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Stacked Juries: A Problem of Military Injustice

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STACKED JURIES: A PROBLEM OF MILITARY INJUSTICE

"The right to trial by individuals selected at random, some of whom may possess attitudes and prior experiences similar to those of the accused, is a fundamental tenet of American jurisprudence."

Since the founding of the Republic nearly 200 years ago, one of the most flagrant contradictions in American jurisprudence has been the dissimilarity in selection of members of courts-martial and civilian juries. Under the latter system, the defendant is constitutionally guaranteed a fair trial by jurors drawn from a cross-section of the community wherein the offense was committed.2 In a court-martial, however, by the authority of Article 253 of the Uniform Code of Military Justice, the serviceman is tried by a panel of court members arbitrarily selected by a convening authority, usually the base commander, who is also responsible for convening the trial. The result is undeniably a hand-picked jury.

Scholars have long debated the underlying concepts of the system of military justice. But particular emphasis has seldom been laid on the justice meted out through the practice of packing the jury under the auspices of Article 25. And, of those who have discussed the matter, too many have either voiced approval or disapproval of the selection process without considering workable alternatives. As a trend, apologists have usually based their arguments on the need to maintain a high degree of discipline within the armed forces. This position has obviously been met with pleasure by military officials who generally submit that any procedure of courts-martial must strike a balance between justice and discipline to insure the proper attainment of military goals.4 On the other hand, critics such as Senator Birch Bayh, noting a swiftly changing American legal structure, contend that four million soldiers, most of whom will never see combat, should be assured a fair trial by more enlightened methods of selecting court members.5

During recent years, a barrage of politically-oriented military cases has swamped the courts-martial, distinctively illuminating the problem of command influence in appointing court members.6 For

4 R. Sherrill, Military Justice is to Justice as Military Music is to Music, ch. 3 (1969) (hereinafter cited simply as Sherrill).
6 See generally, Sherrill.
the reformers, the exposure seems to have generated sympathy from an American public that has viewed with growing distaste a process by which 94 percent of its sons are convicted by hand-picked juries. Moreover, and as a possible result, an increasing number of civilian attorneys are entering the arena to represent military clients charged with everything from "mutiny" at San Francisco to "murder" in Vietnam. The response from the military no doubt is equally energetic, especially with respect to aggravating comments on the issue of stacked juries. Typical was the criticism of Boston attorney F. Lee Bailey representing one of the Song My defendants:

On the outside, we pull a jury from the streets and put them back there after trial. In the case of military justice, the commander who orders the trial—a guy who is himself convinced that there are good grounds for conviction—selects the jury. And if the case is a heavy one, the officer in the jury sits there and reflects on his career in the military. He says 'If I do justice, my conscience will feel better for a couple of days, but that son of a gun, the presiding officer, is going to remember me for years.'

Clearly, the present method of selecting members of courts-martial does not provide an accused a fair and impartial trial. This comment will explore the background of that system, the ancillary issues appurtenant to any precise analysis of the problem, and the alternative proposals available. Basically, these alternatives are all variations of the concept of random selection. Nonetheless, a thorough examination of these proposals discloses some inherent differences in them. Analysis should reveal which of these are suitable substitutes. In general, this comment suggests that a random selection of court members might serve to satisfy the requirements of both justice and discipline within the military command.

THE COMPOSITION OF COURTS-MARTIAL—PAST AND PRESENT

The Uniform Code of Military Justice (UCMJ), enacted by Congress in 1950, is said to be the most enlightened set of military laws ever written. Despite the one revision in 1968, Article 25 of the UCMJ has largely remained the same. Even though servicemen are now granted the full benefit of right to counsel and trial by military judge, the convening authority's awesome control of the trial by hand-picking the court members cannot be gainsaid.

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8 Id. at 22.
11 Id. § 827, as amended (1968).
12 Id. § 816(1)(b)(2)(c), as amended (1968).
13 In 1969, with approximately four million men under arms, there were 76,320
The UCMJ also makes available an appellate process. Once a case is concluded at the trial level, it is sent back to the convening authority for reconsideration. However, this procedure is generally treated more as a clerical function than an inspection of judicial proceedings. Furthermore, because he convened the court in the first place, and then chose its members, it is unlikely that the convening authority would revise the decision. From there, the transcripts are sent to the next higher plateau, the Court of Military Review. Finally, after the exhaustion of all other remedies, the case goes to the United States Court of Military Appeals (USCMA). Here, three civilian judges, each appointed by the President for 15 year terms, make a final determination of the matter. It is the responsibility of the court to interpret the UCMJ, and in the past, it has been called the “Supreme Court” of military justice. It may be important to note as well that normally the only way a court-martial case is transferred from the military to the civilian system is by a writ of habeas corpus. However, this seldom occurs.

