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Safeguarding the Commander's Authority to Review the Findings of a Court-Martial

*Andrew S. Williams**

“Do you really think that after a *jury* has found someone guilty, and dismissed someone from the military for sexual assault, that one person [the commander], against the advice of their legal counselor, should be able to say, ‘Never mind?’” Senator Claire McCaskill recently posed this question in a hearing before the Senate Armed Services Committee,¹ as she and others expressed outrage over the dismissal of a sexual assault conviction by a military commander. Her question reflects a justifiably profound respect for the verdicts of juries, one that runs deep in American legal tradition, but reveals a basic misunderstanding about the court-martial panel in the military.

The court-martial panel is not a true jury. Federal juries in criminal cases must have twelve jurors and be unanimous.² State juries must have at least six jurors, and five of six jurors voting to convict is not enough to satisfy the Sixth Amendment.³ Unlike federal and state juries, the panel that convicted the accused in the sex assault case discussed above had only five members and it did not have to be unanimous—only a two-thirds vote, or four out of five, was needed for a conviction. No five-member panel, unanimous or not, is a jury. Because the panel was not a true jury, the panel's verdict will not always

* Colonel, Judge Advocate General's Corps, U.S. Air Force. B.A., J.D., Brigham Young University; LL.M., McGill University. The author is currently the Staff Judge Advocate, 14th Air Force (Air Forces Strategic), Air Force Space Command, Vandenberg Air Force Base, California. The author is indebted to several leading authorities on the American jury—Professors Shari Seidman-Diamond, Michael Saks, and Neil Vidmar—for their comments and suggestions. He also thanks Melissa Barsotti, Joseph “Dutch” Bialke, Alan Coe, Robert Coit, Ryan Hoback, and Mark Patterson. The views expressed in this article are those of the author and not The Judge Advocate General's Corps, the United States Air Force, or the Department of Defense.

1. Donna Casseta, *Senators Outraged By Dismissal of Assault Case*, ASSOCIATED PRESS (Mar. 5, 2003, 5:20 PM), <http://news.yahoo.com/senators-outraged-dismissal-assault-case-213240150.html> (emphasis added).

2. See *infra* pt. III.E, F.

3. *Id.*

resemble the commonsense judgment of a jury. The Supreme Court made clear that court-martial panels are not juries:

We find nothing in history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property.⁴

If the sexual assault case mentioned above had been tried by the same panel in federal or state court, the Supreme Court would have swiftly thrown out the conviction, for any one of these three reasons: (1) the panel did not have to be unanimous, (2) it was not selected from a cross-section of the community, and (3) it was too small to have effective deliberations, thereby raising “substantial doubt about the reliability and appropriate representation of panels smaller than six.”⁵ Because court-martial panels are not juries, neither the public nor the military community can be genuinely confident that court-martial panels will always reach appropriate verdicts.

As the Supreme Court stated, “There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution.”⁶ The Founding Fathers understood these dangers when they permitted the use of courts-martial in the U.S. Armed Forces. Consequently, they gave commanders the extraordinary authority to review the findings of a court-martial in order to correct the occasional, but inevitable, miscarriage of justice. This authority is now being criticized.

Some critics believe that commanders should be denied this authority because they lack legal training.⁷ They also point out that, even if the commander’s authority is eliminated, the military accused will still be protected by a *robust* system of appeal rights.⁸ However, these arguments are entirely incorrect. A commander does not need legal

4. United States *ex rel* Toth v. Quarles, 350 U.S. 11, 17 (1955).

5. Ballew v. Georgia, 435 U.S. 223, 239 (1978) (conviction was set aside because five-member jury was too small); *see also* Burch v. Louisiana, 441 U.S. 130 (1979) (conviction was set aside because six-member jury was not unanimous).

6. *Toth*, 350 U.S. at 22 (holding that a court-martial had no jurisdiction over a discharged military member suspected of committing a murder while on active duty).

7. *See* Editorial Board, *Next Steps on Military Sexual Assaults*, (Apr. 28, 2013), <http://www.nytimes.com/2013/04/29/opinion/next-steps-on-military-sexual-assaults.html?p>.

8. *Id.*

training to properly review the findings of a court-martial. Additionally, the rights of appeal are illusory with respect to the type of review needed to protect against the potential for a panel's erroneous factual findings.

In a recent hearing before the Senate Armed Services Committee, acting Department of Defense General Counsel Robert S. Taylor seemed to echo critics while also unwittingly making a salient point: "There is something that seems odd about the power to reject the findings that came out of a jury in the absence of some major obvious problem."⁹ That is precisely the danger with the panel's findings. The incorrectness of the verdict 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 jury, commanders need the authority to review those determinations.

In a recent editorial, Senator McCaskill wrote,

And while the military justice system is different from our civil justice system *for good reasons*, I believe the time has come to take a hard look at the rules which allow military commanders to vacate entire jury convictions, expunge criminal records, and reinstate convicted sex offenders to the ranks of our armed forces, without even offering justification.¹⁰

There are many good reasons why the military justice system is different than the civilian system. Much deserves to be said about why commanders must retain oversight and control over the court-martial process. The purpose of this paper is more limited in scope. It is to demonstrate that a court-martial panel is not a true jury and that the commander should retain the authority to review its findings for this reason alone. Although commanders need certain authorities to execute their duties, a full explanation of these reasons is beyond the scope of this paper.

9. Molly O'Toole, *Senators Push Sex Assault Controversy at Hearing, Grilling Military Leaders*, HUFFINGTON POST (Mar. 13, 2013, 6:21 PM), http://www.huffingtonpost.com/2013/03/13/senators-sex-assault-hearing_n_2869473.html.

10. Claire McCaskill, *Their Day in Court*, ST. LOUIS TODAY (Mar. 12, 2013, 12:00 AM), http://www.stltoday.com/news/opinion/columns/their-day-in-court/article_ced54e14-5dca-5c53-a038-4b9de9ccb9a9.html (emphasis added).

Part I introduces the right to trial by jury as the key to liberty in the American scheme of justice. It also explains why the Founding Fathers denied military members this right along with all other protections of the Bill of Rights. Part II discusses the historical foundations of the court-martial and why the military justice system developed separately from the civilian justice system. The court-martial was and still is, first and foremost, a tool of discipline and not a court of law. Part III describes the essential differences between panels and juries and why those differences materially affect the reliability of verdicts. Part IV discusses the safeguards enacted by Congress to make up for the panel's structural flaws. These safeguards are as unorthodox to the American scheme of justice as they are now controversial. They should not be eliminated unless the panel's structural flaws are also corrected. Part V contains recommendations for amending the Uniform Code of Military Justice, to include a return to the original understanding that courts-martial should be limited in times of peace to disciplinary infractions. If the commander's role seems antiquated today, so, too, is the denial of genuine due process to the men and women who serve in the U.S. Armed Forces.

PART I: THE RIGHT OF TRIAL BY JURY AND THE COURT-MARTIAL

For over six hundred years, unanimity of twelve jurors was the essential feature of jury trials at common law.¹¹ The great jurist Sir William Blackstone praised the right to a trial by jury as “the grand bulwark of English liberties”¹² and “the glory of the English law.”¹³ In describing jury trials as “the most transcendent privilege which any subject can enjoy or wish for,” Blackstone observed that no one could

11. JEFFREY ABRAMSON, *WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 179 (Harvard U. Press 2000) (“The first recorded instance of a unanimous verdict occurred in 1367, when an English Court refused to accept an 11-1 guilty vote after the lone holdout stated he would rather die in prison than consent to convict.”).

12. *Jones v. United States*, 526 U.S. 227, 246 (1999) (quoting Blackstone).

13. *Mitchell v. Harmony*, 54 U.S. 115, 142-43 (1951) (quoting 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 227-29 (Oxford, Clarendon Pr. 1992) (1765)).

be affected, “either in his property, his liberty, or his person, but by the *unanimous consent* of twelve of his neighbors and equals.”¹⁴

The Founding Fathers also prized the right to a jury trial, which they considered as their birthright and inheritance from the common law.¹⁵ In 1765, the Stamp Act Congress in its Declaration of Rights asserted, “That trial by jury is the inherent and invaluable right of every British subject in these colonies.”¹⁶ In the Declaration of Independence, the Founding Fathers censured King George III, “For depriving us in many cases, of the benefit of Trial by Jury.”¹⁷ After winning their independence, they took care to insert into the Constitution the guarantee that, “The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.”¹⁸

John Adams, who defended the British soldiers accused of carrying out what had become known as the Boston Massacre, called jury trial, “the lungs of liberty.”¹⁹ Thomas Jefferson identified it as “the only anchor ever yet invented by man, by which a government can be held to the principles of its constitution.”²⁰ James Wilson, one of six men to sign both the Declaration of Independence and the Constitution,²¹ stated, “To the conviction of a crime, the undoubting and *the unanimous* sentiment of the twelve jurors is of indispensable necessity.”²² In the debate over the Constitution before its ratification, Alexander Hamilton observed in his Federalist Papers:

The friends and adversaries of the plan and convention, if they agree in nothing else, concur at least in the value they set upon the trial by

14. *Id.* (emphasis added).

15. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION :§§ 1773–75 (1983), *reprinted in* 4 PHILIP B. KURLAND & RALPH LERNER, THE FOUNDING FATHERS’ CONSTITUTION 407.

16. Stamp Act Congress, Declaration of Rights, 7th. (19 Oct. 1765) (*Sources* 270), *reprinted in* PHILIP B. KURLAND AND RALPH LERNER, 5 THE FOUNDING FATHERS’ CONSTITUTION 251 (Univ. Chicago Press 1987).

17. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

18. U.S. CONST. art. III, § 2, cl. 3.

19. Thomas J. Methvin, *Alabama—The Arbitration State*, 62 ALA. LAW. 48, 49 (2001).

20. Thomas Jefferson, Letter to Thomas Paine, *in* 3 THE WRITINGS OF THOMAS JEFFERSON 71 (Washington, ed., 1861) (1788).

21. Richard O. Lempert, *Uncovering ‘Nondiscernible’ Differences: Empirical Research and the Jury-Size Cases*, 73 MICH. L. REV. 643, 660 n.55 (1975).

22. 2 JAMES WILSON, THE WORKS OF JAMES WILSON 503, 528 (Richard McCloskey ed., 1967), *quoted in* Lempert, *supra* note 21 (emphasis added).

jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.²³

The subsequent adoption and ratification of the Sixth Amendment in the Bill of Rights reaffirmed the guarantee of the right to jury trial: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury”²⁴

However, neither the Article III nor the Sixth Amendment guarantee of the right to a jury trial applies to a military court-martial. The Founding Fathers exempted the Armed Forces from the Sixth Amendment through language inserted in the Fifth Amendment. The Fifth Amendment excluded from its coverage “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”²⁵ The Supreme Court explained the relationship between the Fifth and Sixth Amendments:

[The right to trial by jury]. . . is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service. The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, excepts “cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger,” *and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.*²⁶

. . .

