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Report to the Congress; by Elmer B. Staats, Comptroller General.

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Congressional Relevance: House Committee on Armed Services; Senate Committee on Armed Services; Congress.
Authority: Jury Selection and Service Act of 1968, as amended (28 U.S.C. 1861 et seq. (Supp. IV)). Elston Act [of] 1948. 10 U.S.C 825. United States v. Crawford, 15 USCMA 31, 35 CMR 3, 12 (1964). United States v. McCarthy (1976). Uniform Code of Military Justice, art. 25.

The convening authority has broad authority in the military jury selection process. This jury system is in sharp contrast to the civilian Federal court system, which guarantees the accused a trial by a jury randomly selected from a cross section of the community. The potential for abuse is clearly seen in the power of the convening authority to select jurors, in combination with the low number of jurors needed to convict. Findings/Conclusions: Several defense counsels interviewed believed that jurors drawn from the higher grades may be more severe on the accused. In 244 cases reviewed, 82% of defense counsels' peremptory challenges were used to remove higher graded officers from the juries. Sixty-four military officers at all echelons were interviewed about jury selection, and about 80% of those expressing an opinion believed some form of random selection should be implemented. These respondents were convening authorities, commanders, and legal personnel. In another opinion survey at Fort Riley, Kansas, 68% of the 456 respondents favored change to random selection, and the majority of the respondents were from the ranks selected by convening authorities to serve as jurors. About 7,150 of the 49,300 military people tried by military courts in fiscal years 1975 and 1976 were tried by jury. Many accused are advised by their defense counsel as to their choice of type of trial. Many times a defense counsel will advise trial by judge when his own workload is heavy. Recommendations: Congress should require random selection of military jurors from a pool made up of qualified jurors representing a cross section of the military community. Essential personnel should be excluded from juror

eligibility. This change would require the establishing of juror eligibility criteria and the designating of responsibility for the selection process. Article 25 of the Uniform Code of Military Justice should be amended to either require the President to implement these changes within a specified time or to statutorily establish a random selection procedure based on specific juror eligibility criteria and to designate who should be responsible for the random selection process. The Congress should reexamine whether the minimum size of juries is large enough for general and special court martial, greater consistency and stability in jury size is needed, the number of peremptory challenges should more closely conform with Federal and State practices, military juries should be used to impose sentence, or the convening authority should be closely involved in the judicial proceedings of the accused. (QM)

REPORT TO THE CONGRESS

BY THE COMPTROLLER GENERAL OF THE UNITED STATES

Military Jury System Needs Safeguards Found In Civilian Federal Courts

Department of Defense
Department of Transportation

Many perceive the system of selecting military court members (jurors) to be unfair and advocate change. Chief Justice Burger's indispensable ingredient for justice is public confidence in the court system. Military courts do not provide certain safeguards found in civilian Federal courts, and abuse can occur and go unproven.

GAO recommends that the Congress change the law to require random selection of military jurors as the first step in providing these safeguards. The Department of Defense acknowledges the ethical concept involved and encourages its application by any means consistent with its mission.

In adopting random selection, other changes would have to be considered. Therefore, GAO recommends that the Congress reexamine whether:

--The size of juries should be enlarged and made more uniform.

--The number of peremptory challenges (challenges not requiring a reason) is appropriate.

--Military jurors should impose sentence.

--Too much authority is vested in the officer who approves the trial.

FPCD-76-18

JUNE 6, 1977

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-186183

To the President of the Senate and the
Speaker of the House of Representatives

This report culminates a 2-year study of the differences between jury selection for criminal cases in military courts and civilian Federal courts. The origins of the military jury system date back to before the signing of the Constitution. Many are interested in seeing the system changed. We are recommending that the Congress amend Article 25: Uniform Code of Military Justice to require the random selection of military jurors and that it reexamine related issues.

Our authority for making this review is the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We are sending copies of this report to the Director, Office of Management and Budget; the Attorney General of the United States; and the Secretaries of Defense, Transportation, Army, Navy, and Air Force.

Comptroller General
of the United States

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

MILITARY JURY SYSTEM NEEDS SAFEGUARDS FOUND IN CIVILIAN FEDERAL COURTS

Department of Defense
Department of Transportation

D I G E S T

Military courts do not provide all the safeguards found in civilian Federal courts. For example, military people do not have the right to be tried by a randomly selected jury. Although abuse is difficult to prove, it has been proven in a number of court cases. (See pp. 5 and 6.)

GAO recommends that the Congress require random selection of jurors--selecting from a pool made up of qualified jurors representing a cross section of the military community. Essential personnel, such as those needed for combat during war, would be excluded from eligibility. This change would require (1) establishing juror eligibility criteria and (2) designating responsibility for the selection process. To bring about these changes the Congress would have to amend Article 25: Uniform Code of Military Justice to either

--require the President to implement these changes within a specified time or

--statutorily establish a random selection procedure based on specific juror eligibility criteria and designate who should be responsible for the random selection process.

In adopting random selection, other changes would have to be considered. Therefore, GAO recommends that the Congress reexamine whether

--the minimum size of juries is large enough for general and special court martial (5 and 3 jurors, respectively), particularly when, in the majority of cases, only two-thirds are needed to convict (the 12 jurors in civilian

Federal courts must unanimously decide on a conviction in criminal cases);

--greater consistency and stability in jury size is needed;

--the number of peremptory challenges (defense and prosecution can each challenge or dismiss one juror without giving a reason) should more closely conform with Federal and State practices;

--military juries should be used to impose sentence; and

--the convening authority (the commanding officer who approves the trial) should be intimately involved in the judicial proceedings of the accused.

The convening authority has no counterpart in the civilian Federal court system. He is intimately involved in the judicial process both before and after trial. His duties include (1) deciding whether to bring charges against the accused, (2) appointing the prosecutor and defense counsel, and (3) reviewing and approving a finding of guilty and the sentence imposed. (See pp. 3 and 4.) Except in cases of gross abuse, his decisions are not likely to be challenged.

The convening authority has broad authority in the jury selection process. The law requires him to determine who, in his opinion, are best qualified to serve as jurors. The factors he must consider by law biases this selection towards higher grades. (See pp. 10, 12, and 13.) But convening authorities have widely differing views as to what constitutes "best qualified." Thus, the types and grades of individuals allowed to serve as jurors are different. None of the 13 convening authorities GAO talked to had written criteria for best qualified even though most had delegated initial selections to subordinates. (See pp. 16, 18, and 20.)

This jury system is in sharp contrast to the civilian Federal court system which guarantees the accused a trial by a jury randomly

selected from a cross section of the community who meet minimum qualifying requirements.

The potential for abuse is clearly seen in the power of the convening authority to select jurors combined with the low number of jurors needed to convict. Concern over such issues led the U.S. Court of Military Appeals--the highest military court--to reject the idea that court members are the functional equivalents of jurors in a civilian criminal trial. In a September 1976 ruling, this court expressed concern over the method of jury selection and indicated a need for its reexamination by the Congress. (See pp. 40 and 41.)

GAO talked to several defense counsels who believed that jurors drawn from the higher grades may be more severe on the accused. In 244 cases reviewed, GAO found that 82 percent of defense counsels' peremptory challenges were used to remove higher graded officers. (See p. 22.)

GAO interviewed 64 military officers at all echelons about jury selection. About 80 percent of those expressing an opinion believed some form of random selection should be implemented. Why? The reason most often given was that it would eliminate the appearance of unfairness and the potential for abuse when the convening authority selects jurors. (See p. 35.) Significantly, these were convening authorities, commanders, and legal personnel--including prosecutors, defense counsels, and judges.

Also, an Army opinion survey of the military community at Fort Riley, Kansas, taken at the conclusion of a random selection test program showed change was desired; 68 percent of 456 respondents favored change to random selection. And the majority of the respondents were from the ranks selected by convening authorities to serve as jurors. In this program, the percent of warrant officers and enlisted jurors in the lower and middle grades increased substantially in contrast with the cases GAO reviewed where the convening authorities selected jurors.

About 49,300 military people were tried by military courts in fiscal years 1975 and 1976. GAO estimates that 7,150 of these were tried by jury. The majority of the accused are young--most below age 20--and may lack the maturity and judgment to decide what form of trial is best. Defense counsels have a large influence on whether they elect trial by jury. Defense counsels base their advice on a number of considerations. One is how the findings and sentences of the judge compares to that of juries in similar situations. Another is workload. One defense counsel told GAO that he recommends trial by judge if his workload is too heavy to adequately prepare a case for presentation before jurors. (See p. 22.) Thus, it is difficult to assess what effect a change to random selection would have on the number of accused who elect trial by jury.

In commenting on GAO's proposed report, the Department of Defense acknowledged the ethical concept of random selection and encourages its application within the military by any practical means consistent with their mission. The Department of Defense stated:

"The idea of random selection of court members is really a part of one of the basic cornerstones of the Uniform Code of Military Justice--freedom from improper command influence over all phases of the military justice system, including the selection of court members and the outcome of trials by court-martial."

The services and the Coast Guard stated that they are generally against change in the absence of widespread, improper use of command influence. (See apps. VI and VII.)

Contents

ABBREVIATIONS

DOD	Department of Defense
GAO	General Accounting Office

CHAPTER 1

INTRODUCTION

Through the years there have been many changes in the military court system. One important change has been to allow a greater cross section of the military community to serve as court members. In this report a court-martial is referred to as a military court and court members as jurors.

TYPES OF MILITARY COURTS

There are two types of military courts on which jurors may serve.

--A general court tries the most serious offenses. The accused is tried before at least five jurors and a military judge or a military judge alone. The sentence imposed can be death, life imprisonment, total forfeiture of pay, reduction to lowest enlisted grade, and a bad conduct or dishonorable discharge.

--A special court includes at least three jurors, three jurors and a military judge, or a military judge alone. The maximum sentence that can be imposed is confinement at hard labor for 6 months, forfeiture of two-thirds pay per month for 6 months, reduction to the lowest enlisted grade, and a bad conduct discharge.

Normally field grade (O-4 to O-6) officers can convene special courts while general grade officers or their equivalent (O-7 and higher) convene general courts.

There were about 49,300 trials by general and special courts in fiscal years 1975-76. We estimate that 7,150 (15 percent) were jury trials. The percentage of jury trials varied significantly among the services from a low of about 6 percent in the Marine Corps to a high of about 40 percent in the Air Force.

LEGISLATION ON SELECTION OF MILITARY JURIES

In 1775 the Continental Congress enacted the first legislation governing U.S. (then Colonial) military courts. This legislation was in separate acts for the Army 1/ and

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1/June 30, 1775, Journals of the Continental Congress 1775-1789, Vol. II, pp. 117-18.

Navy. 1/ Both acts provided that only specified commanding officers could convene military courts and that the courts could include only commissioned officers of specified minimum grades or above.

In 1788 the Constitution of the United States was ratified. Article I, section 8, gave the Congress authority to define punishable conduct and to provide rules for trial and punishment of military people. However, the basic methods and criteria the Continental Congress set forth for selecting members of military courts remained about the same for more than a century.

In 1920 legislation 2/ provided general guidance for determining eligibility for serving on Army courts. It required the commanding officers who convened Army courts to appoint officers who, in their opinion, were "best qualified" by reason of age, training, experience, and judicial temperament.

Major changes in juror eligibility were contained in the Elston Act 3/ passed in 1948. For the first time, warrant officers and enlisted persons were allowed to serve on Army courts. This change was prompted by a desire to give enlisted persons greater confidence in the fairness of Army courts. The general views of enlisted persons regarding eligibility to serve as military jurors were presented in the hearings 4/ on the act:

> "* * * They [enlisted persons] have two particular reasons for wanting it.
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> "One is that they feel that officers, in the main, have never served in the enlisted grades and do not understand the problems of enlisted people. While they don't expect any particular sympathy from the court because of that, a court

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1/November 28, 1775, Journals of the Continental Congress 1775-1789, Vol. III, pp. 378-79, 382-83.

2/Act of June 4, 1920, ch. 227, Art. 4, 41 Stat. 759, 788.

3/Act of June 24, 1948, ch. 625, § 203, 62 Stat. 604, 628.

4/Hearings on H. R. 2498 Before Subcomm. No. 1 of the House Comm. on Armed Services, 81st Cong., 1st Sess., No. 37, at 1142 (1949).

which might include enlisted persons, nevertheless they feel that they would have more understanding.

"The second reason is this: They say it is much more democratic. They just like the idea that they have a choice. They say 'We would have it in civilian life and we like the idea that we can have it here.'"

The next major change came in 1950 when the Congress passed the Uniform Code of Military Justice 1/ which established one law for all military courts. The code specifies the circumstances under which commissioned officers, warrant officers, and enlisted persons are eligible to serve as jurors. Enlisted persons are eligible only when requested by an accused enlisted person. The convening authority must appoint jurors who, in his opinion, are best qualified to serve by reason of age, education, training, experience, length of service, and judicial temperament.

