Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces

Randomizing Court-Martial Panel Member Selection: A Report On Improving An Outdated System

December 2023

Defense Advisory Committee

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December 2023

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

December 20, 2023

The Honorable Jack Reed
Chairman
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Washington, DC 20510

The Honorable Roger Wicker
Ranking Member
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The Honorable Mike Rogers
Chairman
Committee on Armed Services
U.S. House of Representatives
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The Honorable Adam Smith
Ranking Member
Committee on Armed Services
U.S. House of Representatives
Washington, DC 20515

The Honorable Lloyd J. Austin III
Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Dear Chairs, Ranking Members, and Mr. Secretary:

We are pleased to provide you with our report *Randomizing Court-Martial Panel Member Selection: A Report on Improving an Outdated System* in accordance with section 546 of the National Defense Authorization Act for Fiscal Year 2015 (Public Law 113-291), as amended. This report and our recommendations are the culmination of the DAC-IPAD's 2023 review of the court-martial panel selection criteria and processes.

The DAC-IPAD's report and 10 recommendations build upon the Independent Review Commission on Sexual Assault in the Military's June 2021 recommendation that Article 25, UCMJ, be amended to establish random selection of panel members in order to "enhance the perception and reality of a fair and impartial panel." We note that Congress amended Article 25 in the National Defense Authorization Act for Fiscal Year 2023 to require random selection of panel members, but retained the requirement that convening authorities select members they determine to be "best qualified" on the basis of age, education, training, experience, length of service, and judicial temperament. After extensive review, this Committee concludes that a meaningful randomized selection process is incompatible with retaining this subjective "best qualified" mandate and recommends that Congress amend Article 25 to remove it.

The DAC-IPAD believes the change to a random selection process using limited objective qualification criteria applied transparently is timely, as recent UCMJ amendments reducing the role of court-martial panel members become effective. It is also necessary—particularly in sexual assault cases—to assure military members and the public that court-martial panel members are being fairly and transparently selected, without real or perceived bias in the selection process.

This Committee recognizes the operational necessity for convening authorities to retain availability and excusal authority over chosen panel members and recommends continuation of that authority, using a more transparent process. Additional recommendations include retaining the requirement in Article 25 that panel members be senior to the accused, when practicable, and establishing a two-year time in service requirement to serve on a panel. Finally, the DAC-IPAD recommends amending Article 25 to allow panel members to be detailed closer in time to the start of court-martial proceedings, thereby reducing the number of member substitutions necessitated by the delay between referral of charges and the start of those proceedings, while still providing selection process flexibility to the Military Services.

The members of the DAC-IPAD would like to express our sincere gratitude and appreciation for the opportunity to make use of our collective experience and expertise in this field to develop recommendations for improving the military's panel selection process.

Respectfully submitted,

Karla N. Smith, Chair

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EXECUTIVE SUMMARY

Since Congress established Article 25 in the Uniform Code of Military Justice (UCMJ) in 1950, there have been repeated calls to change the court-martial panel member selection system to a more objective, transparent process, driven in large part by concerns about fairness and the perception of fairness. Under the current selection process, the convening authority decides whether the accused will be tried by court-martial and the offenses for which they will be tried, and also selects, through a subjective evaluation of selection criteria, the panel members who will sit in judgment of the accused. This consolidation of authority, along with extensive discretion in panel-member selection, in the convening authority presents the opportunity for intentional abuse or unintentional insertion of bias, raising the perception of unfairness in the court-martial process. Similar concerns remain under the process beginning in December 2023, in which the Offices of Special Trial Counsel (OSTCs) determine whether select offenses will be tried but convening authorities—whether or not they support the referral decision—retain power to select the panel members.

The Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) makes 10 recommendations in this report that, when taken together, provide a road map for a panel selection process that reduces subjectivity and the potential for bias and replaces the existing method with objective criteria for determining the eligibility of panel members and a transparent, objective process for randomly selecting panel members.

In completing this review and developing the 10 recommendations accompanying it, the DAC-IPAD was guided by the goals of increasing trust in the military justice system, promoting fairness and the perception of fairness in selecting panel members, and ensuring transparency in the process. In discussing the origins of Article 25 and the panel selection process, this report reveals an outdated system that has not evolved to keep pace with numerous important changes in the military justice process.

The DAC-IPAD's recommendations build upon multiple studies of the court-martial panel selection system, most of which concluded that the process should be changed to a more objective and transparent system. Most recently, the Independent Review Commission on Sexual Assault in the Military (IRC) recommended in a June 2021 report that Article 25, UCMJ, be amended to establish random selection of panel members in order to "enhance the perception and reality of a fair and impartial panel."[1]

Congress agreed that changes to the panel selection process were necessary, and in the National Defense Authorization Act (NDAA) for Fiscal Year 2023 it amended Article 25 to require random selection of panel members, to the maximum extent practicable, by December 2025, under regulations prescribed by the President.[2] However, Congress did not remove the requirement that convening authorities select those members they subjectively consider "best qualified" to perform the duty, using the selection criteria of age, education, training, experience, length of service, and judicial temperament.[3] The Committee believes that a true randomized selection process is incompatible with allowing the convening authority to select members on the basis of this subjective determination. To make random selection meaningful, the Committee

1 Independent Review Commission on Sexual Assault in the Military, Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military 33 (July 2021) [IRC Report], *available at* https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF; *id.* at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System, Recommendation 1.7 d: Random Selection of Panel Members, at 54.

2 National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263 [FY23 NDAA], § 543, 136 Stat. 2395 (2022).

3 10 U.S.C. § 825 (2021) (Art. 25).

recommends that Congress take the additional step of eliminating from Article 25 the requirement that the convening authority select and detail those members they consider best qualified and, instead, require them to detail only those members identified through a randomized selection process.

In the past, some have argued for retaining the subjective "best qualified" mandate and preserving the convening authority selection process because military panel members have broader duties than their civilian jury counterparts that require complex analysis and judgment. However, multiple changes to the military justice system—including the advent of the trial judiciary in 1968, the statutory change effective in 2019 that a military judge must preside over all general and special courts-martial, and the FY22 NDAA statutory amendment requiring all sentencing, except in capital cases, to be conducted by the military judge—means that the fact-finding role of military panel members is virtually identical to the role of jurors in federal and most state systems.

In addition, the Military Services now have computerized rosters of all Service personnel that can be used to produce random selections of panel members based on objective criteria—such as requiring that all members have at least two years' time in service and be senior in grade or rank to the accused. This improved technology can be drawn on to increase efficiency, fairness, and objectivity in the panel selection process, without an overall increase in administrative requirements and regardless of location and operational posture.

While the DAC-IPAD has determined that a randomized selection process involving limited objective selection criteria is the best practice, the Committee also recommends that convening authorities remain an integral part of this process. Convening authorities should retain the authority to detail the appropriate number of randomly selected court-martial members, make availability determinations, and excuse members for operational and personal reasons.

Implementing a randomized process for selecting panel members with limited objective qualification criteria applied transparently will address concerns about subjectivity enabling bias or favoritism and thereby help restore confidence and trust in the military justice system by increasing the perception of fairness among Service members and the public. In addition, a selection process that is more transparent will be less susceptible to manipulation or undue influence. These revisions also have the potential to promote a broader representation of military personnel, including different ranks, backgrounds, and experiences. For all of these reasons, now is the time for change.

RECOMMENDATIONS AND FINDINGS

Recommendation 53: Congress should amend Article 25(e) to remove the requirement for the convening authority to detail members who "in his opinion, are best qualified" based on "age, education, training, experience, length of service, and judicial temperament."

Finding 1: At the time that the Article 25(e) "best qualified" criteria were established in the UCMJ in 1950, military judges did not preside over courts-martial and panel members also served as the sentencing authority. Changes in the law have resulted in the establishment of a trial judiciary with military judges presiding at every court-martial. In addition, military judges will soon serve as sentencing authority in all but capital cases, reducing the panel's role to determining the guilt or innocence of the accused, as is the case in federal and most state courts. This tailoring of the panel's role to fact-finding eliminates the rationale for the "best qualified" criteria in Article 25(e).

Finding 2: The Article 25(e) criteria and "best qualified" mandate result in courts-martial panels composed primarily of officers and senior enlisted Service members. There is no longer a military justification to support this composition. Seniority relative to the accused sufficiently accounts for the military's hierarchical rank structure.

Recommendation 54: Congress should retain the Article 25(e)(4) requirement for the convening authority to detail members randomly selected under regulations prescribed by the President. The qualifying words "to the maximum extent practicable" should be removed.

Finding 3: Removal of the subjective "best qualified" criteria, along with implementation of a process to randomize member selection, will help eliminate the perception that the convening authority is selecting those members most likely to reach a certain result and thus will increase trust and confidence in the military justice system.

Finding 4: Randomizing the court-martial member selection process is not compatible with the Article 25(d) requirement for the convening authority to select members who are "best qualified" according to existing criteria.

Finding 5: Officers and enlisted members of all grades are qualified to serve on courts-martial panels.

Recommendation 55: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial, pursuant to the requirement in Article 25(e)(4), to provide for a randomized court-martial panel member selection process utilizing the Military Services' personnel and pay systems to select the members. This process should preclude the convening authority or other members of command or the judge advocate office from hand selecting members. In addition to the statutory qualification requirements, the randomized selection process should provide for diversity of members based on grade.

Finding 6: The Military Services have the capability to use their personnel and pay systems to generate a randomized pool of Service members for court-martial duty based on objective criteria. This technology will enable increased efficiency, fairness, and objectivity in the panel selection process.

Finding 7: A purely random selection of Service members would result in a panel primarily consisting of junior members. Selecting panel members of different grades will lead to a more diverse panel with regard to age and experience.

Recommendation 56: The Secretary of Defense should direct that a pilot project be initiated to create a court administrator position to be responsible for the panel member selection process—rather than the staff judge advocate or command staff.

Finding 8: A randomized method of panel selection that removes from the convening authority or others in the chain of command or judge advocate office the responsibility to administer the selection process will provide more transparency and thereby increase Service members' and the public's trust in the court-martial process.

Recommendation 57: Congress should amend Article 25 to explicitly give convening authorities the authority to determine whether randomly selected Service members are available prior to being detailed to a court-martial panel and retain the authority in Article 25 to exempt or excuse individuals for operational requirements or personal reasons after they have been detailed.

Finding 9: In the interest of military readiness, convening authorities must retain availability and excusal determination authority.

Recommendation 58: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

Finding 10: Documentation of the bases for excusal and availability determinations increases transparency and the perception of fairness, and minimizes the risk of abuse of the process.

Recommendation 59: Congress should retain the requirement in Article 25(e)(1) that when it can be avoided, no accused Service member may be tried by a court-martial in which any member is junior to the accused in rank or grade.

Finding 11: The Article 25 requirement that court-martial members be senior in rank and grade to the accused serves a specific military purpose to maintain the hierarchical rank structure of the military.

Recommendation 60: Congress should amend Article 25 to add a two-year time-in-service requirement for court-martial panel member eligibility. For Service Academy cadets and midshipman, the calculation of time in service would commence upon commissioning.

Finding 12: A minimum length of service requirement is supported by specific military purposes: to ensure that initial military training is completed and to give Service members a greater understanding of military culture.

Finding 13: A minimum length of service requirement of two years eliminates the need to require a minimum age for serving as a panel member.

Recommendation 61: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to establish uniform criteria for automatic exemption from serving as a court-martial member. For example, federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or be convicted of a felony. The amendment should delegate authority to each Military Department Secretary to promulgate regulations that establish additional bases for automatic exemption. To ensure maximum transparency, any additional exempting criteria established by the Military Departments should be made public through the Federal Register and by other appropriate means.

Finding 14: Federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or be convicted of a felony. Department of Defense accession regulations ensure that all Service members are proficient in English and have no disqualifying mental or physical condition.

Recommendation 62: Congress should amend Article 25(e)(2) and (3) to remove the requirement that the convening authority detail panel members at the time the court-martial is convened. Instead, it should provide that the convening authority must detail panel members within a reasonable time prior to the swearing in of the detailed members and the assembly of the court-martial.

Finding 15: The requirement to detail members at the time a case is referred to court-martial often results in excusal and replacement of a significant number of the originally and subsequently detailed members, creates an administrative burden, and does not serve a military purpose, given the length of time from referral to empanelment and the low percentage of courts-martial in which the accused elects to be tried by members.

Finding 16: Providing the flexibility to detail members later in the process will enable the convening authority to determine more accurately the appropriate number of qualified members to detail to a specific court-martial.

I. INTRODUCTION

This Committee has long been concerned about the fairness of the military justice system and the role of bias in courts-martial and other disciplinary actions in sexual assault cases. These concerns, along with the pending requirement for randomization of the court-martial member selection process, were the impetus for the Committee to embark on this review and assessment.

Since Congress established Article 25 in the UCMJ in 1950, there have been repeated calls to change the system of selecting court-martial panel members to a more objective, transparent process, in large part spurred by concerns about fairness and the perception of fairness. The perception of this process is especially problematic for cases involving sexual offenses[4]—which constitute a significant portion of general court-martial cases.[5]

This panel selection study builds on the 2021 report of the Independent Review Commission on Sexual Assault in the Military (IRC).[6] Following its study of the military's treatment of sexual assault offenses, the IRC concluded that "there is a wide chasm between what senior leaders believe is happening under their commands, and what junior enlisted Service members actually experience," resulting in broken trust between commanders and the Service men and women under their care.[7] Among the recommendations made to improve the military's response to sexual offenses, the IRC proposed that Article 25, UCMJ, be amended to establish random selection of panel members in order to "enhance the perception and reality of a fair and impartial panel."[8] The IRC's recommended changes address a concern among many of those they interviewed "that commanders hand pick members to deliver desired court-martial results."[9]

Congress agreed that changes to the panel selection process were necessary, and in the National Defense Authorization Act for Fiscal Year 2023 it amended Article 25 to require by December 2025 the random selection of panel members to the maximum extent possible, under regulations prescribed by the President.[10] However, it did not remove the Article 25 mandate for convening authorities to select those members they consider best qualified to perform the duty.

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4 IRC Report, *supra* note 1, at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System, Recommendation 1.7, Modify the UCMJ, at 52 (finding recommended changes, including randomization of court-martial member selection, uniquely important in sexual assault cases, in which a significant number of victims have lost trust in the command-centric military justice system.).

5 According to the Military Services' Article 146a, UCMJ, reports from FY22, a total of 670 general courts-martial (GCMs) were tried; and according to the Sexual Assault Prevention and Response Office (SAPRO) report for FY22, a total of 301 courts-martial were completed for sexual assault offenses, defined as rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy, and attempts to commit such offenses. Child sexual assault cases and sexual assault cases in which the victim is a spouse or intimate partner are not included in the 301 cases. The Article 146a reports from FY22 establish that 207 of the total GCMs were tried by members, but the SAPRO report does not have data on how many of the sexual assault cases were tried by members. The Military Services' Article 146a reports can be found on the Joint Service Committee website at https://jsc.defense.gov/Annual-Reports/. Dep't of Def., SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2022, Enclosures 1-3. DoD SAPRO reports can be found at https://sapr.mil/reports.

6 IRC Report, *supra* note 1.

7 *Id*. at 3–4.

8 *See id*. at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System, IRC Recommendation 1.7 d, Random Selection of Panel Members, at 54.

9 *Id*. at Appendix B: Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System 18. *See id*. at 23 (Figure 5 reflecting a 32.4% conviction rate at contested courts-martial for penetrative sexual assault offenses for FY17 and a 56.9% conviction rate for FY18). *See also* Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017 11, 41(Oct. 2020) (finding 61.3% of adult-victim penetrative sexual offense charges going to verdict resulted in acquittal of the sexual offense).

10 FY23 NDAA, *supra* note 2, § 543.

In completing this review and developing the 10 recommendations accompanying it, the DAC-IPAD was guided by the goals of improving trust in the military justice system, promoting both fairness and the perception of fairness in selecting panel members, and ensuring transparency. In discussing the origins of Article 25 and the panel selection process, this report reveals an outdated system that has not evolved to keep pace with numerous groundbreaking changes in the military justice system.

The 10 recommendations in this report, taken together, provide a road map for a panel selection process that removes subjectivity and the potential for bias and replaces it with limited objective criteria for determining the eligibility of panel members. This will lead to a transparent and objective process for randomly selecting panel members.

Section II of this report provides an overview of the current court-martial panel member selection process and provides historical background. Section III discusses randomizing the selection process and reviews past studies of this approach as well as the recent statutory requirement to randomize the process. Section IV summarizes stakeholder perspectives on the selection process. Section V provides the Committee's analysis explaining why these recommended changes should be implemented and contains the Committee's recommendations. Section VI details the Committee's proposed reforms to the selection process and how the new process would work in practice. Finally, Section VII contains the Committee's concluding remarks.

II. THE CURRENT COURT-MARTIAL PANEL MEMBER SELECTION PROCESS AND CRITERIA

A. Convening a Court-Martial

Because the Armed Services do not have a standing court-martial system, commanders must individually convene each court-martial and refer each case individually to the court-martial.[11] This is always true, regardless of whether a commander serving as convening authority or a special trial counsel refers the case to a general or special court-martial.[12]

When convening the court-martial, the convening authority must also simultaneously detail members of the Armed Forces to serve as panel members.[13] While the process for detailing members varies among and within the Military Services, typically lower-level commanders provide a list of nominees, diversified by grade, to the convening authority's staff judge advocate, who then prepares for the convening authority a packet containing the list of nominees, questionnaires completed by the nominees, and a roster of all command members. The convening authority uses the material provided to select and detail the court-martial members.

In reviewing this selection process, the Court of Appeals for the Armed Forces (CAAF) noted that the government has the upper hand in the selection of court-martial members owing to the extensive prescreening built into the nomination and selection processes with the aim of producing the "best qualified" members. In order to provide balance, CAAF created the liberal grant mandate, which requires that military judges liberally grant challenges for cause brought by the defense in the voir dire process.[14]

B. Article 25, Uniform Code of Military Justice, Selection Criteria

Article 25, UCMJ, outlines the criteria according to which a convening authority must select panel members. The statute directs the convening authority to personally select members who "in his opinion, are best qualified" on the basis of six criteria: "age, education, training, experience, length of service, and judicial temperament."[15]

The statute does not further define these criteria or provide the method by which the convening authority makes this selection.

Historical Background

In military courts-martial, accused Service members do not have a Sixth Amendment right to a trial by jury.[16] The Military Justice Review Group summarized the history of Article 25 in its 2015 report, noting that Congress first set

11 10 U.S.C. § 825 (2021) (Art. 25); Manual for Courts-Martial, United States (2023 ed.) [2023 MCM], Rule for Courts-Martial [R.C.M.] 504(a).

12 *Id.*

13 Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

14 *See United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Glenn*, 25 M.J. 278, 279 (C.M.A. 1987); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995); and *United States v. James*, 61 M.J. 132 (C.A.A.F. 2005).

15 Art. 25(e)(2), UCMJ.

16 *United States v. Anderson*, No. 22-0193 (C.A.A.F. June 29, 2023), *citing Ex parte Milligan*, 71 U.S. 2, 123 (1866); *Ex parte Quirin*, 317 U.S. 1, 40 (1942); and *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950).

forth criteria for service on courts-martial panels in the 1920 Articles of War, which Congress then incorporated into the UCMJ as Article 25 upon its enactment in 1950.[17]

Article 4 of the 1920 Articles of War—applicable to the Army, but not the Navy—established criteria for selection of court members: "When appointing courts-martial the appointing authority shall detail as members thereof those officers of the command who, in his opinion, are best qualified for the duty by reason of age, training, experience, and judicial temperament[.]"[18] Article 4 also included a clause stating that officers with less than two years of service should not sit as panel members "if it can be avoided without manifest injury to the service."[19] When the UCMJ was enacted in 1950, Article 25 adopted the selection criteria from Article 4, adding education and length of service to the existing criteria and eliminating the baseline requirement of two years of service.[20]

These criteria have remained the same since 1950, though the military justice system and the composition and functions of courts-martial panels have changed significantly. Enlisted members were not permitted to sit as panel members until the passage in 1948 of the Elston Act, which allowed an enlisted accused to select a panel composed of at least one-third enlisted members.[21] Congress incorporated this provision into Article 25, UCMJ. The Military Justice Act of 2016 (MJA16) amended Article 25 to allow convening authorities to appoint enlisted members to panels in the initial convening order, subject to the accused's ability to specifically elect an officer-only panel.[22] Prior to this change, convening authorities could detail only officer members in the initial convening order.

Timeline Depicting Court-Martial Member Selection Milestones

1920 — Articles of War, art. 4
- Best qualified – age, training, experience, and judicial temperament
- 2 year time in service

1948 — Articles of War, arts. 4, 88
- Enlisted members authorized
- Unlawful command influence prohibited

1950 — Article 25, UCMJ
- Best qualified – age, education, training, experience, length of service, judicial temperament

1964 — Racial inclusion authorized

1968 — Trial judiciary created

1987 — Liberal grant mandate

1988 — Gender inclusion authorized

2019 — All GCMs and SPCMs have military judges; Article 16, UCMJ

2023 — Judge-alone sentencing in all GCMs and SPCMs, effective 27 Dec. 2023.

