ARTICLES

The Two-Thirds Verdict: A Surviving Anachronism in an Age of Court-Martial Evolution

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INTRODUCTION

Since the early 1970's, the United States Supreme Court has heard a progression of cases concerning state statutes which, in contradiction to long-standing history and tradition, have permitted criminal conviction either by juries consisting of less than twelve jurors or without the necessity of a unanimous verdict. The Court has held that in regard to the individual states, neither a twelve person jury nor a unanimous verdict is constitutionally mandated.¹ Eventually, however, the Court concluded that a state criminal jury hearing a non petty offense must number at least six persons, and if this minimum is employed, then unanimity is constitutionally required.²

In contrast to the civilian community, all military prosecutions with offenses for which death is not mandated, require only a two-thirds majority to convict, regardless of the number of members sitting upon a court-martial.³ As well, non petty offenses can be heard by a general court-martial numbering as few as five members.⁴ The question is whether these differences between civilian and military requirements are constitutionally valid.

Although sixth amendment jury protections are not applicable to military courts-martial, the military courts are subject to fifth amendment due process, including the standard of reasonable doubt.⁵ Therefore, founded upon principles of due process, mili-

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tary defendants have attacked the numerical composition and required verdict ratios of military courts-martial based on the differences between the courts-martial and civilian juries.

These attacks have been unsuccessful to date since the military appellate courts have attempted to distinguish between juries and courts-martial, based upon the presumed difference in their respective qualitative composition and functions. When such distinctions are examined analytically in light of the evolution of military justice, the reasoning of the military courts appears to be seriously flawed. This Article demonstrates that a deficiency exists in distinctions between juries and courts-martial thus failing to justify any difference in the numerical vote necessary to convict an accused of a non petty offense.

I. SUPREME COURT CONSTITUTIONAL STANDARDS IN CIVILIAN COURT: REASONABLE DOUBT, JURY SIZE, AND VERDICT REQUIREMENTS

In 1972, the Supreme Court ruled upon two companion cases concerning the conviction of individuals by less than unanimous verdicts involving twelve person juries. In *Apodaca v. Oregon*, five justices concluded that the defendant's conviction upon a ten to two verdict did not violate an individual's sixth amendment right to a trial by jury in a state case.

In *Johnson v. Louisiana*, the defendant, who had been convicted by a nine to three vote in a state trial, was procedurally foreclosed from pursuing a sixth amendment claim. Instead, his argument was premised upon fourteenth amendment equal pro-

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9. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, . . . ." U.S. Const. amend. VI.
10. *Apodaca*, 406 U.S. at 406. The five justice vote consisted of a four-justice plurality plus Justice Powell's concurrence common to both *Johnson* and *Apodaca*. Justice Powell's concurrence, read together with the four dissenters, leaves little doubt that in federal civilian criminal jury trials a unanimous verdict is constitutionally required. *Johnson*, 406 U.S. at 371 (Powell, J., concurring in both *Johnson* and *Apodaca*).
12. Although the Court had held in Duncan v. Louisiana, 391 U.S. 145 (1968) that the sixth amendment was generally applicable to the states by the terms of the due process clause of the fourteenth amendment, it subsequently held that *Duncan* was only prospective in application. DeStefano v. Woods, 392 U.S. 631 (1968).
tion and fifth amendment due process grounds. In particular, Johnson's due process argument was that in order to give substance to the constitutionally required reasonable doubt standard, as established two years earlier, due process must be construed to require a unanimous verdict. While the Court held that the votes of three jurors for acquittal could not be said to impeach the verdict of the other nine (i.e., unanimity is not required) in the same breath the Court implied that a "substantial," or a "heavy" majority of the jury must remain convinced of the defendant's guilt beyond a reasonable doubt. In other words, the reasonable doubt harbored by particular individual jurors may coalesce into a reasonable doubt of the jury as a whole when a sufficient number, albeit a minority, vote for acquittal. But this only holds so long as those who vote for guilt do not constitute a substantial majority.

Related to the issue of unanimity was the question of jury size. In 1970, the Supreme Court examined, in Williams v. Florida, the purposes which gave rise to the development of the institution of the jury. The Court concluded that by "historical accident," twelve person juries had come into existence. Those previous cases which had assumed the number twelve to be constitutionally mandated were cast aside by the Court since none had considered the history and function of the jury. Though the wisdom of Williams has come under criticism, such critical analysis is beyond the scope of this article. Suffice it to say that the ultimate conclusion of Williams was that a state jury of six was not unconstitutional. The Court, however, expressly reserved ruling on whether any number less than six would pass constitutional muster.

The constitutionality of less than six member juries was met in Ballew v. Georgia, a case involving a unanimous five-person state verdict. Specifically, the Court faced a two-fold question:

13. "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V.
14. The Court in, In re Winship, 397 U.S. 358 (1970) wrote: "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Id. at 364.
16. Id. at 362.
18. Id. at 89-90.
19. Id. at 90-92.
21. Williams, 399 U.S. at 91 n.28.
whether a jury of less than six inhibited its functioning to a significant degree, and if so, then (2) whether any countervailing state interest justified such disruption of the jury’s functioning. The Ballew decision held that the sixth amendment, as applied to the state, required a minimum of six jurors in a civilian criminal trial.

In reaching its holding, the Court cited various concerns. First, the empirical data compiled by scholarly research spawned by Williams during the intervening eight years, suggested that progressively smaller juries were less likely to foster effective group deliberation. The Court stated:

> At some point, this decline [in the number of people in a group] leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts. Generally, a positive correlation exists between group size and the quality of both group performance and group productivity.

Various explanations have been offered to support such a conclusion. The smaller a deliberative group, the less likely it is that members will make critical contributions. Also, because of the fallibility of the human memory, a decrease in the size of the group leaves fewer members to remember important aspects of evidence or argument. Additionally, the smaller a group the less likely it is to succeed in overcoming the biases of its individual members.

A second concern of the Ballew court was that the empirical data raised doubts concerning the accuracy of the result achieved by smaller and smaller panels. The statistical studies relied upon by the Court demonstrated that the risk of convicting an innocent person (Type I error) significantly rose as the size of the jury decreased, while the larger the jury, the greater is the risk of acquitting a guilty individual (Type II error). The Court nevertheless mandated a jury with a minimum of six members.

A third doubt about smaller juries stemmed from the increasing inconsistency amongst results of smaller and smaller juries. In other words, the propensity of twelve-person juries to deviate from the average propensity to convict was far less significant

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23. Id. at 231.
24. Id. at 245.
26. Id. at 232-33.
27. Id. at 233.
28. Id. at 234.
29. Id.
30. Id.
31. Id.
than the variation amongst six-person juries.\footnote{32}

Once the Court concluded that a reduction in the number of jurors below six substantially threatened constitutional guarantees, the Court considered whether any interest of the state justified such a reduction. The only alleged justification was the claimed savings in court time and financial costs.\footnote{33} The Court concluded that the asserted saving in judicial time was not proven, and that while financial benefits of a reduction from twelve to six were substantial, a further reduction from six to five would be minimal.\footnote{34} Therefore, no significant state interests existed to justify threatening the constitutional guarantees of the accused.\footnote{35}

\textit{Ballew} was followed a year later by \textit{Burch v. Louisiana}.\footnote{36} In \textit{Burch}, the defendant had been convicted of a non petty offense\footnote{37} by a five to one vote. The Louisiana Supreme Court concluded that such a vote was adequate since the court in \textit{Williams v. Florida} had found a six-person jury permissible and since a five-sixths vote was a greater percentage concurrence than the three-fourths, nine to three, verdict upheld in \textit{Johnson v. Louisiana}.\footnote{38} While the percentage in \textit{Burch} was greater than that in \textit{Johnson}, it was obvious the number of votes to convict in \textit{Johnson} (six) exceeded that in \textit{Burch} (four).\footnote{39}