Before 1968 the accused could only be tried by a military court with jurors. In 1968 the code was revised to provide the accused the alternative of a trial before a judge alone. 2/

ROLE OF CONVENING AUTHORITY

The responsibility for determining who actually serves as jurors on military courts has from the beginning been vested in the convening authority--the commanding officer who approves trial of an accused. Convening authorities also have broad discretionary authority to (1) decide whether to bring charges against the accused, (2) refer, after due investigation, a case to the type of court-martial he considers appropriate, and (3) appoint the prosecutor and defense counsel.

A convening authority's responsibilities continue beyond the trial. He must review the record of trial and approve a finding of guilty and the sentence imposed and in doing so has broad discretion. He can exercise clemency in the form of disapproval, mitigation, commutation, or suspension of the sentence or may order a rehearing. He

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1/Act of May 5, 1950, Pub. L. 81-506, 64 Stat. 107, 10 U.S.C. §801 et seq. (1970).

2/Act of October 24, 1968, Pub. L. 90-632, § 2 (2), 82 Stat. 1335, 10 U.S.C. § 816 (1970).

may make these adjustments, if he finds it appropriate to do so, in the interest of rehabilitating the accused. Thus, he is intimately involved in the judicial process and has important responsibilities in its operation. He is guided and governed by statutes and directives, and his decisions on judicial matters are subject to review by superiors and in some cases are reviewed by appellate courts, including U. S. Court of Military Appeals--the highest court in the military justice system. Except in cases of gross abuse, however, his decisions are not likely to be challenged.

A convening authority's primary duty, however, is to command a ship, division, squadron, brigade, company, or other military component. Although military justice matters are normally not a major part of his workload, in some cases they take one-fourth or more of his time. There is no requirement that he have formal legal training and he usually relies heavily on the advice of others, such as the Staff Judge Advocate.

Because the convening authority is the ranking officer in his particular organizational component, he is in a position to influence the decisions of those who administer military justice. There may be occasions when he or officers superior to him may wish to influence how a particular crime or person accused of an offense is dealt with. The exercise of any command influence in regards to such matters, however, is expressly forbidden by article 37 of the code.

> "(a) No authority convening a * * * court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts. * * *
>
> "(b) In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced, in grade, or in determining the assignment or transfer of a member of the armed forces or

in determining whether a member of the armed forces should be retained on active duty, no person subject to this chapter may, in preparing any such report (1) consider or evaluate the performance of duty of any such member as a member of a court-martial, or (2) give a less favorable rating or evaluation of any member of the armed forces because of the zeal with which such member, as counsel, represented any accused before a court-martial."

Although command influence is prohibited, it can be exercised in many subtle ways that are not readily susceptible to detection. When it is alleged to exist, military courts have considerable difficulty in establishing whether it is present. A 1967 decision by the U.S. Court of Military Appeals addressed this problem. 1/

"These cases involve the same basic issue, i.e., whether the Commanding General * * * violated the provisions of * * * Article 37 * * * with respect to the findings and sentence, or sentence alone. * * * Both parties are agreed that, at the very least, a serious issue is raised concerning whether there was such command interference with these judicial bodies.

"In the nature of things, command control is scarcely ever apparent on the face of the record, and, where the facts are in dispute, appellate bodies in the past have had to resort to the unsatisfactory alternative of settling the issue on the basis of ex parte affidavits, amidst a barrage of claims and counterclaims. * * * The conflicts here make resort to affidavits unsatisfactory * * *." (Underscoring supplied.)

Appellate courts have determined that abuse has occurred in a number of cases. 2/ As discussed in chapter 2, the U.S. Court of Military Appeals has ruled that the convening authority is presumed to have acted within his discretion in the

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1/United States v. DuBay, 17 USCMA 147, 37 CMR 411, 412-13 (1967).

2/See, for example, United States v. Hedges, 11 USCMA 642, 29 CMR 458 (1960); United States v. McLaughlin, 18 USCMA 61, 39 CMR 61 (1968); United States v. Wright, 17 USCMA 110, 37 CMR 374 (1967); United States v. Broynx, 45 CMR 911 (1972).

absence of patent, deliberate, or systematic exclusion of eligible classes of military persons from consideration for jury service.

ADVOCATES OF CHANGE

There are many advocating change in the military court system. Most of the changes proposed would diminish the power of the convening authority.

Since the code was last amended in 1968, bills have been introduced in the Congress to

--require random jury selection and

--eliminate the convening authority from the jury selection process.

In 1972 a Department of Defense (DOD) task force 1/ recommended that random selection be implemented to remove the aura of unfairness that surrounds military courts.

In May 1976 the Committee on Military Justice and Military Affairs, Association of the Bar of the City of New York, released a proposed bill to improve the military justice system. Included in its provisions is an amendment to article 25 of the code providing for a randomly selected jury. Under this proposal, eligibility for jury service is conditioned upon active duty service for at least 1 year. In addition, individuals with any prior court-martial convictions or more than one nonjudicial punishment for misconduct within the previous year would be disqualified from jury service.

In a September 1976 decision, 2/ the U.S. Court of Military Appeals expressed concern over the present jury selection method and suggested the Congress reexamine it. The Chief Judge has endorsed the concept of random jury selection to enhance the perception of fairness in the judicial system. Other proposals by the Chief Judge include:

--Vesting the authority to sentence exclusively in the trial judge regardless of whether the court members determine the issue of guilt.

1/Department of Defense "Report of the Task Force on the Administration of Military Justice in the Armed Forces," Vol. II, pp. 71-73, November 30, 1972.

2/United States v. McCarthy, 25 USCMA 30, 54 CMR 30, n. 3 (1976).

--Considering enlarging the size of the court to conform more closely to Federal and State practice and fix the size of the court by statute. The number of court members required for a general court-martial could be set at nine and the number required for a special court-martial at five. This would eliminate variations in the number of jurors needed to convict.

--Increasing the number of peremptory challenges (challenges not requiring a reason) to reflect similar practices in the civilian system.

The Chief Judge has also made proposals which would relieve the convening authority of certain judicial responsibilities. These proposals include the following:

--Amend the code to remove from the convening authority the power to appoint judges and counsel. This would eliminate the "appearance of evil" and give recognition to the fact that as a practical matter convening authorities today play an insignificant role in the actual selection of judges and counsel.

--Restrict the convening authority's post trial responsibility to matters of clemency.

--Increase the statutory role of the Staff Judge Advocate in the convening process and have him rated by someone other than the convening authority.

As discussed in later chapters, we found that change in the jury selection process was favored by the majority of those in the military community we talked to and others participating in studies and tests we reviewed. During 1974 the Army tested random selection at Fort Riley, Kansas. The Air Force recently established a test location; however, no jury trials have occurred at that location since it was established.

SCOPE

The objective of this review was to assess the appropriateness of the differences between military and civilian jury systems in criminal cases. We:

--Compared the design of the military and civilian criminal court systems.

--Evaluated military juror selection procedures and the consistency of criteria used among convening authorities.

--Reviewed the Army test of random jury selection at Fort Riley, Kansas, and compared the results with records of trial where random selection was not used.

--Interviewed military officers in both command and legal positions regarding jury selection and the desirability and feasibility of random jury selection.

We examined pertinent Federal laws; military policies, regulations, and procedures; and visited Department of Defense, Army, Navy, Air Force, and Marine Corps Headquarters, and one field installation in each service. (See app. I.)

CHAPTEF 2

COMPARISON OF JURY SYSTEMS IN MILITARY COURTS AND CIVILIAN FEDERAL COURTS

The Constitution and law governing the trial of an accused make different provisions for military courts and civilian Federal courts. These provisions make different guarantees to the accused regarding representation on the panel which sits in judgment of the case.

Both military courts and civilian Federal courts discharge judicial functions but military courts are not a part of the judicial branch of the Federal Government as are civilian Federal courts. 1/ Furthermore, military courts and civilian Federal courts have different historical origins. Military courts are based on the civil law system, a Roman source, while civilian Federal courts are based on the common law system, an English source. 2/ Despite their legal and historical differences, military courts and civilian Federal courts have become more alike because of changes in military law during this century.

Military courts have lost some of their jurisdiction in recent years. Cases, which in the past were tried by court-martial, are being tried today in State and Federal courts. In some cases military and civilian courts have concurrent jurisdiction to try the accused. Thus, the rights of a service member may depend on whether he is tried by civil or military authorities.

The military jury system is governed by article 25 of the code. Article 25 requires the convening authority to select from the eligible military population those persons who, in his opinion, are best qualified to serve as jurors. Neither the law nor administrative regulations provide specific procedures or criteria to be used by convening authorities to select jurors. The only guidance is the general factors set forth in article 25, which must be considered. Thus, the military courts rely on convening authorities' integrity and judgment for the selection of jurors. In contrast, the civilian Federal court system provides that an accused will be tried by a jury, who meet

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1/Kurtz v. Moffitt, 115 U.S. 487, 500 (1885), and Toth v. Quarles, 350 U.S. 11, 17 (1955).

2/G. Glenn, The Army and the Law (1943), at 47, and Moore v. United States 91 U. S. 270, 274 (1875).

minimum qualifying requirements, randomly selected from a cross section of the community.

SIZES AND RESPONSIBILITIES

Important differences exist between military and civilian Federal juries in criminal cases.

--The size of military juries is determined by convening authorities and vary in size. The established minimum is three for a special court and five for a general court, but they sometimes number over twice that many. Civilian Federal juries almost always have 12 members; in no case can there be less than 11 members.

--In most cases only two-thirds of the military jurors must agree to convict. A unanimous decision is required only if conviction could result in the death penalty, and three-fourths of the jurors must agree on life imprisonment or confinement for more than 10 years. Civilian Federal juries must reach a unanimous decision to convict.

--Article 25 biases the selection of military jurors towards higher grades, mostly officers. Since most of the military people in trouble are lower grade enlisted personnel, the criteria used to select jurors in the majority of cases denies the accused representation from their peer group--those in the same grade or of the same age. The composition of civilian Federal juries is based on specific selection criteria which disregard the economic or social status of the accused in relation to those selected to try them.

--When empaneled, military juries always impose sentence even if they are not convened to determine guilt. Civilian Federal juries determine whether an accused is guilty but do not impose sentence.

ELIGIBILITY CRITERIA

In military courts, only military persons equal or superior in rank or grade to the accused are eligible for jury service unless using lower grade persons is unavoidable. In the civilian Federal courts, any person meeting stipulated citizenship, age, residency, literacy, and character criteria is eligible for jury service.

Military courts

Article 25 provides that any commissioned officer, warrant officer, or enlisted member of an armed force on active duty is eligible for selection to serve as a juror on general and special courts. Criteria limiting eligibility are listed below.

--Warrant officers cannot serve as jurors for the trial of a commissioned officer.

--Enlisted persons cannot serve as jurors for the trial of a commissioned officer or warrant officer.

--Enlisted persons cannot serve as a juror for the trial of any enlisted person from the same unit.

--No member of an armed force can serve as a juror of a general or special court when he is the accuser or a prosecution witness, or has acted as investigating officer or counsel in the case.

--When it can be avoided, no accused may be tried by a juror who is junior to him in rank or grade.

Civilian Federal courts

The Jury Selection and Service Act of 1968, as amended, 1/ provides that all citizens of the district where the court is convened are to have opportunity for jury service. Qualifications of prospective jurors are to be evaluated on the basis of specified criteria, and those failing to meet the minimum requirements are to be disqualified.

The law states that any person is qualified for jury service unless he

--is not a U.S. citizen, at least 18 years old, or has not resided for a period of 1 year within the judicial district;

--is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

--is unable to speak the English language;

1/28 U.S.C. 1861 et seq. (Supp. IV, 1974), amending 28 U.S.C. 1861 et seq. (1970).

--is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

--has a charge pending against him for, or had been convicted in a State or Federal court of, a crime punishable by imprisonment for more than 1 year for which civil rights have not been restored by pardon or amnesty.

The law further states that members of the active Armed Forces; fire and police departments; and public officers in Federal, State, or local governments who are actively engaged in the performance of official duties are to be barred from jury service.

SELECTION PROCEDURES

In the military, convening authorities select jurors without the use of written procedures or specific criteria. Civilian Federal courts select juries randomly on the basis of specific written procedures.

Military courts

Article 25 requires the convening authority to determine from the eligible military population who may serve as jurors. It states:

"When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament."

An additional selection requirement which pertains to jury composition is that when an enlisted person requests enlisted persons on the court, they must compose at least one-third of the jury, unless eligible persons cannot be obtained because of physical conditions or military exigencies.

In 1949 hearings before enactment of the code, there was discussion as to whether application of article 25 would result in trial of an accused by jurors selected predominately from the senior grades. The Chief Judge of the U.S. Court of Military Appeals in the case of United States v. Crawford, 15 USCMA 31, 35 CMR 3, 12 (1964), observed that those in the senior grades would most often be called upon to serve.

"We may take judicial notice that many enlisted persons below the senior noncommissioned ranks

> are literate, mature in years and sufficiently judicious in temperament to be eligible to serve on courts-matrial. It is equally apparent, however, that the lower enlisted ranks will not yield potential court members of sufficient age and experience to meet the statutory qualifications for selection, without substantial preliminary screening. * * * In fact, the discussions of Article 25 in the hearings on the Code, * * * show a general understanding that the relationship between the prescribed qualifications for court membership, especially 'training, experience, and length of service,' and seniority of rank is so close that the probabilities are that those in the more senior ranks would most often be called upon to serve."

