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AVOIDING THE EXTREMES: A PROPOSAL FOR MODIFYING  
COURT MEMBER SELECTION IN THE MILITARY

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I. INTRODUCTION

Donna Defender has been practicing law for five years and has developed a thriving criminal defense practice. She has become a well-known figure in the local courts and has developed a reputation as a hardworking, smart, and tenacious lawyer. Her practice is located about twenty-five miles from a major military installation. To date, she has been hesitant to take on any military clients because of her lack of experience with the military justice system. She believed she did not have the necessary knowledge and competency to represent clients in a military court-martial. However, in her desire to expand her practice, she thinks now may be a good time to take on a few military clients and gain some experience.

The first opportunity comes when Sergeant Driver seeks out Donna Defender to represent him. Sergeant Driver is stationed at the nearby military installation. Last week, military police pulled him over soon after he left the Community Club on base. The police administered a breathalyzer test which indicated that he had a .09 blood alcohol content. The police subsequently charged Sergeant Driver with driving under the influence (“DUI”), and he is now facing a military court-martial.

Donna sees this as the perfect opportunity to acquire a military client. She has successfully defended a number of DUI cases in the local civilian courts and her initial research of military law suggests that the issues are largely the same in a court-martial.<sup>1</sup> She agrees to take Sergeant Driver's case and begins her preparation.

As the date for the trial approaches, the prosecution sends Donna a copy of a document titled “Court-Martial Convening Order.” Among other things, the convening order identifies General Pane as the court-martial convening authority. As the convening authority, General Pane has the responsibility to send, or in military parlance, refer this \*912 case to trial.<sup>2</sup> According to the Court-Martial Convening Order, General Pane referred the charges against Sergeant Driver to a special court-martial.<sup>3</sup> In addition, the document identifies by name the panel members<sup>4</sup> who are detailed<sup>5</sup> to the case to determine Sergeant Driver's guilt or innocence.<sup>6</sup> If the panel members find Sergeant Driver guilty, they must also determine the appropriate punishment. After reading through the document, Donna thinks to herself, “This is a very different way to pick a jury than I am used to.” After a second read, she realizes the convening authority, General Pane, not only decides and directs the charges to be referred to a court-martial, but also personally selects the military members who will sit in judgment of her client. How can her client hope for a fair trial when the deck is so stacked against him? Suddenly she feels a pit in her stomach and begins to have doubts about taking this case.

Donna's reaction to the military's method used to select the panel or jury members is a pretty typical and obvious reaction. How is a fair trial possible when the very person who determines if there should be a trial at all, and if so, what charges to bring, is also the person who gets to handpick the people responsible for deciding guilt? Often the court-martial convening authority is the most senior military officer on a base.<sup>7</sup> If the convening authority determines that the charges should go to trial, can we

really expect the military subordinates he selected to serve as panel members to exercise an independent evaluation of the case? Nonetheless, this is the very system that exists in the military today.

This Article addresses this issue and offers a proposed change--not to the military's panel selection system itself, but through an expansion of the accused's rights to exercise peremptory challenges as a means of addressing the potential for unfairness and the threat of panel member-stacking. Part II of this Article explores the history of panel member selection and the rationale behind this system. It examines the most common criticisms of this selection process, the proposed \*913 solutions to date, and why those proposed solutions have failed to take hold. Part III looks at the law of challenges for cause and peremptory challenges. It focuses specifically on the historical development of peremptory challenges within military law and how the system of peremptory challenges currently operates. Part IV proposes an expanded use of peremptory challenges for the military accused. Specifically, this part addresses how the selection process should be modified, the costs and benefits of such a modification, and why this proposed change strikes an appropriate balance between the rights of the accused and the unique needs of a military justice system. In Part IV, this Article concludes by addressing the likely criticisms of this proposal.

## **II. THE HISTORY AND RATIONALE FOR COURT MEMBER SELECTION IN THE MILITARY JUSTICE SYSTEM**

Like Donna, anyone unfamiliar with the military justice system in the United States likely assumes that there are some significant differences between it and the civilian criminal justice system. In spite of this assumption, there is a common belief that the fundamentals of the military justice system are not a radical departure from the civilian system. After all, if the military was branding or drawing and quartering service members convicted within the court-martial system, such treatment would most certainly be reported, and it is highly unlikely that Congress would allow such conduct. In fact, in light of the number of high-profile military cases stemming out of the wars in Iraq and Afghanistan, in addition to the attention that military tribunals have garnered in the media, it is fair to say that today the public is much more informed about the military justice system than it was at any time in the recent past.

In spite of this increased familiarity, the general public and many civilian lawyers and legal experts may be surprised to learn how military members are selected to sit in judgment of their fellow service members. There is simply nothing like it in the civilian criminal justice system. In the civilian system, the Sixth Amendment commands that an defendant "shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." <sup>8</sup> There is a long history of well-developed case law on what it means to be tried by an impartial jury under the Sixth Amendment. <sup>9</sup> On the question of jury selection, civilian jurisdictions \*914 throughout the country use a number of different methodologies, from voter registration lists to department of motor vehicle records, to gather names for the jury pool. <sup>10</sup> The similarity among these approaches is the degree of randomness in the selection process. No one who is responsible for prosecuting the defendant is supposed to have a hand in the initial jury selection process. If there is evidence that the prosecuting authority was somehow involved in selecting the potential jurors, it is very likely that a court will find this to be a violation of the Sixth Amendment.

How then can the military have such a different selection process, and how can that process pass constitutional muster? To begin, it is important to note that not all of the Bill of Rights applies in the military system in the same way that it applies in the civilian system. For example, the military is specifically exempted from the Fifth Amendment right to a grand jury indictment. <sup>11</sup> In other areas as well, courts have recognized that the protections of the Bill of Rights do not apply to the military in the same way they apply to civilians. <sup>12</sup> The Court of Military Appeals has held that the Sixth Amendment right to a jury is not applicable to the appointment of military members to serve on courts-martial. <sup>13</sup> To date, the United States Supreme Court has not ruled on the applicability of the right to a jury trial in courts-martial; however, given the Court's past deference to Congress on military justice matters, it is unlikely that the Court would find the right to a jury trial applies to courts-martial.

Much of the Court's deference to Congress on questions of military justice stems from the fact that military courts-martial are not Article III courts. Congress's authority to create a special court of limited jurisdiction to try military service members by courts-martial comes from Article I, Section 8 of the United States Constitution. Specifically, Clause 14 states that Congress has the power “[t]o make \*915 rules for the government and regulation of the land and naval forces.”<sup>14</sup> In the military cases that the Supreme Court has reviewed, a consistent theme has been the Court's unwillingness to challenge the court-martial system. The Court views Congress as better suited to balance the needs of individual rights against the interests of national security and military readiness.<sup>15</sup> As a consequence, the Court has been deferential to Congress.

Congress established the Uniform Code of Military Justice<sup>16</sup> (“UCMJ”), which President Harry S. Truman signed into law in 1951.<sup>17</sup> Since then, Congress amended the code significantly in both 1968<sup>18</sup> and 1983.<sup>19</sup> The UCMJ was seen as a compromise between proponents of individual rights and those who wanted to retain the commander as a source of virtually unlimited control over military justice.<sup>20</sup>

There are a number of statutory provisions in the UCMJ focusing on the panel member selection process. The Rules for Courts-Martial supplement these statutory provisions.<sup>21</sup> Through executive order and pursuant to his authority under [Article 36 of the UCMJ](#), the President promulgates the Rules for Courts-Martial.<sup>22</sup> Finally, each of the uniformed services has the authority to develop implementing regulations.

The UCMJ provision that created the current system of panel member selection is Article 25.<sup>23</sup> Article 25 first establishes who is eligible to serve as a panel member on a court-martial. The pool of potential panel members is quite broad. A commissioned officer of any \*916 rank can serve on any court-martial.<sup>24</sup> Additionally, a warrant officer of any rank can serve as a panel member for any court-martial except when the accused is a commissioned officer.<sup>25</sup> Finally, in the trial of an enlisted member, an enlisted member of any rank who is not in the same company- or battery-sized unit as the accused service member can serve as a panel member.<sup>26</sup> This list of eligible panel members potentially includes just about every military member in that particular military command. If the convening authority selected actual panel members in some kind of random fashion from this list, the selection process would be quite similar and perhaps even broader than the potential jury pool in most civilian jurisdictions.

However, Article 25(d)(2) sets out a very different selection process. Article 25(d)(2) states: “When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”<sup>27</sup> Article 25 has two primary functions. First and most important, it gives the court-martial convening authority the responsibility and authority to individually select the members of the command who will serve as panel members. So while the pool of service members who are eligible to serve as panel members is very broad, that breadth is significantly narrowed because the convening authority has the sole discretion to select the panel members who will actually serve.

The second function of Article 25 is to define the criteria the convening authority should use in making the selection decision. These selection criteria are not narrow or specific. How, for example, should a panel member's age factor into the selection decision? Would older, more senior panel members necessarily be best suited to evaluate a case against a very junior service member? Likewise, what is meant by judicial temperament? Does this criterion suggest that the convening authority should select people who see the case the way he sees it? Does it mean the convening authority should select people who will be \*917 “tough on crime”? In conjunction, these factors seem to suggest that older, more experienced, higher ranking officials are best suited to serve as panel members. That alone makes the selection processes problematic. But beyond that, the factors are so vague that the convening authority has virtually unfettered discretion in making these selections, which certainly creates the potential for mischief.

It would be unfair and inaccurate to suggest that all panel members selected to serve are mere puppets of the convening authority. It would also be unfair to suggest that convening authorities routinely manipulate and abuse the selection process to achieve a certain outcome. The selection process begins with the request for all military units under the command of the convening authority to submit a list of individuals within the unit who would be available to serve as panel members. A military legal advisor usually presents this list to the convening authority. The advisor tells the convening authority that he can select panel members from the list provided or that he can select anyone within his authority to serve as a panel member. Further, the advisor reminds the convening authority of the selection process criteria listed in Article 25. Often the convening authority will also have the personnel files of the potential selectees to aid him in applying the criteria. Once the commander selects a list of names, an order is drafted informing those who were selected and detailing them to serve.<sup>28</sup>

The practice in some branches of the military is to detail the court members to serve for a period of time, which is typically six months. This means these court members will sit in judgement of all the cases that arise over this specified period of time. Because the convening authority details these members for a specific time period, the convening authority selects them independently of any particular case.

These procedures help deter selection process manipulation from taking place and prevent the military justice system from becoming fundamentally unfair. Nevertheless, in a system where one individual or office has so much authority and discretion in selecting those who will sit in judgement of the case, there is the potential for abuse.

#### A. Criticisms of the Selection Process

Over the years, of all the criticisms launched against the military justice system, none seems as frequent or vociferous as the criticism of the role of the convening authority in the selection process. Much of this criticism actually precedes the codification of **\*918 Article 25 of the Uniform Code of Military Justice**<sup>29</sup> (“UCMJ”) and is part of a larger debate over the role of the military commander in the military justice system.

Pressure to reform aspects of the United States military justice system began near the end of World War I.<sup>30</sup> Major General Enoch Crowder, the Provost Marshall General of the Army, was a strong proponent of the then-existing system, which kept the commander as the focal point of the military justice system.<sup>31</sup> Brigadier General Samuel T. Ansell, the acting Judge Advocate General of the Army, argued for major systemic reforms that would reduce the role of the military commander and give greater protection to individual rights.<sup>32</sup> In the short term, General Crowder's position won out in the 1920 Articles of War.