Military justice today, under Article 25, is considerably more genuine than it was in the past. Historically, the accused serviceman has never been granted a trial by his peers. The first Articles of War adopted almost verbatim the British Articles of War, including the provision that stated: “A general court-martial . . . shall not consist of less than thirteen commissioned officers. . . .” Several years later, courts-martial (116 CONG. REC. 10,438 (daily ed. Jul. 1, 1970)) in the Army alone. The largest proportion of these were special courts-martial numbering 59,597 (116 CONG. REC. 10,439 (daily ed. Jul. 1, 1970)). The courts-martial system is roughly a three-layer structure at the trial level. Depending upon the seriousness of the offense and the maximum corresponding punishment, a soldier is sent either to a summary, special, or general court-martial. The general court-martial, although dealing with the least number of cases, is the best known. It tries only major offenses and is empowered to impose life imprisonment and death penalties. Also, this is the court that has tried the most publicized cases, such as that of Lieutenant William Calley (General Court-Martial, United States v. Lieutenant William L. Calley, Jr.), Lieutenant Henry Howe (United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967)), Captain Howard Levy (United States v. Levy, 17 U.S.C.M.A. 135, 39 C.M.R. 672 (1967)), and the Presidio Mutineers. For the purposes of this comment, the only basic difference between the procedures of the special and general courts-martial is the number of members necessary to make up the court. The general court is a more populated tribunal.

15 Id. § 866, as amended (1968).
16 Id. § 867 (1950).
19 See W. WINTHROP, MILITARY LAW AND PRECEDENTS (2d ed. 1896), American Articles Of War Of 1776, art. I, sec. xiv, app. x, at 1489 (hereinafter cited simply as WINTHROP); John Adams, a member of the Congressional Committee that drafted the
that provision was amended to allow, under special circumstances, a trial by as few as five officers. This proved to be the last such revision until shortly after World War I.

Until 1919, when Acting Judge Advocate General Samuel T. Ansell spearheaded the first noticeable attempt at reform of the provision, all courts-martial consisted exclusively of commissioned officers. Ansell's proposals, offered to Congress by Senator Chamberlain and Congressman Royal Johnson, constituted a radical departure from this caste-like procedure. It took into account the intrinsic injustice of trying an enlisted man in an officer's court, and suggested for the first time that enlisted men be also permitted a seat. Under the Ansell plan, the private or the non-commissioned officer tried in a general court-martial was guaranteed a court composed of three-eighths privates or non-commissioned officers. In special courts-martial, enlisted men were guaranteed a panel of one-third men of equal rank. Unfortunately, for both the soldier and the system, the provision was struck in Congress and was not included in the newly formulated 1920 Articles of War.

The second major reform movement in this regard occurred shortly after World War II when a victorious American Army returned home telling tales of a wholly inadequate judicial system. During the War, 1.7 million courts-martial executed 143 men and left 45,000 American soldiers in prison stockades. After extensive study by several government committees, the Elston Act was passed in 1948, finally authorizing courts-martial to include enlisted men. With the exception of various minor distinctions, Article 4 of
the Elston Act and Article 25 of the current UCMJ, enacted two years later, were the same.\textsuperscript{27} The experimentation of the Elston Act proved a wise and successful reform. Although 150 years delinquent, it afforded the serviceman the first step on the long road to securing the right to a trial by an impartial jury.

As noted, the major effect of Article 4 and Article 25 has been the inclusion of enlisted men on the court-martial panel. Nevertheless, both articles are limited. Special courts-martial consist of no less than three members,\textsuperscript{28} and general courts-martial consist of no less than five members.\textsuperscript{29} Under Article 25, the enlisted man brought to trial is required to submit, well in advance of trial, a written request to insure that at least one-third of the court is comprised of other enlisted men.\textsuperscript{30} Barring "military exigencies" or physical impossibilities, the convening authority is compelled to comply. His failure to do so requires "a detailed written statement, to be appended to the record," wherein the convening authority explains why enlisted men could not be obtained.\textsuperscript{31} Notwithstanding this improvement, of the over 75,000 men court-martialed in 1969, only 63 were officers.\textsuperscript{32} Strangely enough, it appears that those who are most often defendants are least often tried by men who share common attitudes and experiences.

