps Military Justice Branch: Judicial temperament is among the criteria convening authorities must consider when identifying those best qualified for duty as courts-martial members. The term is undefined in the UCMJ and the Rules for Courts-Martial, permitting convening authorities to exercise broad discretion in identifying those servicemembers best qualified for duty as court-martial members based in part on consideration of a less tangible and quantifiable criterion than others in Article 25. The following attempts to condense a common understanding of judicial temperament:

[D]istilling extant treatments of judicial temperament reveals that certain characteristics repeatedly surface in the construct's taxonomies. One such quality is compassion, an emotional response to perceiving and caring about another's distress. Another commonly cited trait is patience, judged by the ability to be even-tempered and exercise restraint in trying situations. Dignity also is mentioned with moderate frequency. . . . Collegiality, another oft-named quality, similarly is described as both a generous and respectful attitude towards one's judicial fellows

[10] No. 20180156, 2019 CCA Lexis 464, *7-8 (Army Ct. Crim. App. 2019).

and the concrete actions by which that attitude is manifested. Finally, three other qualities that appear to be both highly valued and commonly regarded as temperamental are being open-minded, even-handed, and committed to equality.

Terry A. Maroney, *(What We Talk About When We Talk About) Judicial Temperament*, 61 B.C. L. REV. 2085, 2099-2100(2020).Whatever collection of specific traits and characteristics a convening authority believes that good judicial temperament entails, it requires the consideration of a servicemembers' character to identify those that are to be entrusted with the important responsibility of serving as court-martial members, which is a valuable part of our system.

Air Force Military Justice Law and Policy: There is an existing judicial temperament requirement to be qualified to serve as a court-martial panel member. Under Article 25(e)(2), UCMJ, when convening a court-martial, the convening authority is required to detail members who are best qualified by reason of judicial temperament, among other factors. This requirement is necessary to ensure the best qualified individuals are selected to serve as panel members; specifically, those with the appropriate disposition to serve as the finder of fact.

Coast Guard Office of Military Justice: While the concept of judicial temperament is primarily associated with judges, it can be applied to individuals who are not serving in a judicial role. In a broader sense, the term refers to the qualities and characteristics that contribute to effective decision-making and fairness with respect to the rule of law.

This concept promotes fairness, integrity, and the rights of the accused. Panel members evincing this characteristic would be expected to approach their duties with impartiality, open-mindedness, and a commitment to military regulations and rule of law. Congress has seen it fit to retain consideration of this attribute in Article 25. Congress' judgment perhaps reflects that military society is separate and apart from civilian society and that military law makes a wide variety of things punishable by courts-martial that would not be a crime in civilian life. By incorporating positive attributes like impartiality and a commitment to rule of law, panels are better suited to make just decisions that align with the military's specific rules and regulations.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Army OTJAG: It would be a very rare instance to have a servicemember with a prior felony conviction, but that would be an appropriate disqualification. Medical or physical conditions should not be disqualifying, but they could make servicemembers unavailable for service as panel members. Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member has pending disciplinary actions, is assigned to the same unit as the accused, or has an ETS or retirement date within the near future.

Navy Criminal Law Division: I would not seek to add to Article 25's list of criteria. Several of the factors listed above are incompatible with military service and the others would normally be identified through the voir dire process.

Marine Corps Military Justice Branch: No additional requirements to serve as a court-martial member are necessary. These are matters that are identified during voir dire, and the military judge shall excuse a member for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N).

Air Force Military Justice Law and Policy: These additional requirements are not needed for service as a panel member. The criteria provided for in Article 25, UCMJ, would frequently rule out the selection of members with these concerns. To the extent they do not, Rule for Court-Martial (RCM) 912 provides the framework for the examination of panel members during which potentially disqualifying information regarding the additional requirements would be discovered. This process allows for identification of potential issues contemplated by the additional requirements, without creating an absolute bar prohibiting an individual from serving as a panel member.

Coast Guard Office of Military Justice: Disqualifying mental and physical conditions would undermine a member's status as "best qualified" under Article 25. Moreover, these conditions would likely render the member physically unable to serve, making them ineligible for panel membership. Similarly, a felony conviction or misconduct resulting in felony charges would normally disqualify a servicemember from serving in the military, let alone meet the "best qualified" criteria outlined in Article 25. Therefore, the inclusion of these specific considerations appears unnecessary and would complicate the framework for selecting panel members.

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Army OTJAG: Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member is flagged for an investigation or pending disciplinary actions. Past completed disciplinary actions are not included in the scrub for members of the selection pool. If a Soldier is selected by the convening authority, the questionnaire provided to all the parties typically includes past disciplinary actions taken against the panel member. Parties may use this information as a basis for a challenge for cause. This practice has been approved by military courts, explaining in United States v. Smith that "[w]hile neither experience nor judicial temperament are explicitly defined by the statute, regulation, or case law, this court finds that both criteria contain elements of judgment and respect for good order and discipline, such that they could be negatively impacted by a completed adverse action."[11]

Navy Criminal Law Division: I do not believe such a requirement is necessary given the discovery, use of member questionnaires, voir dire, and challenge procedures used in military courts-martial. Members are questioned under oath and several of the standard questions within the Military Judge's Benchbook that would be asked of any panel would seem to elicit this information. Likewise, member questionnaires utilized to assess prospective members include this information. Robust voir dire and, if necessary, challenge by counsel for both sides is also a proper means to address this.

[11] *Id.*

Marine Corps Military Justice Branch: No, for the reason articulated above. Further, at least one Court of Criminal Appeals has held that a convening authority may consider these matters when assessing a member's experience, judicial temperament, and availability. *See United States v. Smith*, No. 20180156, 2019 CCA LEXIS 464, at *7–11(A. Ct. Crim. App. November 20, 2019).

Air Force Military Justice Law and Policy: Criteria addressing these factors is not needed. The criteria provided for in Article 25, UCMJ, would frequently rule out the selection of members with these concerns. To the extent they do not, RCM 912 provides the framework for the examination of panel members during which information regarding these criteria would be discovered and evaluated. This process allows for identification of potential issues contemplated by the criteria, without creating an absolute bar for an individual to serve as a panel member.

Coast Guard Office of Military Justice: Consideration that a member has been disciplined under the UCMJ or civilian criminal codes or being under investigation for such offenses would impact a member's judicial temperament evaluation, particularly in cases involving serious UCMJ offenses or civilian criminal codes. However, imposing a requirement to consider pending or disciplinary actions under the UCMJ would be overly broad and could unjustly exclude members who have received corrective action for past infractions. For instance, it is not uncommon for servicemembers to have negative documentation for an inappropriate but consensual relationship in their distant past, which was in violation of technical military rules, despite demonstrating exemplary performance since then.

Maintaining a flexible approach under the current Article 25 criteria allows for fair consideration of an individual's character, ensuring that the selection of panel members remains just and reflective of the needs of the military justice system.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Army OTJAG: The current criteria adequately address the basis for disqualification and no other criteria should be required for servicemembers to qualify as panel members. Under the current process, potential panel members are removed from selection pools, convening orders, or panels if the panel member has pending disciplinary actions, is assigned to the same unit as the accused, if the panel member was the accuser or a witness in the case, acted as preliminary hearing officer of as counsel, or has an ETS or retirement date that will make the Soldier unavailable during the expected time of panel member service.

Navy Criminal Law Division: I do not believe any other requirements beyond those that are currently present in Article 25 are necessary.

Marine Corps Military Justice Branch: None.

Air Force Military Justice Law and Policy: The current member selection criteria, coupled with the requirements of RCM 912, sufficiently address the requirements for qualification for service as a panel member.

Coast Guard Office of Military Justice: The Coast Guard believes that Article 25 adequately serves the purpose of courts-martial. It does not see good cause to recommend the implementation of additional criteria. Further, changing the criteria could introduce unanticipated disruptions and unknown hazards into the system.

3. Should there be a requirement for panels to be diverse by race and/or gender?

Please explain your answer and whether there is a military justification for making this a requirement.

Army OTJAG: We are unaware of any federal or state law or federal or state rule that mandates diversity representation on any jury. However, it might be appropriate for the Joint Service Committee to work deliberately with Congress to identify possible amendments to the UCMJ or Rules for Court-Martial, including adding language to Article 25, UCMJ that would promote diversity of gender, race, and ethnicity on panels. Any proposed amendments should maintain a requirement for "best qualified" members and exercise caution not to raise Constitutional or other issues in a case of first impression.

Navy Criminal Law Division: Ideally, panels should be racially and gender diverse but I do not favor the establishment of a quota system to achieve such an outcome. However, a convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community. This subject is currently under review by the Court of Appeals for the Armed Forces. Given the military's broad discovery requirements, including with respect to matters related to referral and the convening of courts-martial, coupled with a robust voir dire and procedure for challenges of panel members, I believe there are adequate safeguards in place to ensure panels are selected to achieve the fair administration of justice.

Marine Corps Military Justice Branch: There should not be statutory race and gender quota requirements for courts-martial members. Any such requirements would be arbitrary, inconsistent with federal and state practice, and difficult to uniformly comply with across the Services. However, "a convening authority is not precluded by Article 25 from appointing court-martial members in a way that will best assure that the court-martial panel constitutes a representative cross-section of the military community." *United States v. Smith*, 27 M.J. 242, 249 (C.M.A. 1988) (interpreting *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964)). Further, "a convening authority [may]depart from the factors present in Article 25, UCMJ, . . . when seeking in good faith to make the panel more representative of the accused's race or gender." *United States v. Riesbeck*, 77 M.J.

154, 163(C.A.A.F. 2018). This matter is presently under review at C.A.A.F. *United States v. Jeter*, 83 M.J. 77(C.A.A.F. 2022).

Air Force Military Justice Law and Policy: No additional requirement is needed. Convening Authorities are required to consider the factors enumerated in Article 25, UCMJ.

Coast Guard Office of Military Justice: The military's highest court has previously ruled that convening authorities may take race and gender into account so long as the motivation behind such inclusion is compatible with the requirements outline in Article 25.[12] However, it is important to note that issue is currently before the Court of Appeals of the Armed Forces.[13] Given the ongoing deliberation, it is not possible to fully address the delicate issue of racial or gender inclusion without a definitive ruling by the Court.

4. Should there be an option for an all enlisted panel? Why or why not?

Army OTJAG: Currently, neither Article 25, UCMJ nor the Rules for Court-Martial prohibit the selection of an all-enlisted panel; they only require enlisted members comprise at least one-third of the panel upon request by the accused.

Navy Criminal Law Division: No. While a court-martial is of course a legal proceeding, within the military, it must also be understood as a disciplinary proceeding as well. The purpose of military law is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Those are matters of consequence to all military members but especially officers charged with leading and developing subordinates, including enlisted members, and with defending the national security of the United States. I would not favor the option of removal of officers from a disciplinary proceeding with that as its purpose. Of note, in some cases all enlisted panels do result after the conclusion of voir dire and challenges but this should not be an election available to an enlisted accused prior to assembly.

Marine Corps Military Justice Branch: Unless an enlisted accused elects to be tried by all officer members, a convening authority may within his or her discretion detail all enlisted members to a court-martial of an enlisted accused; however, there should be no requirement to do so. As evidenced by replete examples within the UCMJ and Rules for Courts-Martial, Congress and the President recognize the crucial role of officers in the military justice system and vest them with authorities not held by enlisted members; an accused should not be permitted to cut them out of courts-martial by election.

Air Force Military Justice Law and Policy: No, requiring officers on the court-martial panel ensures broad experience and fairness, and reflects the overall military structure. Removing officers from an enlisted member's court-martial is not reflective of how the military trains, evaluates, and operates and would be detrimental to good order and discipline.

Coast Guard Office of Military Justice: As noted in paragraph 1, a hierarchical structure, represented by rank, is fundamental to the military. Congress has deemed it necessary to retain the requirement for officers to serve on panels. A rational basis for this requirement is that the military justice system needs to promote efficiency and discipline including in foreign and domestic crises. The Coast Guard sees no compelling reason to revisit Congress' legislative judgment on this matter.

[12] *U.S. v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (race); *U.S. v. Smith*, 27 M.J. 242 (C.M.A. 1993) (gender).
[13] See Interlocutory Order, U.S. v. Willie C. Jeter, No. 22-0065/NA, CCA 201700248 (May 3, 2022), https://www.armfor.uscourts.gov/grants_disp.htm.

5. Should the military move to a randomized panel member selection process, similar to how federal and state jurisdictions select potential jury members?

Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Army OTJAG: Historically, the "best qualified" requirement was intended as additional protection for the accused and a check on the convening authority's unfettered discretion. As multiple subject matter experts have testified and committee member observations at court-martial have publicly noted, the "best qualified" standard of Article 25, UCMJ and current processes produce excellent panels of military members who take their duties and responsibilities with the utmost seriousness and contribute to the fact-finding portion of the court-martial with thoughtful questions. Maintaining this practice promotes diversity within the panel member selection process and is the best course of action.

Selection of panel members through the use of Alpha rosters, defined in the Army as all personnel with a Unit Identification Code (UIC) that falls within the General Court-Martial Convening Authority's command, would eliminate the "best qualified" requirement, would be logistically challenging, and would likely not achieve greater diversity of gender, race, or ethnicity.

Selection of panel members though the use of Alpha rosters would potentially lengthen the court-martial process by decreasing efficiency, particularly where current Army practice includes the use of standing convening orders. The current process uses two steps. First, subordinate commanders provide nominations for specific time periods ensuring that the nominated personnel are best qualified, will be generally available during the time period, and are not flagged for disciplinary actions. The OSJA then scrubs nominated personnel to confirm they are not pending disciplinary actions. Second, the installation G1 provides the OSJA with a consolidated Alpha roster with all personnel assigned to a UIC that fall within that General Court-Martial Convening Authority. The G1 typically requires an average of two weeks to generate the roster and scrub to ensure personnel are currently assigned and present on the installation. If the convening authority selects personnel from the consolidated Alpha roster, the OSJA must confirm those personnel are not flagged or are not expected to be unavailable due to deployments, field exercises or schools.

A process requiring randomization from the consolidated Alpha roster for all UIC assigned the General Court-Martial Convening would subsequently involve confirmation of assignment, availability, and flags. This would be more cumbersome, particularly at a large installation where the consolidated alpha roster could have over 30,000 assigned personnel. Repeating this process for each court-martial would increase workload and decrease efficiency.

Finally, a purely randomized panel selection process utilizing Alpha rosters would not require consideration of which personnel are "best qualified." This would likely increase the number of junior personnel selected, but would not necessarily promote diversity in gender, race, or ethnicity.

Navy Criminal Law Division: Randomized member selection was approved as part of the FY23 NDAA. The President has not yet issued any implementing guidance. I would suggest holding off on additional changes until we have a full understanding of what these already approved changes will entail and how well they work. Further change in front of, or on top of, the FY23 NDAA could ultimately prove to be at odds with the President's forthcoming guidance. Instead, I would recommend an implementation of the FY23 NDAA changes, study of those changes, and then further calculated and targeted changes as warranted based on need.

Marine Corps Military Justice Branch: Section 543 of the FY23 NDAA amended Article 25(e)to add a new paragraph: "(4) When convening a court-martial, the convening authority shall detail as members thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable." The President has not yet prescribed such regulations. We should await the President to do so, and then assess the impact of the changes before considering additional changes.

Notably, Congress did not amend Article 25(e)(2), which requires the convening authority to detail those that are best qualified for duty as court-martial members.

Air Force Military Justice Law and Policy: The DAF supports the efforts of the Joint Service Committee on Military Justice (JSC) as it works to increase randomization of the panel member selection process. The JSC efforts are taken in accordance with Section 543 of the Fiscal Year 2023 National Defense Authorization Act (FY23 NDAA) and the Secretary of Defense's mandate for compliance with Recommendation 1.7d of the Independent Review Commission on Sexual Assault in the Military's Report. Anticipated amendments to the applicable RCMs will include new requirements for a randomized panel member selection process. As to the initial selection of members, some DAF installation legal offices have already instituted processes using Alpha rosters. The DAF is reviewing these existing options to determine the most effective means for implementing the forthcoming randomized panel member selection process.

Coast Guard Office of Military Justice: Implementing a randomized selection of panel members would present significant challenges in practice. One of the considerations acknowledged by Congress when granting the convening authorities the power to select members was the necessity of commanders to have control over the availability of personnel for operational purposes.[14] In the case of the Coast Guard, implementing a random selection of panel members similar to the federal system would significantly impede the operational effectiveness of Coast Guard cutters, aviation units, search and rescue teams, and deployable law enforcement units. The presence of even a single individual can be crucial to the mission capability of a small unit, especially when considering individuals with specialized or technical skills, such as an aerial use of force gunner or an electronic technician. Taking these members at random to serve on panels would severely degrade, if not debilitate, the operational readiness and capabilities of these units.

[14] See Curry v. Sec'y of Army, 595 F.2d 873, 877 (D.C. Cir. 1979) ("Provisions of the UCMJ authorizing the convening authority to select the members of the court-martial also respond to unique military needs. In order for the command to function effectively, the officer in charge must be assured that he has capable personnel available to perform various tasks. The duties his troops will be called upon to carry out may be difficult, if not impossible, to predict in advance. . . . If, on the other hand, court-martial members were required to be chosen from a broad panel of military personnel, a large number of men would be immobilized and effectively removed from the direct control of the commanding officer pending completion of the selection process. Strategic success and human safety could be jeopardized by so impeding the commanding officer's ability to deploy troops.") (citations omitted).

It is important to note that the Court of the Appeals for the Armed Forces has endorsed the practice of subordinates assembling a pool of potential members by random selection using personnel files, for subsequent selection by a convening authority consistent with Article 25 criteria.[15] This practice is comparable to the Committee's proposal. The military services could probably adapt Alpha Rosters accordingly, in a manner akin to the proposal.

6. Please share with us any other suggestions you have to improve the panel selection process or considerations that we should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Army OTJAG: OTJAG would greatly appreciate the expertise and connections of the committee with regard to obtaining subject matter expertise on the following topics: the demographics of federal juries; opinions from federal or state prosecutors on juror selection and use of peremptory challenges based on non-race attributes such as age or education specifically in sexual assault prosecutions; opinions from Service Special Victim Litigation Experts on experience and comparison between civilian and military juries; jury instructions on unconscious bias that have survived judicial scrutiny; and, experiences from any jurisdiction that has studied juror demographics and identified specific practices that have increased diversity of gender, race, and socioeconomic status.

Navy Criminal Law Division: As was the Military Justice Act of 2016 that preceded it, the Military Justice Reform Act is a generational change to the military justice system. It represents a fundamental change in the way that the prosecution of misconduct is handled. We are working hard to prepare for those changes but there are many "unknown unknowns" that will only reveal over time and potentially through litigation as we implement these changes. These reforms were further modified in the FY23 NDAA and randomization of court-martial members was added to the changes. With that in mind, I would recommend that all parties let those changes be implemented and obtain enough information on how they are working and only then, with data in hand, seek additional change to address known problems.

Marine Corps Military Justice Branch: Evaluating the method and criteria for detailing courts-martial members as compared to jurors in civilian jurisdictions is one matter. Evaluating how the qualifications of courts-martial members compare to those of civilian jurors is a different, more informative matter for assessing needed change, considering that "[a]military panel of court members has often been called a 'blue ribbon' panel due to the quality of its members." *United States v. Youngblood*, 47 M.J. 338, 346(C.A.A.F. 1997)(Crawford, J., dissenting) (citations omitted).

Further, the Committee should remain mindful that Congress "cast the eligibility of . . . officers to serve [as members of courts-martial] in broad and inclusive terms in Article 25(a), UCMJ. . . ."*United States v. Bartlett*, 66 M.J. 426, 428–29(C.A.A.F. 2008). The same is true of enlisted members in Article 25(c)(1), with the only limitation being that enlisted members may only serve on courts-martial of other enlisted members. Further, "Congress and the President crafted few prohibitions on court-martial service to ensure maximum discretion to the convening

[15] See United States v. Dowty, 60 M.J. 163, 170 (C.A.A.F. 2004) ("Other cases are illustrative of what subordinates can do in generating a pool of potential court-martial members to be submitted to the CA."); see also United States v. Kemp, 46 C.M.R. 152 (1973) (approving initial compling of pool of potential nominees by random selection from master personnel file); U.S. v. Crawford, 35 C.M.R. 3, 7 (1964) (approving selection of members following a random selection of a prospective member list).

authority in the selection process, while maintaining the basic fairness of the military justice system. *Id.*at 429.

Air Force Military Justice Law and Policy: The DAF anticipates forthcoming changes to the panel selection process through the pending Executive Order. These changes should be implemented and evaluated prior to proposing additional changes.

Coast Guard Office of Military Justice: It should be noted that Congress has amended Article 25 by specifically enabling the President to prescribe regulations which would require a convening authority to detail members, at random, to a court-martial panel provided said members meet the best qualified standard.[16] Also, proposed amendments to R.C.M. 911 and 912 aim to further facilitate the process of randomization.[17] The DAC-IPAD should support the implementation of these rules in the military and allow for necessary refinements as they are put into practice. A study resulting from the effects and outcomes resulting from the implementation of these new rules would provide valuable insight and inform any future considerations for potential modifications.

7. We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please provide any applicable Service regulations or policies regarding administrative discharge boards that provide this option.

Army OTJAG:

AR 635-200, Active Duty Enlisted Administrative Separations, para. 2–6(3)-(5). Composition of the board, provides:

(3) If the respondent requests a voting member(s) of his or her same race, color, religion, gender, or national origin (or combination thereof), a voting member of the board will be made available.

(4) In the event an individual of the requested race, color, religion, gender, or national origin group (or combination thereof) is determined to be unavailable, the convening authority will annotate the measures taken to have the person(s) made available. The annotation will be entered in the board proceedings.

(5) In the event of nonavailability, the reason will be stated in the record of proceedings. However, the mere appointment, failure to appoint, or failure to record a reasoning to appoint a member of such a group to the board does not provide a basis for challenging the proceedings.

AR 600-8-24, Officer Transfers and Discharges, para. 4-7d provides:

d. When the respondent is a minority, female, or special branch (see 10 USC 7064), the board will (upon the officer's written request) include a minority, female, or special branch as voting member (if reasonably available, as this provision is not an entitlement). If an officer is in more than one category and requests officers from all or two categories, the board membership may be

[16] See Section 543, James M. Inhofe NDAA for FY 2023, Pub. L. No. 117-263, 136 Stat. 2395, 2580 (2022) (adding a new Article 25(e)(4) ("When convening a court-martial, the convening authority shall detail as member thereof members of the armed forces under such regulations as the President may prescribe for the randomized selection of personnel, to the maximum extent practicable.").
[17] See Draft Annex to Proposed Executive Order, pp. 138 – 144. https://jsc.defense.gov/Portals/99/Annex%20to%20the%20draft%20EO.pdf.

met by one or more officers (if reasonably available, as this provision is not an entitlement). The request for these members, if desired, will be submitted 7 days from the date that the respondent receives the notification or else the right to request is waived.

Navy Criminal Law Division: There is no such formal right within the Navy. The respondent or counsel may make such a request that may ultimately be granted, but there is no right to do so. Instead, the Navy's Military Personnel Manual Section 1910.502, states "convening authorities are charged to ensure women and minorities are given equal opportunity to serve on administrative boards. Mere appointment or failure to appoint a member of such a group to the board, however, is not a basis to challenge the proceeding."

Marine Corps Military Justice Branch: There are no provisions in MCO 1900.16 CH 2, Separation and Retirement Manual, or SECNAVINST 1920.6D, Administrative Separation of Officers, that specifically permit a respondent may request minority inclusion among board members. However, nothing prohibits a respondent from making such a request. MCO 1900.16 CH 2 paragraph 6315(1)(c) states, "The convening authority shall ensure that the opportunity to serve on administrative boards is given to women and minorities. The mere appointment or failure to appoint a member of such a group to the board, however, does not provide a basis for challenging the proceeding." Additionally, both MCO 1900.16 CH 2 and SECNAVINST 1920.6D allow for challenges to individual board members.

Air Force Military Justice Law and Policy: The DAF does not have regulations or policies that provide this option.

Coast Guard Office of Military Justice: The Coast Guard's policy responsive to this question is Article 1.C.2 of the Enlisted Personnel Administrative Boards Manual, PSCINST 1910.1 (June 2014), available online.[18]

[18] Available at https://www.dcms.uscg.mil/Portals/10/CG-1/psc/psd/docs/EPAB%20(Final%20Revised%20August%202017).pdf?ver=2018-03-30-101707-787.

THE DEFENSE ADVISORY COMMITTEE ON
INVESTIGATION, PROSECUTION, AND DEFENSE OF
SEXUAL ASSAULT IN THE ARMED FORCES

May 2, 2023

Dear Dean Schenck,

The Policy Subcommittee of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD), a federal advisory committee established by the Secretary of Defense in 2016 in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended, is currently conducting a study of Article 25 of the Uniform Code of Military Justice (UCMJ), which governs panel member selection criteria and panel member selection processes for courts-martial.