The code does not specify how the convening authority must approach the task of selecting jurors. It explicitly gives the convening authority discretion. Again turning to the case of United States v. Crawford, in a concurring opinion, one judge observed that:

> "Article 25 * * * does not provide for any lists of prospective court members, in the sense that panels of prospective jurors must be formulated or persons drawn therefrom by lot or otherwise. Rather, that Article places the responsibility and grants the discretion to the convening authority to appoint the court members from no list or from any list."

In a series of cases in 1964, 1/ the U.S. Court of Military Appeals indicated that in the absence of patent abuses or deliberate and systematic exclusion of eligible classes of military persons from consideration for jury service, it must be presumed that a convening authority acted within his discretion. The court has held that convening authorities have discretion to refer first to senior noncommissioned grades as a convenient and logically probable source for eligible jurors when an accused enlisted person requests enlisted jurors. This appears to be based on the generally accepted view that:

1/ United States v. Crawford, supra; United States v. Mitchell, 15 USCMA 59, 35 CMR 31 (1964); United States v. Motley, 15 USCMA 61, 35 CMR 33 (1964); United States v. Glidden, 15 USCMA 62, 35 CMR 34 (1964); and United States v. Ross, 15 USCMA 64, 35 CMR 36 (1964).

"The convening authority is directed not to make a random selection among all those who might be eligible within the personnel resources available to him, nor to spread his selection among all the eligible ranks, but to make his selection on the basis of who, in his opinion, is best qualified for the duty. Judicial review of this purely discretionary function of the convening authority must be limited to patent abuses of that discretion." 1/

Civilian Federal courts

Federal law requires that juries be selected at random from voter registration lists, lists of actual voters, or other sources representing a cross section of the district in which the court is located. Each district is required to establish specific written selection procedures necessary to insure that juries are selected randomly from a fair cross section of the community. The law requires that a district's written procedures provide for:

--Establishing a bipartisan jury commission or authorization for the clerk of the court to manage the selection process.

--Establishing a source of prospective jurors.

--Establishing a master jury wheel containing a minimum of 1,000 names.

--Having a district judge determine those individuals qualified for jury service.

--Detailing procedures to be followed in selecting names from the source.

--Excusing, upon request, those jurors whose service would cause them hardship or extreme inconvenience.

--Determining persons to be barred from jury service.

--Establishing a time when names drawn from the jury wheel will be disclosed to the parties involved and to the public.

1/United States v. Angeles, U.S. Navy Court of Military Review, NCM 74 0475, April 29, 1974; petition for review denied by U.S. Court of Military Appeals, September 25, 1974.

--Establishing procedures on how persons selected for jury service will be assigned to juries.

CONCLUSIONS

There are many important differences between jury systems in the military courts and civilian Federal courts. One difference is how juries are selected. Military juries are selected by the convening authority on the basis of his judgment as to who is best qualified within the broad framework of article 25. The civilian Federal court system provides that an accused will be tried by a jury which meets minimum qualifying requirements and is randomly selected from a cross section of the community. This difference is particularly significant in view of the fact that the minimum size of military juries is far less then that of the civilian court system and only two-thirds rather than a unanimous vote is often needed to convict.

CHAPTER 3

PRACTICES OF CONVENING AUTHORITIES IN SELECTING MILITARY JURORS

We discussed jury selection with convening authorities at one installation in each of the four services. None of the 13 convening authorities with whom we talked had developed written criteria stating what, in their opinion, constituted "best qualified by reason of age, education, training, experience, length of service, and judicial temperament." All emphasized they sought jurors who would objectively listen to the facts and arrive at an appropriate verdict. These discussions revealed differences in concepts and methods of juror selection.

--All use different criteria, such as position, type experience, grade, and availability to exclude persons from consideration.

--Some personally select jurors while others select from nominations by subordinates.

--Some had not discussed selection criteria with subordinates who nominate jurors.

GENERAL COURTS

The four general court convening authorities we interviewed selected jurors from nominees provided by designated subordinates. Three of them had given verbal instructions to subordinates, but they were general and exclusionary rather than objective measures of best qualified. One had not discussed jury selection with all subordinates.

Criteria used

A comparison of the convening authorities' verbal instructions to subordinates showed differences in criteria for juror selection.

1. Position and/or experience:

--The Army convening authority selects officers who are commanders of combat units--infantry, armor, or artillery--and excludes officers in support elements.

--The Marine Corps convening authority selects officers in support elements because commanders of combat units are too busy.

--The Air Force convening authority selects officers who are commanders of any type unit.

--The Navy convening authority selects from all officers regardless of position or experience.

2. Officer grades:

--All convening authorities stated that they tried to select a broad representation of officers in grades WO-1 to WO-4 and O-1 to O-6 for each court, but only the Army and Navy convening authorities specified the number of juror nominees wanted for each grade.

3. Enlisted grades (appointed when requested by the accused):

--The Army convening authority requests a stipulated number of nominees in each grade or groups of grades from E-2 to E-9.

--The Marine Corps convening authority excludes enlisted grades below E-5.

--The Navy and Air Force convening authorities do not have any instructions on grade.

4. Availability:

--The Air Force, Army, and Marine Corps convening authorities exclude people from consideration for jury duty who are on training exercises or maneuvers; the Navy convening authority does not.

Selection procedures

While the four convening authorities select jurors from nominations made by designated subordinates, the extent of delegation differs. The Air Force and Marine Corps convening authorities selected jurors for each court, while the Army and Navy convening authorities select jurors to serve on courts for a specified period of time. And only the Army convening authority receives a data sheet on each nominee for use in selecting jurors.

The process of nominating jurors for selection by the convening authority is shown below.

	Installation			
Step	Air Force	Army	Marine Corps	Navy
Initial request	made by convening authority's staff	staff judge advocate	prosecution	General court convening authority
Initial selection	made by base deputy staff judge advocate	personnel office	personnel office	Commanders
First interim review	reviewed and subject to change by base staff judge advocate	none	none	Staff judge advocate
Second interim review	reviewed and subject to change by base commander	none	none	none

Air Force and Marine Corps

The convening authorities request about 10 officer nominations for each court. Some nominees may not be approved by the convening authority. If additional nominees are needed, the nomination process is repeated. The process is the same for selecting enlisted nominees although the number requested may vary.

Navy

The convening authority periodically requests 27 officer nominees. From the nominees, the Staff Judge Advocate selects two juries of seven members each and forwards a listing of those selected to the convening authority for approval. The two juries serve on a rotating basis for 90 days.

The Staff Judge Advocate said he had never received a request for enlisted persons on the jury. But if he did he would discuss the matter with the defense counsel to arrive at the appropriate number and grade of jurors desired. A listing of the jury members selected would be submitted to the convening authority for approval. Such a jury would serve only on that court.

Army

The convening authority is periodically provided a listing of 70 officer nominees and a data sheet on each nominee. He selects nine jurors to serve for 6 months. The nominees include a specified number in each grade, as directed by the Staff Judge Advocate.

Grade	Number
W0-1 to 4	9
0-1 and 2	15
0-3	15
0-4	14
0-5	9
0-6	8
Total	70

When enlisted jurors are requested by the accused, the Staff Judge Advocate furnishes a list of 12 nominees to the convening authority who selects four or five to serve on that court along with selected officers. The 12 nominees are to be in the following grades.

Grade	Number
E-2	3
E-3	3
E-4	3
E-5 to 9	3
Total	12

SPECIAL COURTS

We discussed juror selection with nine special court convening authorities representing each military installation. Only four had convened a court with a jury and only one of these had convened a court with enlisted jurors.

Criteria used

Except for grade, the convening authorities described criteria for juror selection in general terms. They wanted mature, intelligent, not "hard-line" individuals. Some convening authorities had not discussed juror selection with subordinates making nominations; others had given verbal guidelines.

All nine convening authorities said they considered all officers eligible. But two Marine Corps and one Army convening authorities would not consider enlisted members below the grade of E-4.

Navy convening authorities do not select enlisted jurors for courts they convene; rather, the jurors are selected by other unit commanders. They said they did not know what other unit commanders consider best qualified.

One of the two Navy convening authorties said, however, that in selecting enlisted jurors for other convening authorities he would exclude those below the grade of E-4.

Selection procedures

Four convening authorities said they selected or would select both officer and enlisted jurors without assistance from others. Five said they would select jurors from nominees submitted by subordinates.

	Number of convening authorities selecting jurors	
	Without assistance	With assistance from subordinates
Air Force	0	1
Army	1	2
Marine Corps	3	0
Navy	0	2
Total	4	5

The convening authorities, who selected or would select jurors from nominees, said they would seek nominations from persons in the following positions:

Service	Position
Air Force	Staff Judge Advocate
Army	Personnel officer
Navy	Executive officer or legal service officer

CONCLUSIONS

The broad discretion given the convening authority by statute has resulted in conceptual differences as to what constitutes best qualified and in different methods for selecting jurors. The convening authorities we interviewed had not developed written criteria for the selection of jurors even though most had delegated initial selections to subordinates.

CHAPTER 4

COMPOSITION OF MILITARY COURTS

We analyzed 244 records of trial for special and general courts to determine the grade of the person tried and the composition and size of the juries. Appendix II lists the cases by court, trial, and service. These records did not include the 123 cases tried at Fort Riley, Kansas, during the Army's test of random jury selection.

WHO IS BEING TRIED? AND HOW MANY SELECT TRIAL BY JURY?

In the 244 cases we reviewed the accused were enlisted persons, ranging in grade from E-1 to E-6. Our analysis of the records showed that

--96 percent were E-4's and below and

--24 percent selected trial by jury.

The schedule below shows the grade of the accused, whether a guilty plea was involved, and whether trial was by judge or jury.

Grade of accused	Total	Plea		Trial by		
		Guilty	Not guilty	Judge	Jury composed of Officers	Jury composed of Officers and enlisted
E-1	73	44	29	59	13	1
E-2	73	40	33	60	12	1
E-3	57	33	24	42	12	3
E-4	31	15	16	18	11	2
E-5	9	2	7	6	2	1
E-6	1	1	-	1	-	-
Total	244	135	109	186	50	8
Percent		55	45	76	20	4

The 13 defense counsels we interviewed said many considerations influenced their advice to an accused regarding selection of trial by judge or jury. One principal consideration was how the judge's record of findings and sentences compared to the record of juries in similar situations. In most instances, they indicated that there was greater risk with jurors because their findings and sentences were somewhat unpredictable. Four defense counsels recommended trial by judge because military juries tend to be drawn from

the higher grades who may be more severe on the accused. Another defense counsel recommended trial by judge because his workload was too heavy to adequately prepare a case for presentation before jurors.

JURY COMPOSITION

Analysis of the 58 cases tried before juries showed that the accused requested a jury composed of officers in 50 cases and a jury composed of officers and enlisted persons in 8 cases, or about 14 percent of the time.

After the convening authority selects a military jury, both the prosecution and the defense can challenge individual jurors for cause, that is, for a reason which disqualifies the person as an impartial member of the jury. In addition, the defense and the prosecution can each challenge one juror without giving any reason--called a peremptory challenge. Any juror successfully challenged takes no further part in the trial. If the jury size is less than the minimum required after challenges, additional jurors are selected by the convening authority.

All-officer juries

Jurors selected by the convening authorities ranged in grade from warrant officers to commissioned officers in the field grade (O-4 to O-6). The largest group was commissioned officers in the lowest three grades--company grades (O-1 to O-3). Less than 2 percent were warrant officers.

There were 19 challenges for cause and 47 peremptory challenges which reduced the number of jurors from 321 to 255. The defense used 82 percent of its peremptory challenges to remove higher grade officers--field grade. Conversely, the prosecution used 85 percent of its peremptory challenges to remove lower grade officers--company grade.

After cause and peremptory challenges, juries included members from all commissioned grades and some warrant officer grades. The largest percent of jurors were still in the company grades.

Grade of officers	Selected by convening authority	Challenges		Final number	Percent
		Peremptory	Cause		
Commissioned officers:					
Field grade (O-4 to 6)	145	30	8	107	42.0
Company grade (O-1 to 3)	172	17	11	144	56.4
Warrant officers	4	-	-	4	1.6
Total	321	47	19	255	100.0

Juries composed of officers and enlisted members

Analysis of the eight cases where the accused requested enlisted jurors showed that the convening authorities' selection of jurors did not include either warrant officers or enlisted persons below the grade of E-4. Defense used peremptory challenges to remove higher grade officers from the jury while prosecution mostly used such challenges to remove lower grade officers. Neither the defense nor prosecution used peremptory challenges to remove enlisted jurors. A comparison of convening authority selection and final composition of juries follows:

Grade	Selected by convening authority	Challenges		Final number	Percent
		Peremptory	Cause		
Commissioned officers:					
Field grade (O-4 to 6)	28	8	3	17	27.4
Company grade (O-1 to 3)	18	3	1	14	22.6
Enlisted:					
Senior grades (E-7 to 9)	14	-	-	14	22.6
Middle grades (E-5 and 6)	19	-	3	16	25.8
Lower grades (E-4)	1	-	-	1	1.6
Total	80	11	7	62	100.0

JURY SIZE

Depending on the service, type of court, convening authority, and challenges, jury size varied from

--5 to 11 jurors for general courts and

--3 to 7 jurors for special courts.