In keeping with military tradition, officers are treated with more consideration under Article 25. An officer can be tried only by fellow officers, and none can be junior in rank except under unavoidable circumstances.\textsuperscript{33} All commissioned officers on active duty are eligible to serve on courts-martial.\textsuperscript{34} The only shortcoming they share with an enlisted man facing trial is that the convening authority picks the personnel of the court.\textsuperscript{35}

Command influence is greatest when the convening authority determines that a case should be tried and a court appointed. Procedurally, a list of all eligible servicemen is compiled by the Staff

\textsuperscript{27} For a discussion of differences between art. 4 of the Elston Act and art. 25 of the UCMJ see F. Wiener, The Uniform Code of Military Justice, 85-6, 88 (1950).

\textsuperscript{28} 10 U.S.C. § 816(2)(a), as amended (1968).

\textsuperscript{29} Id. § 816(1)(a).

\textsuperscript{30} Id. § 825(c).

\textsuperscript{31} Id.


\textsuperscript{33} 10 U.S.C. § 825(d)(1) (1950); this provision also applies to enlisted men; however, for low ranking enlistees, it is practically valueless.

\textsuperscript{34} Id. § 825(a) (1950).

\textsuperscript{35} The military judge and members of the court may be challenged peremptorily and for cause; see 10 U.S.C. § 841 (1950); see also Fuchsberg, Command Influence On Military Justice, 7 Trial 36 (1971).
Judge Advocate and presented to the commander. If an accused has taken the “one-third enlisted man option,” the convening authority summons an appropriate number of enlisted men to insure the proper composition of the court. The balance are officers in either situation. Article 25 requires the convening authority to select court members who “in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.” He cannot select a member who is an accuser, a witness for the prosecution, or “has acted as investigating officer or as counsel in the same case.” In addition, he is forbidden to select an enlisted man from the same unit as the accused. Aside from these restrictions, the convening authority is virtually free to appoint whomever he pleases. It must be obvious that in well publicized cases an adverse conclusion might disrupt the steadfast standards of military discipline. The convenience of a hand-picked court neatly disposes of that problem. And, unlike the civilian system, only two-thirds of a military tribunal is necessary to return a verdict of guilty.

**TRIAL BY PEERS: DOES ARTICLE 25 CREATE A CONSTITUTIONAL QUESTION?**

The sixth amendment of the United States Constitution grants the right to a fair trial by an impartial jury. An “impartial jury,” through years of judicial construction, is interpreted to mean a trial by one’s peers. The Supreme Court expounded upon this right in the landmark decision of *Witherspoon v. Illinois.* *Witherspoon* held that a trial by one’s peers meant a trial by jury, chosen without discrimination, from a cross-section of the community. *Witherspoon,* however, was a civilian case referring to the civilian judicial process created by Article III of the Constitution. But where does the court-martial fit in? Do its members constitute a jury? Or, is it just an *ad hoc* administrative proceeding? Does the same standard of justice expounded in *Witherspoon* apply to courts-martial as well? Is Article 25, then, a severe violation of that principle? In treatment

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36 The Staff Judge Advocate is usually the convening authority's top legal advisor; see generally 10 U.S.C. § 806 (1950).
37 Interview with Captain Thomas Faye, Office of Military Justice, Presidio, San Francisco, Calif., Oct. 30, 1970; although this procedure is not codified, the Staff JAG is usually responsible for securing lists of prospective court members.
39 Id.
40 Id. § 825(c)(1), as amended (1968).
41 Id. § 852(a)(2); § 852(a)(1) (1950) (imposition of death penalty requires unanimous vote).
43 U.S. Const. art. III.
of these issues, consideration should be given to the general proposition of whether or not a serviceman has the right to a trial by petit jury.

The controversy surrounding this problem seems to evolve from a contradiction within the Constitution itself. Article I, Section 8, Clause 14 gives Congress the power "To make Rules for the Government and Regulation of the land and naval Forces..."44 Most authorities interpret this grant to mean that Congress has a free hand in passing whatever laws it desires to govern the military. Indeed, the UCMJ is an obvious by-product of that authority. Moreover, according to Professor Seymour W. Wurfel,45 the constitutional provision of Article III, Section 2, that "The Trial of all crimes, except in cases of Impeachment, shall be by Jury" does not apply to military tribunals.46 Therefore, a court-martial, not being an Article III court, is well within constitutional bounds in permitting a base commander to choose anyone he pleases to sit on the same court that he convenes. If, then, a military court is not a court as we know it, what exactly is it? The general consensus of the Wurfel school asserts that a court-martial is an independent ad hoc tribunal, used for administrative purposes by the executive branch of government. Within its own chambers, it can impose almost any standards of justice necessary to preserve the discipline of the Armed Forces.47

