

“MILITARY DUE PROCESS” AND SELECTION OF COURT-MARTIAL PANELS: AN ILLOGICAL GAP IN FUNDAMENTAL PROTECTION

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Introduction

Since 1951,¹ personnel in the military forces of the United States have been afforded most of the guarantees embodied in the Bill of Rights by decisions of the Supreme Court, the Court of Military Appeals, the Congress, and the president. However, the right to a court-martial by a representative panel selected from the “peers”² of an enlisted accused has been consistently denied.

The Supreme Court has uniformly held that the right to trial by jury embodied in Article III, section 2 and the Sixth Amendment does

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1. In response to the complaints of servicemen concerning the administration of military justice in World War II, the Uniform Code of Military Justice was enacted by Congress in 1950 and became operative the following year. Act of May 5, 1950, ch. 169, § 1, 64 Stat. 107, *as amended*, 10 U.S.C. §§ 801-940 (1970). The legislation provided for a Court of Military Appeals, *id.* art. 67; 10 U.S.C. § 867 (1970), which, as the highest appellate court in the military judicial system, has been called the “Supreme Court of the Military.” For discussion of the origin of the court and its contributions to the development of servicemen’s rights, *see generally* Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39 (1972).

2. “Peers,” as used in this note, connotes those members of the particular military community of which the accused is a member.

“The philosophy behind the civilian right to trial by a jury of peers chosen at random is that there is a better chance for a fair trial if the jury represents different classes, occupations, and perspectives within society.” Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25, 44 (1971).

“Unquestionably officers and enlisted personnel constitute two separate and distinct social and economic classes, and there is considerable support for the proposition that senior grade enlisted personnel constitute a separate economic and social class from that of the lower grade enlisted men.” Benson, *The Military Jury . . . An Unrepresentative Tribunal?*, 7 TRIAL 40, 41 (Sept.-Oct., 1971).

For purposes of this note, the enlisted ranks will be divided into two “communities”: grades E-1 through E-5 (junior enlisted), and grades E-6 through E-9 (staff non-commissioned officers), in recognition of the differences between them in career orientation, social interaction, job responsibility, and mobility within the command structure.

not apply to trials by court-martial.³ The decisions have resulted in an implied exception to the jury right similar to the express exception in the Fifth Amendment which excludes the right to grand jury indictment in the military.⁴ Exhaustive historical analyses conclude that the Sixth Amendment right to jury trial was never intended to apply to the military.⁵

Since courts-martial are not Article III courts,⁶ what personal rights are constitutionally protected under Congress' power to "make Rules for the Government and Regulation of the land and naval Forces"?⁷ Both the Supreme Court and the Court of Military Appeals have held that the rights available in the military are not merely those which are created by statute. For example, in a series of decisions since 1951, every right enumerated in the Sixth Amendment, other than the right to jury trial, has been held to apply to the armed forces through the due process clause of the Fifth Amendment.⁸ Under its Article I power, Congress has embodied most of the Bill of Rights in the Uniform Code of Military Justice.⁹ Finally, by authority delegated

3. O'Callahan v. Parker, 395 U.S. 258 (1969) (dictum); *Ex parte* Quirin, 317 U.S. 1 (1942); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) (dictum).

4. O'Callahan v. Parker, 395 U.S. 258, 261 (1969); *Ex parte* Quirin, 317 U.S. 1, 40 (1942).

The Court's reasoning has been criticized as being based upon inadequate historical analysis of the right to trial by jury in courts-martial and the framers' intent. See Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 IND. L.J. 193, 200-07 (1972) [hereinafter cited as Remcho].

5. See Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 304 (1957). Henderson concludes, however, that with the exception of the rights to petit and grand juries and the right to bail, the original intent of the framers was that the Bill of Rights would apply to the military. *Id.* at 324; cf. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 294 (1958), concluding that none of the provisions of the Bill of Rights were intended to apply to the military. But see Van Loan, *The Jury, The Court-Martial, and the Constitution*, 57 CORNELL L. REV. 363, 412-13 n.254 (1972), suggesting that the omission of an exception clause from the Sixth Amendment similar to that contained in the Fifth Amendment ("No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . .") was nothing more than a historical accident.

6. See *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857).

7. U.S. CONST. art. I, § 8, cl. 14.

8. *E.g.*, *United States v. Brown*, 7 U.S.C.M.A. 251, 22 C.M.R. 41 (1956) (public trial); *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (*Miranda* warnings); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960) (confrontation); *United States v. Sweeney*, 14 U.S.C.M.A. 599, 34 C.M.R. 379 (1964) (compulsory process for obtaining witnesses); *United States v. Culp*, 14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963) (counsel); cf. *United States v. Marshall*, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973); *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971) (speedy trial).

9. 10 U.S.C. §§ 801-940 (1970) [hereinafter cited as UCMJ]. See UCMJ arts.

by Congress,¹⁰ the president has implemented procedural rules for courts-martial in the Manual for Courts-Martial.¹¹ It can be generally stated that members of the armed forces are now effectively entitled to all guarantees of the Bill of Rights¹² except the right to bail, the right to grand jury indictment, and the right to trial by an impartial jury.

There are sound reasons for excluding the right to bail and the right to grand jury indictment. The right to bail has historically been unavailable,¹³ and the recent mandates for speedy trial, much more severe than those required in civilian courts, as a practical matter make the protections inherent in the right to bail unnecessary.¹⁴ The Fifth Amendment specifically excludes the right to grand jury indictment. However, even though grand juries are not required by the Constitution, a more extensive right is provided by statute in the military. Before trial by general court-martial, a hearing must be conducted during which the accused has the right to be represented by counsel and the right to cross-examine witnesses.¹⁵ After the hearing, a judge

16, 27, 31, 32, 44, 46, 55, 63(b), 70; 10 U.S.C. §§ 816, 827, 831, 832, 844, 846, 855 863(b) 870 (1970).

10. UCMJ art. 36; 10 U.S.C. § 836 (1970).

11. U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL, UNITED STATES (rev. ed. 1969) [hereinafter cited as MCM]. See MCM ¶¶ 6(c), 48(a), 52-58, 115(a), 117, 145, 152.

12. Indeed, the rights may be more extensive, see *United States v. Tempia*, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967) (*Miranda* warnings broadened by UCMJ art. 31), or narrower, *United States v. Priest*, 21 U.S.C.M.A. 564, 45 C.M.R. 338 (1972) (First Amendment free speech protection limited by military necessity), than those afforded civilians. The extent of application is different because of the peculiarities of the military community, the need for discipline, and the military mission. For a comparison of military and civilian constitutional rights, see generally Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3 (1970); Moyer, *Procedural Rights of the Military Accused; Advantages Over a Civilian Defendant*, 22 MAINE L. REV. 105 (1970).

13. See Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957).

14. See *United States v. Burton*, 21 U.S.C.M.A. 112, 44 C.M.R. 166 (1971), where the Court of Military Appeals established a presumption of the lack of speedy trial, when pretrial confinement exceeds ninety days; cf. *United States v. Marshall*, 22 U.S.C.M.A. 431, 47 C.M.R. 409 (1973) (presumption rebuttable only by a showing of extraordinary circumstances). See generally Note, *The Military Court System Takes the Initiative With the Issue of Speedy Trial*, 3 CAPITAL U.L. REV. 292 (1974).

Additional protections are afforded the military accused by UCMJ arts. 10, 33, and 98; 10 U.S.C. §§ 810, 833, 898 (1970). See also MCM ¶ 20 (c): "Confinement will not be imposed pending trial unless deemed necessary to insure the presence of the accused at trial or because of the seriousness of the offense charged." In civilian courts, the speedy trial guarantee is not so strictly construed. See, e.g., *Barker v. Wingo*, 407 U.S. 514 (1972) (right to speedy trial not denied despite five year delay between arrest and trial).