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is *not at all affected by the fifth or any other amendment.*²⁷

23. THE FEDERALIST NO. 83, at 499 (Alexander Hamilton) (Mentor Book 1961).

24. U.S. CONST. amend. VI (1789). The Seventh Amendment similarly preserved the right of trial by jury in civil cases.

25. U.S. CONST. amend. V.

26. *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (emphasis added).

27. *Id.* at 138 (emphasis added).

None of the provisions of the Bill of Rights were originally understood to apply in any way to courts-martial.²⁸ In fact, the Bill of Rights in 1792 was not deemed inconsistent with human slavery itself; most African-Americans were also denied its protections, as were Native Americans.

The Constitution granted to Congress the power “To make Rules for the Government and Regulation of the land and naval Forces.”²⁹ The Supreme Court has given the exercise of this congressional power great deference. Congress has exercised its exclusive power to prescribe the rules and rights, if any, to be enjoyed by a military accused. Accordingly, courts-martial are not courts under Article III of the Constitution. In an early case shortly after the adoption of the Uniform Code of Military Justice in 1951, the newly created Court of Military Appeals, in speaking of military due process, declared: “The rights and privileges of ‘military due process’ are based on the laws as enacted by Congress and not on the Constitution,”³⁰ and “we need not concern ourselves with the constitutional concepts.”³¹

More recently, however, appellate courts have exercised the habit of freely citing to Supreme Court decisions as if the Bill of Rights were directly applicable to courts-martial, with the result that the statutory rights of a military accused now often have a content that is identical to the constitutional protections afforded to civilians. Yet the one key ingredient that remains missing is the right to trial by jury, and a military accused’s rights, however plentiful they may be, are meaningless if they do not protect him from inaccurate fact-finding. The court-martial, despite its name, is not a court of justice in the traditional,

28. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 284 (1958) (“The survey of actual practice made herein has shown that at least five other guarantees in the Bill of Rights were either denied the serviceman entirely at the outset or else very substantially curtailed: the right to petition for redress against grievances, and protection against searches and seizures, denied in practice; freedom of speech and the right to confrontation, denied by statute; and pre-eminently, the right to the assistance of counsel, denied inferentially by statute and absolutely in practice. Indeed, the most striking feature of the survey just completed is that for over half a century after the adoption of the Bill of Rights, its provisions were never invoked in a military situation save in a single instance, the trial of General Hull, and that the denial of its applicability to the military on that occasion was approved by no less an authority than the father of the Bill of Rights himself [President James Madison].”).

29. U.S. CONST. art. 1, § 8, cl. 14.

30. *United States v. Clay*, 1 C.M.R. 74, 77 (C.M.A. 1951).

31. *Id.* at 79.

constitutional sense, but is tolerated as an indispensable tool for the preservation of good order and discipline in the U.S. Armed Forces.

PART II: THE COURT-MARTIAL AS A DISCIPLINARY TOOL

If the highly distinguished jurist William Blackstone was effusive in his praise of the English right to jury trial, he was also entirely unflattering in his observation of British courts-martial, upon which the U.S. military justice system was originally built:

Martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is . . . in truth and reality no law, but something indulged rather than allowed as law. The necessity of order and discipline in an army is the only thing which can give it countenance.³²

Another English commentator, Sir Matthew Hale, described British military law in early seventeenth century England as “the arbitrary right to punish or destroy, without legal trial, any assumed delinquent.”³³ Such pronouncements may surprise us today, especially in light of contemporary practice, because military justice has developed, in some areas, to more closely resemble the federal and state judicial systems.

Hale made three important observations about British military law, which were accurate when the Founding Fathers adopted the British Articles of War, and are still largely relevant today:

But touching the Business of Martial Law, these Things are to be observed, *viz.*

First, That in Truth and Reality it is not a Law, but something indulged rather than allowed as a Law; the Necessity of Government, Order and Discipline in an Army, is that only which can give those Laws a Countenance, *Quod enim Necessitas cogit desendi.*

Secondly, This indulged Law was only to extend to Members of the army, or to those of the opposite Army, . . . and never was so much indulged as intended to be (executed or) exercised upon others; for

32. WINTHROP'S MILITARY LAW AND PRECEDENTS 47 n.15 (2d ed. Reprint 1920) (1896)[hereinafter WINTHROP'S MILITARY LAW] (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 413 (Oxford, Clarendon Press 1992)(1765)).

33. M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 26–27, *quoted in* *Loving v. United States*, 517 U.S. 748, 766 (1996).

others who were not listed under the Army, had no Colour of Reason to be bound by Military Constitutions, applicable only to the Army, whereof they were not Parts; but they were to be order'd and govern'd according to the Laws to which they were subject, though it were a Time of War.

Thirdly, That the Exercise of Martial Law, whereby any Person should lose his Life or Member, or Liberty, may not be permitted in Time of Peace, when the King's Courts are open for all Persons to receive Justice, according to the Laws of the Land.³⁴

These three points deserve some elaboration.

1. *That in truth and reality it is not law, but something indulged rather than allowed as Law;*

The Founding Fathers, who revered the common law, had no illusion about the nature of British martial law, which they adopted as their own. Writing nearly one-and-a-half centuries after the Americans adopted British martial law, a Yale law professor concluded, "the fact remains that many of the concepts of the existing law military are so foreign to American jurisprudence, as to startle and perplex the American lawyer."³⁵ The Continental Congress in 1775 adopted the British Articles of War of 1765 without fundamental change. John Adams directly explained why:

There was extant one system of articles of war, which had carried two empires to the head of command, the Roman and the British, for the British Articles of war were only a literal translation of the Roman. . . . I was therefore for reporting the British articles *totidem verbis*. . . . The British articles were accordingly reported.³⁶

34. M. HALE, HISTORY OF THE COMMON LAW OF ENGLAND 26–27, reprinted in PHILIP B. KURLAND AND RALPH LERNER, 5 THE FOUNDING FATHERS' CONSTITUTION 247–48 (Univ. Chicago Press 1987).

35. Edmund M. Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 52–53 (1919). The Yale Law professor was bothered by two aspects of martial law: one was the "remarkable indefiniteness" of martial law's content and the other was the procedural peculiarities of the military system, of which the court-martial panel featured prominently.

36. *Id.* at 52 n.1 (quoting CHARLES FRANCIS ADAMS, 3 WORKS OF JOHN ADAMS (1850) 93).

The Founding Fathers, having pledged their lives and their fortunes in declaring independence from Great Britain, needed the Continental Army to develop into a highly effective fighting force. They saw the intrinsic value of the British Articles of War as a means to instill good order and discipline into the Continental Army, which it needed if it was to prevail against the formidable British armed forces. The Articles of War were apparently so successful that, since their adoption in 1775, Congress only slightly modified them in 1776, in 1806, in 1874, and, again, in 1916 with no significant changes until the adoption of the Uniform Code of Military Justice in 1950.³⁷

2. *This indulged Law was only to extend to Members of the army;*

An entire class of American citizens—members of the armed forces—are currently excluded from the protections of the Bill of Rights contained within the U.S. Constitution. The professional soldier, unless conscripted, was one who had enlisted of his own free will and had voluntarily subjected himself to a discipline that was inconsistent with the freedom of a citizen. Blackstone described military service as a “state of servitude in the midst of a nation of freemen.”³⁸ Soldiers were not well paid and they did not enjoy the highest regard.³⁹ In eighteenth century England, at least, “soldiers, as a class, were despised.”⁴⁰ By contrast, the U.S. military today is one of the most highly respected institutions in American society.

At first, membership in the Armed Forces was not a numerically significant segment of society.⁴¹ Whereas, in 1794, the total number of U.S. persons subject to military law was a mere 3,692,⁴² at the peak of

37. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 49 (1958)(concluding that neither the Sixth Amendment right to have the assistance of counsel nor the companion right of trial by jury was ever “thought or intended or considered, by those who drafted the sixth amendment or by those who lived contemporaneously with its adoption, to apply to prosecutions before courts-martial.”).

38. Wiener, *The Original Practice II*, *supra* note 28, at 293 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 417 (Oxford, Clarendon Press 1992)(1765)).

39. *Constitutional Rights of Military Personnel: Hearing on S. 260 Before the Subcomm. on Constitutional Rights of the S. Comm. on the Judiciary*, 87th Cong. 2 (1962).

40. Wiener, *The Original Practice II*, *supra* note 28, at 292 (citing MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 453 (1908)).

41. Wiener, *The Original Practice I*, *supra* note 37 at 8.

42. *Id.* at 9.

the World War II mobilization in the 1940s, over 12 million persons were subject to military law, and the armed forces handled one-third of all criminal cases tried by the Nation.⁴³ Those demographics would compel numerous changes in martial law. The American public began to see members of the armed forces more as citizen-soldiers who were performing their obligations of citizenship, rather than merely as professional soldiers who had indentured themselves into servitude by, in essence, bargaining away their constitutional rights for the privilege of military service and duty. While the public fully appreciated that discipline was essential to military efficiency, it also questioned whether justice and discipline were so incompatible that its citizen-soldiers should be relegated to second-class constitutional status.

3. That the Exercise of Martial Law. . . may not be permitted. . . when the. . . Courts are open for all Persons to receive Justice, according to the Laws of this Land.

The Founding Fathers, who were familiar with and revered the right to trial by a jury of one's peers, knew that courts-martial were not compatible with the American ideal of justice. They authorized them only as a necessary evil in pursuit of a greater good. The Founding Fathers decided that the court-martial should be used solely for disciplinary matters, but that general crimes committed by military members should be tried in federal or state courts where the right to trial by jury was available.

The court-martial was primarily available to address solely "disciplinary" types of offenses. Obedience to military orders and regulations was, and still is, considered essential to the efficiency of the service. General George Washington astutely observed, "Discipline is the soul of an army."⁴⁴ Members of the armed forces could be punished for committing disciplinary types of offenses—for example, insubordination, desertion, and dereliction of duty—even if these offenses could never be considered crimes when committed by civilians. On the other hand, the military could not function unless it had the ability to demand total obedience, particularly during hostilities, and the court-

43. *Id.* at 11 (citations omitted).

44. General George Washington, Instructions to Company Captains (July 29, 1757), *accessible at* <http://founders.archives.gov/documents/Washington/02-04-02-0223>.

martial power was at first limited to the trial of those offenses actually affecting good order and discipline.

