

REPORT OF THE
 BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA
 PRESENTED JOINTLY WITH THE
 NATIONAL ASSOCIATION OF
 CRIMINAL DEFENSE LAWYERS

RECOMMENDATION*

RESOLVED, That the American Bar Association recommends that a defendant in a capital case tried by court-martial under the Uniform Code of Military Justice be given the right to trial before a court-martial panel containing twelve members.

REPORT

Under the Uniform Code of Military Justice, 10 U.S.C. §§ 801-946, certain offenses carry the potential for capital punishment. For any such offenses which are tried by court-martial, the "convening authority" (the officer who exercises prosecutorial discretion) determines whether or not the court-martial will be authorized to impose the death sentence. *See generally*, Uniform Code of Military Justice (UCMJ) art. 22, 10 U.S.C. § 822 (2000); Rule for Courts-Martial (RCM) 601, Manual for Courts-Martial (MCM) (2000). If the court-martial is so authorized, then the accused person must be tried before a panel of members, the military justice system's functional equivalent of a jury. *See* UCMJ art. 11, 10 U.S.C. § 818 (2000). However, unlike capital trial juries in any other U.S. death penalty juris-

dition, those panels have no fixed size. Rather, a general court-martial panel must have at least five members and, upon the request of an enlisted accused, must have at least one-third enlisted membership. The lack of a fixed size, and the departure from the civilian norm of twelve-member capital juries, undermine the fairness of capital courts-martial.

While some states use juries with as few as six members in ordinary criminal cases, "no State provides for less than 12 jurors [in capital cases]—a fact that suggests implicit recognition of the value of the larger body as a means of legitimizing society's decision to impose the death penalty." *Williams v. Florida*, 399 U.S. 78, 103 (1970). Capital courts-martial, however, have no fixed size. The only size requirements are that at

least five members sit in the case and, if an enlisted accused so requests, at least one-third of the members be enlisted. In practice, the size of capital court-martial panels varies considerably. The panels that condemned the six service members currently on the military's death row ranged in size from six to twelve members. The military justice system is the only capital jurisdiction in the country in which the defendant does not have a right to a twelve-member jury to decide guilt or innocence.

The military's departure from the universal civilian practice is particularly worrisome because some empirical studies have suggested that twelve-member juries are more likely to reach accurate results than are smaller juries. *See generally* David Kaye, *And Then There Were Twelve: Statistical Reasoning, the Supreme Court, and the Size of the Jury*, 68 CALIF. L. REV. 1004, 1019-21 (1980). A five-member civilian jury would be unconstitutional in any trial that could result in more than six months' confinement. *See Ballew v. Georgia*, 435 U.S. 223 (1978); *Baldwin v. New York*, 399 U.S. 66 (1970). Yet a five-member court-martial panel can impose death.

Five-member courts-martial have not always been permissible. The 1775 Articles of War governing the Continental Army required that general courts-martial consist of thirteen officers. Articles of War of June 30, 1775, art. 33, 2 J. Cont. Cong. 111, 117 (1775). Congress authorized courts-martial with as few as five members in 1786, after finding that some Army detachments had an insufficient number of officers to convene a thirteen-member court-martial. Articles of May 31, 1786, 30 J. Cont. Cong. 316 (1786). At that time, when only commissioned officers could serve as court-martial mem-

bers, the entire Army contained fewer than forty officers. Richard Kohn, *Eagle and Sword* 70 (1975). While five-member courts-martial were a necessity in 1786, they are not today. The authorized strength for Department of Defense active duty forces on September 30, 2000 was 1,385,432. Nat'l Def. Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 401, 113 Stat. 512, 585 (1999). Obtaining twelve court-martial members from among well more than one million active duty personnel, including approximately 200,000 commissioned officers, would pose no burden on the American military. Requiring twelve-member capital panels would also be consistent with Congress' preference for military procedural rules that mirror those used in U.S. district courts. *See* UCMJ art. 36, 10 U.S.C. § 836.

A particularly disturbing aspect of the current court-martial size rules is the lack of a fixed number of members, whatever that fixed number may be. A death sentence can result only if the members unanimously convict the accused of a death-eligible offense, unanimously find the existence of a designated aggravating factor, unanimously conclude that the aggravating circumstances substantially outweigh the mitigating circumstances, and unanimously conclude that death is the appropriate punishment. *See United States v. Simoy*, 50 M.J. 1, 2 (1998). Thus, with a twelve-member court-martial, the government must win forty-eight votes to obtain a death sentence. Where only six members sit on the panel the government need win only twenty-four votes. The crucial impact of panel size is apparent.