The United States Supreme Court disagreed with the Louisiana state court. The Court recognized that the \textit{Burch} case was at the very "intersection of our decision concerning jury size and unanimity."\footnote{40} But having departed, in \textit{Williams v. Florida}, from strictly historical treatment of jury trial, the Court found that it

\footnotetext{32.} \textit{Id.} at 235.
\footnotetext{33.} \textit{Id.} at 243-44.
\footnotetext{34.} \textit{Id.} at 244.
\footnotetext{35.} \textit{Id.}.
\footnotetext{36.} 441 U.S. 130 (1979).
\footnotetext{37.} In Baldwin v. New York, 399 U.S. 66 (1970), the plurality opinion concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." \textit{Id.} at 69. \textit{See also} Ballew v. Georgia, 435 U.S. 223, 229 (1978); Burch v. Louisiana, 441 U.S. 130, 134 n.6 (1979).
\footnotetext{38.} 406 U.S. 356 (1972).
\footnotetext{39.} Implicit in the conclusion of the Louisiana Supreme Court was the assumption that the concurrence of the same percentage in groups of different size will be achieved with equal difficulty. In other words, it will be just as difficult to achieve a five to one vote as a ten to two vote, and it will be more difficult to muster that same five to one vote than a nine to three vote. That assumption is not necessarily true. \textit{See infra} note 65.
\footnotetext{40.} Burch v. Louisiana, 441 U.S. 130, 137 (1979).
had become inevitable that a line had to be drawn somewhere if the substance of a jury trial was to be preserved. The Court concluded, for many of the same reasons that led it in Ballew to decide that the use of a five-person jury threatened both the proper role of the trier-of-fact and the fairness of the proceeding, a conviction by only five votes out of six similarly threatened the substance of a jury trial. For this reason, a six-person jury must return a unanimous verdict for guilt. But the Court stated: “We, of course intimate no view as to the constitutionality of non-unanimous verdicts rendered by juries comprised of more than six members.”

In military courts-martial an accused can be convicted of a non-petty offense by a court-martial with as few as five members and only two-thirds finding guilt. Military defense counsel therefore, have pursued a Ballew-Burch attack against the court-martial size and verdict ratio employed in military justice. Before proceeding to review the treatment by the military appellate courts of the constitutional issues related above, it is appropriate to briefly describe the court-martial system.

II. COURT-MARTIAL PROCEDURES

Under its constitutional power “[t]o make rules for the government and regulation of the land and naval forces,” Congress enacted the Uniform Code of Military Justice (U.C.M.J.). The U.C.M.J. provides, inter alia, for the creation of military courts-martial, including pretrial, trial, sentencing, and review procedures, as well as specifying military offenses (the punitive articles).

The military services are perforce dependent upon maintaining discipline. Under the policy of the President as authorized by the Congress, commanding officers are expected to maintain disci-
pline through effective leadership and, when necessary, through nonpunitive measures. Should a member of the service exhibit behavior requiring punishment, a commanding officer, without resort to court-martial, can impose certain limited nonjudicial punishment which is "primarily corrective in nature."

If the commanding officer concludes that his nonjudicial punishment authority is inappropriate or insufficient, he may desire to refer the transgressor to a court-martial. There are three types of courts-martial: summary, special, and general. The choice of court should be the "lowest court that has the power to adjudge an appropriate and adequate punishment."

A summary court-martial, a one officer court, does not differ remarkably in its punishment authority from what a senior commanding officer may impose as nonjudicial punishment. In contrast, special and general courts-martial may impose punishments far in excess of what a commanding officer may impose. The punishment jurisdiction of a general court-martial is limited to the maximum for those offenses of which the accused stands convicted. The punishment jurisdiction of a special court-martial is limited to either (a) six months imprisonment or (b) the maximum for the convicted offenses imposed by the Table of Maximum Punishments, whichever is less.

Civilian criminal juries tend to be of a uniform size, for example, twelve or six. In contrast, the numerical composition of special and general courts-martial varies considerably. The minimum number of members is five for a general court-martial
and three for a special court-martial.\textsuperscript{58} Regardless of the number of members of a court-martial, the concurrence of members necessary to \textit{convict} is a minimum of \textit{two-thirds}.\textsuperscript{59} Where the death penalty is mandatory,\textsuperscript{60} only a unanimous verdict may \textit{convict}.\textsuperscript{61} To \textit{sentence} a person to death, where death is not mandated, likewise requires a unanimous vote of the members.\textsuperscript{62} To sentence a person to life imprisonment or confinement for more than ten years requires a concurrence of three-fourths, whereas all other sentences require a concurrence of two-thirds.\textsuperscript{63}

Though an offense tried by a \textit{special} court-martial could arguably be said to be non petty,\textsuperscript{64} this Article shall limit its discussion to a determination of the constitutionality of the statutory scheme by which a \textit{general} court-martial consisting of as few as five\textsuperscript{65} per-

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  \item \textsuperscript{58} 10 U.S.C. § 816 (1982).
  \item \textsuperscript{59} 10 U.S.C. § 852(a)(2) (1982).
  \item \textsuperscript{60} Conviction for spying in wartime requires the death penalty. 10 U.S.C. § 906 (1982).
  \item \textsuperscript{61} 10 U.S.C. § 852(a)(1) (1982).
  \item \textsuperscript{62} 10 U.S.C. § 852(b)(1) (1982). In October, 1983, in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), the Court of Military Appeals held that the capital sentencing procedure did not pass constitutional muster. The court, in essence ruled that within ninety days if either Congress amended the U.C.M.J., or the President amended the \textit{Manual for Courts-Martial}, a new constitutionally valid procedure could be promulgated. The accused could then face resentencing before a new court-martial.
  \item \textsuperscript{63} 10 U.S.C. § 852(b)(2)(3) (1982).
  \item \textsuperscript{64} As previously discussed, \textit{see supra} note 56, the special court-martial jurisdiction extends to reducing an enlisted individual in rate (as far as to the lowest pay grade, E-1) as well as adjudging a bad conduct discharge. While indirect consequences of civilian incarceration may include jeopardizing a job or career and the stigma associated with a conviction, should a special court-martial reduce an individual in grade the devastation to the accused's career is more than conjectural. Additionally, the opprobrium of a punitive discharge from the service is far more severe than whatever stigma may result from a misdemeanor conviction.
  \item \textsuperscript{65} With five being the minimum quorum and there being no specific maximum, the quotient necessary for conviction varies in relation to the number of members eventually voting. Thus, a "numbers game" occurs. Hence, all other factors held constant, given a choice between five and six person courts, the defense would prefer the former while the government would desire the latter. Since four votes are required to convict in either case, a six person court gives the government the luxury of affording an additional but superfluous vote for acquittal.

In contrast with not only five person courts, but also with seven and eight person courts, a six person court is preferable to the government. For one reason, the additional one or two members must both vote for guilt to ensure a conviction. For a second, the larger the deliberative group, the more likely dissent may exist.

One commentator on military law has addressed the "numbers game" in detail. \textit{See} Smallridge, \textit{The Military Jury Selection Reform Movement}, 19 A.F.L. REV. 343 (1978) [hereinafter cited as Smallridge]. Major Smallridge provides a table of the percentages necessary to convict as a function of total members. \textit{Id.} at 376. An implication of the table may be that for six, nine, twelve, and fifteen member courts, the percentages being identical, there would be comparable likelihoods of conviction or acquittal.

Whether Major Smallridge intended such an implication, the United States Supreme Court has made an explicit statement of such sentiment. \textit{Williams v. Flor-
sons can convict by a concurrence of two-thirds. In other words, is a military accused effectively denied his fifth amendment due process right to the standard of reasonable doubt when the deliberative body is small and the concurrence needed for conviction is a mere two-thirds?