General courts

The size of all-officer juries ranged from 5 to 9. When enlisted jurors were requested, the number of jurors ranged from 6 to 11. The following table shows the size of juries at the installation visited in each service.

	Officer juries	Officer and enlisted juries		
		Officer	Enlisted	Total
Air Force	6 to 9	5 to 6	3 to 5	8 to 11
Army	6	6	5	11
Marine Corps	5 to 9	3 to 5	3 to 5	6 to 10
Navy	5 to 7	(a)	(a)	(a)

a/The convening authority had never received a request for enlisted jurors.

Special courts

The size of all-officer juries ranged from 3 to 7. When enlisted jurors were requested, the range remained the same. The following table shows the size of juries at the four installations visited:

	Officer juries	Officer and enlisted juries		
		Officer	Enlisted	Total
Air Force	3 to 5	(a)	(a)	(a)
Army	(b)	2 to 3	4	6 to 7
Marine Corps	4 to 7	(a)	(a)	(a)
Navy	3 to 4	1	2	3

a/No special court cases were reviewed where enlisted jurors were requested.

b/No special court cases were reviewed where the jury was composed of officers only.

CONCLUSIONS

Random selection would help alleviate the concern expressed by defense counsels that jurors drawn from the

higher grades may be more severe on the accused. In the cases we reviewed, the defense counsels used most of their peremptory challenges to remove higher grade officers.

The defense counsels have a large influence on whether the accused elects trial by jury and would probably continue to do so even were random selection adopted. The majority of the accused are young--most below age 20--and may lack the maturity and judgment to decide what form of trial would best protect their interests. The advice given by the defense counsel is based on a number of considerations. One consideration is how the findings and sentences of the judge compares to that of juries in similar situations. Another is workload. One defense counsel stated that he recommends trial by judge if his workload is too heavy to adequately prepare a case for presentation before jurors.

CHAPTER 5

ARMY TEST OF RANDOM JURY SELECTION

The Army tested random jury selection at Fort Riley, Kansas, for a 13-month period ended December 31, 1974. Of the 123 accused tried during the period, 30 (24 percent) requested trial by jury, and 97 percent (29 of the 30 accused) requested enlisted persons on the juries. This is a dramatic increase over the 14 percent requesting enlisted jurors in the 244 records of trial we reviewed. (See p. 22.) The use of warrant officers and lower and middle grade enlisted persons also increased substantially.

ELIGIBILITY CRITERIA

The criteria used for jury selection during the test program was established by the general court convening authority at Fort Riley. Some of the criteria were similar to the criteria used by the civilian Federal courts. Any individual was considered eligible for jury service under this criteria if he or she

--was a U.S. citizen;

--was at least 21 years old;

--had been on active duty for a least 1 year;

--had been stationed at Fort Riley for at least 3 months;

--had no difficulty in reading, writing, speaking, and understanding the English language;

--had no mental or physical defect which could hinder his ability as a juror;

--had received no nonjudicial punishments during the present enlistment or during the preceding 3 years, whichever was shorter;

--had never been convicted of a felony; and

--had not been convicted of a misdemeanor during the present enlistment or during the preceding 3 years, whichever was shorter.

Eligibility criteria peculiar to the military also had to be met. The individual would be eligible under this criteria if he or she

--was E-3 or higher;

--was not assigned or attached to a confinement facility;

--was not an officer assigned to the medical corps, Judge Advocate General's corps, chaplain corps, military police corps, or a detailed Inspector General;

--had not received orders for permanent change of station or temporary duty; and

--had not already served as a juror during the preceding year.

In no case was a juror to be selected who

--was a member of the same unit as the accused,

--had acted as accuser in the case,

--would be called as a witness in the case,

--had acted as an investigator in the case, or

--was junior to the accused in grade or date of rank.

Persons with approved leave were exempt from jury duty during that time provided the leave was approved before receiving notice of selection for jury duty. Likewise, persons scheduled for an annual training test or a major field exercise were exempt during that time.

SELECTION PROCEDURES

The Fort Riley personnel office provided the Staff Judge Advocate's office with a computer-generated source list containing 1,000 names to be used as a master jury list. The Staff Judge Advocate's office asked each individual listed to complete a questionnaire which was used to determine eligibility for jury service. About 300 persons from the master jury list met eligibility requirements. Juries of 8- and 12-members were selected randomly to serve on special and general courts for a specified period.

The Deputy Staff Judge Advocate and another member of the Staff Judge Advocate's office were responsible for

determining which individuals qualified for jury service on the basis of the questionnaire. In addition, they were responsible for randomly selecting the juries. Once selected, however, a jury had to be approved by the general court convening authority before it could serve.

Initially all officer juries were selected. When an accused requested enlisted persons, the all-officer jury was withdrawn and a new jury having both officers and enlisted persons superior in grade to the accused was randomly selected. However, at least two randomly selected field grade officers were required on all courts.

Representation on juries when enlisted persons were requested was to be as follows:

Type of juror	Special court	General court
Officers	at least 3	at least 4
Enlisted	at least 4	at least 5

TEST RESULTS

There were 123 trials during the test period--30 before a jury and 93 before a judge. The accused were enlisted persons ranging in grade from E-1 to E-7. About 90 percent were E-4's and below.

Jury composition

A comparison of the composition of the 30 juries selected during the random selection test with the 58 juries discussed in chapter 3 that were selected by convening authorities showed:

--When best qualified jurors were selected by the convening authorities, the accused requested enlisted persons on the jury 14 percent of the time (8 of 58 cases).

--Where jurors were randomly selected during the test program, the accused requested enlisted persons on the jury 97 percent of the time (29 of 30 cases).

The types of crimes tried by juries selected during the test are comparable to those tried by juries selected by convening authorities. (See app. III.)

We also compared the grades of jurors randomly selected with those jurors selected by convening authorities. The results showed that the percent of warrant officers and enlisted jurors in the lower and middle grades (E-3 to E-6) increased substantially during the random selection test even with the requirement that jurors be at least age 21 and a grade of E-3, and at least two field grade officers serve on all courts.

Grade	Jurors selected by convening authorities		Jurors randomly selected		Percent increase or decrease (-) during test
	Number	Percent of total	Number	Percent of total	
Commissioned officers:					
Field grade (O-4 to 6)	17	27.4	50	24.6	-2.8
Company grade (O-1 to 3)	14	22.6	24	11.8	-10.8
Warrant officers	-	-	11	5.4	5.4
Enlisted personnel:					
E-7 to 9	14	22.6	20	9.9	-12.7
E-5 and 6	16	25.8	65	32.0	6.2
E-3 and 4	1	1.6	33	16.3	14.7
Total	62	100.0	203	100.0	

Opinion survey

Following the test, the Staff Judge Advocate distributed questionnaires to 800 military persons stationed at Fort Riley. The response rate for the 456 respondents ranged from about 23 percent for the E-3's to 86 percent for field grade officers. (See app. IV.) The majority of those responding believed that random selection has a greater appearance of fairness and should be implemented.

--68 percent believed the Army should adopt random selection.

--76 percent believed randomly selected juries would result in a greater appearance of fairness.

--60 percent believed randomly selected juries would result in greater actual fairness to the accused.

--60 percent believed juries should be selected from a source constituting a representative cross section of the military community.

--59 percent believed the final composition of the court should be a representative cross section of the military community.

--54 percent favored removing the convening authority from the selection process.

Observations of legal personnel

The legal personnel involved in the test at Fort Riley all agreed that if random selection is implemented some minimum eligibility criteria must be established to insure competent and mature jurors.

The defense counsels' overall view was that random selection was a major improvement over convening authority selection because the appearance of unfairness was eliminated. They felt that random selection would

--create a greater appearance of fairness in the eyes of the soldiers and potential critics and

--be fairer to the accused, as jurors would be drawn from a broader range of grades and experience.

The prosecutors felt that change to random selection is inevitable if not altogether desirable; its appearance of impartiality should do much to silence the critics of the military justice system. However, they were concerned about the quality of jurors randomly selected under the criteria established for the test program. The primary objection was the inexperience and lack of maturity of lower grade enlisted persons.

The judge believed the data obtained from the test program was insufficient, inconclusive, and did not provide a basis for drawing any definitive conclusions as to the feasibility of random selection. He concluded that:

--The test program was not directed toward eliminating the appearance of unfairness because the convening authority still had veto power over any jury.

--Random selection might inject serious problems into the system by reducing necessary high qualities of

juries. Many juries did not appear to understand the issues, arguments, or the instructions.

--Random selection was not tested in the appellate courts, and might not survive the first serious attack upon it.

In commenting on the results of the study at an annual meeting of the American Bar Association Standing Committee on Military Law, the Chief Counsel of the Coast Guard stated:

> "The experience in this program has been extremely gratifying. Generally speaking, both commanders and defendants like the system. One unexpected benefit from the program has been that many of the younger enlisted men who have served as members of a military jury have been the best 'public relations' men for the system of military justice. They have gone back to the barracks and told the troops that a court-martial is not really a kangaroo court and that the defendant really does get a full, fair, and impartial trial from start to finish. Another result of the pilot jury selection program has been that since defendants now know they won't automatically get a crusty old E-9 with thirty-five years' service on the jury if they request enlisted men on the court, more requests for enlisted men as jurors have been made." 1/

Evaluation report

The evaluation report stated that the military community at Fort Riley was generally in favor of random selection. It concluded if random selection is implemented:

--Article 25 of the code should be modified so that (1) the concepts have the sanction of the Congress, (2) selection criteria and procedures are standardized, (3) service secretaries are authorized to implement additional criteria and procedures as necessary, and (4) convening authorities retain the power to exempt or excuse individuals if operational requirements so dictate. Presently the code requires the convening authority to determine which members of the

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1/Ratti; The Military Jury, 61 ABA Journal 308 (1975).

command will be selected as jurors, and it is doubtful whether they can be deprived this power without modifying the code.

--Eligibility criteria should include a provision requiring a potential juror to be at least 21 years old and to have either a high school diploma or possess a cerficate of equivalency.

--It is not necessary to employ computers although removal of the human element tends to reinforce the concepts of randomness.

--A slight increase in the number of jury trials can be anticipated. Also, there is greater likelihood for a jury trial to result in a relatively light sentence if only military offenses are involved. 1/

The evaluation report recommended that a more diversified test be conducted at other installations and in other geographic areas before deciding whether to adopt universally random selection concepts and procedures.

Guilty verdicts during the test program

Our analysis showed that about 65 percent of the 74 specifications to which the accused pleaded not guilty resulted in a guilty verdict when tried by a military judge. About 72 percent of the 46 specifications to which the accused pleaded not guilty resulted in a guilty verdict when tried by a randomly selected jury.

Analysis of sentencing for military offenses

Our analysis showed that the accused was found guilty in all 31 cases involving only military offenses, such as absence without leave. Of these cases, 29 were tried by military judge and 2 were tried by jury.

In 25 of 29 cases tried by the judge and in the 2 cases by a jury the accused was given severe punishment--a punitive discharge. In addition, confinement ranging from 1 to 6 months was given in 19 of these cases. The punitive discharge

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1/The basis for this conclusion is not evident because the accused were found guilty in the only two cases tried by juries involving military offenses and both received a punitive discharge.

is more severe than confinement at hard labor for 1 year and forfeiture of all pay and allowances for a like period, as stated in the "Military Judge's Guide," Army Pamphlet 27-9, May 1969.

Criteria for defining a military offense was established through discussions with the Fort Riley legal personnel, including the Staff Judge Advocate and the Chief, Criminal Law Division. (See app. V.)

CHAPTER 6

MILITARY OFFICERS' VIEWS ON RANDOM SELECTION

We asked 64 military officers questions regarding the military justice system. Four principal questions pertaining to juror selection were:

--Do you favor random selection of jurors over the present system of having the convening authority select best qualified jurors?

--What eligibility criteria, if any, should be imposed on potential jurors if random selection is implemented?

--What effect would implementation of random selection have on a commander's ability to maintain discipline?

--Will random selection function in wartime or national emergency as well as in peacetime?

The number and type of officers interviewed at the installation visited in each of the four services are shown in the following table.

	Installation				
Persons interviewed	Army	Air Force	Marine Corps	Navy	Total
Legal:					
Defense counsel	4	1	5	3	13
Trial counsel	4	2	3	2	11
Staff judge advocate	1	2	1	2	6
Military judge	1	1	2	2	6
	10	6	11	9	36
Nonlegal:					
Convening authorities:					
General courts	1	1	1	1	4
Special courts	3	1	3	2	9
Other commanders	4	5	3	3	15
	8	7	7	6	28
Total	18	13	18	15	64

RANDOM SELECTION PREFERRED

Of the 64 persons interviewed, 43, or two-thirds, stated they preferred random selection over the present system. The 43 were 80 percent of those voicing an opinion. Ten qualified their endorsement contingent on:

--Establishment of juror selection criteria.

--Availability of a sufficient number qualified to serve as jurors.

--Sentencing by the judge.

The responses were as follows.