As a stakeholder in the military justice process and its successful operation, we would be most appreciative if you would be willing to provide us with your perspective in the form of a written response to the informational questions attached to this letter. We would like your response by May 24, 2023, so we may consider your views at our next subcommittee meeting in June.

Thank you for your kind consideration of our request for stakeholder input. If you have any questions regarding this request please feel free to contact the attorney-advisor lead for the project, Ms. Terry Gallagher, at theresa.a.gallagher2.civ@mail.mil.

Respectfully,

Brigadier General James R. Schwenk, USMC, (Ret)
Chair, Policy Subcommittee
DAC-IPAD

Narrative Questions

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined.

These criteria have not changed since 1950, a time when courts-martial members presided over courts-martial and were required to determine an appropriate sentence. Military judges now preside over courts-martial and provide instructions for the panel members to follow, and starting in December 2023, panel members will no longer serve as the sentencing authority, except in death penalty cases. Additionally, starting in December 2024, an as yet undefined, randomized selection process will be used, to the maximum extent possible, in the selection of panel members.

The core qualifications to serve on a jury in the federal and state systems are fairly minimal. Potential jurors must: (a) be U.S. citizens, (b) be at least 18 years old, (c) be a resident for 12 months, (d) be proficient in English, (e) have no disqualifying mental or physical condition, (f) have no felony convictions (unless civil rights have been legally restored), and (g) must not be pending felony charges punishable by imprisonment for more than one year.

R.C.M. 502(a) governs court-martial panel member duties. The applicable duties are to determine whether guilt has been proven "based on the evidence and in accordance with the instructions of the military judge." Additionally, all "members have an equal voice and vote in deliberating on and deciding all matters submitted to them. No member may use rank or position to influence another member." R.C.M. 502(b) identifies the senior ranking member as the president of the court-martial and instructs the president to preside over closed sessions during deliberations and to speak for the members when announcing decisions or requesting instructions from the military judge.

Questions.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age):

Federal, and most state, criminal jurors must be 18 years old or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

b. Length of Service (best qualified by reason of length of service):

Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If

so, what should that minimum length of service be? What is the military justification for a minimum length of service?

c. Education (best qualified by reason of education):

Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be? What is the military justification supporting this requirement?

d. Experience: (best qualified by reason of experience)

Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

e. Training: (best qualified by reason of training)

Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

f. Judicial Temperament: (best qualified by reason of judicial temperament)

Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

g. Senior in Rank and Grade to the Accused:

This requirement is unique to the military. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

3. Should there be a requirement for panels to be diverse by race, ethnicity, and/or gender? Please explain your answer and whether there is a military justification for making this a requirement.

4. Should an accused pending court-martial have the option to request minority inclusion in court-martial members? We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please explain your response**.**

5. Should there be an option for an all enlisted panel? Why or why not?

6. Should the military move to a randomized panel member selection process that is similar to how federal and state jurisdictions select potential jury members? Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

a. Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

b. Should the random selection method include an algorithm that results in a member venire that is diverse in some way, such as by age, grade, race, or sex? Please explain your response.

7. Please share with us any other suggestions you have for improving the panel selection process or considerations that the Committee should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Combined Responses from Academic Experts to DAC-IPAD Policy Subcommittee
Article 25, UCMJ, Narrative Questions

Background: Article 25 provides that a convening authority is required to detail members to a court-martial that are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. These criteria are not further defined.

These criteria have not changed since 1950, a time when courts-martial members presided over courts-martial and were required to determine an appropriate sentence. Military judges now preside over courts-martial and provide instructions for the panel members to follow, and starting in December 2023, panel members will no longer serve as the sentencing authority, except in death penalty cases. Additionally, starting in December 2024, an as yet undefined, randomized selection process will be used, to the maximum extent possible, in the selection of panel members.

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Questions.

1. Please evaluate each of the Article 25 criteria below.

a. Age (best qualified by reason of age). Federal, and most state, criminal jurors must be 18 years old or older. Should there be a different minimum age for military panel members? If so, what is the military justification for the difference? Do you have a suggested minimum age or a suggested age range?

Professor Eugene Fidell, *Adjunct Professor of Law*, NYU School of Law; *Senior Research Scholar in Law*, Yale Law School; *of counsel*, Feldesman Tucker Leifer Fidell LLP, Washington, DC; May 4, 2023 response:

By analogy to Article 36(a), UCMJ, the default position should be that the age criterion for panel members should be the same as that for federal district court jurors. In theory, one could argue that a deviation could be justified if conformity with the federal standard was impracticable, but I know of no basis for Congress to reach that conclusion.

Professor Lisa Schenk, *Associate Dean for National Security, Cybersecurity, and Foreign Relations Law, and Distinguished Professorial Lecturer in Law*, the George Washington University Law School; and **Professor David A. Schlueter,** *Professor of Law Emeritus*, St. Mary's University School of Law; May 24, 2023 response:

We do not believe that there is any necessity to include a minimum age requirement in Article 25. In a particular case, the convening authority (assuming that the convening authority will continue to be involved in the selection process), could request computer-generated, randomly selected names based on a minimum age, such as in the case of a senior officer or enlisted accused. This seems unnecessary because the requirement in Article 25 regarding the preference that members be senior in rank to the accused generally would resolve this issue.

b. Length of Service (best qualified by reason of length of service). Federal criminal jurors must reside primarily in the judicial district for one year before they are qualified to serve as a juror. States generally have a residency requirement and they range from simply being a resident to being a resident for more than 12 months. Should there be a minimum length of service requirement to be qualified to serve as a panel member? If so, what should that minimum length of service be? What is the military justification for a minimum length of service?

Professor Eugene Fidell: There is no compelling basis for treating length of service as a surrogate for the federal juror residency requirement. Applying a one-year active-duty requirement would exclude a great many junior enlisted personnel as well as many junior officers, thus skewing the jury pool. Since military personnel become full members of the specialized military society immediately on entering active duty, they should be deemed "residents" at the same instant. I suppose an argument could be made for relaxing this principle to the extent of requiring that, to be eligible, court-martial members – both enlisted and officers – have received the punitive-articles explanation mandated by Article 137, UCMJ. On the other hand, the military judge will provide much better and more comprehensive information on any pertinent punitive articles when instructing the members on findings.

Professor Lisa Schenk and Professor David Schlueter: As with the age requirement, *supra*, there is no need to require a minimum length of service. Notably, the 1948 Elston Act included a requirement that court members have a minimum of two years of experience. That language was omitted in the UCMJ.[1]

[1] *See United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964) (noting change and providing extensive discussion on selecting enlisted members for court-martial panels).

c. Education (best qualified by reason of education). Federal and state criminal jurors must be proficient in English. There are no other education requirements to be qualified to serve as a juror. Should there be an education requirement to be qualified to serve as a panel member? If so, what should the education requirement be? What is the military justification supporting this requirement?

Professor Eugene Fidell: Follow the civilian federal model. There is no justification for requiring anything beyond proficiency in spoken and written English, which in any event is required for officer and enlisted accessions.

Professor Lisa Schenk and Professor David Schlueter: There should not be a minimal education requirement for panel members. Military panels are sometimes referred to as "blue ribbon panels" because military panel members tend to have more education than the average civilian juror. That reflects the presumption that a panel member with a college degree might be more capable of discerning the facts in a complicated case. But that presumption might not hold up where every day common sense evaluation of the facts and the credibility of the witnesses does not require sophisticated reasoning or understanding. After all, an oft-repeated point in trial advocacy training is that a litigator should be able to take a complicated case and make it simple to understand.

d. Experience: (best qualified by reason of experience). Federal and state criminal jury systems do not have an experience requirement. Should there be an experience requirement to be qualified to serve as a panel member? If so, what experience should be required? What is the military justification for this requirement?

Professor Eugene Fidell: Follow the civilian federal model. Court-martial members are not witnesses, and certainly not expert witnesses. If they need to understand some issue, they will learn what they need to know through the efforts to counsel to build a record through the adversary system and with the benefit of evidentiary rulings and the taking of judicial notice by the military judge. In other words: "no experience needed."

Professor Lisa Schenk and Professor David Schlueter: As with our answer, supra, regarding educational level, there is no need to include a requirement that only members of a certain level of experience may be selected. While a member's level of experience might be helpful in analyzing the facts presented at trial (e.g., combat experience), the key inquiry should be whether the member, upon hearing the evidence and arguments, can fairly and impartially weigh the evidence and determine whether the accused is guilty of the alleged offense.

In United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964), the Court of Military Appeals noted that when the UCMJ was adopted, the 1948 Elston Act requirement that court members have not less than two years of service was eliminated. The Court also observed:

We may take judicial notice that many enlisted persons below the senior noncommissioned ranks are literate, mature in years, and sufficiently judicious in temperament to be eligible to serve on courts-martial. It is equally apparent, however, that the lower enlisted ranks will not yield potential court members of sufficient age and experience to meet the statutory qualifications for selection, without substantial preliminary screening. 35 C.M.R. at 12.

e. Training: (best qualified by reason of training). Federal and state jury systems do not have a training requirement. Should there be a specific training requirement to be qualified to serve as a panel member? If so, what should the training requirement be? What is the military justification for this training requirement?

Professor Eugene Fidell: See response 1d above. A court-martial panel is not an investigative body. The current training requirement, like a number of the other Article 25 criteria, is an artifact of the era before every case had a military judge and both sides were represented by lawyer counsel. Please refer to Eugene R. Fidell & James A. Young, Military Justice and Modernity, 68 VILLANOVA L. REV. __ (2023) (forthcoming), a copy of which is enclosed.

Professor Lisa Schenk and Professor David Schlueter: There should not be a specific training requirement. The current criteria "best qualified" in training probably stems from the view that only members who have received training similar to that of the accused can effectively reach a verdict in the case. The danger of including a training requirement algorithm is that it may raise actual or apparent unlawful command influence issues and assertions that the convening authority is "stacking" the panel.

f. Judicial Temperament: (best qualified by reason of judicial temperament). Federal and state jury systems do not have a judicial temperament requirement. Should there be a judicial temperament requirement to be qualified to serve as a panel member? If so, please define what you mean by judicial temperament. What is the military justification for this requirement?

Professor Eugene Fidell: See responses 1d and 1e above. This criterion should be jettisoned. In addition to the other reasons, it is too vague and therefore is unenforceable as a practical matter.

Professor Lisa Schenk and Professor David Schlueter: There should not be a judicial temperament requirement. In a system of random selection, it would be difficult to include a requirement focused on judicial temperament. In the current system where the convening authority personally selects the members it is more understandable that a convening authority would be familiar with potential members and could use that factor to consider in selecting the members.

g. Senior in Rank and Grade to the Accused. This requirement is unique to the military. Do you believe there is a military reason to support this requirement? If so, what is the military justification?

Professor Eugene Fidell: At one time it made practical sense to require seniority to the accused, since subordinates might have had an incentive to convict and/or adjudge a dismissal in order to improve their own chances for promotion. It was also thought to be deeply wrong, given the hierarchical nature of the armed forces, for a subordinate to sit in judgment on a superior, except in extraordinary circumstances. Neither of these rationales fully accords with contemporary conditions. The promotion incentive does not apply given the sheer size of the armed forces and modern competitive promotion systems. In addition, "command climate" surveys and DEOMI inquiries commonly entail securing the views of subordinates concerning the leadership and

performance of duty of superiors. Nonetheless, I would not jettison the seniority requirement. The armed forces properly remain strongly hierarchical. Abandoning the seniority requirement would erode that important cornerstone.

Professor Lisa Schenk and Professor David Schlueter: This language in Article 25(e)(1) should be retained. As Colonel Winthrop noted, the preference that members of the court be senior in rank and grade to the accused rests on the belief that "officers who as junior to the accused may have an interest in procuring him to be dismissed, suspended, &c…."[2]

This also reflects the view that one of the purposes of the miliary justice system is to enforce good order and discipline. Given the fact that a subordinate should not be in the position of imposing "discipline" on a superior officer or enlisted servicemember, the preference should remain in place.

2. Are there other criteria that should be required to serve as a panel member?

a. Some examples from federal and state jury systems are: No qualifying mental or physical condition, never been convicted of a felony, and must not be pending felony charges punishable by more than a year in prison. Should any of these be requirements to serve as a panel member?

Professor Eugene Fidell: I see no reason not to apply the general federal juror qualifications that Congress prescribed in 28 U.S.C. § 1865(b), given the broad policy reflected in Article 36(a). The Jury Act's general standards are not impracticable for courts-martial, even though, ironically, active duty military personnel are exempt under § 1863(b)(6). Personnel performing fire protection and police functions (including force protection) could be exempted consonant with federal law. A nice question is whether military judges or CCA judges should be exempt by analogy to the Jury Act's exemption of "public officers." State jury qualifications, on the other hand, are irrelevant.