Seemingly, this combination of too small a group and lack of unanimity is violative of the United States Supreme Court's opinions in Ballew and Burch which held respectively that non petty offenses must be tried by a minimum of six persons and if such minimum is used, the verdict must be unanimous. Nevertheless, those Courts of Military Review which have specifically discussed the issues of court-martial size, or vote necessary for conviction in regard to Ballew or Burch, have held those cases inapplicable to the military setting. An analysis of those cases follows.

66. The appellate process entails Courts of Military Review and a Court of Military Appeals. Each service department has its own Court of Military Review composed of commissioned officers and/or civilians. The functions of these courts, unlike a civilian appellate court, include not only determinations of law but also weighing evidence, judging the credibility of witnesses, and determining controverted questions of fact. 10 U.S.C. § 866 (1982). The Court of Military Appeals shall review the record in all cases; (1) in which the sentence as affirmed by a Court of Military Review affects a general or flag officer or extends to death, (2) reviewed by a Court of Military Review which had been reviewed under order of the respective Judge Advocate General, and (3) in which, after review by a Court of Military Review and upon petition by an accused and good cause, the Court of Military Appeals grants a review. The court may take action only with respect to matters of law. 10 U.S.C. § 867. See, however, Appendix B.

III. MILITARY APPELLATE COURT RULINGS UPON COURT-MARTIAL COMPOSITION, SIZE, AND VERDICT RULES

The first relevant published court case of military review following Ballew was United States v. Montgomery. Montgomery was tried and convicted before an Army general court-martial consisting of five members. Relying upon Ballew, he appealed contending that his conviction of a non petty offense by a court-martial numbering less than six was unconstitutional. The Army Court of Military Review rejected his Ballew argument on the ground that since the military judicial system is exempt from the provisions of the sixth amendment, Ballew was inapplicable. No argument was made, nor did the court discuss matters beyond the numerical composition of the trial court-martial.

Subsequently, in United States v. Meckler, another Army case, the accused contended he had been denied due process in a conviction by a general court-martial numbering five members. The Army Court of Military Review, without elaborating upon what type of due process the accused had allegedly been denied, rejected his appeal by simply citing Montgomery.

At the same time the Army Court of Military Review was considering the ramifications of Ballew, the Navy Court of Military Review did likewise in United States v. Wolff. The appellant did not assert the sixth amendment, but rather argued that “the quality of justice provided by group deliberation decreases as the size of the group is reduced to the point that the product delivered by groups of less than six, is unacceptably poor,” and hence violative of the fifth amendment due process. The Navy court disagreed:

We find no evidence in the record to support this premise when the rationale is applied to courts-martial, and we are unwilling to adopt and apply the empirical data referred to in Ballew. That data was compiled in the civilian community, from juries randomly selected to represent a cross-section of the civilian community. Courts-martial are not selected in that manner.

M.J. 110 (C.M.A. 1983), the appellants have again raised a Ballew argument. In Rojas, the Court of Military Review with no independent analysis declared the precedent “most persuasive”. M.J. at 919. The Hutchinson court merely referred to Rojas and the cases cited therein. M.J. at 1063-64.

The most important of the above cases are discussed in detail below.

67. 5 M.J. 832 (A.C.M.R. 1978).
68. Id. at 834.
69. The court did conclude that the variability of the number of members on different courts-martial was a discrimination not so unjustifiable as to be violative of fifth amendment due process. Id.
70. 6 M.J. 779, 780 (A.C.M.R. 1978).
71. Id.
72. 5 M.J. 923 (N.C.M.R. 1978).
73. Id. at 924.
Rather, they are deliberately chosen on the basis of who is best qualified to sit as a court member.\textsuperscript{74}

The court's reasoning is faulty on several grounds. First, by requiring a showing by the appellant that a five-member court-martial does not render the same quality justice as does a larger court,\textsuperscript{75} it failed to apply a most important principle, namely, that the "burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule."\textsuperscript{76}

Second, even if as a matter of law the burden was not already on the government, it would be unfair to place such a burden of persuasion on the defendant. If one infers that the \textit{Wolff} court was insisting upon evidence related to military courts-martial rather than civilian or mock juries, a herculean, if not impossible task would be placed on the defense. Whereas in the civilian community, psychological studies may be conducted upon civilian mock juries, the military does not lend itself to psychological studies of mock courts-martial. Similarly, in the civilian context, actual jurors may be polled in court and interviewed post-trial. In stark contrast, the deliberation and tally of court-martial membership is secret and inviolate, with no provision for polling the members or conducting post-trial interviews or analysis.\textsuperscript{77} The defense, is effectively foreclosed from attaining the data required to make the showing demanded by the \textit{Wolff} court.

Third, the court's conclusion that the defendant received the due process which Congress contemplated, does not necessarily follow logically from the court's premises. In this regard, the court relied upon \textit{DeWar v. Hunter}.\textsuperscript{78} In \textit{DeWar}, which predates the enactment of the U.C.M.J., the tenth circuit dealt with the issue of whether an enlisted person should have been entitled to enlisted personnel on the court-martial board which had condemned him to death.\textsuperscript{79} The \textit{DeWar} court concluded that the defendant was

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  \item \textsuperscript{74} \textit{Id.} at 925.
  \item \textsuperscript{75} \textit{Id.}
  \item \textsuperscript{76} Courtney v. Williams, 1 M.J. 267, 270 (C.M.A. 1976). Surprisingly, however, the \textit{Wolff} court cited and relied upon \textit{Courtney} in a different context. \textit{Wolff}, 5 M.J. at 925.

  \item \textsuperscript{77} The oath for court-members is prescribed by \textit{M.C.M., 1969}, supra note 50, at \S 114(b); it provides inter alia: "you will not disclose or discover the vote or opinion of any particular member of the court . . . upon the findings or sentence unless required to do so in due course of law." \textit{Id.} Indeed, while the court may recommend clemency to the convening authority, nevertheless, such recommendation cannot be based upon a doubt as to the guilt of the accused for such impression "divulges the vote or opinion of any member making such a recommendation and thereby violates his oath." \textit{Id.} at \S 77(a).

  \item \textsuperscript{78} 170 F.2d 993 (10th Cir. 1948).

  \item \textsuperscript{79} \textit{Id.} at 994.
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not so entitled, ruling further that the sixth amendment was not applicable to military courts. 80 But the court departed from that basic conclusion in dictum, which under present law is subject to serious doubt. The court said:

A soldier is subject to military law and what constitutes due process in a trial by a military tribunal is gauged by the principles of military law enacted by the Congress, provided the accused is given due notice of the charge against him, a fair opportunity to prepare his defense, and his guilt is adjudicated by a competent tribunal. 81

As discussed above, present law prescribes that in matters of due process, the rule applicable in civilian courts is applicable in the military courts unless the party seeking a different rule carries the burden to demonstrate the necessity of a distinction. 82 This is but a corollary of the principle enunciated originally by the United States Supreme Court in Burns v. Wilson 83 and interpreted by the Court of Military Appeal, that service personnel are protected by the entire Bill of Rights unless those protections are expressly or impliedly made inapplicable. 84 Whether DeWar has been mooted by Burns and its progeny, it should nevertheless not be questioned whether the due process contemplated by Congress for military justice, i.e., the due process preferred in DeWar, did include the full scope of the protection to be afforded an accused by the standard of reasonable doubt. 85

Finally, and most importantly, the summary rejection by the Wolff court of the Supreme Court's reliance upon social psychological studies is questionable. The rationale for such rejection is that the studies were conducted in a civilian context and hence were inappropriate to the military courts.