This point of view is arduously disputed by another school of thought based predominantly on the Bill of Rights. With the lone exception of the grand jury clause of the fifth amendment,48 where does the Constitution exempt citizens under arms from the safeguards of the Bill of Rights? Living under conditions totally adverse to the best principles of American democracy, should four million servicemen pretend that the Constitution ceases to exist? Senator Ervin of North Carolina, before passage of his Military Justice Act of 1968, replied that no objective "should be more important than to protect the constitutional rights of the servicemen and women who are ever ready to protect the Constitution of the United States and the Government established under it."49

45 Professor of Law, University of North Carolina.
48 U.S. Const. amend V.
Indeed, advocates of a narrow construction of congressional power in the regulation of the military cite the concise language of the 1952 case of Burns v. Lovett.\(^5\)

The power of Congress to make rules for the armed forces is one of a long list . . . of powers conferred . . . upon the Congress. We find no intimation in the Constitution itself that Clause 14 of Section 8 of Article I and proceedings thereto are exempt from the requirements and prohibitions of the Fifth and Sixth Amendments. We think those Amendments apply to each and all of the powers of Congress . . . and to all acts of executive officials . . . and to judicial proceedings . . . except when an exception is stated in the Constitution itself.\(^5\)

Despite the other ramifications of Burns, it is abundantly clear that supporters of this concept construe all provisions of the Constitution within the framework of the entire document itself.\(^5\) They contend that servicemen should be granted the right to a petit jury even though, perhaps, a court-martial is not a court established under Article III of the Constitution. The fifth amendment expressly states that no one can be tried for a serious offense without a grand jury indictment “except in cases arising in the land or naval forces.” It could be argued that because this specific exemption is so appreciably isolated within the wording of the Constitution, that the original framers in fact fully intended all other Bill of Rights safeguards to apply to servicemen. The responses to this assertion are varied. One source concludes that the failure to exempt servicemen from the right to a petit jury was a possible oversight on the part of the framers.\(^5\) The same source suggests that the framers intended the fate of both the grand and petit juries to be the same.\(^5\)

It is venturesome to speculate on the intentions of the framers with respect to the serviceman and his right to a petit jury. Attention must be focused instead on the law as it exists today. The Supreme Court, in O'Callahan v. Parker,\(^5\) decided to extend the benefits of grand jury indictments and petit juries to servicemen convicted of non-service offenses. However, the Court, more than a quarter of a century earlier, in Ex Parte Quirin,\(^5\) held that “[i]n . . . light of . . .

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\(^{50}\) 202 F.2d 335 (D.C. Cir. 1952).
\(^{51}\) Id. at 341.
\(^{54}\) Id.
\(^{56}\) 317 U.S. 1 (1942).
long continued and consistent interpretation we must conclude that § 2 of Article III and the fifth and sixth amendments cannot be taken to have extended the right to demand a jury to trials by military commission. . . ." This opinion seemingly terminates the issue: servicemen simply do not have the right to a trial by petit jury. In the meantime, convictions from special and general courts-martial remain federal convictions. Is it conceivable that in later years the Supreme Court might reverse Quirin? That possibility grows increasingly more realistic. It is too early to discern exactly what role cases such as Augenblick v. United States, decided the same year as O'Callahan, will play. Augenblick reaffirmed that the writ of habeas corpus is the only collateral attack that a civilian court can levy on a military determination. More importantly, the Court noted in dictum that a defect of constitutional dimension might be grounds for the attack.

Nevertheless, the Supreme Court has to date exercised a great deal of restraint from penetrating the internal affairs of the military. The Court has, as former Chief Justice Warren put it, "supported the military establishment's broad power to deal with its own personnel." In conjunction, the law today seems to imply that the exemption of the fifth amendment right to a grand jury indictment inferentially exempts servicemen from the right to petit juries also. In the future, a more narrow interpretation of that inference may be forthcoming, if cases such as O'Callahan and Augenblick are any premonition. Otherwise, the reform processes of case law will rest with the USCMA. A strict construction of Article 25 from the highest court of the military justice system might well topple the existing citadel of injustice.

MILITARY DUE PROCESS: THE EVOLUTION OF A RIGHT?