I have lingered over the fact that thousands of non-citizen permanent residents serve with distinction in the Armed Forces. Such individuals have shown their dedication to the country. Nonetheless, I believe the Jury Act's citizenship requirement should be followed. The same is true of military personnel who are under age 18.

Professor Lisa Schenk and Professor David Schlueter: There is no real need for these factors to be considered in a military court-martial setting. Generally, servicemembers with any criminal or disciplinary record or actions pending are removed from panel selection.

[2] Winthrop, MILITARY LAW AND PRECEDENTS, p. 72 (1920 Reprint) (discussing requirement set forth in Article 79, Articles of War (1874)).

b. Should there be criteria addressing the qualification of Service members under investigation for a violation of the UCMJ, or other criminal code, or who have received or are pending disciplinary or administrative action for committing an offense under the UCMJ?

Professor Eugene Fidell: If there is a pending military, federal or state criminal charge against a potential court-martial panel member and the offense is punishable by more than a year's confinement, that person should be ineligible in light of 28 U.S.C. § 1865(b)(5). Since non-judicial punishment and summary courts-martial are not courts (much less "courts of record") and are by definition reserved for minor offenses, pending or past Article 15, UCMJ, proceedings and summary courts should not be disqualifying. Personnel who are awaiting administration separation for minor misconduct can be winnowed out, if warranted, through voir dire.

Professor Lisa Schenk and Professor David Schlueter: These criteria are probably valid, but could be determined through panel member questionnaires and/or during panel voir dire. In any case, it would be difficult to implement a systematic method to determine whether a potential panel member was being investigated. Many investigations are initiated at the command level rather than law enforcement agencies.

c. Please identify any other criteria that you believe should be required for a Service member to be qualified to serve as a panel member?

Professor Eugene Fidell: I would exempt personnel in training programs that cannot reasonably be interrupted, such as basic or recruit training, The Basic School, officer candidate school, flight training, BUD/S, and the like.

Professor Lisa Schenk and Professor David Schlueter: We do not think of any additional criteria should be required. One of the dangers of including too many criteria is that even a random system of selecting members would be subject to a challenge that the panel was "stacked." And depending on the creativity of those managing the random selection process, that could be a very valid concern.

3. Should there be a requirement for panels to be diverse by race, ethnicity, and/or gender? Please explain your answer and whether there is a military justification for making this a requirement.

Professor Eugene Fidell: One might add age, religious affiliation, extremist views, sexual orientation, and disability.

There are biased individuals in the armed forces just as there are in civil society. Experience teaches, however, that efforts to achieve balance or even a modicum of diversity on panels vests too much unfettered discretion in the official who selects the members, even when that official's motives are entirely pure. American society has struggled with this problem even where jurors are selected by disinterested officials such as jury commissioners. My recommendation is that the military justice system, through the Manual for Courts-Martial and judicial decisions, track

as closely as possible the constitutional jurisprudence set forth in Batson v. Kentucky, 476 U.S. 79 (1986), and its progeny, especially as applied in the trial of criminal cases in the federal district courts.

Professor Lisa Schenk and Professor David Schlueter: No. The alleged purpose of random selection is to take away the discretion of the convening authority, and the opportunity to stack a panel or the appearance of "stacking" a panel. And this is a slippery slope. What other diversity requirements should then be considered—religion, sexual preference, or culture?

If the system were devised to include a gender requirement, for example, and in a sexual assault case the computer selected only female servicemembers for the panel, would that be fair for the accused? On the other hand, could the accused in that case request that no female servicemembers be selected?

However, your committee may want to consider reviewing the need for adding race, ethnicity, and/or gender as an additional Article 25 criteria for the convening authority to consider.

4. Should an accused pending court-martial have the option to request minority inclusion in court-martial members? We heard from several Service members who spoke to the Policy Subcommittee that their Service's administrative discharge policies allowed the respondent to request minority inclusion among the discharge board members. Please explain your response**.**

Professor Eugene Fidell: I recommend against extending these policies to the military justice system. Unlike military administrative boards, courts-martial are presided over by military judges with the protection of fixed terms of office and whose legal rulings are binding. There are multiple other due process guarantees, such as voir dire and causal and peremptory challenges. Here again, I would look to federal district court practice, where criminal defendants have no affirmative right to minority representation on their particular jury, but have more peremptory challenges. Fed. R. Crim. P. 24(b) permits both sides three peremptory challenges if the permissible sentence does not exceed a year's confinement, six for the government and 10 for the defense if it does, and 20 for each side in capital cases. The Policy Subcommittee may wish to recommend that Congress amend Article 41(b)(1), UCMJ, to align with civilian federal practice.

Professor Lisa Schenk and Professor David Schlueter: Perhaps. But if the system permits such requests, where would one draw the line? Would similar requests regarding gender, religion, sexual preference, culture, and language be honored as well? There are cases where it was not error for the convening authority to make a good faith effort to include minority members and women on panels.[3]

This is truly a slippery slope.

We defer to the Services on the question regarding administrative discharge policies.

[3] United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018) (CA may seek in good faith to make panel more representative of accuseds race or gender and may depart from factors in UCMJ; but under facts CA had attempted to stack the court); United States v. Smith, 27 M.J. 242 (C.M.A. 1988) (not error for CA to make good faith effort to include females in sexual assault case but under facts it appeared that they were selected because they would favor prosecution). See generally 1 Schlueter & Schenck, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE § 8-3(E)(5) (discussing selection of court members and citing cases).

5. Should there be an option for an all enlisted panel? Why or why not?

Professor Eugene Fidell: I would not recommend such an option but have no objection in principle to a random selection system that might at times produce an all-enlisted panel for enlisted accuseds, just as a mixed panel currently may morph into an all-enlisted one as the result of challenges. This happened occasionally under the traditional (non-random) system, as in the case of Sergeant Major of the Army Gene C. McKinney.

Professor Lisa Schenk and Professor David Schlueter: It would depend on several factors—whether the accused is an officer or enlisted and whether there would be a sufficient pool of qualified enlisted (assuming the preference that the members out rank the accused). Nevertheless, an option for an all-enlisted panel should only be available in cases where the accused is enlisted or an NCO.

6. Should the military move to a randomized panel member selection process that is similar to how federal and state jurisdictions select potential jury members? Federal and state jurisdictions typically use computer systems to randomly select members from state voter registration rolls to serve on juries. After the venire is chosen in this way, the voir dire process further narrows the number of members sitting on a jury.

a. Should the military use Alpha rosters, or other similar means, to randomly select the initial pool of panel members? Why or why not?

Professor Lisa Schenk and Professor David Schlueter: We defer to the Services on this question as we are not familiar with the current process for obtaining Alpha rosters and similar methods of obtaining unit/command membership data information.

b. Should the random selection method include an algorithm that results in a member venire that is diverse in some way, such as by age, grade, race, or sex? Please explain your response.

Professor Eugene Fidell: I do not have the expertise needed to respond intelligently to the first of these questions. On the second, a truly random system should produce diverse venires since the military workforce is highly diverse. But if that is not the case, I would favor considering focused, transparent, and defensible ways to foster diverse venires, even if the resulting panels turn out not to be diverse. I defer to others who have studied alternative random selection systems in this regard. One thing is clear: the solution cannot be ad hoc non-transparent decision making by individual convening authorities, be they ever so well-intentioned, or left to the vagaries of post hoc case-by-case appellate review.

Professor Lisa Schenk and Professor David Schlueter: As we note, *supra,* we have concerns about attempting to create a "diverse" panel, lest, as we note *supra*, the panel appear to be stacked.

7. Please share with us any other suggestions you have for improving the panel selection process or considerations that the Committee should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

Professor Eugene Fidell: I have two other observations.

First, the Policy Subcommittee should not be under any illusions about whether the Article 25 criteria are enforceable. They are not. Consider United States v. Sullivan, 74 M.J. 448 (C.A.A.F. 2015), a general court-martial case in which I was lead counsel for an O-6 from trial through certiorari petition. A key issue concerned the convening authority's flagrantly illegal exclusion of all flag officers from consideration as panel members, without making any effort to determine whether they were unavailable in fact. Of course, as admirals, these officers were by definition "best qualified," the very term used in both Article 25 and the promotion statute. The Court of Appeals for the Armed Forces in the end determined (correctly) that this violated Article 25, but unanimously held that the error was harmless because the numerous O-6s who constituted the panel asked many questions, deliberated at length, acquitted on one of the two charges, and declined to dismiss the accused or send him to Leavenworth. Those acts in no way showed that the Article 25 violation was harmless because there was nothing to indicate that a panel that included one or more admirals would not have asked even more questions, deliberated even longer, adjudged a complete acquittal, or awarded an even more lenient sentence, including a sentence to No Punishment. As long as CAAF is willing to excuse clear Article 25 violations on grounds that do not in fact show harmlessness, the military justice system is kidding itself about the value of the statutory criteria. They are window-dressing and illusory.

Second, Congress has made worthwhile changes in the Code in recent years, but its effort to square the panel circle by directing randomization in some form while retaining statutory criteria is not one of them. It would be nice if these two fundamentally incompatible systems for member selection could be reconciled, but it cannot be done. The Committee will do Congress a favor if you say as much in your report. You should also urge Congress to get commanders entirely out of the business of member-selection. Everyone knows – and has known for decades – that that is one of the very weakest links in the system, and detracts from public confidence in the administration of military justice. It makes no sense now, and in the fast-approaching OSTC era will make even less sense, for commanders to retain that power.

Professor Lisa Schenk and Professor David Schlueter: As stated *supra*, we believe that the current system which has no minimal requirements for "age, training, experience, and judicial temperament" in Article 25, and involves convening authorities selecting panel members based on these criteria—with the military judge subsequently tasked with conducting a random selection of those chosen (a pending change)—is the best suited to meet the military's unique needs. No minimal requirements for the Article 25 criteria are necessary. A wholly random military panel selection process is impractical, would be extraordinarily difficult to implement, would adversely impact the processing times for military actions, and may adversely impact military readiness and national security. Furthermore, a statutory change may not be called for to resolve perceived unlawful command influence in the selection process. The Committee should consider the alternate resolution of the Services providing recommended solutions to provide increased randomization of military panel member selection.

Additional Comments:

Professor Lisa Schenk and Professor David Schlueter:

Congress first codified selection criteria for courts-martial panel selection in the 1920 Articles of War and required convening authorities to select officers based on "age, training, experience, and judicial temperament" and the 1950 Uniform Code of Military Justice (UCMJ) incorporated these criteria into Article 25.[1] Convening authorities are now tasked with selecting panel members who are best qualified based on the same criteria established in the 1920 Articles of War.[2] We believe that the current system which has no minimal requirements for "age, training, experience, and judicial temperament" in Article 25, and involves convening authorities selecting panel members based on these criteria—with the military judge subsequently tasked with conducting a random selection of those chosen (a pending change)—is the best suited to meet the military's unique needs.

In selecting a military panel, convening authorities are better situated to understand the needs of the command, mission readiness and operational requirements, and needs of those in the "jury pool" within the command. The convening authority has the responsibility to maintain good order and discipline while ensuring efficiency and effectiveness of the military justice system. We do not see that any minimal standards for these criteria are necessary and recommend that no such minimal requirements be imposed.

In addition, we believe that a wholly random military panel selection process is impractical, would be extraordinarily difficult to implement, would adversely impact the processing times for military actions, and may adversely impact military readiness and national security. "The military justice system must be able to operate in deployed and operational environments in which large numbers of potential court-members are engaged in vital national security activities."[3] Moreover, the military justice system must be operational, efficient, and effective across five Services and the U.S Coast Guard, in times of war and peace and on the land, air, and sea. We urge your committee to consider the educated, thoughtful studies and findings of other committees that previously reviewed the issue of military panel member selection.[4] We also urge you to consider the processes and results of the previous random selection experiments conducted at Fort Riley in 1974 and at V Corps in 2005, both of which were unsuccessful[5] and found to result in reducing the competency of the panel.[6]

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[1] MILITARY JUSTICE REVIEW GROUP, REPORT OF THE MILITARY JUSTICE REVIEW GROUP, PART I: UCMJ RECOMMENDATIONS, 252 (2015) [hereinafter MJRG REPORT].
[2] See Art. 25, UCMJ.
[3] MJRG REPORT, supra note 1 at 253-54.
[4] See e.g., MJRG REPORT, supra note 1; JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL (1999) (responding to Congressional mandate in the National Defense Authorization Act Fiscal Year 1999 to review selection of panel members and examine alternatives including random selection); HONORABLE WALTER T. COX III ET. AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (May 2001).
[5] See James T. Hill, Achieving Transparency in the Military Panel Selection Process with the Preselection Method, 205 MIL. L. REV. 117, 128-130 (2010) (proposing internal reforms to achieve transparency without the drawbacks of random selection and stating "[i]f implemented in a wholesale manner, the federal jury selection process would be incompatible with military demographics—making panels disproportionally junior and requiring judgment by members junior in rank to an accused under a 'purist' random scheme." Id. at 119 (footnotes omitted)).
[6] Id. at 129.