The court's unwillingness to adopt and apply the empirical data referred to in Ballew fails to recognize that while much of the data cited in Ballew did originate from the study of randomly selected civilian juries, the essence of Ballew lies in the recognition of the principles of human group dynamics. An analysis of the human dynamics of small fact-finding deliberative groups, therefore, is pertinent to determine whether a significant difference exists between the civilian context and the military context.

Such analysis may begin by highlighting the similarities regard-
The criteria employed by the military pursuant to Article 25 of the U.C.M.J. includes: age, education, training, length of service, experience, and judicial temperament. The first five criteria are obviously redundant in application. That is, the older the member's age, the more likely the member has endured a longer length of service, gained more training, experience, and education. The last criterion—judicial temperament—may or may not be related to the former five.

In regard to the criterion of judicial temperament, it cannot be successfully argued that the inclusion of such a qualifying factor in Article 25 makes the military court distinguishable from civilian courts. Under California law, for example, the qualified jury list drawn from the master jury list requires a selection of only those persons who, inter alia, "are of a fair character and approved integrity, and who are of sound judgment," that is, those who exhibit judicial temperament. Indeed, the Court of Military Appeals has recognized that all civilian jurisdictions have qualifications for jurors similar to judicial temperament. Judicial temperament is, therefore, not a significant factor to distinguish the composition of a court-martial from that of a jury.

Not surprisingly, the most important factors contributing to the determination of a fact-finding group such as a jury or court-martial is the presentation of the case and the relative convincing weight of the evidence. Nevertheless, in those cases where reasonable minds may differ, what demographic criteria, if any, contribute to the quality or bias of any particular individual? A myriad of social and psychological studies abound. Suffice it to say for the purposes of this Article, there exists a lack of consistent relationship between demographic variables and group behavior. This is due to the many unique factors associated with a criminal case. There is little reason to believe that individual characteristics offer any aid in predicting group behavior such as

87. During the legislative debate prior to the enactment of the U.C.M.J., Congress was apparently aware of such redundancy. See, e.g., United States v. Crawford, 35 C.M.R. 3, 12, 19 (C.M.A. 1964).
88. CAL. CIV. PROC. CODE § 205 (West 1982).
90. See, e.g., Saks & Hastie, supra note 65, at 98.
91. In addition to the studies specifically referred to within this Article, as a representative but not all inclusive bibliography, see id. at 223-41; H. Kelley & J. Thibaut, Group Problem Solving, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 88-100 (G. Lindzey & E. Aronson eds. 1969) [hereinafter cited as Kelley & Thibaut, 1969]; H. Kelley & J. Thibaut, Experimental Studies of Group Problem Solving and Process, in THE HANDBOOK OF SOCIAL PSYCHOLOGY 781-85 (G. Lindzey & E. Aronson eds. 1954) [hereinafter cited as Kelley & Thibaut, 1954].
jury or court-martial deliberations.\textsuperscript{92}

In particular, studies which have examined the potential correlation between age, income, education, occupational status, and legal experience and a juror’s verdict have demonstrated no significant correlation.\textsuperscript{93} As far as such criteria are concerned, one may presume that a judge is “better” qualified than the average juror; yet this presumption may be doubted. Although judges and juries usually agree on the issue of guilt, nevertheless, in approximately twenty percent of the cases\textsuperscript{94} there is disagreement. In such cases, one jurist has commented that upon reflection, he realized that the jury’s decision had been the correct one rather than his, and ascribed the jury’s more accurate determination to the size of the jury, the cultural and social composition of the jury, and a requirement that substantially more than a majority of the members must reach agreement.\textsuperscript{95}

While these sociological/psychological results cast serious doubt upon the Wolff court’s conclusion concerning the minimum number of court members, other psychological observations may cast doubt upon the military courts’ less than unanimous requirement. A discussion of such observations will be examined following the analysis of the treatment of Burch v. Louisiana by the military courts.

Since Burch, requiring that if the minimal six person jury is utilized then a guilty verdict must be unanimous, one military court, has attempted to analyze and distinguish the reasoning of Burch in the military context.\textsuperscript{96} In United States v. Guilford,\textsuperscript{97} ten officers were initially detailed to the court-martial; three of them, however, were excused from attending the trial, and of the seven remaining, none were challenged, either peremptorily or for cause.

With concurrence of only two-thirds necessary for conviction, the minimum vote necessary to convict was five. Since the record did not indicate whether five, six, or seven had voted to convict, the Guilford court, while upholding the verdict, presumed for the


\textsuperscript{93} See R. Buckhout, A Jury Without Peers 13 (1973); Sealy & Cornish, Jurors and Their Verdicts, 36 Mod. L. Rev. 496 (1973); S. Penrod, R. Hastie & N. Pennington, Inside the Jury ch. 7 (1983).

\textsuperscript{94} Saks & Hastie, supra note 65, at 98.

\textsuperscript{95} C. Joiner, From the Bench, in Jury System in America 146-47 (R. Simon, ed. 1975).

\textsuperscript{96} United States v. Guilford, 8 M.J. 598 (A.C.M.R. 1979).

\textsuperscript{97} Id.
benefit of the accused that the vote had been five to two. In concluding that Burch was not controlling, the Guilford court relied on three grounds: (1) arithmetic, (2) the inapplicability of civilian jury data, and (3) the differences in the functions of a jury and a court-martial. Each of these will be examined in turn.

A. Arithmetic (or the Numbers Game)

Initially, the Guilford court concluded that Burch did not “govern” on the basis of a reservation in Burch that the Court was “intimating no view as to the constitutionality of nonunanimous verdicts rendered by juries comprised of more than six members.” Reliance upon such an intimation without regard for the policies underlying the Burch holding is an example of being overly literal. While the seven person court-martial in Guilford does exceed the six person jury addressed in Burch, the principles of Burch should indeed govern and give guidance to the issue confronted in Guilford.

Although civilian criminal juries are generally uniform in the number of jurors employed, for example six or twelve, court-martial are variable depending upon the number of officers originally convened and the number who may be excused at any time during the trial. Any particular general court-martial could number, therefore, from five to twelve or more. Thus, just as there may be a sliding number of members, arguably there should be a sliding scale of votes necessary to convict.

In Johnson v. Louisiana, on the basis that a “substantial” majority existed whereby three votes for acquittal failed to impeach a nine vote majority, the Supreme Court found a nine to three vote for conviction permissible. Perhaps, due to the lack of expression in Burch v. Louisiana of where a line may be drawn, the Court may eventually address an eight to four verdict and uphold its validity, concluding that it represents a heavy and substantial

98. Id. at 601 n.3. As noted above, whether or not more than five members actually concurred in the verdict is unascertainable; see supra note 77 and accompanying text.
100. In Williams v. Florida, 399 U.S. 78, 91 n.28 (1970), when the Court ruled that state six-person juries were constitutionally permissible, the Court reserved ruling on any lesser number by stating: “We have no occasion in this case to determine what minimum number can still constitute a ‘jury’, but we do not doubt that six is above that minimum.” Following Williams, Georgia instituted five-member juries. In Blev v. Georgia, 435 U.S. 223, 230-31 n.9 (1978), the state argued that “If six is above the minimum, five cannot be below the minimum. There is no number in between.” The court characterized that argument as “absolute literalness.” Id.
102. Id. at 362.
majority. A seven to five verdict, however, is unlikely to survive constitutional attack. \textsuperscript{103}

If straight line graphs are drawn linking 6/6 and 9/12 in one instance, and 6/6 and 8/12 in a second, (graphs A and B are respectively produced)\textsuperscript{104} both graphs indicate that a seven person jury or court-martial should require seven to convict rather than six, and in both cases, the threshold where a dissenting acquittal vote would not impeach the remaining guilty votes appears to emerge with a group of eight. Should a group of seven be held to constitute a sufficiently large group where a dissent would be held not to impeach the remaining guilty votes, such tolerable dissent

\textsuperscript{103} Since a six to six tie represents no majority on a twelve person jury, the minimum majority would be a seven to five vote. It would be incongruous to term a minimum majority as a heavy and substantial majority.