Racial inclusion prohibited, effective Sept. 2023

OSTC referral authority, effective 27 Dec. 2023

2024 — Randomized selection of court-martial members required, effective 23 Dec. 2024

17 Report of the Military Justice Review Group, Part I 252 (Dec. 22, 2015) [MJRG Report].

18 The Articles of War of 1920, art. 4 (June 4, 1920) *reprinted in* Manual for Courts-Martial, United States (1921 ed.), app. 1, at 494, *available at* https://www.loc.gov/item/2011525334/.

19 *Id.*

20 Art. 25, UCMJ (1950).

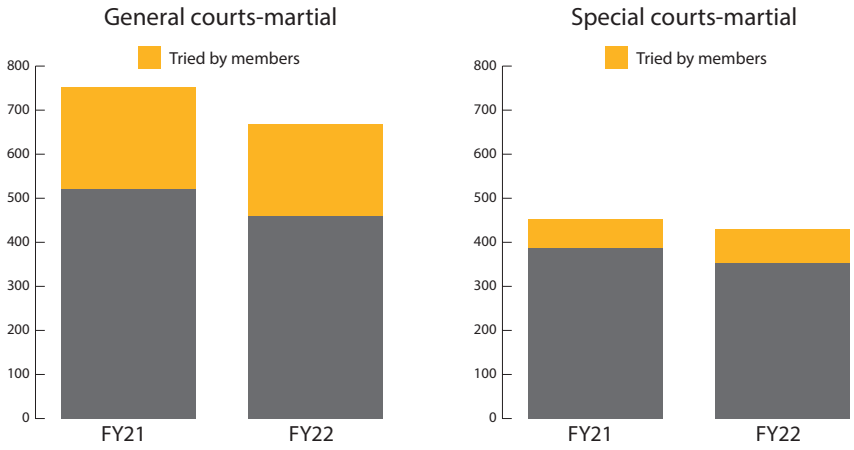
21 The Articles of War of 1948, art. 4 (June 24, 1948) *reprinted in* Manual for Courts-Martial, United States (1949 ed.) app. 1, at 273, *available at* https://www.loc.gov/item/2011525325/.

22 Art. 25(c)(1).

For many years courts-martial operated with no trial judiciary. Following the implementation of the UCMJ in 1950, all general courts-martial had a law officer assigned, though this position did not have the authority and power of a military judge.[23] The senior officer of the panel—who was not an attorney—served as its president. That individual presided during hearings and performed many administrative and judicial functions, such as setting the time and place of the court-martial, administering oaths to counsel, and presiding over closed sessions.[24] In addition, the court-martial panel determined challenges for cause against a member and could make a determination on a motion for a finding of not guilty or on the accused's sanity, if any member objected to the law officer's ruling.[25] This system remained largely unchanged until 1968, when Congress amended the UCMJ to provide for military trial judges to preside over all general and most special courts-martial.[26] This change gave trial judges authority to direct all procedural aspects of trial and allowed an accused to elect to have findings and sentencing conducted by panel members or by the presiding military trial judge.[27] A special court-martial without a military judge presiding was statutorily authorized until Article 16, UCMJ, was amended, effective January 2019, to eliminate this option and require all special courts-martial to have a military judge presiding.[28]

Unlike the federal system and most state systems, an accused military member may elect to be sentenced by a panel of members. This will soon change, as a provision in the National Defense Authorization Act for Fiscal Year 2022 requires military judges to serve as the sentencing authority in all special and general courts-martial, with the exception of capital cases, effective for cases in which the charged offenses are committed after December 27, 2023.[29]

In fiscal years 2021 (FY21) and 2022 (FY22), less than a third of general and special courts-martial were tried before panel members.[30] In FY21, the Services tried a total of 752 general courts-martial, of which 231 (31%) were tried by members,[31] and a total of 454 special courts-martial, of which 68 (15%) were tried by members.[32] In FY22, the Services tried a total of 667



23 Edward F. Sherman, *The Civilianization of Military Law*, 22 Maine L. Rev. 3, 44 (1970).

24 *Id*.

25 *Id*.

26 Wayne L. Friesner, *Military Justice and the Military Justice Act of 1968: How Far Have We Come?*, 23 Sw. L.J. 554, 568–69 (1969).

27 *Id*. at 569.

28 MJRG Report, *supra* note 17, at 221 (conforming to the long-standing military practice requiring a military judge to preside over all special courts-martial).

29 National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81 [FY22 NDAA], § 539E, 135 Stat. 1541 (2021).

30 *See* Annual reports to Congress from the Military Services' Judge Advocates General and Staff Judge Advocate to the Commandant of the Marine Corps for Fiscal Years 2021 and 2022.

31 *Id*.

32 *Id*.

general courts-martial, of which 207 (31%) were tried by members, and a total of 429 special courts-martial, of which 76 (18%) were tried by members.[33]

Diversity of Panel Membership

Neither the Constitution nor the UCMJ provides an accused Service member the right to a cross-sectional representation of the community on their court-martial panel.[34] Case law provides only that significant and identifiable groups may not be systematically excluded from the selection process.[35]

It is no longer permissible for convening authorities to consider race in selecting courts-martial panel members for purposes of inclusion. In its 1964 decision of *United States v. Crawford*, the Court of Military Appeals (now the Court of Appeals for the Armed Forces) first recognized the permissibility of including a panel member on the basis of race, so long as the motivation remained compatible with the criteria in Article 25, UCMJ.[36]

Subsequent appellate court decisions relied on this holding for decades,[37] but the recent CAAF decision in *United States v. Jeter*[38] held that the *Crawford* decision was abrogated by the Supreme Court's holding in *Batson v. Kentucky*, which provided that "[a] person's race simply is unrelated to his fitness as a juror."[39] In holding that a convening authority could not—even in good faith—use race as a criterion for selection in order to make the members panel more representative of the accused's race, CAAF stated: "We cannot blind ourselves to the fact that the military justice system, its member selection process in particular, remains vulnerable to actions by those who harbor outdated views regarding women and minorities."[40] The *Jeter* decision requires that an accused's prima facie showing that race played a role in the panel selection process will give rise to a presumption that the panel was not properly constituted, a presumption that the government may then seek to rebut.[41]

CAAF previously extended the holding in *Crawford* to allow the convening authority to take gender into account in selecting panel members if they are seeking in good faith to select a panel representative of the military population.[42] It is likely the *Jeter* decision will also apply to the convening authority's consideration of gender for purposes of inclusion in panels, making this practice no longer permissible.

Limitations on Selection Criteria

In addition to race and gender, other aspects of the court-martial panel selection process have been the subject of litigation, which has led to judicially interpreted limitations on selection criteria.

33 *Id*.

34 *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988).

35 *E.g.*, *United States v. Bess*, 80 M.J. 1, 8 (C.A.A.F. 2020); *United States v. Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988).

36 *United States v. Crawford*, 35 C.M.R. 3, 13 (C.M.A. 1964).

37 *See*, *e.g.*, *United States v. Cunningham*, 21 M.J. 585, 586 (C.M.R. 1985).

38 *United States v. Jeter*, 2023 CAAF LEXIS 676 (C.A.A.F. 2023).

39 *Id.* at *1, *citing Batson v. Kentucky*, 476 U.S. 79, 87 (1986).

40 *United States v. Jeter* at *6.

41 *Id*. at *2.

42 *United States v. Smith*, 27 M.J. 242, 249 (C.A.A.F. 1988).

1. Rank and Grade

The convening authority may not, when it can be avoided, select members junior in rank or grade to the accused.[43] Aside from that statutory prohibition, the convening authority may not use rank as a device to deliberately and systematically exclude otherwise qualified court members.[44]

2. Position and Occupation

The convening authority may select members on the basis of duty position (e.g., commanders) in a good faith effort to comply with Article 25 criteria. CAAF has noted, "Officers selected for highly competitive command positions . . . have been chosen on the 'best qualified basis,' and . . . the qualities required for exercising command 'are totally compatible' with the statutory requirements for selection as a court member."[45]

Occupation is not a permissible basis for excluding members. The decision by CAAF in *United States v. Bartlett* invalidated an Army regulation that prohibited certain occupational specialties from being detailed as panel members.[46] The Court noted that convening authorities possess "broad power to detail any officer to a panel as long as the requirements of Article 25, UCMJ, are met."[47]

C. Detailing Court-Martial Panel Members and Trial Delays

Article 25(e)(2) requires the convening authority to detail court-martial panel members at the time the court-martial is convened, when charges are referred.[48] It is not uncommon for months to elapse between the convening of the court-martial and the beginning of the trial. For reasons including military deployment or training, members who were available to serve on the panel when the court-martial was convened may no longer be available six months or more later when the court-martial begins. The Military Services, with the exception of the Air Force, therefore create "standing" convening orders, often on a yearly basis, under which all courts-martial of that type (special or general) are initially convened. In the absence of a trial date and with the knowledge that the trial may not be scheduled for several months, these standing convening orders often have "straw panels" detailed—essentially members included on the convening order without any expectation that many or most will actually sit as members on a court-martial panel.

As the trial date for a particular court-martial draws near, the convening authority amends the initial convening order, detailing to the particular court-martial members who are available for the scheduled dates of the trial. If the court-martial is delayed, the convening authority may have to issue additional amendments to the convening order as detailed panel members become unavailable and have to be replaced.

The method used by the Air Force is slightly different. Rather than creating a standing convening order for all courts-martial convened in the command for that year, Air Force convening authorities maintain a pool of available members on a quarterly or similar basis and refers each case to a separate court-martial with a new convening order. The process for amending convening orders to replace unavailable members is the same as the process used by the other Military Services.

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43 Art. 25(e)(1).

44 *United States v. Daigle*, 1 M.J. 139 (C.M.A. 1975). *See also United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

45 *United States v. White*, 48 M.J. 251, 255 (C.A.A.F. 1998) (citing *United States v. Carman*, 19 M.J. 932, 936 (A.C.M.R. 1985)).

46 *United States v. Bartlett*, 66 M.J. 426 (C.A.A.F. 2008).

47 *Id.* at 429.

48 Art. 25(e)(2); R.C.M. 503(a) and R.C.M. 504(d)(1)(A)(ii).

By an executive order signed July 28, 2023, the President amended Rule for Courts-Martial (R.C.M.) 911 to require the military judge in a court-martial to randomly assign numbers to the panel members detailed to the court by the convening authority and to determine how many of the detailed members must be present at the initial session of the court-martial.[49] The general process under the amended rule requires the convening authority to detail an appropriate number of qualified members and provide a list of all detailed members to the military judge for randomization under R.C.M. 911. Military judges then control the process: they randomly assign numbers to all detailed members in an open court session and determine how many of the detailed members appear at court for the initial session.[50] At assembly (swearing in of the members), the military judge will account for the members present and those whom they have temporarily excused. The military judge then uses the list to require additional members to appear in the randomly assigned order, as needed.[51] Under this new process, the additional members can continue to perform their regular military duties in a stand-by status until they are notified to appear in court.

49 Executive Order 14103, Annex 2, para. jjjj (July 28, 2023), *available at* https://jsc.defense.gov/Military-Law/Executive-Orders/. Previously, all detailed members that had not been excused were required to appear at the initial session.

50 *Id*.

51 *Id*. at para. mmmm.

III. RANDOMIZING THE SELECTION PROCESS

In the FY23 NDAA, Congress amended Article 25(e), UCMJ, to require the convening authority to detail members "under such regulations as the President may prescribe for the randomized selection of qualified personnel, to the maximum extent practicable."[52] The President must prescribe implementing regulations by December 23, 2024.[53] However, Congress did not eliminate the Article 25(e) requirement for convening authorities to detail members best qualified for duty.

The Joint Service Committee on Military Justice (JSC) has been tasked to propose amendments to the Manual for Courts-Martial to implement the congressional requirement for the convening authority to detail qualified members through random selection.[54]

Randomizing the court-martial member selection process is not a new concept. On the contrary, it has been the subject of studies,[55] reports,[56] and scholarly articles[57] since the inception of the UCMJ. This section highlights several of these reviews.

A. Fort Riley, Kansas, Study (1973)

In 1973, the Army conducted a 13-month test of a randomized selection process at Fort Riley, Kansas.[58] Relying on selection criteria established by the general court-martial convening authority (GCMCA), a computer generated a randomized list of qualified Service members for the convening authority to use in detailing court-martial members.[59] Using this random selection method, 6 general courts-martial and 23 special courts-martial were tried before mixed officer and enlisted panels and 1 special court-martial was tried before an officer panel.[60] The percentage of warrant officers and of lower- and middle-grade enlisted members (E-3 to E-6) serving as court-martial members increased substantially, as did the number of requests to be tried by an enlisted member panel.[61]

52 FY23 NDAA, *supra* note 2, § 543.

53 *Id*.

54 *See Transcript of DAC-IPAD Public Meeting* 13 (Feb. 21, 2023) (testimony of Captain Anita Scott); transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at https://dacipad.whs.mil.

55 Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. II (Nov. 30, 1972) [Laird Task Force Report] (Secretary of Defense–commissioned study recommending that court-martial members be randomly selected without convening authority involvement in the selection process); U.S. General Accounting Office, *Military Jury System Needs Safeguards Found in Civilian Federal Courts* (June 6, 1977) [1977 GAO Military Jury Report]; DoD Joint Service Committee on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Service on Courts-Martial (1999) [JSC Member Selection Report].

56 IRC Report, *supra* note 1; Honorable Walter T. Cox III et al., Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (May 2001) [Cox Commission Report].

57 Major S. A. Lamb, *The Court-Martial Panel Member Selection Process: A Critical Analysis*, 40th Judge Advocate Officer Graduate Course, April 1992, *available at* https://apps.dtic.mil/sti/citations/ADA456700; Lindsy Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 Duke J. Compar. & Int'l L. 169 (2006).

58 JSC Member Selection Report, *supra* note 55, at Appendix J—Past Experimentation and Studies (summarizing the Fort Riley random member selection test program).

59 1977 GAO Military Jury Report, *supra* note 55, at 26.

60 JSC Member Selection Report, *supra* note 55, at Appendix J, at 4–5.

61 1977 GAO Military Jury Report, *supra* note 55, at 26–29.

Following the test period, affected community members provided their opinions on the random selection process.[62] Service members at Fort Riley favored randomization, noting an increase in both the appearance of fairness and the actual fairness of the process to the accused.[63] Trial counsel and the military judge voiced concern about the intelligence levels of junior members and their ability to understand the evidence, instructions, and arguments by counsel,[64] while defense counsel credited the inclusion of a "broader range of grades and experience" with increasing actual and perceived fairness.[65] The Chief Counsel of the Coast Guard publicly commended the process, noting that commanders and defendants generally liked the system, younger enlisted members spread the word that the defendant "really does get a full, fair, and impartial trial from start to finish," and requests for enlisted panels increased with the knowledge that the members would not all be very senior enlisted.[66]

B. GAO Review (1977)

The General Accounting Office (now called the Government Accountability Office, GAO) conducted a two-year study of civilian and military jury selection processes that included analysis of the Fort Riley test.[67] The GAO report, which was completed in 1977, recommended "that the Congress require random selection of jurors—selecting from a pool made up of qualified jurors representing a cross section of the military community. Essential personnel, such as those needed for combat during war, would be excluded from eligibility."[68]

C. Joint Service Committee Study (1999)

In the FY99 NDAA, Congress directed the Secretary of Defense to submit a report on the processes for selecting court-martial members along with alternative methods, including random selection.[69] A limitation on the study was that the alternatives had to be consistent with the existing requirements for court-martial service specified in Article 25(e).[70]

The report, drafted by the Joint Service Committee on Military Justice, identified two significant features of the military society that warrant special consideration: the significantly younger military population and the need for the selection system to "produce panel members who are available without unduly restricting the conduct of the military mission or national security."[71] The JSC proposed that many of the randomization models could be modified to ensure that the pool included Service members from all grades or ranges of grades senior to the accused.[72]

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62 *Id*. at 29 (800 questionnaires were distributed and 456 responses received; 86% of the responses were from field grade officers).

63 *Id*. at 29; *see also* JSC Member Selection Report, *supra* note 55, at Appendix J, Fort Riley Material, Memorandum to HQDA, Subject: Implementation of the Random Juror Selection Pilot Program, dated 10 Mar. 1975, at 6 (containing the statistical breakdown on the number of questionnaires sent and received by grade).

64 JSC Member Selection Report, *supra* note 55, at Appendix J, Fort Riley Material, Memorandum For: Deputy Staff Judge Advocate, Subject: Remarks Concerning Random Juries, dated 20 Feb. 1975 from Trial Counsel, and Letter to Deputy Staff Judge Advocate, dated 13 Dec. 1974 from the Military Judge, at 5–9.

65 *Id*. at Appendix J, Fort Riley Material, Memorandum For: Deputy Staff Judge Advocate, Subject: Comments of Chief Defense Counsel Regarding the Random Jury Selection Pilot Program, undated, at 1–3.

66 *Id*. at Appendix J, at 31.

67 *Id*. at Appendix J, at 4.

68 1977 GAO Military Jury Report, *supra* note 55, at *i* and 44.

69 National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920 (1998).

70 JSC Member Selection Report, *supra* note 55, at n.11 at 6 (noting alternatives that were determined to be beyond the scope of the study). The criteria identified in the report as in Article 25(d) are now located in Article 25(e)(2), UCMJ.

71 *Id.* at 8.

72 *Id.* at 21.

In addition, the report emphasized the need for court-martial members to have a high level of competence, relying in part on two factors unique to the military that are no longer applicable to panel member duties.[73] First, unlike civilian jurors, court-martial members were responsible for adjudging a sentence, a task that required them to "understand the seriousness of an offense and how it affects military operations, morale, and discipline. Court-martial members must have the judicial temperament, experience, and training necessary to adjudge punishments commensurate with the offense and the need to maintain military discipline."[74] Second, since special courts-martial without a military judge were statutorily authorized, the president of such a panel had to "comprehend and intelligently resolve procedural and evidentiary issues."[75]

The JSC considered several methods of randomizing court-martial member selection while still adhering to the mandate in Article 25(e) that the best qualified members be chosen; it concluded the current selection practice best applied the criteria in Article 25(e) in a fair and efficient manner.[76]

D. Cox Commission Report (2001)

The Cox Commission—a privately funded study sponsored by the National Institute of Military Justice and led by the Honorable Walter T. Cox III, who had previously served as Chief Judge on the Court of Appeals for the Armed Forces—held a public hearing and received written submissions on improving the military justice system. The commission issued a report in May 2001 identifying the "far-reaching role of commanding officers in the court-martial process" as the "greatest barrier to operating a fair system of criminal justice within the armed forces."[77] The Cox Commission recommended that the convening authority be removed from the court-martial member selection process immediately, finding "no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates."[78] In making this recommendation, the commission stated:

> There is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection. The current practice is an invitation to mischief. It permits—indeed, requires—a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority.[79]

E. Independent Review Commission on Sexual Assault in the Military Assessment (2021)

On February 26, 2021, at the direction of the President, the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military and directed its members to conduct a 90-day assessment of the military's treatment of sexual assault and sexual harassment.[80] In its June 2021 report, the IRC concluded that "there is a wide

73 *Id.* at 8 nn.21 and 22, and 12 (a third rationale was the presumption that "best qualified" members would more efficiently reach fair and accurate verdicts, thereby contributing to respect for the verdict and to the expeditious resolution of cases).

74 *Id.* at 8 n.22. Effective December 2023, sentencing at all non-capital cases will be determined by military judges. FY22 NDAA, *supra* note 29, at § 539E.

75 JSC Member Selection Report, *supra* note 55, at n.22 at 8. Effective January 2019, military judges are required to preside at all special courts-martial. FY22 NDAA, *supra* note 29, at § 5161.

76 JSC Member Selection Report, *supra* note 55, at 47.

77 Cox Commission Report, *supra* note 56.

78 *Id*. at 7.

79 *Id*. at 7.

80 *See* IRC Report, *supra* note 1.

chasm between what senior leaders believe is happening under their commands, and what junior enlisted Service members actually experience," resulting in broken trust between commanders and the Service men and women under their care.[81] The IRC made numerous wide-ranging recommendations to correct problems in the processes of military justice and sexual violence prevention, all of which the Secretary of Defense directed be studied and implemented to the extent feasible.[82]

As part of its assessment, the IRC reviewed how court-martial panels are selected and recommended that Article 25 be amended to establish random selection of panel members in order to "enhance the perception and reality of a fair and impartial panel," while acknowledging that the process should account for "practical realities of location and availability."[83] The IRC's recommended changes address the concern heard by the IRC from many witnesses that they lacked trust in the command-centric military justice system, noting that "that commanders hand pick members to deliver desired court-martial results."[84]

81 *Id*. at 3–4.