Lastly, a statutory revision may not be the best solution to address the perception of unlawful command influence in the selection process. Rather, the Armed Forces may be best suited to provide recommended solutions to address increased randomization of military panel member selection.,

Professor Richard D. Rosen, *Glenn D. West Endowed Research Professor of Law*, Texas Tech University School of Law, and Colonel (retired), U.S. Army; May 24, 2023 response:

I neither like nor fully understand the increasing effort to civilianize the military justice system. The civilian federal courts and courts-martial serve different communities, and their purposes are not altogether the same. Courts-martial not only seek justice for criminal offenses, but they are tools for preserving discipline in the armed forces.

For example, I am not convinced transferring referral authority to a Special Trial Counsel ("STC") in Washington will have a significant impact on the number of sexual assaults or courts-martial of the alleged perpetrators. I get the sense that general court-martial convening authorities currently refer most (*i.e.,* nearly all) sexual assault cases to court-martial. If I were a Staff Judge Advocate—provided cases met a "straight-face" test—I would recommend referral to protect my commanders and myself from Congress, the Defense Department, and higher headquarters who might descend upon us if cases are not referred. Thus, once a sexual assault case gets into judge advocate channels, it seems likely to be tried. Moreover, based on what I have read, problems exist at the platoon and company levels where these kinds of offenses never see the light of day. For example, NCOs may "dissuade" victims from brining complaints of sexual assault to protect the unit or its officers and NCOs. If my perception is accurate, an STC sitting in the Pentagon will be unable to discern or influence what happens at the unit level. Perhaps a salutary feature of the new STC is that he or she will be immune from the pressure on commanders to refer weak cases to court-martial, although placing the STC directly under a partisan political appointee may make this difficult.

More directly on point, is there some empirical reason for disturbing Article 25? Some rational unhappiness with current military panels?

First, if Article 25 is amended, from where will prospective court-martial members be selected? Service-wide? Installation level? In this regard, state and federal courts select prospective jurors from relatively stable communities of thousands (or even millions) of citizens. The courts randomly choose citizens from registered voter rolls and driver's license databases. But how would such a process work in the military? Military communities are much smaller and rarely stable: people are constantly on the move whether from change of duty station, TDY, training exercises, and deployments. Moreover, about a decade ago I served on a DoD Legal Policy Board subcommittee that examined courts-martial in deployed environments. Courts-martial must be mobile when we are at war or involved in long-term conflicts. Consequently, there must be a workable system for member-selection in austere environments.

Second, the current method of member selection (at least the one that existed when I was on active duty) generally ensures the availability and diversity of members. Units nominate members based—in part—upon their availability and convening authorities more or less randomly detail members taking into consideration the Article 25 criteria and such factors as race and gender. I assume that the STC will detail members under RCM 503 in cases that fall under the STC's aegis. In any event, I have no idea how a randomized algorithm can get the same results.

Third, I remember a story (perhaps apocryphal) about F. Lee Bailey, before he was disbarred. Bailey represented Captain Ernest Medina in his court-martial in connection with the My Lai

massacre. Bailey purportedly said that if he had a guilty client, he would want a civilian jury, but if he had an innocent client, he would want a trial by court-martial. Simply put, because of the Article 25 criteria, court-martial panels are more likely to reach fair and just verdicts than a jury drawn randomly from a civilian community.

I understand that some of my concerns are alleviated by the fact court-martial members will no longer assess sentences (a good idea). Furthermore, you know much more about the issues than I do. General/Dean Walt Huffman and I wrote a military law treatise for Thomson-Reuters (WESTLAW), which I continue to update. *** I do try to keep somewhat current, but I view military justice from 30,000 feet, whereas you understand what is actually going on.

MILITARY JUSTICE AND MODERNITY

Eugene R. Fidell* and James A. Young†

Abstract

Over the decades, Congress has made significant improvements in the military justice system. In doing so, however, it has neglected to remove outdated features of the system, leading to needless effort, expense, delay, and bloat. A thorough review is warranted to remove these artifacts, while taking care to ensure that the substantial rights of the accused are not prejudiced in the process.

"Change is the basis of all history, the proof of vigor."

Jenny Holzer, Inflammatory Essays (1979-81)

Introduction

A current casebook is called "Modern Military Justice."[1] It's a catchier title than, say, "Military Justice: Cases and Materials,"[2] but one does wonder whether it is not more aspirational than strictly accurate to apply the term "modern" to contemporary American military criminal justice. In important respects, as noted below, our system remains rooted in the 18th century, despite noteworthy recent changes. The argument is not so much that the present military justice system should be altered (it should), but that it already has been altered, repeatedly and usefully, in ways that render parts of it otiose or worse.

In the afterglow of the Supreme Court's decision in *Ortiz v. United States*,[3] those responsible for the administration of justice in the armed forces of the United States have had much to be pleased about. The Court, by a divided vote, pronounced a broad benediction over the military justice system, or at least over that system's highest tribunal, the U.S. Court of Appeals for the Armed Forces. Not to spoil the fun, but a case can be made that the kind words in *Ortiz*–the precise constitutional issue aside–are as misplaced as were the harsh words for which *O'Callahan v.*

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[1] LISA M. SCHENCK, MODERN MILITARY JUSTICE (3d ed. 2019).

[2] EUGENE R. FIDELL, BRENNER M. FISSELL, FRANKLIN D. ROSENBLATT & DWIGHT H. SULLIVAN, MILITARY JUSTICE: CASES AND MATERIALS (4th ed. 2023) (forthcoming).

[3] 138 S. Ct. 2165 (2018).

Parker[4] had been faulted. While there remain major issues for the Court, the new Military Justice Review Panel,[5] and Congress to resolve, scholarly attention has shifted to high theory and history, rather than closer to where the rubber meets the road, where important work remains to be done.

In the past 70 years, Congress has made substantial substantive and procedural changes to align military justice more closely with civilian federal criminal law. And although the last major review of the entire system resulted in the 2015 Military Justice Review Group's two-volume report, the changes keep coming, although in a less systematic manner. Only seven years have passed since that report, but we believe it is time to re-examine the entire system with a view to conforming military justice, to the extent possible, with contemporary standards of judicial administration and thereby decreasing costs, moving cases more quickly, fostering greater public confidence, and, importantly, doing so without prejudicing the substantial rights of the accused.

The armed forces are likely to resist some or all of the changes suggested here, some of which will shrink the several Judge Advocate General's Corps and the equivalent legal programs of the U.S. Marine Corps and U.S. Coast Guard, neither of which has a separate legal corps. Concern over agency rice bowls is hardly a novelty in public administration, and these elements of the defense establishment have enjoyed a kind of triumphalism as a result of mission creep and *Ortiz*'s pat on the head. Resistance to change is a familiar syndrome in the armed forces' administration of military justice.[6] Recent examples include the effort to improve judicial independence through fixed terms of office,[7] the transfer of charging power for a broad and increasing range of offenses from commanders to lawyers,[8] and the proposed but not yet achieved expansion of servicemember access to the Supreme Court on an equal footing with other persons

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[4] 395 U.S. 258 (1969), *overruled, Solorio v. United States*, 483 U.S. 435 (1987).

[5] *See* art. 146, UCMJ, 10 U.S.C. § 946.

[6] *See generally* Eugene R. Fidell, *The Culture of Change in Military Law*, 126 MIL. L. REV. 125 (1989).

[7] The government successfully resisted claims that Fifth Amendment due process requires military judges to have the protection of fixed terms of office. *See, e.g., Weiss v. United States*, 510 U.S. 163 (1994). Eventually the Army and then the Coast Guard established terms by regulation and in time Congress required the other services to get in step, although it did not prescribe a specific minimum term of office. *See* arts. 26(c)(4) & 66(a)(1), UCMJ, 10 U.S.C. §§ 826(c)(4) & 866(a)(1). That was done by the President in the *Manual for Courts-Martial*. *See* R.C.M. 502, 1203.

[8] The Judge Advocates General and service chiefs resisted the transfer of disposition power from commanders to lawyers. They lost that battle in 2021 when Congress passed legislation that will by the end of 2023 create "special trial counsel" in each armed force with disposition power over a broad swath of offenses. *See* arts. 1(17) & 24a, UCMJ, 10 U.S.C. §§ 801(17) & 824a; *see generally* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, §§ 531-539c, 135 Stat. 1541, 1692-99 (2021); Philip D. Cave, Don Christensen, Eugene R. Fidell, Brenner M. Fissell & Dan Maurer, *The Division of Authority Between the Special Trial Counsel and Commanders: Planning Now for the Next Phase of Reform*, Lawfare, Feb. 28, 2022; Rachel VanLandingham, *NDAA 2022: A Missed Opportunity to Improve Military Justice*, Just Security, Dec. 28, 2021. A few additional offenses were transferred to the special trial counsel by the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, § 541, 136 Stat. ____, ____ (2022), and it seems fair to predict that other offenses will meet the same fate in due course.

convicted of federal or state crimes.[9] Since experience teaches that it is unlikely that, left to their own devices, the armed forces will readily jettison structural artifacts that are no longer needed or look aggressively for ways to reduce bloat in the military justice system, Congress should either do so itself or see to it that the Review Panel, which is already charged with conducting periodic comprehensive reviews and assessments of the system,[10] does so.

I

Pentimenti

The *Oxford English Dictionary* defines "pentimento" as, "in a painting (particularly in oils) a trace of an earlier composition or of alterations that has become visible with the passage of time."[11] Oftentimes, the original work of art can still be discerned. So it is with military justice: all you need to do is get beneath the later accretions. And once you do, it becomes apparent that, far from having effaced the earlier state of affairs, the initial version may continue to play a role. Indeed, its effect may be profound even if it is not apparent to the naked eye.

So it is, we suggest, with the many changes that American military justice has experienced over the decades. Some of those have been highly significant; others have been late, reluctant, and in the end unduly tentative. This is not the place to retrace the path of military justice reform; many others have done that. Rather, the question is whether, despite many changes, there remain aspects of the system that silently and unwisely still reflect an earlier state of affairs. This may happen for two reasons: first, the political process (including legislative deference to change-resistance within the armed forces) may be such that only incremental reform is feasible, and second, out of an abundance of caution, Congress may be loath to jettison parts of the system on the premise that there is no harm in retaining them, belt-and-suspenders, even though changes have long since made them redundant. Congress may be slow to grasp the nettle. An example is its unwillingness to create standing military trial courts, even though it has taken steps to empower military judges to rule on certain matters prior to referral. There is no shortage, sadly, of missed legislative opportunities.

Perhaps Holmes overstated the matter when he wrote a century and a quarter ago:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[12]

In the context we are addressing, there is no occasion for revulsion, but simply a recognition that, in 1916, 1920, 1950, 1968, 1983, 2016, and 2021, each of which witnessed

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[9] *See generally* Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. FORUM (May 31, 2021).

[10] *See* art. 146(a)(3), UCMJ, 10 U.S.C. § 946(a)(3).

[11] III OED 363 (1987).

[12] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

dramatic changes, Congress failed to give due consideration to whether, when enacting them, corresponding changes in the interest of removing what is archaic and unnecessary should also have been made, and in any event should be made–or at least carefully considered–now. No known interest-group or PAC is going to make this point, but those who labor in this vineyard might, if the conditions were right, have a chance at attracting the attention of some Senators or Members of Congress who can be persuaded to take the long view rather than waiting for the next discrete reform-ready issue to come without warning across the legislative radar.

The starting point is to identify the core characteristics of the *ur*-system: the command-centric model we and other countries inherited from Great Britain. Common law legal systems around the globe have wrestled with whether, to what extent, and how that system should be modified with evolving expectations and to keep pace with other developments in national law. In this sense, the United States has plenty of company.

What, then, were the core characteristics and assumptions of the original model? Here are a few of the most salient ones. It did not rely on standing courts. It relied on commanders to make charging decisions, select officers to sit on the panel, and act on the record following the trial. It did not contemplate a role for lawyers representing the parties at trial. Nor did it involve trial judges or direct appellate review by a law court. Army and navy courts-martial were governed by separate sets of rules that were far from identical. Most of those who were accused of offenses lacked education. And because the classic model had taken shape long before either the American criminal justice revolution of the 20th century or the development of an international corpus of human rights law, the rights afforded the accused were minimal.

