

Restoring Balance to the Scales: Higher Panel Quorums and Voting Requirement in Light of Article 60 Restrictions

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I. Introduction

The charges Staff Sergeant (SSG) Jones faced were very serious. If convicted, he could spend decades behind bars and receive a Dishonorable Discharge. The decision the panel made could impact the rest of his life. Now, after several days of testimony and argument, the case was in the hands of that panel. The bailiff barked, “All rise!” SSG Jones and his defense counsel, Captain (CPT) Standard, stood at their table, rising with the rest of the courtroom as the general court-martial panel strode in and took their seats. However, there were not the twelve jurors SSG Jones had grown up watching in courtroom dramas.¹ Instead, only six panel members—four officers and two senior NCOs— took their seats in the panel box. As the court-martial progressed, a sinking feeling hit SSG Jones as he remembered his attorney’s advisement that only two-thirds of this panel, or four out of the six members, needed to find him guilty in order to convict him.² Those same four panel members could then sentence him to up to ten years behind bars.³ It required more panel members to sentence SSG Jones to more than ten years confinement. Some members who had voted to acquit him could then vote to give SSG Jones a lengthier sentence.⁴

Regarding the sentence, until 2014, SSG Jones could have submitted matters to the commanding general (CG) who had convened the court-martial, asking that he consider SSG Jones’s years of military service, his combat deployments, his awards, and his injuries in service to his country.⁵ However, due to changes in the Uniform Code of Military Justice

(UCMJ) implemented by the 2014 National Defense Authorization Act (NDAA), that was no longer the case.⁶ While SSG Jones could still submit clemency matters to the CG through his attorney,⁷ the general could not set aside any of the charges and specifications SSG Jones was convicted of, nor could the general reduce the sentence adjudged by the panel.⁸

SSG Jones’s thoughts were interrupted when he saw the president of the panel stand up, findings form folded in his hands, and bellow, “Yes we have, your honor.” The bailiff retrieved the verdict from the panel president and delivered it to the military judge, Colonel (COL) Stern. This was it: SSG Jones’s entire future rested in the hands of just six individuals— and only four of them needed to agree.

Despite dramatic changes to fundamental aspects of the UCMJ over the past two years,⁹ military courts-martial still only require three members for a special court-martial and five for a general court-martial.¹⁰ These panels only need two-thirds of the members to vote guilty to convict the accused.¹¹ Three-quarters of the members must agree in order to sentence the accused to a period of confinement of more than ten years.¹² However, under Article 60, the court-martial’s convening authority (CMCA) was able to unilaterally reduce the sentence adjudged or set aside some or all of the findings of guilt when he took final action regarding the outcome of the court-martial.¹³ This Article 60 ability to actually overturn a conviction, although rarely used, was a type of “safety valve” for the less-than-unanimous conviction

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¹ See *Perry Mason* (CBS television broadcast 1957–1966); *Matlock* (NBC television broadcast 1986–1992); *Law & Order* (NBC television broadcast 1990–2010); *MY COUSIN VINNY* (20th Century Fox Pictures 1992); *A FEW GOOD MEN* (Columbia Pictures 1992); *RULES OF ENGAGEMENT* (Paramount Pictures 2000).

² 10 U.S.C.A. § 852 (2015).

³ 10 U.S.C.A § 852(b)(2) (2015).

⁴ *Id.*

⁵ Manual for Courts-Martial, United States, R.C.M. 1105 (2012) [hereinafter 2012 MCM].

⁶ See National Defense Authorization Act for Fiscal Year 2014, Pub. L. No. 113-66 § 1702(b), 127 Stat. 672, 954 (2014) [hereinafter NDAA FY 14]. Effective June 24, 2014, court-martial convening authorities (CMCAs) are prohibited from disapproving convictions, partly or entirely, or reducing sentences except in very limited circumstances. See *infra* Section III.

⁷ 2012 MCM, *supra* note 5, R.C.M. 1105.

⁸ *Id.* R.C.M. 1107.

⁹ See NDAA FY 14, *supra* note 6. Some of the changes to the Uniform Code of Military Justice (UCMJ) made by the NDAA FY 14 include a narrowing of scope in the Article 32 process from being in part a tool of discovery for the accused to a probable cause hearing for the government. *Id.* § 1702(a). Mandating that sex offenses under Article 120 be tried at a general court-martial. *Id.* § 1705(a)(1)(B). And the codifying of the Special Victim Counsel (SVP) program. *Id.* § 1702(b).

¹⁰ 10 U.S.C.A. § 816 (2015).

¹¹ 10 U.S.C.A. § 852 (2015).

¹² *Id.*

¹³ 10 U.S.C.A. § 860 (2015).

requirement.¹⁴ It provided the ability for the convening authority to act as “outside eyes”: reviewing the facts and evidence independently and, in some extreme cases, setting aside what he believed to be an erroneous conviction.¹⁵

In light of the new restrictions on post-trial action by the convening authority, there should be a higher requirement on the front end of the court-martial process, namely, more panel members and a higher voting requirement in order to garner a conviction. To get there, this paper will provide a brief history of Article 16, which designates the minimum number of members needed for a court-martial panel, and Article 52, which codifies the voting requirement for convictions and sentences. It will then discuss why Congress implemented significant restrictions to the general court-martial convening authority’s (GCMCA’s) Article 60 powers. This authority served as a safety net for questionable convictions or excessive sentences.

This article will compare and contrast military courts-martial and civilian state and federal jury requirements for felony criminal trials. This article proposes increasing the Article 16 panel member requirements for a special court-martial from its current three to seven members and general court-martial’s current five to twelve. It will explain why the Article 52 voting requirement to enter a finding of guilty should be the same requirement that currently exists to sentence an accused to over ten years confinement, that is three-quarters of members. Finally, this article will discuss how these proposed changes to the UCMJ would be implemented.

II. Evolution of the Court-Martial Panel Composition and Voting Requirement

A. Summary of Changes to Court-Martial Panels from 1786 - 1920

The military court-martial process in the United States has slowly developed since the days of the Revolutionary

War. Prior to the UCMJ, military justice was carried out through the Articles of War, which were first enacted by the Continental Congress in 1775 and were occasionally updated by Congress.¹⁶ These early courts-martial required thirteen panel members, and the Articles of War were silent regarding the number of votes required for a conviction.¹⁷

1. *A Desertion Case and the Lowering of the Bar for Panel Cases*

In the years following the end of the Revolutionary War, the Continental Army shrank to a force of less than one thousand Soldiers.¹⁸ Because some units were unable to provide the sufficient number of officers to convene thirteen-member panels,¹⁹ Congress authorized court-martial panels reduced to as few as five members. However, in 1786 when two Soldiers were court-martialed by a five-member panel for desertion and sentenced to death, the Secretary of War, Henry Knox, found the five-member general court-martial panel to be illegal and ordered the Soldiers released.²⁰ Secretary Knox, writing to the Continental Congress, described the impact the reduced force had on following the procedures for military justice:

[T]he small number of troops at present in the service of the United States, and their dispersed situation, render it difficult, and almost impossible to form a general court-martial, of the numbers required by the Articles of War; therefore desertion and other capital crimes may be committed without its being practicable to inflict legally the highest degree of punishment provided by the laws.²¹

At Secretary Knox’s request, the Continental Congress passed a resolution voiding the two convictions.²² Despite voiding the convictions, Congress authorized all future general courts-martial to consist of between five and thirteen

¹⁴ John B. Wells, *A Safety Valve for the Court-Martial System*, VIRGINIAN-PILOT (May 19, 2013), <http://hamptonroads.com/2013/05/safety-valve-court-martial-system>; Andrew S. Williams, *Safeguarding the Commander’s Authority to Review the Findings of a Court-Martial*, 28 BYU J. PUB. LAW 471, 473 (2014) (“The incorrectness of the [court-martial] verdicts will not always be apparent and may not be discoverable at all. Because the panel’s factual determinations will not always be as accurate as those of a [civilian] jury, commanders need the authority to review those determination.”).

