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Trial by Peers:  
*Enlisted Members on Courts-Martial*

CHARLES W. SCHIESSER*

I.

**INTRODUCTION**

Trial by peers would have been unthinkable, and impossible, under the system of military law from which our own was adopted. That system—the British—reflected the characteristics of a monarchial, rather than a republican, form of government, and it was under British colonial rule that military law of the United States had its genesis. This proved unfortunate, because class structure pervaded the administration of American military law even though any classification by caste outside of the military was alien to our founding philosophy.

The British Army, serving a King and officered by the upper classes, constituted a general court-martial at the time of the American Revolution by convening thirteen or more commissioned officers of field grade. Following

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*Captain, U.S. Army, Judge Advocate General's Corps. The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's Corps or any other governmental agency.

1. WINTHROP, MILITARY LAW AND PRECEDENT 21 (2d ed. 1920); AYCOCK & WURFEL, MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE 9 (1955).

2. It is difficult to understand how early America could compose general courts-martial from an all-officer upper class, while professing the following belief found in the Declaration of Independence: "that all men are created equal; that they are endowed, by their Creator, with certain unalienable right; that these are life, liberty, and the pursuit of happiness."

3. For a detailed discussion of how our early military law was designed for empires and monarchies, where the officers spring from the aristocracy while the mass of the Army is recruited from the lower classes, see Morgan, Military Justice, reprinted in Hearings on S. 64 before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st & 2d Sess., 1388-1395 (1919). For similar expressions by a former Acting Judge Advocate General of the Army, see Ansell, Military Justice, 5 CORNELL L.Q. 1 (1919) and Ansell, Some Reforms in our System of Military Justice, 32 YALE L.J. 146 (1922).

4. WINTHROP, op. cit. supra note 1, at appendix VII, 981-942. The British Articles of War of 1765 provided in Article I, Section XV: "A general court-martial . . . shall not consist of less than thirteen officers . . . nor [shall they] be under the Degree of a Field Officer."
this pattern, the first military code for American colonial troops, the so-called Massachusetts Articles, adopted April 5, 1775, provided for an identical general court-martial. The first National Articles, adopted June 30, 1775, provided: "No general court-martial shall consist of a less number than thirteen... commissioned officer[s]."

The Articles of 1775 were so strongly influenced by the British system that they referred to the colonists as His Majesty's most faithful subjects. With the approach of the revolution, it became necessary to abolish allegiance to the Crown. In order to accomplish this, the Congress appointed a Committee on June 14, 1776, to study and revise the Articles of War. Since the Committee was composed of John Adams, Thomas Jefferson, John Rutledge, James Wilson, and R. R. Livingston, one would have anticipated that a distinctive American democratic flavor would be instilled into any code which it recommended for the government of men who were created equal. Nothing could be further from what occurred. John Adams, apparently deeply impressed by the British Army and in control of the Committee, states "There was extant one system of articles of war which had carried two empires to the head of mankind, the Roman and the British; for the British articles of war were only a literal translation of the Roman. It would be in vain for us to seek in our own inventions, or the records of warlike nations, for a more complete system of military discipline... I was, therefore, for reporting the British articles of war Totidem Verbis." In so many words, the code of 1776 did adopt the British Articles of War except for any expression of allegiance to the Crown, and while enlarging and modifying the Articles of 1775, it recast them into the arrangement of the British Articles under separate sections. And like its predecessors, it provided that "A general court-martial in the United States shall not consist of less than thirteen commissioned officers."

This code of 1776 was amended in 1786, providing that "General courts-martial may consist of any number of commissioned officers from 5 to 13 inclusively; but they shall not consist of less than 13 where that number can be convened without manifest injury to the service."

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4 Article 32 reads in part: "No general court martial shall consist of a less number than thirteen, none of which shall be under the degree of a Field officer..." For a reprint of the Massachusetts Articles, see WINTHROP, op. cit. supra note 1, at appendix VIII, 947-950. See generally Article 37, Massachusetts Articles, for the composition of Regimental (Special) courts-martial.

5 Art. XXXIII. See WINTHROP, op. cit. supra note 1, at appendix IX, 953 at 956. See generally Article XXXVIII for the composition of Regimental (Special) courts-martial.

6 3 JOUR. CONG. 374 (1776).


8 See Article I, of Section XIV, American Articles of War of 1776. They are reprinted in WINTHROP, op. cit. supra note 1, at appendix X, 961-967. See generally Article 11 for the composition requirements of Regimental (Special) courts-martial.

9 WINTHROP, op. cit. supra note 1, at appendix XI, 972. This change came about because
cluded as Article 64 of the code of 1806, Article 75 of the code of 1874, and Article 5 of the 1916 amendments.

In that fashion, the composition of American courts-martial followed the all-officer course set for us by the British. In 1918 officials within the Office of The Judge Advocate General in the War Department attempted to alter this course. Their spokesman, General Samuel T. Ansell, based upon his first-hand knowledge of military justice, recommended new Articles of War, "... to supercede personal Military Power over Military Justice by Public Law." To do this, Ansell believed, it was necessary that the new Articles of War regard "... grade in the Army as a requisite of authority only, and not as marking a caste with established rights of preferment in matters of Justice." Thus the American court-martial's composition, based as it was upon the British principle of hereditary nobility, would have to be changed to reflect the democratic philosophy under which all Americans lived, except those in the American Military Establishment. His draft of proposed Articles of War was introduced in the Senate by Senator Chamberlain and in the House by Congressman Royal Johnson. It entitled enlisted members to serve on both general and special courts-martial. If a private or noncommissioned officer were to be tried by a general court-martial, three-eighths of the court-martial membership would be privates or noncommissioned officers, respectively. With special courts-martial, the proportion would be one-third. This equalitarian

requiring thirteen officers on every general court-martial failed to make adequate provision for the trial of accused serving in small and isolated units. In addition, Article 5 reduced the number of officers required to compose a Regimental (Special) court-martial to three.

The British Articles of War had always been arranged in Sections. The American Articles of War followed this arrangement until 1806 when it was abandoned, and it has never been resumed. See Winthrop, op. cit. supra note 1, at appendix XII, 976-981. See generally Article 66 for the three officer composition of Regimental (Special) courts-martial.

Winthrop, op. cit. supra note 1, at appendix XIII, 986-992. See generally Articles 80 and 82 concerning the three officer composition of Regimental (Special) courts-martial.


Morgan, The Existing Court-Martial System and the Ansell Army Articles, 29 Yale L.J. 52, 73 n. 80 (1919).

Ibid.


Art. 4. For interesting, and sometimes vitriolic, discussions of the proposed provisions entitling enlisted members to serve on general and special courts-martial, see Hearings on S. 64 before a Subcommittee of the Senate Committee on Military Affairs, 66th Cong., 1st & 2d Sess., at 52-35, 276-279, 350-351, 493-484, 537-540 and 1378 (1919).

Proposed Article 5 stated: "General courts shall consist of eight members, three of whom in the case of the trial of a private soldier shall be privates, and in the case of the trial of a noncommissioned officer or warrant officer shall be noncommissioned or warrant officers, respectively."

Proposed Article 6 stated: "Special courts shall consist of three members, one of whom in the case of the trial of a private soldier shall be a private, and in the case of the trial of a noncommissioned or warrant officer shall be a noncommissioned or warrant officer, respectively." This equalitarianism was both opposed and supported by members of the American Bar Association, see Morgan, supra note 15, at 58, n. 21.
philosophy was strongly opposed\textsuperscript{20} by those in the War Department whom Professor Morgan called "the conservatives of the regular service. . . ."\textsuperscript{21} Their influence with the Congress resulted in the removal of all proposals from the Articles of War as enacted in 1920\textsuperscript{22} to provide enlisted members with representation on courts-martial. With minor modifications, these class oriented Articles of War of 1920 controlled military justice until after World War II.\textsuperscript{23}

Subsequent to the first attempted reform movement in American military law (the 1918-1920 Ansell reform movement), tranquility prevailed for military justice until shortly after World War II. This was to be but a lull before the storms which revolutionized the military justice system, infusing into it partial democratic reforms. The second reform movement—which culminated in the Elston Act—originated in federal court cases where petitioners seeking writs of habeas corpus alleged that all-officer military tribunals infringed upon their constitutionally protected interests. But the federal courts refused to substitute their judgment for age-old military practices.\textsuperscript{24} This forced the ascending storm of criticism surrounding military justice back into the legislative arena.

\section*{II.}
\textbf{The 1948 Amended Articles of War—the Elston Act}

\textbf{A. Public dissatisfaction with military justice.}

With the end of World War II, the American Army returned from the conflict against Germany and Japan to tumultuous victory celebrations. Crowds cheered as the soldiers passed in review. Casual civilian observers, unfamiliar...
iar with the internal workings of this mighty war machine, were unaware of the seething discontent within the ranks caused by an archaic system of military justice.