Much of the original military justice system has been altered by periodic spasms of reform. Yet it retains features and asserted protections that no longer serve a purpose. Let us begin with a feature that is so obvious that it attracts virtually no attention: the significant autonomy of the individual armed services. In 1950, Congress broke new ground by enacting a single disciplinary statute for all of the armed forces—a step that other democratic countries such as the United Kingdom and Canada took years ago, but that others still have not embraced.[13] Yet the result was not a *unified* American system, but what was labeled merely a *uniform* one, and one that on examination proves to have a host of interservice variations, typically buried in service-specific regulations.[14] To be sure, the services' systems are interoperable in the sense that trial judges (but not appellate military judges)[15] may preside in cases arising in a different armed force (although

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[13] India remains a major holdout. *See* U C JHA & KISHORE KUMAR KHERA, COLONIAL FOOTPRINT IN THE INDIAN MILITARY LEGAL SYSTEM: MILITARY LAW: THEN, NOW AND BEYOND 193-209 (2022) (noting, for example, maximum sentence disparities among armed forces); Eugene R. Fidell & Navdeep Singh, *Why India must get rid of separate disciplinary codes for Army, Navy & Air Force*, The Print, July 16, 2021.

[14] *See* Army Reg. 27-10, Legal Services: Military Justice (Nov. 20, 2020); U.S. Air Force Inst. 51-201, Administration of Military Justice (Apr. 14, 2022); U.S. Navy JAG Inst. 5800.7G, Manual of the Judge Advocate General of the Navy (Jan. 15, 2021); U.S. Coast Guard Commandant Inst. M5810.1H, Military Justice Manual (July 9, 2021).

[15] *See* art. 66(a)(1), UCMJ, 10 U.S.C. § 866(a)(1).

they rarely do so),[16] and courts-martial can try members of other U.S. armed forces.[17] But in critical respects, "the military justice system" to which observers and participants so often refer is not a single system of criminal justice at all, but rather a constellation of similar systems. These systems may be headed by admirals and generals who typically march in lockstep (at least in public), but, with possible exceptions for high-profile or politically-charged cases, they remain subject to only light supervision, if that, at the Department of Defense level.[18]

What of the protections enacted in and after 1950? With the introduction of appellate counsel, it makes no sense to require the service Courts of Criminal Appeals to engage in a non-adversarial review of records of trial in hopes of spotting some error.[19] Nor should the Court of Appeals for the Armed Forces *sua sponte* engage in such review by its Central Legal Staff, especially if the accused has specifically waived an issue at trial.[20] Searching for viable issues is counsel's work, not the judges' and not a Central Legal Staff's. We applaud Congress's amendment of Article 66, UCMJ, to get factual sufficiency review in sync with comparable review

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[16] *See* R.C.M. 201(e)(4). Judge advocates commissioned in one armed force may serve as counsel in courts-martial convened in another. *Id*. Jurors (called "members") may also serve in courts convened by service branches other than their own. *Id.*

[17] *See* R.C.M. 201(e).

[18] The only aspects of military justice in which the Office of the Secretary of Defense plays a case-specific role are (1) as a general court-martial convening authority (a power that seems never to have been exercised since it was conferred in 1986), *see* art. 22(a)(2), UCMJ, 10 U.S.C. § 822(a)(2); (2) decisions on whether to oppose a defense petition for certiorari or to seek certiorari in a case the government has lost at the Court of Appeals for the Armed Forces, *see* Dep't of Defense Inst. 5030.7 (Aug. 22, 1988) (encl. 2); and (3) advising the President on whether to approve a capital sentence. *See* art. 57(a)(3), UCMJ, 10 U.S.C. § 857(a)(3); R.C.M. 1204(c)(2)(B). The practice of forwarding capital cases via the Secretary of Defense was not memorialized in the *Manual for Courts-Martial* until 2007, *see* Exec. Order No. 13,447, 3 C.F.R. 243, 247-48 (2008) (amending R.C.M. 1204), but began under President Eisenhower. *See* Dwight H. Sullivan, *Killing Time: Two Decades of Military Capital Litigation*, 189 MIL. L. REV. 1, 29 n.112 (2006), *citing* Dwight H. Sullivan, *Executive Branch Consideration of Military Death Sentences*, in EVOLVING MILITARY JUSTICE 138 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002). A number of UCMJ and *Manual* provisions confer powers on the Secretary of Defense, but these relate to the wholesale administration of military justice, rather than retail or case-specific matters. *See, e.g*., arts. 22(a)(2), 33, 113(b)(1)(B), 137(c)-(d)(2), 140a(a), (d), 146, 146a(c), UCMJ, 10 U.S.C. §§ 822(a)(2), 833, 913(b)(1)(B), 937(c)-(d)(2), 940a(a), 946, 946a(c); R.C.M. 109(c)(8), 201; M.R.E. 315, 317(c), 505(a). The Joint Service Committee on Military Justice, which proposes statutory and *Manual for Courts-Martial* changes, operates under the direction of the General Counsel of the Department of Defense. *See* 32 C.F.R. § 152.3. The DoD General Counsel's JSC advisor and that of the Chairman of the Joint Chiefs of Staff, however, do not have a vote. *See* 32 C.F.R. § 152.4(a)(6). The Court of Appeals for the Armed Forces is located in the Department of Defense, but "for administrative purposes only." *See* art. 141, UCMJ, 10 U.S.C. § 941.

[19] *See* art. 66(d), UCMJ, 10 U.S.C. § 866(d) (in any case brought by the accused, the Courts of Criminal Appeals "may affirm only such findings of guilty as the Court finds correct in law, and in fact in accordance with subparagraph (B). The Court may affirm only the sentence, or such part or amount of the sentence, as the Court finds correct in law and fact and determines, on the basis of the entire record, should be approved.").

[20] *United States v. Chin*, 75 M.J. 220 (C.A.A.F. 2016).

by the Article III courts of appeals,[21] but it left undisturbed the practice of *sua sponte* review of the entire record that is no longer warranted given the role of legally-trained appellate counsel.

Congress long ago conferred on the accused a right to be represented for free by any military attorney of his own selection, if that attorney is reasonably available—"individual military counsel"—in addition to free detailed (lawyer) defense counsel.[22] Neither of these was part of the George III legacy, but we wonder whether the right to individual military counsel is another artifact that can be dispensed with. After all, Congress materially cut back on that right after the Court of Military Appeals held in *United States v. Johnson*[23] that it extended to lawyers in a different armed force.[24] As a result, individual military counsel play a much smaller role than they once did. Furthermore, unlike in earlier days, defense counsel now have robust support from, and better communication with, more experienced members of the defense bar, both military and civilian. Since there is no comparable right to select one's own free defense counsel in the civilian courts,[25] and all uniformed defense counsel must be certified after extensive training on the Code,[26] perhaps this feature of the system is no longer required.

The classic model of military justice, lacking a legally-trained trial judge, necessarily involved sentencing by the equivalent of a jury. With the advent of true military judges in 1968, other aspects of the system should also have been changed.[27] One of these is that, other than in capital cases, court-martial members should not determine the sentence, yet Congress kept that option open for the military accused.[28] Civilian federal defendants do not enjoy such an option[29] and jury sentencing is uncommon in state non-capital criminal justice systems.[30] Sentencing by members should have been dispensed with long ago in non-capital courts-martial, and Congress

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[21] *See* art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[22] *See* art. 38(b)(3)(A), (B), UCMJ, 10 U.S.C. § 838(b)(3)(A), (B).

[23] 23 U.S.C.M.A. 148, 48 C.M.R. 764 (1974).

[24] *See* arts. 38(b)(3)(B) & (b)(7), UCMJ, 10 U.S.C. § 838(b)(3)(B) & (b)(7); R.C.M. 506(b)(1).

[25] *See generally* Tom Lynch & Adam Bates, *Poor Defendants Should Get to Choose Their Lawyers Too*, CATO at Liberty, Apr. 6, 2017; Melanie Navamanikkam, *The Sixth Amendment and the Right to Choose Appointed Counsel*, U. CIN. L. REV. blog, Mar. 1, 2017.

[26] *See* art. 27(b)-(c), UCMJ, 10 U.S.C. § 827(b)-(c).

[27] Factual sufficiency review by the Courts of Criminal Appeals is a prime example. *See generally* Matt C. Pinsker, *Ending the Military's Courts of Criminal Appeals De Novo Review of Findings of Fact*, 47 SUFFOLK U.L. REV. 481, 489-99 (2014) (implications for factual sufficiency review). Congress has retained factual sufficiency review but the accused must now first make "a specific showing of a deficiency in proof." *See* art. 66(d)(1)(B), UCMJ, 10 U.S.C. § 866(d)(1)(B).

[28] *See* arts. 25(d), 53(b), UCMJ, 10 U.S.C. §§ 825(d), 853(b).

[29] *See* FED. R. CRIM. P. 32.

[30] *See generally* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 953 n.1 (2003 (collecting statutes).

finally did so in 2021, but only for cases in which all of the offenses that resulted in findings of guilty were committed after December 27, 2023.[31]

Given the level of education the armed forces now require of recruits, it could be argued that the statutory requirement to afford all personnel a careful explanation (*i.e.*, actual knowledge) of the punitive articles of the Code[32] is also no longer warranted, and that constructive knowledge should be relied on, just as it is with respect to federal and state civilian criminal prohibitions.[33] On the other hand, to the extent that some, at least, of the punitive articles may well be unfamiliar to personnel entering from civilian life, this inexpensive artifact may be justified simply in the interest of discouraging criminal conduct and there is no reason to abandon it.

In contrast, there is reason to reconsider whether there is a need for a separate, specialized, civilian appellate court sitting atop the military justice system.**[34]** This dates only to enactment of the Code in 1950, rather than the British or American Articles of War, so it is not some truly ancient artifact. Nonetheless, other structural reforms, as well as the inevitable flow of appellate decisions, have rendered the Court of Appeals for the Armed Forces obsolete by undermining the premises that led Congress to create the Court of Military Appeals (as it was originally named) in the first place. These include decades of case law that has filled in the blanks associated with what was in important respects a new statute as well as the dramatic assimilation of military law to civilian federal law, especially in the area of evidence.[35] Additionally, the development of a proper trial judiciary, referred to above, undercuts the case for intermediate military appellate courts and a top court that swoops in and acts as a policeman for the system as a whole. The dramatic fall-off

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[31] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539E, 135 Stat. 1541, 1700 (2021).

[32] *See* art. 137, UCMJ, 10 U.S.C. § 937.

[33] *E.g., Cheek v. United States,* 498 U.S. 192, 199 (1991) (noting that "[t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system"); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57, 68 (1910) (noting that "innocence cannot be asserted of an action which violates existing law, and ignorance of the law will not excuse").

[34] *See generally* Eugene R. Fidell, *The Case for Termination of the United States Court of Appeals for the Armed Forces*, 23 J. APP. PRACTICE & PROCESS Issue 2, ___, __-__ (2023) (forthcoming). How important is it that judges in military cases have specialized military knowledge or experience? In *Grieves v. United Kingdom*, [2003] Eur. H.R. Rep. 688 (2003) (Grand Chamber), the European Court of Human Rights, in words that apply at least as well to appellate judges, saw little benefit in "the knowledge a naval officer would have of the unique language, customs and environment of the Royal Navy."

> [S]ince the essential function of the Judge Advocate is to ensure the lawfulness and fairness of the court-martial and to direct the court on points of law, it is difficult to understand why a detailed knowledge of the way of life and language of the navy should be called for, particularly where, as in the present case, the offence with which the applicant was changed was the ordinary criminal offence of malicious wounding. In any event, the Court is not persuaded that a civilian Judge Advocate would have more difficulty in following naval language or customs than a trial judge would have with complex expert evidence in a civilian case. [¶ 88]

[35] The Military Rules of Evidence, substantially based on the Federal Rules of Evidence, were promulgated by Exec. Order No. 12,198 (Mar. 12, 1980), *reprinted in* 45 Fed. Reg. 16,932 (Mar. 14, 1980).

in the caseload of the Court of Appeals for the Armed Forces is a further factor to take into account: the facts on the ground have simply changed.