82 *See* Memorandum from Defense Secretary Lloyd Austin, *Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military* (Sept. 22, 2021).

83 IRC Report, *supra* note 1, at Appendix B, Rebuilding Broken Trust: Recommendations for Accountability in the Military Justice System, 54, Recommendation 1.7 d: Random Selection of Panel Members, at 54. Appendix B contains the IRC discussion and recommendations on accountability.

84 *Id*. at 6, 18, and 52.

IV. STAKEHOLDER PERSPECTIVES

The DAC-IPAD's Policy Subcommittee sent a request for information (RFI) to each of the Military Services' criminal law/military justice organizations, Offices of Special Trial Counsel, trial defense organizations, and victims' counsel organizations, requesting their responses to a series of questions on Article 25 criteria and panel selection, including the new requirement for randomization.[85] Each of these organizations also spoke at DAC-IPAD public meetings or Policy Subcommittee meetings, answering members' questions on these topics. In addition, the DAC-IPAD heard the perspectives of senior enlisted leaders,[86] former general court-martial convening authorities,[87] and several prosecutors with both military and civilian experience.[88]

The Policy Subcommittee also invited responses to questions on these issues from several victim advocacy organizations and from scholars who have written on the military justice system. The Subcommittee received written responses from Survivors United and Service Women's Action Network (SWAN), and representatives of Survivors United and Protect Our Defenders (POD) appeared at the DAC-IPAD's June 2023 public meeting to provide their perspectives on Article 25 criteria and the panel selection process. In addition, the Subcommittee received written responses from several members of academia: Professor Eugene Fidell, Dean Lisa Schenk, Professor David Schlueter, and Professor Richard Rosen.[89]

While perspectives differed on whether and how a randomized member selection process would work, on the convening authority's role in selecting members, and on the criteria that should be used for selection, each group and individual provided valuable insights to the Committee. Because the role of the convening authority in member selection is fundamental to the process, the Committee believes it is appropriate to highlight the testimony of the convening authorities who appeared before the Committee.

The former GCMCAs who spoke to the DAC-IPAD declared that the current Article 25 requirement that the convening authority select those members believed to be best qualified to serve on a court-martial panel should remain and is important for ensuring good order and discipline and military readiness, as well as promoting justice.[90] They acknowledged the importance of the perception of fairness in the system, which can affect good order and discipline, with one member adding that he selected panel members mindful that the selection must be perceived as fair and not

85 *See* DAC-IPAD Request for Information 2.9 (Apr. 24, 2023) and responses from Service criminal law organizations, Offices of Special Trial Counsel, trial defense organizations, and victims' counsel organizations, Appendix A and *available at* https://dacipad.whs.mil/.

86 *See Transcript of DAC-IPAD Public Meeting* 163–215 (June 13, 2023) (testimony of Command Sergeant Major Michael J. Bostic, U.S. Army, Regimental Command Sergeant Major; Chief Master Sergeant Laura Puza, U.S. Air Force, Senior Enlisted Advisor; Master Chief Tiffany George, U.S. Navy, Command Senior Enlisted Leader; Master Gunnery Sergeant Christopher Pere, U.S. Marine Corps, Legal Services Chief).

87 *See Transcript of DAC-IPAD Public Meeting* 112–220 (Sept. 19, 2023) (testimony of Major General David Hodne, U.S. Army; Rear Admiral (Ret.) Charles Rock, U.S. Navy; Major General Kenneth Bibb, U.S. Air Force; Major General Len Anderson IV, U.S. Marine Corps; and Rear Admiral Brian Penoyer, U.S. Coast Guard).

88 *See Transcript of DAC-IPAD Public Meeting* 100–162 (June 13, 2023) (testimony of Brigadier General Bobby Christine, Lieutenant Colonel (Promotable) Joshua Bearden, Ms. Magdalena Acevedo, and Ms. Kathleen Muldoon).

89 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; Dean Lisa Schenk, Associate Dean for National Security, Cybersecurity, and Foreign Relations Law, and Distinguished Professorial Lecturer in Law, the George Washington University Law School; Professor David Schlueter, Professor of Law Emeritus, St. Mary's University School of Law; and Professor Richard Rosen, Glenn D. West Endowed Research Professor of Law, Texas Tech University School of Law, and Colonel (Ret.), U.S. Army. Responses to the DAC-IPAD's request for information to these interest groups and members of academia can be found at Appendices K and L and are *available at* https://dacipad.whs.mil/.

90 *Transcript of DAC-IPAD Public Meeting* 119 (Sept. 19, 2023) (testimony of Major General Hodne).

as favoring those members most likely to convict.[91] The GCMCAs expressed concern that a randomized system would not allow for evaluation of members' judicial temperament—a factor that is undefined in statute, but that the GCMCAs considered to be important in providing context to other criteria. They described applying the judicial temperament criterion to select members who possessed good judgment, sound reasoning skills, and emotional intelligence; who were open-minded; and who could think critically.[92] Several stated they used the "best qualified" mandate to provide diversity in the racial, ethnic, and gender makeup of the panel, cautioning that randomization would likely result in panels that were less diverse.[93] Some GCMCAs acknowledged that while they would not put all young Service members in the category of "best qualified," most are capable of understanding the proceedings and participating in the process.[94]

One member of the GCMCA panel disagreed with the claim that moving to a randomized selection process would lead to more trust and transparency in the system, stating that it is the convening authorities' involvement in the process that builds trust into the system.[95] Several of the GCMCAs agreed that a random selection process cannot replicate the convening authorities' ability to apply the Article 25 criteria, with an understanding of the pressures on the force and of the impact on mission capability. Convening authorities rely on this understanding in making availability determinations.[96] When asked about the perception that one individual is selecting the members, several noted that they selected members with input from their staff judge advocates.[97] Several GCMCAs suggested that because they believed a randomization system would create a less qualified panel, Service members would lose trust in the process.[98]

In addition, several GCMCAs expressed the concern that randomization would eliminate the thorough prescreening necessary to facilitate detailing "best qualified" members and would require the detailing of a larger number of members to allow for a greater number of members challenged for cause, placing a burden on the force and harming mission readiness.[99] Some on the panel also suggested that if randomization was instituted and the "best qualified" mandate eliminated, then the best way to get a more diverse panel overall might be an algorithm that ensured a diversity of rank.[100] One GCMCA pointed out that diversifying by rank would be a way to incorporate the Article 25 factors of training, experience, and age.[101]

The collected RFI responses from many of these stakeholders are included at Appendixes A, B, and C.

91 *Id*. at 154 (testimony of Major General Bibb).

92 *Id*. at 119–20, 141, 160 (testimony of Major General Hodne); 144, 164–65, 178–79 (testimony of Major General Bibb); 157 (testimony of Major General Anderson); 158, 167–69, 173–74 (testimony of Rear Admiral Penoyer).

93 *Id*. at 125–26 (testimony of Major General Bibb), 128 (testimony of Major General Hodne), 130 (testimony of Real Admiral Penoyer). Note: this panel was held several days before CAAF issued the *United States v. Jeter* decision, which held that it is impermissible to use race as a factor in panel selection.

94 *Id*. at 147 (testimony of Major General Anderson), 148 (testimony of Major General Bibb).

95 *Id*. at 133–34 (testimony of Major General Hodne).

96 *Id*. at 133–34 (testimony of Major General Hodne), 134–35 (testimony of Major General Anderson), 135–36 (testimony of Major General Bibb).

97 *Id*. at 154 (testimony of Major General Bibb), 155 (testimony of Major General Anderson).

98 *Id*. at 156 (testimony of Major General Anderson), 196 (testimony of Rear Admiral Rock), 196 (testimony of Major General Bibb), 212–13 (testimony of Rear Admiral Penoyer).

99 *Id*. at 197–98 (testimony of Major General Hodne), 200–201 (testimony of Rear Admiral Penoyer).

100 *Id*. at 210 (testimony of Rear Admiral Rock), 213 (testimony of Major General Bibb).

101 *Id*. at 210 (testimony of Rear Admiral Rock).

V. THE NEED FOR CHANGE NOW

A. Analysis

Since Article 25 was established in the UCMJ in 1950, there have been repeated calls to change the system of selecting court-martial panel members to something more objective and transparent, in large part because of concerns about fairness and the perception of fairness. Under the current process, the individual who decides whether the accused will be tried by court-martial and the offenses for which they will be tried is the same person who selects the panel members who will sit in judgment of the accused. This system creates the opportunity for intentional abuse or the unintentional insertion of bias, and as numerous prior studies have pointed out it provides the appearance of unfairness. Similar concerns remain under the process beginning in December 2023, in which the Offices of Special Trial Counsel determine whether select offenses will be tried but the convening authority—whether or not they support the referral decision—retains power to select the panel members. The IRC pointed out in its June 2021 report that there is a lack of trust in the command-centric military justice system. Removing the convening authority from the selection process in favor of a randomized method will address concerns that the convening authority is selecting members who will deliver a desired result.

For decades—from the Fort Riley randomized panel selection test program and the GAO report on panel selection in 1977 to the 2001 Cox Commission to the 2021 IRC recommendations to institute randomized panel selection and remove the convening authority from the selection process—studies and reports have recognized that the current system in which the convening authority hand selects panel members by subjective application of the "best qualified" criterion creates a perception of bias and unfairness in the system.

GCMCAs described the judicial temperament criterion as important to their ability to select court-martial members possessing such qualities as good judgment, sound reasoning skills, and emotional intelligence. However, such traits are subjectively evaluated by each GCMCA and each lower-level command member that nominates prospective court-martial members, thereby contributing to the lack of transparency and the perception of bias and unfairness in the current system. The voir dire process provides a transparent forum for both prosecutors and defense counsel to evaluate member suitability.

Statutory changes to the UCMJ and technological advances, among other reasons, make clear that now is the time to finally change a system that has long been recognized as problematic. Congress acknowledged the need for change when it enacted a requirement for randomized panel selection in the FY23 NDAA.

One of the reasons repeatedly put forth for retaining the subjective "best qualified" mandate and the convening authority selection process is that military panel members have broader duties than their civilian jury counterparts, which require more complexity of thought. But following the institution of the trial judiciary in 1968; the statutory change requiring that all general and special courts-martial be presided over by a military judge, effective in 2019; and the statutory amendment requiring that all sentencing, except in capital cases, be conducted by the military judge, enacted in the FY22 NDAA, the role of military panel members will soon be virtually identical to the role of jurors in federal and most state systems.

In addition, the Military Services now can employ computerized rosters of all Service personnel to produce random selections of panel members based on objective criteria—such as requiring that all members have at least two years' time in service and be senior in grade to the accused. This improved technology can be drawn on to increase efficiency, fairness, and objectivity in the panel selection process, without an increase in administrative requirements and regardless of location and operational posture.

Some stakeholders, including the panel of former general court-martial convening authorities who spoke to the Committee at its September 2023 public meeting, pointed out that under the current system convening authorities are able to select panel members in a way that purposefully includes members of minority groups, thereby helping to ensure diversity among panel members. Although this practice of selection mindful of race would be the most difficult to replicate under a randomized selection process, the point is now moot as race-based selection is no longer legally permissible following CAAF's September 25, 2023, decision in *United States v. Jeter*. Going forward, panel member selection—by whatever process—must be race-blind. A randomized selection process that factors in diversity of grade and includes greater numbers of junior enlisted members may have the collateral effect of increasing the racial and ethnic diversity of panels.

While the Committee concludes that a randomized selection process involving objective selection criteria is the best practice, it also recommends that convening authorities should have the authority to make availability determinations and to excuse members for operational and personal reasons. This authority must be wielded with the utmost transparency to promote fairness and to prevent abuse and perceptions of unfairness, even as members' privacy interests and operational security are taken into account.

Finally, the realities of modern practice make clear that requiring that panel members be detailed at the time that charges are referred and the court-martial is convened is impractical. Members who are available to sit as panel members at the time of referral are often no longer available many months later when the trial actually takes place. Separating the panel-detailing requirement from the court-martial convening process will provide the Military Services with greater flexibility and will enable members to be selected closer in time to the trial, ensuring that fewer substitutions will be needed.

In enacting a requirement for a randomized selection process in the FY23 NDAA, Congress did not eliminate the requirement that the convening authority select the "best qualified" members as established by enumerated criteria. The Committee believes that a truly randomized selection process is incompatible with allowing the convening authority to make this subjective determination. For all of the reasons detailed in this report, the Committee recommends that Congress take the additional step of eliminating this requirement from Article 25.

Implementing a randomized process for selecting panel members with limited objective qualification criteria applied transparently will address concerns about subjectivity enabling bias or favoritism and thereby help restore confidence and trust in the military justice system by increasing the perception of fairness among Service members and the public. In addition, a selection process that is more transparent will be less susceptible to manipulation or undue influence. These revisions also have the potential to promote a broader representation of military personnel, including different ranks, backgrounds, and experiences.

Following the changes in the military justice system described above, courts-martial panel members are now performing the same fact-finding role as jurors in civilian courts: there is thus no reason to retain the outdated, subjective panel selection system that has been the source of concern and the subject of reform proposals for almost as long as it has been in place. The legitimacy of the court-martial panel selection process depends on its being perceived by Service members and the public as fair, unbiased, and transparent. Now is the time to make these important changes.

B. Recommendations

The DAC-IPAD makes the following recommendations:

Recommendation 53: Congress should amend Article 25(e) to remove the requirement for the convening authority to detail members who "in his opinion, are best qualified" based on "age, education, training, experience, length of service, and judicial temperament."

Recommendation 54: Congress should retain the Article 25(e)(4) requirement for the convening authority to detail members randomly selected under regulations prescribed by the President. The qualifying words "to the maximum extent practicable" should be removed.

Recommendation 55: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial, pursuant to the requirement in Article 25(e)(4), to provide for a randomized court-martial panel member selection process utilizing the Military Services' personnel and pay systems to select the members. This process should preclude the convening authority or other members of command or the judge advocate office from hand selecting members. In addition to the statutory qualification requirements, the randomized selection process should provide for diversity of members based on grade.

Recommendation 56: The Secretary of Defense should direct that a pilot project be initiated to create a court administrator position to be responsible for the panel member selection process—rather than the staff judge advocate or command staff.

Recommendation 57: Congress should amend Article 25 to explicitly give convening authorities the authority to determine whether randomly selected Service members are available prior to being detailed to a court-martial panel and retain the authority in Article 25 to exempt or excuse individuals for operational requirements or personal reasons after they have been detailed.

Recommendation 58: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to provide a transparent method for convening authorities to document availability and excusal determinations.

Recommendation 59: Congress should retain the requirement in Article 25(e)(1) that when it can be avoided, no accused Service member may be tried by a court-martial in which any member is junior to the accused in rank or grade.

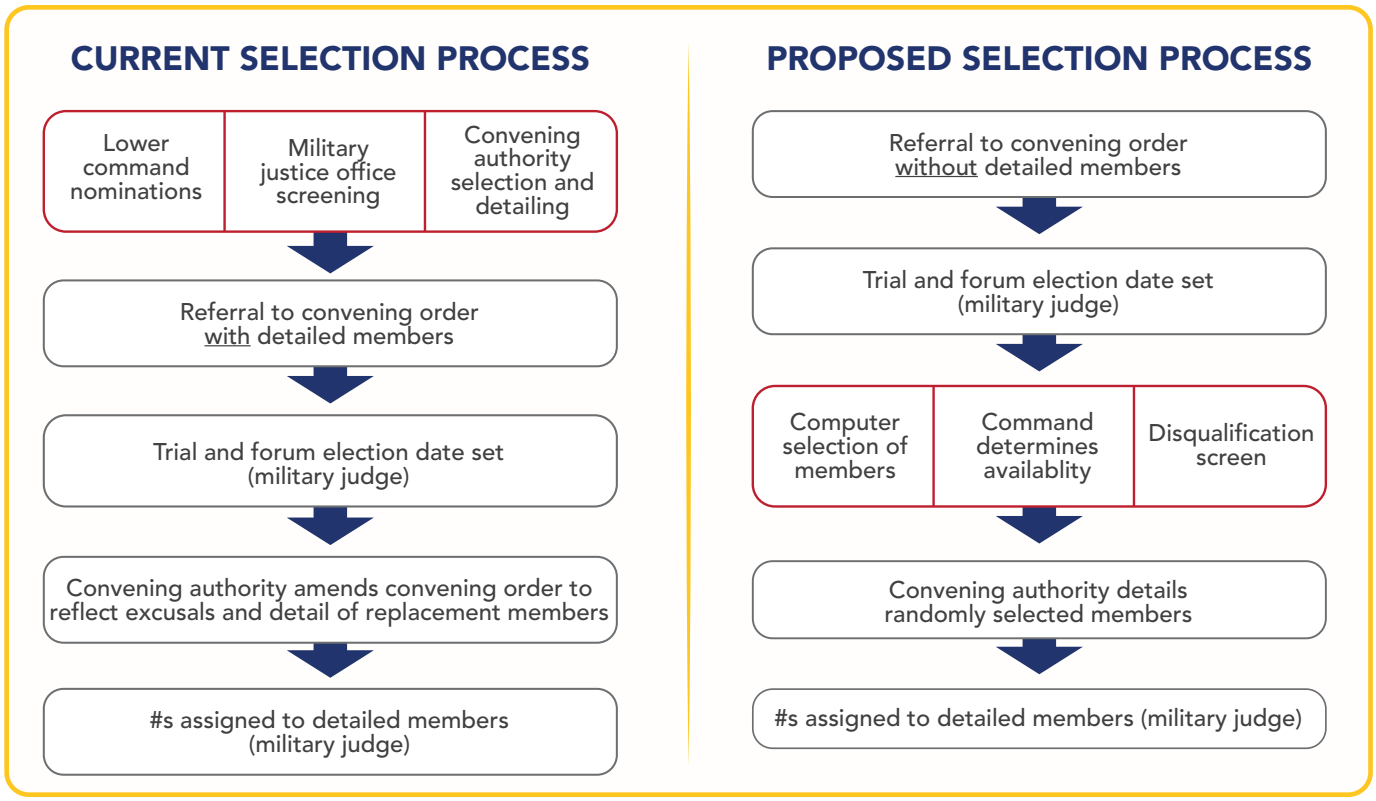
Recommendation 60: Congress should amend Article 25 to add a two-year time-in-service requirement for court-martial panel member eligibility. For Service Academy cadets and midshipman, the calculation of time in service would commence upon commissioning.

Recommendation 61: The Joint Service Committee on Military Justice should draft an amendment to the Rules for Courts-Martial to establish uniform criteria for automatic exemption from serving as a court-martial member. For example, federal courts require jury members to be proficient in English, have no disqualifying mental or physical condition, and not be subject to felony charges or be convicted of a felony. The amendment should delegate authority to each Military Department Secretary to promulgate regulations that establish additional bases for automatic exemption. To ensure maximum transparency, any additional exempting criteria established by the Military Departments should be made public through the Federal Register and by other appropriate means.

Recommendation 62: Congress should amend Article 25(e)(2) and (3) to remove the requirement that the convening authority detail panel members at the time the court-martial is convened. Instead, it should provide that the convening authority must detail panel members within a reasonable time prior to the swearing in of the detailed members and the assembly of the court-martial.

VI. PROPOSED REFORMS TO THE PANEL MEMBER SELECTION PROCESS

The following comparison chart depicts the flow of the current court-martial panel selection process described in detail in Section II of this report and the proposed court-martial panel selection process described below:



The proposed system will begin with referral of charges and the convening of the court-martial. Rather than members being detailed to the court-martial when it is convened, panel selection will take place later.

Following referral, the military judge will set a trial date and a date for the accused to elect whether to be tried by a panel of members or by a military judge. If the accused and government enter into a plea agreement requiring the accused to be tried by a military judge alone—or if the accused otherwise elects to be tried by a military judge—panel members will not be selected for the trial.

If the accused requests a panel of members to hear the case, or if forum election is deferred until the start of trial, the panel members will be selected in time for the appropriate number to be detailed to the courts-martial at least two weeks before the scheduled trial date.

To select panel members, using a database interface with the Service's personnel system, the official assigned to run the selection process creates an algorithm to select a random slate of military members (e.g., 100 members) from the

command or from a certain geographic location. Because the selection of members is subject to a number of filters placed on the system, it is not completely randomized. These filters include

- Grade, and for the accused's grade, rank: members must, when possible, be senior to the accused
- Time in service: members must have at least two years in service
- Availability: those members who are in the system as deployed or in temporary duty (TDY), or otherwise unavailable, during the trial dates are filtered out
- Diversity in grade and rank: to ensure diversity in grade on the panel, the numbers or percentages of randomly selected members by each enlisted grade (for enlisted accused) and officer grades are set

The Services already have the capability to use their personnel and pay systems as the basis for generating a randomized pool of Service members for court-martial duty.[102] Each system maintains some information on Service members' age, rank, time in service, education, location, unit, assignment, training, gender, race, ethnicity, and availability. Updated information for these mission-critical systems is generally added within 24 hours, and the systems are accessible everywhere there is an internet connection. The Services are able to build or use existing analytical tools with a user interface in order to quickly and easily produce a computer-generated randomized list of panel members based on requirements programmed into the system. Lists can be generated based on units and/or locations. While some availability criteria would be in the systems (e.g., permanent change-of-station orders), follow-up with the commands and/or the Service members would be required to reliably determine future availability affected by leave, TDY, and other mission requirements. The depth of information available on each criterion varies by Service.