15. UCMJ art. 32; 10 U.S.C. § 832 (1970).

advocate must review the transcript and recommend a course of action to the convening authority.¹⁶ A similar right is not available prior to trial by special court-martial,¹⁷ but the punishment which may be imposed by such a court is much less severe.¹⁸

This note will examine the right to "trial by an impartial jury" as implemented by statute and judicial decisions under the doctrine of military due process, and the extent of the right of a lower-ranking enlisted accused to a jury selected, in part, from his lower-ranking peers. The interpretation of military due process will be re-examined, and an alternative equal protection argument suggested. Finally, three vehicles which can reform present procedures in the absence of judicial action will be proposed.

Present Rights To Jury Trial And The Effect Of Command Influence

Statutory Rights under the UCMJ

While the Sixth Amendment does not require a jury in trials by court-martial, the right has been effectively granted by article 16 of the Uniform Code of Military Justice.¹⁹ The court-martial panel is often referred to as a "jury." However, the panel differs significantly from a civilian jury in the process of selecting members and the criteria for their selection.²⁰

First, and perhaps the most important of the military requirements, is that an accused will not be tried by anyone junior to him in

16. UCMJ art. 34; 10 U.S.C. § 834 (1970). In *Talbot v. United States ex rel. Toth*, 215 F.2d 22, 28 (D.C. Cir. 1954), *rev'd on other grounds sub nom. United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the court of appeals stated that articles 32 and 34 met the essentials of due process in that phase of the proceedings. While recognizing that grand jury indictment is not constitutionally required in trials by court-martial, the court stated that these articles afforded as much protection to the accused as do the requirements of grand jury indictment in civilian trials.

17. UCMJ art. 16; 10 U.S.C. § 816 (1970).

18. There are three forms of courts-martial provided by the UCMJ. A general court-martial may impose any penalty authorized under the code, including the death penalty. UCMJ art. 18; 10 U.S.C. § 818 (1970). A special court-martial may adjudge a maximum of six months' confinement, plus reduction and forfeitures of pay and, if certain requirements are met, a bad conduct discharge. UCMJ art. 19; 10 U.S.C. § 819 (1970). A summary court-martial may impose only relatively minor punishments, UCMJ art. 20; 10 U.S.C. § 820 (1970), and will not be considered in this note.

19. *See* UCMJ art. 16; 10 U.S.C. § 816 (1970). A general court-martial consists of a military judge and not less than five members. A special court-martial usually consists of a military judge and not less than three members. In either case, the accused may request trial by military judge alone.

20. The panel also differs in function. It acts as the finder of fact, but also imposes sentence by two-thirds vote in noncapital offenses (unanimous vote in capital offenses). UCMJ art. 52; 10 U.S.C. § 852 (1970).

rank or grade, unless unavoidable.²¹ This is necessary because a court-martial is an instrument of discipline as well as a forum for justice.²² The vertical class structure of the military exists, rightfully so, to insure discipline and obedience. In the trial of offenses against discipline or authority, court-martial proceedings necessarily require that punishment be adjudged by the superiors of the accused.²³ In such a case, a lower-ranking member cannot be considered a "peer" of the higher ranking accused on trial for a purely "military" offense.²⁴

Second, the selection process under article 25 of the UCMJ requires the convening authority to select those court members who, in his opinion, are "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."²⁵ This requirement has caused the most litigation and dispute regarding the fairness of the court-martial panel, and is the primary example of "lawful" command influence.²⁶

The language of article 25 is vague, and grants wide discretion in the selection of court members. Absent a showing of intentional disregard of article 25 criteria, the convening authority's discretion is virtually unlimited.²⁷ As a result, lower-ranking enlisted personnel have been systematically excluded from court-martial panels,²⁸ al-

21. UCMJ art. 25(d)(1); 10 U.S.C. § 825(d)(1) (1970).

22. The "duality" of the court-martial has been the cause of the denial of fundamental trial rights to the military accused. However, even the highest military commanders have recognized that the functions of the court-martial are inseparable: "A military trial should not have a dual function as an instrument of discipline and as an instrument of justice. It should be an instrument of justice and in fulfilling this function, it will promote discipline." Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5, 8 (1971). For a comparison of views on the "justice" vs. "discipline" dichotomy, see generally H. MOYER, *JUSTICE AND THE MILITARY*, § 1-150 (1972) [hereinafter cited as *JUSTICE AND THE MILITARY*].

23. See Brookshire, *Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction*, 58 MIL. L. REV. 71, 104 n.110 (1972) [hereinafter cited as *Brookshire*]. But see Remcho, *supra* note 4, at 226.

24. See notes 78-81 and accompanying text *infra*.

25. UCMJ art. 25(d)(2); 10 U.S.C. § 825(d)(2) (1970). The convening authority is that officer given the power to create a court-martial for the trial of an offense and to refer charges to the court convened. UCMJ arts. 22-24; 10 U.S.C. §§ 822-824 (1970) (designation of commanders qualified as convening authority). He also has extensive powers of appellate review in addition to his powers of selecting the members of the court. UCMJ arts. 60-64; 10 U.S.C. §§ 860-864 (1970) (appellate review); UCMJ arts. 25-29; 10 U.S.C. §§ 825-829 (1970) (selection of members).

26. See *JUSTICE AND THE MILITARY*, *supra* note 22, §§ 3-112, 3-201. See text accompanying notes 34-40 *infra*.

27. See notes 66-74 and accompanying text *infra*.

28. See *United States v. Crawford*, 15 U.S.C.M.A. 31, 36, 35 C.M.R. 3, 8 (1964). (During the period 1959-1963, no enlisted man below grade E-4 had served on an Army court-martial panel). Through 1972, very few lower-ranking enlisted men had served on courts-martial in any service. Remcho, *supra* note 4, at 195-97.

though, with the exception of the seniority requirement, rank was not intended by Congress to be a factor in selection.²⁹

Third, an enlisted accused tried by special or general court-martial has three choices in the composition of his court. He may request trial by military judge alone, and such a request is rarely refused.³⁰ He may request a court panel consisting of at least one-third enlisted membership, which must be granted with few exceptions.³¹ Absent either request, he will be tried by a panel of commissioned or warrant offi-

Current statistics indicate the scope of the problems confronted in this note:

	Air Force		Army		Marine Corps Navy	
	FY 73	FY 74	FY 73	FY 74	FY 73	FY 74*
Total General Courts-Martial	252	270	1,547	1,988	740	293
Number with full panel	129	116	486	542	195	84
Number with judge alone	123	154	1,061	1,446	545	209
Number panels with enlisted members	5	5	49	94	**	**
Number with members E-5 or below	**	**	41	81	**	**
Total Special Courts-Martial	2,217	2,557	809 ^{tt}	1,270	10,188	5,942
Number with full panel	599	661	105	143	794	359
Number with judge alone	1,618	1,896	705	1,127	9,394	5,583
Number panels with enlisted members	1***	3***	16	25	**	**
Number with members E-5 or below	**	**	16	25	**	**

* First half fiscal year 74

** Data not collected or not available

*** Special courts-martial resulting in an approved bad conduct discharge (Air Force: 237 in FY 73, 377 in FY 74).

^{tt} Does not equal total of number with full panel and number with judge alone.

Letter from Col. W.L. Lewis, Chief, Military Justice Division, USAF, to author, Nov. 15, 1974; Letter from V.M. McElroy, Clerk of Court, USA, to author, Nov. 6, 1974; Letter from Cdr. L.M. Farrell, Deputy Assistant Judge Advocate General (Military Justice), USN, to author, Nov. 8, 1974. (Letters on file in the offices of the HASTINGS CONSTITUTIONAL LAW QUARTERLY.)

29. "Nothing in the Uniform Code expressly limits membership on a court-martial to persons of a particular rank. On the contrary, notwithstanding the reference to the selection of those 'best qualified,' Article 25 implies all ranks and grades are eligible for appointment." *United States v. Crawford*, 15 U.S.C.M.A. 31, 36, 35 C.M.R. 3, 8 (1964). However, the court noted that the criteria of article 25 bear a close relation to seniority of rank. *Id.* at 40, 35 C.M.R. at 12.