Historically, if an accused was not entitled to review by the Court of Criminal Appeals, she was entitled to have her case reviewed in the Office of the Judge Advocate General. If any part of the findings or sentence was unsupported by law or if the JAG so directed, the case would be reviewed by the service appellate court and, if the JAG further desired, by the Court of Appeals for the Armed Forces.[36] That provision has undergone numerous changes that needlessly complicated military appellate procedure. "[T]he biggest failure of both the [Military Justice Review Group] and Congress was the refusal to afford the appellate review to which every accused convicted at a special or general court-martial should be entitled: an appeal of right to the [Court of Criminal Appeals]."[37] Congress has, at long last, now subjected all general and special court-martial convictions to review by an appellate court.[38] Nevertheless, it makes little sense for some accused to have to apply for relief from the Judge Advocate General before being entitled to review by an appellate court. Article 69 should be repealed.

A final holdover that can properly be dispensed with, even if the Court of Appeals for the Armed Forces is retained, is the power of the Judge Advocates General to certify issues of law for appellate review.[39] Unlike an accused's appeal, which is subject to review at the discretion of the court, certification by the JAG, which is almost always done at the behest of the prosecution,[40] requires the Court of Appeals for the Armed Forces to review the issue raised. Again, this is not something out of George III's playbook, but rather an artifact of the original UCMJ. The purpose was to afford the services a way to obtain, as of right, an authoritative judicial determination of novel points of law under the then-new statute. With the passage of time, the Court of Military Appeals and Court of Appeals for the Armed Forces have painted in virtually every inch of the statutory canvas, some many times over. Additionally, that court has given the certification power even less scope, imposing a time limit,[41] for example, and applying doctrines of mootness and ripeness as further curbs on the Judge Advocates General's power.[42] Nothing of value will have been lost if that power is repealed. What is more, doing so will render it at least slightly more

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[36] Art. 69, UCMJ (1950 version).

[37] James A. Young, *Post-Trial Procedure and Review of Courts-Martial Under the Military Justice Act of 2016*, ARMY LAW., Jan. 2018, 31, 36. Summary courts-martial can be dispensed with given the availability of non-judicial punishment. In any event, appellate review by a court of law is unnecessary since they are not criminal proceedings. *See Middendorf v. Henry*, 425 U.S. 25 (1976).

[38] *See* James M. Inhofe National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, *supra* note 8, § 544, 136 Stat. ____ (2022).

[39] *See* art. 67(a)(2), UCMJ, 10 U.S.C. § 867(a)(2).

[40] EUGENE R. FIDELL, BRENNER M. FISSELL, MARCUS N. FULTON & DWIGHT H. SULLIVAN, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES § 22.03[5], at ___ (22d ed. 2023) (*Rules Guide*) (forthcoming).

[41] *See* C.A.A.F. R. 19(b)(3), 22(b)(3); *Rules Guide, supra* note 40, § 19.03[5], at ___-__.

[42] *Rules Guide, supra* note 40, § 8.03[14], at __-__.

plausible that the Judge Advocates General are merely concerned with prosecuting, rather than being impartial administrators. And ending their certification power will have the desirable side-effect of alleviating the current imbalance in prosecution and defense access to the Supreme Court, which in most cases is based on the Court of Appeals having granted discretionary review.[43]

From the time the Code was enacted, there was, in military justice, a *leitmotif* of paternalism. The Court of Appeals for the Armed Forces has long since gone out of that business.[44] Nonetheless, there is a sense that, like the forms of action at common law,[45] the paternalism legacy (like other, more explicit features of the system inherited from Britain) may yet rule us from the grave. Defenders of the status quo will argue that Congress's failure to tidy up after itself is defense in depth. At a certain point, however, the system becomes so encrusted with artifacts that it loses coherence. We believe that point has been reached.

II

Bloat

Because Congress has failed to get rid of artifacts that have outlived their usefulness and other institutional players have been more than willing to expand (and refuse to contract) whenever possible, the military justice system suffers from both make-work and bloat. Some of the bloat is a result of the make-work, some of it is free-standing. Here are some examples:

Are there too many trial judges for the shrinking overall court-martial caseload?[46] Might fewer judges be needed overall (and might cases move more quickly) if more cases were tried by judges from service branches other than that of the accused? These questions of resources and judicial administration merit examination by the Military Justice Review Panel. It is sometimes claimed that the smaller caseload does not mean fewer trial judges are needed because the cases now being tried are more complicated than hitherto. We reject that claim. Very few court-martial cases are truly complicated or can plausibly be described as "complex litigation," a phrase that can be found on far too many military and former-military resumés. The fact that new issues have to be researched by relatively inexperienced trial and defense counsel does not make those cases "complex." Of course, some cases are indeed complicated – murder cases, for example, but these are rare. Computer cases used to involve learning curve challenges, but there is no reason for them

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[43] Fidell, Fissell & Cave, *supra* note 9, at 14 & n.80; *Rules Guide, supra* note 40, § 22.03[5], at ___-__.

[44] *See, e.g., United States v. Johnson*, 21 M.J. 211, 214 (C.M.A. 1986); *see generally* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 39-40 & n.141 (2013).

[45] *See* FREDERIC W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A.H. Chaytor & W.J. Whittaker eds. 1936) ("The forms of action we have buried, but they still rule us from their graves."). Faulkner similarly observed, "The past is never dead. It's not even past." WILLIAM FAULKNER, REQUIEM FOR A NUN 85 (1919). And as Dickens wrote, "It's in vain, Trot, to recall the past, unless it works some influence upon the present." CHARLES DICKENS, THE PERSONAL HISTORY OF DAVID COPPERFIELD 324 (1850).

[46] *See* Jake Dianno, *Numbers Crunching*, CAAFlog, Oct. 8, 2022, https://www.nimj.org/caaflog/numbers-crunching.

to be treated as *per se* complex today. The same is true for many of the domestic violence cases, which are hardly novel (and many of which belong in the civilian courts in any event, *Solorio* notwithstanding, but that is another article). In addition, military judges are no longer required to perform the onerous task of "authenticating" each record of trial over which the judge presided, in effect, double-checking the court reporter's work for error.[47]

The work of the service Courts of Criminal Appeals and the Court of Appeals for the Armed Forces is needlessly expansive. They review records of trial not only in connection with issues identified by the free appellate defense counsel provided by the taxpayers and the civilian appellate defense counsel who may represent appellants on a fee or *pro bono* basis. Rather, these courts' review includes a search for any errors not identified by either counsel or the petitioner.[48] This kind of review—unheard of in the Article III courts of appeals—may have made sense before lawyers played their current pervasive role in courts-martial, before there was a military trial judiciary worthy of the name, or when the Uniform Code of Military Justice was new and large parts of the jurisprudence had yet to be painted in. But none of these conditions apply now; indeed, they haven't for decades.[49]

The continued willingness of the Court of Appeals for the Armed Forces to entertain petitions for grant of review that cite no issues[50] is a prime example of the persistence of outdated systemic features. Whether or not that practice made sense in the years before Congress transformed the Boards of Review into Courts of Military Review in 1968,[51] it made none thereafter, and yet the Court of Appeals continues to employ a Central Legal Staff that conducts *de novo* review of records of trial. There's no harm in having such a staff to deal with procedural motions, motions for summary disposition, and the like, but what the CAAF staff does far exceeds those tasks. It should be abolished or made smaller.

But the problem runs deeper. There are simply too may appellate courts in the military justice system.[52] At least one, the Coast Guard Court of Criminal Appeals, has almost nothing to

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[47] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, div. E, title LVII, § 5238, 130 Stat. 2918 (2016).

[48] During the October 2021 Term of Court, only half of the petitions for review received by the Court of Appeals for the Armed Forces cited issues that had been identified and briefed by appellate defense counsel.

[49] International standards have also evolved. Thus, the "Yale Draft," a 2018 revision of the 2006 Draft Principles Governing the Administration of Justice Through Military Tribunals, observes in Principle No. 17 (Recourse procedures in the ordinary courts) that "[i]n all cases where military tribunals exist, their authority should be limited to ruling in first instance. Consequently, recourse procedures, particularly appeals, should be brought before the civil courts." *See* MILITARY JUSTICE: CASES AND MATERIALS, *supra* note 2, at ___. The present composition of the Courts of Criminal Appeals does not comport with this principle.

[50] *See* C.A.A.F. R. 21(e).

[51] *See* Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.

[52] The four service intermediate appellate courts—Air Force, Army, Coast Guard, and Navy-Marine Corps—released a combined total of 21 published opinions between January 1 and October 22, 2022.

do—certainly not enough to justify its existence.[53] For all practical purposes it is a collateral duty for everyone, except the chief and one other judge,[54] a kind of judicial "vanity plate" for the Nation's second smallest armed force.[55] Even the larger ones see so few cases in which counsel can actually identify a substantial appellate issue (and conduct so few oral arguments) that they could easily be consolidated into a single "purple" inter-service court, with considerably fewer total appellate military judges.

As for the Court of Appeals, its throughput of cases has become so anemic that a compelling case can be made for its termination.[56] In the most recent three Terms, it handed down decisions on full opinion in only 86 cases: 25 in 2019, 36 in 2020, and 25 in 2021.[57] This is not necessarily to fault that court: trial court caseloads are down, and we are willing to assume that the Court of Appeals grants any petition that qualifies even marginally as a showing of the requisite "good cause."[58] If that is so, it simply does not have enough work to justify its existence. Nor is it a question of not warranting five judgeships; even the three it had from 1951 to 1989 are not warranted given the paucity of cases that have come to it with colorable issues over the last 10 or more years.

The time has come for the military justice appellate structure to replicate that of the civilian federal courts. If, as we believe, the uniformed trial judiciary has reached maturity, there is simply no need, if there ever was one, to subject courts-martial to three tiers of appellate review. We therefore recommend abolition of the Courts of Criminal Appeals and the Court of Appeals for the Armed Forces. In their place, there should be appellate review as of right in the U.S. Court of Appeals for the District of Columbia Circuit, subject to the usual discretionary review by the Supreme Court by writ of certiorari.[59]

Apart from questions of appellate structure and featherbedding, the amount and variety of bloat in the military justice system is impressive. There is no shortage of examples. The Army, Navy-Marine Corps, and Air Force run separate law schools, located in, respectively, Virginia, Rhode Island, and Alabama. Surely this is unnecessary.[60] Similarly, the services have continued

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[53] Including cases submitted without allegation of error, the Coast Guard Court issued a total of 15 opinions between January 1, 2020 and September 12, 2022 (an average of less than one every two months). *See* https://www.uscg.mil/Resources/Legal/Court-of-Criminal-Appeals/CGCCA-Opinions/.

[54] *See* https://www.uscg.mil/Resources/legal/Court-of-Criminal-Appeals/.

[55] The U.S. Space Force is much smaller and has no intermediate appellate court of its own. Space Force court-martial appeals are heard by the Air Force Court of Criminal Appeals.

[56] *See generally The Case for Termination, supra* note 34, at __.

[57] *See* https://www.armfor.uscourts.gov/opinions.htm.

[58] *See* art. 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3).

[59] *See generally The Case for Termination, supra* note 34, at __-__.

[60] The taxpayers also continue to fund multiple law-review-ish publications where a single purple one would suffice. The Army trains all of the armed forces' military judges at its Legal Center and School in Charlottesville.

to promulgate separate rules relating to trial and appellate procedure, professional responsibility, judicial conduct and legal citation. Whether this is inevitable or merely the result of personnel turbulence so every new incumbent feels impelled to revamp their predecessors' rulemaking, the result is a book that is far thicker than it needs to be.[61]

Additional bloat can be attributed to recent legislation creating special trial counsel in each service to assume responsibility for charging decisions in an as-yet unknown fraction of the overall general and special court-martial caseload.[62] At least one service, the Army, has seized on it as an opportunity to add scores of additional lawyers, paraprofessionals, and others to its JAG Corps workforce.[63] It is hard not to see this as excessive. Indeed, introduction of the special trial counsel will (or should) reduce the work of existing legal personnel. Congress should consider whether the armed forces' legal programs are adding bodies unnecessarily.

Conclusion

The Military Justice Act of 2016 and the National Defense Authorization Acts for Fiscal Years 2022 and 2023 made important changes in the military justice system. They remained, however, essentially conservative projects. It would be tremendously unfair to those who worked to enact them to say that all these measures achieved was mere tinkering. But the 2016 legislation remained tethered to the essential architecture of the preexisting system and the FY22-23 NDAAs unwisely left the armed forces with—at least for the time being—two parallel charging systems for court proceedings, one "owned and operated" by commanders and another in which lawyers outside the chain of command will make the charging decision. What Congress should have done—and can still do—is undertake a more sweeping redesign rooted not in the 18th century but in the 21st. What it would opt for today if it were to work on a clean slate is anyone's guess, and this Essay does not pretend to offer anything approaching a complete blueprint for such a system. Rather, it identifies some systemic issues in the hope that a proper holistic debate can occur and inform congressional thinking, particularly as the dust settles from the last several cycles of defense authorization legislation.