After the initial pool of members are selected via the randomized system, the selected members' commanders are notified and asked to make a recommendation regarding the availability of the members for the projected trial dates. The convening authority (or designee) makes final availability determinations and, if a member is determined to be unavailable, documents the reason in a way that provides transparency while protecting national security and the member's personal information.

The designated selection official will send courts-martial questionnaires to those selected members determined to be available in order to identify other disqualifying criteria as determined by statute, the President, or the Services (e.g., exclusion of members if they were the accuser, had served as preliminary hearing officer or counsel, or will be witnesses in the case). The designated selection official will review the questionnaires and remove disqualified members from the list.

After the modified randomized selection process picks the designated number of panel members and those members determined to be unavailable or otherwise disqualified have been removed from the list, the remaining members are detailed to the court-martial by the convening authority. The members are notified that they have been detailed and are required to inform the designated selection official of any changes that would preclude them from participating in the court-martial during the projected dates of trial.

The list of detailed members is then provided to the military judge, who randomly assigns numbers to the detailed members and determines the number that are required to appear at the court-martial. The members selected to appear at the court-martial are notified and provided instructions on where and when to be present for court-martial duty. The

102 As part of this study, DAC-IPAD staff interviewed experts on the Services Personnel and Pay Systems (hereinafter Personnel Systems) to determine what information relevant to court-martial member selection was collected in those systems and could be reliably accessed to generate randomized lists of Service members based on programmed requirements. The Services use the following Personnel Systems: the Navy Standard Integrated Personnel System, the Marine Corps Total Force System, the Army Integrated Personnel and Pay System, the Air Force Military Personnel Data System and the Coast Guard Direct Access System. Service Alpha rosters are generated from these Personnel Systems.

remaining members are notified that they should remain available during the projected dates of trial in case they are needed.

If need arises between the time that members are detailed and the court assembles, the convening authority or designee may, upon request of the panel member and their commander, excuse the member. If this request occurs after assembly of the court, the convening authority may excuse a member only for good cause. The excusal must be documented in a way that provides transparency while protecting national security and the member's personal information.

If the trial is delayed after the members have been detailed but prior to assembly, the convening authority may excuse detailed members who are not available for the new trial dates. Excused members will be replaced by previously detailed members in the numerical order previously prescribed by the military judge. If, after excusals, additional members are required, the designated selection official will use the modified randomized selection process discussed above to select a cohort of additional members available for detail to the court by the convening authority. The list of additional members will be provided to the military judge for random assignment of numbers.

The Military Services should have some discretion and flexibility to modify this system as best meets their needs. For example, members may be selected for each court-martial, or members may be selected in a pool from which the members of each court-martial are drawn for a prescribed period of time (e.g., six months).

VII. CONCLUSION

To increase Service members' trust in the court-martial process, the outdated, subjective panel selection system must evolve. Congress recognized this need by enacting a requirement for a randomized panel selection process. The DAC-IPAD recommends that Congress take the next step in fully implementing this process by eliminating the Article 25 "best qualified" mandate and replacing it with objective selection criteria, applied transparently.

The Committee believes that the proposed revisions to the panel selection process appropriately takes into account the need for objectivity and transparency, the reduced role of court-martial panel members, technological advancements available to implement random selection, and the necessity for convening authorities to retain availability and excusal determination authority. In addition, detailing panel members closer in time to the trial date acknowledges that many accused Service members elect trial by military judge alone, as well as the increased length of time between referral of charges and the start of court-martial proceedings.

Separate Statement of Meghan Tokash

December 5, 2023

Congress created the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces (DAC-IPAD) as an independent body 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.[1] How the military has handled cases involving sexual assault and related offenses (colloquially known as "special victim crimes") has been the subject of intense scrutiny by the Congress and the public over the past decade.[2] To address these concerns, in 2021, at the direction of the President, the Secretary of Defense established the Independent Review Commission on Sexual Assault in the Military (IRC) to conduct an "independent, impartial assessment" of the military's current treatment of sexual assault and sexual harassment.[3] In its final assessment, the IRC found that trust has been broken between commanders and the Service men and women under their care at almost all stages of the military justice system.[4]

Court-martial panel selection is a critically important part of the military justice process. And while Congress made historic reforms in the FY2022 and FY2023 National Defense Authorization Acts, including removing the commander's authority over prosecutions of rape, sexual assault, and other special victim-based offenses, the commander still has a role in the court-martial panel assembly process.[5] The DAC-IPAD's assessment of Article 25, UCMJ, hits many of the right notes, but it does not go far enough. The full suite of recommendations falls short of removing commanders from making availability and excusal determinations for panel members. I write a separate dissent here because leaving commanders in this role fails to address the perception that they may not make those determinations objectively or transparently.[6]

The DAC-IPAD's recommendation and supporting finding that, in the interest of military readiness, convening authorities must retain availability and excusal determination authority are based on the testimony of high-ranking

1 The Secretary of Defense, pursuant to § 546 of the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, (Pub. L. No. 113-291) [FY15 NDAA], 128 Stat. 3292 (2014), as modified by § 537 of the National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726, and in accordance with the provisions of the Federal Advisory Committee Act (FACA) of 1972 (5 U.S.C., Appendix, as amended) and 41 C.F.R. § 102-3.50(a), established this nondiscretionary Committee. The Committee, pursuant to § 546(c)(1) of the FY15 NDAA, will advise the Secretary of Defense and the Deputy 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.

2 Thom Shanker, "Pentagon Finishing Rules to Curb Sexual Assaults," *New York Times*, Aug. 7, 2013, https://www.nytimes.com/2013/08/08/us/hagel-finishing-rules-to-curb-sexual-assault-in-military.html.

3 At the direction of President Biden, on February 26, 2021, Secretary of Defense Austin established the 90-Day Independent Review Commission on Sexual Assault in the Military. The Commission, chaired by Lynn Rosenthal, was charged with conducting "an independent, impartial assessment" of the military's current treatment of sexual assault and sexual harassment. The IRC officially began its review on March 24, 2021, and delivered its report and recommendations to Secretary Austin on July 2, 2021.

4 Independent Review Commission on Sexual Assault in the Military, Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military 3–4 (July 2021) [IRC Report], *available at* https://media.defense.gov/2021/Jul/02/2002755437/-1/-1/0/IRC-FULL-REPORT-FINAL-1923-7-1-21.PDF.

5 "Summary of the Fiscal Year 2022 National Defense Authorization Act," United States Senate Committee on Armed Services, 2–3, https://www.armed-services.senate.gov/imo/media/doc/FY22%20NDAA%20Agreement%20Summary.pdf; "Summary of the Fiscal Year 2023 National Defense Authorization Act," United States Senate Committee on Armed Services, 4, https://www.armed-services.senate.gov/imo/media/doc/fy23_ndaa_agreement_summary.pdf

6 *See Transcript of DAC-IPAD Public Meeting* 90-215 (Sept. 20, 2023).

commanders and attorneys within the U.S. military.[7] It disregards the concerns raised both by sexual assault survivors and by military accused. Those voices tell us that keeping commanders in such a role—even a seemingly administrative one—creates the appearance that the process of selecting Service members to decide the outcomes of sexual assault cases is untrustworthy.[8] If we have learned anything from the lessons of the IRC, it is that "there is a wide chasm between what senior leaders believe is happening under their commands, and what junior enlisted Service members actually experience," resulting in broken trust between commanders and the Service men and women under their care.[9]

Preserving command authority over this purely administrative step in the pretrial process weakens trust, especially when the trial judiciary can more appropriately fill this role. In the year 2023, when most members of the Armed Forces are digital natives and the wall between the military and the civilian world is incredibly thin, antiquated and paternalistic command involvement with the selection of panel members is unnecessary. Instead, the military should establish court clerks within the trial judiciary who can make preliminary excusal determinations. And, once summoned to the courtroom, the individual Service member is perfectly capable of informing the military judge of their availability. If a Service member is unavailable—owing to deployment orders, parental leave, or any other reason—today's military judges are more than capable of making appropriate excusal determinations and having them do so "will go a long way to the perception of fairness" of the process.[10] I have neither seen nor heard any empirical evidence to prove that taking this authority away from commanders and giving it to military judges will degrade good order and discipline.[11] Nor has the DAC-IPAD heard that military judges would somehow be incapable of handling a task that their Article III judge counterparts across the United States manage every day. In an age of historic military justice reform, this is a moment for additional transparency and judicial parity. I therefore vote no on Recommendation 57.

7 *See Transcript of DAC-IPAD Public Meeting* 112–220 (Sept. 19, 2023) (testimony of Major General David Hodne, U.S. Army; Rear Admiral (Ret.) Charles Rock, U.S. Navy; Major General Kenneth Bibb, U.S. Air Force; Major General Len Anderson IV, U.S. Marine Corps; and Rear Admiral Brian Penoyer, U.S. Coast Guard). Transcripts of all DAC-IPAD public meetings can be found on the DAC-IPAD website at https://dacipad.whs.mil/; *See also* Appendix A, Service responses to DAC-IPAD request for information.

8 *See Transcript of DAC-IPAD Public Meeting* 14 (Dec. 7, 2022).

9 IRC Report, *supra* n. 4, at 3–4.

10 *See Transcript of DAC-IPAD Public Meeting* 92-92 (Feb. 22, 2023) (testimony of former military judge LtCol (retired) Michael Libretto).

11 All transcripts and supporting materials are available at the DAC-IPAD website, https://dacipad.whs.mil/.

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.

Table D-4.
U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense,
During the 12-Month Period Ending December 31, 2021

Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Bench Trial	Jury Trial			Bench Trial	Jury Trial
Total	**67,686**	**5,617**	**5,379**	**54**	**184**	**62,069**	**61,066**	**123**	**880**
Violent Offenses, Total	**2,475**	**380**	**346**	**5**	**29**	**2,095**	**1,989**	**8**	**98**
Homicide	149	46	40	1	5	103	97	-	6
Robbery	**426**	**32**	**27**	**1**	**4**	**394**	**385**	**-**	**9**
Bank	365	24	19	1	4	341	332	-	9
Other Robbery Offenses	61	8	8	-	-	53	53	-	-
Assault	939	231	211	2	18	708	688	5	15
Kidnapping	118	17	15	-	2	101	85	-	16
Racketeering	552	22	22	-	-	530	488	1	41
Carjacking	125	17	16	1	-	108	107	-	1
Terrorism	34	3	3	-	-	31	25	2	4
Other Violent Offenses	132	12	12	-	-	120	114	-	6
Property Offenses, Total	**7,416**	**942**	**907**	**12**	**23**	**6,474**	**6,323**	**15**	**136**
Burglary	**38**	**4**	**4**	**-**	**-**	**34**	**34**	**-**	**-**
Larceny and Theft	**1,127**	**281**	**278**	**-**	**3**	**846**	**834**	**5**	**7**
Bank	25	1	1	-	-	24	24	-	-
Postal Service	190	10	10	-	-	180	180	-	-
Interstate Shipments	11	1	1	-	-	10	9	-	1
Theft of U.S. Property	782	234	231	-	3	548	541	1	6
Theft Within Maritime Jurisdiction	45	22	22	-	-	23	21	2	-
Transportation of Stolen Property	61	10	10	-	-	51	51	-	-
Other Larceny and Theft Offenses	13	3	3	-	-	10	8	2	-
Embezzlement	**240**	**31**	**29**	**-**	**2**	**209**	**205**	**1**	**3**
Bank	16	-	-	-	-	16	16	-	-
Postal Service	120	15	15	-	-	105	105	-	-
Financial Institutions	10	-	-	-	-	10	9	1	-
Other Embezzlement Offenses	94	16	14	-	2	78	75	-	3
Fraud	**5,734**	**567**	**541**	**10**	**16**	**5,167**	**5,035**	**7**	**125**
Tax	377	15	15	-	-	362	351	-	11
Financial Institutions	315	16	16	-	-	299	291	-	8
Securities and Exchange	69	11	8	3	-	58	53	-	5
Mail	163	20	19	-	1	143	142	-	1
Wire, Radio, or Television	526	27	26	-	1	499	488	-	11

Bankruptcy	28	1	1	-	-	27	25	1	1
Social Security	136	23	22	1	-	113	110	1	2
False Personation	19	4	4	-	-	15	13	-	2
Citizenship and Naturalization	81	22	22	-	-	59	59	-	-
Passport	193	12	11	1	-	181	180	-	1
Identification Documents and Information	502	41	41	-	-	461	453	2	6
False Claims of Government Services	62	11	10	-	1	51	48	-	3
False Statements	587	51	45	2	4	536	530	-	6
Conspiracy to Defraud the United States	1,116	72	70	-	2	1,044	1,032	2	10
Unauthorized Access Devices	221	32	32	-	-	189	185	-	4
Computer	48	6	6	-	-	42	41	-	1
Health Care	208	35	31	2	2	173	158	1	14
Attempt and Conspiracy to Defraud	1,050	161	155	1	5	889	851	-	38
Other Fraud Offenses	33	7	7	-	-	26	25	-	1
Forgery and Counterfeiting	**144**	**16**	**16**	**-**	**-**	**128**	**126**	**1**	**1**
Auto Theft	**16**	**-**	**-**	**-**	**-**	**16**	**16**	**-**	**-**
Other Property Offenses	**117**	**43**	**39**	**2**	**2**	**74**	**73**	**1**	**-**
Drug Offenses, Total	**20,608**	**1,909**	**1,863**	**4**	**42**	**18,699**	**18,413**	**22**	**264**
Marijuana	**1,287**	**306**	**304**	**1**	**1**	**981**	**965**	**3**	**13**
Sell, Distribute, or Dispense	790	79	78	-	1	711	698	3	10
Import/Export	103	8	8	-	-	95	94	-	1
Manufacture	32	2	2	-	-	30	28	-	2
Possession	362	217	216	1	-	145	145	-	-
All Other Drugs	**19,268**	**1,593**	**1,550**	**2**	**41**	**17,675**	**17,409**	**18**	**248**
Sell, Distribute, or Dispense	16,234	1,121	1,083	2	36	15,113	14,863	17	233
Import/Export	2,568	351	346	-	5	2,217	2,210	-	7
Manufacture	135	9	9	-	-	126	121	-	5
Possession	331	112	112	-	-	219	215	1	3
Other Drug Offenses	**53**	**10**	**9**	**1**	**-**	**43**	**39**	**1**	**3**
Firearms and Explosives Offenses, Total	**10,763**	**741**	**687**	**9**	**45**	**10,022**	**9,801**	**34**	**187**
Firearms	**10,638**	**728**	**676**	**7**	**45**	**9,910**	**9,693**	**34**	**183**
Possession by Prohibited Persons	6,987	474	438	2	34	6,513	6,386	26	101
Furtherance of Violent/Drug-Trafficking Crimes	1,744	132	125	3	4	1,612	1,558	4	50
Other Firearms Offenses	1,907	122	113	2	7	1,785	1,749	4	32
Explosives	**125**	**13**	**11**	**2**	**-**	**112**	**108**	**-**	**4**
Sex Offenses, Total	**3,016**	**212**	**193**	**3**	**16**	**2,804**	**2,701**	**11**	**92**
Sexual Abuse of Adults	94	26	21	-	5	68	62	-	6
Sexual Abuse of Minors	739	66	62	1	3	673	625	3	45
Sexually Explicit Material	1,480	60	56	-	4	1,420	1,396	4	20
Transportation for Illegal Sexual Activity	344	17	14	-	3	327	303	4	20
Sex Offender Registry	350	41	38	2	1	309	308	-	1
Other Sex Offenses	9	2	2	-	-	7	7	-	-

Justice System Offenses, Total	**910**	**138**	**135**	-	**3**	**772**	**751**	**2**	**19**
Aiding, Abetting, or Accessory	261	7	7	-	-	254	254	-	-
Obstruction of Justice	145	27	24	-	3	118	101	-	17
Escape from Custody	358	47	47	-	-	311	309	1	1
Failure to Appear	107	51	51	-	-	56	56	-	-
Perjury	18	3	3	-	-	15	14	1	-
Contempt	21	3	3	-	-	18	17	-	1
Immigration Offenses, Total	**17,975**	**440**	**428**	**4**	**8**	**17,535**	**17,489**	**10**	**36**
Alien Smuggling	4,114	119	115	-	4	3,995	3,974	2	19
Improper Entry by Alien	384	29	28	-	1	355	354	1	-
Improper Reentry by Alien	12,934	237	233	3	1	12,697	12,675	7	15
Fraud and Misuse of Visa/Permits	458	11	9	1	1	447	446	-	1
Other Immigration Offenses	85	44	43	-	1	41	40	-	1
General Offenses, Total	**1,884**	**335**	**323**	**5**	**7**	**1,549**	**1,515**	**2**	**32**
Bribery	71	4	3	-	1	67	64	-	3
Money Laundering	636	73	72	-	1	563	552	1	10
RICO (Racketeer Influenced and Corrupt Organizations Act)	198	3	2	-	1	195	185	-	10
Racketeering	66	4	3	-	1	62	62	-	-
Extortion and Threats	151	28	24	1	3	123	120	-	3
Gambling and Lottery	36	1	1	-	-	35	35	-	-
Failure to Pay Child Support	5	2	2	-	-	3	3	-	-
Other General Offenses	721	220	216	4	-	501	494	1	6
Regulatory Offenses, Total	**1,254**	**149**	**130**	**8**	**11**	**1,105**	**1,080**	**9**	**16**
Civil Rights	97	17	10	-	7	80	71	1	8
Copyright	10	2	2	-	-	8	8	-	-
Food and Drug	57	2	2	-	-	55	53	-	2
Hazardous Waste Treatment, Disposal, and Storage	16	2	1	-	1	14	14	-	-
Telegraph, Telephone, and Radiograph	4	1	1	-	-	3	3	-	-
National Defense	47	11	11	-	-	36	35	-	1
Antitrust	12	1	1	-	-	11	11	-	-
Labor	27	2	2	-	-	25	24	-	1
Game and Conservation	101	14	14	-	-	87	85	2	-
National Parks/Recreation	28	1	1	-	-	27	27	-	-
Customs	246	18	16	-	2	228	225	2	1
Postal Service	92	3	3	-	-	89	89	-	-
Reporting of Monetary Transactions	137	10	10	-	-	127	126	1	-
Migratory Bird	38	8	2	6	-	30	29	1	-
Maritime and Shipping	65	2	1	-	1	63	62	1	-

Aircraft Regulations	50	12	11	1	-	38	37	-	1
Other Regulatory Offenses	227	43	42	1	-	184	181	1	2
Traffic Offenses, Total	**1,385**	**371**	**367**	**4**	-	**1,014**	**1,004**	**10**	-
Drunk Driving	541	93	92	1	-	448	442	6	-
Other Traffic Offenses	844	278	275	3	-	566	562	4	-

NOTE: This table includes defendants in all cases filed as felonies or Class A misdemeanors, but includes only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges.