The lack of a fixed number of members directly threatens the fairness of capital courts-martial. As Judge C. H. Morgan of the Air Force

Court of Criminal Appeals has noted, in civilian capital cases, "those members challenged off *are replaced*. A defendant considering challenging a juror can be assured that the decision will not correspondingly reduce the size of his jury." *United States v. Simoy*, 46 M.J. 592, 627 (A.F. Ct. Crim. App. 1996) (Morgan, J., concurring), *rev'd*, 50 M.J. 1 (1998). In the military, on the other hand, the defense is faced with the dilemma of accepting a potentially-biased panel or engaging in voir dire and challenges, thus reducing the panel size and thereby making it easier for the government to obtain a unanimous vote on a death sentence. The combination of the requirement for unanimity and the variable panel size creates an inherent bias for the government in the impaneling process. Because smaller panels favor the government, the government has an incentive to voir dire the members and exercise challenges vigorously. The defense, on the other hand, has an incentive not to engage in voir dire or challenges. The system transforms the facially-neutral voir dire and challenge procedures into weapons wielded exclusively by the government counsel. Capital court-martial panels tilting toward the prosecution are the inevitable result. *See generally* Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1 (1998).

In addition to producing biased panels, the lack of a fixed number of members allows an arbitrary factor to influence who is sentenced to death. Common sense suggests that the number of members impaneled at the end of voir dire and challenges will vary directly with the number of members originally detailed to the court-martial. But convening author-

ities have no guidance concerning how many members to appoint to capital cases beyond the requirement that the final panel include at least five members. The variable nature of court-martial panel size also introduces an arbitrary and irrational factor into the death penalty sentencing decision. Hypothesize two coconspirators being tried for the same murder. One is tried by a six-member panel while the other is tried by a twelve-member panel. The resulting unfairness is facially obvious, yet such a scenario could easily occur in the military justice system. The likelihood of a military defendant being sentenced to death is impacted greatly by the convening authority's unconstrained discretion, the very definition of arbitrariness.

The Court of Appeals for the Armed Forces has rejected challenges to trying capital courts-martial before panels with fewer than twelve members, and the United States Supreme Court has thus far declined to review the issue. *See, e.g., United States v. Curtis*, 32 M.J. 252, 267-68 (C.M.A.), *cert. denied*, 502 U.S. 952 (1991); *United States v. Loving*, 41 M.J. 213, 287 (1994), *cert. granted in part and denied in part*, 515 U.S. 1191 (1995); *Gray v. United States*, 112 S. Ct. 1354 (2001) (order denying certiorari). However, even while opining that the Constitution does not mandate a twelve-member panel in a military capital case, then-Chief Judge Eugene R. Sullivan of the Court of Military Appeals offered his "personal view" that "in peacetime, a service member in a capital case should be tried by a 12-member court-martial." *Curtis*, 32 M.J. at 271 (Sullivan, C.J., concurring); *see also Loving*, 41 M.J. at 310 (Sullivan, C.J., concurring in part and in the result). Furthermore, the Supreme Court's denial of the

issue thus far "imports no expression of opinion upon [its] merits." *Teague v. Lane*, 489 U.S. 288, 298 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923)).

A requirement for twelve-member capital courts-martial could be accomplished through either presidential or congressional action. Congress could amend the Uniform Code of Military Justice to require twelve-member panels in capital cases. Alternatively, the President could modify the death penalty procedures provided by Rule for Courts-Martial 1004, one of the regulations implementing the UCMJ contained in the Manual for Courts-Martial, to require twelve-member panels in capital cases.

At the Spring 2001 meeting of the Standing Committee on Armed Forces Law, representatives of the Department of Defense noted that any proposed military death penalty reform must take into account the military justice system's worldwide application in peace and war, as well as the armed forces' legitimate concerns for judicial economy and good order and discipline. All of the courts-martial that have adjudged death sentences since the current procedures were adopted in 1984 have been tried at major installations where large cadres of officer members are available.¹ In any hypotheti-

cal case in which an insufficient number of members is available, the Rules for Courts-Martial specifically authorize the convening authority to appoint members of another command. R.C.M. 503(a)(3). Thus, the military justice system is already sufficiently flexible to ensure that twelve-member panels will be available to try capital cases.

The Department of Defense representatives also noted that the military justice system provides defendants with a number of protections not enjoyed by their civilian counterparts. This Recommendation is not intended to disparage the military justice system, which has well served our country and its armed forces for many years, and is a system entitled to respect. However, these other protections relate primarily to the pre-trial process, how a case gets to trial, and how a case is reviewed after a conviction and sentence, rather than to the trial process itself. Additionally the Department of Defense noted that the court-martial panel is a "blue-ribbon" panel, comprised of persons selected and considered by the convening authority (the person who directed the capital prosecution) to be "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." UCMJ art. 25(d)(2); 10 U.S.C. § 825(d)(2)

¹See *United States v. Loving*, 41 M.J. 213 (1994), *aff'd*, 517 U.S. 748 (1996) (tried at Fort Hood, Texas); *United States v. Gray*, 51 M.J. 1 (1999), *cert. denied*, 112 S. Ct. 1354 (2001) (tried at Fort Bragg, North Carolina); *United States v. Curtis*, 52 M.J. 166 (1999) (per curiam) (tried at Camp Lejeune, North Carolina); *United States v. Murphy*, 50 M.J. 4 (1998) (tried at 3d Armored Division, Germany); *United States v. Simoy*, 50 M.J. 1 (1998) (tried at Andersen Air Force Base, Guam); *United States v. Thomas*, 46 M.J. 311 (1997) (tried at Camp Pendleton, California); *United States v. Dock*, 28 M.J. 117 (C.M.A.