¹⁵ Williams, *supra* note 14.

¹⁶ LAWRENCE J. MORRIS, *MILITARY JUSTICE: A GUIDE TO THE ISSUES* 14-15, 17-19 (2010).

¹⁷ Articles of War of June 30, 1775, 2 J. CONT. CONG. 111, 117 (1775). The tradition of thirteen panel members dates back to 1666, predating the founding of the United States. Howard C. Cohen, *The Two-Thirds-Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution*, 20 CAL. W.L. REV. 9, 30 (1983).

¹⁸ In 1789, the U.S. Army numbered only 672 Soldiers. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72

HARV. L. REV. 1, 9 (1958). By 1794, the Army’s size had been increased to 3,692. *Id.*

¹⁹ Colonel Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 6 n.18 (1998).

²⁰ *Id.* While Congress had allowed courts-martial to be tried with as few as five members, the preference was still thirteen. *Id.* The issue came to Secretary Knox’s attention when the garrison commander, Major John Palsgrave Wyllys, wrote the War Department seeking its permission to carry out the executions. *Id.* The Continental Congress initially ordered the arrest of Major Wyllys because it also concluded that trying the deserters in a capital case with only five panel members was illegal. *Id.* Secretary Knox recommended Major Wyllys’s release, stating that his actions arose from a need to stop desertions and were “justifiable on military and political principles.” *Id.* Congress agreed and released Major Wyllys. *Id.*

²¹ *Id.*

²² *Id.*

members.²³ As a result, courts-martial in the eighteenth and nineteenth centuries required a simple majority from a panel of as few as five and as many as thirteen members.²⁴ Those facing capital crimes, however, required conviction by two-thirds vote.²⁵

The Army in the 1780s was a force of only hundreds of Soldiers, so the policy regarding panel size made sense. However, in the intervening 230 years, the military services have grown exponentially. Even with budget cuts, the Army is projected to be comprised of 475,000 Soldiers and officers in Fiscal Year 2016.²⁶ The underlining personnel crisis of the 1780s simply does not exist anymore, and the requirement for only five panel members is as antiquated as muskets and wooden battleships.

2. Race Riots, Extraordinary Sentences, and Early Reform Efforts

The next major change to court-martial panels occurred in 1920 when Congress updated the Articles of War.²⁷ The motivation to update the Articles came mainly from the millions of Americans who had fought in the First World War and the need to correct perceived deficiencies in military justice that had essentially remained the same since the start of the nineteenth century.²⁸ Gone was the preference for thirteen-member panels. The 1920 changes simply stated that a general court-martial could consist of “any number of members not less than five.”²⁹ For the first time, a two-thirds majority vote was needed in Army courts-martial to convict for all offenses except those mandating the death penalty,

which now required a unanimous vote.³⁰ Sentencing requirements also mandated three-fourths vote for sentences in excess of ten years.³¹

At the time, there had been an effort to increase the voting requirement for a conviction to be the same as the one for sentencing. Brigadier General (BG) Samuel T. Ansell, the then-acting Judge Advocate General of the Army,³² proposed a bill³³ in 1919 that would require three-fourth vote in order to convict in all non-capital courts-martial.³⁴ Reforming the court-martial system became a passion for BG Ansell.³⁵ His concerns were greater than simply the panel’s voting requirement. Brigadier General Ansell “strongly condemned the existing system of courts-martial in vogue in the army,” arguing that “the death penalty and heavy terms in prison had been inflicted for what he characterized as relatively trivial offenses.”³⁶ He gave an example of a Soldier court-martialed for refusing to give an officer a cigarette when asked, telling the officer, “Go to hell.”³⁷ The Soldier was convicted and sentenced to forty years confinement and a Dishonorable Discharge.³⁸

There was also a post-First World War racial aspect to BG Ansell’s proposed changes. In the summer and fall of 1917, there was tremendous controversy regarding the mass general courts-martial of 63 African-American Soldiers following a race riot in Houston, Texas.³⁹ Of the 63 Soldiers tried, the general court-martial panel convicted 58 of them, sentencing thirteen to death and most of the rest to life

²³ *Id.*

²⁴ Sullivan, *supra* note 19, at 7.

²⁵ *Id.*

²⁶ Andrew Tilghman, *Pentagon Budget Reveals Next Pay Raise, Military Retirement Changes*, MILITARY TIMES, Feb. 19, 2016, <http://www.militarytimes.com/story/military/2016/02/09/dods-2017-budget-reveals-16-percent-pay-raise-and-new-changes-military-retirement/80055802/> (“The Army’s current long-term plans call for bringing the size of its force down to 450,000.”).

²⁷ Articles of War of June 4, 1920, ch. 227, 41 Stat. 759 (1920).

²⁸ MORRIS, *supra* note 16, at 25-31. Similar to the 1919-1920 reforms following the First World War, Congress addressed problems with military justice and its implementation following the Second World War a generation later. With eight million servicemembers in uniform during the Second World War, there were over 1.8 million courts-martial. *Id.* at 122. Instead of simply amending the Articles of War as it had done in 1920, Congress replaced the Articles of War with the Uniform Code of Military Justice in 1950. *Id.* at 125-30.

²⁹ Articles of War of June 4, 1920, ch. 227, 41 Stat. 787, 788 (1920).

³⁰ Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 (1971).

³¹ Articles of War of June 4, 1920, ch. 227, 41 Stat., 795-96 (1920).

³² President Wilson appointed the actual Judge Advocate General of the Army, Major General Enoch Crowder, to the position of Provost Marshall

for the Army in 1917. Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1, 2 (1967). Seeing the inherent conflict of interest in having the Army’s chief lawyer also serve as the chief military policeman, Wilson appointed Brigadier General (BG) Ansell as the “acting” Judge Advocate General that same year. *Id.*

³³ *Courts-Martial Called Atrocious*, N.Y. TIMES (Feb. 14, 1919), <http://timesmachine.nytimes.com/timesmachine/1919/02/14/issue.html>.

³⁴ *Id.*

³⁵ Brown, *supra* note 32, at 2 (detailing the prosecution at a general court-martial for a group of enlisted Soldiers who refused to attend drill formation and were convicted and sentenced to Dishonorable Discharge and periods of confinement ranging from ten to twenty-five years).