30. UCMJ arts. 16(1)(B), 16(2)(C); 10 U.S.C. §§ 816(1)(B), 816(2)(C) (1970). Statistics indicate that most accused are tried by military judge alone. *See* note 28 *supra*; Brookshire, *supra* note 23, at 86-87.

Fear of the "blue-ribbon" panel or appointment of senior noncommissioned officers where enlisted representation is requested may account in part for the disproportionate number of trials by judge alone. For a tactical evaluation of request for trial by judge alone, *see Trial by Judge Alone—Danger?*, 3 THE ADVOCATE 61 (1971).

31. UCMJ art. 25(c)(1); 10 U.S.C. § 825(c)(1) (1970).

cers.³² These "choices" have been criticized as illusory by several writers.³³ Despite such criticism, absent an abuse of discretion by the convening authority in the selection of members of the court, an enlisted accused has more choice in the composition of his court than has the civilian defendant.

Abuse of Discretion: Command Influence

Perhaps the greatest fear voiced and the deficiency most apparent in the military justice process is the opportunity for command influence.³⁴ Since the commander has the responsibility for the discipline and morale of his command, he will have a personal interest in the outcome of any court-martial of one of his men. Vehement commentary has been directed at the actual or possible abuse of power, particularly in the selection of court members.³⁵ While there is potential for unlawful command influence, it is submitted that *actual* abuses by the convening authority are rare.

The opportunities for personally influencing the outcome of the court-martial are curtailed by the selection procedures used in most large commands. Court members are selected from a master list by the judge advocate or a member of the convening authority's staff and submitted to the convening authority for approval.³⁶ Although personal selection is apparently required by article 25, the convening

32. UCMJ arts. 25(a), 25(b); 10 U.S.C. §§ 825(a), 825(b) (1970).

33. See, e.g., Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 21, 48 (J. Finn ed. 1971); Remcho, *supra* note 4, at 196-97. The "illusory" nature of the choice is based on the assertion that the convening authority usually appoints senior noncommissioned officers to the court panel when enlisted representation is requested by the accused. Such members often are more severe in their judgments than an all-officer court.

34. See, e.g., Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971); JUSTICE AND THE MILITARY, *supra* note 22, §§ 2-590, 3-111, 3-112, 3-400; Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971).

35. See Comment, *Stacked Juries: A Problem of Military Injustice*, 11 SANTA CLARA LAW. 362 (1971).

36. Brookshire, *supra* note 23, at 91, 114 (app. B). "[A] convening authority may shape the composition of a jury panel in many ways short of the heavy-handed method of naming an obviously biased panel [H]owever, the existence of a broad command discretion does not prove that it is invariably exercised. Indeed, many factors suggest that convening authorities commonly do not exercise the full measure of their lawful prerogatives, much less exceed them. Many commanders as a matter of practice have nothing to do with the mechanics of selecting court members." JUSTICE AND THE MILITARY, *supra* note 22, § 3-201, at 725. Unlawful command influence is proscribed by article 37 of the code, and is punishable under article 98 of the code. However, as far as the author can determine, there has never been a court-martial for an article 98 offense. See Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 39, 69 n.160 (1972).

authority is rarely involved in the process except for the final selection. This procedure has been approved by the Court of Military Appeals.³⁷ Finally, perhaps in a backhanded view of the problem, the number of courts-martial sitting with a full panel is quite small in relation to the number of courts convened.³⁸

Although the extent of *actual* command influence and active interference with the court-martial process is small, it is well established that the mere appearance of impropriety or unfairness may undermine confidence in the judicial system, and provide a basis for constitutional attack.³⁹ Unfortunately, the Court of Military Appeals has required much more than an "appearance of unfairness" to reverse a court-martial conviction by a "blue ribbon" panel consisting of high ranking members.⁴⁰ The reluctance of the court to do so results from a balance in favor of the requirements of military necessity over those of military due process.

History of Military Due Process in a Judicial Setting

The concept of "military due process" was developed by the Court of Military Appeals to insure fundamental fairness to the accused in trials by court-martial under the due process clause of the Fifth Amendment. In *United States v. Clay*,⁴¹ it was unclear whether the court defined military due process in terms of constitutional rights or upon purely statutory rights created by the Uniform Code. The court clearly established a constitutional right in *United States v. Jacoby*, stating:

[T]he protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces.⁴²

After *Jacoby*, Chief Judge Quinn defined the concept in terms of both constitutional and statutory rights:

37. See *United States v. Kemp*, 22 U.S.C.M.A. 152, 46 C.M.R. 152 (1973); cf. *United States v. Allen*, 5 U.S.C.M.A. 626, 18 C.M.R. 250 (1955) (convening authority must still ratify the final nominations).

38. See note 28 *supra*. This remains true although trials by military judge alone result in higher conviction rates and more severe sentences than do those sitting with a full panel. JUSTICE AND THE MILITARY, *supra* note 22, § 2-609, at 533.

39. "Faith in the courts and in the jury system must be maintained That faith can be sustained only by keeping our judicial proceedings from the suspicion of wrong. The question is, not whether any actual wrong resulted . . . but whether [an action] created a condition from which prejudice might arise or from which the general public would suspect that the jury might be influenced to reach a verdict on the ground of bias or prejudice." *Stone v. United States*, 113 F.2d 70, 77 (6th Cir. 1940).

40. See notes 66-74 and accompanying text *infra*.

41. 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

42. 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960).

It can be said, therefore, that military due process begins with the basic rights and privileges defined in the federal constitution. It does not stop there. The letter and the background of the Uniform Code add their weighty demands to the requirements of a fair trial. Military due process is, thus, not synonymous with federal civilian due process. It is basically that, but something more, and something different.⁴³

The "something more and something different" has become an amorphous concept of "military necessity," which emphasizes the court-martial as an instrument of discipline. The fundamental fairness required by due process is thus balanced in trials by court-martial with the military necessity for discipline.⁴⁴ The Supreme Court has also recognized these countervailing factors, most recently in *Parker v. Levy*:

The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.⁴⁵

The military necessity for discipline and obedience has been cited time and again as justification for denial of fundamental rights.

Prior to the creation of the Court of Military Appeals in 1951,⁴⁶ members of the armed forces had few protections, since the argument of military necessity had been accepted by the Supreme Court with little inquiry.⁴⁷ Until *Burns v. Wilson*,⁴⁸ the Court had refused to review convictions by courts-martial for lack of jurisdiction resulting from alleged constitutional deprivations. This "hands-off" attitude has strong historical support,⁴⁹ and the Court is still prohibited from reviewing courts-martial convictions except by appeal of habeas corpus petitions from the federal courts.⁵⁰ The Supreme Court has therefore

43. Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225, 232 (1961).

44. Cf., *United States v. Priest*, 21 U.S.C.M.A. 564, 569-71, 45 C.M.R. 338, 343 45 (1972) (Military necessity for discipline dictates the extent of First Amendment rights to free expression).

45. 417 U.S. 733, 758 (1974).

46. Act of May 5, 1950, ch. 169, § 1, art. 67, 64 Stat. 107, as amended 10 U.S.C. § 867 (1970).

47. See Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. REV. 181, 186-88 (1962).

48. 346 U.S. 137 (1953) (plurality opinion).

49. "The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal." Warren, *supra* note 47, at 187. See Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953).

50. The Supreme Court has consistently adhered to its holding in *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863), that it has no power to review by certiorari the

played an intermittent role in the development of constitutional law as applied to military justice. The concept of military due process has been developed almost entirely by the Court of Military Appeals.