	Method favored				
Persons interviewed	Random selection	Random selection with qualifications	Present system	No opinion	Total
Legal	21	5	6	4	36
Convening authorities	3	3	3	4	13
Commanders	9	2	2	2	15
Total	33	10	11	10	64

The reason most often given in favor of random selection was that it would eliminate the appearance of unfairness and potential for abuse when the convening authority selects jurors. Other reasons were:

--Random selection would bring better justice to the military and would satisfy the critics of the present system.

--Military persons are entitled to a trial by a randomly selected jury.

--Randomly selected jurors would not be as likely to prejudge an accused.

--Random selection would decrease the number of authoritarian persons on the jury.

--Convening authorities tend to pick jurors who have less pressing duties rather than those who are best qualified.

Only in the Air Force did the majority of officers favor having the convening authority select jurors. The reason most often given in favor of the present method of selection was that random selection would result in poorer quality jurors. Other reasons were that random selection:

--Would add nothing to the present system.

--Is contrary to the military justice system.

--Would not permit the convening authority to routinely eliminate individuals with a bias.

--Might be less fair than the present system as its effects are unknown.

--Would be difficult due to nonavailability of all potential service personnel as military missions must take precedence over jury service.

The results we obtained were consistent with those in a series of studies conducted in 1971 and 1972 by an Army officer. Based on opinions solicited from field grade Army officers he concluded that:

> " * * * the great majority of Army officers today are themselves overwhelmingly in favor of some system of random selection of court-martial members." 1/

ELIGIBILITY CRITERIA NEEDED

All but two officers favored establishing jury eligibility criteria for enlisted personnel if random selection were adopted. Others felt that criteria would be needed to insure that juries selected would be competent and mature enough to return a verdict consistent with the evidence presented. There were differing opinions on criteria that should be established for each of the following factors which were mentioned at all of the installations visited.

--Character: Most believe jurors should not have any prior military court convictions. Others believed persons who had received nonjudicial punishments should also be excluded.

1/Brookshire; Juror Selection Under the Uniform Code of Military Justice: Fact and Fiction, 58 Military Law Review, 71, 75 (1972).

--Juror grade in relation to grade of accused: Most believed jurors should be equal or senior in grade or rank to the accused, as currently required. A few believed individuals should be eligible for jury duty regardless of grade or rank in relation to the accused.

--Grade: Minimums ranged from E-2 to E-6.

--Age: Minimums varied from 17 to 21, with 21 being the most frequently suggested.

--Education: Most believed that jurors should have a high school diploma or an equivalent. Some believed jurors need only be literate.

--Experience: Some believed 1 year or more of military experience should be the minimum experience needed to be eligible. Others believed 6 months or more at one installation would be adequate experience.

--Intelligence: Some believed a score of 90 or above on military tests should be required. Some believed mental competency would be adequate. Others recognized the need for a minimum, but gave no specifics.

The following table shows the frequency by installation that each of these factors were mentioned.

	Installation				
Factors	Army	Air Force	Marine Corps	Navy	Total
Character	11	7	12	17	47
Juror grade in relation to grade of accused	2	4	13	11	30
Grade	3	3	11	5	22
Age	4	4	5	7	20
Education	4	4	6	5	19
Experience	1	2	5	7	15
Intelligence	4	2	6	1	13

EFFECT OF RANDOM SELECTION ON DISCIPLINE

About 82 percent of the 28 convening authorities and other commanders we talked to believed that random selection would have no effect on discipline. One commander stated that discipline might be adversely affected if randomly selected jurors returned acquittals or light sentences

inappropriate to the evidence presented. The following is a breakdown of these views for the installation in each of the services we visited.

	No effect on discipline	Would adversely affect discipline	No opinion
Army	6	2	-
Air Force	5	1	1
Marine Corps	7	-	-
Navy	5	1	-
Total	23	4	1

RANDOM SELECTION DURING WARTIME

The largest group of officers interviewed believed that random selection would work in a wartime situation. A tabulation of the responses is shown below.

Random selection of jurors	Number of persons responding
Would work in a wartime situation	25
Would work in wartime for general but not special courts	2
Would work only in a limited war, like Vietnam	5
Would not work	17
No opinion	15
Total	64

Logistic and administrative problems were cited by most persons who believed that random selection would not work in wartime. Many who believed random selection would work felt that the potential logistic and administrative burden could and should be overcome.

CONCLUSIONS

Eighty percent of the officers we interviewed who voiced an opinion favored random selection of military jurors. Also, the great majority believed some criteria would be needed to insure that juries would be composed of competent, mature individuals. The results obtained during our review were consistent with other studies dealing with random selection of military juries.

CHAPTER 7

CONCLUSIONS AND RECOMMENDATIONS

CONCLUSIONS

Public confidence in a system of justice is essential. To earn this confidence the system must appear to be fair. The Chief Justice of the United States Supreme Court has stated:

> "The public image of justice, like justice itself, is indivisible * * * what the public thinks * * * becomes the measure of public confidence in the courts, and that confidence is indispensable." 1/

The military justice system has many critics both inside and outside the military because the system is poorly perceived. Abuse is possible and has been proved in a number of court cases. But it is difficult to prove. Therefore, appellate reviews cannot always be relied on to insure justice is properly administered. We believe the military jury system should have more of the safeguards found in civilian Federal courts. Chief among these would be the random selection of jurors from a pool of qualified jurors representing a cross section of the military community. Other changes relating to the size and responsibilities of jurors serving on military courts should also be considered.

It is important to eliminate elements in the judicial process which foster the appearance of evil that are not essential to meeting the needs of commanders. By improving the perception of justice, service members should have greater confidence in the integrity of the command structure. In turn this should enhance the ability of commanders to lead.

Differences between military and civilian court systems

The jury schemes in criminal trials in both Federal and State court systems differ in many important respects from the military court system which is governed by article 25 of the code. Article 25 requires the convening authority to determine from the eligible military population who, in his opinion, are best qualified to serve as jurors.

1/Burger; The Image of Justice, 55 Judicature 200 (1971).

Neither the law nor administrative regulations provide specific procedures or criteria to be used by these authorities to select eligible jurors. The only guidance is the general factors set forth in article 25, which must be considered. The broad discretion given convening authorities has resulted in differing views among the 13 convening authorities we interviewed as to what constitutes best qualified jurors. Thus, there were differences in the types and grades of individuals allowed to serve as jurors. None of the convening authorities had written criteria for best qualified even though most had delegated initial selections to subordinates.

In terms of power and influence, the convening authority has no counterpart in the civilian Federal court system. Because of his intimate involvement in the judicial process both before and after trial, the integrity of the court system largely hinges on the integrity and judgment of this individual. In addition to selecting jurors, he (1) decides whether to bring charges against the accused, (2) appoints the prosecutor and defense counsel, and (3) reviews and approves a finding of guilty and the sentence imposed. Except in cases of gross abuse, his decisions are not likely to be challenged.

In comparing the military court system with the civilian Federal court system, we found the military courts do not have certain safeguards that are found in civilian Federal courts. The potential for abuse is clearly seen in the power of the convening authority to select jurors in conjunction with a minimum jury size of three to five with often only two-thirds needed to convict. In a general court-martial, as few as four people may be needed to convict; in a special court-martial only two votes may be needed.

In a civilian Federal court the accused is tried by a jury who meet minimum qualifying requirements and are randomly selected from a cross section of the community. Also, civilian juries almost always have 12 members, and a unanimous decision is needed to convict.

It is little wonder that the military jury system is perceived to be unfair by many and has critics even in the absence of widespread examples of abuse.

Views of the U.S. Court of Military Appeals

Concern over such issues led the U.S. Court of Military Appeals--the highest military court--to reject the idea that court members are the functional equivalents of jurors in a civilian criminal trial and to express concern over the

method of jury selection and to indicate a need for its reexamination by the Congress. In the September 1976 United States v. McCarthy ruling, this court stated:

> "* * * This case provides no occasion for reviewing whether the military jury system as embodied in Article 25, Uniform Code of Military Justice, 10 U.S.C. §825, offends the Sixth Amendment, whether the Sixth Amendment right to trial by jury applies to the military, and whether constitutionally military juries must reflect a representative cross-section of the military community. Suffice it to say that court members, hand-picked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court had found constitutionally mandated in criminal trials in both federal and state court systems. Constitutional questions aside, the perceived fairness of the military justice system would be enhanced immeasurably by congressional reexamination of the presently utilized jury selection process." (Underscoring supplied.)

The Chief Judge of this court has proposed many changes in the military justice system, including considering random selection of court members as a means of enhancing the perception of fairness.

Views of defense counsels

Several defense counsels told us that juries drawn from the higher grades may be more severe. This is apparently why in the 244 records of trial for special and general courts we reviewed, the defense used 82 percent of their peremptory challenges--a challenge not requiring a reason--to remove higher grade officers. Conversely, the prosecution used 85 percent of its peremptory challenges to remove lower grades officers. The defense and prosecution each have one peremptory challenge; in Federal and State courts this number is usually much higher.

Changes in jury composition in test of random selection

In a comparison of 123 cases tried at Fort Riley, Kansas, during a 1974 Army test of random jury selection with the 244 records of trial we reviewed, we found discernible differences in the composition of juries. The accused in both

cases were enlisted persons ranging in grade from E-1 to E-7, with 90 percent or better in grades E-4 and below. However:

--In the cases we reviewed, the accused requested enlisted people to sit on the jury only 14 percent of the time. In the test, this figure dramatically increased to 97 percent (29 of 30).

--The percent of warrant officers and enlisted jurors in the lower and middle grades increased substantially in the test, even with the requirement that jurors be at least age 21 and a grade of E-3 and that at least two field grade officers serve on all courts.

The Chief Counsel of the Coast Guard felt that this test was extremely gratifying to both commanders and defendants. He stated:

"* * * many of the younger enlisted men who have served as members of a military jury have been the best 'public relations' men for the system of military justice. They have gone back to the barracks and told the troops that a court-martial is not really a kangaroo court and that the defendent really does get a full, fair, and impartial trial from start to finish. Another result * * * has been that since defendents now know they won't automatically get a crusty old E-9 with thirty-five years' service on the jury if they request enlisted men on the court, more requests for enlisted men as jurors have been made."

Many in the military community favor change

An opinion survey taken by the Army at the conclusion of the random selection test showed that

--76 percent believed randomly selected juries would result in a greater appearance of fairness,

--68 percent favored changing to random selection,

--60 percent believed that juries should be selected from a source constituting a representative cross section of the military community, and

--54 percent favored removal of the convening authority from the selection process.

Defense counsels involved in the test viewed random selection as a major improvement because it would

--eliminate the appearance of unfairness and

--work to the advantage of the accused to the extent that jurors were drawn from a broader range of grades and experience.

Prosecutors felt that random selection was inevitable and its appearance of impartiality should do much to silence the critics of the system.

The great majority of officers we talked to--officers at all echelons in command and legal positions--favored change in the jury system. Why? Again and again the reason given was the need to eliminate the appearance of unfairness and the potential for abuse that exists when the convening authority selects jurors. These views are consistent with studies made by the military and others.

Reservations against random selection and other changes in the jury process expressed by those in the military community we talked to centered on the:

--Impact if less qualified or experienced jurors were allowed to serve.

--Administrative and logistics problems which would make random selection unworkable in wartime.

--Effect on discipline if randomly selected jurors returned acquittals or light sentences inappropriate to the evidence presented.

Many raising these concerns did not consider them insurmountable, since:

--Minimum eligibility criteria would insure that jurors meet standards of competency and maturity acceptable to the military.

--Administrative and logistic problems which may occur were generally considered solvable and something that should be overcome.

About 82 percent of the convening authorities and commanders we talked to believed that random selection would have no effect on discipline. We believe that anyone qualified for military service should be competent and mature enough to serve as a juror on both Federal and military courts.

RECOMMENDATIONS TO THE CONGRESS

We recommend that the Congress require random selection of jurors--selected from a pool of qualified jurors representing a cross section of the military community. Essential personnel, such as those needed for combat in war, would be excluded from eligibility. This change would require (1) establishing juror eligibility criteria and (2) designating responsibility for the selection process. To bring about these changes the Congress would need to amend article 25 of the code to either

--require the President to implement these changes within a specified time (similar to the delegation in article 56 for establishing maximum punishments) or

--statutorily establish a random selection procedure based on specific juror eligibility criteria and designate who should be responsible for the random selection process.

In adopting random selection, other changes would have to be considered.

We recommend that the Congress reexamine whether

--the minimum size of juries is sufficiently large for general and special courts-martial, particularly when, in the majority of cases, only two-thirds are needed to convict;

--greater consistency and stability in jury size is needed;

--the number of peremptory challenges should more closely conform with Federal and State practice;

--military juries should be used to impose sentence; and

--the convening authority should be intimately involved in the judicial proceedings of the accused.

CHAPTER 8

AGENCY COMMENTS AND OUR EVALUATION

On April 8, 1976, we sent copies of our proposed report to the Secretaries of Defense and Transportation for review and comment and we sent information copies to Secretaries of the Army, Navy, and Air Force. The Secretary of Transportation responded by letter dated June 10, 1976, on the Coast Guard's position. DOD responded in a February 1, 1977, letter and included as attachments comments from the Departments of the Navy and Air Force. The Department of the Army did not comment on the report. On the basis of these comments, we reevaluated our report and revised it where warranted.