The court-martial also had the power to punish general crimes, but only when they impacted the military. The 1775 and 1776 Articles of War permitted trial by court-martial for all crimes that were not capital offenses as well as all disorders and neglects to the prejudice of good order and military discipline.⁴⁵ If military offenders were accused of committing crimes “punishable by the known laws of the land,” the commanding officer had a duty “to use his utmost endeavors to deliver over such accused person or persons to the civil magistrate” for trial, under pain of being discharged himself.⁴⁶ The Articles of War thus expressed a strong preference for the trial of common law crimes in civilian courts where the military member’s rights, to include a right to a jury trial, would have been honored.⁴⁷ The Articles gave civilian courts, “if not a supremacy of jurisdiction, at least a primary power to proceed against military offenders violating the civil law, although the same acts were concurrently within the jurisdiction of the military courts.”⁴⁸ Military members thus retained their Sixth Amendment right to jury trial for general crimes.

At first, general crimes were seldom tried by court-martial when a civilian court was available. The jurisdictional scope of the original Articles of War, from about 1776 until the Civil War, was generally limited to specific military-unique offenses, such as desertion, absence without leave, mutiny, war offenses, and making false official statements.⁴⁹ None of these offenses were crimes at common law. With few exceptions, such as larceny or embezzlement of military stores or rioting, the trials of common-law felonies were not mentioned in official records.⁵⁰ The military did not have jurisdiction if a crime was committed against a person wholly unconnected to the military, or if no military order or rule of discipline was violated.

45. ARTICLES OF WAR OF 1775, art. L; ARTICLES OF WAR OF 1776, §XVIII, art. 5.

46. *Id.*; see also Wiener, *The Original Practice II*, *supra* note 28, at 10 (citing Arts. of 1776, § 10, art. 1).

47. See THE AMERICAN ARTICLES OF WAR OF 1776 § X, art. 1, *reprinted in* WINTHROP’S MILITARY LAW at 964.

48. *Caldwell v. Parker*, 252 U.S. 376, 382 (1920).

49. Wiener, *The Original Practice II*, *supra* note 28, at 10.

50. *Id.*

The scope of offenses triable by courts-martial gradually broadened. During the Civil War in 1863, common-law felonies, including capital ones, were made punishable in time of war, insurrection, and rebellion.⁵¹ Congress, out of pragmatic concern that civilian courts could not function in all places during hostilities, expanded the jurisdiction of courts-martial.⁵² By 1916, common-law felonies were made military offenses at all times, except for murder and rape.⁵³

In 1950, following World War II, Congress enacted the Uniform Code of Military Justice (UCMJ) applicable to all the military services. The UCMJ removed all existing limitations so that even murder and rape committed by military personnel were triable by courts-martial at all times. The UCMJ broadly authorized courts-martial for all crimes and even made a provision for the assimilation of those it did not enumerate. Even then, however, court-martial jurisdiction over military members was constitutionally limited by the Supreme Court to the trial of offenses with a genuine “service connection.”⁵⁴ Because court-martial jurisdiction was still limited to “service connected” offenses, military members still enjoyed the right to trial by jury for offenses tried in civilian courts.

The enlargement of courts-martial jurisdiction over military members, however, became absolute when the Supreme Court abandoned the “service connection” limitation in the landmark decision of *Solorio v. United States*.⁵⁵ In *Solorio*, the Court held that a person’s status as a military member, and not the service connection of the offense, was the sole test for determining whether a court-martial had *in personam* jurisdiction to try him for the offense. With *Solorio*, the expansion of courts-martial jurisdiction became complete and universal for military members. As the jurisdictional reach of the court-martial expanded, the practical effect was that the soldier’s and sailor’s Sixth Amendment right to trial by jury was correspondingly diminished, because civil offenses committed by military members formerly triable only in civilian

51. *Id.* at 12.

52. *See* *Loving v. United States*, 517 U.S. 748, 753 (1996).

53. Wiener, *The Original Practice II*, *supra* note 28, at 12.

54. *O’Callahan v. Parker*, 395 U.S. 258 (1969); *see also* *United States v. Trotter*, 9 M.J. 337, 339 (C.M.A. 1980).

55. *Solorio v. United States*, 483 U.S. 435, 442, 47 (1987) (expressly overruling *O’Callahan*).

courts were now triable by courts-martial. In addition, the military's policy, in the interests of enforcing good order and discipline, is to maximize its jurisdiction—even when civilian authorities may be interested in trying the case.⁵⁶

With the expansion of court-martial jurisdiction, the collateral consequences of a court-martial conviction are now essentially the same as those of the civilian justice system. Today, for example, persons convicted by courts-martial have their convictions registered on the National Crime Information Center (NCIC), and they are subject to mandatory supervised release, DNA processing, and sex offender registration. They lose the right to vote, the right to purchase and own firearms, veteran entitlements, retirement eligibility, parental rights, and public employment eligibility.⁵⁷ Sentences imposed by a general or special court-martial are generally considered federal convictions and are included in an offender's criminal history under the Federal Sentencing Guidelines, even when the convictions are for uniquely military offenses such as unauthorized absence.⁵⁸

Over a hundred years ago in 1896, Colonel William Winthrop, whom the Supreme Court called “the Blackstone of Military Law,”⁵⁹ made this observation:

[Courts-martial] are in fact simply instrumentalities of the executive power, provided by Congress for the President . . . to aid him in properly commanding the army and navy and ensuring discipline therein A court-martial is not a court . . . it is as much subject to the orders of a competent superior as is any military body or person.⁶⁰

The first part of this statement remains accurate and poignant today. The role of the military commander in the court-martial process must remain paramount if the court-martial is to serve any useful purpose in the Armed Forces. However, the second part is no longer

56. See, e.g., Air Force Instruction 51-201, para. 2.6 (Administration of Military Justice Oct. 2, 2011) (Oct. 2 2011) (noting that Air Force authorities should foster relationships with local civilian authorities with a view toward maximizing Air Force jurisdiction).

57. Jeff Walker, *The Practical Consequences of a Court-Martial Conviction*, THE ARMY LAWYER, Dec. 2001, 9–12.

58. U.S.S.G. Manual, § 4A1.2(g); see, e.g., United States v. Martinez, 122 F.3d 421 (7th Cir. 1997). For a more complete discussion of this problem, see Matthew S. Freedus & Eugene R. Fidell, *Conviction by Special Courts-Martial: A Felony Conviction?*, 15 Fed. Sent. R. 220 (2003).

59. Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006).

60. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 49 (2d ed. 1896).

strictly correct. Now, while the court-martial serves the ends of justice, it also performs the function of a court of law, even if the Sixth Amendment Right to trial by jury is not available. Court-martial convictions for serious offenses, like rape and murder, result in the same heavy penalties and collateral consequences as are meted out in federal and state courts. In the absence of command oversight, these offenses should only be tried by real juries.

PART III: THE DIFFERENCES BETWEEN THE JURY AND THE PANEL

If the Uniform Code of Military Justice is to be reexamined with a view toward eliminating the commander's authority to review the court-martial's findings, Congress should also ensure that the court-martial panel is properly structured to render accurate verdicts. A side-by-side comparison of the features of federal and state juries and court-martial panels will highlight the key differences between them, making plain the shortcomings of court-martial panels.

At common law, the jury consists of twelve persons who are required to agree unanimously on the verdict. Federal juries are constitutionally required to follow the common law. States juries, on the other hand, are now constitutionally required to do so only in part.⁶¹ In addition, court-martial panels do not at all possess the jury's common-law features. Yet the jury's and the panel's features materially affect the quality of its deliberations and determinations.

61. The disparity in the constitutional requirements for federal and state juries is best explained by the Supreme Court's current reluctance to complete the task of fully incorporating the Sixth Amendment guarantee into the Fourteenth Amendment. The Bill of Rights did not originally apply to the states, *see, e.g.*, *Palko v. Connecticut*, 302 U.S. 319 (1937) (Sixth Amendment right to trial by jury does not apply to the states); *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (same); *Maxwell v. Dow*, 176 U.S. 581 (1900) (same), but its provisions have over time been selectively incorporated by the Supreme Court into the Fourteenth Amendment. The incorporation of the Sixth Amendment right to trial by jury only began in 1968 with the case of *Duncan v. Louisiana*, 391 U.S. 145 (1968), and is arguably not yet complete.

A. *The Jury's Role*

According to the Supreme Court, the jury places itself between the accused and his accuser in order to “prevent oppression by the government.”⁶² A jury of one’s peers is “an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”⁶³ Unlike the prosecutor or the judge, the jury must be relied upon to supply “the commonsense judgment of a group of laymen.”⁶⁴ The jury thus furnishes an important check against arbitrary prosecutions. The jury’s hallmark is in the “community participation and shared responsibility that results from that group’s determination of guilt or innocence.”⁶⁵ Chief Justice Thomas Cooley of the Michigan Supreme Court summarized the jury’s role:

The trial of criminal cases is by a jury of the country, and not by the court. The jurors, and they alone, are to judge of the facts, and weigh the evidence. The law has established this tribunal because it is believed that, from its numbers, the mode of their selection, and the fact that the jurors come from all classes of society, they are better calculated to judge of motives, weigh probabilities, and take what may be called a common sense view of a set of circumstances, involving both act and intent, than any single man, however pure, wise and eminent he may be. This is the theory of the law; and as applied to criminal accusations, it is eminently wise, and favorable alike to liberty and to justice.⁶⁶

The jury’s commonsense judgment, arrived at through community participation and shared responsibility, permits the stridency of its decisions to be accepted.

B. *Judge-Jury Disagreement*

The Supreme Court expressed a strong preference for the commonsense judgment of the community furnished by the jury over “the professional or perhaps over conditioned or biased response of a

62. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (citations omitted) (emphasis added).

63. *Id.*

64. *Id.*

65. *Id.*

66. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 n.10 (1955)(quoting *People v. Garbutt*, 17 Mich. 9, 27).

judge.⁶⁷ This is a remarkable endorsement considering that judges and juries disagree on the guilt or innocence of an accused in twenty-two percent of cases.⁶⁸ This finding was reported in the most comprehensive study ever undertaken on juries, and published as *The American Jury* by H. Kalven and H. Zeisel of the University of Chicago.⁶⁹ The now classic study has been cited with approval by the Supreme Court in fourteen of its published decisions.⁷⁰

According to *The American Jury*, judges and juries disagree in one out of every five cases.⁷¹ In nineteen percent of trials, the jury acquitted when the judge would have convicted the defendant. In only three percent of trials, the judge would have acquitted when the jury convicted. The researchers examined those cases closely and learned that the disagreement did not arise from the jury's incompetence or unwillingness to follow the law. Rather, the disagreement had to do with the strength of the evidence in close cases.⁷² In nearly eighty percent of those cases,

67. *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (citing *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968)).