Returned to civilian life and free of military censorship, American soldiers began to voice their complaints against the military system under which they had won the war. Mildly at first, then rising in tempo, finally reaching a grand crescendo of contumely in the spring of 1946; it could no longer be ignored.\(^{25}\)

In order to determine the causes of so much discontent with the Army, the then Secretary of War, the Honorable Robert P. Patterson, on March 18, 1946, appointed a board of officers and enlisted men to study officer-enlisted man relationships.\(^{26}\) The Board found that the Army structure in 1946 was based upon a caste system.\(^{27}\) As a result, many officers abused enlisted men by improperly exercising their rank and privileges as officers.\(^{28}\) No single fault found with the Army, however, was as great as that found with the courts-martial system.\(^{29}\) With respect to military justice, the Board stated:

> The largest differential [difference in treatment between officers and enlisted personnel] which brought the most criticism in every instance, was in the field of military justice and courts-martial procedure which permitted inequities and injustices to enlisted personnel.\(^{30}\)

Amid the Board's many recommendations for change,\(^{31}\) almost hidden in obscurity, was the statement "... that enlisted personnel be permitted on

\(^{25}\) For some examples of post-war criticism of the Army, see editorials reprinted in *Hearings before the Legal Subcommittee of the House Committee on Armed Services, on H.R. 2375, 80th Cong., 1st Sess. 2166-2175 (1947)* and *13 U. Chi. L. Rev. 494, 498-500 (1946).*

\(^{26}\) This was the famous Doolittle Board named after its Chairman, Lieutenant General James H. "Jimmy" Doolittle. Other members were Lieutenant General Troy H. Middleton, Lieutenant Colonel Robert Neville, Captain Adna H. Underhill, Technical Sergeant Jake W. Lindsey, and Sergeant Meryll M. Frost.

\(^{27}\) *Report of the Secretary of War's Board on Officer-Enlisted Man Relationships,* S. Doc. No. 196, 79th Cong., 2d Sess., 2 (1946). With respect to criticism of the Army immediately after the war, the Board said at page 3, "Americans... strongly resist any growth of an old-world type of military caste because such would be out of keeping with our democratic government. Therefore, as soon as soldiers returned to civilian status, many became articulate; some vociferous; and a few outright abusive. The peak of editorial attack on the Army was reached in the spring of 1946."

\(^{28}\) *Id.* at 10 and 17.

\(^{29}\) It appears strange that authors most conversant with World War II military justice apparently found it perfect. At least their articles are silent on the subject of inadequacy of that military law. Compare McCarthy, *Administration of Military Justice in the United States Army,* 19 CONN. B. J. 194 (1945) and Saden, *Army Justice,* 20 CONN. B. J. 106 (1946) who wrote as active duty judge advocates, *with Berry, The Courts-Martial System, Justice or Tyranny?* 3 J. Mo. B. 54 (1947), a former judge advocate who was highly critical of the World War II military justice system.


\(^{31}\) *Id.* at 19-22.
These seven words were ultimately to instill into courts-martial part of the democratic influences sought in vain in 1919, by General Samuel T. Ansell.

Even before the Doolittle Board's report was printed, it became apparent that military justice was the center of extreme controversy. In response to this criticism a distinguished group of individuals was appointed to a War Department Advisory Committee on Military Justice. Its Chairman was Arthur T. Vanderbilt, and it has subsequently been referred to as the Vanderbilt Committee. From March 25, 1946, until December 13, 1946, the Committee investigated military justice, held hearings, and studied voluminous statistical data received from The Judge Advocate General's Department. The Vanderbilt Committee recommended, in part, that:

Qualified enlisted men should be eligible to serve as members of general and special courts-martial and should be appointed thereon to the extent that in the discretion of the appointing authority, it seems desirable to do so. We realize that there is a sharp division of opinion on the subject. The generals and commissioned officers generally are divided as to the desirability of the proposal, while a preponderant majority of the enlisted men favor it. Those opposed to it contend that since the movement of qualified men in the Army is upward, the appointment of enlisted men will lower the quality of the courts and give rise to personal antagonism and recrimination in Army units when enlisted men participate in the conviction and sentence of their fellows. We think, however, that some improvement of the morale of the enlisted men may follow from increasing their knowledge of the functioning of the Army system of Justice, their confidence in its operation and their feeling of responsibility for the enforcement of Army discipline. (Emphasis added).34

32 Id. at 21.
33 The Committee was appointed by War Department Memorandum No. 25-46 dated March 25, 1946. The other members of the Committee were Alexander Holtzoff, Walter P. Armstrong, Frederick E. Crane, Joseph W. Henderson, William T. Joyner, Jacob M. Lashly, Morris A. Soper, and Floyd E. Thompson. Perhaps the War Department was induced to act by the report of the House Committee on Military Affairs, Investigation of the National War Effort, H.R. Rep. No. 2722, 79th Cong., 2d Sess., (1946). This report, dated August 1, 1946, contained sixteen recommendations which called for general reform in military law. Recommendation 3 reads as follows:

That Congress consider amending article of war 4 in such manner as to provide that when charges are brought against enlisted men for trial by special or general court-martial, they shall be informed of their right to have enlisted men sit on the court;

That if the accused so request, enlisted men shall be appointed to the number of one-third of the total membership of the court;

That enlisted men so appointed shall be selected from other companies or equivalent organizations than that of the accused person and that of the officer bringing the charges; and

That failure to comply with this provision shall be a jurisdictional error.

34 Report of the War Department Advisory Committee on Military Justice, 14 J.B.A.D.C. 69, 85 (1947). Note that the underscored report recommended that an accused's right to enlisted court members should be discretionary with the appointing authority, but this was rejected by Congress in enacting the Elston Act, 62 Stat. 624 (1948).
With the Vanderbilt Committee's imprimatur on enlisted membership for courts-martial, support for the movement gained tremendous momentum.\(^3\) The subsequent approval of the enlisted member proposal by the War Department\(^8\) assured that the experiment would be tried.

**B. Article 4—Enlisted members qualify.**

The Committee hearings in the Congress on the Elston Act favored enlisted membership on courts-martial,\(^3\) as did the floor debate.\(^3\) As enacted, the pertinent part of the enlisted member provision reads:

Enlisted persons . . . shall be competent to serve on general and special courts-martial for the trial of enlisted persons when requested in writing by the accused at any time prior to the convening of the court. When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one third of the total membership of the court.\(^8\)

The storm of protest following World War II, as we have seen, swept aside one-hundred-seventy-three years of tradition; all-officer courts-martial were no longer mandatory for enlisted accused in the Army or the Air Force. After a short abatement, the tide of change was to arise again sweeping in front of it this time one-hundred-seventy-six years of tradition—the tradition that each individual service be governed by its own military justice code.

**III.**

**The Uniform Code of Military Justice—Article 25**

In 1948 the newly created Department of Defense decided to unify the separate military justice codes\(^4\) of its subordinate departments into one Uniform

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\(^4\) At this time, the Army and Air Force were governed by the Articles of War, as amended, by Title II of the Selective Service Act of 1948 (the Elston Act), Public Law 759, 80th Cong., 62 Stat. 604. The Navy had separate Articles for the Government of the Navy found in Rev. Stat. § 1624, as amended by 10 Stat. 627 (1855), 35 Stat. 621 (1909) and 39 Stat. 586 (1916).
Code of Military Justice. This Uniform Code was to be applicable to all personnel within the Department of Defense. A special committee was appointed to draft a recommended code to be submitted to the Congress. One of the Committee's recommendations was to permit enlisted membership on general and special courts-martial, which, of course, was merely consistent with the then current Army and Air Force military law.

When the proposed code reached the Congress, there was no opposition to enlisted representation on courts-martial, although there were extended discussions concerning the implementation of the proposed scheme.

As codified Article 25, Uniform Code of Military Justice, provides that any enlisted member of an armed force on active duty is eligible to serve on general and special courts-martial, except members of an accused's unit, and those junior to the accused in rank or grade (when it can be avoided). Enlisted members are authorized only if the accused personally requests, in writing, and before the convening of the court, that enlisted members serve. After such a request an enlisted accused may not be tried unless one-third of the court-martial's membership is enlisted, unless eligible enlisted members cannot be obtained due to physical conditions or military exigencies. When such conditions occur, and prevent enlisted membership on the court-martial, the convening authority must make a detailed written explanation which becomes a part of the record of trial in the particular case. When selecting enlisted members for court-martial duty, just as in the case of officers selected for court duty, the convening authority is directed by the Code to detail those members who, in his opinion, are best qualified for court-martial duty by reason of age, education, training, experience, length of service, and judicial temperament.

In comparing Article 25 of the Code with Article 4 of the Elston Act, one can note several significant differences:

The Coast Guard was then governed by the Disciplinary Laws of the Coast Guard found in Public Law 207, 81st Cong., 1st Sess., ch. 393, approved August 4, 1949, 14 U.S.C. § 563, 564 (1949). Neither the Navy nor the Coast Guard was authorized courts-martial, in part, composed of enlisted members prior to the applicability of the Uniform Code of Military Justice.

The Chairman of this Committee was Professor Edmund M. Morgan, Jr., of the Harvard Law School. Other members of the Committee were then Assistant Secretary of the Army Gordon Gray, then Under Secretary of the Navy John Kenney, and then Assistant Secretary of the Air Force Eugene Zuckert.