Table D-4.
U.S. District Courts–Criminal Defendants Disposed of, by Type of Disposition and Offense,
During the 12-Month Period Ending December 31, 2022

Offense	Total Defendants	Not Convicted				Convicted and Sentenced			
		Total	Dismissed	Acquitted by		Total	Plea of Guilty	Convicted by	
				Bench Trial	Jury Trial			Bench Trial	Jury Trial
Total	**71,896**	**6,434**	**6,140**	**68**	**226**	**65,462**	**64,067**	**132**	**1,263**
Violent Offenses, Total	**2,808**	**378**	**337**	**9**	**32**	**2,430**	**2,272**	**8**	**150**
Homicide	205	49	45	-	4	156	138	-	18
Robbery	**418**	**15**	**14**	**1**	**-**	**403**	**393**	**1**	**9**
Bank	369	14	13	1	-	355	346	1	8
Other Robbery Offenses	49	1	1	-	-	48	47	-	1
Assault	1,000	220	204	6	10	780	750	2	28
Kidnapping	152	31	22	1	8	121	96	1	24
Racketeering	657	24	21	-	3	633	578	4	51
Carjacking	175	20	15	-	5	155	148	-	7
Terrorism	56	5	5	-	-	51	46	-	5
Other Violent Offenses	145	14	11	1	2	131	123	-	8
Property Offenses, Total	**8,058**	**939**	**896**	**9**	**34**	**7,119**	**6,875**	**14**	**230**
Burglary	**42**	**2**	**2**	**-**	**-**	**40**	**39**	**-**	**1**
Larceny and Theft	**1,000**	**209**	**208**	**-**	**1**	**791**	**781**	**2**	**8**
Bank	46	1	1	-	-	45	44	-	1
Postal Service	164	10	10	-	-	154	153	-	1
Interstate Shipments	13	1	1	-	-	12	12	-	-
Theft of U.S. Property	668	173	172	-	1	495	487	2	6
Theft Within Maritime Jurisdiction	42	18	18	-	-	24	24	-	-
Transportation of Stolen Property	55	5	5	-	-	50	50	-	-
Other Larceny and Theft Offenses	12	1	1	-	-	11	11	-	-
Embezzlement	**248**	**39**	**38**	**-**	**1**	**209**	**205**	**-**	**4**
Bank	32	4	4	-	-	28	28	-	-
Postal Service	111	22	22	-	-	89	89	-	-
Financial Institutions	8	1	1	-	-	7	7	-	-
Other Embezzlement Offenses	97	12	11	-	1	85	81	-	4
Fraud	**6,487**	**629**	**589**	**8**	**32**	**5,858**	**5,637**	**9**	**212**
Tax	402	24	23	-	1	378	359	-	19
Financial Institutions	323	20	19	1	-	303	296	-	7
Securities and Exchange	67	7	7	-	-	60	57	-	3
Mail	159	13	13	-	-	146	138	-	8
Wire, Radio, or Television	720	52	44	-	8	668	641	2	25
Bankruptcy	27	5	4	-	1	22	20	-	2

Social Security	148	59	59	-	-	89	86	-	3
False Personation	15	3	1	1	1	12	11	-	1
Citizenship and Naturalization	75	19	19	-	-	56	50	2	4
Passport	166	8	8	-	-	158	156	1	1
Identification Documents and Information	544	35	35	-	-	509	499	3	7
False Claims of Government Services	38	6	6	-	-	32	28	-	4
False Statements	537	55	54	-	1	482	475	-	7
Conspiracy to Defraud the United States	1,411	95	94	-	1	1,316	1,284	-	32
Unauthorized Access Devices	211	15	15	-	-	196	192	-	4
Computer	49	16	14	-	2	33	31	-	2
Health Care	258	58	48	3	7	200	188	-	12
Attempt and Conspiracy to Defraud	1,299	136	124	2	10	1,163	1,091	1	71
Other Fraud Offenses	38	3	2	1	-	35	35	-	-
Forgery and Counterfeiting	**151**	**32**	**31**	**1**	**-**	**119**	**118**	**-**	**1**
Auto Theft	**21**	**3**	**3**	**-**	**-**	**18**	**17**	**-**	**1**
Other Property Offenses	**109**	**25**	**25**	**-**	**-**	**84**	**78**	**3**	**3**
Drug Offenses, Total	**22,204**	**2,366**	**2,308**	**12**	**46**	**19,838**	**19,485**	**21**	**332**
Marijuana	**1,208**	**466**	**466**	**-**	**-**	**742**	**730**	**2**	**10**
Sell, Distribute, or Dispense	684	86	86	-	-	598	588	2	8
Import/Export	54	25	25	-	-	29	27	-	2
Manufacture	33	7	7	-	-	26	26	-	-
Possession	437	348	348	-	-	89	89	-	-
All Other Drugs	**20,918**	**1,880**	**1,823**	**12**	**45**	**19,038**	**18,702**	**19**	**317**
Sell, Distribute, or Dispense	18,216	1,310	1,265	8	37	16,906	16,591	18	297
Import/Export	2,178	397	387	3	7	1,781	1,764	1	16
Manufacture	178	31	29	1	1	147	143	-	4
Possession	346	142	142	-	-	204	204	-	-
Other Drug Offenses	**78**	**20**	**19**	**-**	**1**	**58**	**53**	**-**	**5**
Firearms and Explosives Offenses, Total	**11,036**	**760**	**701**	**12**	**47**	**10,276**	**10,035**	**24**	**217**
Firearms	**10,905**	**744**	**686**	**12**	**46**	**10,161**	**9,923**	**24**	**214**
Possession by Prohibited Persons	7,154	489	452	9	28	6,665	6,530	13	122
Furtherance of Violent/Drug-Trafficking Crimes	1,707	134	125	1	8	1,573	1,520	5	48
Other Firearms Offenses	2,044	121	109	2	10	1,923	1,873	6	44
Explosives	**131**	**16**	**15**	**-**	**1**	**115**	**112**	**-**	**3**
Sex Offenses, Total	**3,301**	**173**	**160**	**1**	**12**	**3,128**	**2,963**	**13**	**152**
Sexual Abuse of Adults	106	27	21	-	6	79	61	2	16
Sexual Abuse of Minors	927	53	49	-	4	874	808	2	64
Sexually Explicit Material	1,544	49	47	-	2	1,495	1,458	3	34
Transportation for Illegal Sexual Activity	409	24	24	-	-	385	348	3	34
Sex Offender Registry	310	19	18	1	-	291	284	3	4
Other Sex Offenses	5	1	1	-	-	4	4	-	-
Justice System Offenses, Total	**1,037**	**157**	**139**	**5**	**13**	**880**	**825**	**7**	**48**
Aiding, Abetting, or Accessory	298	10	9	-	1	288	288	-	-

Obstruction of Justice	212	34	19	4	11	178	133	3	42
Escape from Custody	357	29	27	1	1	328	327	-	1
Failure to Appear	106	64	64	-	-	42	41	-	1
Perjury	23	2	2	-	-	21	18	-	3
Contempt	41	18	18	-	-	23	18	4	1
Immigration Offenses, Total	**18,220**	**437**	**414**	**7**	**16**	**17,783**	**17,730**	**20**	**33**
Alien Smuggling	4,229	143	131	2	10	4,086	4,055	8	23
Improper Entry by Alien	383	8	8	-	-	375	373	1	1
Improper Reentry by Alien	13,084	269	258	5	6	12,815	12,797	10	8
Fraud and Misuse of Visa/Permits	467	11	11	-	-	456	455	1	-
Other Immigration Offenses	57	6	6	-	-	51	50	-	1
General Offenses, Total	**1,899**	**362**	**352**	**3**	**7**	**1,537**	**1,472**	**7**	**58**
Bribery	88	8	6	-	2	80	76	-	4
Money Laundering	754	140	136	2	2	614	583	2	29
RICO (Racketeer Influenced and Corrupt Organizations Act)	300	1	1	-	-	299	287	-	12
Racketeering	61	4	4	-	-	57	57	-	-
Extortion and Threats	147	17	15	1	1	130	119	1	10
Gambling and Lottery	17	1	1	-	-	16	16	-	-
Failure to Pay Child Support	1	1	1	-	-	-	-	-	-
Other General Offenses	531	190	188	-	2	341	334	4	3
Regulatory Offenses, Total	**1,344**	**171**	**145**	**7**	**19**	**1,173**	**1,123**	**8**	**42**
Civil Rights	180	24	17	2	5	156	127	1	28
Copyright	2	-	-	-	-	2	2	-	-
Food and Drug	43	2	2	-	-	41	40	-	1
Hazardous Waste Treatment, Disposal, and Storage	29	3	-	3	-	26	26	-	-
Telegraph, Telephone, and Radiograph	8	-	-	-	-	8	8	-	-
National Defense	51	12	12	-	-	39	36	-	3
Antitrust	27	15	8	-	7	12	10	-	2
Labor	25	-	-	-	-	25	25	-	-
Game and Conservation	72	11	11	-	-	61	61	-	-
National Parks/Recreation	29	2	2	-	-	27	26	-	1
Customs	307	14	13	-	1	293	289	2	2
Postal Service	76	14	13	-	1	62	62	-	-
Reporting of Monetary Transactions	127	14	12	-	2	113	112	1	-
Migratory Bird	13	-	-	-	-	13	12	1	-
Maritime and Shipping	61	-	-	-	-	61	58	1	2
Aircraft Regulations	63	15	12	1	2	48	47	-	1
Other Regulatory Offenses	231	45	43	1	1	186	182	2	2
Traffic Offenses, Total	**1,989**	**691**	**688**	**3**	**-**	**1,298**	**1,287**	**10**	**1**

Drunk Driving	721	162	160	2	-	559	552	6	1
Other Traffic Offenses	1,268	529	528	1	-	739	735	4	-

NOTE: This table includes defendants in all cases filed as felonies or Class A misdemeanors, but includes only those defendants in cases filed as petty offenses that were assigned to district judges rather than magistrate judges.

Request for Information Set 2.9, Narrative Questions
Service Office of Special Trial Counsel (OSTC) 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.

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 OSTC: No, there should not be exclusion based on a minimum age for potential military panel members. Pursuant to Article 25, UCMJ, convening authorities may consider age as one criterion among other equally weighted criteria (i.e., education, training, experience, length of service, and judicial temperament) to select the best qualified service members to serve as potential court-martial panel members.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the age criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There should not be a different minimum age requirement for military panel members.

Coast Guard Office of the Chief Prosecutor: The Office of the Chief Prosecutor defers to the Office of Military Justice on all responses.

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 OSTC: The military reason to support this requirement is found in the preamble to the Manual for Courts-Martial: "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." In order to maintain good order and discipline and to achieve an effective, lethal, and obedient force, superior ranked uniform personnel exercise command authority over junior personnel. Additionally, a junior Soldier may feel inhibited or reluctant to vote to convict a more senior Servicemember, such as an NCO or officer. Likewise, some junior Soldiers may be more inclined to convict someone of superior rank. Having panel members who are senior in rank or grade removes those possible biases.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the criteria requiring panel members to be senior in rank to the accused. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: The UCMJ should retain the requirement that panel members be senior in rank and grade to the Accused. This is due to the hierarchical structure of the military. It is antithetical to the military rank structure to call upon junior service members to judge the actions of a service member who outranks them. Moreover, even if junior members are not within the chain of command or supervision of an accused, there is a significant danger rank disparity will create a coercive environment. For example, if an E-7 is facing an allegation of sexual assault, there is a significant risk an E-4 might feel pressure to come to a particular outcome he/she believes other NCOs in the relevant military community desire.

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 OSTC: No, a minimum length of service requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider length of service as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member.

Navy OSTC: We concur with the comment of the Navy's Criminal Law Division that we should maximize the potential pool and do not need to add a minimum length of service requirement. The experience and seniority requirements discussed above already operate as de facto filter for a potential member's time in service.

Marine Corps OSTC: OSTC recommends no changes to the length of service criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: There does not need to be a minimum length of service requirement. By the time a member is eligible to serve on a panel they will have gone through the basic training/Reserve Officer Training Corps (ROTC)/Officer Training School (OTS) and technical training which has given them sufficient time to acclimate to the military. Additionally, there is no compelling reason that they need more time in the military in order to follow the Military Judge's instructions and the law as given to them. Requiring members to be senior to the accused in rank and grade will ensure panel members have the requisite experience to sit as a panel member in a particular case.

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 OSTC: No, a minimum education requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider education as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member. However, education should remain one of several selection factors due to the value that education brings to a body charged with making informed, critical decisions.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the education criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: 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.

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 OSTC: No, a minimum experience requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider experience as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member. Like education, experience should remain a factor in selecting panel members. Experience gives panels members additional perspectives that inexperienced members may not have. Additionally, military-related UCMJ offenses such as fraternization sometimes include an element (explicit or implicit) regarding the "custom of the service." All Article 134 offenses have as an element either "to the prejudice of good order and discipline" or "of a nature to bring discredit to the armed forces." These types of elements are often best judged by someone who actually has lived experience within the armed forces, is familiar with customs of the service, and has seen both strong and degraded good order and discipline.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the experience criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: 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.

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?

Army OSTC: No, a minimum or specific training requirement should not exclude members from being eligible to serve as court-martial panel members. Pursuant to Article 25, UCMJ, convening authorities may consider training as one criterion among other equally weighted criteria to select the most qualified service members to be part of the pool of individuals who may potentially be selected to serve as a court-martial panel member.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes to the training criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: 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.

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 OSTC: Yes, judicial temperament is an appropriate factor to consider in determining who is best qualified to sit as a potential panel member and promote the purpose of military law. While, Article 25, UCMJ does not offer a definition of judicial temperament, the American Bar Association (ABA) provides that it includes "compassion, decisiveness, open-mindedness, courtesy, patience, freedom from bias and commitment to equal justice under the law." These are exactly the qualities the military seeks to see on panels.

Navy OSTC: We concur with the comments of the Navy's Criminal Law Division that we should continue to see members with the qualities outlined in their comments to promote fairness and confidence in our system.

Marine Corps OSTC: OSTC recommends no changes to the judicial temperament criteria. The legislative history, caselaw, and justifications regarding the various Article 25, UCMJ, selection criteria are well-developed.

Air Force OSTC: 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.

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 OSTC: Felony convictions or pending disciplinary actions would be appropriate bases to render a member ineligible to serve on a court-martial panel. Physical and/or mental conditions, depending on their nature and their impact on a service member's ability to be fair and impartial, may also be appropriate disqualifying criteria.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: Members should not be eligible to serve as a panel member if they have a prior court-martial conviction, if they are currently under investigation, if they are undergoing administrative discharge processing, currently undergoing nonjudicial punishment, or if they have an active UIF. A conviction, active investigation, active UIF, or active administrative discharge processing present a danger for significant bias against the system prosecuting the Accused.

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 OSTC: No. Current processes allow for the removal potential members who are being investigated or are facing disciplinary actions.

Navy OSTC: We concur with the comments of the Navy's Criminal Law Division that the voir dire process is the best way to identify and assess these issues.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: Members should not be eligible to serve as a panel member if they have a prior court-martial conviction, if they are currently under investigation, if they are undergoing administrative discharge processing, currently undergoing nonjudicial punishment, or if they have an active UIF. A conviction, active investigation, active UIF, or active administrative discharge processing present a danger for significant bias against the system prosecuting the Accused.

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 OSTC: The current Article 25, UCMJ provides commanders with sufficient criteria to consider when determining a service member's ability to serve on a panel.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no other criteria that should be required to serve as a panel member. The issues raised above regarding mental or physical conditions, convictions, pending felony charges, and members under investigation, or pending disciplinary or administrative action should be addressed by the Convening Authority when applying the Article 25 criteria and by the military judge when applying the well-developed legal standards for actual and implied bias challenges during the member selection and voir dire process.

Air Force OSTC: The current member selection criteria, coupled with the requirements of RCM 912, sufficiently address the requirements for qualification for service 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.

Army OSTC: Constitutionally, the Sixth Amendment guarantee of the right to a trial by an impartial jury requires that a petit jury be selected from a pool of people that represents a fair cross-section of the community; the requirement refers to the venire from which the jury is chosen rather the jury itself. Article 25, UCMJ, does not exclude consideration of race and gender and permits convening authorities to use a race conscious process to select a venire/pool of people which represent a fair cross-section of the community for the purpose of inclusion (United States v. Crawford, 15 C.M.A. 31, 35 C.M.R. 3, 15 USCMA 31 (1964)). However, given that the case of United States v. Jeter, (USCA Dkt. No. 22-0065/NA) is currently pending before the Court of Appeals for the Armed Forces (CAAF) and directly implicates Crawford and its progeny of cases, the OSTC will await CAAF's decision in Jeter before making recommendations with respect to panel criteria and processes. Respectfully, the OSTC recommends that the DACIPAD does the same.

Navy OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC recommends no changes that would require a particular diversity criteria. Instead, the Convening Authority should properly apply the Article 25 criteria when selecting members, and the military judge should properly apply the well-developed caselaw regarding "panel stacking," and Batson and its military progeny.

Air Force OSTC: No additional requirement is needed. The law already prohibits the exclusion of panel members on the basis of race or gender. Convening authorities, in applying Article 25 criteria, are allowed to factor in the race and gender diversity of the panel in making their

selections. If we move to random panel selection, building a diverse panel pool will ensure no one is being excluded, either intentionally or unintentionally.

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

Army OSTC: Article 25 does not prohibit the selection of an all-enlisted panel.

Navy OSTC: We concur with the comment of the Navy's Criminal Law Division that allowing for an all enlisted panel limits the potential pool, precluding some of our most experienced personnel from participating in the process.

Marine Corps OSTC: Because of the unique nature of military service, OSTC recommends no changes that would create an option for an all-enlisted panel.

Air Force OSTC: No. The current system works fine and there is no rational basis for granting an accused the right to exclude officer members from potential service on a court-martial panel. 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.

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 OSTC: No. Article 25, UCMJ criteria result in members who are best qualified to be in panel-member pools. Random selection of individuals via alpha rosters would lead to inefficiency in that members who are deploying, changing stations, imminently retiring/separating, or pending disciplinary actions would be potentially selected for venires and would have to go through voir dire at court-martial vice earlier in the convening authority's initial convening process. Additionally, random selection ignores the very important criteria that Article 25 lays out. As discussed previously, factors such as superior grade, education, experience, and judicial temperament are desirable traits that improve the overall quality of a decision-making panel.

Navy OSTC: We concur with comments of the Navy's Criminal Law Division that we should implement the most recent changes and assess their effectiveness before attempting any additional changes.

Marine Corps OSTC: OSTC recommends no changes that would alter the current system by applying a new random selection method. Utilizing such a system would inevitably result in less

diverse venire, would be less efficient, and likely significantly impact the convening authority's operational mission.

Air Force OSTC: The DAF supports the efforts of the 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 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.

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 OSTC: OSTC joins the Army Office of the Judge Advocate General in requesting 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 OSTC: We concur with the response of the Navy's Criminal Law Division.

Marine Corps OSTC: OSTC does not believe Article 25, UCMJ, requires modification to ensure the detailing or selection of unbiased, qualified panel members. At its core, the issue is not Article 25, UCMJ, but adherence to its requirements by Convening Authorities. Article 25, UCMJ, requires that Convening Authorities detail members who are not just minimally qualified by reason of age, education, training, experience, length of service, and judicial temperament, but who are best qualified for such duty in accordance with Article 25's criteria.

DAC-IPAD should remain cognizant of the purposes of our military justice system as stated in the Preamble to the Manual for Courts-Martial … "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 strengthen the national security of the United States." Article 25, UCMJ, the processes and procedures established to implement and ensure adherence to its mandate provides the flexibility needed to accomplish these purposes – provided the Convening Authority details the best qualified.

Air Force OSTC: 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.

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 OSTC:

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 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 OSTC: No response.

Marine Corps OSTC: As the OSTC will only have the authority to refer charges to special or general courts-martial, we defer to our Military Justice Branch (JMJ) at Judge Advocate Division to provide these regulations or policies.

Air Force OSTC: No substantive comments.

Request for Information Set 2.9, Narrative Questions
Service Trial Defense Organization 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.

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 Trial Defense Service: There should be a minimum age of 18 years for military panel members, which is the same as for Federal criminal juries. A younger age is not appropriate, because deliberating on findings in a criminal case is very important and requires the same experience and wisdom required for Federal civilian jurors. Also, an older minimum age is not necessary. As will be mentioned below, one year of active duty service is an appropriate length of service requirement. If a Soldier has been in the Army for one year, that means they have successfully accomplished the initial training required for service. They are qualified to handle the responsibility required of a court member. The minimum age of 18 is sufficient for a Soldier to serve in combat, which requires as much or more judgement than serving as a court member. One of the guiding principles of the Military Justice Review Group still deserves consideration. "Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into military justice practice." Report of the Military Justice Review Group; Part I: UCMJ Recommendations (December 22, 2015), page 14.

Navy Trial Defense: There should be a minimum age of 18 for military panel members.

Marine Corps Defense Services Organization: No different age requirement is necessary. If you can serve in the military and potentially kill and die for your country, then you should be able to sit on the jury.

Air Force Trial Defense Division: No. Due to age requirements to join the Air Force, it is unlikely that someone younger than 18 would be selected to sit on a panel. However, a requirement that panel members be 18 years of age or older would be appropriate.

Coast Guard Office of Legal Assistance and Defense Services: The Coast Guard has an MOU with the Navy, wherein the Navy provides Trial Defense Services to the Coast Guard and the Coast Guard sends the Navy 7/8 Coast Guard members. We defer to the Navy Defenders and their responses to these questions (which they shared with us).

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 Trial Defense Service: There is still a military justification for the seniority requirement. One of the antiquated purposes for this requirement, which was to avoid an incentive for junior court members to improve their promotion chances by opening up positions in a higher grade, is no longer valid in the reality of today's Army. However, there are still valid reasons for this requirement. First, good order and discipline requires a level of respect for rank that will conflict with the duties of a court member. There is a difference between respecting the person and respecting the rank, but being asked to judge the actions of a superior will likely cause a cognitive disconnect with court members. Also, the military justice system should not act to chisel away from the respect for authority that we instill in Soldiers. An additional concern is that military leaders know that doing what is right for the nation may require making decisions that are unpopular with subordinates. The Uniform Code of Military Justice (UCMJ) protects individuals with the status of being a superior, because it recognized this concern. Removing the seniority in rank and grade requirement may create problems or at least raise concerns that interfere with good order and discipline.