The term "military due process" was coined by the USCMA in United States v. Clay. The term is used to describe those rights set out by the President in the Manual For Courts-Martial, and by the Congress in the UCMJ, subject to the continual interpretation

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87 Id. at 40.
88 Interview with Captain Thomas Faye, supra note 37.
94 Manual For Courts-Martial (revised ed. 1969); (includes the UCMJ and is the major reference book for military law).
and application of the USCMA. Its intended purpose is to preserve the fundamental fairness of the military trial. In theory, "military due process" bears no connection to the Constitution. In practice, however, many of the components of "military due process" closely identify with their sister provisions in the Bill of Rights. Significantly, "military due process" is solely a creation of the military judicial system. The fine line separating it from the Constitution is best stated in Clay by Judge Latimer when he said:

For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws created by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or by other federal statutes.

The court in Clay explicitly pronounced a wide range of due process rights. However, the right to a fair hearing by an impartial court was not among them. A narrow interpretation of the rights enumerated in Clay and those subsequently added to them might leave the impression that the existent authority opposes any alteration in the present method of appointing the court. On the whole, the trend seems to indicate otherwise.

Conceivably, in the not so distant future, the "lost component" of "military due process" may well become reality. Over the years, commanding generals have blatantly abused their appointment powers. In the more obvious instances, the USCMA has taken a firm stand in opposition. Under Article 25, it is recalled, the convening authority makes his appointments on the basis of age,

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67 Id.
68 Id. at 77-78, 1 C.M.R. at 77: "To be informed of the charges against him; to be confronted by witnesses testifying against him; to cross-examine witnesses for the government; to challenge members of the court for cause or peremptorily; to have a specified number of members compose special and general courts-martial; to be represented by counsel; not to be compelled to incriminate himself; to have involuntary confessions excluded from consideration; to have the court instructed on the elements of the offense, the presumption of influence, and the burden of proof; to be found guilty of an offense only when a designated number of members concur in a finding to that effect; to be sentenced only when a certain number of members vote in the affirmative; and to have an appellate review."
69 Quinn, The United States Court Of Military Appeals and Military Due Process, 35 St. Johns L. Rev. 215, 242 (1960): "An unbiased jury is, of course, sine qua non for a fair hearing. . . . Even the most skilled and vigorous counsel is worth little to an accused, if the trial is before a court that is prejudiced against him. Due process demands a fair hearing."
education, training, experience, length of service, and judicial temperament. In 1964, the case of United States v. Crawford\(^71\) upheld the power of the convening authority to exclude lower ranking enlisted men from appointment to courts-martial \textit{as long as} his selection process did not evince a systematic exclusion, and that the court members eventually selected were those best qualified to judge and sentence an accused. The result in \textit{Crawford} was that one-third of the court was comprised of senior non-commissioned officers. Despite the fact that \textit{Crawford} is good law today, the more apparent difficulty goes to the heart of the failure of Article 25 itself. Under this article, an inherent prejudice can exist in all military trials because of the systematic exclusion of the young, the inexperienced, and those with a minimal amount of service background. When selecting members upon the basis of their judicial temperament, the convening authority has the ability to turn the court into a well-controlled panel of disciples.

The \textit{Crawford} qualifications on Article 25 may have served warning to convening authorities to exercise more discretion before selecting court members. Even though the decision supported commanding generals, it made amply clear that future courts-martial would be subject to reversal if they were arbitrarily stacked with commissioned and non-commissioned officers. Prior to \textit{Crawford}, the USCMA had invalidated courts-martial because of the capriciousness of the selection process,\(^72\) but the most recent decision condemning the practice was the December, 1970, case of United States v. Greene.\(^73\) In Greene, a court-martial was reversed when proof established that the Staff Judge Advocate had requested of his administrative division a list of potential court members consisting solely of lieutenant colonels and above. Hence, wholly aside from the fact that lieutenant colonels may have been the best qualified officers to man the court, the USCMA found a systematic exclusion and nullified the court.

One can only wonder where decisions such as Greene will take the court the next time it is called upon to construe the appointment powers of Article 25. Will it continue to limit the convening authority? One possibility is the often recalled axiom that when Congress does not act to make long-needed changes, the courts do.\(^74\) One need only heed the caveat of the Clay case where, after specifying the first

“military due process” rights, the court cautioned that they were not “intended . . . to be all inclusive.”