Hearings before a Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Cong., 1st Sess., at 602, 715, 723-724, 727, 1138-1141, and 1147-1152 (1949); Hearings before a Subcommittee of the Senate Armed Services Committee on S. 857 and H.R. 4080, 81st Cong., 1st Sess., 95-96 (1949).

Article 4, Elston Act

1. "Enlisted persons . . . shall be competent to serve on general and special courts-martial . . . ." (emphasis added)

2. [Enlisted members must be] "... requested in writing by the accused at any time prior to the convening of the court."

3. "When so requested, no enlisted person shall, without his consent, be tried by a court the membership of which does not include enlisted persons to the number of at least one-third of the total membership of the court." (emphasis added)

4. [Selection is by] "... age, training, experience, and judicial temperament. . . ."

5. "... officers and enlisted persons having less than two years' service shall not, if it can be avoided without manifest injury to the service, be appointed as members of courts-martial. . . ."

Article 25, UCMJ

1. "Any enlisted member . . . is eligible to serve on general and special courts-martial . . . ." (emphasis added)

2. [An enlisted member] "... shall serve as a member of a court only if, before the convening of the court, the accused personally has requested in writing that enlisted members serve on it." (emphasis added)

3. "After such a request the accused may not be tried . . . [unless there are] enlisted members in a number comprising at least one-third of the total membership of the court, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies." [If enlisted members are unavailable, the convening authority must provide a detailed written explanation of their absence which is appended to the record of trial in the particular case.] (emphasis added)

4. [Selection is by] "... age, education, training, experience, length of service, and judicial temperament." (emphasis added)

5. No comparable provision.

IV.

The Convening Authority and Enlisted Members on Courts-Martial

A. The selection of enlisted court members

In discussing the question of who should select enlisted court members, it is necessary to distinguish between initial and ultimate selection. The law clearly provides that only the convening authority personally may make the ultimate selection of those enlisted members actually to participate in the trial.45

The convening authority of a general court-martial normally will command a division, corps, army or higher command. It is apparent that he will be unable personally to prepare lists of prospective enlisted court members and still fulfill his other important command duties. This is why normal

staff procedure is utilized to secure the initial list of prospective enlisted court members. In common practice, either the staff judge advocate or the adjutant general of a command draws up a list of from eight to ten names of enlisted members arranged in order of rank. From this list, which usually only discloses the prospective member's name and rank, the convening authority selects the court members.

The major defect in this system is that each command exercising general court-martial jurisdiction has its own unique policy, or no policy, on how to make this initial selection. It was just this policy, or lack of policy, which led the convening authority in United States v. Barben, in selecting two E-8's and one E-7 for the accused's court-martial, to choose enlisted members none of whom was a graduate of the twelfth grade. Even more startling, in CM 409319, Johnson, the enlisted members were selected by a warrant officer in the command. The list of prospective enlisted court members was never presented to the convening authority. Examples like these are certain to arise again unless a new policy is adopted to correct the present defects in selecting enlisted members. (It should be noted that all of the defects applicable to selecting enlisted members is equally applicable to the system used in selecting officer court members).

B. How enlisted members should be selected for court service

One of the most desirable objectives of any change in policy would be the creation of an Army-wide court-martial selection system designed to insure that all pertinent information about prospective court-martial members is provided to convening authorities prior to their ultimate selection of court members. This system can be secured without Congressional action through a departmental regulation which would set minimum standards for a general court-martial selection policy. Unfortunately, neither the Manual For Courts-Martial, United States, 1951, nor the Uniform Code of Military Justice established a satisfactory selection system.

No regulation issued by the Department of the Army can take away the individual commander's discretion to make the ultimate selection from whatever group he may lawfully select court members. It is not intended that a regulation should even attempt to do this, for the Uniform Code of Military Justice gives this discretion specifically to the court-martial convening authority. Indeed, a commander's desire to select enlisted court members ei-
ther from the highest enlisted grades or from a cross-section of the enlisted community is wholly irrelevant to the present discussion. For in either case what is desired is selections of those members best qualified, and in order to obtain this end, a new administration is recommended.

A departmental regulation should require that each general court-martial jurisdiction assign one of the officers presently on the commander's staff the responsibility of accomplishing functions similar to those of a civilian jury commissioner (court-martial commissioner). This officer, in addition to performing his regular duties, would be directed by the court-martial commissioner regulation to keep lists of officers, warrant officers, and enlisted members available for the staff judge advocate to present to the convening authority when necessary. This initial selection would be made from any group within the above three categories which the local commander desired, so long as the selection is within minimum legal standards. Hence, it would be possible to have variations in local selection systems depending upon the individual commander's exercise of discretion. The court-martial commissioner system would not necessarily broaden the base of any group from which enlisted members are selected. Rather, its primary function would be to provide every commander with sufficient information to insure that in the exercise of his discretion he may select only those members who are best qualified whatever base of selection is employed.

The initial selection lists presently utilized provide convening authorities with only the prospective member's name and rank in most cases. The following additional information about each prospective court member should be provided, as a minimum, on such lists: (1) age; (2) educational attainment; (3) training generally and in military justice; (4) experience generally and any court-martial experiences; (5) length of service; and (6) comments by the prospective member's immediate commanding officer (except where the convening authority is that officer and thus the comment would be unnecessary) regarding the member's temperamental suitability for court-martial duty.

The procedure suggested would be nothing more than an administrative method of making available to the convening authority in usable form that information about prospective court members which would be logically relevant to him in following the guidelines established by the Code in this area. It would in no sense limit or otherwise affect the convening authority's exercise of discretion, but would merely make available to him in a systematized way pertinent information about prospective court members.

C. When enlisted members should be selected

By creating the position of court-martial commissioner on the commander's staff, the command would have an officer responsible for maintaining con-
tinuously lists of court members, officers and enlisted. These lists should be kept current at all times so they could be available for immediate use. This would prevent the usual embarrassment which arises when an accused requests enlisted members for his court-martial shortly before the court-martial is to convene.

D. Which enlisted members should be selected for court service


Commissioned officers are qualified to be members of any court-martial. Warrant officers are qualified, except to participate in the trial of a commissioned officer, while enlisted members are qualified only after they are requested by an enlisted accused. Whether the members of a court-martial are officers or enlisted, they may not be selected in a manner which might deny a fair trial to an accused. The trial counsel may not participate in the court member selection process because this tends to destroy the adversary nature of the criminal proceedings. This rule is, of course, in accord with civilian law in this area.

The court-martial commissioner could keep additional information in his files, such as prospective court member’s departure dates from the command pursuant to permanent orders, TDY orders, and other pertinent information which might affect prospective court-martial member’s availability to perform court-martial duty. This would make the Army system more nearly resemble the system used in selecting so-called “blue ribbon” juries in New York. In the New York system, the special panel, or “blue ribbon” panel, is a part of the regular judicial machinery, and is not brought into existence from case to case. See Fay v. New York, 332 U.S. 261, 268 (1947).

This very thing occurred in United States v. Crawford, 15 USCMA 31, 35 CMR 3 (1964), motion for leave to file petition for cert. denied, 380 U.S. 970 (1965). Both the staff judge advocate and the convening authority were still seeking out eligible enlisted members the evening before the morning on which the court-martial was to convene. As to when it is necessary to have the court-martial composed of one-third enlisted members, compare MCM, 1951, para. 61g with WC NCM 58-01534, Rendon, 27 CMR 844 (1958).

MCM, 1951, para. 4a; art. 25 (a), UCMJ, 10 U.S.C. § 825 (a) (1958). Indeed, absent evidence of prejudgment of the accused’s case, a court-martial trying a colored accused may be composed of “senior officers” who are predominantly “southerners.” CM 360557, Bryson, 10 CMR 164, 171 (1952), petition for review denied, 3 USCMA 814, 10 CMR 159 (1953). But see, Art. 25 (d) (1), UCMJ, 10 U.S.C. § 825 (d) (1) (1958) which provides that neither commissioned officers, warrant officers, nor enlisted members should be permitted on a court-martial to try an accused senior in rank or grade to the member, if it can be avoided.

MCM, 1951, para. 4a; art. 25 (b), UCMJ, 10 U.S.C. § 825 (b) (1958). MCM, 1951, para. 4a; art. 25 (c), 25 (c). (l), UCMJ, 10 U.S.C. § 825 (c) (1) (1958).


ACM 8501-R, Cook, 18 CMR 715 (1955). But see, ACM 10226, Sax, 19 CMR 826, 887-889 (1954), petition for review denied, 6 USCMA 822, 19 CMR 418 (1955). This case permits a trial counsel to initiate a request for court-martial members, but limits permissible conduct to purely administrative action, and prohibits the trial counsel from selecting any of the court members.

United States v. Murphy, 224 Fed. 554 (N.D.N.Y. 1915); Patrick v. Commonwealth, 115 Va. 935, 78 S.E. 628 (1915).
2. Enlisted member selection

While Article 25 (c) (1), Uniform Code of Military Justice,\(^9\) makes any enlisted member on active duty eligible to serve on general and special courts-martial, experience shows that usually only senior enlisted members actually serve on general courts-martial.\(^9\)

This practice was challenged by the author, then acting as appellate defense counsel for the accused, in the case of United States v. Crawford.\(^1\) The accused claimed that otherwise eligible enlisted members had been intentionally and systematically excluded, on an Army-wide basis, from participation in general courts-martial, and the effect of this exclusion as applied to the accused’s case deprived him of military due process. Although the United States Court of Military Appeals, with one Judge dissenting, rejected the accused’s contentions, certain important rules were set forth concerning the selection of enlisted members for courts-martial service. Three opinions were written in this case, and they will be discussed seriatim.