³⁶ *Courts-Martial Called Atrocious*, *supra* note 33.

³⁷ *Id.*

³⁸ *Id.* Had that Soldier been court-martialed today for disrespect towards a superior commissioned officer, a violation of Article 89, UCMJ, the maximum punishment would be a reduction to the grade of E-1, total forfeiture of all pay and allowances, confinement for one year, and a Bad Conduct Discharge. See 2012 MCM, *supra* note 5, Appendix 12.

³⁹ Fred L. Borch, “The Largest Murder Trial in the History of the United States”: *The Houston Riots Courts-Martial of 1917*, ARMY LAW., Feb. 2011, at 2. The sixty-three Soldiers on trial were represented by the same defense counsel, who himself was not an attorney. *Id.*

imprisonment.⁴⁰ The condemned men's executions were carried out a mere two days later.⁴¹ Horrified by the manner in which the Soldiers received a mass court-martial and mass execution, BG Ansell argued for change to the courts-martial.⁴²

Assisting BG Ansell's efforts in reforming the court-martial composition and voting requirements was U.S. Senator George E. Chamberlain, who sponsored the reform bill in the Senate.⁴³ The Secretary of War, Newton D. Baker, opposed BG Ansell's efforts and helped to ultimately defeat Chamberlain's proposed reforms in the Senate. Senator Chamberlain and BG Ansell's efforts were unsuccessful nearly a century ago.⁴⁴ However, in light of Congress's recent desire to update the UCMJ, perhaps their efforts should be taken up again.

B. The Military Court-Martial: A Sixth Amendment-ish Right to Trial by Panel

There is no Sixth Amendment right to a trial by jury in the military system.⁴⁵ Unlike civilian Article III courts, military courts-martial are convened under Congress's powers under Article I, Section 8 of the U.S. Constitution to "make rules for the government and regulation of the land and naval forces."⁴⁶ Military courts are seen as instrumentalities of the executive branch to allow the President, as Commander-in-Chief of the Armed Forces, to properly command the force by enforcing discipline therein.⁴⁷ As a consequence, the United States Supreme Court has held that military servicemembers being tried in military courts are not entitled to a jury trial under the Fifth and Sixth Amendments,

and courts-martial are not jury trials as understood under Article III.⁴⁸ In *O'Callahan v. Parker*, the Supreme Court held, in part,

The Constitution gives Congress power to "make Rules for the Government and Regulation of the land and naval Forces," and it recognizes that the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Art. III trials need apply. The Fifth Amendment specifically exempts "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" from the requirement of prosecution by indictment and from the right to trial by jury. The result has been the establishment and development of a system of military justice with fundamental differences from the practices in the civilian courts.⁴⁹

However, military case law has evolved to provide the right to a court-martial panel, which is different from a civilian jury, to try cases at a general or special court-martial.⁵⁰ Military appellate courts have held that so long as the minimum number of panel members is maintained

⁴⁰ *Id.* Only four of the fifty-eight Soldiers convicted received a sentence less than death or life imprisonment. *Id.* Those sentenced to life imprisonment were pardoned in the 1920s. *Id.* at 3 n.14.

⁴¹ *Id.* at 2. The Army executed the thirteen Soldiers by hanging on the morning of December 11, 1917. *Id.* It was the first mass execution since 1847. *Id.*

⁴² *Id.* Of particular concern to BG Ansell was the fact that there was no review of the death sentences by a Judge Advocate prior to them being carried out:

The men were executed immediately upon the termination of the trial and before their records could be forwarded to Washington or examined by anybody, and without, so far as I can see, any one of them having had time or opportunity to seek clemency from the source of clemency, if he had been so advised.

Id. at 2-3. This court-martial and mass execution was the basis for BG Ansell creating General Orders No. 7, promulgated by the War Department on January 17, 1918, and prohibited the execution of the sentence in any case involving death before the Judge Advocate General conducted a legal review and determination. *Id.* at 3. This Board of Review was the precursor to today's Army Court of Criminal Appeals. *Id.*

⁴³ Larkin, *supra* note 30, at 251 n.68, citing S. 64, 66th Cong., 1st Sess (1919).

⁴⁴ Larkin, *supra* note 30, at 251 n.68.

⁴⁵ *Ex Parte Quirin*, 317 U.S. 1, 39-40 (1942) ("The fact that 'cases arising in the land or naval forces' are . . . expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth [Amendment]."). Some have argued that the Framers simply forgot to address military justice in the Sixth Amendment. Eugene M. Van Loan, *The Jury, the Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 411 (1972) (stating that the military exception was "merely an oversight" brought on by an exhausted Congress); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 305 ("The most logical explanation for the failure to mention courts-martial in [the Article III jury] clause is that it was the result of oversight or poor draftsmanship."). Others have stated that the Framers never intended the Sixth Amendment to apply to a court-martial. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 280-84 (1958).

⁴⁶ U.S. CONST. art. I, § 8, cl 14.

⁴⁷ WILLIAM WINTHROP, WINTHROP'S MILITARY LAW AND PRECEDENTS 48-49 (2d ed. 1920).

⁴⁸ *O'Callahan v. Parker*, 395 U.S. 258 (1969).

⁴⁹ *Id.* at 261-62.

⁵⁰ *United States v. Witham*, 47 M.J. 297 (C.A.A.F. 1997); *see also United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (The accused "has a constitutional right, as well as a regulatory right, to a fair and impartial panel."). *Id.*

throughout the trial,⁵¹ there are no violations of due process rights if a panel starts with a certain number of members and concludes with a different number due to excusals.⁵²

The procedures for these courts-martial have likewise evolved over time. In 1950, Congress introduced Articles 16 and 52 of the UCMJ when President Truman signed it into law. Specifically, Article 16 lays out the panel composition for general and special court-martial panels. A general court-martial will consist of “a military judge and not less than five members.”⁵³ For a special court-martial, where the maximum punishment is no more than one year confinement and a Bad Conduct Discharge, the panel must consist of “a military judge and not less than three members.”⁵⁴ In those cases where the accused may be sentenced to death, there must be at least twelve members on the general court-martial panel.⁵⁵ Both the UCMJ and the Rules for Courts-Martial are silent regarding a maximum number of court-martial members.

Once the number of court-martial members is addressed, there is the question of the voting requirement for a conviction. Article 52 sets the requirements of panel votes needed in order to enter a finding of guilty at a court-martial.⁵⁶ It takes “a concurrence of two-thirds of the members present at the time the vote is taken” to convict the accused at trial.⁵⁷ The exception to this is a capital case, which requires all twelve panel members to vote unanimously.⁵⁸ Curiously, the UCMJ requires three-fourths of the panel to sentence a convicted servicemember to life imprisonment or confinement more than ten years, a higher burden than actually convicting someone beyond a reasonable doubt.⁵⁹ Despite significant changes to other aspects of the UCMJ, Articles 16 and 52 have remained unchanged since the UCMJ was implemented in 1951. The need to address these articles

is timely, considering the recent changes Congress has made to the convening authority’s abilities under Article 60.