DOD

DOD stated that the idea of random selection of jurors is a part of the basic cornerstone of the code--freedom from improper command influence over all phases of the military justice system, including the selection of jurors and the outcome of trials by military courts. It further acknowledged the ethical concept involved and encourages its application within the military society by any practical means consistent with its mission. DOD is concerned, however, with the practical aspects of implementing a system of random selection, noting that the military is unique due to its complexity and by virtue of its combat role. The combat or crisis situation calls for authoritarian techniques with decisionmaking and individual responsibility resting in a predetermined hierarchical command structure.

DOD referred to hearings occuring before the passage of the code in 1950, when a non-command-appointed jury selection system was discussed. DOD opposed such a system at that time on the basis that it would be "* * * impracticable and unwieldly, would hamper the utilization of persons on the panels or normal military antics, and could not operate efficiently in time of war." The Navy and Air Force, according to DOD, oppose random selection today for almost these same reasons.

NAVY

The Navy stated that the report failed to identify any lack of impartiality on the part of jurors and it opposed any alteration of the procedures outlined in article 25. The Navy contends that under current procedures the commanding officer has the flexibility necessary to administer the military justice system while maintaining operational requirements. The Navy cautions that experimentation with or

implementation of random selection should be consistent with article 25 or preceded by an appropriate amendment.

AIR FORCE

According to the Air Force, random selection is neither necessary or desirable. It believes the argument that random selection is needed to provide a better appearance of fairness is of limited weight and offset by disadvantages in its implementation. However, the types of concerns raised, such as using mission-essential personnel for jury service and insuring that junior personnel are not called on to judge their superiors, could be handled through establishing juror eligibility criteria. The Air Force made several recommendations on how to minimize any adverse impact on military operations and discipline should random selection be adopted.

COAST GUARD

The Coast Guard believes that while there have been examples of abuse under the present system, the courts can apply appropriate remedies. It pointed out that the present system is working well, and attempts to maximize the representative nature of jury selection tend to produce jurors of lesser ability. Also, the discretion provided the commanding officer by article 25 permits him to fulfill his statutory responsibility while at the same time effectively carrying out his assigned mission. If the Congress concludes that random selection is desirable, however, the Coast Guard believes random selection should be (1) made available to the accused as an alternative rather than an inflexible rule and (2) implemented by legislation without further testing.

OUR EVALUATION

We recognize that the military is complex and unique and that change is not always easy. But that is not a sufficient reason to oppose system improvements. DOD is in complete agreement with the concept of random jury selection, but its reluctance to adopt or to further test random selection is inconsistent with this endorsement.

DOD, the services, and the Coast Guard indicated that they might be more receptive to the idea of random selection had we found widespread instances of improper command influence. However, we did not believe it necessary to attempt to discover and document anything as elusive as improper command influence. It has been proven in several military court cases. But these courts have had considerable difficulty in determining whether abuse is present in

any particular case because command influence is rarely apparent on the surface. For this reason, we believe that the system should be designed to emphasize the prevention of abuse and rely less on appellate reviews to correct a wrong once it has occurred.

Our argument for change is premised on the importance of public confidence in a system of justice and the belief that justice and the image of justice are indivisable. Change is needed to diminish the susceptibility of the system to abuse which has led to its poor perception.

Those most vocal about the need for change in current methods are not the lower grade enlisted personnel who are most likely to stand trial; rather, those in leadership positions within the command structure, including convening authorities, commanders, and legal personnel, as well as the U. S. Court of Military Appeals.

MILITARY LOCATIONS VISITED

OFFICE OF THE SECRETARY OF DEFENSE:
Office of Assistant Secretary of Defense (Manpower and Reserve Affairs), Washington, D.C.

AIR FORCE:
Headquarters, Washington, D.C.
Barksdale Air Force Base, Louisiana

ARMY:
Headquarters, Washington, D.C.
Fort Riley, Kansas

MARINE CORPS:
Headquarters, Washington, D.C.
Camp Lejeune, North Carolina

NAVY:
Headquarters, Washington, D.C.
Naval Air Station, Jacksonville, Florida

RECORDS OF TRIAL REVIEWED

Our analysis of trial records is presented in chapters 4 and 5.

We reviewed 367 trial records for special and general courts. Our review included the 123 trials during the Army test at Fort Riley, Kansas, of random juror selection. It also included a sample consisting of 244 trial records at the four installations visited.

We selected the 244 cases to review by type of court and by judge or jury trial. Because military court records were filed differently at the four locations visited, we did not select cases the same way at every location. The cases analyzed included either (1) all records for 1974, (2) all records for the last 6 months of 1974, (3) a random sample of records available for 1974, (4) all records available for the first 6 months of 1975, or (5) a combination of the four methods. The records reviewed are categorized below.

	Type of court				
	General courts		Special court		
Installation	Judge	Jury	Judge	Jury	Total
Air Force	20	9	63	20	112
Army	5	2	9	2	18
Marine Corps	16	12	27	7	62
Navy	2	3	44	3	52
Total	43	26	143	32	244
Random selection - Army	11	6	82	24	123

TYPES OF CRIMES TRIED BY JURIES

Our comparison of the composition of juries selected by convening authorities with randomly selected juries is presented on pages 28 and 29. The type cases tried are shown below by service.

Method of selection	Military offenses (note a)	Combination of military and other offenses	Other offenses	Total
Convening authority				
Air Force	9	4	16	29
Army		2	2	4
Marine Corps	3	7	9	19
Navy	—	2	4	6
Total	12	15	31	58
Random selection-				
Army	2	9	19	30

a/As defined in appendix V.

APPENDIX IV

OPINION SURVEY OF

ARMY'S RANDOM JURY SELECTION TEST

At the completion of the 13-month random selection test program, questionnaires were distributed to 800 of 16,705 military persons stationed at Fort Riley to obtain their opinions relating to various aspects of random juror selection. The distribution breakdown and return rate are indicated below.

Grade level	Base population	Questionnaires dispatched	Questionnaires returned	Percent of total returned
Officers:				
0-4 to 6	300	100	86	86.0
W0-1 to 0-3 (note a)	1,300	300	203	67.7
Enlisted:				
E-7 to 9	985	100	54	54.0
E-4 to 6	7,870	239	99	41.4
E3	6,250	61	14	22.9
Total	16,705	800	456	57.0

a/Includes the grades W0-1 to W0-4 and 0-1 to 0-3.

Questionnaires were sent to all battalion and brigade commanders, but the balance of personnel was randomly selected.

The questionnaire had 27 multiple choice questions. The respondents were instructed to select the one response that most accurately described their own opinion concerning the question. The six questions asked that pertained to whether random selection should be implemented and the responses follow.

SHOULD THE ARMY ADOPT A SYSTEM OF RANDOMLY SELECTING ITS COURT-MARTIAL JURIES?

The respondents were given a choice of:

a. Yes.
b. No.
c. Have no opinion.

Of those responding, about 68 percent selected answer (a) favoring adoption of random selection procedures within the Army. The responses are shown in the following table.

APPENDIX IV

Grade level	Number choosing answer (a)	Percent of total responses
Officers:		
0-4 to 6	45	52.3
WO-1 to O-3	142	69.9
Enlisted:		
E-7 to 9	44	81.5
E-4 to 6	70	70.7
E-3	11	78.6
Total	312	68.4

DO YOU BELIEVE THAT RANDOMLY SELECTED JURIES RESULT IN A GREATER APPEARANCE OF FAIRNESS IN THE MILITARY JUSTICE SYSTEM?

The respondents were given a choice of:

a. Yes.
b. No.
c. Have no opinion.

Of those responding about 76 percent selected answer (a)--they believe randomly selected juries result in a greater appearance of fairness in the military justice system. The responses are shown in the following table.

Grade level	Number choosing answer (a)	Percent of total responses
Officers:		
0-4 to 6	70	81.4
WO-1 to O-3	158	77.8
Enlisted:		
E-7 to 9	43	79.6
E-4 to 6	68	68.7
E-3	8	57.1
Total	347	76.1

DO YOU BELIEVE THAT RANDOMLY SELECTED JURIES RESULT IN GREATER ACTUAL FAIRNESS TO THE ACCUSED?

The respondents were given a choice of:

a. Yes.
b. No.
c. Have no opinion.

Of those responding about 60 percent selected answer (a)--they believe randomly selected juries result in greater actual fairness to the accused. The responses are shown in the following schedule.

Grade level	Number choosing answer (a)	Percent of total responses
Officers:		
0-4 to 6	36	41.9
WO-1 to O-3	121	59.6
Enlisted:		
E-7 to 9	40	74.1
E-4 to 6	67	67.7
E-3	11	78.6
Total	275	60.3

DO YOU BELIEVE THAT COURT-MARTIAL JURIES SHOULD BE SELECTED FROM A REPRESENTATIVE CROSS SECTION OF THE MILITARY COMMUNITY?

The respondents were given a choice of:

a. Yes; it's not only desirable but essential if justice is to be done.

b. Yes, but it's not really essential for a fair trial.

c. No. A true cross section would be bottom heavy with the lower enlisted grades, if the accused requested enlisted members, and the interests of discipline would suffer.

d. No. Convening authorities are supposed to pick those people who, in their opinion, are best

qualified for jury service; a true cross section would, of necessity, include average and even mediocre personnel.

Of those responding, about 60 percent selected either answer (a) or (b) indicating they believed that juries should be selected from a source which is a representative cross section of the military community. The responses are shown in the following table.

Grade level	Number choosing answer (a) or (b)	Percent of total responses
Officers:		
0-4 to 6	44	51.2
W0-1 to 0-3	124	61.1
Enlisted:		
E-7 to 9	36	66.7
E-4 to 6	62	62.6
E-3	9	64.3
Total	275	60.3

DO YOU BELIEVE THAT COURT-MARTIAL JURIES SHOULD ACTUALLY BE A REPRESENTATIVE CROSS SECTION OF THE MILITARY COMMUNITY?

The respondents were given a choice of:

a. Yes; it's not only desirable but essential if justice is to be done.

b. Yes, but it's not really essential for a fair trial.

c. No. A true cross section would be bottom heavy with the lower enlisted grades, if the accused requested enlisted members, and the interests of discipline would suffer.

d. No. Convening authorities are supposed to pick those people who, in their opinion, are best qualified for jury service; a true cross section would, of necessity, include average and even mediocre personnel.

Of those responding about 59 percent selected either answer (a) or (b) indicating they believed the composition

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of the jury should actually be a representative cross section of the military community. The responses are shown in the following table.

Grade level	Number choosing answer (a) or (b)	Percent of total responses
Officers:		
O-4 to 6	41	47.7
WO-1 to O-3	119	58.6
Enlisted:		
E-7 to 9	37	68.5
E-4 to 6	61	61.6
E-3	9	64.3
Total	267	58.6

THE UNIFORM CODE OF MILITARY JUSTICE NOW REQUIRES THAT COURT MEMBERS BE SELECTED, AT LEAST ULTIMATELY, BY THE COVENING AUTHORITY. HOW DO YOU REGARD THIS REQUIREMENT?

The respondents were given a choice of:

a. I am in favor of it, for the convening authority should have the opportunity to exclude members who would be disproportionately defense or prosecution oriented.

b. I would like to see the requirement changed or modified in some way for it has the "appearance of evil;" that is, some people think convening authorities deliberately "stack the court" to get a conviction.

c. It is just another requirement of the code, and convening authorities fulfill it by being "ultimately responsible," but the actual selection of the court members is a job normally left to a staff member. Convening authorities usually approve the recommendations of the staff officer as to court composition.

d. I am in favor of changing the present requirement, substituting some method of random selection.

Of those responding about 54 percent selected either answer (b) or (d) indicating they favored removing the convening authority from the selection process. The responses are show in the following table.

Grade level	Number choosing answer (b) or (d)	Percent of total responses
Officers:		
0-4 to 6	38	44.2
W0-1 to 0-3	119	58.6
Enlisted:		
E-7 to 9	29	53.7
E-4 to 6	52	52.5
E-3	8	57.2
Total	246	54.0

CRITERIA USED TO IDENTIFY MILITARY OFFENSES

Criteria used to identify military offenses was established through discussion with Fort Riley legal personnel. The criteria agreed to are shown below.

Article	Specifications considered military offenses
Article 86--absence without leave	All
Article 89--disrespect toward superior commissioned officers	All
Article 90--assaulting or willfully disobeying superior commissioned officer	Willfully disobeying a lawful command
Article 91--insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer	Disobeying the lawful order
	Contempt or disrespect in language or deportment
Article 92--failure to obey order or regulation	Violation of any lawful general order or regulation
	Dereliction in performance of duties
Article 134--general article	Straggling
	Uniform violations

APPENDIX VI

ASSISTANT SECRETARY OF DEFENSE
WASHINGTON, D.C. 20301

MANPOWER AND
RESERVE AFFAIRS

1 FEB 1977

Honorable Elmer R. Staats
Comptroller General of the United States
Washington, D. C. 20548

Dear Mr. Staats:

This is in reply to your letter to Secretary Donald Rumsfeld, regarding your draft report, "Should Military People Have Rights In Jury Selection Equivalent To Those Of Other Citizens? -- A Question For Congress," dated April 8, 1976 (OSD Case #4333).