\textsuperscript{104} Table A is mathematically defined as \( y = \frac{x}{2} + 3, \) for \( 6 \leq x \leq 12, \) and Table B is described as \( y = \frac{x}{3} + 4, \) for \( 6 \leq x \leq 12. \) Since the number of votes necessary to convict requires that when a fraction results, such fraction will be counted as one, that is, raised to the next highest whole, \textit{MCM, 1969, supra} note 48, at \( \S 74(d)(3), \) the conviction ratios permitted by Table A are 6/6, 7/7, 7/8, 8/9, 8/10, 9/11, and 9/12, and Table B, 6/6, 7/7, 7/8, 7/9, 8/10, 8/11, and 8/12.
TWO-THIRDS VERDICT

should seemingly be held to one, i.e., a six to one vote, rather than two, i.e., the five to two vote sustained in Guilford.

The Guilford court, however, wisely did not rely upon arithmetic as its sole reason to ignore Burch. One of the two remaining rationales was the asserted inapplicability of civilian jury data.

B. Civilian Jury Data

In regard to civilian jury data, the Guilford opinion curiously states without citation or reference that:

[D]ata indicating that jurors supposed to represent a cross-section of a local civilian community do not adequately perform their function under certain conditions cannot be taken to mean that the purpose and function of courts-martial are similarly impaired.105

Taken in context with its citation to United States v. Wolff and other various military decisions which held Ballew inapplicable, the inference one may draw is that Guilford was adopting the reasoning of Wolff by rejecting so-called civilian studies.106 Since Burch rests "squarely" upon Ballew, Guilford reasons, Burch must similarly be rejected.107

This conclusion is countered by two rejoinders. First, as discussed above,108 the logic of Wolff is seriously flawed, and therefore, to the extent that Guilford rests upon Wolff's reasoning, it too is flawed. Second, even if one is to assume, arguendo, that the criteria of U.C.M.J. article 25(d)(2) serves to distinguish courts-martial from the studies upon which Ballew and Burch are postulated, psychological principles dictate that because of those very criteria a court-martial should have a more stringent majority rule than the present two-thirds.

A court-martial, like a jury, is in fact a small decisionmaking group subject to the same psychological phenomena as are other small decisionmaking groups.109 The first task a small decision-making group must accomplish is to organize and produce leadership.110 The longer this takes or the more competitive the process of choice, the less organized the group may remain and the more likely that conflicting subgroup coalitions may form.111 The faster

106. See supra notes 86-95 and accompanying text.
107. Guilford, 8 M.J. at 601-02.
108. See supra notes 86-95 and accompanying text.
110. See Kelley & Thibaut, 1954, supra note 91, at 761; Kelley & Thibaut, 1969, supra note 91, at 31, 71-72, 76.
111. Id.
and the less competitive the initial organization is, the more cohesive the group is likely to be.

While a jury and court-martial may be subject to the same psychological phenomena, because of the differences in their demographic composition, the resultant pressures associated with decisionmaking may differ. While a jury is seated at random and must first choose its foreperson, the court-martial is at its inception organized on the basis of seniority. The court-martial thus begins its existence as a cohesive group, and such cohesion tends to pressure its members toward conformity and unanimity. While members of a jury chosen at random tend to be heterogeneous in character, the members of a court-martial tend to be homogeneous. The tendency shall be to have a court consisting of officers, and as such, college educated, male, white, and of course, from the same profession. Again, as with organization and leadership, the more homogenous a group the less differences in opinion shall exist with a correspondingly greater pressure toward uniformity and conformity.

112. The senior officer remaining after challenges is the presiding officer. M.C.M., 1969, supra note 50, at ¶ 40(a). He/she has special powers and duties, akin to, but exceeding that of a foreperson of a jury. Id. at ¶ 40(b). Even the seating arrangement of the court-martial members is specified according to rank, similar to the seating of appellate judges. Id. at ¶ 61(b).


114. Although an enlisted accused may demand a court-martial consisting of not less than one-third enlisted personnel, 10 U.S.C. § 825(c)(1) (1982), the assumption amongst military attorneys is that an enlisted accused of the lower ranks will not make such an election for fear that the enlisted personnel chosen by the convening authority shall be from the senior enlisted ranks who shall be more severe than commissioned officers. See Letters to the Editors, CALIFORNIA LAWYER, March 1983, at 69. Little empirical data is available to test the thesis.

115. The estimated percentage of total Department of Defense commissioned officers who had graduated from college as of September 30, 1980 was 95.3 percent. DEPARTMENT OF DEFENSE, SELECTED MANPOWER STATISTICS, FISCAL YEAR 1980. Table 2-5, at 68 (1980) [hereinafter cited as MANPOWER STATISTICS].

116. Male officers constitute approximately ninety-two percent of total officers. Id. Compare MANPOWER STATISTICS id., Table 2-13, at 99 with Table 2-19, at 113.

117. The percentage of white officers in all services as of June 30, 1972 was 97.2 percent. DEPARTMENT OF DEFENSE, REPORT OF THE TASK FORCE ON THE ADMINISTRATION OF MILITARY JUSTICE IN THE ARMED FORCES, Vol. II, at 55 (1973) [hereinafter cited as TASK FORCE REPORT].

118. See Festinger & Thibaut Interpersonal Communication in Small Groups, 46 J. Abnormal & Soc. Psychology 92-99 (1951), a study conducted under contract with the Office of Naval Research; Kelley & Thibaut, 1954, supra note 91, at 761. Additionally, it may be noted that, by chance alone, larger groups will tend to be more heterogenous than small ones. I. Steiner, GROUP PROCESS AND PRODUCTIVITY 129 (1972). Thus, a small group, say five or six, will tend to be more homogenous than a group of twelve. While individual members of small groups, all other matters being equal, will be more unique than those of a larger group, in the court-martial
Additionally, one must consider the impact of what may be termed the authoritarian personality. Individuals of high authoritarian personality who perceive themselves dissimilar to the defendant will tend toward a guilty verdict; conversely, high authoritarians who perceive similarities between themselves and the accused tend toward acquittal. In the military context, the only similarity between the defendant and the members of court-martial may be the service to which they belong. The differences, however, may be striking since the members of the court-martial will predominantly be college educated, white officers, while the defendant is typically an enlisted individual, of lesser education, who may often be of a racial or ethnic minority. Therefore, to the extent that members of a court-martial tend to have authoritarian personalities and perceive themselves as dissimilar to the accused, a preexisting pressure toward a guilty verdict may exist.

Because the sixth amendment is inapplicable to the military trial, random selection resulting in a heterogenous group of triers of fact is not constitutionally required. To the degree that a homogenous tribunal consisting primarily of male, white, college-educated officers creates conforming pressures, an attendant decrease in the deliberative process will result. While increased pleasantness and minimized disagreement may be desirable in many group contexts, the collective trier of fact is a particular group where disagreement and contentiousness are precisely what should be stimulated to test more severely the compelling weight of evidence. Where such stimulation is lacking because of the homogenous character of the deliberative group, the “substantial” majority required in Johnson v. Louisiana necessitates a greater need of unanimity in guilty verdicts. This is especially true in groups as small as six and but little dissent for an acquittal in groups only slightly larger.

In addition to the asserted inapplicability of civilian jury studies and the mathematical argument addressed above, the Guilford context all other matters are not equal but rather the general characteristics of members tends toward homogeneity.