The conclusion of World War II saw a groundswell of support for reforms to the military justice system.<sup>33</sup> During the war, many in uniform were subjected to what they believed was an unfair and arbitrary system of justice.<sup>34</sup> Due in large part to these pressures, Congress held extensive hearings, which ultimately led to the creation of the UCMJ. However, practically before the ink was dry on the UCMJ, **Article 25** was a target of continued criticism.<sup>35</sup>

Critics of military justice in general have used **Article 25** as the prime example of the inherent unfairness that renders military justice an oxymoron. Not surprisingly, these critics describe the various ways convening authorities can manipulate the system. One of the various ways critics argue convening authorities can manipulate the system is by stacking the court-martial panel with officers having the same view of the case as the convening authority. Another criticism is that the convening authority can handpick the panel members and order them to reach a particular outcome<sup>36</sup>

**\*919** Even many supporters of the military justice system from both outside and inside the military have singled out **Article 25** for criticism, making calls for reform. Their criticisms have often been more nuanced. Some have argued, for example, that while convening authorities may not routinely, or ever, use **Article 25** to unfairly manipulate the court-martial process, the fact that such a potential even exists undermines public confidence in the system. Their calls for reform are based largely on the

need to have a system that not only is fair but is also perceived as fair. For them, [Article 25](#) remains one of the last stumbling blocks and a vestige of a bygone era.<sup>37</sup>

Other critics have attacked [Article 25](#) on constitutional grounds. They argue that fundamental due process protections apply to members of the armed forces in much the same way they apply to civilians. They also see the Sixth Amendment right to a fair and impartial jury as a key aspect of fundamental due process and believe the panel member selections should reflect this right.<sup>38</sup> Regardless of critics' reasons for attacking the panel member selection process, they generally agree that a solution to the problems associated with [Article 25](#) is to replace the convening authority's role with some version of a random selection process.<sup>39</sup>

Over the years, some of these criticisms have gotten the attention of the courts and Congress. As noted above, the Court of Military Appeals and the Court of Appeals for the Armed Forces have held that the Sixth Amendment right to a jury trial does not apply to a military court-martial.<sup>40</sup>

**\*920** Even though the military appellate courts have been unwilling to apply the jury trial right to courts-martial, they have acted in a number of ways to limit the convening authority's discretion in the selection process. For example, in evaluating the convening authority's compliance with [Article 25](#), the Court of Appeals for the Armed Forces considers three primary factors: first, whether an improper motive to pack the member pool existed; second, whether there was systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank; and, third, whether a good faith attempt to be inclusive and to require representativeness was made so that court-martial service is open to all segments of the military community.<sup>41</sup>

Courts have also looked skeptically at efforts to exclude certain groups from being considered for service on a court-martial panel. The Court of Appeals for the Armed Forces struck down an Army regulation that exempted officers in certain career fields from serving as court members.<sup>42</sup> Military courts have also invalidated selection processes that systematically excluded service members based solely **\*921** on their rank.<sup>43</sup> Military courts have also held that any panel member who exhibits an inelastic disposition to the case or to the appropriateness of a potential punishment is not qualified to serve.<sup>44</sup>

In addition, the Court of Appeals for the Armed Forces developed the doctrine of implied bias as a means of evaluating the qualifications of a particular panel member to serve, even if the accused cannot prove actual bias. The court developed this doctrine from the [Rule for Court-Martial 912\(f\)\(1\)\(N\)](#),<sup>45</sup> which requires the removal of a panel member in the "interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality."<sup>46</sup> Under this rule, the Court of Appeals for the Armed Forces has invalidated military panels that lack the appearance of fairness.<sup>47</sup>

Congress has also responded at times more directly to critics of the selection process. In 1971 Senator Birch Bayh introduced a bill that would have abolished [Article 25](#). The bill would have created an independent court-martial command that would appoint panel members by a random selection process.<sup>48</sup> In the late 1970s, the Army briefly experimented in *United States v. Yager*<sup>49</sup> with a type of random selection process at Fort Riley, Kansas.<sup>50</sup> Most recently, as part of the 1999 Defense Authorization Act, the military was directed to examine alternatives to the current selection process.<sup>51</sup> After completing the study, the Joint Service Committee, composed of representatives from each of the services reported to Congress that the **\*922** current system is most likely to obtain the best-qualified members and the Committee recommended that Congress not adopt a random selection procedure.<sup>52</sup>

## **B. Why the Military Has Been Resistant to Change**

In the face of these criticisms and with such a seemingly ready-made alternative solution available, one has to wonder why and how the military has continued to resist any change. To understand this, it is important to appreciate the purposes of the military justice system, the role the military commander plays in that system, and why that role is so significant.

### 1. Purposes of the Military Justice System

First and foremost, military justice is one of the primary tools available to a military commander to maintain discipline within the ranks.<sup>53</sup> Military operations, particularly in war, often require immediate and unquestioned obedience to orders and commands. Even in peacetime, commanders must establish and maintain a high level of respect for authority. Military leaders in the United States are trained to develop and maintain this level of discipline primarily through positive leadership techniques such as leading by example, maintaining high standards of performance and readiness, and attending to the needs of both the individual soldiers and the requirements of the military organization.<sup>54</sup>

However, because a military organization is unlike any other organization, as soldiers may be ordered to sacrifice their lives to accomplish a mission or an objective, positive leadership may not be enough to maintain a necessary level of discipline. The provision granting the commander the means to impose swift and sometimes summary punishment to maintain discipline and obedience is a critical aspect of the United States military justice system.<sup>55</sup>

Maintenance of discipline is a hallmark of military justice, but it is not, as some assume, the be all and end all of military justice, particularly in a democracy. Loyalty to both superiors and subordinates \*923 is an essential part of the military ethos.<sup>56</sup> Soldiers must be loyal to their superiors and willing to support the unit's mission. In turn, the senior leaders owe a measure of loyalty to the soldiers they command.<sup>57</sup> A justice system seen--particularly by the enlisted ranks--as arbitrary and unfair detracts from that loyalty.<sup>58</sup> In such a system, soldiers may become resentful of their superiors.<sup>59</sup> This resentment can lead to a lack of trust and confidence and, ultimately, to a weakening of discipline.<sup>60</sup>

The United States military draws its members from the population it serves. To varying degrees, the members of a military organization reflect the values, customs, and attitudes of the general public. That said, in many ways military law is treated as separate and apart from state and federal law.<sup>61</sup> This may reflect the treatment of military society as separate and apart from civilian society.<sup>62</sup> It has its own values, attitudes, customs, and norms. From the first day of basic training, service members are taught to subordinate individual interests to the organization's needs.<sup>63</sup>

A military justice system should reflect the unique values, norms, and attitudes that create this separate society. Service members who understand the impact that insubordination has on a military organization should sit in judgment of those accused of disobedience. Those who know firsthand how the rights of the individual must be balanced against the needs of the organization should decide where that line should be drawn. Those who have trained for war and have served in combat should judge the behavior of soldiers on the battlefield who are being charged with violating the laws of war.

Another, sometimes overlooked, purpose of a military justice system is that it must be deployable. It must be capable of functioning when military forces are overseas or otherwise outside the reach of the civilian courts. This need for deployability has both practical and theoretical components. Practically speaking, sending cases that arise while forces are deployed back to the home country to adjudicate would severely undermine the system's effectiveness. It is impractical to expect a commander to dedicate the time and resources necessary to send the accused soldier, relevant witnesses, and evidence back home, particularly during combat or other military operations. It is also unlikely \*924 that the commander would wait to resolve these cases until the unit redeployed. Without a justice system that can follow the commander into a deployed environment, there is a risk that the commander might operate outside of the established system.

By having a justice system that can travel with the forces into combat and other operations, the military encourages its forces to respect the rule of law. A military force that respects the rule of law garners respect and trust from the world community. This trust and respect can certainly carry over to world opinion about the legitimacy of military operations. Of course, the contrary is also true--when military forces operate outside the rule of law, the legitimacy of their operation is significantly undermined.

A final objective of a military justice system, particularly relevant to the United States, is the reinforcement of civilian control over the military. In the United States, Congress has the primary responsibility for making rules to regulate armed forces.<sup>64</sup> Ultimately, elected officials strike the balance between the needs of the military and the rights of individual service members. The United States military justice system is an expression of the nation's collective will as to how much authority it is willing to give to its military leadership. Such a system reinforces the notion that the military derives its authority from civilians and, in so doing, helps minimize the risk of a military coup and protects civilian supremacy over the military.<sup>65</sup>

## 2. The Role of the Commander

In the civilian justice system, there is no counterpart to the commander. Beyond the selection of the members who will hear the case, the convening authority has several significant functions during the course of the trial. The convening authority, for example, can order that depositions be taken in a pending case.<sup>66</sup> The convening authority approves and authorizes funding for witness travel<sup>67</sup> and employment and funding for expert witnesses requested by either the prosecution or the defense.<sup>68</sup> The convening authority is also authorized \*925 to grant both transactional and testimonial immunity for any witness subject to the Uniform Code of Military Justice<sup>69</sup> ("UCMJ").<sup>70</sup> If the accused desires to enter a guilty plea, the accused and the convening authority may directly negotiate a pretrial agreement, which will be binding on the court.<sup>71</sup> The convening authority can also order an inquiry into the mental capacity or mental responsibility of the accused.<sup>72</sup>

At the conclusion of the trial, if the court finds the accused guilty of any offense, the convening authority continues to have significant involvement in the case. Before the case becomes final, the convening authority must approve both the findings and the sentence of the court-martial.<sup>73</sup> At that time, the convening authority may dismiss any specification or charge by setting aside findings of guilt.<sup>74</sup> The convening authority may also change any findings of guilt to a lesser included offense,<sup>75</sup> modify to a lesser sentence, or order a proceeding in revision or rehearing.<sup>76</sup> No proceeding in revision can reconsider a finding of not guilty.<sup>77</sup> The commander's authority to modify the findings and sentence in this manner is viewed as "a matter of command prerogative involving the sole discretion of the convening authority."<sup>78</sup>

Why would a justice system give the commander such a significant role? To answer this question, one must consider how the military justice system relates to the commander's personal responsibility and associated criminal liability if he fails to adequately prevent, suppress, and punish law-of-war violations committed by the forces under his command. The doctrine of command responsibility holds that a commander may be criminally liable for law-of-war violations committed by the forces under his command.<sup>79</sup> Over the years, the doctrine has obtained the status of customary international law and has been codified in various international agreements.<sup>80</sup> Under this doctrine, if \*926 a commander fails to control his forces in such a way as to prevent, suppress, or punish law-of-war violations that he knew existed or recklessly or negligently failed to notice, he can be punished as if he committed the crimes personally.<sup>81</sup>

This doctrine is based on the commander's unique position in a military organization. It recognizes the commander as the focal point of military discipline and order, and it is the commander's responsibility to maintain command and control of his subordinate forces.<sup>82</sup> The basis of the doctrine reflects the traditional role of the military commander as the oracle of justice. The doctrine is based on the recognition that there is often a very thin line separating a disciplined military force from a mob.

It is the commander who stands on that line and, by use of all resources and authority available to him, ensures that his forces do not violate the laws of war. If they do, it is in large part attributable to the commander's failings.