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[61] *See* EUGENE R. FIDELL, BENJAMIN K. GRIMES, JONATHAN F. POTTER, FRANKLIN D. ROSENBLATT & JOCELYN C. STEWART, MILITARY COURT RULES OF THE UNITED STATES: PROCEDURE, CITATION, PROFESSIONAL RESPONSIBILITY, CIVILITY AND JUDICIAL CONDUCT viii (9th ed. 2023) (forthcoming) ("The sheer size of this compendium is clear and convincing evidence that the proliferation of rules has become excessive and indefensible.").

[62] *See generally* Cave *et al., supra* note 8.

[63] *See* Todd South, *Army Creates New Legal Office for Murder, Rape and Other Serious Crime*, Army Times, Dec. 5, 2022, https://www.armytimes.com/news/your-army/2022/12/05/army-creates-new-legal-office-for-murder-rape-and-other-serious-crime/.

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May 30, 2023

VIA E-MAIL

Brigadier General James R. Schwenk, USMC,
(Ret)
Chair, Policy Subcommittee
DAC-IPAD

Gen. Schwenk,

I am writing on behalf of Survivors United in response to your May 4, 2023, letter requesting the Organization's perspective on potential changes to Article 25 of the Uniform Code of Military Justice (UCMJ), pertaining to member selection.

Survivors United is a victim created, victim led non-profit 501(c)(3) organization seeking to ensure that military-connected victims' perspectives are received and considered at all levels of the military criminal justice system. Survivors United's members and stakeholders come from varying experiences and backgrounds but share a common hope and goal: continued improvement in the military justice system's investigation and prosecution of sexual assault and harassment. The Organization includes current and former military personnel as well as civilian victims united in the belief that only through validation of the victim perspective will meaningful change occur in the ongoing effort to prevent and punish sexual assault and harassment within the military.

Survivors United fully supports racial, ethnic, and gender diversity on military court martial panels and believes proactive and deliberate actions should be taken to ensure panels are comprised of a cross section of the broader community. In addition, Survivors United requests that the Committee review and assess the application and ongoing need for the "liberal grant mandate" which is frequently employed in ways that undermine gender diversity. Finally, Survivors United supports the current process by which panel members must be of higher rank than the accused.

Diversity on Panels

The lack of gender diversity on panels is a common feature of court martials. It is particularly common in the Marine Corps but exists across all branches. Lack of gender diversity on panels erodes victims' confidence in the process and materially undermines the justice system's goal of creating trust and a belief in the fairness of the system. The result is an erosion in victims' desire to come forward and hold their assailants accountable and a widely shared belief that minority accused, in particular, do not receive fair trials.

Female representation on panels is not just an issue of gender diversity and equality. Without women on a panel to provide input during deliberation, panels lose valuable feedback and life experiences that bring clarity and essential perspectives. This is especially true in sexual assault cases where the victim is female. A clear understanding of female anatomy and how certain acts of sexual violence may feel to a victim is critical to understanding and evaluating female victim testimony. For example, a victim might report that the assault "burned like fire." Where there are no females on a jury panel, this evidence is received in a vacuum without the life experience to put this evidence in context.

For the same reasons, racial and ethnic diversity are essential to the fair administration of the court martial process. Survivors United is committed to a process that is fair for all, including the accused. Recent analysis reporting racially disproportionate charging and court martial proceedings is deeply concerning, and further erodes faith in the process. *See* Protect Our Defenders, Racial Disparities in Military Justice (2017) (finding that black service members were more likely than white service members to face military justice or disciplinary action); *see also* DAC-IPAD, Report on Racial and Ethnic Data Relating to Disparities in the Investigation, Prosecution, and Conviction of Sexual Offenses in the Military (2020) (reporting on data limitations in the court martial process preventing concrete conclusions regarding racial disparities in the military justice system).

All military branches can and must take affirmative steps to ensure greater participation of females and ethnic/racial minorities on court martial panels. This can be achieved in a myriad of ways, including most obviously the recordation and consideration of diversity characteristics as part of the initial panel appointment process. These steps may require pulling members from other branches or taking additional prospective panel members from other commands. The increased trust in the system resulting from these actions more than makes up for the minimal disruption to the system they create.

Liberal Grant Mandate

RCM 912 governs challenges and removal of potential members for cause and details the reasons members shall be excused from serving on the panel, to include whenever it appears that a member "should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." A causal challenge implicates both actual and implied bias – i.e., the public's *perception* of fairness in having a particular member as part of the court-martial panel. When ruling on an implied bias challenge in a close-call case, the "liberal grant mandate" directs the military judge to err on the side of granting the challenge.

The concept of the "liberal grant mandate" first appeared in the 1890 Instructions for Courts-Martial and Judge Advocates (the precursor to the Manual for Courts Martial (MCM)), which advised that "Courts should be *liberal* in passing upon challenges." At the time, the process for challenging for cause was very different from the process we have today. For example, there were no enumerated bases for cause, so the challenging party had to allege a specific reason for the challenge, which often required litigating the merits of the challenge in a "mini-trial" that provided evidence of the member's bias. Additionally, the panel members served as both jury and judge in that they were both the ones being challenged and the ones to eventually decide whether to sustain the challenge or not. And, if the challenge was denied, then the member (whose potential bias and impartiality was just called into question by one of the parties) would remain on the panel. Under these circumstances, the liberal grant mandate was seen as necessary to prevent bias and ensure a fair and impartial panel and was, accordingly, included in subsequent MCMs.

However, the reasons for this policy dissipated over time due to the development of specific, enumerated grounds for cause and the creation of a military judge who had the power to determine the relevancy and validity of challenges for cause, rather than the panel. Therefore, when the MCM was revised in 1984, the language requesting panels to liberally grant challenges for cause was removed by the drafters, who stated that the language was "precatory" and "unnecessary." This was the first time since 1890 that this language was not included in the MCM.

Even though the liberal grant mandate language was removed from the MCM, the policy was still followed and reinforced through military court rulings and appellate decisions, effectively turning the advisory policy into judge-made law. Moreover, the mandate was limited to challenges by the *accused*, citing the role of the convening authority in selecting members and the limit of one peremptory challenge per side as the reasons that military judges were required to be liberal in granting *defense* challenges for cause, but not government challenges. *See, e.g., United States v. Leathorn*, No. ARMY 20190037, 2020

WL 7343018, at *8 (A. Ct. Crim. App. Dec. 11, 2020) (quoting *United States v. Clay*, 64 M.J. 274, 276 (C.A.A.F. 2007)) ("[M]ilitary judges are enjoined to be liberal in granting defense challenges for cause."); *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005) (stating that there is "no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause").

While the liberal grant mandate was initially designed to prevent bias and ensure a fair and impartial panel, in practice, it does just the opposite. It is abused by defense counsel who use the policy to restrict individuals from serving as members who should otherwise be able to serve, to the detriment of sexual assault victims and the fair administration of justice. For example, in our experience, the following types of people are typically challenged by defense counsel for implied bias and, due to the liberal grant mandate, are often excused even though they state that they will follow the judge's instructions, consider only the evidence in the present case, and not bring any personal experiences into the courtroom when deciding guilt or innocence:

- Those who have been sexually assaulted or know someone who has;
- Those who have previously served as a victim's advocate or victim's counsel;
- Those who have been involved with certain sexual assault trainings or programs (for example, Sexual Assault Prevention and Response (SAPR) training).

The exclusion of these types of individuals disproportionately affects women and often results in an all-male panel. Additionally, having a panel member who is empathetic, familiar with trauma and how it can affect the brain and/or a victim's behavior, generally aware of concepts of consent, or who can provide a female perspective to deliberations, for example, does not mean that the member is biased or that the accused would not have a fair and impartial trial. However, excluding all of these types of individuals – and only leaving those who have *no* connection to sexual assault or sexual assault/victim training – ensures that the panel is unrepresentative of the actual military population and unfair for the victim.

Like the drafters in the 1984 MCM, we recommend eliminating the liberal grant mandate policy as unnecessary and unfair. The decision to sustain or deny a challenge for cause is no longer made by the very individuals who are being challenged and, instead, is being made by a judge who is presumed to know the law and be able to apply it fairly. Therefore, there is no longer a reason to apply the liberal grant mandate. Moreover, not only is this policy unnecessary, but it is also being used unfairly by defense counsel to the detriment of sexual assault victims and creating skewed, biased member panels, which is the opposite of what the policy aims to accomplish.

Panel Member Rank

Respect for rank is drilled into the heart and mind of every recruit. For this reason, rank is a critical and necessary component in military jury selection. A junior enlisted deciding the guilt of a senior officer or NCO will result in an unnecessary and unacceptable conflict. The risk of feared retaliation is simply too great. For this reason, Survivors United supports the continued seniority requirements in place.

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Survivors United appreciates the opportunity to work with the Committee on these important issues and remains available to consult as you move forward with your evaluation of Article 25 reform.

Very respectfully,

Ryan Guilds

Service Women's Action Network (SWAN) Responses to DAC-IPAD Questions

1. Please evaluate Article 25 Criteria Below

a. **Age:** Recommend leave as 18.
b. **Length of Service:** Recommend this be one year. Military Justification: Panelists should be through initial enlisted or officer entry training to ensure they understand the basics of the military justice system before serving as a panelist.
c. **Education:** Proficiency in English should be required. Beyond that the educational requirements for entry into service should be sufficient.
d. **Experience:** No additional experience should be required.
e. **Training:** Panelists should have satisfactorily passed their initial enlisted or basic officer training course.
f. **Judicial temperament:** No requirement for this should be necessary. Military Justification: When Article 25 was first instituted, non-lawyer panel members often performed judicial duties at courts-martial that now must be performed by JAG lawyers and judges.
g. **Senior in Rank or Grade to the Accused:** SWAN believes this should continue as a requirement. Military Justification: Panelists should not be named to serve on panels for their accused military seniors—especially those in their current chain of command. It leaves junior panelists open both to pressure from the accused during the court-martial or to retribution at a later date. Unlike jury members in civilian courts, military panelists and those accused often know each other, and may work together now or in the future.

2. Are there other criteria that should be required to serve as a panel member?

Panel members should meet requirements similar to those in civilian courts: Not convicted of a felony, not under investigation for a felony. Should not be the accuser or a potential witness.

3. Should there be a requirement for panels to be diverse by race, ethnicity, and/or gender?

SWAN believes the pools from which panelists are drawn should be diverse including by race, ethnicity and gender. Under current law, the Convening Authority is either the accused's commander or a more senior officer in the area who serves as Convening Authority for special and/or general courts-martial. Depending on the location of the Convening Authority, the size of the panelist pool may be large enough to ensure diversity or it may be small and not particularly diverse at all. If the revision of Art 25 allows, we recommend an effort be made to increase the size and, thereby, the likely diversity of panelist pools.

4. Should an accused pending court-martial have the option to request minority inclusion in court-martial members?

This would be ideal, but the term "minority" needs to be clarified—exactly who would be able to exercise this option? Must the minority member on the panel be from the exact same community as the accused or a survivor of MST? If an accused is a member of several minority communities, must all be represented on the panel? Will this provision apply to accused members from the LGBTQ community—which could require panel pool members to disclose information they would prefer to keep private. What will happen when a straight, cis-gender, white male asks that member of the majority be named to the panel?

5. **Should there be an option for an all-enlisted panel?**

Yes, the rules governing the duties of court-martial panels have changed greatly since 1950 when the original version of Art 25 became law. In those days most court-martials were held without military judges presiding. That is an extraordinarily rare occurrence these days.

6. Should the military panel member selection move to a randomize process that is similar to how federal and state jurisdictions select potential jury members?

No. Military Justification: There is too little geographic stability for military members to make that system convenient. Individuals and deployable units move about constantly; people enter and leave the service daily.

a. **Should the military use Alpha list rosters or other similar means to randomly select the initial pool members?** Not sure that all units have Alpha list rosters and even if they do, they could change daily or weekly.
b. **Should the random selection method include an algorithm that results in member venire that is diverse in some way, such as by age, grade, race, or sex? Please explain your response.** Yes, to all the categories mentioned. Achieving this sort of diversity should not be difficult in most geographic areas. Recommend the algorithm also allow for diversity in the service branches of the pool members where possible.

7. Please share with us any suggestions you have for improving the panel selection process or considerations that the Committee should be cognizant of in making recommendations to change the selection criteria or randomize the selection process.

SWAN recommends that before setting up a method for random selection, the DAC-IPAD consider ways to expand panel pools by selecting the pool members based on geographic area rather than individual units. This will enlarge the pools and so provide a better chance of achieving diversity of all varieties.