Your draft report examines various aspects of the concept of random court member selection for military courts-martial, compares the military and civilian federal court jury systems, describes current military practices and recounts the results of an experiment with random selection at Fort Riley, Kansas.

[See GAO note p. 61.]

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[See GAO note p. 61.]

As referenced in your draft report, random selection is part of a legislative proposal introduced in the 94th Congress (H.R. 95), and was recommended by the 1972 DoD Task Force on Military Justice to remove the "aura of unfairness." It is further noted that random selection of court members has been suggested by the current Chief Judge of the U.S. Court of Military Appeals, and is now under consideration by the Joint Service Committee on Military Justice. Also, it is part of comprehensive legislation on military justice proposed by the New York City Bar Association. It is noted that all concerned, including the Department of Defense, generally concur with the conclusion found on page 9 of your draft report to the extent that it infers Article 25, UCMJ (10 U.S.C. 825) is not consistent with random selection of court members, and recommends that any such system should also include eligibility criteria and an administrative procedure under which it would operate.

The idea of random selection of court members is really a part of one of the basic cornerstones of the Uniform Code of Military Justice -- freedom from improper command influence over all phases of the military justice system, including the selection of court members and the outcome of trials by court-martial. Interpretations and applications of this principle have been under almost constant development and scrutiny by the courts, the legal community, and other interested persons for many years. In Congress, it was addressed at length in the exhaustive hearings in 1962 and 1966 which preceded passage of the Military Justice Act of 1968. Significantly, a non-command appointed court member selection system, where the Staff Judge Advocate would select the members from a panel of officers and enlisted men, was thoroughly explored during the hearings prior to the passage of the Uniform Code of Military Justice in 1950. A summary of the discussion of this concept, as appearing in U.S. Code Congressional Service, vol. 2, 81st Congress, 1950, pp. 2225 et seq., @ p. 2227, is attached for your review.

It is noteworthy that the 81st Congress did not adopt this non-command appointed court member selection system, since that Congress was confronted with many actual cases of improper command influence, which had pervaded predecessor military and naval disciplinary systems. The Congress apparently felt it could rely on the many other safeguards built into the Code to cure the problem. Its judgment was accurate, because as can be inferred from your report, we are not currently dealing with identifiable widespread or even specific instances of improper command influence.

Although your draft report does not specifically recommend adoption of a random selection system, its tone, much of the selection of language, and the emphasis on the favorable personal opinions of those interviewed and surveyed, all strongly imply a system of random selection should be adopted in order to achieve for the military a greater measure of Chief Justice Berger's indispensable ingredient for justice -- public confidence in the court system. The Department of Defense acknowledges the ethical concept involved and would encourage its application within military society by any practical means consistent with our mission. However, as reflected in the attachments, the Departments of the Navy and Air Force oppose implementation of random selection as a means of realization for almost the same practical reasons as in 1950.* Also to be considered is the added factor that long experience with the current system reflects an absence of evidence of (1) widespread or inherent lack of impartiality, unfairness or incompetence on the part of court members selected to serve by convening authorities because they are considered "best qualified," or, (2) marked lack of public confidence in military courts.

In addition to practical matters, the Department strongly suggests, as a necessary corollary in postulating any system affecting U.S. military personnel, this question be considered in the context of the concept that the U.S. military differs from all other forms of organizations and political segments of our society due to its complexity, and by virtue of its combat role. That is, as a general proposition, within American society, an individual can expect to be governed by means consistent with his station, thus providing him with a psychological understanding of his obligations. Although the U.S. military has a consistent mission of defending our national security, it has changing immediate goals, depending upon whether the country is at peace or war. While in a

* The current views of the Department of the Army as to feasibility or desirability of this proposition will not be available pending evaluation of your final report.

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peacetime mode, the military and individuals therein may be compared with the civilian sector in certain matters. However, when at war or in a crisis situation, there is no valid comparison. The combat or crisis situation for the military calls for authoritarian techniques with decision-making and individual responsibility resting in a predetermined hierarchal command structure -- in wartime the military system requires an intense personal commitment on the part of each member.

[See GAO note below.]

Thank you for the opportunity to respond to your draft report.

Sincerely,

Attachments

GAO note: Portions of this letter have been deleted because they are not relevant to the matters discussed in this report.

U.S. Code Congressional Service, vol. 2, 81st Congress, 1950, pp. 2225 et seq., @ p. 2227:

"...A number of witnesses...urged...a different method of selection of court members. It was conceded that the commanding officers should retain the right to refer the charges for trial, select the trial counsel, and review the case after trial. It was contended, however, that the authority to appoint the court presented the opportunity to the commander to influence the verdict of the court. It was proposed that members of a court be selected by a staff judge advocate from a panel of eligible officers and enlisted men made available to commanding officers.

"Departmental witnesses opposed these amendments on the grounds that the military has a legitimate concern with military justice and the responsibility for operating it, and that it is not inappropriate for the President, the Secretaries of the Departments, or selected commanding officers to appoint the members of a court. It is their position that to have the court members selected by judge advocates from among panels of eligibles submitted by the commanders is impracticable and unwieldy, would hamper the utilization of persons on the panels or normal military antics, and could not operate efficiently in time of war. A number of added protections not found in either the Articles of War or the Articles for the Government of the Navy are included in this bill, such as a supreme civilian court of military appeals, boards of review removed from the commander, and provisions that the law officer, trial and defense counsel

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of a general court must be trained lawyers. Further, the influencing of the action of a court by any authority becomes a crime for which the offender is subject to trial by court martial under this bill. With these safeguards, the committee adopted the provisions recommended by the National Military Establishment."

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DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D. C. 20350

26 MAY 1976

MEMORANDUM FOR THE ASSISTANT SECRETARY OF DEFENSE
(MANPOWER & RESERVE AFFAIRS)

Subj: GAO Draft Report on Should Military People Have Rights in Jury Selection Equivalent to Those of Other Citizens, GAO Code 964056 (OSD Case No. 4333)

Encl: (1) Comments on GAO Draft Report on Should Military People Have Rights in Jury Selection Equivalent to Those of Other Citizens, GAO Code 964056 (OSD Case No. 4333)

Enclosure (1) summarizes the subject report's findings and conclusions comparing the jury selection procedures of the Federal civilian court system with military courts-martial. The report did not conclude that any changes are necessary to provide an accused with a court-martial whose members are in fact impartial. It did identify three changes to the Uniform Code of Military Justice necessary to eliminate the elements which "can cause a perception of unfairness" in the selection of court-martial members: (a) amend the Uniform Code of Military Justice to require random selection of court members; (b) establish eligibility criteria for court members; and (c) establish responsibility for the random selection of court members.

Since the subject report fails to identify any lack of impartiality on the part of court-martial members and only recommends elimination of elements which merely "can cause a perception of unfairness," the Department of the Navy opposes any alteration to the current procedures outlined in Article 25, Uniform Code of Military Justice. The convening authority has a positive responsibility to select as members of courts-martial those who, in his opinion, are best qualified for such duty by reason of age, education, training, experience, length of service, and judicial temperament. This procedure provides the commanding officer

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with the flexibility necessary to perform his responsibility for administering the military justice system while maintaining his unit according to its operational requirements. Any experimentation with random selection procedures which is inconsistent with this positive selection responsibility of the convening authority should not be implemented.

JOSEPH T. [illegible], JR.
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

COMMENTS ON GAO DRAFT REPORT ON SHOULD MILITARY PEOPLE HAVE RIGHTS IN JURY SELECTION EQUIVALENT TO THOSE OF OTHER CITIZENS, GAO CODE 964056 (OSD CASE NO. 4333)

1. Summary of GAO Findings and Conclusions. The subject report contrasts the civilian Federal court system with the military system on the eligibility and selection of jurors. It also discusses the composition of military juries, military members' impression of the system, and an alternate method of jury selection tested by the Army. The subject report found that the process of jury selection for military courts contains elements which "can cause a perception of unfairness" among those persons serving in the military. It did not find any evidence, nor did it conclude, that the military jury selection procedure resulted in actual unfairness for military accused pending courts-martial.

The factor in the present military jury selection process which the GAO Study felt could create the appearance of unfairness is the convening authority's obligation under Article 25, Uniform Code of Military Justice, 10 U.S.C. § 825, to detail as members of a court-martial those members of the Armed Forces who are, in his opinion, best qualified for such duty by reason of age, education, training, experience, length of service, and judicial temperament. While Article 25 establishes these guidelines and requirements for convening authorities, in practice convening authorities have substantial discretion in their selection of court-martial members. Interviews conducted with several convening authorities in the preparation of the subject report revealed a great deal of variation in the manner in which they exercise the responsibilities imposed by Article 25.

The subject report reviewed an alternate system of jury selection based upon random procedures tested by the Department of the Army at Fort Riley, Kansas, and adopted the conclusions of that test, including the opinion that a majority of the military community responding in a survey favors

a change to random selection of court-martial members. The subject report concluded that, if Congress desires to shape the military jury selection process in the same manner as that used in Federal civilian courts, three changes would be required: (a) amend the Uniform Code of Military Justice to require random selection of court members; (b) establish eligibility criteria for court members; and (c) establish responsibility for the random selection of court members.

[See GAO note p. 70.]

2. Department of the Navy Position. The Department of the Navy opposes any alteration in the requirements and procedures for the selection of members of courts-martial as established in Article 25, Uniform Code of Military Justice. The absence in the subject report of any evidence to establish that the present system is defective in any way, that it is not working well to provide military jurors who are fair and impartial, or that there is, in fact, any widespread perception of unfairness, indicates clearly that no changes are required.

3. Statement.

a. Random selection. The military is, by necessity, a specialized society separate from civilian society. The difference between the military community and civilian community results from the primary purpose of the military: to fight wars and to be ready to fight wars should the occasion

arise. As a separate community, the military has developed in its long history its own laws and traditions. A significant part of this tradition in American military law is the concept that commanding officers should select the members for service on courts-martial created by them. The commanding officer of American military forces has held this responsibility since the first Articles of War in the 1770's. This design is as necessary in today's military as it was in the eighteenth century.

The selection of a jury in both the military and civilian community is in reality a four step process.

First, there must be a determination of a source of potential jurors. Under the Uniform Code of Military Justice, Article 25(a), (b), and (c), provides that any commissioned officer on active duty may serve on any court-martial. In addition, a warrant officer may serve on a general or special court-martial of any person other than a commissioned officer, and an enlisted man, when requested by the accused, may serve as a member of a general or special court-martial.

Second, the jurors must be screened and the qualified separated from the unqualified. In the military, this screening is the responsibility of the convening authority, who must select for potential service as members those persons who, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.

Third, qualified jurors, as needed for trial, must be selected and summoned for service. This selection and call for duty is also the responsibility of the convening authority in the military. From among those persons deemed best qualified -- and with an eye to the statutory command that, when it can be avoided, no member of the Armed Forces may be tried by a court-martial comprised of a member junior to him -- the convening authority selects those who will actually be detailed to serve as a member. It is at this step in the process that random selection is proposed in the GAO draft report as the alternate method. While random selection may also be used in obtaining a list of persons from the potential jury source who will be screened as to their qualifications (steps one and two), it is the third step in the process which the GAO draft report suggests could create the appearance of unfairness.

The final step in the selection of jurors occurs at the trial itself, when the judge and attorneys conduct a voir dire examination of the jurors summoned or detailed to the court. In any civilian or military criminal proceeding,

accused persons have an unlimited number of challenges for cause against jurors or members summoned or detailed to their trial. They also have a limited number of peremptory challenges. Through the exercise of the challenges during voir dire, an accused, as well as the government, has the opportunity to eliminate those persons on the jury panel who cannot provide him with a fair and impartial trial. It is important that this fourth step be kept in mind in any discussion regarding the establishment of random selection of members at the third step in the military system.

The Uniform Code of Military Justice cannot be equated to a civilian criminal code, and in many ways it cannot be equated with the civilian federal court system. Not only does the Uniform Code of Military Justice proscribe conduct which is not criminal in the civilian community, but it also establishes a court system which is designed to meet the needs, purposes, and organization of the military. In the Federal civilian community, Congress has established courts which sit in specified locations. The personnel and administrative organizations supporting these courts do not move from these locations. In the military community, the court-martial moves to wherever the commanding officer and his unit happen to be located. This system for the administration of criminal justice is designed to provide maximum flexibility while comporting with basic due process of law. The commanding officer, acting as convening authority, creates a court-martial when the need arises and military circumstances require.

The current provisions of Article 25 regarding the selection of members of courts-martial are consistent with this basic design. Any military unit must be flexible in performing its assigned duties and missions. Inherent in this concept is the requirement that the personnel involved in the performance of those missions must be readily available to the commanding officer. This flexibility and required availability is even more essential in today's Navy, where technology has made many jobs highly specialized and dependent upon persons trained in their performance. This discretion in the commanding officer, as convening authority, in selecting members actually detailed to courts-martial, as provided for in Article 25, permits the commanding officer to carry out his responsibility for administering the military-justice system while maintaining his military unit according to its operational requirements. By denying the commanding officer this discretion in selection, the random selection procedures have the potential of undermining the ability of a military unit to perform its assigned mission.

b. Congressional alternatives. It is the position of the Department of the Navy that any attempt to experiment with or implement in the military a jury selection procedure based upon random selection should be preceded by an appropriate amendment to Article 25, Uniform Code of Military Justice.