Much of the resistance to removing the commander from the panel member selection process stems from more than just slavish commitment to tradition; it stems from the very real and legitimate concern that removing or significantly diminishing the commander's role will fundamentally change the military justice system. This change may bring about a host of unintended and unwanted consequences. The panel member selection issue is just one part of a much bigger debate over the role of the commander in military justice issues.

### 3. Practicability Concerns

In addition to concerns about fundamentally changing the military justice system, there are also important concerns about the practicability of changing the panel member selection process, particularly if these changes create some type of random selection. Removing the commander from the selection decision and delegating that function to some outside organization means the commander loses not only some control over the selection process but also over the forces under his or her command. If service members are selected at random to serve on court-martial duty, that means they can be removed from critical assignments and mission essential work without the commander's permission or say in the decision.

**\*927** These kinds of disruptions may be problematic in peacetime, but in a combat environment, such disruptions may prove devastating. Just imagine that on the eve of a major operation a subordinate commander responsible for leading the offensive is called to serve on a court-martial. Would the benefits of having a random selection process outweigh the costs to the mission's success by pulling that subordinate commander off the line just before the initiation of an important military offensive? Many would say this is too high of a price to pay for the perception of fairness that a random selection process might provide.

To avoid these problems, a commander may decide to postpone or forgo a court-martial rather than run the risk of losing critical members of the command to court-martial duty. This decision to delay or forgo court-martial procedures comes with its own significant costs. For example, justice might be delayed or ultimately denied. Additionally, commanders may become so frustrated with a system that imposes such a heavy burden on mission readiness that they may seek other means, perhaps even illegal means, to punish soldiers outside of the court-martial system. Forgoing action on a case can also lead to a breakdown in discipline or a belief that behavior that is illegal in peacetime is not punishable in combat. If such an attitude develops within a command, it can have devastating consequences.<sup>83</sup>

Of course, there may be responses and resolutions to some of these practical concerns. The strongest proponents for removing the commander from the panel member selection process point to Canada and Great Britain that once had systems similar to the United States system but have undergone significant reforms and have removed the commander from panel member selection process.<sup>84</sup>

These reforms have come with costs. The recent Canadian case, *Director of Military Prosecutions v. The Court Martial Administrator and the Chief Military Judge*,<sup>85</sup> illustrates one of the perhaps unintended consequences of dividing the responsibilities of the convening **\*928** authority into three separate offices.<sup>86</sup> In this case, the Director of Military Prosecutions sought to bring a member of the Canadian Armed Forces before a court-martial to face charges of aggravated assault and ill-treatment of a subordinate.<sup>87</sup> However, the soldier in question was assigned to a special unit of the Canadian Armed Forces at the time and, under the policy of the armed forces, his name and other identifying features could not be made public.<sup>88</sup> Because the identifying information on the charge sheet was marked "SECRET," the Chief Military Judge refused to assign a military judge to the case, and the Court Martial Administrator refused to issue a convening order.<sup>89</sup>

To resolve the dispute between the three agencies, the Director of Military Prosecution sought an order of mandamus from a Canadian federal court to compel the Chief Military Judge to assign a judge to the case and to require the Court Martial



Administrator to issue a convening order.<sup>90</sup> As this case illustrates, when the system divides and delegates the commander's traditional role in military justice to separate agencies, these agencies can become a three-headed creature requiring all three heads to agree before the Administrator can convene the court.<sup>91</sup> In such a situation, the question is whether adding fairness, or perceived fairness, to Canada's system is worth the loss in efficiency, deployability, control, and discipline, which are hallmarks of a system embracing the military commander's role.

Likewise, the United Kingdom's military justice system, despite monumental changes that have occurred, has suffered legal attacks. Three fairly recent cases from the European Court of Human Rights ("ECHR") show that this court is still subjecting the British military justice system to intense scrutiny.<sup>92</sup> In each of these cases brought before the ECHR, individual claimants challenged various aspects of the British court-martial system.

Removing the commander may create a risk of turning the current system over to courts and other agencies that have little understanding \*929 of how such a system must operate in combat and during other military operations. Those concerned that the United States military maintain a justice system that works both in peacetime and in combat, taking into account the practical realities and operational needs, are loath to remove the commander from the panel selection process.

#### 4. Current Protections Against Unlawful Command Influence

Another reason why the United States military has been resistant to reform is that there are already a number of safeguards built into the system designed to prevent the commander from unfairly manipulating the selection process. As noted above, the military appellate courts have been active in providing certain limits on the commander's discretion to select or exclude certain categories of potential panel members. Using the doctrine of implied bias, in combination with an evaluation of the commander's selections for improper motives and the systemic exclusion of otherwise qualified potential members based on impermissible variables, these courts have rained in the otherwise unbridled discretion of commanders.

To reiterate, [Article 25 of the Uniform Code of Military Justice](#)<sup>93</sup> ("UCMJ") also gives the commander specific guidance on who to select for court-martial service. Commanders are not free to select those who would be inclined to vote for convictions or harsh punishments regardless of the evidence. Commanders are not permitted to select only those who will see the case as the commander sees it. Instead, they must select members who, by reason of their age, education, experience, length of service, and judicial temperament are best suited for this service.<sup>94</sup> A commander who earnestly uses these criteria is likely to select a panel that is independent in thought and action. The selected panel is likely to carefully consider the evidence, apply the law as instructed by the military judge, and earnestly seek to achieve a just result.

In addition to these protections, [Article 37 of the UCMJ](#)<sup>95</sup> anticipates the risk that exists in a system where the commander has so much authority. To prevent abuse, [Article 37](#) provides in part:

(a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other \*930 exercises of its or his functions on the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving or reviewing authority with respect to his judicial acts.

(b) In the preparation of an effectiveness, fitness, or efficiency report on any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member before . . . a court-martial.<sup>96</sup>

In addition, Military Rule of Evidence 509<sup>97</sup> and Rule for Courts-Martial 922(g)<sup>98</sup> protect the deliberations and voting of individual court members from disclosure.

These statutory protections are not insignificant. Article 37, in effect, insulates the actions and decisions of a panel member from any type of command retribution. Congress wrote the statute in broad terms to give panel members the ability to exercise their independent judgment and discretion. Military Rule of Evidence 509 and Rule for Courts-Martial 922 provide additional protection by prohibiting anyone, including the commander, from attempting to discover how a particular member voted in a case.

In combination, these specific protections along with other systemic protections provided to the accused service member facing court-martial, make it hard to prove that the system is fundamentally unfair merely because the commander selects those who will sit in judgment of the accused. In light of these protections, considering the unique functions of a military justice system, the important role played by the military commander within the system, and the reasons for the military's continued resistance to reform, the current panel member selection process is more understandable.

Nonetheless, in spite of these very legitimate concerns, the military cannot simply ignore reasonable criticisms of the current selection system. Even if the system is fundamentally fair, if a perception \*931 of unfairness continues to exist, it can be difficult for the military justice system to maintain legitimacy.

Further, the selection process criteria outlined in Article 25 hardly provides bright line rules. Even with the active involvement of the courts to add clarity, a commander who has a mind to abuse the system could manipulate the selection criteria. Because of the way these selections are made, it can be difficult to prove the commander acted improperly. While the protections of Article 37 are important and useful, these protections, too, can only go so far. If a commander abuses the system by selecting those who will vote his way, he will have no need to take adverse action against the members, and he will not trigger the protections of Article 37.

Even with the protections designed to prevent unlawful command influence in the panel selection process, if a better system is available, the military should embrace those changes. The problem up to this point is that the most frequently proffered reform is some type of random selection. A random selection process, though, fails to give proper consideration to the unique needs of the military justice system and the important responsibilities of a commander within that system. Random selection virtually removes the commander altogether. This is why random selection has gained little, if any, real traction either with the military or Congress.

### III. PEREMPTORY CHALLENGES IN THE MILITARY JUSTICE SYSTEM

What is needed is reform that is sensitive to the legitimate interests of the military and that makes the system fairer and less amenable to abuse by unscrupulous commanders. This Article proposes a reform that will allow the commander to continue to select those most qualified to serve as panel members in line with Article 25 of the Uniform Code of Military Justice<sup>99</sup> ("UCMJ") and, at the same time, will allow defense attorneys in individual cases to level the playing field by giving them greater ability to remove potential panel members from a particular case. Simultaneously, the reform will limit who the prosecutor can remove from the panel. This Article proposes an expanded use of peremptory challenges for the defense and an elimination of the prosecution's peremptory challenge. This relatively simple reform will ensure a fairer and more balanced court-martial panel while preserving the commander's role in the justice system.

#### \*932 A. Background and Use of Peremptory Challenges in the Military

Peremptory challenges should be distinguished from challenges for cause. There are no limits to the number of challenges for cause that either party can make. Under military rules, there are a number of potential bases for a challenge for cause including: (1) the member is not competent to serve under the criteria set out by [Article 25 of the Uniform Code of Military Justice](#)<sup>100</sup> (“UCMJ”);<sup>101</sup> (2) the member is not properly detailed to serve;<sup>102</sup> (3) the member acted as an accuser, investigator, or convening authority in the case;<sup>103</sup> (4) the member expressed a definite opinion as to the guilt or innocence of the accused;<sup>104</sup> or (5) the member should not sit in the interest of legality, fairness, or impartiality.<sup>105</sup>

On the other hand, peremptory challenges of potential panel members require no reason or explanation. A party can exercise a peremptory challenge for any reason other than the race or gender of the panel member.<sup>106</sup> In the court-martial system, each party gets one peremptory challenge.<sup>107</sup> To understand how an expansion of peremptory challenges for the military accused can serve as a workable and meaningful reform for the current panel member selection process, some background on the status and use of peremptory challenges in the United States legal system and the court-martial system in particular is helpful.

In *Swain v. Alabama*,<sup>108</sup> the United States Supreme Court described the origins of the peremptory challenge. It noted the use of peremptory challenges as a well-established part of the English legal system. At the time when the Colonies separated from England, peremptory challenges became a part of common law in the United States.<sup>109</sup> Peremptory challenges soon were a staple in both state and federal courts and often times these challenges were codified by statute.<sup>110</sup> Though the Court has never held that peremptory challenges are constitutionally required,<sup>111</sup> it has stated they are a necessary part of a jury trial<sup>112</sup> and one of the most important rights secured to the defendant.<sup>113</sup> It is notable for our discussion that the Court seems to view the right to a peremptory challenge primarily as a right of the criminal defendant rather than the prosecution.

The Court in *Swain* also detailed several reasons why peremptory challenges have become an integral part of a criminal trial, and subsequently one of the most crucial rights given to a criminal defendant. First, the peremptory challenge serves to eliminate jurors who might hold extreme views and thus helps ensure those selected to sit in judgment will decide the case on the evidence and not otherwise.<sup>114</sup>

Second, peremptory challenges allow for more probing of prospective jurors for possible bias. In voir dire, counsel is able to inquire more deeply into the juror's possible bias even if those questions might offend or alienate the potential juror. If the probing questions do not reveal bias or a basis for a challenge for cause, counsel can remove the juror who was subjected to the probing and perhaps uncomfortable inquiry with a peremptory challenge.<sup>115</sup>

Finally, in the Court's view, peremptory challenges help ensure a fair trial for the criminal defendant by allowing him to eliminate those who would be biased against him. Interestingly, the Court in *Swain* noted that in times past, when the sheriff was responsible for the jury list and suspected of partiality, the peremptory challenge was seen as an effective check on the sheriff's bias and helped to ensure a more impartial and better qualified jury.<sup>116</sup> This rationale is particularly instructive as we consider the expanded use of peremptory challenges for the accused in courts-martial.