CAPITOL HILL: THE MEANS FOR REFORM

Problem: An Inherent Injustice

The Constitution has endowed Congress with the power to make all laws governing the military. In the last twenty years, Congress has adopted and revised the UCMJ by making significant reforms of the courts-martial system. Part of this movement may be attributed to the slow-moving wheels of “military due process” as administered by the USCMA in exposing case after case of military injustice. But the more important part has resulted from political pressure put to bear on our elected representatives. Conspicuously absent from past reforms of the UCMJ is the total revision of Article 25.

The Military Justice Act of 1968 established a separate military judiciary of qualified judges independent of the local base command. Coupled with this, Congress also made possible the right of the serviceman to elect to be tried by a military judge alone. Initial reports, claims Chief Judge Quinn, indicate that 97 percent of the accused in special courts-martial take advantage of this procedure. The figure in general courts-martial is approximately two-thirds. What are the implications of this? One military lawyer, Captain Thomas Faye, defense counsel in the Presidio Mutiny Trials, insists that statistics prove that the military judge is more apt to hand out lighter sentences than a fully empanelled court-martial. Also, the element of command influence is considerably decreased. The judge has no official relationship to the base commander who convenes the trial. His only responsibility is to the Judge Advocate General's Office in Washington, D.C. Hence, when an enlisted man is confronted with the choice of whether to be tried by a relatively unbiased judge or by a court panel packed with non-commissioned officers, it is no wonder why the former procedure is more popular.

The impetus of the Elston Act supposedly reduced command influence. Enlisted men had finally transgressed class barriers and

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78 Id. § 816(b).
79 Quinn, supra note 60, at 20.
80 Id.
81 Interview with Captain Thomas Faye, supra note 37.
taken their rightful place on the court. At surface value, this reform
seems to be meaningful; but in practice, the results have been quite
the contrary. Almost without exception, when an enlisted man
chooses the Elston option he is faced with a court of officers and
non-commissioned officers, most of whom are career men.82 One
notable example occurred during the Presidio Mutiny Trials. Defense
counsel Terrence Hallinan requested the one-third quota and was
accorded two senior sergeants and a young buck sergeant just
returned from Vietnam.83

This creates a perplexing problem. With whom does the alle-
giance of the non-commissioned officer rest—the brass or the enlisted
men? Arguments exist for both positions. One source suggests that
common experiences with fellow enlisted men prompt non-comis-
sioned officers to vote more often for acquittal.84 Others contend that
their attitudes are more in tune with other career servicemen and,
therefore, more often return the guilty verdict.85 Despite the
disagreement, the most probable conclusion is that non-commissioned
officers occupy a class all of their own. This being true, low ranking
enlisted men, who make up the majority of those on trial, are not
afforded a trial by their peers; indeed, not even a trial by one-third
of their peers.

Theoretically, the accused officer is in a better position than the
accused enlisted man. On the average, he is well educated and is tried
by a court with much the same background. Nevertheless, this is not
always the rule. For instance, there was the 1967 court-martial of
Captain Howard Levy.86 Levy, a physician, was originally brought to
trial for refusing to give Green Berets first aid instruction. But
beyond the implications of the formal charges, Levy was somewhat
of a controversial figure. He had long before fallen into disfavor
with Army officials who made no secret of the fact that they were
annoyed with his activities in the civil rights movement while
stationed in South Carolina. Court-martialed for wilful disobeyance
of an order, Levy's panel consisted of ten officers. All were white,
and seven of them were natives of South Carolina. Four were Viet-
nam combat veterans including one who had recently lost half his

82 F. GARDNER, THE UNLAWFUL CONCERT 127 (1969); see also an excellent discus-
sion of enlisted men on courts-martial in Schiesser, Trial By Peers: Enlisted Members
84 Schiesser, Trial By Peers: Enlisted Members On Courts-Martial, 15 CATHOLIC
85 Interview with Paul Halvonik, American Civil Liberties Union, San Francisco,
Calif., Oct. 22, 1970; interview with Terrence Hallinan, supra note 83; interview with
Captain Thomas Faye, supra note 37.
face in battle. These "impartially chosen" court members prompted Levy's defense counsel, American Civil Liberties Union attorney Charles Morgan, to comment: "Any trial lawyer would trade every procedural right in the Bill of Rights for the right to choose the jury."87,88

These conditions, in the cases of both officers and enlisted men, lead inevitably to the same bulwark; as long as the power to arbitrarily appoint court members rests with one individual, the convening authority, an accused in the court-martial system has very little chance of getting a fair trial. The answer is simple—reform is needed. Although it is sometimes the least accessible, the most acceptable method of reform is undoubtedly Congressional action.