Constitutional Deprivations under the UCMJ

The court-martial system arguably results in due process and equal protection violations in the jury selection process. The excessive discretion granted the convening authority under article 25 in the selection of court members may result in a court panel which has the appearance of being fundamentally unfair. In addition, an enlisted accused of lower rank is deprived of the equal protection of the laws under article 25 in three ways. First, an officer enjoys the right to be tried by his fellow officers,⁵¹ while an enlisted accused is entitled to only one-third enlisted personnel on his panel,⁵² and these members are likely to be senior enlisted personnel who comprise a different peer group than the accused.⁵³ Second, the argument may be advanced on the basis that Congress has designed one selection procedure for civilians under the Federal Jury Selection and Service Act of 1968,⁵⁴ which provides for the random selection of jurors,⁵⁵ while members of the armed forces are discriminated against as a class under article 25 for no compelling reason. Third, there are significant interservice and intraservice variations in the application of the article 25 selection criteria.⁵⁶

Discretion v. Due Process

Due Process Does an "About Face"

The Supreme Court has noted that neither a twelve-member jury⁵⁷ nor a unanimous verdict⁵⁸ is constitutionally required under the

decisions of courts-martial. See UCMJ arts. 59-76; 10 U.S.C. §§ 859-876 (1970) (present military appellate procedure).

This shortcoming in the military appellate process has been the subject of proposed legislation. See, e.g., S. 987, 93d Cong., 1st Sess., § 1259 (1973) (empowering the Supreme Court to issue writs of certiorari to the Court of Military Appeals). For discussion and critique of the present procedures, see Bayh, *The Military Justice Act of 1971: The Need for Legislation Reform*, 10 AM. CRIM. L. REV. 9, 21-23 (1971).

51. Cf. UCMJ, art. 25(d)(1); 10 U.S.C. § 825(d)(1) (1970).

52. UCMJ, art. 25(c)(1); 10 U.S.C. § 825(c)(1) (1970).

53. See JUSTICE AND THE MILITARY, *supra* note 22, § 2-598.

54. 28 U.S.C. §§ 1861-1869 (1970).

55. "It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community . . ." *Id.* § 1861.

56. See notes 106-112 and accompanying text *infra*.

57. *Williams v. Florida*, 399 U.S. 78 (1970).

58. See *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion): cf. *John-*

Sixth or Fourteenth Amendments in state criminal trials. Furthermore, a jury is required only in those criminal cases where more than six months' confinement may be imposed.⁵⁹ Thus, of all constituencies possible in a court-martial, only the three-man panel of a special court-martial authorized to award a bad-conduct discharge would not meet the present requirements of constitutional due process.⁶⁰

While the *resulting* civilian jury is not required to reflect a community cross-section, selection procedures may not arbitrarily discriminate to exclude an identifiable class of potential jurors.⁶¹ Systematic exclusion from consideration on the basis of occupation⁶² or race⁶³ has been held to be an unconstitutional deprivation of due process.

Conceding that the various ranks within the military are identifiable groups, does *de facto* exclusion from a court-martial panel on the basis of *rank* constitute a denial of due process of law under the Fifth Amendment? The Court of Military Appeals has held that it does not.⁶⁴ Other rights have been granted which conceivably pose greater threats to discipline and are more inconvenient to the military forces,⁶⁵ but the right to a fairly selected panel has been uniformly denied by

son v. Louisiana, 406 U.S. 356 (1972). In *Johnson*, reviewing a state case decided before the Sixth Amendment jury guarantee was applied to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court indicated that a unanimous verdict by a five-person jury would meet the Fourteenth Amendment requirements of due process and equal protection. *Id.* at 363-65.

In a Navy Court of Military Review decision, the two-thirds voting procedure under article 52 met the "substantial majority" test of *Johnson*. *United States v. Murray*, 48 C.M.R. 331, 333 (NCMR 1973).

59. See *Baldwin v. New York*, 399 U.S. 66 (1970) (plurality opinion).

60. A bad conduct discharge is viewed as so punitive that up to one year of confinement may be substituted on rehearing by a general court-martial. *Remcho, supra* note 4, at 217 n.125. It is doubtful whether a three-member "jury" authorized to convict and impose punishment by a two-thirds vote would be considered a "constitutional" jury.

61. *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220 (1946).

62. *Thiel v. Southern Pac. Co.*, 328 U.S. 217 (1946).

63. *Hernandez v. Texas*, 347 U.S. 475 (1954) (persons of Mexican descent); *Avery v. Georgia*, 345 U.S. 559 (1953) (negroes); *cf. Taylor v. Louisiana*, 95 S. Ct. 692 (1975) (systematic exclusion of women from jury panels held unconstitutional under the Sixth Amendment).

64. See notes 66-74 and accompanying text *infra*.

65. See, e.g., *MCM, supra* note 11, ¶ 152, which restricts the commander's authority to conduct searches without probable cause. Commanders are often frustrated in their desire to search entire barracks seeking to recover stolen government property, stolen personal property, or contraband. In the author's experience, evidence seized in such unannounced "health and comfort" inspections is often excluded in courts-martial. *Cf. Carlson v. Schlesinger*, 364 F. Supp. 626 (D.D.C. 1973), where the commander's discretion to curtail protest activities which he deemed injurious to the morale of his command was restricted as conflicting with the First Amendment rights of the offenders.

the Court of Military Appeals, despite flagrant examples of discriminatory selection procedures.

In *United States v. Crawford*,⁶⁶ the court appeared prepared to reverse a conviction coming from a stacked court, stating: "Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the facts."⁶⁷ However, the court upheld the conviction by a panel consisting of one-third senior noncommissioned officers, since the selection procedure was "directly and reasonably calculated to obtain persons with the qualifications prescribed by [article 25]"⁶⁸ The test to be applied in evaluating allegations of discriminatory selection based upon rank was stated by Chief Judge Quinn:

What we have said about the original understanding of the Code's enlisted membership provision indicates that a method of selection which disregards individual qualification and *deliberately and systematically* excludes all enlisted persons of the lower ranks is contrary to the Uniform Code.⁶⁹

In *United States v. Kemp*,⁷⁰ the court held that not only is the Sixth Amendment inapplicable to the military, but also the "accompanying considerations of constitutional means by which juries may be selected has no application to the appointment of members of courts-martial."⁷¹ The court held that appointment of members is governed by article 25 of the Uniform Code, and refused to accept the argument that the selection process created a constitutional deprivation of due process of law. The convening authority had selected court members from a list of nominees comprised of lieutenant colonels, majors, and captains. The court approved the procedure and stated that "no controlling weight was given to the factor of grade by any of [the convening authority's] subordinates."⁷² The court distinguished *United States v. Greene*,⁷³ where the *announced command policy* was to place only colonels and lieutenant colonels on the panel. Finally, the court recognized the merits of a random selection procedure, but also the peculiar requirements of the military justice system, and left to Congress the

66. 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964).

67. *Id.* at 34, 35 C.M.R. at 6.

68. *Id.* at 40, 35 C.M.R. at 12.

69. *Id.* at 37-38, 35 C.M.R. at 9-10 (emphasis added).

70. 22 U.S.C.M.A. 152, 46 C.M.R. 152 (1973).

71. *Id.* at 154, 46 C.M.R. at 154.

72. *Id.* at 155, 46 C.M.R. at 155.

73. 20 U.S.C.M.A. 232, 43 C.M.R. 72 (1970). A panel which on its face shows an overwhelming taint of unfairness and has the appearance of favoritism to the government will be invalidated. See *United States v. Hedges*, 11 U.S.C.M.A. 642, 29 C.M.R. 458 (1960) (seven of nine members had duties involving law enforcement and crime control).

burden of implementing the random selection procedure requested by the appellant.