In spite of the long tradition of peremptory challenges in the civilian criminal system, the use of these challenges in the military system has a much shorter history. Peremptory challenges had no tradition in the original British Articles of War.<sup>117</sup> Until the early 20th Century, peremptory challenges were not a feature of the court-martial system in the United States.<sup>118</sup> The 1920 Articles of War for the United States military was the first to recognize the right to peremptory challenge.<sup>119</sup> Article 18 allowed one peremptory challenge for each side.<sup>119</sup> That provision was carried over to [Article 41 of the UCMJ](#).<sup>120</sup>

The rationale for peremptory challenges in the military is much the same as in the civilian court system. Courts have noted [Article 41](#) as a tool used to ensure fairness and the appearance of fairness in the system. In addition, peremptory challenges

in the military can also reduce the size of the panel below the required number for a quorum, which will delay the proceeding until the convening authority can select additional members.

Since each party has only one peremptory challenge, most military case law has focused on how an accused can exercise that one peremptory challenge while at the same time preserving for appeal a denied challenge for cause.<sup>121</sup> A detailed discussion of this issue is beyond the scope of this Article. What is important for the purposes of this Article is that military courts, like their civilian counterparts, see the peremptory challenge as an important feature of a fair trial for the accused.

## B. Batson and Peremptory Challenges

The use of peremptory challenges both in civilian criminal trials and military courts-martial had until relatively recently escaped close scrutiny by the United States Supreme Court. However, in 1986, the Court in *Batson v. Kentucky*<sup>122</sup> addressed prosecutors' long-standing and persistent use of peremptory challenges to systematically exclude African-American jurors from the jury panel.

The Court had previously held in *Swain v. Alabama*<sup>123</sup> that the State's purposeful or deliberate denial to African-Americans of participation as jurors in the administration of justice on account of race violates the Equal Protection Clause.<sup>124</sup> The problem after *Swain* was the difficulty of proving deliberate or purposeful discrimination. This was particularly true in the prosecutor's exercise of peremptory challenges, which does not require the government to state any basis or reason for the exercise of that challenge.

The Court's concern in *Batson* was how to prevent the State from using peremptory challenges to discriminate against African-Americans. *Batson*, at its core, is a case addressing burden shifting. Cases \*935 following *Swain* had required the defense to establish purposeful discrimination by showing proof of repeated strikes of African-American jurors over a number of cases in order to establish an Equal Protection Clause violation.<sup>125</sup> The *Batson* court said that such a requirement was a "crippling burden of proof," making the prosecutor's racially motivated use of peremptory challenges largely immune from constitutional scrutiny.<sup>126</sup>

To address this problem, the Court announced a three-part burden shifting formula to evaluate the prosecutor's exercise of its peremptory challenge. First, the defendant must show that he or she is a member of a cognizable racial group and that the prosecutor has used the peremptory challenge to remove members of the jury that share the defendant's race. Second, if this is established, the defendant is entitled to the irrebuttable presumption that the exercise of peremptory challenges constitutes a practice permitting prosecutors with a mind to, to discriminate. Third, the defendant must show the facts and circumstances raise an inference that the prosecutor used the peremptory challenge to exclude the veniremen<sup>127</sup> from the petit jury on the account of the veniremen's race.<sup>128</sup>

Once the defendant makes this prima facie showing, the burden shifts to the prosecution to show a race-neutral reason for exercising the peremptory challenge against the veniremen existed.<sup>129</sup> The prosecution's reason does not have to rise to the level of a challenge for cause. The prosecution, however, cannot rebut the presumption by stating that the prosecution challenged the veniremen because they share the same race as the defendant, insinuating they are likely to be more sympathetic to the defendant's case.<sup>130</sup> Likewise, the prosecutor cannot rebut the presumption by simply claiming that the challenge was not racially motivated. Instead, the prosecution must offer a race-neutral reason for the exercise of the peremptory challenge.<sup>131</sup>

*Batson* was far from the Court's last word on these issues. In a series of cases following *Batson*, the Court further refined, and in some instances expanded and limited *Batson*'s reach. In *Powers v. Ohio*,<sup>132</sup> the Court expanded *Batson*'s reach, holding that a white defendant has standing to object to a prosecutor's exercise of peremptory \*936 challenges to exclude African-Americans

from the jury.<sup>133</sup> The Court reasoned that racial discrimination in jury selection violates the Equal Protection Clause. If the white defendant was not given standing to assert the rights of the excluded juror, it is unlikely that those rights would ever be vindicated.<sup>134</sup>

In *Georgia v. McCollum*,<sup>135</sup> the Court applied the Batson requirements to the defense counsel's peremptory challenges.<sup>136</sup> The Court stated that whether the discrimination comes at the hands of the prosecution or the defense, if the court allows jurors to be excluded based on group bias, the court becomes a willing participant in discrimination.<sup>137</sup>

In *J.E.B. v. Alabama ex rel. T.B.*,<sup>138</sup> the Court expanded Batson's requirements to exclusions based on gender. The Court noted a similarity in the prejudicial attitudes toward racial minorities and women in the United States.<sup>139</sup> The Court reasoned that when peremptory challenges are gender based they perpetuate stereotypes and reinforce prejudicial views, which is the kind of discrimination that the Equal Protection Clause prohibits.<sup>140</sup>

Not all of the Court's post-Batson jurisprudence has expanded Batson's holding. In two cases, the Court reiterated that any race-neutral reason is sufficient to overcome the presumption that the prosecution exercised its peremptory challenge based on race or gender. In *Hernandez v. New York*,<sup>141</sup> the prosecutor's explanation for exercising his peremptory challenge against Hispanic jurors was his concern that the jurors would not accept the court translator's interpretation as the final authority of what Hispanic witness testifying in the case said.<sup>142</sup> The Court held that this explanation met the prosecutor's burden because it demonstrated that the challenge was based on something other than race.<sup>143</sup>

Most significantly, in *Purkett v. Elem*,<sup>144</sup> the Court reversed a lower court that held in order to rebut the presumption of a racially-motivated peremptory challenge, the prosecutor's explanation must \*937 not only be race-neutral, but must also be plausible.<sup>145</sup> The Court held there was no plausibility requirement in order to rebut the presumption. The prosecution only needs to provide a race-neutral reason. Once that is done, the trial judge must then decide whether the race-neutral reason is genuine or whether the opponent of the strike proved purposeful discrimination.<sup>146</sup>

### C. Batson in Courts-Martial

Military cases after *Batson v. Kentucky*<sup>147</sup> have applied the United States Supreme Court's holding in *Batson* to peremptory challenges of panel members. In some ways, these cases have actually applied Batson's requirements more broadly than the Supreme Court requires. *United States v. Santiago-Davila*<sup>148</sup> was the first appellate case to apply Batson to the military. The case went to trial before Batson was announced. At trial the defense counsel objected to the prosecutor's use of its peremptory challenge to remove one of the two Hispanic members of the panel. The defense counsel, in raising the objection, cited to state law precedents in California and elsewhere, requesting the prosecutor articulate his reason for striking the Hispanic member. The military judge denied the request. By the time the case reached the Court of Military Appeals ("COMA"), the Supreme Court had issued Batson. Noting the role that the Armed Services have played in eradicating racial discrimination in our society, COMA reasoned that Congress would never have intended the peremptory challenge in the military justice system to be used to exclude members of a cognizable racial group.<sup>149</sup> COMA held that the principle espoused in *Batson* applies with equal force to the military and reversed the conviction.<sup>150</sup>

Soon after its ruling in *Santiago-Davila*, COMA went a step further by streamlining the defense's burden in raising a Batson issue. In *United States v. Moore*,<sup>151</sup> the court addressed the first procedural step in Batson, which requires the defense to make a prima facie showing of discrimination. In a civilian criminal proceeding, the defense would frequently make this showing by noting that the prosecution used its peremptory challenges to eliminate all or most of the racial minorities from the jury. In the military,

however, such a prima facie case would be difficult to make because each side has only one \*938 peremptory challenge. Recognizing this difficulty, COMA eliminated the prima facie requirement.<sup>152</sup> COMA held that whenever the prosecution exercises a peremptory challenge against a member of the accused's race, upon objection by the defense, the prosecution must articulate a race-neutral reason for the challenge.<sup>153</sup>

In *United States v. Tulloch*,<sup>154</sup> the Court of Appeals for the Armed Forces<sup>155</sup> examined the applicability of the Supreme Court's Batson jurisprudence to the military justice system and once again expanded Batson's protections beyond what the Supreme Court required. In *Tulloch*, the court ruled on the applicability of *Purkett*<sup>156</sup> in the military context. Specifically, the court addressed whether the prosecution's race-neutral reason had to be persuasive or even plausible.<sup>157</sup> As in *Moore*, the court in *Tulloch* noted that military panels are different than civilian juries. Unlike the civilian system, the convening authority in the military system selects military panels using criteria set out in [Article 25 of the Uniform Code of Military Justice](#)<sup>158</sup> ("UCMJ"). Because those criteria attempt to create a panel capable of rendering a fair verdict, there is less need for the parties to use peremptory challenges to obtain a qualified panel.<sup>159</sup> Because of these important differences in the selection process, the court in *Tulloch* held that *Purkett*'s holding did not apply to the military, and the prosecution's rationale for exercising its peremptory challenge against a cognizable class cannot be unreasonable or implausible.<sup>160</sup>

In other cases, the Court of Appeals for the Armed Forces held that Batson challenges also apply to gender<sup>161</sup> and that Batson applies to both the prosecution and the defense.<sup>162</sup> It is notable that military courts have had little difficulty applying Batson to courts-martial cases. It is equally notable that the courts in *Tulloch* and *Moore* expanded the protections of Batson beyond what the Supreme Court required.

What is most significant about these military cases is the rationale the military courts used to justify broader Batson protections. \*939 These cases take particular note of the role that [Article 25](#) plays in the panel member selection process and how the process promotes selection of a more qualified panel on one hand, but on the other hand, gives the prosecution a potentially much greater role in the initial selections. Some opinions justifying greater Batson protections note, for example, the incongruity of the prosecution exercising a peremptory challenge on a panel member who has already gone through the [Article 25](#) screening process.<sup>163</sup>

The Court of Appeals for the Armed Forces also distinguished the selection process used in the military system from the process used in the civilian system as a reason for applying more Batson protections. In *Tulloch*, the court noted that, "in civilian jurisdictions, the numerous peremptory challenges are used to 'select' a jury, but in courts-martial, a peremptory challenge is used to eliminate those already selected by the convening authority."<sup>164</sup> This important distinction certainly suggests that the prosecution should not enjoy the same right to peremptory challenges as their civilian counterparts, or even as the defense counsel in the case.