Solution: A Random Selection

To best insure the impartiality of prospective courts-martial, reformers should strive to duplicate the selection methods used in the civilian jury system. There, the safest and most foolproof method has been the selection of jurors at random.89 If a system such as this were implemented in courts-martial, it would most assuredly have the effect of removing a great deal of command influence from the trial. Not surprisingly, though, the opposition to this type of proposal from within the military is adamant. While defenders of the present system concede that Article 25 compares unfavorably to methods utilized in federal courts, they emphasize that civilian defendants have no real guarantee of a trial by their peers.90 No doubt, random selection does have its imperfections. But in spite of these, is it really worthwhile to pursue the argument? A random selection of the court, or jury, is manifestly a more just technique.

Another criticism is that random selection would cause heightened disruption and inconvenience within the administrative workings of the command.91 The logic, or illogic, behind this viewpoint is that in some way a random selection, rather than an arbitrary selection of court members, would cause grave difficulties in the carrying on of normal military affairs. Probably the most credible defense of all is that a random selection of court members would not

88 Id.
conform to the traditional military caste system. Could a young private, drafted into service and subjected to both mental and physical abuses never before experienced, adjudge a superior with the necessary unbias of a trier of fact? In circumstances such as these, could a commissioned or non-commissioned officer receive a fair trial?

Professor Edward F. Sherman of Indiana University has offered some acceptable replies to the military position. He sees the military argument as threefold: (1) the military authorities believe that a heavy majority of court members would be low ranking enlistees, vengeful and too willing to convict their superiors; (2) but, on the other hand, military officials seem to contradict themselves in contending that "low ranking enlisted men might be overwhelmed by the presence of officers on the court and therefore would not exert their own independence"; and (3) low ranking enlisted men are too inexperienced, the military believes, to understand the importance of military discipline and would, consequently, be unqualified to sit as court members.

Very eloquently, Sherman responds:

These arguments actually go the heart of the jury system itself. Permitting an accused to be tried by a jury of his peers chosen at random always involves the possibility that jurors will be sympathetic to the accused, swayed by other members of the jury, or that they will not appreciate the purposes and objectives of the prosecution and the criminal laws. These qualities, however, are only objectionable if they prevent a juror from viewing a case with an open mind, and they have a valuable function in insuring trial by jury whose members reflect the different experiences, attitudes, and class prejudices found in the community. The court-martial comprised solely of officers is especially lacking in these qualities.

In addition, Sherman calls attention to the third argument regarding the qualifications of enlistees with the retort that a substantial percentage of them are in fact high school and college educated. In this respect, and with the limited amount of time one needs in the service to "understand" discipline, they should be as capable as anyone of appreciating the balance between justice and discipline intrinsic to the system of military justice.

Professor Sherman is one of the few non-legislators to offer a feasible alternative to Article 25. His solution is a compromise

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93 Id. at 97.
94 Id.
95 Id.
96 Id. at 98.
resembling that proposed by General Ansell over half a century earlier. Taking into account the problems with the military caste system, Sherman's recommendations are made in light of the possibilities that younger enlistees may be "more class motivated and less objective" than desirable. In essence, his proposal suggests that court-martialed servicemen, whether they are officers or enlisted men, should have the right to one-half the court, in both special and general courts-martial, composed of men of their own rank. The balance of the court would be officers. If the right is not invoked, then the entire court would be drawn from a pool of eligible officers. In all situations, Sherman emphasizes, court members should be selected at random.

In efforts to curb command influence, the Congress of the United States has finally reacted after years of indifference and has begun the proper steps to bring about reform. In the summer of 1970, Senators Birch Bayh and Mark Hatfield each proposed separate legislation to amend Article 25. Senator Joseph Tydings had done the same in November of 1969. All three reform measures were based on the principle of random selection. And, all three were either part of more inclusive bills or were accompanied by other bills having the same effect.

The Hatfield bill, dealing with the reconstruction of Article 25, is almost a duplicate of Professor Sherman's plan. Aside from various minor differences, the bill essentially guarantees the same rights.

The Tydings bill is slightly different. It makes no provision for any discrimination between officers and enlisted men, and calls for a Circuit Judicial Officer to "select at random the members of the court from among those officers and enlisted men who are eligible and available within the circuit." The major failure of the Tydings amendment, however, is that it is designed for general courts-martial only. For some reason, Senator Tydings chose not to include

97 See text accompanying note 22, supra.
99 Id. at 98-99.
106 Id. at 33,013.
107 Id.
special courts-martial in his revision. This effectively eliminates the overwhelming number of cases. The rationale behind such a moderate approach to the problem may have been political.