III. Article 60 Under Attack: Taking Away the Safety Valve

A. Previous Law

Prior to 2014, the convening authority had broad authority regarding the disposition of a general or special court-martial he had convened. Under Article 60, the convening authority could “modify the findings and sentence of a court-martial.”⁶⁰ This was considered “a matter of command prerogative involving the sole discretion of the convening authority.”⁶¹ This authority dates back to the early 1800s, when senior commanding officers were entrusted with the authority to convene courts-martial and were vested with the responsibility to ensure justice was served.⁶² The Articles of War gave the commanding general the plenary authority to both convene courts-martial and to approve the outcome of the tribunal.⁶³ This tradition was continued with the UCMJ’s enactment in 1950.⁶⁴ Although the UCMJ was revised in 1969 and 1983, Congress kept this power in the hands of the convening authority.⁶⁵ The United States Court of Appeals for the Armed Forces (CAAF) upheld this plenary power as being lawful as recently as 2003.⁶⁶ It would take an otherwise unremarkable court-martial to gain national attention and mark the beginning of the end of this authority.

B. 2014 NDAA: “Commanders, You Have Gone Too Far”

The term “strategic corporal” is often used to describe how the actions of one Soldier on the battlefield can have policy impacts that ripple across the entire strategic

⁵¹ See 10 U.S.C.A. § 829(a)(2015) (“No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.”); 10 U.S.C.A. § 829(b), (c)(2015). General and special courts-martial cannot proceed if the number of panel members falls below the quorum until the convening authority details a sufficient number of new members. *Id.* See also *United States v. Brown*, 206 U.S. 240 (1907) (holding that when court-martial panel was of the minimum number of members, the incompetency of one member voided the proceedings).

⁵² *United States v. Montgomery*, 5 M.J. 832, 834 (C.M.R. 1978).

⁵³ 10 U.S.C.A. § 816 (2015).

⁵⁴ *Id.*

⁵⁵ 10 U.S.C.A. § 825a (2015).

⁵⁶ 10 U.S.C.A. § 852 (2015).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ 10 U.S.C.A. § 852 (2015).

⁶⁰ 10 U.S.C. § 860(c)(1) (2012).

⁶¹ *Id.*

⁶² Major Brent A. Goodwin, *Congress Offends Eisenhower and Cicero by Annihilating Article 60, UCMJ*, ARMY LAW., July 2014, at 23-24.

⁶³ Articles of War, 2 Stat. 359 (1806):

Any general officer commanding an army, or Colonel commanding a separate department, may appoint general courts-martial whenever necessary. But no sentence of the courts-martial shall be carried into execution until after the whole proceedings shall have been laid before the same officer ordering the same.

Id.

⁶⁴ Goodwin, *supra* note 61, at 24.

⁶⁵ *Id.*

⁶⁶ *United States v. Davis*, 58 M.J. 100, 102 (C.A.A.F. 2003) (citing 10 U.S.C. § 860(c)(1)-(2)(2002)) (“As a matter of ‘command prerogative[.]’ a convening authority ‘in his sole discretion, may approve, disapprove, commute, or suspend the sentence in whole or in part.’”).

spectrum.⁶⁷ Similarly, there has been the emergence of the “strategic court-martial”: a military trial where the outcome, regardless of the merits, has political and policy ramifications well outside of its jurisdiction. Examples include the court-martial of First Lieutenant William Calley after the My Lai Massacre during the Vietnam War⁶⁸ and the courts-martial of several military guards for prisoner abuse in the Abu Ghraib detention facility during the Iraq War.⁶⁹ The most consequential strategic court-martial of the modern era is the U.S. Air Force general court-martial of Lieutenant Colonel (LTC) James H. Wilkerson.⁷⁰

At his trial, a panel consisting of five colonels convicted LTC Wilkerson in November 2012 of several specifications of aggravated sexual assault, in violation of Article 120 of the UCMJ,⁷¹ and conduct unbecoming an officer and a gentleman, in violation of Article 133 of the UCMJ.⁷² The general court-martial convening authority (GCMCA) in the case, Lieutenant General (LTG) Craig A. Franklin, reviewed the case and, using his authority under Article 60 as the GCMCA, disapproved the panel’s finding of guilt and dismissed the case.⁷³

The public uproar as a result of LTG Franklin’s actions was immediate and intense.⁷⁴ Sexual assault victim

advocates argued that LTG Franklin’s decision was a “reckless disregard for the safety of those who work and serve at Aviano” and that LTG Franklin’s action was “just one example of an extremely biased and broken military justice system.”⁷⁵ Soon after news broke of LTC Wilkerson’s conviction being overturned, LTG Susan Helms, the commanding general of 14th Air Force, similarly overturned the verdict of an officer convicted of sexual assault at a general court-martial.⁷⁶ When President Obama nominated LTG Helms for promotion to four-star general, U.S. Senator Claire McCaskill placed a hold on LTG Helms’s promotion, using the matter as a vehicle to discuss her concern regarding convening authorities overturning Article 120 convictions.⁷⁷ Advocacy groups strongly lobbied Congress to make sweeping changes to the UCMJ regarding the authorities of the CMCA. The overriding theme of those arguing for Article 60 repeal or restrictions was that it was abused by those GCMCAs taking care of subordinates they knew.⁷⁸ The actions of these GCMCAs under Article 60,⁷⁹ although rare,⁸⁰ were sufficient to end both LTG Franklin’s and Helms’s career⁸¹ and began a passionate debate in Congress about more fundamental changes to the UCMJ.

⁶⁷ General Charles C. Krulak, *The Strategic Corporal: Leadership in the Three Block War*, MARINES (Jan. 1999), http://www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm.

⁶⁸ MICHAEL R. BELKNAP, *THE VIETNAM WAR ON TRIAL: THE MY LAI MASSACRE AND THE COURT-MARTIAL OF LIEUTENANT CALLEY* (2013).

⁶⁹ STJEPAN GABRIEL MESTROVIC, *THE TRIALS OF ABU GHRAIB* (2005).

⁷⁰ *United States v. Lieutenant Colonel James H. Wilkerson* (3d Air Force, Aviano Air Base, Italy, 3 Nov. 2012).

⁷¹ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 45 (2008) [hereinafter 2008 MCM]. The date of the alleged offenses was March 24, 2012. *Id.* Therefore, the misconduct was prosecuted using the offenses prescribed in the 2008 Manual for Courts-Martial.

⁷² *Id.* pt. IV, ¶59.

⁷³ *United States v. Lieutenant Colonel James H. Wilkerson* (3d Air Force, Aviano Air Base, Italy, 3 Nov. 2012).

⁷⁴ Nancy Montgomery, *Case Dismissed Against Aviano IG Convicted of Sexual Assault*, STARS AND STRIPES (Feb. 27, 2013), <http://www.stripes.com/news/air-force/case-dismissed-against-aviano-ig-convicted-of-sexual-assault-1.209797>; Karen McVeigh, *Victim of US Sexual Assault ‘Scared’ After Conviction Overturned*, THE GUARDIAN (Mar. 12, 2013), <http://www.theguardian.com/world/2013/mar/12/us-military-assault-overturned-victim>; James Risen, *Hagel to Open Review of Sexual Assault Case*, N.Y. TIMES (Mar. 11, 2013), <http://www.nytimes.com/2013/03/12/us/politics/hagel-to-open-review-of-sexual-assault-case.html>.