Navy Trial Defense: Selecting panels senior to an accused prevents the appearance that a junior member will fear reprisal from the senior member. It also reduces the possibility that the accused has previously taken some action as part of their duties that negatively affected the member or the possibility that the accused may in the future be in a position of authority over a member.

Marine Corps Defense Services Organization: Yes. Military service comes with unique requirements and decisions, and those requirements and decisions flow based almost exclusively on rank (and billet). That sets up senior clients for being judged more harshly by junior jurors. Nevertheless, we should avoid the current bias to significantly more senior members (to which the current criteria inures). Senior by DATE OF RANK (DOR) only as the criteria most closely closes the gap. It more closely aligns with a jury of peers while recognizing that having members who have walked in the accused shoes (by rank) helps members identify with an accused. Additionally, avoiding a bias towards vastly seniors members ensures an accused identify with

members while still protecting from any potential biases against senior accused by a jury of junior members who may hold unconscious biases or are merely subject to the orders of such a senior accused merely by grade. It protects against any fear (conscious or otherwise) of reprisal from an accused against a junior court member, and significantly reduces the chance that the juror either previously worked under the direction of the accused or will be subordinate to the accused in a future assignment.

The system should also attempt to spread the grades across the spectrum senior to the accused, and not based on the rank demographics of the location. For example the National Capital Region is very heavy on officers and senior enlisted; MATSG 21 is almost exclusively company grade officers; while Camp Lejeune is heavily tilted to the non-commissioned officer ranks. The system should endeavor to include all ranks senior to the accused.

Enlisted Marines should retain the ability to request a minimum portion of the panel be enlisted.

Air Force Trial Defense Division: Yes. Good order and discipline in the United States military is dependent upon obedience to lawful orders issued by those superior in rank. In addition to the more obvious concerns that a junior member might feel pressured to render a certain result if called to sit on a panel with a more senior accused, the idea that junior members might routinely be called upon to sit in judgment of a senior member at court-martial would be antithetical to the function of the military in every other mission context. The current iteration of Article 25 recognizes this by allowing junior members to sit in judgment of senior members only when it cannot be avoided, and by prohibiting enlisted members from serving on the court-martial panel of a commissioned officer.

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 Trial Defense Service: The length of active duty service is somewhat similar to the residency issue mentioned below. To incorporate the principles used in United States district courts, an appropriate length of service is at least one year of active duty service. The servicemember's BASD can be used to screen for this qualification. The one year will ensure that initial training has been completed and the Soldier is adequately familiar with the military culture. Some UCMJ offenses require this familiarity, such as offenses charged under Clause 1 of Article 134.

Navy Trial Defense: Appellate courts have declared that service members in the two lowest enlisted grades are presumed to lack the experience and maturity level contemplated by Congress in establishing the criteria in Article 25(d)(2).[1] Beyond that, the military reason for excluding service members with less than two years experience is the reality of military onboard training.

[1] See, U.S. v. Lewis, 46 M.J.338, 342 (1997); US v. Yager, 7 M.J. 171 (C.M.A. 1979).

For the first two years, most service members are deeply embedded in their onboarding training schedules. Interrupting those evolutions would cause considerable challenges to readiness. By making those with less than two years of military service ineligible, the process of random panel selection will be streamlined without impact to readiness.

Marine Corps Defense Services Organization: A twelve-month fleet minimum requirement would parallel most civilian jurisdictions, deconflict most indoctrination and MOS training, and ensure the potential juror has a basic understanding of military culture sufficient to understand and participate in jury deliberations, especially on military specific offenses.

Air Force Trial Defense Division: Yes, there should be a minimum length of service requirement to be qualified to serve as a panel member. That minimum length of service should be 18 months of total active federal military service. That mandatory length of service for potential panel members will eliminate those servicemembers who are still in the midst of initial training required of military members and will ensure that all potential panel members have already experienced the unique culture of military service. These considerations are important given that, even though they will soon not be called upon to render a sentence, military panel members are often called upon to make judgments on uniquely military offenses. For example, offenses charged under Article 134, UCMJ could require a panel to decide as to whether charged conduct is "of a nature to bring discredit upon the armed forces," or "to the prejudice of good order and discipline." A servicemember who has completed initial training and has engaged in the operational mission over 18 months will be better equipped in terms of baseline knowledge of military service necessary to make these determinations.

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 Trial Defense Service: Proficiency in English should be the only educational requirement. A requirement for proficiency in English is a valid requirement, because there are some servicemembers from other countries who have successfully completed initial training but still struggle with English. Understanding all the evidence is essential to perform the duties of a court member. However, no other educational requirements are necessary, as they will have had sufficient education to enlist or receive an appointment and successfully complete initial training, which is a threshold higher than that for jurors in United States district courts.

Navy Trial Defense: There should be no additional education requirement for military panel members.

Marine Corps Defense Services Organization: No education should be required beyond that necessary to enlist or commission.

Air Force Trial Defense Division: No. Beyond proficiency in English, Article 25 should not contain additional education requirements as a prerequisite to service as a panel member. In order to join the military, an enlistee must have earned a high school diploma or equivalent (e.g., a General Education Development certification), and must be proficient in English. If any language or education-related issues would prevent a panel member from understanding his or her duties on a court-martial, this issue would be identified and resolved during the voir dire process.

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 Trial Defense Service: With the requirement of one year of active duty experience, no further experience requirement is appropriate. To the extent that knowledge of certain aspects of the military is necessary to make informed decisions for findings, the trial counsel and defense counsel are free to present the evidence to assist the court members in their deliberations.

Navy Trial Defense: There should be no experience requirement for military panel members.

Marine Corps Defense Services Organization: No experience should be required beyond indoctrination training.

Air Force Trial Defense Division: No. If 18 months of military service is adopted as a minimum requirement for service on a court-martial panel, no other experience criteria should be considered. Such consideration itself by a convening authority or other body would likely frustrate Congress's direction to randomize panel member selection. Further, any concern over experience required to understand a unique military crime or other military specific matter could be identified and resolved during voir dire.

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?

Army Trial Defense Service: The only training requirement that would be appropriate is initial training, but the one year of active duty experience should already ensure that. Therefore, no training requirement should be included in Article 25.

Navy Trial Defense: There should be no training requirement for military panel members, other than that panel members not be in an initial training pipeline (as discussed above).

Marine Corps Defense Services Organization: There should not be a training requirement. Voir dire is replete with examples of potential members receiving quasi-legal topic training

which is incorrect or biased and can cloud servicemembers' ability to accept the facts at trial in a fair and impartial manner and requires them to set aside "training" to follow the judge's instructions. Accordingly, the services should seek to avoid training which unnecessarily encroaches on legal definitions and issues.

Air Force Trial Defense Division: No, there should not be a training requirement to be qualified to serve as a panel member. The proposed requirement for length of total active federal military service above would resolve any potential issues about sufficient military training to serve on a 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?

Army Trial Defense Service: Like Federal and state jury systems, there should not be a judicial temperament requirement to be qualified as a court member. Such a requirement is far too subjective to implement in a way that could coexist with true random selection. Also, there is no need for this requirement, as judicial temperament is tested during the process of voir dire and challenges.

Navy Trial Defense: There should be no judicial temperament requirement for military panel member, particularly now that sentencing is no longer a Member function.

Marine Corps Defense Services Organization: Perhaps lack of judicial temperament should be a disqualifier, but otherwise, a requirement of "judicial temperament" is unnecessary and open to very broad interpretation.

Air Force Trial Defense Division: No. Though justice would benefit from the selection of panel members with a positive judicial temperament as defined by the American Bar Association (ABA) (having "compassion, decisiveness, open-mindedness, sensitivity, courtesy, patience, freedom from bias and commitment to equal justice."), the subjective consideration of which prospective members possess such a temperament would frustrate any random selection of panel members.

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 Trial Defense Service: The only other requirements warranted are to have never been convicted of a felony, to not be indicted/referred to court-martial for an offense punishable by confinement for more than one year, and be a United States citizen. Just as service as a juror is an important civic duty, so is service as a court member. Loss of that privilege and responsibility upon conviction of a felony is appropriate, even though it will be rare for a servicemember on active duty. The indictment/referral requirement addresses different concerns about bias toward either side and the ability to concentrate on the evidence in the trial. One other criteria to be considered is United States citizenship. As the finding of a court-martial may result in a Federal conviction, it would be appropriate for only citizens of the United States, who are familiar with the American justice system, to be on the panel. No other requirements are appropriate. The military standards The military standards for mental and physical fitness will already satisfy any concerns about mental or physical conditions.

Navy Trial Defense: These should all be requirements in the military system.

Marine Corps Defense Services Organization: All of these are easily handled at voir dire with the starting point that anyone on active duty is mentally and physically qualified. The number of service members on active duty with a felony conviction must be so de minimus as to not warrant developing a tracking system within the randomization process. The question can easily be handled during regular voir dire which would allow for the exploration of the basis of the conviction and any relevance it might have toward capacity to be a fair and impartial panel member.

Air Force Trial Defense Division: Yes. It would be exceptionally rare for any potential panel member serving on active duty to be disqualified from service on the basis of a prior conviction or due to a limiting mental or physical condition. It would be slightly more likely that a servicemember pending court-martial (where charges have been preferred or referred) or criminal trial by civilian authorities might be selected for panel member duties through a random selection process. These criteria should remain under Article 25, as they are articulable and subject to implementation in an objective manner that would not frustrate the goal of randomizing member selection.

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 Trial Defense Service: There should not be a criteria addressing investigation or pending adverse action for a criminal offense. There has been no such requirement in the UCMJ, and that has not caused any significant problems, because it is addressed during the voir dire and challenges process.

Navy Trial Defense: No, this can all be vetted during voir dire, especially with additional peremptory challenges. Unfortunately, in today's complaint-driven society, our best and brightest are generally the individuals that find themselves to be the subject of unfounded complaints. Most of these complaints will not ultimately be substantiated, but must be

investigated and that process often takes time. To judge a potential member based on an unsubstantiated complaint would eliminate some of our most capable and dedicated members.

Marine Corps Defense Services Organization: It would be nearly impossible to create such a system since the servicemember may not know they are under investigation, nor their command or the administrator of the randomized processor. Robust voir dire should ferret out disqualifying biases.

Air Force Trial Defense Division: No. Discipline can take a wide variety of forms under the UCMJ. Minor offenses can result in administrative action. Allegations of misconduct can result in inquiries or investigations that can last for a significant period of time, even if the underlying evidence is facially weak. This requirement would potentially result in the disqualification of a broad swath of otherwise qualified servicemembers who have committed or been investigated for minor disciplinary issues. Given the logistical difficulties in screening based on these criteria, these issues are better left to counsel and the courts through the voir dire and challenge process.

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 Trial Defense Service: No other criteria should be required for a servicemember to be qualified to serve as a panel member.

Navy Trial Defense: None.

Marine Corps Defense Services Organization: None.

Air Force Trial Defense Division: There are no criteria that should be required for a service member to be qualified to serve as a panel member, other than those identified above. Additional factors should be addressed by counsel through voir dire and challenges.

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 Trial Defense Service: No, court members should not be selected based on race. A truly random selection, as long as there are not improper requirements beyond what was listed above, will statistically result in diversity that is demographically proportionate to the population within the jurisdiction. By requiring a specific number of members of a certain race or gender on a panel that has a set number of eight or four, you will logically be excluding someone else, and that other prospective member could be a member of a different minority. If the selection process is truly random, that will instill trust and faith in the system. Because there may be some level of distrust, the option for the accused to elect inclusion of at least one member of the accused's minority group(s) would be a protection that is easy to implement and promotes trust and faith in the system.

Navy Trial Defense: Military demographics make the ideal of racial and gender diversity nearly impossible. Panels should be diversified by grade.

Marine Corps Defense Services Organization: Recommend that, like enlisted representation, minority accused (race or gender) be permitted to request a panel that includes representation. Also, studies have shown implicit biases exist, and a proactive step should be taken to prevent/minimize said biases. The racial/gender make-up of the military does not match that of the U.S. population. Experts argue that varied life experiences within groups leads to more equitable decision making. An accused should not be disadvantaged because a Service disproportionately fails to recruit certain minority members. While randomization of panel selection should do a better job than we often see in the jury box, an ability to affirmatively request it will ensure some level of representation.

However, such a requirement will put a strain on individual members within underrepresented minority groups. At certain ranks and locations, the same minority servicemember will be tapped over and over and over again; no single person can or should be expected to represent the entirety of their race or gender. That, in and of itself, is prejudicial to our system of justice.

Air Force Trial Defense Division: There is no uniquely military requirement, as compared to civilian juries, for court-martial panels to be diverse based on race and gender of members. The demographics of the military in some contexts (e.g., courts-martial with an officer accused) would make this difficult if required due to a lack of racial diversity at or above certain ranks. Anecdotally, the lack of diversity among panel members is a significant concern for accused members facing trial by court-martial. A system that specifically allows for an accused facing trial by court-martial, following random selection of panel members, to request a panel with additional racial or gender diversity would address those concerns to some extent. The RCMs could be changed to provide a procedure by which this could be accomplished by the convening authority when practicable. Concerns about interference with the random selection of members would be reduced since the accused would be the impetus to revisit the make-up of the panel.

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

Army Trial Defense Service: The current options to elect an all officer panel or a panel with at least one-third enlisted members should be maintained. United States Army Trial Defense Service does not oppose an additional option of an all enlisted panel. For the same reason why a panel with all officers may be preferrable in some cases, a panel with all enlisted members may be preferrable in other cases. Because of the ever-present dangers of the mortal enemy of the military justice system – unlawful command influence, providing an enlisted accused with this additional option will only increase the possibility for true justice and promote trust and faith in the system.

Navy Trial Defense: There should be an option for an all enlisted panel. When officers are tried by court-martial, all members are also officers, which helps bring the members panel in line with the civilian right to a jury of one's peers. An all enlisted panel would provide the same benefit to enlisted members.

Marine Corps Defense Services Organization: Yes, there should be an "all enlisted" panel option for enlisted accused. An "all enlisted" panel option would produce fair results by raising the level of shared experiences between the panel and accused, and more closely mirroring the "peer" jury of civilians, while still being (by our recommendation) senior to the accused. Our enlisted Marines enforce good order and discipline as part of their ethos. The SNCO creed includes: "I am the mainstay of discipline… I shall be just in the enforcement of discipline…"

Air Force Trial Defense Division: No. Although increasing the quorum for enlisted members above the current minimum requirement for an enlisted accused who selects to be tried by a mixed panel would likely ameliorate some concerns about lack of racial diversity, there should not be an option to exclude the perspective of officers from a panel due to the unique nature of the military mission. While all ranks in the military are expected to lead, officers by training and duty bring more of an operational and strategic perspective to a panel. This is not to imply that officers apply a different burden than enlisted members, but in cases involving panels called upon to make more subjective decisions (e.g., whether an accused was derelict in his duties, failed to obey orders, or acted in a manner to the prejudice of good order and discipline), this different perspective as part of the finder of fact's deliberations is important to preserve. Raising the quorum for enlisted members presents a compromise solution that will help to increase diversity of panels and the opportunity for an enlisted accused to be judged by his or her enlisted peers as opposed to a panel dominated by officers. Given the role of officers within the military, no enlisted member should sit on an officer accused's court-martial panel, even by that accused's request. To allow for enlisted members to sit in judgment of officers would undermine the legal and actual authority upon which our military hierarchy is built.

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 Trial Defense Service: Yes, the military should absolutely move to a randomized panel member selection process. The command's involvement in the selection of court members has long been a major and unnecessary criticism of the military justice system. Also, the military justice system is always hesitant to progress from an old process to a new process. Instead of looking at how selection is done now and tinkering to make it somewhat more random, the military should look at fully randomized selection and then only tinker with it as required for military necessity. This is feasible by using the Alpha rosters for the jurisdiction involved. Just as with the civilian systems, the voir dire and challenges process will narrow the pool of members qualified to serve in a particular trial.

Navy Trial Defense: Yes. What follow is a brief History of Article 25 criteria in support of our answer.

Court member selection criterion were born after experiences with overly harsh sentences imposed during WW I by inexperienced and insecure Commanders afraid of appearing weak. After WWI, a special clemency board created by the Army recommended reduction of sentences in over 77% of the cases that came before it, remitting over 18,000 years of confinement.[2]

From the period post WWI, calls for reform were met with piece meal changes, until the adoption of the UCMJ in 1950. For the first time, the so-called "law member," formerly a deliberating member of the panel, was replaced by a non-member, non-deliberating "law officer," and later in 1968, that officer became what we know today as the military judge. The MJ's authority extended to all questions of law and the progress of the trial, except for determinations on the Accused's mental responsibility.[3] The UCMJ also added "education" and "length of service" as criteria for selecting court members.

Throughout these changes, one responsibility remained exclusively the province of Members where the Accused elected trial before a panel; sentencing. The nightmare of the sentences during the WWI period were the primary impetus for the inclusion of the "best qualified" criterion for selection in Article 25(d)(2).[4] As the landscape of military justice has changed and continues to change, the Article 25 criteria have become obsolete and should be eliminated.

Analysis
Preliminarily, the criteria are inherently subjective. They assume that a convening authority ("CA") will have some personal knowledge of prospective members, knowledge which they most certainly do not have, particularly in larger commands. If a CA does have personal knowledge of potential members, how do we guard against the improper use of that knowledge (UCI) in the selection of the venire?

What exactly does "best qualified" really mean, and how do we codify a uniform standard? Best qualified to render a verdict consistent with the facts and the law? Best qualified by way of specific knowledge and experience which will prove useful in a case with specific facts? Best qualified by being particularly service minded, and unlikely to tolerate any hint of misconduct, thereby making them likely to convict? It is impossible to codify and uniformly apply the meaning of "best qualified" even with the breakdown of specific criteria.

"Judicial temperament" is a perfect example of why Article 25 is now obsolete. How does a CA know about a potential member's judicial temperament if the CA doesn't personally know the potential member? How does the CA define "judicial temperament" and how is that concept standardized across commands? If members no longer sentence after a guilty finding, of what moment is judicial temperament for a potential member? This criteria was added to safeguard against rogue and inconsistent sentencing, which is now no longer a Member function. It is obsolete.

Considering training or experience; what type of training and experience would make a potential member more or less qualified to serve, and wouldn't that necessarily change depending on the

[2] Jonathan Lurie, Arming Military Justice: The Origins of the United States Court of Military Appeals, 1775-1950, 111 (1992)
[3] Gilbert D. Stevenson, The Inherent Authority of the Military Judge, 17 A.F.L. Rev. 1, 5 (1975)(footnotes omitted).
[4] See Lurie, supra at note 1, at 77-78, 103, 111, 128.

charges and anticipated evidence? By curating potential Members by assessing training and experience, a CA must necessarily know the Member, and know the facts of the case. He will then make a subjective assessment of whether that potential Member's training and experience will help or hurt the ability of the Member to render a fair verdict, or some would argue, render the verdict the CA who sent the charges for trial wants to see. The CA is selecting the deciders by in part assessing their sophistication, savvy, and smarts. It's not surprising the process is perceived as unfair.

Conclusion
Under the current system, the subjective Article 25 criteria are subjectively applied depending on the CA, the charges, and the Accused, thereby perpetuating the long standing perception of unfairness. To eliminate the perception of unfairness, the CA who sends charges for trial must be removed from having a role in the selection of the deciders of the outcome of the trial on those charges. Because Article 25 criteria are impossible to standardize or apply uniformly across all commands for all cases, and were put in place to safeguard Member sentencing which will shortly no longer exist, they are no longer necessary and should be eliminated in favor of random selection of court Members.

Issues of training, education, and experience are best left to counsel during the voir dire process, and can be successfully curated using a combination of challenges for cause, and peremptory strikes which should be increased for both sides to a suggested number of six for all cases which carry a minimum punishment of more than one year confinement.

The better solution is a randomized panel selection scheme. With very few exceptions, all members of the community from which the case comes would be eligible for selection. Service members in medical billets (doctors, dentists, vets, nurses, etc.) would be eligible to serve, and not excluded by rule. However, lawyers, chaplains, and members of the IG would remain ineligible. Only those with more than two years of military service would be eligible. When possible, all Members on a partial court will be senior in grade to the accused. While it would be impossible based on military demographics to ensure a community cross-section factoring for race and gender, the selection scheme should contemplate a cross section of the military community by grade.

Once the randomized selection process is complete, selected Members will convene with the Court. In a preliminary voir dire process which includes all counsel and is on the record and can form the basis for appellate review, the Court may excuse any detailed Member for a stated disqualifying reason, illness, emergency, unavailability, or deployment. The remaining Members will then be sat for traditional voir dire and challenges from both sides until a panel is sworn.