68. H. KALVEN, JR. & H. ZEISEL, *THE AMERICAN JURY* 58 (1966) [hereinafter *The American Jury*]. Judges and juries agreed that the defendant was guilty in sixty-four percent of the cases and not guilty in fourteen percent, thereby reaching agreement in seventy-eight percent of the cases.

69. Although *The American Jury* was published in 1966, its conclusions have been remarkably revalidated by numerous studies conducted in 1987, in the 1990s, and in the early 2000s by other researchers, including by Valerie P. Hans and the National Center for State Courts, despite changes in the intervening years in trials, the law, new types of evidence, and the demographic makeup of juries that contain more women and minorities than juries in the 1950s. NEIL VIDMAR & VALERIE HANS, *AMERICAN JURIES: THE VERDICT* 149-51 (2007).

70. *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987); *Standefer v. U. S.*, 447 U.S. 10, 22-23 (1980); *Ballew v. Georgia*, 435 U.S. 223, 235, 238 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 295 (1976); *Apodaca v. Oregon*, 406 U.S. 404, 411 n.5 (1972); *Johnson v. Louisiana*, 406 U.S. 380, 389 n. 4, 391 (1972); *Johnson v. Louisiana*, 406 U.S. 366, 377 n. 20 (1972); *McGautha v. California*, 402 U.S. 183, 199 (1971); *Williams v. Florida*, 399 U.S. 78, 101 n. 49 (1970); *Baldwin v. New York*, 399 U.S. 66, 74 n. 22 (1970); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n. 13 (1968); *Duncan v. Louisiana*, 391 U.S. 145, 157 n. 24 (1968); *United States v. Jackson*, 390 U.S. 570, 574 n. 8 (1968); *Spencer v. Texas*, 385 U.S. 565 n. 8 (1967).

71. KALVEN & ZEISEL, *supra* note 68, at 58.

72. Although there was often more than one reason in a given case for judge-jury disagreement, the weighted reasons for disagreement were, in order of prevalence, issues of evidence (54 percent), sentiments on the law (29 percent), sentiments on the defendant (11 percent), disparity of counsel (4 percent), and facts only the judge knew (2 percent). *Id.* at 115. The researchers learned that, although judges and juries disagree four times as often in close cases than in clear cases, "there is virtually no difference between the frequency of disagreement when the case is easy and when the case is difficult; this holds true for the cases that are clear as well as for the close ones." *Id.* at 157. According to the researchers, "The result is a stunning refutation of the

the jury disagreed with the judge because of a combination of a lack of evidence and the community's notions of justice.⁷³ This research is important because it demonstrates that jurors do not merely engage in simple fact-finding and nothing else, but as the triers of fact they also make value judgments based on societal norms of behavior.⁷⁴ Jurors bring their common sense, life experience, beliefs, and knowledge of the ways of the world into the jury box. In short, the jury embodies the moral values of the community.

The jury supplies the commonsense judgment of the community, because of its features—the manner in which jurors are selected, the number of jurors, and the requirement for unanimity for a verdict.

C. *The Jury Represents the Community*

According to the Supreme Court, “the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial.”⁷⁵ Juries, especially federal juries, are selected at random from a fair cross section of the community.⁷⁶ The jury plays an important role in the administration of justice. A jury selected at random is best suited to this role.⁷⁷

The Report in the House of Representatives, which led to the passage of the Federal Jury Selection and Service Act of 1968, stated:

. . . the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased

hypothesis that the jury does not understand.” *Id.*

73. In two percent of the cases, judges would have convicted based on information known to the judge but not disclosed to the jury. *Id.* at 121. This interesting statistic indicates that judges are not always able to compartmentalize information.

74. The jury's political function of applying community standards to factual determinations is readily apparent in sexual assault cases. In these cases, the law recognizes only one issue other than the fact of sexual contact: whether there was consent at the moment of the contact. When sexual contact occurs in private without observers and the testimony of the participants is opposed on the issue of consent, the jury must scrutinize the participants' prior history and behavior immediately before and after the moment of the sexual contact. Juries decide the issue of consent based on community standards regarding acceptable norms of behavior. *See Id.* at 249–56; VIDMAR & HANS, *supra* note 69, at 198–201.

75. *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975).

76. *The Federal Jury Selection and Service Act of 1968*, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. 1861 et seq.

77. *Taylor*, 419 U.S. at 529–30 (citations omitted).

juries are the result—biased in the sense that they reflect a slanted view of the community they are supposed to represent.⁷⁸

The Senate Report stated, “A jury chosen from a representative community sample is a fundamental of our system of justice.”⁷⁹

The idea behind the cross-section goal is that people see and evaluate things differently, and one function of the jury is to bring the divergent perceptions that exist in the community to the trial process.⁸⁰ Diversity promotes vigorous and fruitful discussion. Not only do persons from different backgrounds bring unique insights to the deliberations,⁸¹ but their mere presence brings out the best in other jurors.⁸² If the jury is to speak authoritatively, it must itself reflect the community at large and its values. Researchers found that diverse juries deliberate longer, discuss a wider range of information, and make more accurate statements about the case.⁸³ Thus, researchers have concluded, “Diverse juries have an edge in fact-finding, especially when the matters at issue incorporate social norms and judgments, as jury trials often do.”⁸⁴

The Supreme Court has set aside convictions when identifiable segments of society have been systematically excluded from the pool of available jurors.⁸⁵ The Court was careful to note that the jurors seated to try the case after being examined by the trial court need not mirror the community or reflect various distinctive groups, but they

78. H.R. REP. NO. 90-1076, at 1797 (1968).

79. S. REP. NO. 90-891, (1967) (quoted in *Taylor v. Louisiana*, 419 U.S. 522, 529 n. 8 (1975)).

80. H. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 715 n.33 (1971) (“This is perhaps more true today than it was at the time the jury grew into a legal institution. Originally, the emphasis was directed more towards the difference between the jury and the judges as the representatives of the King, and less towards the differences among jurors.”).

81. See, e.g., Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261 (2000) (arguing that the lack of diversity of juries diminishes the quality of their deliberations and decisions).

82. Valerie P. Hans, *Deliberations and Dissent: 12 Angry Men Versus the Empirical Reality of Juries*, 82 CHI.-KENT L. REV. 579, 586 (2007) (“Compared to all-white juries, whites in racially mixed juries were more systematic and accurate, bringing up more issues in the deliberation. Thus whites behaved differently when they were in homogeneous and mixed juries.”).

83. VIDMAR & HANS, *supra* note 69, at 340.

84. *Id.*

85. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522 (1975) (exclusion of women).

must be randomly selected in the first instance.⁸⁶ In setting aside the convictions for improper jury selection, the Court has not had to find anything wrong with the trial process itself. The systemic flaw in the jury's selection was enough for the Court to set aside the conviction.

D. Panel Members are Individually Selected

The method of selecting panel members has met severe criticism. According to Judge Cox, it is "the most vulnerable aspect of the court-martial system; the easiest for critics to attack."⁸⁷ In fact, the U.S. Court of Military Appeals invited Congress to reexamine the panel member selection process: "Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process."⁸⁸ However, Congress did not accept this invitation.

The UCMJ gives the commander great latitude in picking panel members. Under Article 25, UCMJ, the commander individually selects those panel members who, "*in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."⁸⁹ The U.S. Court of Military Appeals has made clear that Article 25, UCMJ, does *not* contemplate that the court-martial panel will be a representative cross-section of the military community.⁹⁰ For instance, in all cases, panel members must outrank the accused.⁹¹ Most important, however, is the fact that panel

86. *Id.* at 538.

87. *United States v. Smith*, 27 M.J. 242, 252 (C.M.A. 1988) (Cox, J., concurring). For scholarly criticisms of the selection process, see 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* § 15-31.00 (1991) ("Arguably, the most critical and least necessary vestige of the historical origins of the military criminal legal system is the personal appointment of the members by the convening authority."); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 19–20 (1991); Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F.L. REV. 343 (1978); James A. Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000).

88. *United States v. McCarthy*, 2 M.J. 26, n.3 (C.M.A. 1976).

89. UCMJ, art. 25 (emphasis added).

90. *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988).

91. UCMJ, art. 25(d)(1).

members are not the accused's peers or equals. Further, they are not randomly selected from a cross-section of the military community, much less the community at large.

After the panel members have been selected by the convening authority, they may be examined and challenged. Both the prosecution and the defense may challenge any and all panel members who are or may be biased. In addition, each side is entitled to exercise one peremptory challenge against a panel member for any or no reason.⁹² But as Judge Cox notes, the commander picks the panel members, thereby giving the government "the functional equivalent of an unlimited number of peremptory challenges."⁹³ And as long as the total number of panel members does not go below a certain minimum, the commander does not need to replace the panel members dismissed by the military judge.

The Supreme Court acknowledged that military panel members exhibit a "high degree of honesty and sense of justice which nearly all of them undoubtedly have."⁹⁴ But it also observed that court-martial panels "have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."⁹⁵ According to the Court, laymen are better than specialists to perform the task of determining the guilt or innocence of an accused:

Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field, including specialists in the military field.

On many occasions, fully known to the Founders of this country, jurors—plain people—have manfully stood up in defense of liberty

92. Rule for Courts-Martial 912(g), *Manual for Courts-Martial* (2012).

93. *Smith*, 27 M.J. at 252 (Cox, J., concurring) (quoting *United States v. Carter*, 25 M.J. 471, 478 (C.M.A. 1988)).

94. *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (holding that a court-martial has no jurisdiction or competence to try a former military member for a crime committed while on active duty); see also *United States v. Wiesen*, 56 M.J. 172, 180 (2001) (Crawford, C.J., dissenting) (referring to court-martial panels as "blue ribbon panels").

95. *Toth*, 350 U.S. at 17. Panels also do not have the same kind of qualifications deemed constitutionally essential to fair trials of civilians in state courts.

against the importunities of judges and despite prevailing hysteria and prejudices.⁹⁶

The Supreme Court is clear about the “great difference between trial by jury and trial by military members of the military forces.”⁹⁷ The Court declared, “the proper functioning of the jury system, and indeed our democracy itself, requires that the jury be ‘a body truly representative of the community,’ and not the organ of any special group or class.”⁹⁸ Community participation in the administration of justice is a part of our democratic heritage and is critical to public confidence in the whole judicial process.

E. The Number of Jurors is Important

The jury’s size will affect the quality of its deliberations. At common law, the jury consisted of twelve persons, which was large enough to represent the community and remain manageable. The more jurors on a jury, the greater the likelihood that the divergent views existing in the community will be represented on the jury. A large number of jurors is also important, because “the greater the number of persons

96. *Id.* at 18–19 (footnotes omitted).