⁷⁵ Brian Purchia, *Victim in Aviano Scandal Calls on Air Force to Remove Commander Who Overturned Both Her Attacker’s Conviction and Decided Against the Recommendation of the Base Commander Not to Court-Martial Another Airman Accused of Rape*, PROTECT OUR DEFENDERS (Dec. 19, 2013), <http://www.protectourdefenders.com/statement-aviano-victim-calls-on-air-force-to-remove-commander-following-new-scandal/>.

⁷⁶ Craig Whitlock, *General’s Promotion Blocked Over Her Dismissal of Sexual Assault Verdict*, WASH. POST (May 6, 2013),

http://www.washingtonpost.com/world/national-security/generals-promotion-blocked-over-her-dismissal-of-sex-assault-verdict/2013/05/06/ef853f8c-b64c-11e2-bd07-b6e0e6152528_story.html.

⁷⁷ *Id.*

⁷⁸ Kristin Davis, *Lawmakers Lambaste ‘Old Boy’s Network’ In Email Exchange*, THE MIL. TIMES (Sept. 10, 2013), <http://www.militarytimes.com/article/20130910/NEWS05/309100011/Law-makers-lambaste-old-boy-s-network-email-exchange> (“Newly released emails show the lengths to which [Lieutenant General Franklin] went to help a fellow fighter pilot [Lieutenant Colonel Wilkerson] get a new assignment and advance in his career after overturning the pilot’s sex assault conviction.”). *Id.*

⁷⁹ Lieutenant General (LTG) Franklin initially tried to defend his actions in light of the public criticism. See Letter from LTG Franklin to the Sec’y of Air Force (Mar. 12, 2013). In his letter, LTG Franklin stated that he conducted an exhaustive review of the record of trial. He wrote that he “reviewed the Article 32 investigation report again[,] . . . the entire court transcript[,] and all the other evidence the jury reviewed,” and that he “looked at some evidence a second and third time” and “re-read particular portions of the court transcripts.” LTG Franklin wrote that he “reviewed affidavits provided after trial by the prosecuting attorneys” and that he “also read a personal letter to [him] from the alleged victim.” LTG Franklin concluded, “The more evidence that I considered, the more concerned I became about the court martial findings in this case.” *Id.*

⁸⁰ The Air Force reported that between 2008 and 2013, there had been 327 convictions for sexual assault, rape, and similar crimes, but only five verdicts (1%) had been overturned at the clemency stage. See Craig Whitlock, *Air Force General’s Reversal of Pilot’s Sexual-Assault Conviction Angers Lawmakers*, WASH. POST (Mar. 8, 2013), http://www.washingtonpost.com/world/national-security/air-force-generals-reversal-of-pilots-sexual-assault-conviction-angers-lawmakers/2013/03/08/f84b49c2-8816-11e2-8646-d574216d3c8c_story.html.

⁸¹ Nancy Montgomery, *Franklin Will Retire as a Two-Star, Officials Say*, STARS AND STRIPES (Jan. 9, 2014), <http://www.stripes.com/news/franklin-will-retire-as-a-two-star-officials-say-1.261202>; Jeff Schogol, *With*

In the wake of the controversy that would ultimately lead to LTG Franklin's and Helms's retirement, the Obama administration sided with advocacy groups and those in Congress arguing for changes to the UCMJ.⁸² The Secretary of Defense called for the removal of commanders' ability to overturn convictions under Article 60, stating, "These changes [to Article 60], if enacted by Congress, would help ensure that the military justice system works fairly, ensures due process, and is accountable," and that the changes would "increase the confidence of servicemembers and the public that the military justice system will do justice in every case."⁸³ The *Wilkerson* controversy had stoked anger from both political parties, from the White House to Capitol Hill.⁸⁴

Sensing political momentum for a major overhaul of the UCMJ,⁸⁵ Senator Kristen Gillibrand of New York proposed legislation that would completely remove military commanders from the court-martial process, replacing them with "independent prosecutors."⁸⁶ While popular among many activists, the service chiefs and their supporting judge advocates general resisted.⁸⁷ Opponents defeated the bill in a procedural maneuver,⁸⁸ although Senator Gillibrand has indicated that she intends to reintroduce her legislation

removing commanders from the UCMJ process.⁸⁹ This pressure to completely remove military commanders as convening authorities, however, helped result in the compromise legislation regarding limits to the convening authorities.⁹⁰ The final bill allowed the UCMJ to stay within the purview of the chain of command, but placed severe limits on commanders' discretion regarding the outcome of the cases they referred.⁹¹

Specifically, the convening authority can no longer set aside a finding of guilt or only find the accused guilty of a lesser included offense.⁹² The only exceptions to this blanket prohibition are so-called "qualifying offenses": those offenses that carry a punishment no greater than two years confinement and where the sentence adjudged at trial was six months or less without a punitive discharge.⁹³ Sexual assault crimes under Articles 120 and 125 were specifically exempted as "qualifying offenses."⁹⁴ This change became effective in June 2014.⁹⁵

This change by Congress, in its efforts to increase convictions for sexual assault in courts-martial,⁹⁶ was within its authority. However, changing panel quorums and voting requirements are also within Congress's authority.

Nomination Blocked, 3-Star Applies for Retirement, AIR FORCE TIMES (Nov. 8, 2013), <http://archive.airforcetimes.com/article/20131108/CAREERS03/311080013/With-nomination-blocked-3-star-applies-retirement> (noting LTG Helms's retirement from the Air Force).

⁸² President Obama stated in May 2013 that those accused of sexual assault in the military would "be held accountable, prosecuted, stripped of their positions, court-martialed, fired, dishonorably discharged—period." Craig Whitlock, *Obama Delivers Blunt Message on Sexual Assaults in the Military*, WASH. POST (May 7, 2013), http://www.washingtonpost.com/world/national-security/possible-military-sexual-assaults-up-by-33-percent-in-last-2-years/2013/05/07/8e33be68-b72b-11e2-bd07-b6e0e6152528_story.html. Those comments were the basis for at least one successful unlawful command influence (UCI) motion in a pending sexual assault case. Erik Slavin, *Judge: Obama Sexual Assault Comments "Unlawful Command Influence"*, STARS AND STRIPES (June 14, 2013), <http://www.stripes.com/judge-obama-sex-assault-comments-unlawful-command-influence-1.225974>.

⁸³ Chris Carroll, *Hagel: Change UCMJ to Deny Commanders Ability to Overturn Verdicts*, STARS AND STRIPES (Apr. 8, 2013), <http://www.stripes.com/hagel-change-ucmj-to-deny-commanders-ability-to-overturn-verdicts-1.215629>.

⁸⁴ Donna Cassata, *Outraged Lawmakers Look to Change Military Justice*, ASSOCIATED PRESS (Apr. 30, 2013), <http://bigstory.ap.org/article/outraged-lawmakers-look-change-military-justice>.