The effect of *Crawford*, *Kemp* and *Greene* appears to be that military due process permits *de facto* exclusion of lower ranking enlisted personnel from court-martial panels. So long as the convening authority "considers" all personnel and then decides to exclude the lower ranks as not meeting the criteria of article 25, fairness is served. As one authority observes, absent an announced command policy of exclusion (*Greene*) or a court that is facially weighted in favor of the government (*Hedges*), the present procedures will withstand constitutional attack based upon the due process clause of the Fifth Amendment.⁷⁴

Fairness v. Necessity: Re-evaluation

The military argues that a representative selection procedure would result in an increased acquittal rate and more lenient sentences, thereby undermining military discipline. The advocates of a representative procedure cite the increasing responsibility and educational level of lower-ranking enlisted personnel.⁷⁵ Neither side has offered statistics or other proof to support the hypothetical effects of junior enlisted personnel sitting on court-martial panels. However, it is known that the military would have little economic or administrative difficulty in implementing representative procedures, either by random selection or by allowing the convening authority to select junior enlisted members personally.⁷⁶ It may also be argued that such procedures would improve enlisted morale, and reduce the number of disciplinary infractions.

There are also no statistics available comparing the severity of sentences and conviction rates of courts where panels consist of officers and senior noncommissioned officers with panels including members from the lower ranks. Until recently, lower ranking enlisted personnel have rarely been allowed on court-martial panels.⁷⁷ Absent any clear demonstration of military necessity, the appearance of fairness resulting from a representative panel should be required by military due process in the trial of "military crimes"⁷⁸ and by constitutional due process in

74. JUSTICE AND THE MILITARY, *supra* note 22, § 2-596.

75. *E.g.*, Sherman, *Justice in the Military*, in CONSCIENCE AND COMMAND: JUSTICE AND DISCIPLINE IN THE MILITARY 21, 48-50 (J. Finn ed. 1971); JUSTICE AND THE MILITARY, *supra* note 22, § 2-598, at 526-27. *See also* Brookshire, *supra* note 23, at 88-91, indicating that the majority of the convening authorities surveyed see no inherent problem in assigning junior enlisted men to courts-martial.

76. *See, e.g.*, Brookshire, *supra* note 23, at 94-106.

77. *See* note 28 *supra*.

78. "Military" crimes are those which historically have been tried by courts-martial

the trial of "true crimes."⁷⁹

It can be argued that "military crimes" are not crimes at all within the meaning of Article III and the Sixth Amendment, and that constitutional due process requirements would therefore not apply.⁸⁰ The majority of offenses tried by court-martial are such crimes.⁸¹ They are primarily offenses against command and obedience, and their volume and peculiarities of evidence would make them inappropriate for trial in civilian courts. Yet there is no reason to believe that a private on trial for unauthorized absence will not be disciplined by a court that empanels corporals among its enlisted members.

The due process argument becomes stronger in a court-martial for a "true crime." Much more than an "appearance of fairness" is involved. In such a case, *constitutional* due process should require a panel free from any possible command influence under article 25.

and are primarily disciplinary offenses with no counterpart in civilian life. *See* UCMJ, arts. 85-87; 10 U.S.C. §§ 885-887 (1970) (absence offenses); UCMJ arts. 88-92, 117; 10 U.S.C. §§ 888-892, 917 (1970) (disrespect and disobedience of superiors); UCMJ arts. 94, 99, 100, 101, 104-106, 113; 10 U.S.C. §§ 894, 899, 900, 901, 904-906, 913 (1970) ("combat related" offenses).

79. "True" crimes may have a military element. *See, e.g.*, UCMJ art. 90(1); 10 U.S.C. § 890(1) (1970) (assault on a superior officer). But true crimes comprise a category of offenses historically not tried by courts-martial. *See* UCMJ arts. 118-131; 10 U.S.C. §§ 918-931 (1970) (murder, manslaughter, rape, larceny, robbery, forgery, uttering, maiming, sodomy, arson, extortion, assault, burglary, housebreaking, and perjury).

80. This argument would apply only to those offenses tried by a special court-martial not authorized to award a bad conduct discharge, since the Supreme Court has classified "offenses" as "crimes" or "petty offenses" on the basis of the punishment which may be imposed, and not on the nature of the offense. *Baldwin v. New York*, 399 U.S. 66 (1970). *But see* *United States v. Crawford*, 15 U.S.C.M.A. 31, 35 C.M.R. 3 (1964): "Courts-martial are criminal prosecutions, and those constitutional protections and rights which the history and text of the Constitution do not plainly deny to military accused are preserved to them in the service." *Id.* at 34, 35 C.M.R. at 6.

81. 3 U.S. DEP'T OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, at 197-98 (1972) [hereinafter cited as DOD REP.]. The study classified offenses into five major categories, *id.* at 183-84, and collected data from all services during the period June 5-July 5, 1972, concerning the number of offenses within each category tried by courts-martial within the period. The results were as follows:

Category I —Major military or civilian crimes (UCMJ arts. 80-81, 107-109, 115, 118-132)	694
Category II —Drug Related Offenses (UCMJ art. 134)	209
Category III—Confrontation or Status Offenses (UCMJ arts. 89-92, 95, 116, 117)	413
Category IV—Other military or civilian offenses (drunk and disorderly, uniform violations, false I.D., etc.)	114
Category V —Unauthorized Absence (UCMJ arts. 85-87)	731

Id. at 208-212.

The military disciplinary interest is weaker when a court-martial tries an accused for an offense which does not affect command authority. The Supreme Court recognized this problem in *O'Callahan v. Parker*,⁸² by requiring the offense to be "service connected", but in practice the connection may be found in any number of situations.⁸³ In such trials, the court-martial panel becomes a jury in the true sense, and should be selected as is the jury for a criminal trial. Despite the recommendations of some critics,⁸⁴ such crimes do not require trial by a civilian court and jury to assure fairness. A court-martial is not inherently more "unfair" than a civilian court.⁸⁵ However, the jury selection process is one area in which court-martial procedure does not provide the safeguards of a civilian court.

Since any serious crime would be tried before a general court-martial, a representative selection procedure would meet the requirements of both military due process and constitutional due process. Furthermore, since such crimes are not offenses against discipline, the requirement of seniority of the panel would not apply.

Breaking New Ground

Several procedures would meet the requirements of military due process and constitutional due process, while imposing a minimal burden on the military.⁸⁶ Command discretion could be maintained under article 25 as to military crimes, and a random selection procedure established, *regardless of rank*, for the trial of true crimes. A random selection procedure could be implemented in the trial of both types of offenses, maintaining the seniority requirement. Alternatively, military jurisdiction over serious crimes could be eliminated entirely, and representative selection required for the trial of military

82. 395 U.S. 258 (1969).

83. *See, e.g.*, *Relford v. Commandant*, 401 U.S. 355 (1971) (sufficient service connection when all essential acts of an offense are committed on a military installation); *Rainville v. Lee*, 22 U.S.C.M.A. 464, 47 C.M.R. 554 (1973) (off-base sale of drugs by one military member to another sufficient service connection); *United States v. Rego*, 19 U.S.C.M.A. 9, 41 C.M.R. 9 (1969) (jurisdiction established when the essential act is committed off-base, since theft from other soldiers is peculiarly a military crime). For discussion of the after-effects of the *O'Callahan* decision, *see Rice, O'Callahan v. Parker: Court-Martial Jurisdiction, "Service Connection," Confusion, and the Serviceman*, 51 MIL. L. REV. 41 (1971).

84. *E.g.*, Fuchsberg, *Command Influence on Military Justice*, 7 TRIAL 36 (Jan.-Feb., 1971); Hatfield, *Civil Safeguards for the Military*, 7 TRIAL 43, 44 (Sept.-Oct., 1971). *But see* 119 CONG. REC. S3144 (daily ed. Feb. 22, 1973) (remarks of Senator Bayh).

85. *See* notes 8, 12, 14-16 *supra*.