Judge Walter Cox's concurring opinion in *United States v. Carter*<sup>165</sup> is perhaps the clearest call for limiting the prosecution's use of peremptory challenges.<sup>166</sup> Judge Cox made flowing observations about peremptory challenges in the military. First, he stated that "jurors in a civilian trial will come from some pool of persons selected at random from the general population, the new members of a court-martial will be hand-picked by the convening authority . . . the very person who has referred the charges for trial in the first place."<sup>167</sup> Second, he argued,

The Government has the functional equivalent of an unlimited number of peremptory challenges. [Article 25\(d\)\(2\)](#) provides that "the convening authority shall detail as members . . . such members of the armed forces as, in his opinion, are best qualified for the duty." The statutory authority to choose the members necessarily includes the corollary right not to choose.<sup>168</sup>

Third, he stated, “[Article 41](#) gives trial counsel, who represents the Government in the court-martial, one more peremptory challenge.”<sup>169</sup>

\*940 Judge Cox's observations about the relationship between [Article 25](#) and the use of peremptory challenges by the prosecution further illustrate why eliminating the prosecution's use of peremptory challenges and expanding the defense's use of peremptory challenges is an appropriate way to strike a balance between the convening authority's legitimate interests and the accused's right to a fair trial even in light of the Batson requirements. Batson should not be applied to the defense in exactly the same way it is applied to the prosecution for the simple reason that the defense, unlike the prosecution, did not have a hand in selecting the panel members. The defense had no say in who was selected and who was excluded and, therefore, has a greater reason to remove panel members who the defense did not like.

#### IV. PROPOSAL FOR EXPANDED USE OF PEREMPTORY CHALLENGES

##### A. Expanded Use of Peremptory Challenges for the Defense

The power of the convening authority to select panel members under [Article 25 of the Uniform Code of Military Justice](#)<sup>170</sup> (“UCMJ”) is considerable. This power also includes the power to exclude members. Commanders who legitimately apply the criteria described in [Article 25](#) are likely to select panel members who will fairly assess the cases before them. Nevertheless, the selection system is subject to abuse and manipulation by unscrupulous commanders and the potential for abuse creates a perception of unfairness.

Reform that is sensitive to the legitimate interests of the military, while making the system fairer and less amenable to abuse, is needed. The history of peremptory challenges in the military, and more specifically, the rationale that military courts have used to apply Batson and its progeny in the military system, give important insight into the type of member selection reform that will strike a fair balance and will be effective. These cases note that there is incongruity with the prosecution exercising peremptory challenges of members who have already been selected using [Article 25](#). Further, while the convening authority, and by extension, the prosecution, has already exercised a virtually limitless number of peremptory challenges in selecting the court-martial panel, up to the time of trial, the defense has had no input in the selection process.

As these cases suggest, the most problematic aspects of panel member selection can be cured not by completely revamping the system and removing the convening authority from the process, but by giving the defense counsel a greater role in making the selection. This \*941 can be done by expanding the number of peremptory challenges available to the defense, while at the same time eliminating the government's use of peremptory challenges altogether.

[Article 41\(b\)\(1\)](#)<sup>171</sup> of the UCMJ currently gives both the prosecution and the defense each one peremptory challenge. This number needs to be expanded significantly for the defense. One peremptory challenge is not enough to counter the potential for abuse of [Article 25](#) by a commander who seeks to stack a panel with members who might be unfairly disposed against the accused. This is true for several reasons. First, other than in capital cases, the UCMJ does not require unanimous verdicts. A guilty verdict in non-capital cases requires the concurrence of two-thirds of the members present at the time of the vote.<sup>172</sup> If there is less than a two-thirds concurrence as to guilt, then the accused will be found not guilty. Also, for sentences in excess of ten years, three-fourths of the members must concur. Lesser sentences require a concurrence of two-thirds of the members.<sup>173</sup> Because unanimous verdicts are not required for guilt or for an agreement on the sentence imposed, even if the defense exercises its one peremptory challenge to remove one member from the panel, this is not enough to have any real impact on curing a potentially unfair panel.

One of the oft-stated reasons for peremptory challenges is to allow the parties to exclude potential jurors whom they might have offended or upset while conducting a probing voir dire<sup>174</sup> during which they attempted to expose reasons for a causal challenge.

If the accused is limited to one peremptory challenge, it significantly limits the defense counsel's willingness and ability to conduct a probing voir dire for fear of offending panel members that they may have no ability to challenge peremptorily.

Finally, as noted above, the convening authority already has a limitless number of peremptory challenges by means of [Article 25](#). Allowing the prosecution to exercise one more peremptory challenge at trial is a tacit admission that the convening authority either did not exercise his [Article 25](#) criteria correctly, or that the prosecution is better suited than the convening authority to apply [Article 25](#) criteria. Neither of these reasons has a place in the selection process. There is simply no need for the prosecution to exercise a peremptory challenge. In contrast, the defense has no involvement in the initial selection process. The defense needs more than one peremptory challenge in order **\*942** to have any meaningful opportunity to select a fair panel and to eliminate those members who might be unfavorably disposed to the defense's case but who cannot be eliminated on a challenge for cause.

To rectify this inadequacy and to remedy the potential for abuse that currently exists in the [Article 25](#) selection process, Article 41(b)(1) <sup>175</sup> and (c) <sup>176</sup> of the UCMJ should be amended as follows:

(b)(1) Each accused at a general court-martial is entitled to three peremptory challenges of the members of the court. Each accused at a special court-martial is entitled to two peremptory challenges of the members of the court. The trial counsel (prosecution) is not entitled to exercise any peremptory challenges in either a general or special court-martial. The military judge may not be challenged except for cause.

(c) Whenever additional members are detailed to the court, and after any challenges for cause against such additional members are presented and decided, the accused is entitled to additional peremptory challenges equal to at least one third of the additional members detailed. At a minimum, the accused is entitled to one additional peremptory challenge. These additional peremptory challenges are to be exercised against members not previously subject to peremptory challenges.

The specifics of this proposed change require further explanation. In any general court-martial other than a capital case, the minimum number of panel members needed is five. <sup>177</sup> In a special court-martial, the minimum number is three. <sup>178</sup> Frequently the convening authority will appoint more than the minimum number, possibly as many as eight to ten for a general court-martial and five to seven for a special court-martial. The practical reason for appointing members above the minimum requirement is to account for the possibility that some detailed members may be excused for cause or by way of a peremptory challenge. By appointing members in excess of the minimums required, even if some members are excused, the hope is that the number of members will not fall below the required quorum and the court-martial can proceed.

The rationale for giving the accused three peremptory challenges in a general court-martial and two peremptory challenges in a special court-martial is tied to these minimum numbers. If the accused has three peremptory challenges in a general court-martial, he has the ability to peremptorily challenge at least two-thirds of the required **\*943** number of panel members. The same is true if the accused has two peremptory challenges in a special court-martial. In essence, these numbers give the accused veto power over any court-martial panel comprised of the minimum number or close to the minimum number of panel members required. This veto power is significant in at least two ways. First, by allowing the accused to veto these minimum-number court-martial panels, the accused now has the ability to affect and participate in the selection process. No longer is the accused relegated to one token peremptory challenge that is unlikely to prevent a convening authority from improperly manipulating the selection process. These changes will create an incentive for the convening authority to select a panel that is more representative and more likely to fairly consider the case. In short, it will encourage the convening authority to abide by the selection criteria in [Article 25](#).

Second, even if the convening authority responds to the proposed change to [Article 41](#) by increasing the panel to a size that would make it veto-proof, the increase is likely advantageous to the defense. In a general court-martial, the minimum veto-proof panel size would be eight. To account for possible challenges for cause, a much safer veto-proof panel size would be ten to twelve members. Increasing the size of the panel in this way makes it much more difficult for the convening authority to manipulate the selection process. If the panel size is larger, the convening authority will have more difficulty finding panel



members who might be disposed to the convening authority's view of the case. Additionally, as the panel becomes larger, the convening authority's attempts to stack the panel become more transparent. A five or six person panel composed exclusively of members of a similar background can be explained as a fluke more easily than a panel composed of ten or twelve such members. This practical consequence, along with the other court imposed protections against court member stacking discussed above, will make it much more difficult for a convening authority to simultaneously choose a veto-proof panel while manipulating [Article 25](#) selection process criteria.

If the number of panel members originally detailed does fall below the required quorum, the convening authority, using [Article 25](#) criteria, must appoint additional members. Currently under [Article 41\(c\)](#), these additional members are subject to challenge for cause and each party can exercise one peremptory challenge against these additional members. The proposed changes in [Article 41\(b\)\(1\)](#) must be carried over to [Article 41\(c\)](#) to maintain consistency and to ensure the convening authority uses appropriate selection criteria when choosing additional court members. To do this, the proposed changes to [Article 41\(c\)](#) will give the accused at least one additional peremptory challenge and possibly more, depending on the number of additional members \*944 detailed to the court. These additional peremptory challenges, which the accused can exercise only against the new members, serve the same function as the increased peremptory challenges under the proposed changes to [Article 41\(b\)\(1\)](#).

## B. Benefits to Increasing Peremptory Challenges

The primary practical benefits of increasing the number of the accused's peremptory challenges and eliminating the prosecution's peremptory challenges is the incentive it provides to the convening authority to select a panel that the accused (1) believes is fair and (2) is not likely to veto. In the alternative, if the convening authority opts to select a large enough panel to make it veto-proof from the accused's peremptory challenges, that expansion alone is likely to result in a fairer and more representative panel.

Beyond these practical benefits, the proposed amendments to [Article 41 of the Uniform Code of Military Justice](#)<sup>179</sup> (“UCMJ”) have other important benefits. First, the amendments to the selection process do not reject [Article 25](#)<sup>180</sup> of the UCMJ selection process or the [Article 25](#) selection criteria. On the contrary, the proposed amendments to [Article 41](#) preserve the important place the commander holds in the court-martial process, while helping to ensure the commander legitimately applies the [Article 25](#) criteria. Those who have resisted proposed changes to the panel member selection process have done so largely based on concerns that any random selection process would take the commander out of the military justice system. Those who are opposed to the current system are critical not so much of the [Article 25](#) criteria, but of the risk that the criteria are subject to unfair manipulation by the convening authority.

Giving the accused a greater number of peremptory challenges respects the commander's important role in the military justice system. Giving more peremptory challenges to the accused does not change the [Article 25](#) criteria. What it does, instead, is allow the accused to play a greater role in evaluating whether the commander did in fact fully and fairly comply with [Article 25](#). If he did, it is unlikely the accused will use his peremptory challenges to eliminate fair-minded panel members, and if the accused exercises his peremptory challenges rashly, he does so at his own risk. To avoid panels being reduced below quorum, spiraling into endless rounds of selections and peremptory challenges, the convening authority will be inclined to honestly apply the criteria set out in [Article 25](#) to ensure a fair panel at the beginning of the process. This solution provides a symmetry \*945 not found in other proposals that call for the abandonment of [Article 25](#) all together.

Another benefit of amending [Article 41](#) is that it is a relatively simple solution that can be easily and quickly implemented. Contrasted with proposals that call for creating some form of random selection, amending [Article 41](#) is much more operationally feasible. As noted above, one of the most valid criticisms of random selection is that it does not work effectively in the military context. Frequent deployments, diverse missions, and the necessities of combat make random selection unworkable. It would be virtually impossible to create a useful and accurate random list of service members who are available to serve as panel members. Any such list that must take into account the demands of the military mission would hardly be random.

An attempt to create random selection would also adversely impact unit readiness and tie up important resources. Imagine, for example, a soldier who is deployed or on a combat mission being called up for panel member duty. Would the soldier or his commander have to appear in court to explain why the soldier cannot serve? Would the commander have to provide some form of written affidavit to the court that sets out the soldier's unavailability? These and other similar requirements could have an adverse impact on unit readiness. These are valid and important reasons why Congress opted not to create a system of random selection. The proposed amendment to [Article 41](#) takes these important operational concerns into consideration. Because the convening authority still personally details the panel members using [Article 25](#) criteria, the convening authority still takes into account the member's availability. This solution is much more operationally workable and uses the selection mechanisms that are already in place.