⁸⁵ The President ordered a review of the military services' response to sexual assaults in units, vowing, "If I do not see the kind of progress I expect, then we will consider additional reforms that may be required to eliminate this crime from our military ranks." Scott Neuman, *President Orders Review of Sexual Assault in Military*, NAT'L PUB. RADIO (Dec. 20, 2013), <http://www.npr.org/blogs/thetwo-way/2013/12/20/255826837/president-orders-review-of-sexual-assault-in-military>.

⁸⁶ Military Justice Improvement Act, S. 1752, 113th Congress (2013).

⁸⁷ Elliott C. McLaughlin, *Military Chiefs Oppose Removing Commanders from Sexual Assault Probes*, CNN (June 5, 2013), <http://www.cnn.com/2013/06/04/politics/senate-hearing-military-sexual-assault/>.

⁸⁸ Arlette Saenz & Jeff Zeleny, *Military Assault Bill Months in the Making Fails in Senate*, ABC NEWS (Mar. 6, 2014), <http://abcnews.go.com/blogs/politics/2014/03/gillibrand-military-sexual-assault-bill-fails-in-senate/>.

⁸⁹ Anna Palmer & Daniel Samuelsohn, *Kirsten Gillibrand Gears Up for Another Round*, POLITICO (Jan. 7, 2015), <http://www.politico.com/story/2015/01/kirsten-gillibrand-military-sexual-assault-114018.html> (Senator Gillibrand: "I think [sexual assault in the military] is a major issue, and I think the next commander in chief will have to look at this very seriously, particularly if our current one doesn't embrace this final reform as necessary . . .").

⁹⁰ Jonathan Weisman and Jennifer Steinhauer, *Negotiators Reach Compromise on Defense Bill*, N.Y. TIMES (Dec. 9, 2013), http://www.nytimes.com/2013/12/10/us/politics/house-and-senate-reach-compromise-on-pentagon-bill.html?pagewanted=all&_r=0.

⁹¹ *Id.*

⁹² NDAA FY 14, *supra* note 6, at § 1702(b).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ See transcript of Honorable Judge Barbara Jones testimony, Department of Defense Response Systems to Adult Sexual Assault Crimes Panel (June 16, 2014), at 73-74. The panel was commissioned by Congress. Judge Jones stated in part:

I think the way you began this . . . was to say we need to – that a lot of our assessment with respect to this narrow issue, not about all commanders but of convening authority within the UCMJ, our, at least the majority's decision at this point not to do anything was because we did not believe we had enough evidence to convince us that it was going to increase reporting or increase convictions or what have you.

Id.

Consequently, Congress missed an opportunity to rebalance the court-martial process by exploring ways to address the composition and voting requirement.

IV. Following the State and Federal Lead for Panel Size and Voting Requirements

The Fifth Amendment of the Constitution ensures that no one will lose life, liberty, or property without due process of law.⁹⁷ The Sixth Amendment states in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]”⁹⁸ These amendments apply to the states under the Fourteenth Amendment.⁹⁹ In considering how to reform the UCMJ regarding court-martial panels, Congress need only look at the practices of the federal and state courts, practices which have withstood appellate scrutiny at the United States Supreme Court.

A. Federal Criminal Jury Requirements

While in many ways the military court-martial system is modeled after federal courts, there are key differences. The military system adopted the Federal Rules of Evidence, made minor military-specific adjustments to it, and named it the Military Rules of Evidence.¹⁰⁰ Under Article 134, certain federal criminal statutes can be prosecuted in military court.¹⁰¹ However, a key difference is in the standards for civilian juries versus court-martial panels for criminal trials. Under the federal rules, unless a defendant agrees to a lower number, there must be twelve jurors in every federal criminal trial.¹⁰² These jurors must return a verdict to a judge in open court and the verdict must be unanimous.¹⁰³ There are no exceptions to this requirement for unanimity; anything less

will result in a mistrial.¹⁰⁴ With the military justice system mirroring the federal system, there should be a higher standard for panel quorums and conviction burdens. While a unanimous verdict by twelve panel members may be considered to be too much change to the UCMJ, state courts provide a pathway for more moderate reform to the court-martial panel size and voting requirements which are not as onerous as the federal criminal courts but provide more protections for the accused than the current system.

B. State Criminal Jury Requirements

Except for Florida, all states and the District of Columbia require twelve jurors for felony trials.¹⁰⁵ Florida only requires six jurors who must vote unanimously to convict.¹⁰⁶ In 1978, the United States Supreme Court held in *Ballew v. Georgia* that a trial consisting of a jury of less than six persons deprived a defendant of the right to trial by jury as contemplated in the Sixth Amendment.¹⁰⁷ The Court reached its conclusion based largely on empirical studies showing that “the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.”¹⁰⁸ Six jurors were enough to meet constitutionality under the Sixth Amendment.¹⁰⁹ The following year, in *Burch v. Louisiana*,¹¹⁰ the Court held that any guilty verdict by a six-member jury must be by unanimous vote.¹¹¹

However, in 2014 the CAAF summarily affirmed a ruling from the Air Force Court of Criminal Appeals, holding that that the Supreme Court’s decision in *Burch* did not apply to military courts-martial where there were fewer than six panel members convicting without a requirement to vote unanimously.¹¹² Because of the military appellate courts’

⁹⁷ U.S. CONST. amend. V.

⁹⁸ U.S. CONST. amend. VI. The Seventh Amendment also ensured the right of trial by jury in civil cases.

⁹⁹ U.S. CONST. amend. XIV.

¹⁰⁰ Fredric I. Lederer, *The Military Rules of Evidence: Origins and Judicial Implementation*, 130 MIL. L. REV. 5 (1990) (discussing origins of the MRE).

¹⁰¹ 2012 MCM, *supra* note 5, pt. IV, ¶ 60b(4)(b) (2012)(discussing use of Article 134 to prosecute federal crimes not covered elsewhere by the punitive articles of the UCMJ).

¹⁰² FED. R. CRIM. P. 23.

¹⁰³ FED. R. CRIM. P. 31(a).

¹⁰⁴ FED. R. CRIM. P. 31(b)(3).

¹⁰⁵ DAVID B. ROTTMAN AND SHAUNA M. STRICKLAND, STATE COURT ORGANIZATION, table 42 (Washington, DC: Bureau of Justice Statistics, 2004) (providing complete state-by-state information on jury composition and voting requirements for criminal and civil trials).

¹⁰⁶ *Id.*

¹⁰⁷ *Ballew v. Georgia*, 435 U.S. 223, 239-40 (1978).

¹⁰⁸ *Id.* at 239. Studies of jury verdicts in several civil lawsuits in the 1960s demonstrated significant differences in finding for either the plaintiff or defendant based on the size of the jury, with six-member juries awarding larger damages than twelve-member juries. *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Burch v. Louisiana*, 441 U.S. 130 (1979).

¹¹¹ *Id.* at 131.

[M]uch the same reasons that led us in *Ballew* to decide that use of a five-member jury threatened the fairness of the proceeding and the proper role of the jury, lead us to conclude now that conviction for a nonpetty offense by only five members of a six-person jury presents a similar threat to preservation of the substance of the jury trial guarantee and justifies our requiring verdicts rendered by six-person juries to be unanimous.

Id. at 138.