119. See generally, Decision Processes, supra note 92, at 335.
120. See Manpower Statistics, supra note 115, at 68.
121. See Task Force Report, supra note 117, Vol. I, at 31. A racial difference does not imply overt racism. It can, however, result in misunderstanding. If an accused minority takes the stand, his ability to communicate to the court-martial may spell the difference between guilt and acquittal. The task force concluded that “manners of speech in non-standard English . . . can be construed as manifestations of dullness or disrespect by those not familiar with the speech pattern in question." Id., Vol. II at 43.
123. See Saks & Hastie, supra note 65, at 81.
court also chose to focus upon the differences in function between a jury and a court-martial to distinguish the holdings of *Ballew* and *Burch*. Whether the asserted “differences” are different or relevant is open to serious doubt.

C. Functions of a Court-Martial

One asserted difference between a jury and a court-martial is the determination of sentence.\(^{124}\) While it is true that currently a court-martial determines the accused’s sentence while juries do not,\(^{125}\) this distinction is not logically relevant to the threshold issue of the appropriate decisionmaking rule for conviction. The fact that the court-martial may eventually be posed with a sentence determination after conviction has no impact upon the appropriate majority that should be necessary for conviction.\(^{126}\) Also, in regard to sentencing by a court-martial, another practical

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\(^{125}\) Juries, of course, are tasked with the responsibility of deliberating upon the most important sentences of all, *i.e.*, death. See, *e.g.*, CAL. PENAL CODE §§ 190.3, 190.4 (West Supp. 1983).

\(^{126}\) In capital cases where death is not mandated, although the sentence of death must be unanimous, the guilty verdict presently need only be the two-thirds vote. Two such cases are currently pending before the Court of Military Appeals. See *supra* note 66. The fact that a death sentence must be unanimous can in no way justify a two-thirds verdict. No matter that a member may have voted for acquittal, regardless of such vote, it is his duty to vote for a proper sentence for the offense for which the accused stands convicted. *M.C.M., 1969, supra* note 50, at ¶ 76(b)(2). This compulsion of military law is not new; a noted nineteenth century military legal expert wrote:

> At the first impression it might seem unreasonable and inconsistent that a member, fully persuaded that the accused was innocent, or at least that the evidence had failed to convict him beyond a reasonable doubt, and who had voted accordingly, in the minority, for an acquittal, should at the next moment be required to adjudge that a specific punishment be imposed upon him as upon a guilty person. But this apparent inconsistency disappears when the principle is recalled, which has heretofore been set forth as resulting from the fundamental rule of the government of the majority in court-martial proceedings; *viz.* that the finding, when completed, becomes the act and judgment of the court as a *unit*, the opinions of the majority and minority no longer existing as such but being absorbed in the conclusion of the whole. Where, therefore, the accused has been found guilty, the conviction is to be recognized and acted upon by each member as a fixed fact—as something which has passed out of the region of individual opinion and become ascertained and concluded. Though he may have voted not guilty, he is to vote upon the sentence precisely as if he had voted for a conviction, or as if the fact of guilt had been determined by some competent agency wholly independently of himself, and the rightfulness of such determination was beyond question.

> Further, he must not only vote a sentence but—when the punishment is discretionary—an adequate sentence, *i.e.*, one commensurate to the offence or offences found. If, having voted to acquit, he gives his vote for a slight and inadequate penalty, he fails in his full duty as an officer and member of the court.
consideration arises. The possibility exists, as it is presently being contemplated in Congress, that the power to sentence may be removed from the members and placed solely upon the military judge presiding at the trial.127

The other functional "difference" referred to by the Guilford court is the ability of the members of a court-martial to pose questions.128 No express statutory authority grants the court-martial members that privilege. Rather, the U.C.M.J. delegates to the President the power to prescribe trial procedure regulations consistent with the trial procedures of the federal district courts.129 Under such delegation, the President in the Manual for Courts-Martial has granted the members of courts-martial the right to pose questions.130

In contrast to the mere existence of such a privilege, the extent of its use or the quality of the questions posed would be of greater importance in a determination of whether a different decision-making rule should be employed by a particular trier of fact. In other words, granted that the members of a court-martial may pose questions, if the questions actually posed do not assist them in their duty, then logically no different decisionmaking rule should be utilized. The evidence available affords no confidence that members of courts-martial effectively employ questioning.131

WINTHROP, W., MILITARY LAW AND PRECEDENTS 392 (1979) [hereinafter cited as Winthrop].

In addition, those who voted to acquit on the state of the evidence during the guilt phase of trial may find that evidence, otherwise inadmissible during the guilt phase, but admissible during the penalty phase, for example, in aggravation, would compel a vote for death. That a court-martial would have little difficulty in assessing death in a case where matters of aggravation may warrant the same does not denigrate against the principle that the standard of reasonable doubt may not have met with a two-thirds verdict on guilt. It does not follow and this Article does not urge that because a greater majority than is now required should be imposed for conviction, that a two-thirds vote is improper for sentencing in most cases. Whereas the individual member need only deliberate in regard to conviction on a dichotomous question, i.e., whether the government has proven each element of the offense beyond a reasonable doubt, in sentencing, any number of variables may be put in issue. Sentencing is not merely a determination of time in custody. Rather, it encompasses more: Is a punitive discharge appropriate and if so, what type?; Is a reduction in rank appropriate and if so, how much?; Is time in custody appropriate and if so, how long?; Is a fine appropriate, and if so, how much? Because of the wide variety of possibilities, a consensus of two-thirds may remain altogether appropriate whereas the dichotomous issue of guilt should require a larger consensus, at least for courts-martial numbering no more than twelve members.

127. See S. 974, supra note 37, at § 9(b)(1)(A). See, however, Appendix B.
130. M.C.M., 1969, supra note 50, at ¶ 54(b). One may query whether the executive direction to permit questioning by the court members is consistent with the trial procedures in the district courts.
131. See Appendix A.
Additionally, this alleged difference cannot support the distinction between courts-martial and juries since a multitude of civilian jurisdictions either encourage or permit jurors to pose questions.\(^{132}\)

The \textit{Guilford} court failed to demonstrate that courts-martial and juries do not differ significantly in their functions in relation to reaching a verdict. More importantly, it failed to perceive that courts-martial have, in their functioning, evolved in the recent past to resemble their civilian counter-part. An analysis of military legal history clearly demonstrates such an evolution.

\section*{IV. A History Of The Evolution Of The Courts-Martial}

Although codifications of English military law predated the American Revolution,\(^{133}\) it is convenient to begin to trace the evolution of the court-martial from that time. During the revolution, the British Army was governed by the Articles of War of 1765. Section XV, articles I and II required that a general court-martial should not consist of less than thirteen commissioned officers.\(^{134}\) Although no article addressed the necessary quorum for conviction of a noncapital offense, a sentence of death by a general court-martial required a minimum of nine votes and if the number of members exceeded thirteen, a judgment required a concurrence of two-thirds.\(^{135}\)

Following the outbreak of the war, the Second Continental Congress enacted the American Articles of War of 1775. In large part these were substantial replications of the British Articles.\(^{136}\) One notable exception was the absence of a specific provision concerning the vote necessary to impose death. Then, in 1776, the Articles were enlarged and modified, and the required two-thirds concurrence for capital punishment was re-introduced.\(^{137}\)

The first significant amendment occurred in 1786. Because there were circumstances where offenders could escape punishment while serving with small detachments having less than thir-
teen officers, the articles were revised to establish that a general courts-martial could consist of any number of commissioned officers from five to thirteen inclusively. The general courts-martial, however, were not to consist of less than thirteen "where that number (could) convene without manifest injury to the service." 138