The defect in the Tydings bill was recognized and remedied in Senator Bayh's proposed Military Justice Act of 1970. An all-inclusive bill, the proposed statute provides for a total random selection of court members for both general and special courts-martial. It, too, fails to discriminate in any way between officers and enlisted men. One major difference between this bill and the others is that it restores a built-in eligibility requirement of at least one year on active duty.

Senator Bayh's revision of Article 25 is certainly the most innovative reform measure offered. It most closely resembles the federal system of selecting jurors, and, unlike the other proposals, is not a compromise solution. It is testimonial to the ideals of fair play and justice under military law. Any other solution falls short of that mark. Although most court members under the Bayh amendment would be enlisted men, the vast majority of defendants fall under the same class or category. Given the opportunity, this stratum of military society could be as objective as any other while sitting in judgment of fellow servicemen. Both higher educational backgrounds and increased experience in the courts-martial process would eventually mold a corps of enlisted men capable of understanding military necessity and qualified to adjudge their military peers accordingly. This process, in conjunction with the one-year active duty requirement, would insure the proper safeguards for officers on the few occasions that they face courts-martial. In time, the intentional or unintentional vindictiveness of the enlisted man for his superiors would soon be replaced by greater forces of individual respect and responsibility.

The Hatfield and Bayh amendments, if passed, would do a good deal to furnish servicemen with a fair and impartial trial. Both, significantly, dispense with command influence in hand-picking the court, and yet, both are reasonable pieces of legislation in light of the gross inequities of Article 25. Whether or not Congress acts on them may be an altogether different matter. Each bill, after its initial introduction on the floor of the Senate, was sent to the Armed Forces Committee. In committee, no action was taken and the bills died.

However, both Senators reportedly intend to reintroduce their bills in the 92nd Congress, hopefully to meet a more enthusiastic and favorable reception. The political implications surrounding these bills are many, and speculation as to their possibilities of becoming law would be impractical.

CONCLUSION

Major General Kenneth J. Hodson, Judge Advocate General of the United States Army, recently commented: "Military justice is as good or better than the justice in 48 of the 50 states." This statement is typical of those who defend the courts-martial system. It should be clear that this sort of thinking cannot prevail if an ailing, outdated, and unfair system of justice is to keep stride with its civilian counterpart. Indeed, the de facto jury structure of the military justice system is wholly inadequate by today's standards. The coveted benefits of a fair and impartial trial are not realities for four million American servicemen. The power of the convening authority to appoint at will members of courts-martial is a regrettable contradiction of all notions of fairness existent within our judicial tradition. The keeper of that evil, Article 25 of the UCMJ, is overdue for a revision.

It would appear at this juncture that Article 25 is safe from constitutional attack. The Supreme Court held in Ex Parte Quirin, almost a third of a century ago, that courts-martial are not Article III courts, and the right to demand a trial by petit jury is not applicable to servicemen.

Change must occur by either of two means: (1) the USCMA must narrowly interpret Article 25 to bring the full force of "military due process" to bear on convening authorities; or (2) by the power of Article I, Section 8, Clause 14, Congress should amend Article 25 of the UCMJ to expressly prevent the capricious selection of court members.

Congressional action is the most desirable means for change. But, it is also the most fickle. History teaches that legislators seldom act without the mandate of public expression, and, consequently, reform of the military legal system has nearly always followed war.

111 Information obtained in conversation with the Senate Offices, Washington, D.C., of Senators Bayh and Hatfield, Nov. 2, 1970.
112 NEWSWEEK, supra note 7, at 22.
113 317 U.S. 1 (1942).
114 Id. at 40.
The best possible way to insure servicemen a trial by peers is to institute one of several variations of the random selection plan in place of Article 25. The most suitable substitute is included in Senator Bayh's Military Justice Act. It virtually eliminates command influence in providing a more equitable method of selecting court members. Furthermore, the element of discipline necessary to the orderly functioning of the military community would not be endangered. The convening authority still retains his powers of non-judicial punishment. Also, as Senator Bayh asserts, "... experience has taught us that inequitable laws spawn disrespect and eventually lead to disobedience."

It was once observed that "fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice." The most convenient instrument to render that ideal a reality for servicemen is manifestly borne by Congress. Accordingly, it should begin work to prevent the continuation of the present travesty of justice.

G. Edward Rudloff, Jr.

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117 Id.