¹¹² *United States v. Daniel*, 2014 CCA LEXIS 224 (A.F. Ct. Crim. App. 2014), *aff’d*, 2014 CAAF LEXIS (C.A.A.F. 2014), *cert. denied*, No. 14-621 (2014) (Appellant, relying on *Ballew v. Georgia* and *Burch v. Louisiana*, challenged the constitutionality of his conviction at a general court-martial by a panel of only six members who were not required to unanimously vote to convict. The Air Force Court of Criminal Appeals held that because courts-martial were not subject to the same jury requirements as other

holdings regarding the non-applicability of the Sixth Amendment right to a larger panel size and voting requirement,¹¹³ it is clear that only congressional action updating Articles 16 and 52 will result in a higher panel quorum and voting requirement for conviction.

While some may argue that the current two-thirds voting requirement to convict is “enough” due process for courts-martial,¹¹⁴ not requiring a higher voting requirement undermines the concept of “proof beyond a reasonable doubt.” The reasonable doubt is, in effect, the one-third of those panel members who voted to acquit.¹¹⁵ In practice, the total effect of our current system is that a simple majority of members favoring conviction may be able to force reballoting until a conviction results, hardly “proof beyond reasonable doubt.”¹¹⁶

While most states and the federal government require unanimous verdicts by twelve-member juries, this is not universal. In a 1972 plurality opinion, the Supreme Court held that while the Sixth Amendment guaranteed a unanimous verdict in federal criminal trials, this right was not extended to the states under the Fourteenth Amendment. Therefore, states could convict individuals with a 9-3 verdict.¹¹⁷ Louisiana and Oregon are the only states that allow convictions based on juries that are not unanimous in reaching verdicts.¹¹⁸ Oregon requires eleven jurors to be in favor of conviction for murder and only ten for all other offenses.¹¹⁹ Louisiana only requires nine out of twelve jurors to vote to convict for all non-capital felony cases.¹²⁰ These states provide excellent examples for increased panel size with a larger, non-unanimous voting requirement.

criminal trials, there was no merit to appellant’s claim that his due process rights were violated when he was prosecuted by a court-martial panel consisting of only six members whose verdict did not have to be unanimous.)

¹¹³ *Id.*

¹¹⁴ See Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L. Q. 141 (2005) (arguing that a focus on criminal juries being unanimous in their verdicts is misplaced and that a supermajority of jurors is not only sufficient due process, but also a better indicator of “society’s will” in jury decisions).

¹¹⁵ *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950).

An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shares of venerated legal ancients. They are working rules of law bidding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

Id.

V. Proposed Solution: More Members and More Votes Equals More Military Justice

A. A Higher Court-Martial Quorum

The practice of using only five panel members in general courts-martial is a relic of the 1780s and reflects a time when the military was simply too small to field a larger panel.¹²¹ That is no longer the case. As punitive articles and procedures have evolved with the times, so too should the court-martial panel reflect current practices by state and federal courts in terms of panel size. An increased quorum for courts-martial promotes a greater sense of fairness and justice for the accused and for the public at large.

Mandating a panel of twelve members for a general court-martial and seven for a special court-martial would also remove the gamesmanship¹²² of having the “right” number of panel members to reach the conviction requirement.¹²³ Knowing the size of the panel depending on the type of court-martial, the “magic number” of three-fourths members to convict would be known by all: six members for a special court-martial and nine for a general court-martial. Additionally, while appellate courts have upheld the current quorum requirements, this was always with the presumption that the convening authority had the ability to unilaterally take corrective action after the trial under Article 60. This is no longer the case. The Supreme Court has previously stated that it could review the UCMJ in the future and determine that it no longer meets basic due process requirements.¹²⁴ Congress should complete its work with UCMJ reform and increase the court-martial quorum before the issue is reviewed by appellate courts. Not only should the panel size be increased, but the voting requirement to convict should be increased also.

¹¹⁶ Larkin, *supra* note 30, at 247.

¹¹⁷ *Apodaca v. Oregon*, 406 U.S. 404, 412-13 (1972); *Johnson v. Louisiana*, 406 U.S. 356 (1972).

¹¹⁸ ROTTMAN AND STRICKLAND, *supra* note 104.

¹¹⁹ OR. REV. STAT. § 136.450 (2013).

¹²⁰ LA. CONST., art. VII, § 41.

¹²¹ Sullivan, *supra* note 19.

¹²² MAJOR S.A. LAMB, THE COURT-MARTIAL PANEL MEMBER SELECTION PROCESS: A CRITICAL ANALYSIS, at 95 (“A specified number of members would remove any incentive on the part of either defense counsel or trial counsel to play the numbers game with peremptory challenges.”) (1992).

¹²³ U.S. Dep’t of Army, Reg. 27-9, Military Judge’s Benchbook table 2-1 (10 Sep. 2014) [hereinafter AR 27-9].

¹²⁴ *Weiss v. United States*, 510 U.S. 163, 177-78 (1994) (“We do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today”; however, history “is a factor that must be weighed” in considering the constitutionality of a challenged military justice practice.); see also *Ballew v. Georgia*, 435 U.S. 223, 239-40 (1978).

B. Two Out of Three Ain't Bad, Unless One's Liberty Is At Stake

Florida, Oregon, and Louisiana demonstrate that it is possible to have courts that have fewer than twelve jurors and non-unanimous convictions, but perhaps not both. The proposed changes to court-martial panels are incremental and seek in part to prevent possible appellate due process challenges to Articles 16 and 52 under the Sixth Amendment now that the "safety valve," or Article 60, has effectively been shut off. The states mentioned demonstrate that it is possible to increase our quorum to twelve for general courts-martial, have three-fourths voting requirement for conviction (effectively what Louisiana requires), and have the conviction withstand any future constitutional scrutiny. Special courts-martial have a maximum punishment of one year confinement and a Bad Conduct Discharge, which is roughly the equivalent of a misdemeanor conviction in civilian courts. Having a non-unanimous conviction by seven panel members will most likely not draw the appellate challenges that a felony-level conviction at a general court-martial would.

The current military justice system can create a form of "conviction peer pressure"¹²⁵ that can affect court-martial panel deliberations. For example, consider a court-martial panel consisting of nine members. Under the current two-thirds rule, six votes are needed in order to convict.¹²⁶ If upon the first ballot on the question of guilt or innocence the vote is five to four for acquittal, the four members who would convict probably could not force a reballoting because they do not constitute a majority. The accused would be acquitted. However, if the vote were five to four for conviction, the five who would convict may force reballoting repeatedly until one member agrees to change his vote and convict.¹²⁷ It is much easier to get this one vote under the two-thirds system than the two if a conviction required three-fourths vote. More to the point, with a standard panel size and three-fourths voting requirement, every trial counsel, accused, military judge, and general court-martial panel would know at the start of trial that it requires nine of the twelve panel members to convict. Because there are no "deadlocked juries" resulting in a mistrial in the military justice system, the risk of this "conviction peer pressure" is real and taints a verdict that relies on only two-thirds support.¹²⁸ The current 230 year-old paradigm of small majorities from even smaller panels

¹²⁵ JEFFREY ABRAMSON, *WE, THE JURY* 197 (paperback ed. 2000) (discussing data showing the widespread occurrence of splits among jurors that were eventually overcome by intimidation, as opposed to persuasion, of would-be holdouts); Tom Jackman, *Prieto Juror's Reversal Could Lead to Mistrial*, WASH. POST, July 3, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/02/AR2007070201828.html> ("A juror in Fairfax County's double murder trial of Alfredo R. Prieto wrote a letter to the judge yesterday saying he should not have voted for conviction two weeks ago, calling his fellow jurors 'a pack of lions protecting their kill.'"); *California Case Puts Spotlight on Jury Coercion and Peer Pressure*, N.Y. TIMES, July 17, 1992, <http://www.nytimes.com/1992/07/17/news/california-case-puts-spotlight-on-jury-coercion-and-peer-pressure.html> ("Invariably, two to five assertive people, often the most articulate in the group, take the lead in jury deliberations, while four to six others say very little, jury analysts say. And when assertive

should be updated to provide better due process for our Soldiers.