The idea of randomizing the military selection process is not mine, nor is it new. Much of my thought and analysis in this document was informed by and can be attributed to lessons in the following scholarly articles:

Military Juries: Constitutional Analysis and the Need for Reform (indiana.edu)
2000-Spring-Young-Revising Member Selection.pdf
Military Jury System Needs Safeguards Found in Civilian Federal Courts | U.S. GAO

Once the pool of eligible service members is established, they should be categorized by grade, then randomly selected evenly across the grades to form the venire. This results in a cross section

of randomly selected preliminarily eligible members who will proceed to preliminary voir dire with the court where personal applications to be excused from service will be heard and decided upon.

Marine Corps Defense Services Organization: Yes, however, the selection should come from a randomized roster of all individuals within a particular geographic location (not within any particular unit or command). No one should be excluded from the requirement to submit eligibility questionnaires, regardless of billet or grade. This will protect the convening authority as much as it protects the accused. This will, however, put pressure on the command to ensure the alpha roster is up-to-date and accurate. Additionally, such a system would limit inadvertent disclosure from the command to potential members of information about the facts of a case, which might have permeated throughout the unit. It reduces the potential for (inadvertent or otherwise) unlawful command influence, jury shopping, and fear of reprisal for decision making by jurors. It also invests everyone in the process, which both enhances routine good order and discipline but also encourages resolving legal issues at the lowest level (as it should be in accordance with R.C.M. 306(b)).

Air Force Trial Defense Division: Yes, as we move to implement Congress's NDAA FY23 directive to randomly select panel members, the military should use Alpha rosters or other similar means to achieve that goal subject to whatever objective requirements that remain in place under Art 25. Alpha rosters could serve as the initial list of potential members and could be modified to exclude potential members who will not be available due to extended temporary duty (TDY), deployments, or leave.

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 Trial Defense Service: In the Army, it is standard practice to have a "standing panel" that serves as needed for approximately six months. This is similar to civilian jurors being selected for a pool of jurors for a period of a month. It is best to leave this choice to the local authorities selecting court members. Because the selection of court members does have many moving parts and does distract from the warfighting mission, the practice does promote efficiency and decreases the chaos with which servicemembers are so familiar. Also, a suggestion that will improve the system in many ways is to change the procedure for getting to the required quorum of eight for a non-capital general court-martial and four for a special court-martial. Instead of using the procedures for random assignment of numbers and impaneling, under Rule for Court-Martial (R.C.M.) 912(f(5) and R.C.M. 912A, the UCMJ should be amended to allow the use of peremptory challenges to get to the required number of members. Each party can still be entitled to the use of one peremptory challenge in the same way that is now authorized, and then additional peremptory challenges alternating between the parties (beginning with the defense) can be used until there are eight or four members. For example, if, after challenges for cause in a general court-martial, there are 13 members remaining, just like the current system, the trial counsel can use a peremptory challenge to get to 12, and the defense counsel can use a peremptory challenge to get to 11. There are now three too many members, so the defense counsel can use the first extra peremptory challenge, the trial counsel the second, and the defense

counsel the third, which will bring the panel to eight members. Because the government is involved in the selection process, allowing the defense to go first with the extra peremptory challenges promotes trust and faith in the system. There are three advantages to this system. First, the use of the peremptory challenges by both sides will likely remove the members whose judicial temperament makes them outliers on the spectrum, resulting in a more reasonable panel. Second, this system is easily deployable. Courts-martial are tried in locations where Internet service may be nonexistent, and there is no need for a randomized number generator. Third, it is both more efficient and error-free. Under the current system, a recess is called and the military judge or designee runs a computer program to assign random numbers. This is more time-consuming and error-prone than simply allowing alternating additional peremptory challenges.

Navy Trial Defense: No response.

Marine Corps Defense Services Organization: As our military criminal justice system seeks to mirror the civilian criminal justice system, we should not lose sight of the things that are unique to our system. What will always be true of the military system is that rank and power play an enormous role in everything we do, inside and outside of the courtroom. We wear our rank on our collars every day. We address every person by their rank before saying their name. Rank and power are inherent within the military, and we must be cognizant of how that engrained structure can impact courts-martial regardless of any changes to Article 25.

Under the current rules, when an accused challenges members for cause, the military judge is required to liberally grant such challenges.[5] "Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations."[6] "If after weighing the arguments for the implied bias challenge [by the Defense] the military judge finds it a close question, the challenge should be granted."[7] The liberal grant mandate "also serves as a preventative measure because 'it is at the preliminary stage of the proceedings that questions involving member selection are relatively easy to rapidly address and remedy.'"[8] When a case is close, "military judges are enjoined to liberally grant challenges for cause."[9] It should be noted that the liberal grant mandate only applies to Defense challenges for cause. Because this is a measure that was created in reaction to the inherent imbalance of power in favor of the Government during members selection (i.e. the convening authority selects each member in the venire), only the Defense receives the benefit of the liberal grant mandate.

The Marine Corps Defense Services Organization recommends that any changes to Article 25 criteria also work to codify the liberal grant mandate. While efforts can be made to reduce the inherent imbalance of power in the military criminal justice system through reform, the fact remains that the entire military apparatus is based on rank and power. Not just within a unit, but in the promotion, command slating, and school selection processes. Superior ranking officials have vast power, over anyone junior regardless of chain of command. We instill "instant obedience to orders" that itself reflects the power of our rank structure. Thus, an accused is always at a disadvantage when standing in opposition to the United States. This power

[5] *United States v. James*, 61 M.J. 132, 139 (C.A.A.F. 2005).
[6] *United States v. Clay*, 64 M.J. 274, 276–77 (C.A.A.F. 2007).
[7] *Peters*, 74 M.J. at 34.
[8] *Id*. (quoting *Clay*, 64 M.J. at 277).
[9] *Clay*, 64 M.J. at 277.

imbalance, of course, permeates members selection. The best way to ensure fair panels in the face of an inherent bias in favor of the Government is a robust voir dire process and great latitude to strike members that may not be fair and/or impartial. As such, the liberal grant mandate should be continued and codified.

Additionally, the current preemptory challenge is limited to one per side. Given the randomization model and the presumption that far more members will be selected to participate in voir dire than are actually seated and sworn, we recommend no less than six preemptory challenges be available to both the prosecution and defense.

Air Force Trial Defense Division: As changes are made to the selection criteria or randomization process, consideration should be given to increasing the number of peremptory challenges beyond the single peremptory challenge typically available to each party to the court-martial. A brief review of military caselaw reveals a significant number of appellate decisions addressing whether military trial judges abused their discretion by denying a defense challenge for cause of a member on the basis of implied or actual bias. An increase in peremptory challenges would increase the ability of an accused to address perceived errors at the trial level. More peremptory challenges would also bring the court-martial process more in line with the federal criminal justice system and would reduce concerns over the administration of the remaining Article 25 criteria within the context of random selection of panel members.

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 Trial Defense Service:

The Army's policy is contained in its enlisted separations regulation, AR 635-200, Active Duty Enlisted Administrative Separations, para. 2-6.b (28 June 2021). Specifically,

(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 (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.

Navy Trial Defense: No response.

Marine Corps Defense Services Organization: No response.

Air Force Trial Defense Division: DAF regulations currently do not explicitly permit a respondent to request minority inclusion among discharge board members, though some convening authorities have accommodated these requests prior to administrative discharge boards. Similar to what is described above in the context of a court-martial, DAF policy should be modified to specifically allow for such a request and create procedures whereby a convening authority is encouraged to accommodate that request when practicable. Administrative proceedings often involve the litigation of complex and serious issues, to include sexual assault or other allegations. Boards may recommend service characterizations that can have a long-lasting impact on respondents. Improving the perception among military members that these panels are appropriately assembled and fair in their adjudication of issues is an important consideration when reviewing the administrative side of military justice.

Request for Information Set 2.9, Narrative Questions
Service Special Victims' Counsel/Victims' Counsel/Victims' Legal Counsel 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.

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 Special Victims' Counsel (SVC): The SVC office concurs with OTJAG on all responses and will not submit a separate response.

Navy Victims' Legal Counsel (VLC): USN VLC elected not to answer with regard to the specific criteria of Article 25(e)(2) and related questions, but does offer the following to the general question of how member selection can be improved. *[Navy VLC provided a response to Q 6]*

Marine Corps VLC: There should be no minimum age for military panel members. While it is possible for a potential panel member to be under the age of 18 in the case of early enlistments, that possibility is exceedingly remote. The current Article 25 requirement that members be equal to or senior in rank to the accused will almost certainly prevent servicemembers under 18 from serving as panel members. In the very small number of cases where a servicemember under 18 is equal to or senior in rank to the accused, the rank qualification is most likely due to that member's above-average performance. Disqualifying that individual based solely on age would both discount that performance and signal a distrust of servicemembers who are otherwise called upon to make extraordinary decisions under the trying circumstances of combat.

Air Force Victims' Counsel (VC): There should not be a different minimum age for military panel members.

Coast Guard SVC The Special Victims' Counsel Office defers to the Office of Military Justice on all responses.

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?

Marine Corps VLC: Rank and grade seniority requirements serve two valid military purposes. First, military effectiveness is dependent on a structured rank system in which higher ranking members can compel obedience from lower ranking members, even when the servicemembers do not know one another. This military rank structure is essential to good order, discipline, and success in combat. This system requires constant maintenance and reinforcement and is the justification behind the many rank-based customs and courtesies practiced throughout the military. Requiring lower ranking servicemembers to judge higher ranking servicemembers for misconduct undermines this system of obedience and deference. A system in which subordinate servicemembers debate, challenge, or question the decisions of superior enlisted personnel and officers may be suitable for non-combat organizations, but would even in garrison degrade the rigidity of a disciplinary structure in war it is not conducive to mission accomplishment. Given that a court-martial may involve allegations requiring careful questioning of the official conduct of the accused, permitting junior servicemembers to sit in judgment of those decisions during trial invites similar habits in other settings.

The second valid military purpose served by rank and grade seniority requirements is related to but distinct from the first. Servicemembers junior to the accused are not fully qualified to evaluate the performance of higher ranking servicemembers when the charges at issue relate to the performance of a military duty, as is the case with charges such as conduct unbecoming or dereliction of duty. A more mature and nuanced understanding of the exercise of military judgment and experience is essential to a fair trial in such cases.

Air Force VC: 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.

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?

Marine Corps VLC: There should be no minimum length-of-service requirement for service on a court-martial panel for much the same reason as there should be no minimum age requirement. Servicemembers are presumed to be competent in many complex and demanding tasks very early in their service. This requirement would add administrative burden without significant benefit.

Air Force VC: There should not be a minimum length of service required to serve as a panel member.

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?

Marine Corps VLC: There should be no independent education requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider education as a factor in determining who is best and most fully qualified to serve on a panel. There is an implicit minimum education requirement by virtue of the fact that all servicemembers have a high school diploma or equivalent certificate. Adding additional educational requirements would unnecessarily narrow the pool of members, adding burden without substantial benefit.

Air Force VC: There should not be an educational requirement to be qualified as a panel member.

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?

Marine Corps VLC: There should be no independent experience requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider experience as a factor in determining who is best and most fully qualified to serve on a panel. As with education, military experience is implicit in the existing statute, given the rank and grade requirements in relation to the accused. All of these—rank, grade, and experience—are relevant in the context of many charges, especially military-specific offenses related to the performance of a specific duty, dereliction, and other charges. The current Article 25 criteria adequately address these concerns.

Air Force VC: From a Victims' Counsel perspective, experience should not be a requirement to be qualified to serve as a panel member.

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?

Marine Corps VLC: There should be no independent training requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider training as a factor in determining who is best and most fully qualified to serve on a panel. In some cases involving highly technical skills or unique knowledge, both training and experience of the panel members might be relevant, for example where a pilot is charged with an offense related to the operation of an aircraft. In that case, the training and experience of pilots who have completed pilot training might make them better qualified to serve as members under the current Article 25 criteria. In addition, there should be no specific training requirement related to service on a court-martial panel. The responsibility of instructing members on the law and how to apply it rightfully rests with the military judge.

Air Force VC: There should not be a specific training requirement to be qualified to serve as a panel member.

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?

Marine Corps VLC: There should be no judicial temperament requirement for service on a court-martial panel beyond the existing Article 25 provision allowing a convening authority to consider temperament as a factor in determining who is best and most fully qualified to serve on a panel. Judicial temperament means two things: the intellectual focus, discernment, and experience effectively and fairly to weigh facts, assess credibility of witnesses, and apply the law as instructed; and the exercise of neutral, independent, and mature judgment required to assess and measure unpleasant facts, and to impose unpleasant outcomes where the law and facts of an individual case require. Judicial temperament should be viewed as a positive requirement that is properly addressed by the existing language in Article 25.

Air Force VC: "Judicial temperament" should include the qualities of open-mindedness, non-judgmental, decisive, and respectful.

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?

Marine Corps VLC: Concerns related to mental and physical conditions and disciplinary status should be addressed through the voir dire process on a case-by-case basis, viewed in the context of the facts and circumstances of an individual case. In addition, establishing per se exclusions for personnel who may have already disclosed past misconduct and have gone on to honorable service is inconsistent with the rehabilitative objectives of military and civilian justice systems.

Air Force VC: No other specific criteria should be required 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?

Marine Corps VLC: Only those already enabled by the existing language in Article 25 and during routine voir dire conducted prior to every case involving members. These matters are far better suited to detailed, nuanced examination by the judge in a particular case than to rigid and binary exclusions by statute.

Air Force VC: Additional, specific criteria addressing the qualifications of Service members under investigation or who have received at least administrative action for committing a UCMJ offense is not necessary.

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?

Marine Corps VLC: No other criteria should be required.

Air Force VC: There is no other criteria that 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.

Marine Corps SVC: There should not be specific race or gender requirements for panel members, but military judges should have broad authority carefully to examine and reject any attempt to exclude a potential panel member from service due to race, gender, or any other protected category. Imposing a requirement based on race, gender, or other protected category presumes an unquantifiable bias in potentially harmful ways. The DAC-IPAD should also consider the possibility of specific sanctions for the willful attempt to exclude a potential member from service on a court-martial panel based on a protected category.

Air Force VC: From a Victims' Counsel perspective, ideally a panel should be diverse by race and/or gender, but there should not be a requirement for panels to reflect as such.

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

Marine Corps SVC: Enlisted servicemembers should have a statutory right to demand an all-enlisted panel of members equal or senior in rank and grade to the accused. Enlisted members are eminently capable of making fair determinations and reaching just results. Creating the right to all-enlisted panels for enlisted accused would increase the perception the court martial system is fair among enlisted Marines in the court martial system.

Air Force VC: From a Victims' Counsel perspective, we would not be opposed to an all enlisted panel for an enlisted accused.

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?

Marine Corps SVC: Randomization should not be used to select members of the court. However, randomization may be effectively used to scope the list of potential members for more detailed review in light of the Article 25 criteria. While state and federal civilian courts use randomization, those courts also carefully examine potential jurors for bias and other disqualifiers through a robust voir dire process. The military justice system can and should employ random selection of potential members prior to the application of Article 25 criteria and voir dire.

Air Force VC: From a Victims' Counsel perspective, we are not opposed to using Alpha rosters or other similar means to randomly select the initial pool of panel members.

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.

Navy VLC: Navy VLCP notes during voir dire, the current common practice is to automatically disqualify panel members who are sex crime victims, or have close family members or friends who are sex crime victims. Panel members who have served in a victim support role, such as a unit Sexual Assault Prevention and Response Victim Advocate, are also summarily disqualified from serving as members.

A member's prior connection to a crime similar to the charged crime should not be a per se disqualifier to serve as a panel member. This automatic disqualifying practice denies an entire class of individuals the opportunity to serve as members. The result of this systematic disqualification of sex crime victims, persons who are close to sex crime victims, and persons

with experience in victim support roles is a remainder panel with no connection to a victim experience.

VLCP recommends the following to counter this unfair practice:

1. Require trial counsel, defense counsel, and military judges to attend regular training on implied bias in the voir dire process.
2. Revise the Court-Martial Member Questionnaire. After the standard question, Have you or a close family member ever been a victim of any sex related crime, such as sexual assault, rape, sexual assault of a child, etc.? Please only indicate yes or no. include check-boxes for members to select whether they would prefer to answer follow-up questions in open court or in a closed court setting.
3. Close the courtroom for individual voir dire when a member responds in the affirmative to the above question and has indicated in the questionnaire a preference to respond to follow-up questions in a closed setting. Court closure would be limited to the individual voir dire follow-up questions.
4. Seal the portion of the Record of Trial containing the individual voir dire follow-up questions in the closed session.

The above recommendations align with civilian courts' practice of protecting juror privacy. Civilian trial judges inform prospective jurors of the option to discuss their privacy concerns in camera and some jurisdictions permit sealing of a juror's voir dire transcript and/or questionnaire.

Sex crime victims have legitimate privacy concerns that are not currently protected in open court during voir dire. VLCP's recommendations seek to protect victims' rights by ensuring privacy through closing the court and sealing the individual voir dire portion related to their victim experience. These recommendations do not take away from the accused's rights, but rather carve out a process for victims to rightfully serve as members.

Notes:
1. Maj. Chase C. Cleveland, Voir Dire in a Time of "Me Too", ARMY LAWYER, Issue 4 at 78 (2019).
2. National Crime Victim Law Institute, Protecting the Rights of Survivors When They Are Called to Participate in Jury Service, Victim Law Position Paper, (2014).
3. See United States v. Smith, 25 M.J. 785, 787 (A.C.M.R. 1988) (holding a recent crime victim is not automatically disqualified). But see United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007) (ruling the trial judge erred in not granting the challenge for cause when panel member's experience with rape was pronounced and distinct)..

Marine Corps SVC: The establishment of the Office of Special Trial Counsel (OSTC) and the many other related changes to the military justice system will not remedy the historical concern that commanders send not who is qualified, but who is available. Front-end randomization could help correct this historical trend by requiring a convening authority to apply the Article 25 criteria to select only from among those members whose names were drawn at random. Another potential course of action could include the randomization of initial selection across supporting and operational commands at an installation, with the installation commander responsible for maintaining a pool of members selected after applying Article 25 criteria. Randomizing initial eligibility across commands would parallel the concept of service as a member of a court-martial

with the civic duty to serve as a juror. Linking the concept of duty to justice to courts-martial independent of a specific unit would promote justice, enhance the military justice knowledge of service members, and enhance awareness of both accountability measures and the fundamental fairness of judicial systems.

Air Force VC: Placing women or victim advocates on panels deciding sexual assault cases should not raise the specter that the panel is not fair or impartial toward the accused.

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.

Marine Corps SVC: The Marine Corps Separations Manual does not afford a respondent the right to request minority representation among board members.

Air Force VC: DAF does not have regulations or policies providing this option.

Appendix B. Narrative Questions Request, Combined Academic Experts Responses

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.

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?

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]

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."

[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).

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…."[1]

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?

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

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.

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.[1]

This is truly a slippery slope.

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

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.

[1] 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).

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.

[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.

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."[1] 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.[2] 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[3] and found to result in reducing the competency of the panel.[4]

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.

[1] MJRG REPORT, supra note 1 at 253-54.
[2] 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).
[3] 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)).
[4] Id. at 129.

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.

Arnold & Porter

Ryan Guilds
[redacted]

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.

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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.

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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

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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.

Arnold & Porter

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.

* * *

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.

APPENDIX D. DAC-IPAD MEMBER BIOGRAPHIES

Marcia Anderson was the Clerk of Court for the Bankruptcy Court–Western District of Wisconsin starting in 1998 until her retirement in 2019. In this role she was responsible for the management of the budget and administration of bankruptcy cases for 44 counties in western Wisconsin. Major General Anderson recently retired in 2016 from a distinguished career in the U.S. Army Reserve after 36 years of service, which included serving as the Deputy Commanding General of the Army's Human Resources Command at Fort Knox, Kentucky. In 2011, she became the first African American woman in the history of the U.S. Army to achieve the rank of major general. Her service culminated with an assignment at the Pentagon as the Deputy Chief, Army Reserve (DCAR). As the DCAR, she represented the Chief, Army Reserve, and had oversight for the planning, programming, and resource management for the execution of an Army Reserve budget of $8 billion that supported more than 225,000 Army Reserve soldiers, civilians, and their families. She is a graduate of the Rutgers University School of Law, the U.S. Army War College, and Creighton University.

Martha Bashford served in the New York County District Attorney's Office starting in 1979 until her retirement in 2020. At the time of her retirement, she was the chief of the New York County District Attorney's Office Sex Crimes Unit, which was the first of its kind in the country. She served in this role starting in 2011. Previously she was co-chief of the Forensic Sciences/Cold Case Unit, where she examined unsolved homicide cases that might now be solvable through DNA analysis. Ms. Bashford was also co-chief of the DNA Cold Case Project, which used DNA technology to investigate and prosecute unsolved sexual assault cases. She indicted assailants identified through the FBI's Combined DNA Index System (CODIS) and obtained John Doe DNA profile indictments to stop the statute of limitations where no suspect had yet been identified. She is a Fellow in the American Academy of Forensic Sciences. Ms. Bashford graduated from Barnard College in 1976 (*summa cum laude*) and received her J.D. degree from Yale Law School in 1979. She is a Fellow in both the American College of Trial Lawyers and the American Academy of Forensic Sciences.