The proposal to expand the number of peremptory challenges for the accused is not a blank check for the defense to abuse the process. It also does not require the panel size to increase so substantially that it imposes a significant operational burden on the selection process. Giving one additional peremptory challenge to the accused in special courts-martial and two additional peremptory challenges in general courts-martial is not a dramatic increase. The relatively small but important increase requires the defense to exercise its peremptory challenges carefully. If the defense simply attempts to slow up the process by exercising its challenges in the hope of bringing the panel below the required quorum, it takes a great risk. The defense may like members appointed to replace those who were removed even less than the removed members, and because the defense's number of additional peremptory challenges are proportionally reduced, the defense may not **\*946** be able to remove these new, less favorable members. In addition, if the convening authority appoints more members to the panel, the defense will not have sufficient peremptory challenges to bring the panel below the quorum. The limited number of additional peremptory challenges prevents the defense from exercising its challenges simply to obstruct the system. The defense must exercise its challenges wisely.

Giving additional peremptory challenges to the defense and eliminating the prosecution's challenge also helps level the playing field. There is no need for the prosecution to have a peremptory challenge in view of the selection method set out in [Article 25](#). With only one peremptory challenge, the defense has no real voice in how the convening authority applied [Article 25](#) criteria. If the defense is unable to make a challenge for cause under the current system, it is virtually stuck with the convening authority's choices. More peremptory challenges allow the defense to have a real voice in the selection process.

Amending [Article 41](#) rather than adopting some form of random selection is important not only because it preserves the commander's role in the member selection process, but also because it helps to preserve the commander's role in the administration of military justice. While other countries, including the United Kingdom and Canada, have significantly modified their military justice systems to remove the commander from the administration of military justice matters, these countries made the changes in response to court opinions not applicable in the United States. Further, the opinions in the other countries failed to adequately account for reasons the commander must remain very involved in military justice. Because the commander has the responsibility for ensuring his forces abide by the law of war, the commander must have the necessary disciplinary tools to ensure that compliance. If the system removes the commander from the panel member selection process, we begin down a slippery slope that could ultimately lead to removing the commander from the military justice function. We could then find ourselves in a situation where the civilian courts, which have little or no expertise in military matters, are responsible for military discipline.

Amending [Article 41](#) avoids these dangers. It gives the defense a fair role in the panel member selection process while still maintaining the important functions of the commander in military justice. It avoids the slippery slope while still bringing about meaningful reform.

Much of the current criticism of panel member selections does not focus on evidence of actual manipulation by an unscrupulous commander. Rather, the concern is that the potential for manipulation exists and this potential creates the perception of unfairness. While the perception of unfairness is not the same as actual unfairness, perceptions **\*947** are important. An [Article 41](#) that gives the defense more peremptory challenges addresses this perceived unfairness by expanding the role of the defense

in the selection process and by creating greater incentives for commanders to comply with [Article 25](#) criteria in the selection of potential panel members.

The benefits that come from adopting the proposed amendments to [Article 41](#) are tangible, and they evidence real reform to a panel member selection process that is often viewed as the weakest link in the military justice system. The benefits of reform would also come at a relatively small cost compared to the significant costs that are associated with a random selection alternative.

### C. Costs of Proposed Amendments

The most obvious cost of the proposed amendments is the increase in potential panel sizes. In a general court-martial, the minimum number of panel members needed for a quorum is five and in a special court-martial the minimum number is three.<sup>181</sup> To avoid the panel falling below the quorum, if the defense were to exercise all of its peremptory challenges, the convening authority would need to select, at a minimum, eight members for a general court-martial and five members for a special court-martial. To account for any possible challenges for cause, a prudent convening authority would likely select at least two or three members above the minimum number.

There is no question that adding these additional numbers can prove to be a burden, especially to a command that is stretched thin. Nevertheless, it is certainly less of a burden than requiring the convening authority to randomly select members. More importantly, if these amendments improve the overall fairness of the system, the changes will reduce the long-term burdens of having to litigate questionable selection decisions and will improve the overall efficiency and finality of the military justice system. Also, adding an additional two or three members to the panel is not likely to impose undue hardship where the current panel selection method incorporates selecting more members than the court requires to account for possible challenges for cause and for each party's peremptory challenge.

However, it is important to note hardship might result from these proposed amendments to [Article 41 of the Uniform Code of Military Justice](#)<sup>182</sup> (“UCMJ”) for a unit deployed in a theater of combat. Finding a sufficient number of available panel members could prove to be very difficult. Still, the burden of finding more panel members is not \*948 likely to prove much more significant than the other burdens a unit faces when trying a court-martial case in the theater of combat. In some services, the Army in particular, it is not uncommon to remove cases out of the combat theater for trial. There are many situations where the combat commander has in fact forfeited control over cases to another military authority outside the theater of combat.<sup>183</sup> When the combat commander elects to do this, he gives up any military justice authority he may have had over that service member.

There are many understandable reasons for this practice. A commander engaged in combat operations may not want to be distracted with a criminal investigation and subsequent trial, particularly in serious cases, which may demand extra resources and a great deal of time and attention. The command may not want to divert the resources that would be needed to conduct an investigation and convene a court-martial. Instead, the commander may elect to keep those resources focused on combat operations, allowing a commander out of theater to determine the disposition of the case. Because the practice of moving cases out of the theater of combat is already a fairly common way for commanders to limit the drain on resources caused by trying a case in the theater, this can also serve as a ready mechanism for a commander to address the hardship that might be imposed by the proposed amendments to [Article 41](#).

## V. OPPOSITION TO AMENDING ARTICLE 41

Perhaps the strongest opposition to amending [Article 41 of the Uniform Code of Military Justice](#)<sup>184</sup> (“UCMJ”) will come from those who see these amendments as a back-door way of creating a random selection system. They will likely argue that

giving the defense additional peremptory challenges and taking away the prosecution's peremptory challenge means that the commander will have to give too much deference to the defense if he is to select a panel that will meet the defense's approval. In essence, the commander will have less discretion to select a panel in order to find members acceptable to the defense.

**\*949** On the other hand, some opposing random selection may also oppose the amendments to [Article 41](#) for essentially the same reasons. This argument, however, is short sighted. In some sense, it is a tacit admission that the criteria in [Article 25](#)<sup>185</sup> of the UCMJ intended to favor the prosecution. Examined carefully and fairly, [Article 25](#) criteria certainly have the potential to be applied in a way that is fair to both the prosecution and the defense. In case after case, subjecting the commander's panel member selections to significant defense peremptory challenges might strongly indicate that the commander ought to rethink the application of the selection criteria. Commanders can best avoid these random selection back doors by fairly applying [Article 25](#) criteria and selecting impartial panel members who represent different military ranks, different perspectives, and different experiences. If commanders choose impartial members as a result of the proposed amendments, then the criteria has accomplished the very purpose it was intended to achieve. If, on the other hand, commanders seek to select panels that seem stacked against the defense in contravention of [Article 25](#) criteria, then there is little to criticize when the system prevents the commander from achieving those illegitimate purposes.

Finally, some may contend that, in light of *Batson v. Kentucky*,<sup>186</sup> it is unworkable and ineffectual to extend a greater number of peremptory challenges to the defense. In fact, some have contended that the proper way to address peremptory challenges in the post-Batson military system is simply to eliminate them altogether because of Batson's race-neutral peremptory challenge requirements.<sup>187</sup> This contention, too, is short sighted.

First, Batson only applies to peremptory challenges against a member of a cognizable group. Thus far, that group is limited to some but not all races and gender. While this includes a significant subset of all peremptory challenges, it does not apply to all peremptory challenges. Additionally, while Batson applies to challenges by both the defense and the prosecution, the unique nature of panel selection in the military suggests that Batson should not be applied against the military accused in the same way it might be applied to a civilian criminal defendant.

As we have already seen, military cases addressing Batson have considered the unique military context in applying Batson's requirements. In future cases, military courts should be cognizant of the fact **\*950** that Batson does not apply to the convening authority's initial panel member selections, even though there is the potential that the convening authority might not select a certain member because of his or her race or gender.

The practical reality is that Batson is most often applied against the prosecution's exercise of its peremptory challenge because this is where the greatest mischief is likely to occur. Eliminating the prosecution's peremptory challenge will likely reduce or eliminate the need to raise Batson issues.

In those cases where the defense raises a Batson issue in a peremptory challenge, military courts, like their civilian counterparts, have significant experience with the issue and are capable of sorting out exercises of legitimate peremptory challenges from challenges having an inappropriate motive. Batson's application to the defense does not eliminate the defense's peremptory challenge; it simply helps ensure that the defense is not motivated by inappropriate bias.

## VI. CONCLUSION

The military justice system under the Uniform Code of Military Justice<sup>188</sup> is a fundamentally fair system. Even though the military justice system is similar to the civilian justice system, in many ways it is more protective of individual rights than the civilian system and remains a separate system of justice. There are good and necessary reasons for maintaining this separate system. However, separateness alone does not justify inadequate protections of individual rights. The military system, like any

system of justice, must undergo close and regular scrutiny to ensure basic fairness. The military justice system must strike an appropriate balance between the needs of the military and the rights of individual service members.

One aspect of military justice that has been closely scrutinized and criticized in the past several years is the manner in which a convening authority selects panel members to sit in judgment of their comrades in arms. There are protections in place to check against the unbridled authority of a convening authority to inappropriately manipulate the selection process. Nonetheless, under the current system, the potential still exists for a commander who is inclined to abuse the system to do so. This potential for abuse is recognized by critics of the justice system and practitioners and judges within the military.

To date, the proposals to remove this potential for abuse have centered on removing the commander from the panel member selection process and other aspects of the military justice system and adopting **\*951** some kind of random selection of panel members. The problem with these proposals is that they go too far and fail to strike the appropriate balance between the needs of the military and the rights of service members. The impracticability of these proposals and their call for the removal of the commander from the justice system has prevented any serious consideration of these reforms.

What is needed to address this issue is a solution that allows the defense to have a greater role in selecting panel members and, at the same time, preserves the important functions of the military commander. The proposal for expanding the number of peremptory challenges for the defense and eliminating the prosecution's use of peremptory challenges strikes the right balance. It gives the defense a significant role in the selection process while preserving the commander's authority to select those best qualified to serve on a court-martial. The proposal brings greater fairness and helps to ensure that those who sit in judgment of a service member will act independently and free of any inappropriate influence.

#### Footnotes

<sup>d1</sup> Professor of Law, New England Law--Boston. I would like to thank my research assistant Elizabeth Funk for her fine work. I am also grateful to New England Law--Boston and Dean John O'Brien for financial support for this project.

<sup>1</sup> [Uniform Code of Military Justice art. 111, 10 U.S.C. § 911 \(2006\)](#).

<sup>2</sup> See [R. Courts-Martial 601](#).

<sup>3</sup> A special court-martial has limited punishment authority. See [Uniform Code of Military Justice art. 19](#). Because the maximum punishment for a violation of [Article 111](#) is below the jurisdictional ceiling of a special court-martial, Sergeant Driver's punishment could include a bad conduct discharge, confinement for six months, and a reduction to the lowest enlisted rank. See *id.* art. 111, cmt, available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

<sup>4</sup> Military jurors are referred to as panel members.