Chief Judge Quinn, whose opinion constitutes the Court’s decision, while recognizing that servicemen do not have the protection of indictment by grand jury or trial by petit jury, would accord to them all constitutional rights not plainly denied them as military accused. One of these rights is to be treated equally with all other accused in the selection of impartial triers of the facts. All enlisted members are eligible for court-martial service, and any blanket exclusion would be unlawful, whether accomplished by the convening authority making an ultimate selection or by a staff officer making an initial selection. Some junior enlisted members would meet the statutory qualifications\(^2\) for selection, but substantial preliminary screening would be necessary in order to find them. Hence it is permissible to select enlisted court-martial members from the highest non-commissioned officer ranks first (E-7 to E-9),\(^6\) when the only reason in looking to these higher non-commis-

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\(^1\) For similar views, see Mullally, Military Justice: The Uniform Code in Action, 53 Colum. L. Rev. 18 (1953); as of December 1964, the same was true of the Air Force. Comment, Current Trends in Military Criminal Law, 6 AF JAG L. Rev. 13, 15 (Nov.-Dec. 1964).

\(^6\) 15 USCMA 31, 35 CMR 3 (1964), motion for leave to file petition for cert. denied, 380 U.S. 970 (1965). The author wishes to gratefully acknowledge the legal and statistical research done by co-counsel, Captain Daniel Benson, in Crawford, since it constitutes a source of information relied upon in this paper. See also United States v. Motley, 15 USCMA 61, 35 CMR 33 (1964) and United States v. Glidden, 15 USCMA 62, 35 CMR 34 (1964).


\(^6\) 15 USCMA 3 at 40, 35 CMR 3 at 12. These qualifications are “... age, education, training, experience, length of service, and judicial temperament.” See Art. 25 (d) (2), UCMJ, 10 U.S.C. § 825 (d) (2) (1958).

\(^6\) Thus excluding all specialists of whatever grade, as was admittedly done in the Crawford case.
sioned officer ranks is to find persons possessed of proper qualifications to judge and sentence an accused.

Judge Kilday believed that civilian cases concerning jury selection are inapplicable to a court-martial selection system. For Judge Kilday, trial by court-martial is trial by one's superiors, not by one's peers. He believed that the Congress was aware that senior enlisted members would be used by the services, and also that a convening authority in faithfully exercising his discretion in selecting enlisted members would naturally select those most responsible which, in most cases—although not necessarily—would be those who had attained seniority.

Judge Ferguson, in dissent, considered the issue so fundamental that it must be treated as jurisdictional in nature. After determining, much like Chief Judge Quinn, that all enlisted members were eligible for court-martial service, he noted that for the period 1959 to 1962, an average of 89.4 per cent of all enlisted court-martial members in general courts-martial in the Army were selected from the top three enlisted grades—E-7, E-8, and E9. He found that "[T]he statistics cited [by the accused] show that in the Army there is a 'systematic and intentional exclusion' from . . . court lists. . . ." Judge Ferguson, therefore, would have ordered a new trial.

As a matter of literal interpretation, under the Crawford decision a command could select its enlisted court members from the top three non-commissioned officer grades, excluding all specialists, and make no further inquiry into the qualifications of the members thus selected. This would be too narrow a reading of Crawford, however. Great caution should be exercised in this area since the rationale of the Court's decision in the Crawford case is subject to attack as representing a radical departure from modern federal law. This departure must be explored in some detail in order to extract reliable guides for future cases from Crawford.

The United States Court of Military Appeals has repeatedly held that federal practice should be followed in the military unless it is contrary to, or incompatible with, military law. Thus, while conformity of practice is not duplication of practice, it was to be expected, in Crawford, that the court would follow federal precedent in the area of jury selection. Certainly a court-martial is not a jury, and the comparison of one with the other can be

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64 Trial by peers is allowed by the Code, however; it is trial by juniors that is prohibited. For example, if an E-8 were on trial, all E-8's with an equal or earlier date of rank would be authorized to participate as members of the court-martial. Certainly this is trial by one's peers. Conversely, all E-8's with a later date of rank, and all enlisted personnel below the grade of E-8, would not be authorized to participate as members of the court-martial if that could be avoided.

deceptive if this fact is not recognized. But having recognized the difference, it is at once apparent that there are many similarities; both tribunals find facts, determine guilt or innocence, and in some instances, juries fix punishments, as do courts-martial. The analytical generic problems involved in determining whether exclusion of eligible members during selection procedures was intentional, systematic, or arbitrary, are the same in the military as in civilian law. But the United States Court of Military Appeals did not follow federal law at that point where it was most applicable: in the analysis of the generic problems of exclusion. Surprisingly enough, while the court indicated a readiness to follow some of the federal principles involved, it did not adopt the working tests utilized by the federal courts in resolving the generic problems. This is demonstrated by an examination of the federal rules in the area of jury selection.

First, as to the general legal principles involved, the applicable rules may be broadly stated as follows: (1) an accused is not entitled to any particular kind of jury; (2) an accused has no right of inclusion on the panel of any person or class of persons; but, (3) an accused is entitled to a fair and impartial jury drawn from a panel from which no class of eligible persons was systematically, arbitrarily, and purposefully excluded solely because of membership in that class, or prejudice against that class, as determined by considerations of race, color, sex, party affiliation, social status, economic condition, or any other consideration which is irrelevant to the performance of jury duty. These rules were developed in a long line of cases by the Supreme Court of the United States, and they are now applied.

In determining how and when to apply these rules, the Supreme Court of the United States looks at the facts to reach the generic problems involved: was there exclusion, and if so, what was its scope and purpose? General assertions of regularity by the officials involved are rejected when a prima facie

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67 In Texas, for example, the jury determines the sentence in many instances. See Vernon's Texas Code of Crim. Pro. arts. 502, 778 (1964).

68 Exclusion of certain well-defined classes on bona fide grounds of community welfare is not prohibited, such as judges, attorneys, police officers, ministers, firemen, and physicians as some examples. See, 50 C.J.S. Juries § 153 (1947); 31 Am. Jur. Jury § 68 (1958). Nor is exclusion of the type practiced in New York for "blue ribbon" juries prohibited, since classes are not excluded there, but individuals and the exclusion is based on factors that are relevant to jury duty. See, Fay v. New York, 332 U.S. 261, 268-270 (1947).

69 Judge Kilday conceded the correctness of this formulation and statement of the rules in the Crawford case. 15 USCMA at 48. 35 CMR at 20.

case of exclusion is made out. A showing of exclusion over a long period of
time of substantial portions of the population results in application of the
Supreme Court's "rule of exclusion" doctrine, which is available in supply-
ing proof of discrimination against any delineated class. When a *prima facie*
case of exclusion is made out, the government must come forward with evi-
dence to contradict such a showing if it is to prevail. Also, the selecting au-
thorities cannot be heard to say that they practiced exclusion inadvertently
through ignorance. It is unnecessary to show prejudice.

The United States Court of Military Appeals did not follow the analytical
rules enumerated immediately above, although it tacitly accepted the fed-
eral rules prohibiting blanket exclusion on an arbitrary basis. Intentional
exclusion of a substantial portion of the military community (all specialists
of whatever grade, and all other enlisted members who were not in the top
three non-commissioned officer grades) was admitted by the personnel who
made the initial selection of names for the prospective court member list in
the *Crawford* case. Even so, the United States Court of Military Appeals did
not find that a showing of unlawful exclusion had been made by the accused.
The conclusion is inescapable that the Supreme Court of the United States
would have applied its analytical rules differently in a jury selection case.
Since *Crawford* deviates from modern federal law in the analogous area of
jury selection, and since there was a concurring opinion and a vigorous dis-
sent, it would appear that a command would be well advised to avoid selec-
tion policies more narrow than those sanctioned in the *Crawford* case.

If a command were to limit its enlisted selectees to the grade of E-9, this
would probably be unlawful. At least that result is intimated by Chief Judge
Quinn in *United States v. Mitchell*. It might be lawful to select only E-8's
and E-9's, but such a policy would be unwise. Although selection from the
top three non-commissioned officer enlisted grades has been specifically ap-
proved by a majority of the United States Court of Military Appeals, cer-
tainly no selections should ever be made from a more restricted group, par-
ticularly in view of the court's deviation from modern federal law and a
vigorous dissent, in *Crawford*, as discussed above.