William E. Cassara is a former Army prosecutor, defense counsel and appellate counsel, with more than 30 years of military law experience. Mr. Cassara holds a law degree from University of Baltimore and an undergraduate degree in business administration from Florida State University. He is a former professor at the University of Baltimore School of Law and the University of South Carolina School of Law. Mr. Cassara has been in private military law practice since 1996 focusing on court-martial appeals, discharge upgrades, security clearance and all other administrative military law matters.

Margaret "Meg" Garvin, M.A., J.D., is the executive director of the National Crime Victim Law Institute (NCVLI), where she has worked since 2003. She is also a clinical professor of law at Lewis & Clark Law School, where NCVLI is located. In 2014, Ms. Garvin was appointed to the Victims Advisory Group of the United States Sentencing Commission, and during 2013–14, she served on the Victim Services Subcommittee of the Response Systems to Adult Sexual Assault Crimes Panel of the U.S. Department of Defense. She has served as co-chair of the American Bar

Association's Criminal Justice Section Victims Committee, as co- chair of the Oregon Attorney General's Crime Victims' Rights Task Force, and as a member of the Legislative & Public Policy Committee of the Oregon Attorney General's Sexual Assault Task Force. Ms. Garvin received the John W. Gillis Leadership Award from National Parents of Murdered Children in August 2015. Prior to joining NCVLI, Ms. Garvin practiced law in Minneapolis, Minnesota, and clerked for the Eighth Circuit Court of Appeals. She received her bachelor of arts degree from the University of Puget Sound, her master of arts degree in communication studies from the University of Iowa, and her J.D. from the University of Minnesota.

Suzanne Goldberg has served in the U.S. Department of Education's Office for Civil Rights since day one of the Biden-Harris administration as Acting Assistant Secretary (January – October 2021) and Deputy Assistant Secretary for Strategic Operations and Outreach. Goldberg brings extensive experience in civil rights leadership, with expertise in gender and sexuality law, and many years as a university administrator and faculty member. Before joining the U.S. Department of Education, Goldberg was the inaugural Executive Vice President for University Life at Columbia University and on the faculty of Columbia Law School, where she is on a public service leave from her role as the Herbert and Doris Wechsler Clinical Professor of Law at Columbia Law School. She founded the Law School's Sexuality and Gender Law Clinic, the first of its kind in the nation, and was co-founder and co-director of the Law School's Center for Gender and Sexuality Law. Goldberg earlier served as a senior staff attorney with Lambda Legal, a national legal organization committed to the full recognition of the civil rights of LGBT people and people living with HIV. Goldberg holds a law degree with honors from Harvard University and a bachelor's degree with honors from Brown University and was a Fulbright Fellow at the National University of Singapore.

Judge Paul W. Grimm is a Professor of the Practice and Director of the Bolch Judicial Institute at Duke Law School. Prior to joining Duke Law School, Judge Grimm served as a federal judge for 25 years. In 2012 he was appointed as a District Judge for the United States District Court for the District of Maryland. Previously, he was appointed to the Court as a Magistrate Judge in February 1997 and served as Chief Magistrate Judge from 2006 through 2012. In September, 2009 he was appointed by the Chief Justice of the United States to serve as a member of the Advisory Committee for the Federal Rules of Civil Procedure. Additionally, Judge Grimm is an adjunct professor of law at the University of Maryland School of Law, where he teaches evidence, and also has taught trial evidence, pretrial civil procedure, and scientific evidence. He also has been an adjunct professor of law at the University of Baltimore School of Law, where he taught a course regarding the discovery of and pretrial practices associated with electronically stored evidence.

Before joining the Court, Judge Grimm was in private practice in Baltimore for thirteen years, during which time he handled commercial litigation. He also served as an Assistant Attorney General for the State of Maryland, an Assistant State's Attorney for Baltimore County, Maryland, and a Captain in the United States Army Judge Advocate General's Corps. While on active duty in the Army, Judge Grimm served as a defense attorney and prosecutor while assigned to the JAG Office at Aberdeen Proving Ground, Maryland, and thereafter as an action officer in the Office of the Judge Advocate General of the Army (Administrative Law Division), The Pentagon. In 2001, Judge Grimm retired as a Lieutenant Colonel from the United States Army Reserve.

Judge Grimm received his undergraduate degree from the University of California Davis (summa cum laude), his J.D. from the University of New Mexico School of Law (magna cum laude, Order of the Coif) and his LLM from Duke Law School.

A. J. Kramer has been the Federal Public Defender for the District of Columbia since 1990. He was the Chief Assistant Federal Public Defender in Sacramento, California, from 1987 to 1990, and an Assistant Federal Public Defender in San Francisco, California, from 1980 to 1987. He was a law clerk for the Honorable Proctor Hug, Jr., U.S. Court of Appeals for the Ninth Circuit, Reno, Nevada, from 1979 to 1980. He received a B.A. from Stanford University in 1975, and a J.D. from Boalt Hall School of Law at the University of California at Berkeley in 1979. Mr. Kramer taught legal research and writing at Hastings Law School from 1983 to 1988. He is a permanent faculty member of the National Criminal Defense College in Macon, Georgia. He is a Fellow of the American College of Trial Lawyers. He is a member of the Judicial Conference of the United States' Advisory Committee on Evidence Rules and the ABA Criminal Justice System Council. He was a member of the National Academy of Sciences Committee on Scientific Approaches to Understanding and Maximizing the Validity and Reliability of Eyewitness Identification in Law Enforcement and the Courts. In December 2013, he received the Annice M. Wagner Pioneer Award from the Bar Association of the District of Columbia.

Jennifer Gentile Long (M.G.A., J.D.) is CEO and co-founder of AEquitas and an adjunct professor at Georgetown University Law School. She served as an Assistant District Attorney in Philadelphia specializing in sexual violence, child abuse, and intimate partner violence. She was a senior attorney and then Director of the National Center for the Prosecution of Violence Against Women at the American Prosecutors Research Institute. She publishes articles, delivers trainings, and provides expert case consultation on issues relevant to gender-based violence and human trafficking nationally and internationally. Ms. Long serves as an Advisory Committee member of the American Law Institute's Model Penal Code Revision to Sexual Assault and Related Laws and as an Editorial Board member of the Civic Research Institute for the Sexual Assault and Domestic Violence Reports. She graduated from Lehigh University and the University of Pennsylvania Law School and Fels School of Government.

Jenifer Markowitz is a forensic nursing consultant who specializes in issues related to sexual assault, domestic violence, and strangulation, including medical-forensic examinations and professional education and curriculum development. In addition to teaching at workshops and conferences around the world, she provides expert testimony, case consultation, and technical assistance and develops training materials, resources, and publications. A forensic nurse examiner since 1995, Dr. Markowitz regularly serves as faculty and as an expert consultant for the Judge Advocate General's (JAG) Corps for the U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard. Past national activities include working with the Army Surgeon General's office to develop a curriculum for sexual assault medical-forensic examiners working in military treatment facilities (subsequently adopted by the Navy and Air Force); with the U.S. Department of Justice Office on Violence Against Women (OVW) to develop a national protocol and training standards for sexual assault medical- forensic examinations; with the Peace Corps to assess the agency's multidisciplinary response to sexual assault; with the U.S. Department of Defense to revise the military's sexual assault evidence collection kit and corresponding documentation forms; and as an Advisory Board

member for the National Sexual Violence Resource Center. In 2004, Dr. Markowitz was named a Distinguished Fellow of the International Association of Forensic Nurses (IAFN); in 2012, she served as IAFN's President.

Jennifer O'Connor is Vice President and General Counsel of Northrop Grumman Corporation. Prior to joining Northrop Grumman, Ms. O'Connor served as the General Counsel for the Department of Defense. In that role, she was the chief legal officer of the Department and the principal legal advisor to the Secretary of Defense. Earlier in her career, she served in numerous positions and agencies throughout the federal government. Her past positions include service in the Obama administration as Deputy Assistant to the President and Deputy White House Counsel responsible for the litigation, oversight and investigations portfolios; Senior Counsel at the Department of Health and Human Services; and as Counselor to the Commissioner of the Internal Revenue Service. Ms. O'Connor also worked in the Clinton Administration as Deputy Assistant Secretary for Policy at the Department of Labor, Special Assistant to the President in the Office of the White House Deputy Chief of Staff; Special Assistant to the President in the Office of Cabinet Affairs; and as Deputy Director of the White House Office of Management and Administration. Ms. O'Connor received a Bachelor of Arts degree from Harvard University, a Masters in Public Administration from Columbia University's School of International Public Affairs, and a Juris Doctor degree from Georgetown University.

BGen James (Jim) Schwenk was commissioned as an infantry officer in the Marine Corps in 1970. After serving as a platoon commander and company commander, he attended law school at the Washington College of Law, American University, and became a judge advocate. As a judge advocate he served in the Office of the Secretary of Defense, the Office of the Secretary of the Navy, and Headquarters, Marine Corps; he served as Staff Judge Advocate for Marine Forces Atlantic, II Marine Expeditionary Force, Marine Corps Air Bases West, and several other commands; and he participated in several hundred courts-martial and administrative discharge boards. He represented the Department of Defense on the television show *American Justice*, and represented the Marine Corps in a Mike Wallace segment on *60 Minutes*. He retired from the Marine Corps in 2000.

Upon retirement from the Marine Corps, BGen Schwenk joined the Office of the General Counsel of the Department of Defense as an associate deputy general counsel. He was a legal advisor in the Pentagon on 9/11, and he was the primary drafter from the Department of Defense of many of the emergency legal authorities used in Afghanistan, Iraq, the United States, and elsewhere since that date. He was the principal legal advisor for the repeal of "don't ask, don't tell," for the provision of benefits to same-sex spouses of military personnel, in the review of the murders at Fort Hood in 2009, and on numerous DoD working groups in the area of military personnel policy. He worked extensively with the White House and Congress, and he retired in 2014 after 49 years of federal service.

Judge Karla N. Smith was appointed to the Circuit Court for Montgomery County, Maryland in December 2014 by Governor Martin O'Malley. Judge Smith served on the District Court of Maryland from August 2012 until her appointment to the Circuit Court. In addition, Judge Smith serves as the Judiciary's representative on the State Council on Child Abuse and Neglect; the Operations Subcommittee of the Judiciary Committee on Equal Justice; and she represents the Circuit Court on the Montgomery County Domestic Violence Coordinating Council (DVCC).

Prior to her appointment, Judge Smith worked as a prosecutor for over 15 years. For five years, Judge Smith served as the Chief of the Family Violence Division of the Montgomery County State's Attorney's Office. Additionally, she sat on the Montgomery County Child Fatality Review Team; the Multidisciplinary Case Review Team for Child Abuse and Neglect; the Elder and Vulnerable Adult Abuse Task Force, which she chaired; the Interagency Sex Offender Management Team; Domestic Violence Case Review Team; and the Montgomery County Teen Dating Taskforce. It was during this time that Judge Smith was integral to the development of the Montgomery County Family Justice Center and the drafting and passage of a criminal child neglect statute that was signed into law in 2011.

Judge Smith received her Bachelor of Arts degree from the University of Maryland and her Juris Doctor from the University of Virginia. A life-long resident of Montgomery County and a product of Montgomery County Public Schools, Judge Smith currently lives in Bethesda with her husband and three sons.

Cassia Spohn is a Regents Professor in the School of Criminology and Criminal Justice at Arizona State University and an Affiliate Professor of Law at ASU's Sandra Day O'Connor College of Law. She is a Fellow of the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Western Society of Criminology. She is the recipient of numerous academic awards, including the University of Nebraska Outstanding Research and Creative Activity Award, the W.E.B. DuBois Award for Contributions to Research on Crime and Race/Ethnicity, the Lifetime Achievement Award from the American Society of Criminology's Division on Corrections and Sentencing, and Arizona State University's Faculty Achievement Award for Defining-Edge Research in the Social Sciences. Dr. Spohn's research interests include the correlates of federal and state sentencing outcomes, prosecutorial decision making, the intersections of race, ethnicity, gender, crime and justice, and sexual assault case processing decisions. She is the author of eight books, including *How Do Judges Decide: The Search for Fairness and Justice in Punishment* and *Policing and Prosecuting Sexual Assault: Inside the Criminal Justice System.* She is the author of more than 140 peer-reviewed publications. She currently is working on a National Science Foundation-funded project evaluating the impact of Arizona's recent ban on peremptory challenges and a series of papers on the imposition of life sentences in the U.S. District Courts.

Meghan Tokash is an Assistant United States Attorney at the Department of Justice. Previously, she served as a special victim prosecutor in the U.S. Army Judge Advocate General's Corps for eight years, litigating cases related to homicide, rape, sexual assault, domestic violence and child abuse. Tokash worked in the Army's first Special Victim Unit at the Fort Hood Criminal Investigation Division Office. She deployed to Iraq as the senior trial counsel for U.S. Forces Iraq, and prosecuted special victim cases across U.S. Army Europe and U.S. Army Central Command. Tokash was an attorney advisor for the Judicial Proceedings Panel prior to her 2017 appointment by Secretary of Defense Ash Carter to serve on the Defense Advisory Committee on the Investigation, Prosecution and Defense of Sexual Assault in the Armed Forces. In 2021, Tokash served on the 90-day Independent Review Commission on Sexual Assault in the Military that was established by Secretary of Defense Lloyd Austin at the direction of President Biden.

Judge Walton was born in Donora, Pennsylvania. In 1971, he graduated from West Virginia State University, where he was a three-year letterman on the football team and played on the 1968 nationally ranked conference championship team. Judge Walton received his law degree from the American University, Washington College of Law, in 1974.

Judge Walton assumed his current position as a U.S. District Judge for the District of Columbia in 2001. He was also appointed by President George W. Bush in 2004 as the Chair of the National Prison Rape Elimination Commission, a commission created by Congress to identify methods to reduce prison rape. The U.S. Attorney General substantially adopted the Commission's recommendations for implementation in federal prisons; other federal, state, and local officials throughout the country are considering adopting the recommendations. U.S. Supreme Court Chief Justice William Rehnquist appointed Judge Walton in 2005 to the federal judiciary's Criminal Law Committee, on which he served until 2011. In 2007, Chief Justice John Roberts appointed Judge Walton to a seven-year term as a Judge of the U.S. Foreign Intelligence Surveillance Court, and he was subsequently appointed Presiding Judge in 2013. He completed his term on that court on May 18, 2014. Upon completion of his appointment to the Foreign Intelligence Surveillance Court, Judge Walton was appointed by Chief Justice Roberts to serve as a member of the Judicial Conference Committee on Court Administration and Case Management.

Judge Walton traveled to Russia in 1996 to instruct Russian judges on criminal law in a program funded by the U.S. Department of Justice and the American Bar Association's Central and East European Law Initiative Reform Project. He is also an instructor in Harvard Law School's Advocacy Workshop and a faculty member at the National Judicial College in Reno, Nevada.

APPENDIX E. ACRONYMS AND ABBREVIATIONS

CA	Convening Authority
CAAF	Court of Appeals for the Armed Forces
CMA	Court of Military Appeals
DAC-IPAD	Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces
DoD	Department of Defense
FY	fiscal year
GAO	General Accounting Office/Government Accountability Office
GCM	general court-martial
GCMCA	general court-martial convening authority
IRC	Independent Review Commission on Sexual Assault in the Military
JSC	Joint Service Committee on Military Justice
MJA16	Military Justice Act of 2016
MCM	Manual for Courts-Martial
MJRG	Military Justice Review Group
NDAA	National Defense Authorization Act
OSTC	Office of Special Trial Counsel
R.C.M.	Rule for Courts-Martial
RFI	request for information
SAPRO	Sexual Assault Prevention and Response Office
TDY	temporary duty
UCMJ	Uniform Code of Military Justice

APPENDIX F. SOURCES CONSULTED

1. Legislative Sources—Enacted Statutes

10 U.S.C. § 825 (2021) (Article 25)

10 U.S.C. § 825 (1950) (Article 25)

The Articles of War of 1920, Art. 4 (June 4, 1920)

The Articles of War of 1948, Art. 4 (June 24, 1948)

Article 146a, Uniform Code of Military Justice

National Defense Authorization Act for Fiscal Year 2023, Pub. L. No. 117-263, 136 Stat. 2395 (2022)

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

National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, §552, 112 Stat. 1920 (1998)

2. Judicial Decisions

a. Supreme Court

Ex parte Milligan, 71 U.S. 2 (1866)

Ex parte Quirin, 317 U.S. 1 (1942)

Whelchel v. McDonald, 340 U.S. 122 (1950)

Batson v. Kentucky, 476 U.S. 79 (1986)

b. Military Courts of Criminal Appeals

United States v. Downing, 56 M.J. 419 (C.A.A.F. 2002)

United States v. Glenn, 25 M.J. 278 (C.M.A. 1987)

United States v. Dale, 42 M.J. 384 (C.A.A.F. 1995)

United States v. James, 61 M.J. 132 (C.A.A.F. 2005)

United States v. Anderson, No. 22-0193 (C.A.A.F. 2023)

United States v. Carter, 25 M.J. 471 (C.M.A. 1988)

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United States v. Crawford, 35 C.M.R. 3 (C.M.A. 1964)

United States v. Cunningham, 21 M.J. 585 (C.M.R. 1985)

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United States v. Smith, 27 M.J. 242 (C.A.A.F. 1988)

United States v. Daigle, 1 M.J. 139 (C.M.A. 1975)

United States v. McClain, 22 M.J. 124 (C.M.A. 1986)

United States v. White, 48 M.J. 251 (C.A.A.F. 1998)

United States v. Carman, 19 M.J. 932 (C.M.R. 1985)

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

3. Rules and Regulations

a. Executive Orders

Manual for Courts-Martial, United States (2023 ed.), Rule for Courts-Martial (R.C.M.) 504(a)

R.C.M. 503(a)

R.C.M. 504(d)(1)(A)(ii)

Manual for Courts-Martial, (1921 ed.)

Manual for Courts-Martial (1949 ed.)

Executive Order 14103, Annex 2, (July 28, 2023)

4. Meetings and Hearings

a. Public Meetings of the DAC-IPAD

Transcript of DAC-IPAD Public Meeting (September 21, 2022)

Transcript of DAC-IPAD Public Meeting (December 6, 2022)

Transcript of DAC-IPAD Public Meeting (February 21, 2023)

Transcript of DAC-IPAD Public Meeting (June 13, 2023)

Transcript of DAC-IPAD Public Meeting (September 19, 2023)

5. Official Reports

a. DoD and DoD Agency Reports

Department of Defense, 2021, Independent Review Commission on Sexual Assault in the Military, *Hard Truths and the Duty to Change: Recommendations from the Independent Review Commission on Sexual Assault in the Military (July 2021)*

Department of Defense, 2022, *SAPRO, Department of Defense Annual Report on Sexual Assault in the Military Fiscal Year 2022*

Department of Defense, 2015, *Report of the Military Justice Review Group, Part I 252* (December 22, 2015)

Department of Defense, 1972, *Report of the Task Force on the Administration of Military Justice in the Armed Forces, Vol. II* (November 30, 1972)

Department of Defense, 1999, *DoD Joint Service Committee on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Service on Courts-Martial* (1999)

b. Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces Reports

Report on Investigative Case File Reviews for Military Adult Penetrative Sexual Offense Cases Closed in Fiscal Year 2017 (Oct. 2020)

c. Other Government Reports

Government Accountability Office, *Military Jury System Needs Safeguards Found in Civilian Federal Courts* (June 6, 1977)

d. Commission Reports

Honorable Walter T. Cox III et al., *Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice* (May 2001)

6. Scholarly Articles

a. Law Reviews and Law Journals

Edward G. Sherman, *The Civilianization of Military Law,* 22 Main L. Rev. 3 44 (1970)

Wayne L. Friesner, *Military Justice and the Military Justice Act of 1968: How Far Have We Come?,* 23 SW. L.J. 554, 568-69 (1969)

Alleman, Lindsy Nicole, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 Duke J. Compar. & Int'l. L. 169 (2006)

b. Other Academic Articles

Major S. A. Lamb, *The Court-Martial Panel Member Selection Process: A Critical Analysis*, 40th Judge Advocate Officer Graduate Course, April 1992

7. Requests for Information and Responses

DAC-IPAD Request for Information 2.9 (April 24, 2023) and responses from Service criminal law organizations, Offices of Special Trial Counsel, trial defense organizations, and victims' counsel organizations

Responses to the DAC-IPAD's request for information from interest groups and members of academia

8. Letters, Emails, and Other Media

Memorandum from Defense Secretary Lloyd Austin, *Commencing DoD Actions and Implementation to Address Sexual Assault and Sexual Harassment in the Military* (Sept. 22, 2021)

APPENDIX G. DAC-IPAD PROFESSIONAL STAFF

Professional Staff

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