1989) (tried at 3d Armored Division, Germany); *United States v. Parker*, *appeal docketed*, No. 95-01500 (N.M. Ct. Crim. App. Dec. 23, 1997) (tried at Camp Lejeune, North Carolina); *United States v. Walker*, *appeal docketed*, No. 95-01607 (N.M. Ct. Crim. App. August 18, 1998) (tried at Camp Lejeune, North Carolina); *United States v. Kreutzer*, *appeal docketed*, No. ARMY 9601044 (A. Ct. Crim. App. Sept. 30, 1996) (tried at Fort Bragg, North Carolina); *United States v. Quintanilla*, *appeal docketed*, No. 9801632 (N.M. Ct. Crim. App. Oct. 5, 1998) (tried at Camp Pendleton, California).

(2000). Notwithstanding these factors, without capital court-martial panels of fixed size, the military justice system is not as fair as it could be. Thus, regardless of other protections available to a military capital defendant, the unfairness resulting from the confluence of the unanimous vote requirement and the variable panel size should be remedied. Addressing this problem is particularly important because a military defendant in a capital case cannot choose a bench trial. See UCMJ art. 18, 10 U.S.C. § 818 (2000). Because a panel of service members is the only authorized forum for a military capital case, it is particularly important that the procedures for selecting such panels be free of systemic threats to their fairness.

The Department of Defense representatives also expressed concern that modifications of death penalty procedures might spill over to non-capital cases. However, the military justice system already provides capital defendants with numerous protections that are unavailable in non-capital cases, including the requirement for a unanimous verdict for a death-eligible offense,² and the right to automatic review by the Court of Appeals for the Armed Forces. R.C.M. 1004(a)(2); UCMJ art. 67(a)(1), 10 U.S.C. § 867(a)(1) (2000). Additionally, every state that permits juries with fewer than twelve members in non-capital cases requires twelve-member juries in death penalty cases. See Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity*

² Non-capital cases tried in this system require a 2/3 vote to convict, RCM 921(c)(2); UCMJ art. 52(a)(2), 10 U.S.C. § 852(a)(2) (2000); and a 2/3 or a 3/4 vote on sentence, R.C.M. 1004(d)(4); UCMJ art. 52(b)(2) & (3), 10 U.S.C. § 852(b)(2) & (3) (2000).

Cases and Capital Sentencing, 64 IND. L.J. 617, 644 (1989). Thus, adopting heightened procedural protections in capital cases will not mandate similar procedures in non-capital courts-martial.

Finally, the Department of Defense representatives expressed concern about the specific mechanism that might be adopted to implement this Recommendation. The Recommendation, however, simply endorses the principle that capital courts-martial should have a fixed number of twelve members. It does not endorse any particular procedures to accomplish this result. Regardless of whether the principle of twelve-member capital courts-martial is implemented by an amendment to the UCMJ or a change to the Manual for Courts-Martial, the Department of Defense will have ample opportunity to influence the resulting procedures. Thus, while the issues raised by Department of Defense representatives are legitimate and worthy of consideration, they do not overcome the imperative to provide fixed panels of twelve members in courts-martial where service members' lives are at stake. Having carefully considered the concerns expressed, the sponsors find none that detract from the merits of the Recommendation, and are all the more convinced that the proposal should be adopted and implemented.

This Recommendation implies neither support for nor opposition to the military death penalty. Similarly, it does not change existing ABA policy calling upon each jurisdiction that imposes capital punishment not to carry out the death penalty until the jurisdiction implements policies and procedures that are consistent with certain "American Bar Association policies intended to (1) ensure that death penalty cases are adminis-

tered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed." (Recommendation 107 adopted February 1991). Rather, it proceeds from the assumption that if the military death penalty is to remain in place, it should operate in a fundamentally fair manner, and is intended to further both of the policy goals quoted in Recommendation 107 above. Justice Stevens has written that "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Loving v. United States*, 510 U.S. 748, 774 (1996) (Stevens, J., concur-

ring). Depriving defendants in military capital cases of a twelve-member panel deprives service-members of important protections available to their civilian counterparts. Accordingly, either a Rule for Courts-Martial or an amendment to the UCMJ should be adopted setting a fixed size for capital court-martial panels. In keeping with universal civilian practice, that fixed number should be twelve.

Respectfully submitted,

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