Despite the firm mandate of the latter phrase requiring thirteen, the United States Supreme Court subsequently held that the phrase "manifest injury," was "merely directory to the officer appointing the court, and that his decision as to the number which can be convened without manifest injury to the service, being in a matter submitted to his discretion, [was] conclusive." 139

Military courts-martial composition remained comparatively static for approximately 134 years with only minor amendments. 140 Similarly, the functioning of the court-martial remained relatively unchanged. In regard to its functions, Colonel William Winthrop 141 provided this description:

Thus it has frequently been compared, as to some of its powers and proceedings, to a judge, and as to others to a jury. Indeed, in its taking of a statutory oath, its being subject to challenge, its hearings and weighing of evidence, its finding of guilt or innocence, and its liability to be reassembled to reconsider its verdict, it nearly resembles a traverse jury in a criminal court. On the other hand, in its arraignment of the accused, its entertaining of special pleas to its jurisdiction or competency as a court and objections to the sufficiency of the pleadings and the admission of testimony, its authority to grant continuances and to adjourn, and its power to impose sentence, it is more closely assimilated to the judge. 142

Indeed, in early English codifications the members of a court-martial were respectively referred to as the judges, 143 and it was

138. Articles of War, 1786, art. 1.
140. See WINTHROP, supra note 126, at 23, 976-85, 986-96. The 1916 legislation was H.R. 17498, 64th Cong., 1st Sess. (1916). The Articles of 1806 and 1874 are reprinted in WINTHROP, supra note 126, at 976-96. Several minor modifications occurred in the interim years. Id. at 23-24, 997-1000.
141. Colonel Winthrop was described during the hearings before the subcommittee of the Committee of Military Affairs as:

[T]he Blackstone of the Army, a man of great capacity to express himself, and who was also a keen legal reasoner. But Col. Winthrop was first a military man, and he accepted easily and advocated the view that courts-martial are not courts, but are simply the right hand of a military commander.

142. WINTHROP, supra note 126, at 54-55 (footnotes omitted) (emphasis in original).
143. The Articles of War of James II, 1688, art. XLVIII provided in part:
precisely because of their role as judges and the similarity of the court-martial to other English courts, such as the King's Bench, Common Pleas, and Court Exchequer, that the then majority rule for conviction existed rather than the unanimity required of the English jury.\textsuperscript{144}

The administration of military justice came under severe criticism in the latter part of the First World War and culminated in substantial revision in 1920.\textsuperscript{145} The legislation, which began as Senate Bill 64,\textsuperscript{146} had been authored by the former Acting Judge Advocate General of the Army, Samuel Ansell,\textsuperscript{147} and was introduced by Senator George Chamberlain.\textsuperscript{148}

While much of the controversy centered on a meaningful review of courts-martial sentences by a higher authority, the new articles did serve to change the character of the courts-martial in several particulars: the minimum quorum was reduced to five without the necessity of a showing of manifest injury,\textsuperscript{149} the vote ratio necessary to convict for non-capital offenses was increased from a majority to two-thirds,\textsuperscript{150} qualifications for service as members were added,\textsuperscript{151} and a law member was added to the

\begin{itemize}
\item Such who are Judges in a General Court-Martial or in a Regimental Court-Martial, shall hold the same Rank in those Courts as they do in the Army for Orders sake, . . .; and shall demean themselves orderly in the hearing of Causes, and before giving of Sentence every Judge shall deliver his Vote or Opinion distinctly . . . .
\end{itemize}

\textit{Id.} Similarly a noted nineteenth century British military law commentator also referred to court-martial members as judges. C. Clode, \textit{Administration of Justice Under Military and Martial Law} 127-29 (1874). \textit{See also infra} note 163.


\textsuperscript{146} The new Articles of War as enacted were part of H.R. 12775. The original version of H.R. 12775 had been amended by striking out its entirety and substituting what had been S. 3792. The original H.R. 12775 and S. 3792 had been parallel efforts in the respective houses of Congress to reorganize the Army. Efforts to engraft new Articles of War upon the original H.R. 12775 failed in the House of Representatives. The efforts in the Senate succeeded, however. The new Articles had been proposed as S. 64. Eventually, however, S. 64 was added as an amendment to S. 3792. Thereafter, S. 3792 (and subsequently, H.R. 12775 as enacted) contained two parts: I, Army Reorganization and II, Articles of War.


\textsuperscript{148} While Senator Chamberlain did, in fact, introduce the legislation, he was not in complete agreement with all of General Ansell's suggestions. \textit{See generally, Hearings, 1919, supra} note 141.

\textsuperscript{149} Act of 1920, \textit{supra} note 145, ch. II, art. 5.

\textsuperscript{150} \textit{Id.} at ch. II., art. 43.

\textsuperscript{151} \textit{Id.} at ch. II, art. 4.
While the bill that emerged from the subcommittee after hearings did differ in certain respects from Ansell's draft, no written report or document exists clearly delineating the legislators' reasons for the changes made during the legislative process. One may, however, surmise the legislative intent in regard to each of the above changes.

1. **Quorum.** In regard to the quorum requirement, the subcommittee members may not have done any more than recognize reality. That reality was that the actual size of the court, the mandated thirteen notwithstanding, was the choice of the convening authority and his personal perception of what might constitute an injury to the service. (Testimony before the subcommittee had been that the average size of a general court-martial was nine.)

A further recognition of reality was that even if a thirteen member court was convened, there was no requirement that the court remain at thirteen. If, for whatever reason, a member was excused prior to judgment, the court could continue, assuming a minimum five person quorum existed, with a lesser number, or substitute members could be appointed. If the latter circumstance occurred, as new members might be added, the testimony to the time of the substitution would be re-read. Two deleterious results would, therefore, occur. Delay and tedium could set in, and possibly a court could consist of a substantial number of members who had not percipiently heard key evidence and were, therefore, without the opportunity to decide cases by judging the demeanor of witnesses.

2. **Verdict Rule.** The decision to change the decisionmaking rule from a majority to two-thirds was probably a compromise. General Ansell had suggested a three-fourths rule for noncapital offenses. The recommendations at the hearing as to an appropriate fraction ranged from maintaining the existing majority rule to as high as a four-fifths rule. A two-thirds rule was the median between the theretofore majority and the proposed three-
fourths. 157

3. **Member Qualification.** Prior to 1920, there had been no
statutorily required criteria for selection of members for court-
martial. General Ansell’s proposed legislation likewise contained
no specific qualifications for members, save fairness, impartiality,
and competence. 158 In all probability, the lack of specific require-
ments existed in his draft because the members were not to serve
as judges. Rather, a judge advocate general or, when not avail-
able, a qualified officer with legal learning and experience was to
serve in a judicial manner ruling upon all questions of law. 159

Though General Ansell did not delineate qualifications for
members, his proposed legislation did employ criteria for sum-
mary court-martial officers in virtually the same language as was
eventually adopted for members. 160 Since the testimony before
the subcommittee was that the state of military legal knowledge
and education in the officer corps was deplorable, 161 it is not sur-
prising for Congress to have adopted General Ansell’s language
for court-martial members who were to continue to serve in a
quasi-judicial role. In other words, when Congress did not accept
General Ansell’s suggestion to make the presiding judge advocate
general the sole judicial functionary, but continued the collective
judicial function of the entire court-martial, Congress imposed
what is now Article 25 criteria for members. 162 This was not for
their role as triers of fact, but as judges of law. 163 The qualifica-