86. *See, e.g.*, Brookshire, *supra* note 23, at 94-106; Remcho, *supra* note 4, at 223-29; Van Sant, *Trial by Jury of Military Peers*, 15 JAG L. REV. 185, 187-89 (1974) (proposed random selection procedures).

offenses. An extreme solution would remove all court-martial authority from the military and try all offenses in civilian courts.⁸⁷ The latter solution should not be seriously considered, since the administrative burden on the federal courts would be immense, and it is questionable whether the trial of "military" crimes should be entrusted to a civilian jury that has no understanding of the nature of such offenses and the reasons for creating them.

Either military or constitutional due process should require a court-martial panel that is representative of the military community, consonant with the requirements of seniority in the trial of military offenses, absent a showing of substantial interference with military discipline. Article 25 does not comprehend exclusion of broad classes of enlisted ranks, yet such *de facto* exclusion has uniformly occurred, and is presently sanctioned by the Court of Military Appeals.

While the due process arguments appear to have been settled by the decision in *Kemp*, no panel selection cases have been argued on the basis of an asserted denial of the equal protection of the law. There is no doctrine of "military" equal protection, since the Court of Military Appeals has not had occasion to rely on such analysis in reaching its decisions. However, such analysis ought to be applied to the current court-martial panel selection procedures which are protected under article 25.

Equal Protection Throughout the Ranks

The equal protection argument has only recently been suggested in challenging the jurisdiction of courts-martial over offenses resulting in infringement of First Amendment rights.⁸⁸ A constitutional attack on military jury selection based upon the implied equal protection guarantees of the Fifth Amendment⁸⁹ may be advanced by analogy on three separate grounds. First, federal law provides separate standards for selection of military and civilian juries. Second, article 25 provides for officer and noncommissioned officer representation on a court-martial panel, and denies it to a lower-ranking enlisted accused. Third, the vague selection criteria of article 25 result in invidious discrimination against lower-ranking enlisted personnel between service branches and organizations within the same service.

87. West, *A History of Command Influence on the Military Judicial System*, 18 U.C.L.A.L. REV. 1, 151-56 (1970). "[T]he only concession necessary or desirable to effect discipline within the entire military judicial process, is that of signing charges against offenders of military law. . . . All remaining functions within the court-martial process, however, should be civilian operated and controlled." *Id.* at 154. West would, however, retain military juries for the trial of military offenses in civilian courts to prevent civilian prejudice. *Id.* at 154-55.

88. See notes 97-102 and accompanying text *infra*.

89. Cf. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Civilian v. Military: Conflict in Federal Standards

When the jury selection provisions of article 25 and the Federal Jury Selection and Service Act are compared, there appears to be *de jure* discrimination against members of the armed forces as a class. The criteria of article 25 also result in invidious discrimination against lower-ranking enlisted personnel. However, neither the classification as "military" nor "enlisted" has been held to be suspect by the Supreme Court. The Court has also refused to declare that the *random* selection of juries from a cross-section of the community is a fundamental right.⁹⁰

Military discipline may be considered a "compelling governmental interest." However, even if the statutes create neither a suspect classification nor violate a fundamental interest,⁹¹ there is still no demonstrable rational relation between the power of the convening authority to select a court-martial panel and military discipline.⁹²

90. The right to a jury trial in state criminal trials was held "fundamental" for the first time by the Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968), and thus guaranteed under the due process clause of the Fourteenth Amendment. However, random selection of juries is not yet required as an element of fundamental fairness. See *Brookshire*, *supra* note 23, at 78-80, 82-84. In *Taylor v. Louisiana*, 95 S. Ct. 692 (1975), the Court held "the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment," *id.* at 697-98, and that this requirement was violated by the systematic exclusion of women from jury service. The Court stated that "[t]he right to a proper jury cannot be overcome on merely *rational grounds*. There must be weightier reasons if a distinctive class representing 53% of the eligible jurors is for all practical purposes to be excluded from jury service." *Id.* at 699-700 (emphasis added).

The Court in *Taylor* distinguished *Hoyt v. Florida*, 368 U.S. 57 (1961), where such exclusion was held not to violate due process and equal protection standards, as being decided prior to *Duncan's* application of the Sixth Amendment to the states. The anomalous position of requiring a jury drawn from a fair cross-section for purposes of the Sixth Amendment but not as required by the "fundamental fairness" of due process was criticized by Mr. Justice Rehnquist. *Id.* at 702-04 (Rehnquist, J., dissenting).

91. The Court's equal protection analysis is based upon the nature of the interest violated. If the discrimination affects a "fundamental interest" or is based upon a "suspect classification," "strict scrutiny" will be required to determine if there is a "compelling governmental interest" to sustain the classification. If neither a fundamental interest nor a suspect classification is involved, minimal scrutiny will be applied to determine if there is a "rational relationship" between the discriminatory conduct and a legitimate governmental interest. *Cf. San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). For a discussion of the Court's shifting views of proper equal protection analysis, see Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

92. Senator Hatfield suggests an inverse correlation and states that "[t]here is a definite positive correlation between the degree of civilianization and the decreased problems of maintaining discipline," Hatfield, *Civil Safeguards for the Military*, 7 TRIAL 43 (Sept.-Oct., 1971). In a survey of career Army officers, 62.7 percent of the officers responding believed that there would be no appreciable effect on discipline by requiring the appointment of court members by someone other than the convening authority, and

It is arguable that the maintenance of discipline requires the selection of members by the convening authority for the trial of purely military offenses. In such cases the court-martial is, in reality, an instrument of discipline. However, in the trial of serious crimes, there is no justification for establishing two separate systems of jury selection. Since Congress grants the right to a five-person panel in trials by general courts-martial,⁹³ the selection procedure should, at the very least, provide for prohibition against *de facto* exclusion of lower-ranking enlisted personnel.

Officer v. Enlisted Rights under Article 25

An officer has the right to be tried by a court-martial panel no member of which will be junior to him in rank. He is thus tried by his peer group.⁹⁴ Similarly, should a noncommissioned officer request enlisted representation, he will be tried by a panel representing at least one-third of his peers.⁹⁵

It is well established that noncommissioned officers constitute a separate class within the military hierarchy, but they will comprise the enlisted portion of the panel in the trial of a lower-ranking accused.⁹⁶ Thus, *all* enlisted personnel are denied the protection afforded officers, but lower-ranking enlisted personnel are also denied the one-third peer representation granted to noncommissioned officers. Such *de facto* exclusion is a direct result of the vague standards of article 25 and the excessive discretion which it vests in the convening authority.

Interservice Variances

Recently, armed forces regulations affecting First Amendment rights have been struck down by federal courts on equal protection grounds, where the armed forces could demonstrate no military necessity for their discriminatory application. These decisions may validly be extended in evaluating discriminatory application of article 25 criteria.

that "the 'maintenance of discipline' is based on leadership and other considerations which far outweigh the significance of who it is that details court members." Brookshire, *supra* note 23, at 90-91 n.73.

93. See UCMJ art. 16(1)(A); 10 U.S.C. § 816(L)(A) (1970).

94. See note 2 *supra*. It is arguable that a junior officer is not tried by his "peers" when he is tried by field grade officers (grades 0-4 through 0-6). However, there is little question that the educational and social "gap" between these classes is much smaller than that between junior enlisted personnel and noncommissioned, commissioned, and warrant officers.

95. The right accrues to the noncommissioned officer because of the seniority requirements of UCMJ art. 25(d)(1); 10 U.S.C. § 825(d)(1) (1970).