<sup>5</sup> The word "detail" means to order a person to perform a specific temporary duty, unless the context indicates otherwise.

<sup>6</sup> See [R. Courts-Martial 503, 601](#).

<sup>7</sup> A convening authority is a commissioned officer who has the statutory and regulatory authority to convene a court-martial. The convening authority is also a military commander. See [R. Courts-Martial 103\(6\)](#).

<sup>8</sup> [U.S. Const. amend. VI](#).

<sup>9</sup> See [Ballew v. Georgia, 435 U.S. 223 \(1978\)](#) (finding that a trial by jury of less than six members violated the accused's right to a trial by jury as protected by the Sixth and Fourteenth Amendments); [Williams v. Florida, 399 U.S. 78 \(1970\)](#) (holding that "the 12-man [jury] requirement cannot be regarded as an indispensable component of the Sixth Amendment"); [Patton v. U.S., 281 U.S. 276 \(1930\)](#) (defendant who starts out with a 12 person jury cannot waive the presence of one of the jurors).

- 10 In Illinois, jurors are randomly selected from a general jury list which combines the names of all registered voters and drivers licenses holders 18 years of age and older. In Kentucky, jurors are drawn from people filling a Kentucky resident individual tax return, people registered to vote, and people over 18 years old licensed to drive.
- 11 U.S. Const. amend. V.
- 12 [Parker v. Levy](#), 417 U.S. 733, 758 (1974) (due process rights and freedom of expression); [United States v. Brown](#), 45 M.J. 389, 396 (C.A.A.F. 1996); [United States v. Middleton](#), 10 M.J. 123, 126-27 (C.M.A. 1981); [United States v. Priest](#), 45 C.M.R. 338, 344 (C.M.A. 1972).
- 13 See [United States v. Smith](#), 27 M.J. 242 (C.M.A. 1988). In 1992 the Court of Military Appeals was renamed the Court of Appeals for the Armed Forces. This five-member court is composed of civilian judges who have the statutory authority to review courts-martial cases. See [Uniform Code of Military Justice art. 67](#), 10 U.S.C. § 867 (2006).
- 14 U.S. Const. art. I, § 8, cl. 14.
- 15 Sam Nunn, [The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases](#), 29 Wake Forest L. Rev. 557, 563-66 (1994).
- 16 10 U.S.C. §§ 801-950 (2006).
- 17 See James B. Roan & Cynthia Buxton, [The American Military Justice System in the New Millennium](#), 52 A.F. L. Rev. 185, 187-88 (2002).
- 18 See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335.
- 19 See Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.
- 20 Fredric I. Lederer & Barbara S. Hundley, [Needed: An Independent Military Judiciary--A Proposal to Amend the Uniform Code of Military Justice](#), 3 Wm. & Mary Bill Rts. J. 629, 637 (1994).
- 21 [R. Courts-Martial 101-1308](#). A commander is a commissioned officer who is in command of a military unit. A convening authority is a commander who has the authority to convene a military court-martial. While all court-martial convening authorities are commanders, not all commanders are court-martial convening authorities. As used in this Article, the term commander and convening authority are used interchangeably and both terms refer to a commander who has court-martial convening authority.
- 22 [Uniform Code of Military Justice art. 36](#), 10 U.S.C. § 836 (2006) (providing that “[a]ll rules and regulations made under this article shall be uniform insofar as practicable” and shall be reported to Congress). Under this Article, the President is allowed to prescribe rules and procedures to implement the provisions of the UCMJ.
- 23 [Uniform Code of Military Justice art. 25](#).
- 24 A commissioned officer is a member of the service who derives authority directly from a sovereign power, and as such holds a commission from that power.
- 25 [Uniform Code of Military Justice art. 25\(b\)](#). A warrant officer is a member of a military organization with a rank subordinate to other commissioned officers and senior to noncommissioned officers.
- 26 [Uniform Code of Military Justice art. 25\(c\)\(1\)](#). Though not required by statute, panel members preferably should be senior in rank of the accused. An enlisted member is a member of a military organization below the rank of a warrant or commissioned officer. This role is similar to that of a company employee or supervisor. A company-sized unit is a military unit, consisting of any number of soldiers, ships, vehicles, or aircraft.
- 27 [Uniform Code of Military Justice art. 25\(d\)\(2\)](#).
- 28 [R. Courts-Martial 504\(d\)](#).
- 29 [Uniform Code of Military Justice art. 25](#), 10 U.S.C. § 825 (2006).

- 30 Fredric I. Lederer & Barbara S. Hundley, [Needed: An Independent Military Judiciary--A Proposal to Amend the Uniform Code of Military Justice](#), 3 *Wm. & Mary Bill Rts. J.* 629, 646 (1994).
- 31 *Id.*
- 32 *Id.*
- 33 See James B. Roan & Cynthia Buxton, [The American Military Justice System in the New Millennium](#), 52 *A.F. L. Rev.* 185, 187-88 (2002).
- 34 *Id.*
- 35 See Victor Hansen, [Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn from this Revolution?](#), 16 *Tul. J. Int'l & Comp. L.* 419 (2008), for further discussion concerning [Article 25 of the UCMJ](#).
- 36 Major Guy P. Glazier, [He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three--Selection of Military Juries by the Sovereign: Impediment to Military Justice](#), 157 *Mil. L. Rev.* 1, 1 (1998).
- 37 See Nat'l Inst. of Military Justice, [Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice \(2001\)](#), available at [http://www.wcl.american.edu/nimj/documents/cox\\_comm\\_report2.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1); Michael I. Spak & Jonathon P. Tomes, [Courts-Martial: Time to Play Taps?](#), 28 *Sw. U. L. Rev.* 481, 534-41 (1999) (calling for virtual abolition of the military justice system except in time of war or other overseas deployments); Andrew M. Ferris, [Comment, Military Justice: Removing the Probability of Unfairness](#), 63 *U. Cin. L. Rev.* 439, 487-91 (1994) (calling for a greater role for lawyers and military judges).
- 38 See Keith M. Harrison, [Be All You Can Be \(Without the Protection of the Constitution\)](#), 8 *Harv. BlackLetter J.* 221 (1991); Major James Kevin Lovejoy, [Abolition of Court Member Sentencing in the Military](#), 142 *Mil. L. Rev.* 1 (1993); Matthew J. McCormack, [Comment, Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice](#), 7 *Geo. Mason L. Rev.* 1013, 1049-51 (1999).
- 39 See Lindsay Nicole Alleman, [Note, Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems](#), 16 *Duke J. Comp. & Int'l L.* 169, 190-92 (2006) (suggesting a random selection method for choosing panel members that is tailored to meet needs of U.S. military); McCormack, *supra* note 38, at 1049-51 (arguing that the military should remove the convening authority's power to handpick court-martial panel members).
- 40 Article 67 of the Uniform Military Code of Justice ("UCMJ") established the Court of Military Appeals ("CMA") as a three-judge civilian court. The intention beyond the creation of the CMA was to create a court completely removed from all military influence of persuasion. In 1989, Congress enacted comprehensive legislation to enhance the effectiveness and stability of the court. The legislation increased the court's membership to five judges, consistent with the American Bar Association's Standards for Court Organization. In 1994, Congress gave the court its current designation, the United States Court of Appeals for the Armed Forces ("CAAF"). The CAAF exercises worldwide appellate jurisdiction over members of the armed forces on active duty and other persons subject to the UCMJ. The Court is composed of five civilian judges appointed for 15-year terms by the President with the advice and consent of the Senate. Decisions by the Court are subject to direct review by the Supreme Court of the United States. Clerk of the Court, [The United States Court of Appeals for the Armed Forces 1-3 \(2009\)](#), available at <http://www.armfor.uscourts.gov/CAAFBooklet2009.pdf>; see also [United States v. Wiesen](#), 56 *M.J.* 172, 174 (C.A.A.F. 2001) (holding that a military judge had abused his discretion in denying a defense challenge for cause of a panel president who had a supervisory relationship over enough of the panel members to form the two-thirds majority necessary to convict).
- 41 [United States v. Dowty](#), 60 *M.J.* 163, 171 (C.A.A.F. 2004).
- 42 [United States v. Bartlett](#), 66 *M.J.* 426 (C.A.A.F. 2008) (the Secretary of the Army impermissibly contravened the provisions of [Uniform Code of Military Justice art. 25\(d\)\(2\)](#), 10 *U.S.C. § 825(d)(2)*, which requires a convening authority to select court-martial members best qualified for duty based upon age, education, training, experience, length of service, and judicial temperament, by issuing a regulation that exempted from court-martial service officers of the Medical Corps, Medical Specialist Corps, Army Nurse Corps, Dental Corps, Chaplain Corps, Veterinary Corps, and those detailed to Inspector General duties); [United States v. Townsend](#), 65 *M.J.* 460 (C.A.A.F. 2008) (law enforcement personnel are not per se disqualified from service as court members; if status as a law enforcement officer is not a disqualification, it follows that a mere familial relationship with a member of the law enforcement

community creates no greater basis upon which to disqualify a member than law enforcement status itself); [United States v. Townsend](#), 65 M.J. 460 (C.A.A.F. 2008) (lawyers are not per se disqualified as court-martial members unless they have served in one of the capacities explicitly set forth as a disqualification in the UCMJ; it follows that one who only aspires to become a lawyer is not disqualified and presents no greater threat to the fairness of a proceeding than does a court member who is a fully-trained and licensed attorney).

43 [United States v. Kirkland](#), 53 M.J. 22 (C.A.A.F. 2000) (where the chart used in seeking court member nominees did not provide any place to nominate court members below the grade of E-7, where no enlisted members were nominated below the grade of E-7, where no nominees below the grade of E-7 were presented to the convening authority, and where no individuals below the grade of E-7 were selected to serve as members, the exclusion of potentially qualified members was improper and the military judge erred in denying the defense request for a new court-martial panel. Even where a convening authority does not use rank as a criterion in the selection process, an unresolved appearance that potentially qualified court members below the grade of E-7 were excluded made reversal of the sentence appropriate to uphold the essential fairness and integrity of the military justice process); [United States v. Bertie](#), 50 M.J. 489 (C.A.A.F. 1999); [United States v. Roland](#), 50 M.J. 66 (C.A.A.F. 1999).

44 [United States v. Martinez](#), 67 M.J. 59 (C.A.A.F. 2008) (an accused is entitled to a fair and impartial panel of service members; consistent with that enjoinder, the accused is entitled to have his case heard by service members who are not predisposed or committed to a particular punishment, or who do not possess an inelastic attitude toward the punitive outcome).

45 R. Courts-Martial 912(f)(1)(N).

46 [United States v. Wiesen](#), 56 M.J. 172, 174 (C.A.A.F. 2001).

47 *Id.* at 172 (the court invalidated a panel where the president of the panel had a supervisory relationship over six of the other panel members).

48 S. 1127, 92d Cong. (1971).

49 7 M.J. 171 (C.M.A. 1979).

50 See [United States v. Yager](#), 7 M.J. 171 (C.M.A. 1979).

51 Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 2023 (1998).

52 Joint Serv. Comm. on Military Justice, Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial (1999).

53 Fredric I. Lederer & Barbara S. Hundley, [Needed: An Independent Military Judiciary--A Proposal to Amend the Uniform Code of Military Justice](#), 3 Wm. & Mary Bill Rts. J. 629, 646 (1994).