97. *Id.* at 17–18.

98. *Id.* (quoting *Glasser v. United States*, 315 U.S. 60, 86 (1942)). The Supreme Court has not limited its criticism of so-called elite juries to the court-martial panel. In *Glasser*, the Court expressed disapproval in the selection of women on the jury drawn from the membership list of the Illinois League of Women Voters. The women had all attended jury classes where lecturers had presented the views of the prosecution. The Court stated:

The deliberate selection of jurors from the membership of particular private organizations definitely does not conform to the traditional requirements of jury trial. No matter how high principled and imbued with a desire to inculcate public virtue such organizations may be, the dangers inherent in such a method of selection are the more real when the members of those organizations from training or otherwise acquire a bias in favor of the prosecution. The jury selected from the membership of such an organization is then not only the organ of a special class, but, in addition, it is also openly partisan. If such practices are to be countenanced, the hard won right of trial by jury becomes a thing of doubtful value, lacking one of the essential characteristics that have made it a cherished feature of our institutions.

Id. at 86. As far back as 1938, the New York State Judicial Council conducted a study showing that special juries are more than twice as likely to convict a defendant, or in 80 percent of the cases, while ordinary juries convicted in only 40 percent of the cases. VIDMAR & HANS, *supra* note 69, at 69 n.12 (citing Fourth Annual Report of the Judicial Council of the State of New York (1938)).

entertaining a conclusion the greater the probability of that conclusion being sound and true.”⁹⁹

The federal jury must have twelve jurors, which is required by the Sixth Amendment.¹⁰⁰ State juries, on the other hand, can be as small as six persons, “*particularly if the requirement of unanimity is retained.*”¹⁰¹ Juries smaller than six persons, however, are inherently unreliable and therefore prohibited by the Constitution. Thus, in *Ballew v. Georgia*, the Supreme Court set aside the conviction by a five-person jury for being too small.¹⁰² The Supreme Court cited to research showing that progressively smaller juries are less likely to foster effective group deliberation.¹⁰³ In smaller groups, members are less likely to make critical contributions necessary for the solution to a problem, they are less likely to remember all of the important pieces of evidence or argument, and they are less likely to overcome the biases of its members to obtain an accurate result.¹⁰⁴ Moreover, a juror in the minority will adhere to his position more frequently when he has at least one other person on the jury supporting his argument.¹⁰⁵ The Court reasoned that a juror in the minority is more likely to have an ally on a twelve-person jury than on a six-person jury.¹⁰⁶

The Supreme Court also observed that the risk of an innocent person being wrongly convicted also rises as the size of the jury diminishes.¹⁰⁷ Studies showed that twelve-person juries rendered “correct” decisions more frequently (fourteen percentage points more often) than six-person juries, and twelve-person juries could be expected to reach extreme compromises considerably fewer times (only one-fourth

99. James R. Clark, *Should Verdicts be Unanimous in Criminal Cases?*, 46 A.B.A. REP. 591 (1921), quoted in Hans Zeisel, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438, 445 n.53 (1954).

100. *Patton v. United States*, 281 U.S. 276 (1930) (reversing conviction because federal jury did not have 12 men); *Thompson v. Utah*, 170 U.S. 343 (1898) (reversing conviction because 8-person jury violated the constitutional requirement of 12 jurors, as at common law) (overruled on grounds regarding the *Ex Post Facto* clause); FED. R. CRIM. P. 23(b)(1) (“A jury consists of 12 persons. . .”).

101. *Williams v. Florida*, 399 U.S. 78, 100 (1970) (citations omitted) (emphasis added).

102. *Ballew v. Georgia*, 435 U.S. 223 (1978).

103. *Id.* at 232.

104. *Id.* at 233.

105. *Id.* at 236 (citing Zeisel, *supra* note 80, at 720).

106. Zeisel, *supra* note 80, at 719.

107. *Ballew v. Georgia*, 435 U.S. at 234.

as often) than six-person juries.¹⁰⁸ These studies vindicate the six-hundred year-old wisdom of the common law.

The original Articles of War stated, “General courts-martial may consist of any number of members from five to thirteen; but they shall not consist of less than thirteen when that number can be convened without manifest injury to the service.”¹⁰⁹ The British would detail more than 13 officers; sometimes as many as 25 officers.¹¹⁰ Perhaps the large number of panel members was supposed to make up for the fact they could convict by a simple majority. Today, however, the court-martial panel is often smaller than even six persons. Under the UCMJ, a general court-martial panel can be as small as five members; the special court-martial can consist of only three members, even though it can impose a sentence of imprisonment for up to one year.¹¹¹ The current court-martial panels are too small for effective deliberations.

Though the number of panel members is small and their mode of selection has been criticized, the panel’s most pernicious feature is that the members do not have to unanimously agree on the findings.

F. The Importance of a Unanimous Verdict

For over six centuries, unanimity of twelve jurors was the essential feature of jury trials at common law. As early as 1367, an English Court refused to accept an eleven-to-one guilty vote after the lone holdout stated he would rather die in prison than vote to convict.¹¹² As Blackstone reminds us, no one could be deprived of life, liberty, or property “but by the *unanimous consent* of twelve of his neighbors and equals.”¹¹³ John Adams left no doubt as to which common-law feature of a jury

108. *Id.* at 235.

109. WINTHROP’S MILITARY LAW, *supra* note 32, at 77; ARTICLES OF WAR OF 1775, art. 64.

110. WINTHROP’S MILITARY LAW, *supra* note 32, at 77.

111. The right to a trial by jury is triggered whenever a person has been charged with a serious offense as opposed to a petty offense. A serious offense is one where the defendant can receive a sentence greater than six months. *New York v. Baldwin*, 399 U.S. 66 (1970). In requiring that the right to jury trial attach for serious offenses, the Court in *Baldwin* rejected the suggestion that the distinction be made between felonies and misdemeanors.

112. ABRAMSON, *supra* note 11, at 179.

113. *Mitchell v. Harmony*, 54 U.S. 115, 142–43 (1951) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 227–29 (Oxford, Clarendon Press 1992)(1765)) (emphasis added).

was most important: “it is the *unanimity* of the jury that preserves the rights of mankind.”¹¹⁴

According to *The American Jury*, only one-third of all juries in criminal cases reach agreement on the first ballot.¹¹⁵ The other two-thirds find their vote split and must continue to deliberate to reach a verdict. Research also shows that jurors voting in the minority on the first ballot succeed in persuading an initial majority in a significant number of cases—about ten percent.¹¹⁶ The jury’s consideration of minority viewpoints in its deliberations is therefore critical to the accuracy of its determinations. The very object of a jury system is to secure unanimity by a comparison of views and by agreement among the jurors themselves. As jurors sift and weigh the evidence, the discussion inevitably prompts a reevaluation of the case and a changing of opinions. Because the verdict must be unanimous, jurors may vote several times to assess the state of their agreement until they reach a verdict.

Unlike Federal juries, which must be unanimous, the Supreme Court has held that state juries do not always have to follow the unanimity rule.¹¹⁷ Even so, only two states, Louisiana and Oregon, permit their juries to render verdicts on felonies without a unanimous vote. Both Louisiana and Oregon require at least ten of its twelve jurors (eighty-three percent) to agree on the verdict.¹¹⁸ Thus, no state jury can convict on a felony with a vote as low as the court-martial panel’s two-thirds concurrence.

The number of persons serving on a jury and a unanimity requirement are interrelated. Although the Supreme Court permits state juries to convict by a supermajority or to be smaller than twelve persons, the Court has also held that the fewer the jurors serving on a state jury, the greater the need for the jury to be unanimous. Thus, in *Burch v.*

114. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF THE GOVERNMENT OF THE UNITED STATES 376 (1797) (emphasis added).

115. KALVEN & ZEISEL, *supra* note 68, at 462, 487.

116. *Id.* at 490.

117. *Apodaca v. Oregon*, 406 U.S. 404 (1972) (jury verdict was 11–1, or 91 percent); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (jury verdict was 9–3, or 75 percent). Louisiana now requires a 10–2, or 83 percent, implicitly acknowledging that a 9–3 verdict is too weak a standard. LA. CONST. art. 1, § 17.

118. OR. REV. STAT. § 136.450 (2013); LA. CODE. CRIM. PROC. ANN. art. 782 (2013).

Louisiana the Supreme Court set aside a conviction when the six-member jury was not unanimous.¹¹⁹ If only five of six jurors had voted for conviction (an eighty-three percent concurrence), then the jury was effectively reduced in size to a jury of five. The Court had previously held in *Ballew v. Georgia* that a jury of five is too small for the jury to function properly or to achieve accurate results.¹²⁰

But the problem with a mixed verdict is even greater than a mere reduction in the jury's size. According to Professor Zeisel, a principal author of *THE AMERICAN JURY*:

The important element to observe is that the abandonment of the unanimity rule is but another way of reducing the size of the jury. *But it is reduction with a vengeance*, for a majority verdict requirement is far more effective in nullifying the potency of minority viewpoints than is the outright reduction of a jury to a size equivalent to the majority that is allowed to agree on a verdict. Minority viewpoints fare better on a jury of ten that must be unanimous than on a jury of twelve where ten members must agree on a verdict.¹²¹

Minority viewpoints fare worse when a majority is allowed to agree on a verdict, because the majority jurors will often choose to ignore the minority viewpoints as soon as they reach the requisite number of votes for a verdict. When unanimity is required, no viewpoint can be ignored.

According to *The American Jury*, when unanimity is required, the rate at which criminal juries hang, or not reach agreement, is 5.6 percent.¹²² When the jury hangs by one or two jurors, the rate is only 2.4 percent.¹²³ When a majority vote is permitted, the rate at which they will hang is still 3.1 percent, or 45 percent fewer hung juries than those that require unanimity.¹²⁴ The inference is clear: one or two jurors do not hang the majority of hung juries, reflecting significant disagreement among the jurors. "Yet in Oregon, which allows 10–2 verdicts" and which requires that the vote be disclosed when it is not unanimous, "the number of juries rendering verdicts with one or two holdouts is

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

120. *Ballew v. Georgia*, 435 U.S. 223 (1978).

121. Zeisel, *supra* note 80, at 722 (emphasis added).

122. KALVEN & ZEISEL, *supra* note 68, at 460.

123. *Id.*

124. *Id.* at 461.