This does not mean, of course, that a command could not or should not
have a broader enlisted selection system. A much better system could easily
be attained if each general court-martial command had a court-martial com-

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71 Norris v. Alabama, *supra* note 70 at 598-599.
480.
74 Hill v. Texas, *supra* note 70 at 400-404.
75 Thiel v. Southern Pacific Co., *supra* note 70 at 225.
76 15 USCMA 59, 60, 35 CMR 31, 32 (1964); Cf. United States v. Freeman, 15 USCMA 120,
35 CMR 98 (1964).
missioner responsible for *initially* selecting court-martial members. This official could do the substantial preliminary screening of lower grade enlisted members, spoken of by Chief Judge Quinn, so that those with the proper individual qualifications could be selected for court-martial service. In this manner, a large segment of the enlisted military community, now unrepresented on our courts-martial, could be accorded fair and democratic representation.

3. **Ineligible enlisted members**

a.) *Enlisted members from the accused's unit.* Any enlisted member selected for service on an accused's court-martial must be from a unit other than the accused's unit.\(^7\) Before the Uniform Code of Military Justice, the statutory limitation provided that a member could not be assigned to the accused's unit.\(^7\) This was held to apply only to those members formally assigned to the unit; one could be present in the unit in an attached or other status and not be formally assigned to the unit, and therefore unit personnel could be eligible court members.\(^7\)

The same result has been reached by a Navy Board of Review under the Uniform Code of Military Justice. In NCM 329, *Cook*, the accused was assigned to a naval receiving station only for the purposes of trial.\(^8\) He requested and received enlisted members for his court-martial, three of whom were provided from the enlisted population of the receiving station. None of these members was a member of the accused's unit at the time of the commission of the alleged offense, so the issue presented on appeal was whether these enlisted members and the accused were members of the same unit at the time of the trial. The Board held implicitly that the receiving station was composed of more than one unit. It found that personnel temporarily assigned for administrative convenience, like the accused, composed one unit, while permanent party personnel composed another wholly separate unit. Therefore, the court members were not from the same unit as the accused, and they could lawfully participate in his court-martial. This decision is subject to criticism, however, as in fact the receiving station, as far as administration was concerned, comprised one unit only. Hence the Board seems to have created units for judicial purposes, thus exercising a power probably not possessed by a Board of Review.

An Army Board of Review reached a contrary, and much more sound, re-

\(^7\) Art. 25 (c) (1), UCMJ, 10 U.S.C. § 825 (c) (1) (1958). This was to prevent ill feeling in a unit and also to assure selection of individuals free of bias or prejudice either for or against an accused. For a definition of “unit”, see Article 25 (c) (2), UCMJ, 10 U.S.C. § 825 (c) (2) (1958).

\(^8\) Art. of War 16, as amended, 41 Stat. 787 (1920).

\(^7\) NCM 329, *Cook*, 16 CMR 404 (1954).
result in CM 398315, Scott.81 The accused was assigned to the 24th Military Police Company, 24th Infantry Division, at the time of the alleged offense. Because of a reorganization, this company became the 15th Administrative Company of the 1st Cavalry Division, a unit containing over 1,000 personnel. Although the accused was assigned, by a local commander, to a "provisional" sub-unit of the 15th Administrative Company, the Board of Review would not recognize this locally created "provisional" unit for court-martial purposes. It held that any enlisted member from the 15th Administrative Company was from the same unit as the accused.

To date there has been no definitive decision, either by the Court of Military Appeals or by service Boards of Review, as to when disability for court-martial service attaches to the members of an accused's unit. Is a potential court member ineligible if he was in the accused's unit at the time of the offense, but not at the time of trial? Is there a different result in the case of a potential court member who joins the accused's unit after the offense but before trial? The critical question of precisely when an individual is or is not a member of another's unit, for court-martial purposes, remains unanswered. The way to avoid difficulty in this area is to select individuals for court-martial service who are not members of the accused's unit either at the time of the alleged commission of the crime charged, or at the time of trial.

b.) *Enlisted members junior to the accused.* Article 25 (d) (1), Uniform Code of Military Justice,82 reads: "When it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." This provision, of course, applies to officers as well as to enlisted members. It was formerly a recognized custom in the Army to compose a court-martial of one's superiors, and it was therefore generally assumed that one's equals or juniors would not participate. Judge Kilday called this provision of the Code "The first clear and positive direction to the convening authority in appointing a court-martial. . . ."83

Certainly, if it becomes necessary to compose a court-martial with members junior to the accused, this can be done lawfully. But the convening authority should make a detailed written statement explaining that his action was taken because of justifiable physical conditions or military exigencies. A copy of this explanation should be appended to the record of trial.84

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81 CM 398315, Scott, 25 CMR 656 (1957).
83 United States v. Crawford, 15 USCMA 31, 47, 35 CMR 3, 19 (1964). In so doing, however, he erroneously interpreted the Code. The Code does not exclude those of equal rank or grade; they may serve. It only excludes *juniors*, and there is a significant difference; manifestly one's equals in rank or grade are in that sense one's peers.
84 Cf. Art. 25 (c) (1), UCMJ, 10 U.S.C. § 825 (c) (1) (1958).
4. Accused who are not entitled to enlisted members.

a.) Discharged former enlisted members. In order for enlisted members to serve on a court-martial, there must be a request for such members by an enlisted accused. In a recent Air Force case, a discharged former enlisted member serving confinement pursuant to a prior court-martial conviction requested enlisted members to serve on his court-martial. His request was denied. On appeal, this action was held to be correct as there is no authority in law to allow enlisted participation, except in the trial of other enlisted members.\(^5\)

b.) Civilians. In time of peace, civilians will not be a military justice problem for the military lawyer.\(^6\) But in time of war civilians being tried by court-martial may seek to have the tribunal's membership contain other civilians or enlisted members. There is no authority for this in military law. Civilians may be tried by all-officer tribunals.\(^7\)

V.

The Trial Defense Counsel And Enlisted Members on Courts-Martial

A. Advice that must be given to an enlisted accused.

Of the many duties\(^8\) which a trial defense counsel is obligated to perform before, during, and after trial by court-martial, none is more important than advising an enlisted accused of his right to request enlisted representation on his court-martial. Counsel for the accused is commanded to do this by the Manual For Courts-Martial, United States, 1951.\(^9\)

Minimal advice also includes the information that the right to request or not request enlisted members to serve on his court-martial is personal, and involves a decision which the accused must make personally.\(^0\) The accused must be informed that he is free to make his decision in this regard at any

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\(^5\) ACM 18035, Ragan, 32 CMR 913 (1962), aff’d, 14 USCMA 119, 33 CMR 331 (1963).

\(^6\) Civilians, in time of peace, are not subject to court-martial jurisdiction. Reid v. Covert, 345 U.S. 1 (1957); McElroy v. Guagliardo, 361 U.S. 281 (1960).

\(^7\) ACM 7081, Covert, 16 CMR 465 (1954), rev’d, 6 USCMA 48, 19 CMR 174 (1955). Later dismissed for lack of jurisdiction.

\(^8\) For a concise summary of these duties, see MCM, 1951, para. 48.

\(^9\) MCM, 1951, para. 48e reads, in part: “Before the trial he [trial defense counsel] will advise an accused enlisted person of his right to have enlisted persons as members of the court.” (Emphasis added). Correct advice to an enlisted accused would require substituting “request” for “have” in the quoted portion of para. 48e. Under certain circumstances, a convening authority can deny enlisted membership in an accused’s court-martial for “physical conditions” or “military exigencies”. See, Art. 25 (c) (1), UCMJ, 10 U.S.C. § 825 (c) (1) (1958).

\(^0\) Art. 25 (c) (c), UCMJ, 10 U.S.C. § 825 (c) (1) (1958). See Chapter III of this paper, infra, where Article 4 of the Elston Act is compared with the language of Article 25, UCMJ. There item 2 points out the specific change in the language of the UCMJ which requires the accused to “personally” request enlisted members for his court-martial. This change in language was intentional, and not a mere oversight. See Hearings on H.R. 2498 before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 147 (1949). See also, MCM, 1951, para. 48e.
time before the convening of the court-martial\textsuperscript{91} (although for obvious reasons, an accused should be strongly persuaded to elect for or against an enlisted court-martial well in advance, so that amending orders and changes in personnel can be efficiently effected). Counsel should point out to the accused, by reference to the Guide to Trial Procedure,\textsuperscript{92} the point at which a court-martial is deemed to be convened.\textsuperscript{93} And he should make it very clear that subsequent to this time, the accused no longer has any right to demand enlisted representation on his court-martial.

B. Additional advice which should be given to an enlisted accused.

The Congress, in changing the Elston Act, unfortunately decided to require enlisted accused to decide personally whether or not to request enlisted members to serve on their courts-martial. The reason given for this change was to prevent any enlisted accused from requesting enlisted court members through counsel and thereafter complaining about the conduct of the enlisted membership after conviction and sentence.\textsuperscript{94}

The results of this Congressional policy, however, have been detrimental to enlisted accused. Because counsel defending enlisted accused have been deprived of most of their necessary freedom of decision to select or reject enlisted members on courts-martial, many have tended to inform an accused only of his right to enlisted representation and no more.\textsuperscript{95} Thus many accused, especially the young and unsophisticated, must make an important legal decision in their trial without really effective assistance of counsel in this area.