54 U.S. Dep't of Army, Field Manual 6-22 (FM 22-100): Army Leadership B-7 (2006).

55 James M. Hirschhorn, [The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights](#), 62 N.C. L. Rev. 177, 219 (1984).

56 U.S. Dep't of Army, *supra* note 54, at 4-4.

57 *Id.*

58 Lederer & Hundley, *supra* note 53, at 647.

59 *Id.*

60 *Id.*

61 [Burns v. Wilson](#), 346 U.S. 137, 140 (1953).

62 [Parker v. Levy](#), 417 U.S. 733, 744 (1974).



- 63 See Thomas E. Ricks, *Making the Corps 40* (1997) (providing an example of this basic training process).
- 64 U.S. Const. art. I, § 8, cl. 14.
- 65 James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. Rev. 177, 238-39 (1984).
- 66 See R. Courts-Martial 702(b).
- 67 R. Courts-Martial 703(e).
- 68 R. Courts-Martial 703(d). In some regards, the convening authority's power to fund and authorize witness employment and travel is limited by the military judge's ability to abate the proceedings if the convening authority refuses to fund a witness that the military judge has deemed essential to the case. Nevertheless, obtaining the convening authority's authorization for witness funding is not a mere formality, and the convening authority's use of the power of the purse can certainly have an impact on the trial.
- 69 10 U.S.C. §§ 801-950 (2006).
- 70 R. Courts-Martial 704.
- 71 R. Courts-Martial 705.
- 72 R. Courts-Martial 706.
- 73 10 U.S.C. §§ 860(c)(1)-(2).
- 74 See *id.* § 860(c)(3)(A).
- 75 See *id.* § 860(c)(3)(B).
- 76 See *id.* § 860(e)(1).
- 77 *Id.* § 860(e)(2)(A).
- 78 *Id.* § 860(c)(1).
- 79 See generally *Yamashita v. Styer*, 327 U.S. 1, 13-15, 23 (1946) (approving military commission to try commander for war atrocities committed by troops under his command); *Ex Parte Quirin*, 317 U.S. 1, 1 (1942) (sanctioning use of military tribunal to try Nazi saboteur).
- 80 See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an Int'l Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/ CONF/183/9 (July 17, 1998); S.C. Res. 955, P1, U.N. Doc. S/RES/955, at 5-6 (Nov. 8, 1994); S.C. Res. 827, P2, U.N. Doc. S/RES/827 (May 25, 1993).
- 81 S.C. Res. 955, *supra* note 80, at 5-6.
- 82 See, e.g., Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex, Oct. 18, 1907, 36 Stat. 2295, art. 1.
- 83 One need look no further than the events at Abu Ghraib prison in Iraq in 2003 and 2004. One of the contributing factors that lead to a breakdown in discipline and prisoner abuse was a belief among soldiers working at the prison that the “gloves were coming off” and that the law-of-war protections simply did not apply to the detainees at the prison. See Anthony R. Jones, AR 15-6 Investigation of the Abu Ghraib Prison and 205th Military Intelligence Brigade 8 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040825fay.pdf>; James R. Schlesinger et al., Final Report of the Independent Panel to DOD Detention Operations 10 (2004), available at <http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf>.
- 84 See Nat'l Inst. of Military Justice, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (2001), available at [http://www.wcl.american.edu/nimj/documents/cox\\_comm\\_report2.pdf?rd=1](http://www.wcl.american.edu/nimj/documents/cox_comm_report2.pdf?rd=1).

- 85 [2006] F.C. 1532 (Can.).
- 86 Canada (Dir. of Military Prosecutions) v. Canada (Court Martial Admin.), [2006] F.C. 1532 (Can.), overruled by Canada (Dir. of Military Prosecutions) v. Canada (Court Martial Admin.), [2007] F.C.A. 390 (Can.). Although the case was overruled, it still illustrates the consequences that can occur when the traditional role of the convening authority is divided among several different government bodies.
- 87 Id.
- 88 Id.
- 89 Id.
- 90 Id.
- 91 Id.
- 92 See *Thompson v. U.K.*, 40 Eur. Ct. H.R. 11 (2004); *Cooper v. U.K.*, 39 Eur. Ct. H.R. 8, 197 (2003); *Grievies v. U.K.*, 39 Eur. Ct. H.R. 2 (2003). In each of these cases the European Court considered various aspects of the British system following the reforms to that system.
- 93 Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (2006).
- 94 See id.
- 95 Id. art. 37.
- 96 Id.
- 97 Mil. R. Evid. 509.
- 98 R. Courts-Martial 922(e).
- 99 Uniform Code of Military Justice art. 25.
- 100 Id.
- 101 See R. Courts-Martial 912(f)(1)(A).
- 102 See R. Courts-Martial 912(f)(1)(B).
- 103 See R. Courts-Martial 912(f)(1)(C), (F), (G).
- 104 See R. Courts-Martial 912(f)(1)(M).
- 105 See R. Courts-Martial 912(f)(1)(N).
- 106 See R. Courts-Martial 912(g). The requirements and procedure set out in *Batson v. Kentucky*, 476 U.S. 79 (1986), apply to peremptory challenges in the military courts. Military appellate courts have made additional rulings on *Batson's* application to military panels. See *infra* subsection B. *Batson* and Peremptory Challenges and accompanying notes.
- 107 See Uniform Code of Military Justice art. 41; R. Courts-Martial 912(g).
- 108 380 U.S. 202 (1965).
- 109 *Swain v. Alabama*, 380 U.S. 202, 213-14 (1965).
- 110 *Swain*, 380 U.S. at 214.
- 111 Id. at 219.

- 112 [Lewis v. United States](#), 146 U.S. 370, 376 (1892).
- 113 [Pointer v. United States](#), 151 U.S. 396, 408 (1894).
- 114 [Swain](#), 380 U.S. at 219.
- 115 [Id.](#) at 220.
- 116 [Id.](#) at 217-18.
- 117 See <http://www.io.com/gibbonsb/articles.html> for the 1749 British Articles of War.
- 118 See William Winthrop, [Military Law and Precedents](#) 206 (2d ed. 1920).
- 119 See [Uniform Code of Military Justice art. 18](#), 10 U.S.C. § 818 (2006).
- 120 See [id. art. 41](#); [R. Courts-Martial 912\(g\)\(1\)](#).
- 121 See Major Robert Wm. Best, [Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off](#), 183 [Mil. L. Rev.](#) 1 (2005), for a detailed discussion of this issue.
- 122 [476 U.S. 79](#) (1986).
- 123 [380 U.S. 202](#) (1965).
- 124 [Swain v. Alabama](#), 380 U.S. 202, 203-04 (1965).
- 125 [Batson v. Kentucky](#), 476 U.S. 79 (1986).
- 126 [Batson](#), 476 U.S. at 92-93.
- 127 Plural of venireman, which is a person summoned to jury duty under a writ issued by a judge to a sheriff directing the summons of prospective jurors.
- 128 [Batson](#), 476 U.S. at 96.
- 129 [Id.](#) at 97.
- 130 [Id.](#) at 97-98.
- 131 [Id.](#) at 98.
- 132 [499 U.S. 400](#) (1991).
- 133 [Powers v. Ohio](#), 499 U.S. 400, 402, 404 (1991).
- 134 [Powers](#), 499 U.S. at 415.
- 135 [505 U.S. 42](#) (1992).
- 136 [Georgia v. McCollum](#), 505 U.S. 42, 57-58 (1992).
- 137 [McCollum](#), 505 U.S. at 49-50.
- 138 [511 U.S. 127](#) (1994).
- 139 [J.E.B. v. Alabama](#), 511 U.S. 127, 129 (1994).
- 140 [J.E.B.](#), 511 U.S. at 131.
- 141 [500 U.S. 352](#) (1991).

- 142 [Hernandez v. New York](#), 500 U.S. 352, 360 (1991).
- 143 [Hernandez](#), 500 U.S. at 369.
- 144 514 U.S. 765 (1995).
- 145 [Purkett v. Elem](#), 514 U.S. 765, 770 (1995).
- 146 See [id.](#)
- 147 476 U.S. 79 (1986).
- 148 26 M.J. 380 (C.M.A. 1988).
- 149 [United States v. Santiago-Davila](#), 26 M.J. 380, 390 (C.M.A. 1988).
- 150 [Santiago-Davila](#), 26 M.J. at 390.
- 151 28 M.J. 366 (C.M.A. 1989).
- 152 See [United States v. Moore](#), 28 M.J. 366 (C.M.A. 1989).
- 153 [Moore](#), 28 M.J. at 368.
- 154 47 M.J. 283 (C.A.A.F. 1997).
- 155 Note the Court of Military Review was renamed the Court of Appeals for the Armed Forces in 1994.
- 156 514 U.S. 765 (1995).
- 157 [United States v. Tulloch](#), 47 M.J. 283, 287 (C.A.A.F. 1997).
- 158 Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (2006).
- 159 [Tulloch](#), 47 M.J. at 287.
- 160 See [id.](#)
- 161 See [United States v. Witham](#), 47 M.J. 297 (C.A.A.F. 1997).
- 162 See [United States v. Ruiz](#), 49 M.J. 340 (C.A.A.F. 1998) (once defense counsel raised issue of whether trial counsel's use of peremptory strike was discriminatory, burden to give gender-neutral explanation for strike shifted to trial counsel).
- 163 [Tulloch](#), 47 M.J. at 287.
- 164 [Id.](#) at 286.
- 165 25 M.J. 471 (C.M.A. 1998).
- 166 [United States v. Carter](#), 25 M.J. 471 (C.M.A. 1998) (Cox, J., concurring).
- 167 [Carter](#), 25 M.J. at 475.
- 168 [Id.](#) at 478.
- 169 [Id.](#)
- 170 Uniform Code of Military Justice art. 25, 10 U.S.C. § 825 (2006).
- 171 [Id.](#) art. 41(b)(1).

- 172 See id. art. 52.
- 173 See id.
- 174 Voir dire is a preliminary examination of prospective jurors or witnesses, under oath, to determine their competence or suitability.
- 175 Uniform Code of Military Justice art. 41(b).
- 176 Id. art. 41(c).
- 177 Id. art. 16.
- 178 Id.
- 179 Uniform Code of Military Justice art. 41, 10 U.S.C. § 841 (2006).
- 180 Id. art. 25.
- 181 Uniform Code of Military Justice art. 16, 10 U.S.C. § 816 (2006).
- 182 Id. art. 41.
- 183 Some recent examples of this practice include the Akbar case, the Haditha prosecutions, and the Abu Ghraib prosecutions. In *United States v. Akbar*, a soldier charged with the murder and attempted murder of a number of his comrades on the eve of the invasion of Iraq was immediately sent back to the United States for trial within days of the incident. The marines charged with the killings in Haditha are not being tried in theater, but back at their home base in San Diego. The soldiers charged with detainee abuse at Abu Ghraib prison were all removed from Iraq and were eventually tried in Fort Hood, Texas and other installations in the United States. See <http://www.washingtonpost.com/wp-dyn/articles/A7210-2005Apr21.html> for a discussion of this case.
- 184 Uniform Code of Military Justice art. 41, 10 U.S.C. § 841 (2006).
- 185 Id. art. 25.
- 186 476 U.S. 79 (1986).
- 187 See generally, Major Robert Wm. Best, *Peremptory Challenges in Military Criminal Justice Practice: It is Time to Challenge Them Off*, 183 Mil. L. Rev. 1 (2005).
- 188 10 U.S.C. §§ 801-950 (2006).

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