25 percent of all juries.”¹²⁵ The experience of Oregon juries provides evidence that the jurors in the majority will ignore the minority viewpoints and end their deliberations once the minimum number for a quorum is reached.¹²⁶

Because court-martial panels can vote to convict by a mere two-thirds concurrence—a low threshold—the majority can ignore minority viewpoints to a degree not seen on even state juries. They can choose to end their deliberations at any time. Professor Zeisel has asked, “One might wonder why the men who drafted the rules for this type of court martial jury went to the extreme. Might one of their motives have been that such a jury, more than any other, could be expected to circumvent or conceal a disturbing minority position?”¹²⁷ The final vote of a court-martial panel is not known because the verdict announcement permits the panel to hide the fact that its finding may not have been unanimous. The formula for announcing the verdict reads: “[T]his court-martial finds you”¹²⁸

The unanimity rule ensures that all viewpoints are fully vetted and considered. The unanimity rule would help the panel identify the precise moment when deliberations can end. When unanimity is not required, the panel members must make a judgment call about when to take a formal ballot. With the two-thirds concurrence rule, deliberations can end prematurely. Any efficiency gained through shorter deliberations cannot be a sufficient reason to overcome concerns about the quality of the decision.

125. ABRAMSON, *supra* note 11, at 199.

126. *Id.*

127. Zeisel, *supra* note 80, at 723.

128. MANUAL FOR COURTS-MARTIAL UNITED STATES, app. 10 (2012 ed.).

COMPARISON TABLE

	Federal Jury	State Jury	Court-Martial Panel
Mode of selection	<ul style="list-style-type: none"> ▪ Randomly from cross-section of the community 	<ul style="list-style-type: none"> ▪ Randomly from cross-section of the community 	<ul style="list-style-type: none"> ▪ Individually selected by convening authority ▪ Must outrank the accused
Number	<ul style="list-style-type: none"> ▪ 12 persons 	<ul style="list-style-type: none"> ▪ Usually 12 persons, but can be as small as 6 	<ul style="list-style-type: none"> ▪ Varies, but can be as small as ▪ 5 for general court-martial ▪ 3 for special court-martial
Decision rule	<ul style="list-style-type: none"> ▪ Unanimous 	<ul style="list-style-type: none"> ▪ Most states require a unanimous decision ▪ 10 of 12 jurors (83%) for Oregon and Louisiana 	<ul style="list-style-type: none"> ▪ Two-thirds concurrence (67%)

G. Overblown Concerns About the Potential for Hung Panels

The court-martial panel was adopted to secure justice swiftly.¹²⁹ One perceived benefit of the panel is that it can never “hang”—or fail to reach a verdict—due to a lack of agreement among its members. The panel must either vote to convict, which it can do with a two-thirds concurrence, or its vote automatically results in an acquittal. Despite the low level of agreement needed for conviction, it is thought that this decision rule also greatly benefits the accused.

According to *The American Jury*, the probability a jury will hang grows almost exponentially the longer a jury deliberates beyond two

129. See *O’Callahan v. Parker*, 395 U.S. 258, 265 (1969) (“A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.”); *United States ex. rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) (“Court-martial jurisdiction sprang from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order.”).

hours.¹³⁰ This finding is interesting because many panels deliberate longer than two hours. The long deliberation times of panels may indicate a lack of unanimity. Professor Zeisel commented on the lengthy deliberation of the court-martial panel that tried Lieutenant Calley after the My Lai affair in Vietnam:

A significant characteristic of this Calley-type jury is its ability to hide the fact that the jury's findings may not have been unanimous; whether the verdict of the Calley jury was unanimous is still unknown. . . . The reason for the extraordinary length of the Calley jury's deliberation may have been its desire to achieve unanimity in a trial for a capital offense, even if that aspect of the verdict remained unpublished.¹³¹

Many mistakenly believe that the "hung" jury often results from a single, erratic or unreasonable juror who obstinately refuses to listen to others.¹³² But juries rarely hang because of only one or two holdout jurors. "[J]uries which begin with an overwhelming majority," either for conviction or acquittal, "are not likely to hang."¹³³ "It requires a [sizable] minority of [four] or [five] jurors at the first vote to develop the likelihood of a hung jury."¹³⁴ Because most hung juries have a sizable minority on the first ballot, the primary reason for a hung jury

130. KALVEN & ZEISEL, *supra* note 68, at 459.

131. Zeisel, *supra* note 80, at 723–24.

132. To break deadlock, many trial judges will try to persuade holdout jurors to reevaluate the case through a jury instruction:

. . . [T]hat in a large proportion of cases absolute certainty [could not be expected]; that although the verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows, yet they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other; that it was their duty to decide the case if they could conscientiously do so; that they should listen, with a disposition to be convinced, to each other's arguments; that, if much the larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of so many men, equally honest, equally intelligent with himself. If, upon the other hand, the majority was for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of a judgment which was not concurred in by the majority.

Allen v. United States, 164 U.S. 492, 501 (1896). The problem with the *Allen* instruction is that the judge signals his agreement with the majority viewpoint without knowing what it is. "[T]he probability that an acquittal minority will hang the jury is about as great as a guilty minority will hang it." KALVEN & ZEISEL, *supra* note 68, at 461.

133. KALVEN & ZEISEL, *supra* note 68, at 462.

134. *Id.*

will be the ambiguity of the case and not the popular notion of a single eccentric juror who refuses to listen to and consider the views of the majority.¹³⁵

One study found that “one-third of [the criminal cases] that resulted in a hung jury were re-tried to a new jury.”¹³⁶ A small percentage (2.4 percent) were retried in a bench trial.¹³⁷ The remaining cases were disposed of by plea agreements or dismissals.¹³⁸ “Retrials [of cases] to a new jury . . . mirror the distribution of original jury outcomes almost perfectly.”¹³⁹ Statistically, in the felony cases studied, the original jury convicted in 54.9 percent of the cases, acquitted in 14.5 percent, and hung in 4.8 percent of the cases.¹⁴⁰ When the “hung” cases were re-tried, the new jury convicted in 69 percent of the cases, acquitted in 19 percent, and “hung” again in nearly 7 percent of the cases.¹⁴¹ These findings undermine the popular notion that but for the unreasonable juror on the original jury, the jury would not have hung.¹⁴²

Researchers from Northwestern University were recently permitted to observe the deliberations of fifty juries in Arizona.¹⁴³ Prior to this study, no one had ever been allowed to watch actual deliberations.¹⁴⁴ The Arizona Supreme Court permitted researchers from 1998 to 2001 to videotape the civil trials, including their deliberations.¹⁴⁵

135. *Id.* at 462–63.

136. PAULA L. HANNAFORD-AGOR ET AL., ARE HUNG JURIES A PROBLEM? 82–84 (2002).

137. *Id.* at 26.

138. *Id.*

139. *Id.* at 27.

140. *Id.* at 21. According to the National Institute of Justice, there were also mistrials for reasons other than a “hung” jury in 3.1 percent of the cases, and it was unknown what had happened in the remaining 14.5 percent of the cases.

141. *Id.* at 27. Retried cases also resulted in mistrial in 4 percent of the cases.

142. *Id.* at 84.

143. Shari Seidman Diamond, Mary R. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The Behavior of the Non-Unanimous Civil Jury*, 100 NW. U. L. REV. 201 (2006).

144. The authors of *The American Jury* had recorded jury deliberations in five civil cases with the consent of the trial judge and counsel, but without the knowledge of the jurors. When this fact was discovered, it resulted in a national scandal, to include congressional hearings and public censure by the Attorney General of the United States. The authors provided assurances to Congress and the Attorney General that their published study would not include any observations from those recordings. KALVEN & ZEISEL, *supra* note 68, at vi–vii.

145. Diamond, Rose & Murphy, *supra* note 143 at 204 n. 20 (citing Supreme Court of Arizona Administrative Order 98–10, available at <http://www.supreme.state.az.us/orders/admorder/orders99/pdf98/9810.pdf>) (authorizing the civil jury filming project).

They did so with the written consent of the judges, the jurors, and the parties.¹⁴⁶ The researchers also provided questionnaires to judges and jurors, and had access to documents and court exhibits, so that they could fully assess juror behavior.¹⁴⁷ This study was also significant because civil juries in Arizona do not have to be unanimous.

The researchers found that juries did not reach unanimity in one-third of the cases.¹⁴⁸ They examined those cases and found that the majority jurors and the holdouts both recalled seeing and hearing substantially the same evidence, but they interpreted it differently:

Although the majority in each of these cases took a different view of the evidence or the appropriate level of care, in none of the cases did the minority jurors indicate errors in recall or a misunderstanding of the legal framework in justifying their positions. The disagreements did not arise from confusion about the content of the evidence, but rather from conflict over how to interpret it and which witness to believe.¹⁴⁹

The jurors thus differed over the credibility of the witnesses and the behavior of the parties, precisely the types of issues that are most appropriately determined by a properly constituted jury.

Significantly, the researchers did not find a single instance in which the outvoted juror had advocated indefensible positions.¹⁵⁰ In one case, it was the holdout juror who correctly interpreted the trial judge's somewhat confusing instruction, but the juror was ignored "[w]hen a vote revealed that the majority had enough votes for a . . . verdict."¹⁵¹ The trial judges who presided over the cases would have reached the same verdict as the holdout jurors almost as often as they would have done so with the majority jurors,¹⁵² a finding that debunks the popular myth that holdout jurors are eccentric and unreasonable. From this research, it is evident that the deliberation process can be strengthened when every viewpoint must be considered.

146. *Id.* The Administrative Order requires that all parties and jurors execute a consent form approved by the chief justice. *Id.*

147. *Id.* at 204–05 n.22.

148. *Id.* at 212.

149. *Id.* at 220 (footnotes omitted).

150. *Id.*

151. *Id.* at 221.

152. *Id.* at 221–22.

H. The Concurrence Requirement's Other Evil

Lord Patrick Devlin once observed that trial by jury “is a process designed to make it as sure as possible that no innocent man is convicted.”¹⁵³ The court-martial panel is not designed to do so. Ironically, the panel’s design can lead to yet another evil.

The low concurrence needed for a guilty verdict also heightens the risk that the panel will acquit guilty persons at a higher rate than would be possible if unanimity is required. Recall that, according to *The American Jury*, the probability that a juror is holding out for acquittal is about the same as the probability that a juror is holding out for a conviction.¹⁵⁴ While some panel members may be ready to acquit an accused, other panel members may want to discuss a critical fact they believe cannot easily be explained away if the accused is to be acquitted. The viewpoints of these other panel members can also be ignored, not by a two-thirds concurrence of the other panel members, but by any number of panel members greater than one-third of the panel. It takes a two-thirds concurrence to convict. If a two-thirds concurrence for conviction is not reached when a formal ballot is taken, the accused is automatically acquitted, even if a majority of the panel members are convinced of the accused’s guilt.