Only trial defense counsel can correct this grave deficiency. This can be done by conscientious counsel using all available information regarding the type of case involved to determine whether it is beneficial or detrimental to have enlisted members participate. This information can be obtained from senior judge advocate general's corps officers who have had substantial trial experience, from statistical studies compiled by the Records Control and Analysis Branch, United States Army Judiciary, and from counsel's own experience. This information should be passed on to the accused so that he can

\textsuperscript{91} Art. 25 (c) (1), UCMJ, 10 U.S.C. § 825 (c) (1958).
\textsuperscript{92} MCM, 1951, app. 8a at 504.
\textsuperscript{93} Id. at para. 61g. Of course, in actual practice such requests will, and should, be made sufficiently in advance of trial to permit the convening authority to name enlisted members to the court-martial. However, occasionally an accused will request enlisted members at the last moment. Normally, this would occur in cases where the trial defense counsel failed to advise an enlisted accused of his right to request enlisted members.
\textsuperscript{94} Hearings on H.R. 2498 before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess., 1147 (1949).
\textsuperscript{95} The author's survey of trial defense counsel indicates some defense counsel do not inform accused of their right to enlisted members at all. Others merely inform an accused of this right, but do not comment upon the desirability or undesirability of having enlisted members, while others do both.
make an intelligent election in requesting or rejecting enlisted participation in his court-martial.

Another important consideration for an enlisted accused, who requests enlisted members to serve on his court-martial, is the knowledge that his request may be denied. The accused should be prepared for this by being informed that a convening authority can deny such a request under certain physical conditions or military exigencies. Appellate defense counsel would have a duty to test any such denial of enlisted members, on appeal, since the denial is a reviewable issue. In this connection, the facts should be developed at trial, and a proper foundation laid both by the Government and the defense, in order to preserve the matter for appeal.

C. Ethics and the severance problem.

1.) The request.
In a joint or common trial of accused, defense counsel often seek severances. If the charges preferred against separate accused are not closely related, or if an accused desires to use testimony from his co-accused, or his wife, or if his co-accused’s defense is antagonistic to his own, or if the evidence which is to be presented by a co-accused is prejudicial, then good cause can be shown for a severance.

Lawyers also desire severances for other reasons which the law has not deemed important enough to merit such relief. These reasons might include a lawyer's personal desire to exercise complete control over the case as the only attorney involved; the lawyer's fear of so-called substantial justice, where a co-accused is found not guilty, while the lawyer's client is found guilty because the latter had the worst record of the two accused, and the court-martial wanted to appear fair; or the fear that in sentencing, the court-martial will unfavorably compare the accused's bad record with the co-accused's good record, thereby harshly sentencing the accused rather than applying

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9 These exceptions to the enlisted member requirement are other changes from the Elston Act. See Chapter III, item 3, of this paper, infra, comparing Article 4 of the Elston Act with Article 25, UCMJ. In making the enlisted provisions of the Elston Act which applied only to the Army and the Air Force, applicable to the Navy and the Coast Guard, some provision was needed to allow trials without enlisted participation for courts-martial on ships at sea and remote weather stations ashore, when eligible enlisted members were unavailable. See, Hearings on H.R. 2498 before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1150-1151 (1949). In time of peace, denial of enlisted participation should be rare, and generally limited to the naval services. The test to be applied is sustaining or overruling the denial of enlisted members by the convening authority is simply, did the convening authority act reasonably under all of the facts and circumstances of the particular case? CGCM 20629, Rivera, 24 CMR 519, 521 (1957); LEGAL AND LEGISLATIVE BASIS, MANUAL FOR COURTS-MARTIAL, 1951, 22 (1951).
8 MCM, 1951, para. 4c.
7 Id. at para. 591.
6 Id. at para. 69d. See United States v. Bodenheimer 2 USCMA 130, 7 CMR 6 (1953).
general sentence standards to him. Whatever the reasons, it is very common for defense counsel to desire these severances.

When the accused are enlisted, whether good reasons or no reasons are present to justify a severance, one can be obtained automatically by merely having one of the enlisted accused request enlisted members for his court-martial. In taking such action, however, many lawyers may hesitate and ponder over the ethics of their conduct. Any hesitation, in the author's opinion, is completely unnecessary. After all, the right to enlisted members on his court-martial is a fundamental right of an enlisted accused, subject only to very limited exceptions, and the Manual For Courts-Martial, United States, 1951, explicitly contemplates the use of that right to obtain severances. The Manual drafters specifically provided, that in joint and common trials, "... an enlisted person [may] make an individual request that the membership of the court include enlisted persons..." When this action is taken, the request must be treated as if it were a granted motion to sever, and this requires the court-martial to decide which accused will be tried first, and which will have his case deferred. The trial counsel, of course, must report this action to the convening authority at once. Since the original drafters contemplated that enlisted accused would use their right to enlisted trial participation as a severance device, and since an accused has a right to request enlisted representation for no reason, or for any reason, it is perfectly proper to advise an enlisted accused to request enlisted court members for the sole purpose of securing a severance.

2.) The withdrawal.

Let us assume, for the sake of discussion, that two enlisted accused have been brought before a general court-martial in a common or joint trial. One accused has requested, and the convening authority has granted, enlisted participation, thereby severing the trials of the two accused. The accused desiring an all-officer court-martial is immediately tried, while the other accused's trial is deferred. The accused who requested enlisted participation did so on the advice of counsel solely in order to obtain a severance. He is now being brought to trial before a court-martial, one-third of which is composed of enlisted members. At this stage, whether the accused's legal counsel may ethically advise him to withdraw the request for enlisted members, there-

100 Even if one accused has a good record vis-a-vis his co-accused, there is no assurance that the difference will be reflected in the sentences actually imposed, and unfavorable results can follow the gamble involved in obtaining a severance by requesting an enlisted court. This did occur in CM 410853, Gallagher, 11 June 1964, petition for review denied, 15 January 1965 (No. 18,212).

101 MCM, 1951, para. 53c.

102 Id. at para. 61g.

103 Id. at para. 69d.
by obtaining the benefits of a severance, and avoiding trial by enlisted members too, is a problem which is being faced more and more often.

This problem is complicated somewhat by a 1952 administrative ruling permitting a fully-advised accused to insert in writing at the formal court-martial proceedings a withdrawal of a prior written request for enlisted members. This ruling, however, did not contemplate a case such as here posited, but rather one where an accused, who requested enlisted members because he actually desired trial by them, changed his mind before trial, and where no severance, or other benefit, was obtained incidentally.

A lawyer's duty to vigorously defend his client may not extend to the point where his conduct lacks candor and fairness to the court-martial. Nor may the attorney allow his client to act in a manner which would be unethical were the attorney acting. Necessarily, asking for enlisted members to obtain a severance entails, or should entail, a balancing of the benefit of the automatic severance thereby obtained against any detriment, real or fancied, flowing from enlisted participation. Ethically, the attorney must decide in advance which will be the best choice of action, and having elected a course of conduct, remain steadfastly to it unless a change of circumstances requires some alteration of tactics. While there is no explicit authority in the Uniform Code of Military Justice pertaining to a withdrawal of an enlisted member request, certainly adherence to the administrative decision allowing it requires that the request should not be withdrawn after the benefit of severance has been obtained, except in the most unusual circumstances. This would be especially true where one co-accused has already been tried, after severance, and a joint or common trial such as would have been had in the absence of the request for an enlisted court is no longer possible. In other words, an accused cannot have his cake and eat it too; if severance is secured through a request for an enlisted court, and if that was the sole purpose for the request, then the accused must submit to trial by such a court.

VI.

THE LAW OFFICER AND ENLISTED MEMBERS ON COURTS-MARTIAL

A. The law officer should give advice to an enlisted accused.

It is apparent that as drafted, the Manual For Courts-Martial, United States, 1951 did not place any burden upon law officers to advise enlisted accused of their right to enlisted membership on courts-martial. The law officer was

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104 JAGJ 1952/6970 (11 Sept. 1952). An accused could not merely waive enlisted representation. He must insert into the record a formal written withdrawal.
105 American Bar Association, Canons of Professional Ethics, Canon 22.
106 Id. at Canon 16.
107 Art. 25 (c), UCMJ, 10 U.S.C. § 825 (c) (1958).
merely required to ask the trial counsel if the accused was requesting in writing that enlisted members participate. The trial counsel replied, appropriately, that the accused was or was not, and then the court-martial was convened.108

This procedure is inadequate today. In United States v. Parker,109 appellant alleged that he had never been advised by counsel of his right to request enlisted members to serve on his court-martial. This claim was not refuted by his trial defense counsel. The United States Court of Military Appeals noted that a request for enlisted members must be made in writing prior to the convening of the court-martial, but if an accused was never advised of his right, failure to do this would not constitute a waiver. The court, speaking through Judge Latimer, stated that "...if an accused in the lower intelligence bracket is not informed [of his right to enlisted members], the in-court discussion would hardly put him on notice that he had waived a right."110 This case also contained many other serious errors, and in reversing the court relied upon all of the errors.111

Manifestly then, it is wise for the law officer to advise the enlisted accused in open court of his right to enlisted court members. Although not all law officers in the Army do this, that service's official position appears to require it.112

B. When an accused requests further advice.

An enlisted accused must decide personally whether or not he desires enlisted members to serve on his court-martial. Let us assume that the accused, a private, has consulted with his legally qualified defense counsel. Counsel has advised113 against enlisted participation because it is his opinion, under the facts and circumstances of the case, that enlisted court members will be unsympathetic to the accused.