C. In Pursuit of a More Perfect Military Justice System

Some will undoubtedly ask why one would propose this greater emphasis on due process and heightening the burden on military court-martial panels, especially at a time when Congress appears to be seeking a higher conviction rate in sexual assault prosecutions. The answer is best given by the former Judge Advocate General of the Air Force, Lieutenant General Richard C. Harding, who said,

Due process enhances discipline. America's mothers and fathers send their sons and daughters to us to join our all-volunteer force because they believe their children will be fairly treated. They believe and expect that we will adhere to due process in judging their children, should they violate our code; otherwise, they would not have sent them to us. As a result, when we adhere to due process, we send a message to those parents, parents of other prospective [servicemembers] and all [servicemembers] everywhere that they can trust the [armed forces] to treat its [servicemembers] fairly and protect and promote justice within our service[s]. By protecting our recruiting and retention pipelines, due process safeguards our combat effectiveness. Conversely, when we permit due process to suffer, we discourage enlistment of America's best and brightest; we demoralize and discourage the retention of currently-serving [servicemembers], who worry they will likewise be treated unfairly, and as a consequence, we degrade military discipline and combat effectiveness.¹²⁹

Due process is a component of the good order and discipline our UCMJ system was created to protect. It goes hand-and-hand with the justice our commanders, Congress, and the public seek. Addressing court-martial panel composition and voting requirements, therefore, is fundamental to UCMJ reform.

jurors agree with each other, the others will often follow, even if they disagree.").

¹²⁶ AR 27-9, *supra* note 119.

¹²⁷ Larkin, *supra* note 30, at 247.

¹²⁸ *Id.*

¹²⁹ Lieutenant General Richard C. Harding, *A Revival in Military Justice: An Introduction by the Judge Advocate General*, THE REPORTER, Summer 2010, at 4, available at www.afjag.af.mil/shared/media/document/AFD-101105-056.pdf (emphasis added).

The fact that our courts require twelve panel members to vote unanimously in order to convict an accused of a capital offense and sentence him to death shows that there is less than the beyond-reasonable-doubt standard for all other charges only requiring two-thirds of panel members in order to convict.¹³⁰ An increase in our voting requirement—implementing BG Ansell’s proposed reforms nearly a century later—helps ensure that procedural due process is afforded for the accused. Ultimately, it is the accused’s presumption of innocence and right to a fair trial that must be protected, and recent changes to the UCMJ made in political haste threaten to undermine this right.¹³¹ With the extensive experience of CMCA’s and their supporting judge advocates, the practical implementation of this policy is very achievable.

VI. Implementation at Your Local Installation

How would these proposals play out in actual practice? For starters, Staff Judge Advocates and their Chiefs of Justice would draw a greater pool of potential panel members through their Court-Martial Convening Orders (CMCOs). Instead of ten to twelve officers and enlisted panel members per CMCO, a greater number, perhaps twenty-four or thirty-six, would be required. As a practicable matter, this is not a great challenge to OSJAs, and the practice of selecting mainly senior officers and NCOs is more of a custom than a requirement under the UCMJ.¹³²

At the convening of the general court-martial, a larger number of potential panel members from the CMCO, perhaps twenty, would report to court for voir dire. Their questionnaires and officer or enlisted Soldiers record briefs would already have been provided to the accused through his defense counsel days or weeks earlier. The “primary” panel would be made of the twelve most senior officers and enlisted, and if there are no challenges they would be seated. Once twelve members are seated and the court-martial assembled, the remainder of those summoned would be excused. Although the proposed changes are arguably more onerous on

commands, the court-martial process is one of the most important responsibilities of commanders and their judge advocates in order to maintain a disciplined fighting force and ensure justice to the military, society, victims, and the accused.¹³³ These proposed policy changes are important to give the commanders, Soldiers, those accused of crimes, and the public at large greater trust and confidence in the military justice system.

VII. Conclusion

The current court-martial panel quorum and voting requirements are vestiges of a much smaller, isolated military.¹³⁴ Back then, commanders, not legally-trained attorneys and judges, arbitrarily meted out justice against the accused, often with the horrific results which necessitated the formation of the UCMJ over sixty-five years ago.¹³⁵ The current standard of three to five panel members determining the fate of an accused, who faces federal conviction at trial, has outlived its usefulness and is insufficient due process. This is especially true in light of the severe restrictions on the CMCA’s authority under Article 60. Congress should complete its work and bring the military court-martial into the twenty-first century by raising panel seating and voting requirements for special and general courts-martial. Doing so will provide Soldiers like SSG Jones with an increased sense of fairness in the court-martial process, regardless of the verdict.

¹³⁰ Larkin, *supra* note 30, at 251.

¹³¹ Congressman Loretta Sanchez, *The Forty-First Kenneth J. Hodson Lecture in Criminal Law*, 218 MIL. L. REV. 265, 275 (2013).

We need to do justice and deter crime. Notice that I did not simply say “punish the guilty.” We must always preserve the rights of the accused. Americans are innocent until proven guilty. Doing justice means thoroughly and fairly investigating and trying these cases so that the guilty can be punished according to the offense and their individual culpability. False accusations, overcharging, or the rush to judgment can do tremendous harm to those accused of sexual assault.

Id.

¹³² 10 U.S.C.A. § 825 (2015) (Any commissioned or warrant officer can serve on a court-martial panel and any enlisted member “who is not a member of the same unit as the accused” may serve. Panel members should not be junior in rank to the accused “[w]hen it can be avoided.”).

¹³³ MORRIS, *supra* note 16, at 5.

A military justice system in a free society is only truly effective when it commands the broad respect of those whom it governs. The concern for justice, then, is grounded partly in the concern that good order and discipline are so important that they must be rooted in a system that soldiers essentially trust. If soldiers perceive that the system—popular or not—essentially produced just results, then it would be an effective tool for leaders to enforce discipline and produce a fighting force that is more cohesive and effective.

Id.

¹³⁴ Wiener, *supra* note 18.

¹³⁵ Brigadier General John S. Cooke (Retired), *Military Justice and the Uniform Code of Military Justice*, ARMY LAW., Mar. 2000, at 2.