The panel is too small to function properly, it does not represent the community, and it does not follow the unanimity rule. Under the two-thirds concurrence rule, the innocent may be convicted and the guilty acquitted. Since the panel’s features affect the quality of its decision-making, the panel’s verdict cannot be equated with that of a jury. Congress made up for this deficiency by providing a safeguard—a check and balance.¹⁵⁵

153. KALVEN & ZEISEL, *supra* note 68, at 190.

154. *Id.* at 461.

155. In federal and state court, the defendant’s interest in the chosen jury is so strong that the Fifth Amendment guarantee against double jeopardy attaches when the jury is empanelled and sworn. *Crist v. Bretz*, 437 U.S. 28 (1978) (applying the federal rule governing the time when jeopardy attaches to the states). Because courts-martial do not have true juries, jeopardy attaches when the first witness is sworn, without regard to whether the accused is tried before a panel or a military judge sitting alone. UCMJ, art. 44(c) (Former Jeopardy). For purposes of double jeopardy, every court-martial is treated the same as a federal or state prosecution tried without a jury.

PART IV: SAFEGUARDS AGAINST THE PANEL'S STRUCTURAL
FLAWS

With the court-martial panel structurally unsound, Congress had to enact a safeguard to make up for the panel's critical shortcomings. The safeguard is as unorthodox in the American scheme of justice as it is now controversial. The safeguard does not exist in federal or state practice. There is no need for it there.

Once the jury makes its factual determinations on the question of guilt or innocence, the verdict must not be disturbed on appeal, absent legal error or newly discovered evidence. The power to overturn a jury's verdict in the absence of legal error or newly discovered evidence undermines the jury as a legal institution.¹⁵⁶ Because the court-martial panel's features fall short of federal and state juries, Congress chose to offer the accused some level of protection against the panel's unsupported findings by giving commanders the authority to review the panel's findings.¹⁵⁷ As an additional safeguard, Congress also gave the courts of criminal appeals a similar authority to review the findings.¹⁵⁸

Since the founding of the Nation, a court-martial has never been considered final until the commander who convened it has approved the findings and sentence. There was a time when the President himself was the reviewing authority in certain types of cases. The Supreme Court explained the importance of this statutory role:

[T]he action required of the president is judicial in character, not administrative. As Commander-in-Chief of the Army he has been made by law the person whose duty it is to review the proceedings of courts-martial in cases of this kind. This implies that he is himself to consider the proceedings laid before him, and decide personally whether they ought to be carried into effect. Such a power he cannot delegate. His personal judgment is required, as much so as it would

156. Senator McCaskill identified the commander's authority to review the findings as "the crux of the problem here." *Proposed Fiscal 2014 Defense Authorization as it Relates to the U.S. Air Force Before the S. Comm. on Armed Services*, CQ Congressional Transcripts, p. 36 (May, 7, 2013).

157. In reality, the commander's authority to review the findings and sentence is not merely a safeguard as a first level of appellate review. It is also a requirement to "complete" the court-martial so that the sentence can take legal effect. Military appellate courts can only review cases with "approved" sentences. UCMJ art. 66; 10 U.S.C. § 866 (2012).

158. *Id.*

have been in passing on the case, if he had been one of the members of the court-martial itself.¹⁵⁹

Under Article 60 of the UCMJ, Congress preserved the commander's authority to set aside a finding of guilty or to change it to a lesser offense.¹⁶⁰ The commander can exercise this authority only after obtaining and considering the written legal recommendation of his Staff Judge Advocate.¹⁶¹ In fact, the commander must not have a predisposition to approve the findings or the sentence.¹⁶² The accused is entitled "as a matter of right . . . to an individualized, legally appropriate, and careful review of his sentence by the convening authority."¹⁶³ The exercise of this command authority is not limited to correcting legal error, but can be exercised for another important reason: whenever the commander, after reviewing the record of trial, is not himself convinced that the government met its burden of proof. This type of review is an important safeguard to the panel's unsupported factual determinations and is called, appropriately, the factual sufficiency review.

Congress is now considering legislation to strip away this authority from commanders.¹⁶⁴ Supporters of this proposal argue that, with the

159. *Runkle v. United States*, 122 U.S. 543, 557 (1887).

160. UCMJ art. 60(c)(1) & (3) ("The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority.").

161. UCMJ art. 60(d).

162. *See United States v. Fernandez*, 24 M.J. 77 (C.M.A. 1987) (when the convening authority is performing his post-trial duties, his role is similar to that of a judicial officer).

163. *Id.* at 78.

164. S. 538, 113th Cong. (2013) (introduced by Senator McCaskill). Section 1(b)(2) states: If a convening authority or other person acts on the findings of a court-martial, the convening authority or other person may not—

- (A) dismiss any charge or specification by setting aside a finding of guilty thereto; or
- (B) change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification.

Id. at §1(b)(2). *See also* Military Justice Improvement Act of 2013, S. 967, 113th Cong. §6(b)(2) (2013) (introduced by Senator Gillibrand) (proposing the exact same text amendment as S. 538); A bill introduced to the house by Congresswoman Speier and seven others would amend the UCMJ as follows:

As soon as practicable after the receipt of the findings and sentence of a court-martial by the convening authority, the convening authority shall approve of the sentence in whole. Except as provided in section 858b(b) of this title (article 58b(b)), the convening authority shall have no authority whatsoever to modify the findings or sentence of the court-martial.

commander removed from the process, a military accused would continue to have access to “a robust system of appeal rights.”¹⁶⁵ But they are mistaken. The rights of appeal are not as *robust* as one might hope. In fact, experience shows that the commander is best suited to perform the type of review needed to make up for the panel’s flaws.

Each military service has its own court of criminal appeals, which is authorized to review cases on appeal under Article 66 of the UCMJ. Unlike civilian appellate courts, these courts are empowered to review cases for both legal and factual sufficiency of the evidence.¹⁶⁶ The first type of review is the same review offered by all federal and state courts of appeal—the appellate court looks for legal error. An appellate court reviews each case to ensure the evidence presented at trial, when viewed in a light most favorable to the prosecution, would permit a factfinder to conclude beyond a reasonable doubt that the offense was committed.¹⁶⁷ The appellate court will set aside a conviction based on legal sufficiency if there is a lack of evidence on an element of the offense. The legal sufficiency review will not discover error in the jury’s factual determinations, because it is presumed that the jury—by its size, mode of selection, and unanimity—makes accurate determinations. This type of review is designed to respect the jury’s verdict.

A second type of review is therefore needed, one that does not exist elsewhere in the American justice system: the factual sufficiency review. This review is similar to the one performed by the convening authority. Exercising this unique power, military appellate judges are supposed to affirm the convictions if, and only if, “after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [the military appellate judges] are themselves convinced of the accused’s guilt beyond a reasonable doubt.”¹⁶⁸ This review is supposed to be performed even in the absence

Military Judicial Reform Act of 2013, H.R. 1079 § 2(a).

165. Julian E. Barnes, *Pentagon Pushes Military-Justice Overhaul*, WALL ST. J., Apr. 9, 2013, at A5.

166. UCMJ art. 66(c) (“Court[s] of Criminal Appeals may . . . affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.”).

167. *United States v. Turner*, 25 M.J. 324, 324 (C.M.A. 1987).

168. *Id.* at 325. One key problem is that only the trial court saw and heard the witnesses.

of legal error.¹⁶⁹ So it may be asked why the factual sufficiency review performed by a court of criminal appeals cannot replace the commander's review.

The answer is as simple as it is alarming. The factual sufficiency review is more illusory than it is real when it is performed by appellate courts. It may not happen at all. The rights of appeal under the UCMJ depend foremost on the sentence received and not on the legal error committed at trial. Military convictions can be appealed only if the sentence includes a sentence to death, a punitive discharge, or a sentence to confinement of one year or more.¹⁷⁰ If the approved sentence does not include one of these elements, there is no right of appeal.¹⁷¹ Thus, for example, it is theoretically possible for an accused to be convicted of a sex assault and to have to register for life as a sex offender without any review being done on the case, because the approved sentence was too low to qualify for appellate review.¹⁷²

More importantly, military appellate judges have struggled to perform the factual sufficiency review, despite their legal training and experience. No one really knows how to perform it. Law schools do not teach it. The Judge Advocate General's School does not contain any

The witnesses' demeanors cannot be captured in the verbatim transcript of the trial. This aspect of the case is thus inherently unreviewable. Courts of criminal appeals must make allowances for "not having personally observed the witnesses." This phrase appears in nearly every published decision. *See, e.g., United States v. Ferres*, __ M.J. __ (A.F. Ct. Crim. App. 2013) (emphasis added). This is another way of saying military appellate judges generally avoid second-guessing the panel's determinations as to the credibility of witnesses and controverted questions of fact. The whole point of the factual sufficiency review is that witnesses can be disbelieved.

169. The factual sufficiency review has been called an "awesome, plenary, *de novo* power." *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001) (quoting *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990)).

170. UCMJ Art. 66(b).

171. But compare what Chief Justice Earl Warren wrote for the Supreme Court a half-century ago:

Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for "minor" offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.

Sibron v. New York, 392 U.S. 40, 52–53 (1968) (addressing warrantless searches under the Fourth Amendment).

172. When cases otherwise do not qualify for appellate review, a summarized record of trial is reviewed by a judge advocate for legal sufficiency under UCMJ art. 64(a). No meaningful review can be performed on a summarized record.

instruction on the matter. The Military Judges' Course does not include it in its curriculum. The concept of a factual sufficiency review is so foreign to American jurisprudence that some members of Congress justifiably consider the idea to be repugnant.¹⁷³

The military appellate courts' performance of this type of review is not encouraging. Military appellate judges have committed no fewer than seven types of errors in performing this otherwise straightforward review. They have sometimes been unclear as to whether they did the review,¹⁷⁴ they have applied the wrong legal standard,¹⁷⁵ they have affirmed a lesser offense on a theory not presented at trial,¹⁷⁶ they have reconsidered their own acquittals,¹⁷⁷ they have affirmed a sentence in spite of insufficient evidence,¹⁷⁸ they have affirmed a conviction without knowing what the accused had been convicted of,¹⁷⁹ and they have purported to clarify a panel's ambiguous verdict using their own powers of speculation.¹⁸⁰ These errors are all the more striking because no

173. Senator Claire McCaskill made this point when she criticized a six-page letter from a commander explaining his reasons for overturning a sex assault conviction: "This letter is filled with selective reasoning and assumptions from someone with no legal training, and it's appalling that the reasoning spelled out in the letter served as the basis to overturn a jury verdict in this case." Julian E. Barnes, *General Defends Dismissal of Sex-Assault Conviction*, WALL ST. J., April 11, 2013 at A4.

174. *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987) (remanding the case because it was not clear factual sufficiency review was done).