[See GAO note below.]

Any experiment with the selection of court members should be consistent with Article 25 of the Uniform Code of Military Justice. As long as Article 25 places in the convening authority the positive responsibility of detailing members to courts-martial who are, in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament, a random selection procedure inconsistent with this positive responsibility should neither be tested nor implemented.

[See GAO note below.]

GAO note: The deleted comments relate to alternatives to the present system which were discussed in the proposed report but omitted from this final report.

APPENDIX VI

DEPARTMENT OF THE AIR FORCE
WASHINGTON, D. C. 20330

OFFICE OF THE SECRETARY

20 MAY 1976

MEMORANDUM FOR ASSISTANT SECRETARY OF DEFENSE
(MANPOWER AND RESERVE AFFAIRS)

SUBJECT: General Accounting Office Draft Report: "Should Military People Have Rights in Jury Selection Equivalent to Those of Other Citizens?--A Question for Congress" (OSD Case #4333)

The Air Force has been requested to provide comments to your office on the subject draft report.

In our opinion, the adoption of random selection of members or "jurors" in courts-martial is neither necessary nor desirable. It is well established that the Constitution does not require a randomly selected jury in military courts. There is ample control through the military appellate process to insure that the present selection process is not unfairly used to the disadvantage of those tried in military courts, and experience establishes that commanders do not seek to "stack" courts with those predisposed to convict or impose unfairly severe sentences. The argument that random selection is needed to provide a better appearance of fairness is of limited weight and is offset by disadvantageous aspects of the proposal. Nor is the argument that the process of choice might be made more uniform a reason for eliminating it.

Random selection following the pattern of Federal district courts is impracticable because of military necessity and the special circumstances of the military structure and operations. Adverse effects on efficiency may be anticipated when the selection process calls for jury service by key personnel whose absence from duties is unwarranted, and special provisions will be necessary to insure that junior personnel are not called on to judge their superiors. The

procedure will be more costly of manpower than the present system due to the need to provide additional members to allow for increased challenges, and because this in turn may be expected to increase trial lengths. Further, elimination of the requirement that members be affirmatively selected on the basis of experience can be expected to reduce the juries' appreciation of the significance of military discipline to an effective force, and to lessen the utility of courts-martial in dealing with military offenses and in enforcing essential standards of discipline.

If the decision is, however, made that random selection should be adopted, we strongly recommend that it be done only after further testing and pilot programs, under Department of Defense coordination, to identify resultant problems and provisions in the ultimate legislation necessary to resolve them. We also urge that the practical aspects of the program and details necessary to resolve anticipated problems be made the subject of an inter-service study, by the Joint Service Committee on Military Justice or an ad hoc group.

If random selection is adopted, we urge that the right of an accused not to be tried by those junior to him if it can be avoided, and the right of an enlisted accused to elect whether enlisted personnel shall be members (jurors) in his court-martial be retained. We also believe that it is essential that adoption of this program be made concurrent with an elimination of all special courts-martial without military judges. It may also be desirable to transfer the sentencing responsibility in all cases to the military judge.

Additionally, we recommend the following steps to minimize the adverse impact upon military operations and military discipline which we anticipate:

a. Provide authority for establishing a spread of grades among court members, to insure that random selection does not yield either all-junior or all-senior panels of jurors.

b. Permit commanders to withdraw a fraction, perhaps 30%, of the persons in the jury pool to eliminate those required for particular duties, with conflicting schedules or anticipated absences from the place of trial, or other reasons rendering them unsuitable for jury duty.

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c. Permit the convening authority to reject a randomly generated panel in toto, whereupon a substitute panel will be similarly generated.

d. Leave the convening authority a limited power to excuse jurors to meet emergent needs between the time the panel is selected and the time of trial, and to do so upon the establishment of compelling reason after trial begins.

The suitability of these suggestions and others which may be developed should be a subject for study, as noted above.

Daniel P. Taylor

Assist[illegible]

Manpower [illegible]

OFFICE OF THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

ASSISTANT SECRETARY
FOR ADMINISTRATION

June 10, 1976

Mr. Henry Eschwege
Director
Resources and Economic Development
Division
U. S. General Accounting Office
Washington, D. C. 20548

Dear Mr. Eschwege:

This is in response to your request for the Department's comments on the General Accounting Office (GAO) draft report entitled "Should Military People have Rights in Jury Selection Equivalent to those of Other Citizens?".

The report concludes that, if the Congress desires to shape the military jury system in the manner now used in civilian courts, three changes would be required: (1) amend the Uniform Code of Military Justice (UCMJ) to require random selection of jurors; (2) establish eligibility criteria for court members; and (3) establish responsibility for random selection of court members.

It is the U.S. Coast Guard's opinion that no persuasive evidence has been developed indicating that a need for change to the present system exists. Therefore, this Department opposes any alteration to Article 25, UCMJ.

I have enclosed two copies of the Department's reply.

Sincerely,

William S. Heffelfinger

Enclosure
(two copies)

APPENDIX VII

DEPARTMENT OF TRANSPORTATION REPLY

TO

GAO DRAFT REPORT OF 9 April 1976

ON

SHOULD MILITARY PEOPLE HAVE RIGHTS IN JURY SELECTION EQUIVALENT TO THOSE OF OTHER CITIZENS?

SUMMARY OF GAO FINDINGS AND RECOMMENDATIONS

The GAO Draft Report contrasts the civilian Federal court system with the military system on the eligibility and selection of jurors. It also discusses the composition of military juries, military members' impressions of the system, and an alternate method of jury selection tested by the Army. The GAO Draft Report found that the process of jury selection for military courts contains elements which "can cause a perception of unfairness" among those persons serving in the military. It did not find any evidence, nor did it conclude that the military jury selection procedure resulted in actual unfairness for military accused before courts-martial.

The factor in the present military jury selection process which the GAO Study felt could create the appearance of unfairness is the convening authority's obligation under Article 25, Uniform Code of Military Justice, 10 U.S.C. §825, to detail as members of a court-martial those members of the Armed Forces who are, in his opinion, best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. While Article 25 establishes these guidelines and requirements for convening authorities, in practice convening authorities have substantial discretion in their selection of court-martial members. Interviews conducted with several convening authorities in the preparation of the GAO Draft Report revealed a great deal of variation in the manner in which they exercise the responsibilities imposed by Article 25. The Draft Report reviewed an alternate system of jury selection based upon random procedures tested by the Department of the Army at Fort Riley, Kansas, and adopted the conclusions of that test, including the opinion that a majority of the military community responding in a survey favors a change to random selection of court-martial members. The Draft Report concluded that, if Congress desires to shape the military jury selection process in the same manner as that used in federal civilian courts, three changes would be required:

(a) amend the Uniform Code of Military Justice to require random selection of court members; (b) establish eligibility criteria for court members; and (c) establish responsibility for the random selection of court members.

[See GAO note p. 77.]

SUMMARY OF DEPARTMENT OF TRANSPORTATION POSITION

The Department of Transportation opposes any alteration in the requirements and procedures for the selection of members of courts-martial as established in Article 25, Uniform Code of Military Justice. The absence in the GAO Draft Report of any evidence to establish that the present system is defective in any way, that it is not working well to provide military jurors who are fair and impartial, or that there is, in fact, any widespread perception of unfairness, indicates clearly that no changes are required.

POSITION STATEMENT

No persuasive evidence has been cited indicating that there is any substantial degree of actual unfairness in the military jury selection process in the Coast Guard. In those few instances in which abuses of the system have occurred, the courts can apply appropriate remedies. See e.g., United States v. Hedges, 11 USCMA 642, 20 CMR 458 (1960).

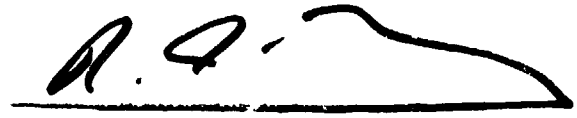
The question is thus whether to change the existing system of jury selection in order to satisfy the eternal quest for the "appearance of justice". At this point it is appropriate to

point out that the American Bar Asscciation, in its Standards Relating to Trial by Jury, §2.1 at 54, has observed that in any jury selection process there is an inherent conflict between the concepts of representativeness and competency. Any attempt to maximize the representative nature of jury panels tends to produce jurors of lesser ability. The present system works well and meets the requirements of the military justice system.

The Uniform Code of Military Justice cannot be equated to the civilian Federal court system. The Uniform Code established a flexible court system which was designed to meet the needs, purposes, and organization of the military. The current provisions of Article 25, UCMJ, regarding the selection of members of courts-martial are a necessary ingredient to the design for flexibility in the Uniform Code. Personnel involved in the performance of the assigned missions of the service must be readily available to the commanding officer. The discretion provided the commanding officer by Article 25 in detailing court-martial members permits the commanding officer to fulfill his statutory responsibility under the Code, but also to carry out his assigned mission effectively. By denying the commanding officer this discretion in selection, the random selection procedures have the potential of undermining the ability of the unit to perform its assigned mission. Therefore, if there is to be a mandatory random selection procedure, it should contain a provision allowing the commanding officer to excuse members of his command from serving due to military necessity.

There are two other points to be made. One is that if Congress concludes that random selection is desirable, it might well make it an alternative available to the accused rather than an inflexible rule. Secondly, the Department of Transportation sees little merit in Congressionally mandated tests. As on any other subject, Congress should implement the concept by legislation, if, after appropriate consideration, they conclude it is desirable. Further tests would prove little. If anything, the Army test at Fort Riley demonstrated the relative unimportance of the issue since over two-thirds of the soldiers requested trial by judge alone, even with the alternative of a randomly selected jury available to them. This is comparable to the experience in the Coast Guard where the majority of the accused elect trial by judge alone.

GAO note: The deleted comments relate to alternatives to the present system which were discussed in the proposed report but omitted from this final report.



R. H. SCARBOROUGH
Rear Admiral, U. S. Coast Guard
Chief of Staff

GAO REPORTS ON THE MILITARY JUSTICE SYSTEM

Addressee	Report title, number, and issue date
Secretary of Defense	Millions Being Spent to Apprehend Military Deserters Most of Whom Are Discharged As Unqualified for Retention, FPCD-77-16, 1/31/77
Congress	The Clemency Program of 1974, FPCD-76-64, 1/7/77
Secretary of Defense	People Get Different Discharges In Apparently Similar Circumstances, FPCD-76-46, 4/1/76
Secretary of Defense	More Effective Criteria and Procedures Needed for Pretrial Confinement, FPCD-76-3, 7/30/75
Congress	Uniform Treatment of Prisoners Under the Military Correctional Facilities Act Currently Not Being Achieved, FPCD-75-125, 5/30/75
Secretary of Defense	Urgent Need for a Department of Defense Marginal Performer Discharge Program, FPCD-75-152, 4/23/75
Senate--Committee on Armed Services	Need for and Uses of Data Recorded on DD Form 214 Report of Separation From Active Duty, FPCD-75-126, 1/23/75
Congress	Improving Outreach and Effectiveness of DOD Reviews of Discharges Given Service Members Because of Drug Involvement, B-173688, 11/30/73

APPENDIX IX

PRINCIPAL OFFICIALS

RESPONSIBLE FOR ADMINISTERING

ACTIVITIES DISCUSSED IN THIS REPORT

	Tenure of office	
	From	To
DEPARTMENT OF DEFENSE		
Secretary of Defense:		
Dr. Harold Brown	Jan. 1977	Present
Donald H. Rumsfeld	Nov. 1975	Jan. 1977
Deputy Secretary of Defense:		
Charles W. Duncan, Jr.	Jan. 1977	Present
William P. Clements	Jan. 1973	Jan. 1977
Assistant Secretary of Defense (Manpower and Reserve Affairs):		
Carl Clewlow (acting)	Jan. 1977	Present
David P. Taylor	July 1976	Jan. 1977
DEPARTMENT OF THE ARMY		
Secretary of the Army:		
Clifford Alexander	Jan. 1977	Present
Martin R. Hoffman	Aug. 1975	Jan. 1977
DEPARTMENT OF THE NAVY		
Secretary of the Navy:		
W. Graham Claytor, Jr.	Feb. 1977	Present
J. William Middendorf II	Apr. 1974	Feb. 1977
Commandant of the Marine Corps:		
Gen. Louis H. Wilson	July 1975	Present
Gen. Robert E. Cushman	Jan. 1972	June 1975
DEPARTMENT OF THE AIR FORCE		
Secretary of the Air Force:		
Thomas C. Reed	Jan. 1976	Present
James W. Plummer (acting)	Nov. 1975	Jan. 1976

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	Tenure of office	
	From	To
DEPARTMENT OF TRANSPORTATION		
Secretary of Transportation:		
Brock Adams	Jan. 1977	Present
William T. Coleman	Mar. 1975	Jan. 1977