At the trial, the accused informs the law officer that he has been advised to forego enlisted court members, but also that this must be his personal decision. When he asked counsel to furnish facts from which he could determine whether enlisted court members were beneficial or not, he was informed none was available. He has discussed this issue with each judge advocate officer in the command associated with the defense, and in each instance he failed to acquire sufficient information from which he could make an intelligent election in favor of or against enlisted court participation. He now

108 MCM, 1951, app. 8a at 504.
109 6 USCMA 75, 19 CMR 201 (1955).
110 Id. at 86, 19 CMR at 211.
111 Id. at 89, 19 CMR at 214.
112 Pursuant to U.S. Dep't of Army Pamphlet, No. 27-9, The Law Officer 12 (2 ed. 30 April 1958).
113 Pursuant to U.S. Dep't of Army Pamphlet, No. 27-10, The Trial Counsel and The Defense Counsel 76 (2d ed. 1962).
desires the law officer to advise him on the merits or demerits of enlisted court membership. While there is apparently no authority precisely in point, general considerations regarding the law officer's role and status permit the formulation of certain guidelines.

The law officer should hold an out-of-court hearing immediately. The accused should be advised, on the record, that the law officer has access to very little information which would provide an answer to his question, and that normally an accused can rely upon the advice of his counsel as being sound. The law officer should give his personal opinion favoring or opposing enlisted court members in the particular case only if requested to do so by the accused or defense counsel, and state the reasons therefor, explaining that this advice is not binding upon the accused nor need it be accepted by him. The accused should then be given sufficient time to consider this advice, and consult again with his counsel, before he is required to make his decision.

VII.

EXPERIENCE UNDER ARTICLE 25, UNIFORM CODE OF MILITARY JUSTICE

A. When and why enlisted members have been requested.

One who desires to study enlisted member participation on courts-martial will quickly find that there is a dearth of information on the subject. There are many rumors, however, from those beginning in the legislative history of the Uniform Code of Military Justice itself, such as the statement "... some of these 'crusty' noncoms might throw the book at these boys...", to current rumors present in many Army judge advocate offices, which when stated sound like this: "don't ever, under any circumstances request enlisted members on any court-martial; they will be quick to convict and then they will render a harsh sentence."

In order to judge the validity or invalidity of such rumors, it was necessary for the author to determine what enlisted accused and their counsel do in fact. This determination proved to be very worthwhile, because those judge advocates participating in the day-to-day defense of enlisted accused do, in fact, use enlisted members on certain types of clearly defined cases.

An analysis of the situations wherein enlisted members are desired on courts-martial shows that they are generally non-military offenses. It is pertinent to remember that most enlisted court members will be senior enlisted personnel, for that appears to be a significant factor. The senior enlisted member is commonly a mature individual, widely traveled, and well acquainted with human nature. More often than not, he will be a family man. By virtue

114 Hearings before a Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Cong., 1st Sess., 1140 (1949).
of his rank and position, it is likely that he is well acquainted with the difficulties of living within the financial limits of a soldier's means. He understands, or at least is aware of, sexual problems inherent in long separation of men from their wives. Similarly, he is familiar with the drives, frustrations, and problems of the young men with whom he is in daily professional contact. He is likely to adopt a tolerant attitude toward human shortcomings, possessed by all individuals to a greater or lesser degree. These traits tend to explain why he is desired as a court member in cases involving offenses arising from financial problems, offenses involving domestic difficulties, and offenses where a soldier is in trouble because of sexual misconduct or overindulgence in intoxicants.

Generally, a senior enlisted member would not be desired as a court member in trials of military-type offenses unless the circumstances of the case would lead to some kind of sympathetic identification with the accused. In some military offenses, the offense will have arisen out of an officer-enlisted dispute, or some other factor will be present which makes the enlisted member identify with the accused and his predicament. In maltreatment cases, the accused will normally be a training sergeant. The enlisted members serving upon his court-martial will also be sergeants, or their equivalent in the specialist grades, and many of them will have served as training sergeants or specialists themselves. It is understandable that they would be sympathetic to the plight of the accused. In dereliction of duty cases, the offenses generally condoned by a custom of the service, enlisted members, like the civilian jury, will apply the sense of the community to the accused, rather than static rules of law unadaptable to the common experience of mankind. That enlisted members are requested, and profitably so, can no longer be disputed.

It must be remembered that the above comments are, at best, generalizations. As in jury selection, there are no hard and fast rules.

B. How enlisted court members have performed.

Mentioned earlier is the rumor, of long duration and still current, that enlisted members on courts-martial adjudge harsh sentences when they participate in the judicial process. Another current tale tells that they are quick to convict on a scintilla of evidence. Once again, it was important to distinguish what enlisted court-martial members do in fact, from what they are reputed to do.

What officer-enlisted courts-martial do in fact in those limited situations where they are desired because of attitudes favorable to the defense, as discussed above, when compared with all-officer courts-martial, is quite surprising. The comparison shows their acquittal percentage to be more than twice that of the all-officer court-martial. This certainly refutes the claim that enlisted members are hasty to convict.
Likewise, in comparing eighteen cases involving generally similar offenses and maximum sentences, the officer-enlisted courts-martial gave more lenient sentences in nine cases, approximately tied with the all-officer courts-martial in six cases, and gave more severe sentences in only three cases. Thus one can see that the idea that enlisted court members as a group are harsh, tough martinet is without basis in fact, at least in today's army.

C. Enlisted members can be trained sufficiently in military justice.

In presenting arguments to Army Boards of Review and the United States Court of Military Appeals asserting that members of all enlisted classes eligible for selection should be selected for court-martial duty, whatever their rank or grade, the defense bar was always met with the argument (from the bench as well as from government counsel) that enlisted members, and especially the junior ones, were and are inadequately trained to perform well on courts-martial.

The answer to this argument is that the Army Establishment itself is in charge of military justice training, and those officials who speak for the department should not be heard on one hand to say, "enlisted members, and particularly the junior ones, are not adequately trained to serve on courts-martial so they will not be used," and on the other hand, in setting up the Army's military justice educational program, to say, "enlisted members, and particularly the junior ones, cannot be given more than minimal training in military justice."

It is the belief of many persons closely connected with the court-martial process that senior enlisted personnel are much better trained for effective court-martial service than junior enlisted personnel. This belief may indeed have a great deal of merit, not because of any inherent inability of junior enlisted members to compete with their senior brethren, but because by Army regulations the juniors are regulated to minimal military justice training while their senior counterparts, from E-5 and above, are not. In fact, those enlisted members, E-4 and below, receive little more military justice training than that which is required by statute. Those E-5 and above, in addition to the statutory minimum, receive training which should give them a clear understanding of both judicial and nonjudicial processes.

There seems to be an assumption in the Army that personnel with the most knowledge of military justice matters, and therefore best qualified to serve on courts-martial, are at the top of the grade structure with the senior commissioned officers and descend by grade to the lower enlisted members,

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115 Army Regs. No. 350-212 (14 Aug. 1964) [hereafter cited as AR 350-212].
116 AR 350-212, para. 2b (1) and 2b (2) are designed to give that military justice training required by 10 U.S.C. § 937 (1958) (Art. 137, UCMJ), and three additional hours of general instruction.
117 AR 350-212, para. 2b (3).
with each rung in this ladder being a little less qualified to serve on courts-martial. If this is true, then the military justice educational system should be re-organized to give the most training to those who need it the most—the lower enlisted members. And the least training to those who need it the least—the senior commissioned officers. Yet the training program presently in effect is exactly the opposite; more training is provided for officer than for enlisted personnel.118

A broader consideration which merits some discussion is whether any training in military justice is really needed for prospective courts-martial members. In the modern general court-martial, with which we are primarily concerned, the members really perform the functions of a jury, and their duties are not unlike that of civilian juries. Certainly no training is accorded to civilian jury members, since what is desired is a community consensus applied to an accused rather than any pre-disposed conclusions obtained from legally trained personnel. Doing away with military justice training, however, is not presently possible because it is one of the important considerations applied by a convening authority in selecting courts-martial members.119 As training is necessary in military law, it should be strengthened where it is needed the most; in the lower enlisted ranks.

D. "Influence of Rank" over enlisted members is not a problem

Whether there is any "influence in rank" over enlisted members participating in courts-martial is, of course, a subject not open to direct study because of the inviolability rule as to what occurs in closed courts-martial sessions. Certainly, the beliefs of officials directly participating in courts-martial based upon their observations and experience would be relevant, and might answer our inquiry, thus their opinions were sought out. Unfortunately, there is a lack of agreement on this issue. Of those officials queried, two law officers, twenty-nine trial counsel and forty defense counsel believed such a problem exists. However eleven law officers, forty-six trial counsel, and thirty-five defense counsel believe the problem does not exist.