175. *United States v. Sill*, 56 M.J. 239 (C.A.A.F. 2002) (remanding the case for new factual sufficiency review because it appeared the Air Force court had applied a preponderance-of-the-evidence standard instead of the beyond-a-reasonable-doubt standard).

176. *United States v. Riley*, 50 M.J. 410 (C.A.A.F. 1999) (*Riley I*) (holding that the lower court violated due process when it approved a finding of guilty based on a theory not presented to the court-martial panel).

177. *United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001) (*Riley II*) (holding that the lower court misunderstood scope of remand when it was asked to clarify its ambiguous findings).

178. *United States v. Riley*, 58 M.J. 305 (C.A.A.F. 2003) (*Riley III*) (holding that the lower court's factual finding of guilty on offense was not legally supported by the evidence).

179. *United States v. Walters*, 58 M.J. 391, 397 (C.A.A.F. 2003) ("The Court of Criminal Appeals . . . could not conduct a factual sufficiency review of Appellant's conviction because the findings of guilty and not guilty do not disclose the conduct upon which each of them was based.") (holding that the lower court improperly affirmed ambiguous finding of guilty with respect to the occasion of illegal drug use).

180. *United States v. Seider*, 60 M.J. 36 (C.A.A.F. 2004) (holding that the lower court improperly affirmed ambiguous finding of guilt after speculating about the occasion of illegal drug use); *see also* *United States v. Augspurger*, 61 M.J. 189 (C.A.A.F. 2005) (reversing court of criminal appeals for affirming a conviction after conducting factual sufficiency review on an ambiguous verdict).

legal training is required to perform the factual sufficiency review. After all, the panel members who made the factual determinations in reaching the verdict also do not have legal training. Instead, panel members, like jurors, are supposed to supply the community's commonsense judgment and values in making factual determinations.

The courts of criminal appeals are no better structured to make factual determinations than the court-martial panels whose verdicts they are reviewing. Like court-martial panels, the panels of military appellate judges are small (usually three persons), they are not randomly selected from a cross-section of the community, and, equally important, they do not have to be unanimous. In one case, a military appellate judge was not persuaded by the evidence in the record of trial with respect to 14 convictions. The convictions were still affirmed because no other military appellate judge agreed with him.¹⁸¹ In another case, the military appellate judges reportedly could not agree on the theory of guilt of a lesser offense on which they wished to affirm the conviction.¹⁸² The American public must wonder when military appellate judges, with all their legal training and experience, cannot agree among themselves that the convictions they are reviewing have been proven beyond a reasonable doubt.

The reality is that courts of criminal appeals have not effectively conducted these factual sufficiency reviews, and no one can or should blame them. The very notion of a factual sufficiency review is foreign to the American legal tradition. If there were any substance to the factual sufficiency review, it would have been adopted as a practice in federal and state courts of appeals.¹⁸³

181. See, e.g., *United States v. Lubasky*, 2006 WL 6625281 (A. Ct. Crim. App. 2006) (dissenting military appellate judge would have found thirteen more convictions to be factually insufficient, but they were all affirmed).

182. *United States v. Riley*, 52 M.J. 825, 829 (A.F. Ct. Crim. App. 2000) ("There is no requirement that two-thirds of the members of the court-martial agree on a particular theory of criminal liability. . . . We believe this rule applies to the judges on the courts of criminal appeals when performing their fact-finding duties."), *overruled by* *United States v. Riley*, 55 M.J. 185 (C.A.A.F. 2001) (*Riley II*) (finding that the lower court misunderstood scope of remand when it was asked to clarify its ambiguous findings).

183. Appellate courts in only two states perform factual sufficiency reviews: Texas and New York. TEX. CODE CRIM. PROC. ANN. art. 44.25 (West 2013); N.Y. CRIM. PROC. LAW § 470.15 (McKinney 1994). Factual sufficiency reviews have posed problems for these two states as well. See, e.g., W. Wendall Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 588 (2008) (arguing Texas should abolish the

The accused's best hope for relief on this basis resides with the commander who convened the case and must review it. The U.S. Court of Military Appeals instinctively understood this point when it stated, "It is at the level of the convening authority that an accused has his best opportunity for relief because of the former's broad powers which are not enjoyed by Courts of [Criminal Appeals] or even by this Court."¹⁸⁴ In exercising the power of review, the commander behaves more like ordinary jurors, whom the Supreme Court described as "plain people" who "manfully [stand] up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices."¹⁸⁵ It takes great courage and commonsense for someone to perform this type of review. Commanders have both.¹⁸⁶

The commander was chosen for the position based on his proven record and demonstrated judgment. He brings a unique perspective and competence to the process. Like the accused, the commander also has a great stake in the case. He feels an acute sense of responsibility for it. The commander referred it to trial, and the verdict directly impacts his command. The commander's sense of responsibility is thus greater and more pronounced than what can be felt by any military appellate judge or court of criminal appeals, which has no ties to the command. The commander's authority to review the findings serves as an important check and balance to an otherwise flawed system. The commander should therefore be allowed to continue his role in reviewing cases.

PART V: RECOMMENDATIONS FOR CONGRESS TO CONSIDER

If Congress is genuinely troubled by the decisions of convening authorities, it should consider returning the court-martial back to what

factual-sufficiency reviews and do only legal-sufficiency reviews); Elizabeth A. Ryan, *The 13th Juror: Re-Evaluating the Need for a Factual Sufficiency Review in Criminal Cases*, 37 TEX. TECH. L. REV. 1291 (2005) (same); see also *People v. Bleakley*, 508 N.E.2d 672, 673-75 (N.Y. 1987) (holding that Appellate Division erred in failing to conduct the statutorily required factual sufficiency review when defendant claimed evidence was insufficient).

184. *United States v. Boatner*, 43 C.M.R. 216, 219 (1971) (case returned to convening authority for new post-trial review because the staff judge advocate's advice was deficient).

185. *United States ex rel Toth v. Quarles*, 350 U.S. 11, 18-19 (1955).

186. For an example of a commander's courageous and principled decision to disapprove the findings of a court-martial panel, see the Memorandum for Record by Lieutenant General Susan J. Helms (Feb. 20, 2012), *infra* app.

it was at the time when our Nation was founded. The court-martial then was solely a tool of command available to address disciplinary infractions. General crimes were tried in federal and state court, where the common-law right to trial by jury is preserved for military members and civilians alike. The commander has no authority to overturn civilian convictions, and society can be confident in the jury's verdict.

In the alternative, Congress can strengthen court-martial panels by having them acquire the features of the common-law jury. The logic behind the panel's current features is that courts-martial may need to be tried during a military exigency or under austere conditions, and the panel should be able to reach a decision quickly, without the concurrence of every panel member. Although the United States has participated in numerous and ongoing combat operations since 2001, the logic for the panel's features now seems antiquated and is no longer defensible. If the panel is increased to twelve members and randomly selected from a cross-section of the military community without regard to rank or position, and the panel is required to follow the unanimity rule, the panel's verdicts would be entitled to the same respect as that of a jury. As the Supreme Court stated, "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution."¹⁸⁷ Congress has the power to eliminate these dangers, and should consider doing so if commanders are removed from the court-martial process.

If it were not for command oversight of the court-martial process, it would be an intolerable principle that the men and women of the U.S. Armed Forces are still denied genuine due process in this modern age. For its part, the American Bar Association endorses unanimity as the optimal decision rule for both criminal and civil jury trials.¹⁸⁸ The ABA also recommends that, in criminal cases, juries should consist of at least twelve persons if a penalty of confinement for more than six months may be imposed, and juries should consist of at least six persons if the maximum period of confinement that may be imposed upon conviction is six months or less.¹⁸⁹ Except for two states, all other states

187. *Toth*, 350 U.S. at 22.

188. AM. BAR ASSOC., PRINCIPLES FOR JURIES AND JURY TRIALS 6 (2005).

189. *Id.* at 5.

require unanimous verdicts. This near-uniform judgment of the Nation should provide Congress a useful guide to help it determine how court-martial panels should decide cases.

If Congress is not ready to adopt these two recommendations, then perhaps it should not rush to judgment. It can, however, take some incremental steps. The first is for Congress to amend the Uniform Code of Military Justice to require unanimity by the panel for convictions. In the alternative, Congress could require that the panel disclose its vote for each offense, much like the Oregon practice. This way, Congress will know how panels behave and can make informed decisions about court-martial jurisdiction and the panel's features. Congress can also require that commanders consider the input of victims before taking action¹⁹⁰ and that they justify, in writing, their actions to disapprove a finding or to reduce a sentence. This way, there will be greater transparency into how commanders decide to exercise their prerogative in reviewing these cases.

But even if Congress decides to make the court-martial a full-fledged court of law, the commander should still not be removed from the process. Otherwise the court-martial will cease to be a disciplinary tool. While the ends of discipline and justice may not be incompatible, they will become so if the commander is removed from the process. The court-martial must and should remain a tool of command.

VI. CONCLUDING THOUGHTS

As Congress considers revisions to the Uniform Code of Military Justice, it should tread carefully. It should not upset the delicate balance between discipline and justice. If it is not careful, Congress will enfeeble commanders by taking away the very tool that makes them effective. When commanders cannot enforce discipline, their authority and effectiveness is severely undermined. They must have authority to oversee trials of serious offenses, or there will be no reason for a separate military justice system.

190. While the commander may consider matters outside the record of trial to disapprove the findings or sentence, he "may not consider matters that are derogatory or unfavorable to [the] accused . . . from sources outside the record without first affording [the accused] an opportunity for rebuttal." *United States v. Wilson*, 26 C.M.R. 3 (C.M.A. 1958).

Martial law developed apart from the American system of justice for sound reasons. The Founding Fathers adopted martial law to help the United States rise on the world stage, as martial law had done for the Roman and the British Empires. When the Founding Fathers adopted it, they firmly believed that “an army cannot be kept together if its discipline is left to the ordinary common law.”¹⁹¹ They could not have imagined that Congress might one day consider removing commanders entirely from the court-martial process. Before Congress makes any drastic decisions, it should remember that the court-martial is a tool of discipline and that the panel is not the same as a jury. Left unchecked by command authority, the panel is a clear threat to liberty.

A celebrated French writer reminded Blackstone that Rome, Sparta, and Carthage had all lost their liberties, and England in time must also perish. Blackstone replied that these great civilizations, “at the time when their liberties were lost, were strangers to the trial by jury.”¹⁹² We should ask ourselves if we, too, have become strangers to command authority and trial by jury. We may rediscover that our national security *and* liberty depend on them.

191. Wiener, *The Original Practice II*, *supra* note 28, at 293 (quoting MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 279 (1908)).

192. Story, *supra* note 15, at 407.