96. JUSTICE AND THE MILITARY, *supra* note 22, § 2-598. *But see* Army statistics, *supra* note 28.

In *Schreiber v. Wick*,⁹⁷ the Air Force was enjoined from enforcing a regulation which prohibited the wearing of wigs by reservists, since the Army allowed the wearing of wigs by personnel similarly situated. The court noted the possibility of a violation of the equal protection clause:

The conflicting policy between branches of the military service concerning the grooming of reservists might well involve constitutional problems of equal protection and due process.⁹⁸

In *Etheridge v. Schlesinger*,⁹⁹ the Navy permitted the wearing of wigs for cosmetic purposes, but barred their use by reservists to cover long hair during drill periods. The court cited *Massie v. Henry*,¹⁰⁰ in requiring the Navy to show the necessity of infringing on the freedom of the reservists. Such necessity was not demonstrated in *Etheridge*,¹⁰¹ and the court held:

Accordingly, so long as the military chooses to recognize and not curtail the rights of certain of its personnel it cannot arbitrarily curtail the same rights of other personnel. Policies of that nature, which are prohibited by the Equal Protection Clause of the 14th Amendment as applied to the states, are violative of the Due Process Clause of the 5th Amendment as applied to the Federal Government.¹⁰²

While the equal protection argument was not presented in *Carlson v. Schlesinger*,¹⁰³ a vaguely worded Air Force regulation¹⁰⁴ proscribing dissident and protest activities was declared an unconstitutional interference with First Amendment rights. The court characterized the regulation as follows:

These guidelines [in AFR 35-15], in fact, provide no substantive standards at all, and, as circumstances surrounding this litigation

97. 362 F. Supp. 193 (N.D. Ill. 1973).

98. *Id.* at 194. The preliminary injunction granted was enlarged in *Cullen v. United States*, 372 F. Supp. 441 (N.D. Ill. 1974).

99. 362 F. Supp. 198 (E.D. Va. 1973).

100. 455 F.2d 779 (4th Cir. 1972). *Massie* established in civilian cases a balancing test between governmental interests and personal interests under the First and Ninth Amendments.

101. The Navy argued that such discretionary acts were not bounded by the Constitution, and could not be interfered with by the court. The court summarily dismissed the argument. 362 F. Supp. at 204.

102. *Id.*

103. 364 F. Supp. 626 (D.D.C. 1973).

104. AFR 35-15 attempted to regulate on-base possession and distribution of dissident and protest materials, by providing: "When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission would result. If such a determination is made, distribution or posting will be prohibited" *Id.* at 629-30,

so strikingly reveal, *easily permit discriminatory and arbitrary application*.¹⁰⁵

Interservice application of article 25 criteria shows similar variances. In the Army, lower-ranking enlisted personnel served on every special court-martial where enlisted representation was requested in fiscal years 1973 and 1974.¹⁰⁶ In fiscal year 1973, eighty-four percent of enlisted members serving on general courts-martial were in the grade E-5 or below.¹⁰⁷ In fiscal year 1974, eighty-six percent were in the lower grades.¹⁰⁸ Similar statistics were not available for the Navy, Marine Corps, or Air Force.¹⁰⁹ However, out of a total of 522 Air Force general courts-martial for the two years, only ten included enlisted members on their panels,¹¹⁰ while enlisted representation was requested in four percent of Army general courts-martial.¹¹¹ Interservice variances in enlisted representation are even more pronounced in trials by special court-martial.¹¹²

Whether the courts will expand their limited application of equal protection analysis to First Amendment rights and include the right to equal treatment in the selection process under article 25 remains to be

105. *Id.* at 633 (emphasis added). The Air Force also argued for a "hands-off" policy because this was an area of military discretion. The court stated that "the mere categorization of a duty as discretionary does not, in and of itself, foreclose judicial inquiry." *Id.* at 631 n.10. The increased scrutiny given by the federal courts to alleged constitutional violations by the military has resulted from the decision in *Kauffman v. Secretary of the Air Force*, 415 F.2d 991 (D.C. Cir. 1969), *cert. den.*, 396 U.S. 1013, *reh. den.*, 397 U.S. 1031 (1970), where the court stated: "[T]he test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id.* at 997.

106. *See* note 28 *supra*.

107. *Id.*

108. *Id.*

109. Letter from Col. W.L. Lewis, Chief, Military Justice Division, USAF, to author, Nov. 15, 1974; Letter from Cdr. L.M. Farrell, Deputy Ass't Judge Advocate General, USN, to author, Nov. 8, 1974. (Letters on file in the offices of HASTINGS CONSTITUTIONAL LAW QUARTERLY.)

110. *See* note 28 *supra*.

111. *Id.* Out of a total of 3,535 general courts-martial in fiscal years 1973 and 1974, 143 accused requested enlisted representation.

112. *Id.* For fiscal years 1973 and 1974, the Army conducted 2,079 special courts-martial resulting in an approved bad conduct discharge, with enlisted representation requested in 41 (2.0%) courts. In the Air Force, there were 614 such courts, with only four constituted with enlisted members. Note also the discrepancies between services in the use of the court-martial sanction:

	Courts-Martial per 1000 Service Strength Jan-June 1972		
	General	Special	Summary
Army	.91	6.89	6.02
Navy	.20	3.00	3.60
Air Force	.13	1.49	.10
Marine Corps	1.80	14.50	14.50

1 DOD REP., *supra* note 81, at 11.

seen. First Amendment rights have long been held to be fundamental, while the right to a representative jury has only recently been recognized. Military personnel in the ranks of E-1 to E-5 certainly are in a "class" as easily identifiable as reservists. The argument's success will depend upon whether or not article 25 can be shown to bear a rational relation to the necessity of military discipline.

Judicial action is, however, only one means by which necessary reform may be implemented. There are at least three other vehicles available: (1) congressional action under article 25; (2) presidential action under the powers delegated to him by article 36 of the UCMJ; (3) action by the military itself.

Alternate Vehicles for Reform

Congressional Action

Proposals for the reform of the military justice system have been advanced in the last three sessions of Congress.¹¹³ The most comprehensive are those sponsored by Senator Birch Bayh (D. Ind.)¹¹⁴ and Senator Mark Hatfield (R. Ore.)¹¹⁵ Both proposals include provisions for the random selection of court-martial panels,¹¹⁶ and remove virtually all control over the military justice process from the convening authority.¹¹⁷ These proposals indicate an awareness in Congress of the

113. For a detailed discussion of the proposals before the 91st and 92d Congress, see Sherman, *Congressional Proposals for Reform of Military Law*, 10 AM. CRIM. L. REV. 25 (1971). Substantially identical bills were introduced in the 93d Congress: H.R. 291-292, 748, 1076, 4194, 93d Cong., 1st Sess. (1973) (constitutional rights of servicemen); H.R. 8196, 93d Cong., 1st Sess. (1973) (independent court-martial command); H.R. 316, 93d Cong., 1st Sess. (1973) (companion bill to S. 987).

114. S. 987, 93d Cong., 1st Sess. (1973). This bill is identical with S. 1127, 92d Cong., 1st Sess. (1971), discussed in Bayh, *The Military Justice Act of 1971: The Need for Legislative Reform*, 10 AM. CRIM. L. REV. 9 (1971). For discussion of the provisions and effect of S. 987, see 119 CONG. REC. S3137 (daily ed. Feb. 22, 1973) (remarks of Senator Bayh).

115. S. 2202-2214, 93d Cong., 1st Sess. (1973). These bills are identical with S. 2171-2183, 92d Cong., 1st Sess. (1971), discussed in Hatfield, *Civil Safeguards for the Military*, 7 TRIAL 43 (Sept.-Oct., 1971).

116. S. 987, 93d Cong., 1st Sess. §§ 806a(e), 825(b) (1973); S. 2211, 93d Cong., 1st Sess. (1973).

117. The proposals are greatly concerned with actual or apparent command influence. Senator Bayh and Hatfield propose to institute some form of a military judicial "circuit" to remove the judicial process from the authority of the commander. Senator Hatfield proposes to remove all jurisdiction over civilian type offenses from courts-martial. Hatfield, *Civil Safeguards for the Military*, 7 TRIAL 43, 44 (Sept.-Oct., 1971). Senator Bayh believes that such offenses may be fairly tried by courts-martial if the present system is reformed. 119 CONG. REC. S3144 (daily ed. Feb. 22, 1973) (remarks of Senator Bayh). Parallel reforms include provisions for Supreme Court review, abolishing the summary court-martial, prohibition of trial by court-martial for an offense already tried by a state court, and more strict procedures regulating pretrial confinement.

image of the military justice system which prevails today: a system exists in which the potential for command influence pervades the process from the referral of charges to review on appeal. At this date, however, none of the reform proposals have been enacted into law.