If by "influence in rank" one means some perfidious action by superior officers directing enlisted court members to conform to the officer court member's desires, then this should result in more convictions and equally severe sentences by officer-enlisted courts-martial when compared to all-officer courts-martial. In fact, the opposite result has occurred. Officer-enlisted courts-mar-

118 Compare AR 350-212, para. 2b (1), (2), and (3), which concern enlisted training with para. 2c (1), (2), (3), and (4), providing for officer training. It is fully understood, of course, that military justice training for officers extends to many areas beyond mere qualification for court membership, as officers also must administer the entire military justice system. There is certainly no objection in providing officers with more training than enlisted personnel; but there is a valid objection to denying enlisted personnel sufficient training so that convening authorities consider them ineligible for court-martial duty due to lack of training. 119 Arts. 25 (d) and 137, UCMJ, 10 U.S.C. §§ 825 (d) (2) and 937 (1958).
tial have a higher percentage of acquittals and less severe sentences than all-officer courts-martial. Therefore, it appears clear that no substantial, if any, problem exists with "influence in rank" over enlisted court-martial members.

Members of the military service, officers and enlisted alike, are not unmindful of the changes wrought in military justice since World War II. The very fact that enlisted members were made eligible to sit upon courts-martial attests to their judicial equality with officers, regardless of rank. Law officers regularly instruct that "The influence of superiority in rank shall not be employed in any manner in an attempt to control the independence of members in the exercise of their judgment."

As all of the facts point toward an absence of any "influence in rank" problem in courts-martial, the conclusion that there is none is inescapable.

VIII.

CONCLUSIONS AND RECOMMENDATIONS

We have seen that historically our military legal system, which was adopted from the British, was an anomaly. It comported with the concept that an upper class had the right and duty to judge the common man who, unrepresented, must acquiesce because he was deemed incompetent to govern himself. Such a system could not survive in a free democracy where no man is deemed common. Thus in the military reforms after World War II, enlisted members for the first time were made eligible for court-martial duty. This was done for two reasons. First, it extended the real meaning of democracy to the military legal system, wresting it from the age-old captivity of European class doctrine. Secondly, the enlisted members, by participating, would gain confidence in the basic fairness of the court-martial system, and such participation would also provide training to selected members of the enlisted community.

To the extent that enlisted participation has been utilized, it has worked very well. There are definite types of cases where officer-enlisted courts-martial are beneficial to an enlisted accused, and they have generally adjudged lighter sentences than all-officer courts-martial.

In four areas, however, there are grave deficiencies. First, in selecting enlisted members or officers for court-martial duty under the present system, the convening authority usually has before him only a list of names preceded by the individual's rank or grade. Hence, it is impossible for the convening authority to comply knowledgeably with the requirements of Article 25 (d) (2) of the Uniform Code of Military Justice ... choose those whom he be-

120 Of 129 enlisted members asked if they knew of enlisted representation on courts-martial, 122 replied they did; only 7 replied they did not.
121 MCM, 1951, para. 74 d (I).
lieves best qualified by reason of age, education, training, experience, length of service, and judicial temperament . . . in selecting court members. Therefore, the present selection system needs to be improved in this area. Second, in the Army, only senior enlisted members, with rare exceptions, are selected for general courts-martial duty. While this is evidently legal, it is a substandard policy for it means that our military courts are still unrepresentative tribunals. Any group excluded from participation in the judicial process will be suspicious of that process, and until all are represented on courts-martial, these tribunals will not be accepted by all to the extent desirable, and possible, in our system of law. This does not mean that all enlisted members should be selected at random. It does, however, mean that those lower grade enlisted members, who can meet the qualifications of Article 25 (d) (2) of the Uniform Code of Military Justice on an individual basis, should be selected for, and not excluded from, general court-martial duty. Third, enlisted accused find themselves acting as their own legal advisor on the question of whether or not to request enlisted membership on their court-martial trial. In response to the author's inquiry, two defense counsel replied that they did not even advise an accused of his right to request enlisted members. Twenty-eight replied that while they did advise an accused of his right to have enlisted members, their advice was confined to that information, and consequently was of little or no assistance to the accused in making a choice. Although it is true that the final decision is personal to an accused, when counsel fail to give tactical advice on this important question, they abdicate their responsibilities. Fourth, all enlisted members, but particularly those in grades E-1 to E-4, should receive more intensive training in military justice so that they will not be considered by convening authorities to be ineligible for court-martial duty because of inadequate training.

Means for correcting these deficiencies are at hand, and can be readily utilized. With respect to the area of selection procedures, a departmental regulation could establish the commissioner system discussed in this paper, and the operation of such a system would provide convening authorities with the information necessary to the proper exercise of their discretion in selecting court members. The system would have the further virtue of doing this on a uniform, Army-wide basis. Court members could then be selected under a program that would take into account their individual qualifications for

\[\text{For those, like Judge Kilday, who believe that trial by court-martial is trial by one's superiors, and democratic influences have no proper part to play, the author refers the reader to the following language from the legislative hearing on the Code's enlisted member provision.}

"Mr. River. . . . Can we say that this whole provision [Article 25 (d) (1) UCMJ] here gives a man an opportunity to be tried by a jury of his peers?"

"Mr. Smart. A jury composed of at least one-third of his peers, I would say." 

*Hearings before a Subcommittee of the House Armed Services Committee on H.R. 2498, 81st Cong., 1st Sess., 1140 (1949).*
court duty, thus insuring complete conformity with the requirements of the Code. Insofar as advice to the accused is concerned, the present deficiencies can be remedied by making defense counsel aware of their responsibility to provide sound tactical guidance regarding the wisdom of requesting an enlisted court in any given case. Finally, the obvious answer to deficiencies in the training of enlisted personnel regarding military justice lies in strengthening and expanding the current educational and training program.

We are living in a time when the law is moving forward with a rapidity that would have astounded earlier generations of lawyers. Perhaps this is as it should be, in view of the enormous advance of technology during this century. At least, in a world where seething discontent is the order of the day in so many areas of the globe, we should not be surprised to find that in the realm of law, too, cries are heard demanding reform and progress. Our modern American law is not the English law of Charles Dickens' day—law which all too often was the instrument of the privileged upper classes, insensitive to the rights, and bearing primarily on the duties, of the masses. Instead, our developing contemporary jurisprudence is replete with instances of re-examination of hitherto accepted and unquestioned doctrines from out of the past, asking anew whether those doctrines measure up to the increasingly high standard of due process which we are coming to expect from our courts. Cases such as Escobedo v. Illinois, Jackson v. Denno, Gideon v. Wainwright, and Massiah v. United States are making it plain that it is no longer sufficient to answer “stare decisis,” or “so it was laid down in the time of Henry IV.” Modern criminal law must square with the facts of life, and if it does not, it will be changed; this is no longer doubted. Our present Uniform Code of Military Justice is living proof of the fact.

The military services learned much from the storms of protest and dissent which arose out of the American citizen-soldier's experiences with military justice in World War II. Instead of resisting the coming changes, the Army acknowledged the validity of many of the complaints, and took an affirmative and commendable part in the birth of the incipient reforms. The Army's field judiciary system was hailed as a successful and effective innovation. Following the successful experience with the field judiciary system, the
Army created its United States Army Judiciary—the all-encompassing organization which comprises and operates the military justice program. The Army augments the operation of its military justice activities by maintaining a post-graduate level law school at Charlottesville, Virginia. These examples serve to illustrate the fact that the Army can affirmatively lead in developing military criminal justice, rather than waiting passively to be led at the whims of civilian reformers. The great effectiveness of the Army's past assumptions of leadership in this area attests to the wisdom of continuing the tradition now firmly established. Not the least of the advantages obtained thereby in this: military lawyers and judges know best what change is necessary in the system with which they work on a daily professional basis.

It is significant to note that the other armed services have followed the Army's lead in initiating internal improvements in the administration of military justice, and thus in a very real sense, the Army is in a position to continue to give direction and service-wide guidance by its progressive attitude.

In light of all this, the time is ripe for development of a democratically mature, Army-wide program regarding the selection of enlisted members for court-martial duty and their effective utilization in modern military criminal trial procedure. Once again, as in the recent past, the Army can anticipate the demands for reform from civilian quarters and meet the indicated need independently by internal processes. In this manner, the required changes can be made in such a way as to insure that the Army will be able to perform its mission effectively. Indeed, the suggested measures should enhance the effectiveness of the military justice system, and thus materially support the overall mission of the Army.

In view of the increasing egalitarian spirit and direction of the criminal law in America, it seems inevitable that our jurisprudence will not countenance much longer any system of criminal trial using a lay fact-finding body which is not thoroughly democratic in nature and operation. As noted in this paper, our present scheme of military justice is basically democratic to the extent that it has rid itself of the monarchial trappings of the ancient British code from which it came.

It is submitted that Congress legislated wisely in providing for enlisted membership on courts-martial. Since Congress imposed no class restrictions on the basis of rank, other than to prevent trial by one's military juniors unless unavoidable, it would be appropriate for the Army to eliminate the last vestiges of class discrimination inherited from the parent system. Then the military accused would enjoy protection comparable to that of his civilian counterpart before the analogous body, the jury.

131 Gen. Orders No. 56, Hq. Dep't of Army (26 Sept. 1962).
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