Presidential Action

The president has authority under article 36 of the UCMJ to prescribe procedures for the conduct of courts-martial.¹¹⁸ His regulations, however, may not be inconsistent with the Uniform Code.¹¹⁹ The critical question is whether the president can amend paragraph 4(c) and 4(d) of the Manual for Courts-Martial to require the random selection of jurors or, at least, representation by members of the lower ranks.¹²⁰ Would this be considered "procedural" and thus within the grant of authority, or would such an amendment conflict with article 25? It should be noted that the president has prescribed the rank of those officers who may act as summary courts-martial,¹²¹ although the UCMJ merely requires "one commissioned officer."¹²² The Court of Military Appeals has previously invalidated provisions of the Manual as conflicting with the Code, but in most of these cases the Manual had attempted to create offenses which were not proscribed by the Code.¹²³

118. UCMJ art. 36(a); 10 U.S.C. § 836(a) (1970).

119. "If a Manual provision deals with a rule of evidence or a procedural question and does not conflict with the Constitution, other law, or other Manual provisions, it is effective." *United States v. Montgomery*, 20 U.S.C.M.A. 35, 38, 42 C.M.R. 227, 230 (1970).

120. MCM, ¶ 4(c) states, in part:
"Rank of members.

. . . .

An enlisted member [who has requested enlisted members] . . . may not be tried by a court the membership of which does not include enlisted members in a number comprising at least one-third of the total membership of the court . . ." MCM ¶ 4(d) quotes verbatim the provisions of UCMJ art. 25(d)(2). Similarly, MCM ¶ 36(c)(2) (a) might be amended to direct the convening authority to select from among the peers of the enlisted accused, those who are "best qualified" under the article 25 criteria.

121. MCM ¶ 4(c) states: "Whenever practicable, the senior member of a general or special court-martial should be an officer whose grade is not below that of [0-3]. Whenever practicable, a summary court-martial should be an officer whose grade is not below that of [0-3]." These requirements have not been invalidated by the Court of Military Appeals as inconsistent with the UCMJ.

122. UCMJ art. 16(3); 10 U.S.C. § 816(3) (1970). There is also no rank or status qualification for membership on general and special courts-martial. The Code, in terms, requires only "members." UCMJ arts. 16(1)(A), 16(2)(A); 10 U.S.C. §§ 816(1)(A) (1970).

123. *E.g.*, *United States v. Landry*, 14 U.S.C.M.A. 553, 34 C.M.R. 333 (1964) (improper limitation on sentencing powers of the court-martial); *United States v. Jenkins*, 7 U.S.C.M.A. 261, 22 C.M.R. 51 (1956) ("fraudulent enlistment" under article 83 held not to include induction as stated in the Manual).

Military Action

Affirmative action has been taken by the military itself. The military is extremely sensitive to civilian criticism, and this is responsible in part for the "in-house" cleaning which is beginning within the armed forces. It has been demonstrated that the military jury selection process can conform to the American Bar Association standards¹²⁴ without hindering military discipline and without amendment of article 25.¹²⁵ Several commands have experimented with random selection procedures,¹²⁶ and current Army statistics reflect that representation of lower-ranking enlisted personnel is increasing.¹²⁷

In addition to the voluntary efforts of individual commanders, the Department of Defense completed a study of military justice¹²⁸ and in 1973 implemented several of the task force recommendations.¹²⁹ Court-martial panel selection was noted as one deficiency in the process,¹³⁰ but no corrective action has been directed by the Department of Defense.¹³¹

Conclusion

The accused in a court-martial has a statutory right to trial by jury. An enlisted person has the right to request enlisted representation on his court, but statistics indicate that few do so. No statistics are available concerning motives for avoiding the choice, but fear of an imbalanced and biased panel may play a part in the choice of trial by mili-

124. Brookshire, *supra* note 23, at 76 n.17 citing AMERICAN BAR ASSOCIATION STANDARDS RELATING TO TRIAL BY JURY, Approved Draft 1968. The ABA standards provide for random selection from a community cross-section, and conform closely with the procedures and policy of the Federal Jury Selection and Service Act of 1968.

125. *Id.* at 94-106.

126. Remcho, *supra* note 4, at 219-20; Van Sant, *Trial by Jury of Military Peers*, 15 JAG L. REV. 185, 186 n.18 (1974).

127. Compare Army statistics, *supra* note 28, with *United States v. Crawford*, 15 U.S.C.M.A. 31, 36, 35 C.M.R. 3, 8 (1964).

128. 1-4 DOD REP., *supra* note 81.

129. SECRETARY OF DEFENSE, MEMO TO SERVICE SECRETARIES, Jan. 11, 1973, cited in 1 MIL. L. REP. 4002 (Jan.-Feb. 1973).

130. 1 DOD REP., *supra* note 81, at 89-90, 125. The task force recommended implementation of random selection procedures, in addition to numerous other reforms. The task force report expressed the opinion that "[r]eference to the interests of the country and the armed forces is not in any way incompatible with justice for the individual. There can be no real and lasting discipline for American servicemen that does not rest upon a fair and just administration of our law as it impacts upon the individual. So no need is seen to consider the sacrifice of justice for the sake of discipline. The two are, for American servicemen, inextricable, and the latter cannot exist without the former." *Id.* at 13.

131. See note 129 *supra*. The secretary's memorandum noted that many of the task force recommendations would require congressional action for implementation. Presumably, random selection of court-martial panels falls within this category.

tary judge alone. Whether the panel which sits at the trial is *in fact* unfair is not in issue, but *appearance* of unfairness can be remedied under existing statutes without excessive administrative burden and without any demonstrable decline in discipline or morale.

Under the present system, the dilemma of the low-ranking enlisted accused should be obvious. He may request trial by military judge alone and quite possibly receive a more severe sentence. He may accept an all-officer panel and hope that company grade officers more likely to be sympathetic towards him will be assigned to the panel. He may request enlisted membership hoping that his particular convening authority believes that lower-ranking enlisted men are mature and responsible enough to perform jury duty.

The differences in availability of junior enlisted personnel on courts-martial between services and commands within the same service are considerable. The requirements of due process or equal protection cannot justify such a system of inequality by recourse to a 200 year old history which has no application to the modern military,¹³² or by allowing congressional action under the auspices of Article I, which is unsupported by any clear showing of necessity.

In the absence of a right to direct review by the Supreme Court, and because of Congress' hesitancy to reform the Uniform Code of Military Justice, the burden of judicial action necessarily falls on the Court of Military Appeals. That court has refused to apply military due process requirements to court-martial panel selection. A representative selection procedure could be required by the court by re-evaluating the requirements of military due process. Alternatively, the requirement could be imposed under the implied equal protection guarantee of the Fifth Amendment.

In the absence of judicial action, reform may be implemented by Congress through its Article I powers. The president may direct "procedural" modifications in the selection process and await judicial determination whether such procedures are in conflict with the congressional intent underlying article 25. But immediate action can be, and is, being taken by the military itself. The convening authority is increasingly aware that there is no inconsistency between fairness and discipline. If the trend continues, the court-martial will become a court of justice for all military personnel.

132. The enormous increase in the size of the military forces, the expansion of court-martial jurisdiction into criminal cases, the number of Americans subject to military service, and the increased educational level and training of the modern enlisted person are factors which were nonexistent, and probably undreamed of, in 1789. See Wiener, *Courts-Martial and the Bill of Rights: The Original Practice II*, 72 HARV. L. REV. 266, 298-302 (1958).