157. For example, a simple majority in a twelve person court would be seven to
five, a three-fourths vote would be nine to three, and two-thirds, eight to four. Like-
wise, a two-thirds vote for courts-martial numbering seven, nine, ten, and eleven
members, falls between majority and three-fourths requirements. For five and eight
person courts, a two-thirds vote requires the same as a three-fourths vote, whereas for
a six member court, a majority and two-thirds are identical. Also, a board of senior
officers called upon by the Secretary of War reported to the subcommittee its recom-
modation as to the two-thirds rule. *Id.* at 442.
158. *Id.* at art. 10.
159. *Id.* at art. 12.
160. *Id.* at art. 7.
161. *Id.* at 40, 152.
162. *Id.*
163. See, e.g., *Id.* at 31, 539-40. Today, very few persons, if any, would question
the competence of staff corps officers in contrast to combat or line officers to sit as
members. Such mentality was not always the case:

As before stated, only commissioned officers can sit on courts-martial, and
two of our military writers have interpreted the word “commissioned” so as
to exclude officers of the Medical and Paymaster’s Corps. The reasons as-
signed are those given by Attorney-General Berrien: He says, “If we look to
the origin of courts-martial in England (from whence we borrow them) it
would be difficult to believe that a tribunal which has succeeded there in the
ancient court of chivalry, could be composed of other than military men.
And if we consider the nature of the subjects which are generally submitted
to the decision of these tribunals, the knowledge of military discipline and
tions were not enacted to ensure that a court-martial would be constituted by a "blue-ribbon" panel of triers of fact, as apparently perceived by the military courts of review in their recent decisions, but to enable the members to serve their judicial function adequately.

4. **Law Members.** On its face, the amendment of military law by which a law member was now to be selected especially as a member of a general court-martial may appear to be the change least apposite to the discussion. It is, however, the most important.

Under most circumstances, it was envisioned that the detailed law member would be a member of the Judge Advocate General's Department. If, however, an officer of that department was not available, an officer of another department "specially qualified" to perform the duty could be assigned as the law member. The special qualification was necessary because the law member was to rule initially upon all interlocutory questions other than challenges.

His ruling, however, was not absolute. If any member took exception to the ruling of the law member, the entire court would go

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Usage, and frequently of tactics (which is indispensable to those who preside there), it would seem that non-combatants whose duties do not lead them to acquire this species of information, and who have no rank, either real or assimilated, could not be deemed competent to sit on court-martial."

The Judge-Advocate General, however, in referring to this subject, stated that, "though it is in accordance with the general usage of the service not to detail officers of the medical corps of the army on courts-martial, where it can be avoided, yet such details are not unfrequently and properly made at stations where commissioned officers are few in number.

"Medical officers being, as a class, men of learning and a high order of capacity and intelligence, no instance is known of any injurious result ensuing from their being appointed on military courts. The proceedings of no trial, where an officer of this corps was a member of the court, have, it is believed, been for that reason disapproved, during the war; and a very considerable number of records of military trials have been passed by this Bureau as regular and sufficient, from which it appeared that such officer or officers had been part of the detail."

Paymasters are not so frequently detailed upon courts-martial as medical officers, but there seems no good reason, in our service, why they should not be, as many of them have acquired a knowledge of military law in the line of the army. Court-martial are called upon to act as judges and jurymen. As jurymen it is hardly necessary to compare the ability of these two classes of officers with that of the average jurymen in criminal cases before the civil courts; as judges their competency is certainly equal to that of officers when first appointed from civil life, and who are frequently detailed for court-martial service the moment they are appointed.

R. Ives, A TREATISE ON MILITARY LAW 26-38 (1879) (footnotes omitted).

164. *See supra* note 74 and accompanying text.


166. *Id.* at ch. II, art. 31.
into closed session and the issue would be decided by a majority vote.\textsuperscript{167} One may conclude, therefore, that for a member of a court-martial to engage in the function of objecting to a ruling of a law member and/or voting upon such an objection in closed session, and for this collective ruling function to be meaningful, all the members would perforce need the education and knowledge of military law that length of service, training, and experience may have afforded each of them.\textsuperscript{168} Therefore, although Congress had not accepted General Ansell’s suggestion to appoint a non-member judge advocate general with power to rule upon the law, it had taken the first step of a half-century long evolution to that same end.

The Articles of War of 1920 sufficed until post-World War II. Just as actual war experience had demonstrated weaknesses in the pre-World War I Articles of War, similarly the nation’s experience with a war of greater extent and long duration led to the belief that further reform was necessary. As important, if not more so, the unification of the major defense forces in the new Department of Defense led to an enactment “[t]o unify, consolidate, revise and codify the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard, and to enact and establish a Uniform Code of Military Justice.”\textsuperscript{169}

Under the U.C.M.J., the five person quorum, the typical two-thirds rule, and the criteria for court-martial membership remained intact.\textsuperscript{170} The function of the law officer continued to evolve, however.

First and foremost, the officer was now characterized as the law officer rather than the law member.\textsuperscript{171} This was no mere semantic

\begin{enumerate}
\item[167.] \textit{id.} If a law member was not detailed, every interlocutory ruling was subject to objection. If a law member was detailed, a member could object to any interlocutory ruling except as to “the admissibility of evidence.” That exception was, however, subject to a further proviso that “objection to the admissibility of evidence . . .” did not include a plethora of issues to which any member could still object. \textit{id.}
\item[168.] It may also be parenthetically noted that the qualification criteria for court-martial membership was equally applicable to special courts-martial. No law member was required to be assigned to a special court-martial. Rather, the initial ruling on any interlocutory question was made by the president, \textit{i.e.}, senior member of the court, subject in all incidents, including questions as to the admissibility of evidence, to the objection of any member, and upon such objection, the majority vote of the entire court.
\item[170.] \textit{id.} at arts. 16(1), 52(2), 25(d)(2). The Articles of War, 1920, were the foundation for the U.C.M.J. The Articles of the Government of the Navy which had continued to provide for a majority verdict were rejected in favor of the Army’s two-third rule. \textit{See} S. Rep. No. 486, 81st Cong., 2d Sess., \textit{reprinted in} 1950 U.S. \textit{CODE CONG. SERV.}, 2222, 2248.
\item[171.] Act of 1950, \textit{supra} note 169, at arts. 1(12), 26(a). Additionally, a law officer was now required in naval general courts-martial, when previously, no law member

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change. The law officer could not generally communicate with
the members of the court except in open court in the presence of
the accused and both counsel, nor could he vote with the
members. 172

Second, while the 1920 Articles contained no mandatory qual-
ifications for the law member, the U.C.M.J. required the law of-
ficer to be a member of a bar properly certified as qualified by the
Secretary of his/her respective service. 173

Third, and crucially, the ruling of a law officer on any interloc-
utory question except upon challenges for a finding of not guilty
or the question of the accused's sanity, was final and conclu-
sive. 174 As with pre-U.C.M.J. Articles of War, though, no law of-
ficer was required to be assigned to a special court-martial and the
ruling of the president of a special court-martial upon any inter-
locutory question was subject to objection and vote. 175 Thus,
while the special qualifications for court-martial membership,
which had originated for the member's judicial functions, contin-
ued to have a certain validity in the more numerous but less seri-
sous special courts-martial, the evolution of the functions of the
law officer moved more and more toward the role of a trial judge
and decreased the need for specialized knowledge amongst gen-
eral court-martial members per se.

The U.C.M.J. remained relatively unchanged for nearly two de-
cades. In 1968, the evolution of the institution of the court-mar-
tial continued by the passage of an act the preamble of which
clearly states the legislative intent, namely "[t]o increase the par-
ticipation of military judges and counsel on courts-martial
..." 176

First, the change served to amend the title of the law officer to
"military judge." 177 Second, a military judge could now be de-

was ever required. S. Rep. No. 486, 81st Cong. 2d Sess., reprinted in 1950 U.S. CODE
CONG. SERV., 2222, 2227.
173. Id. at art 26(a).
174. Id. at art. 51(b).
175. Id.
176. Pub. Law 90-362, 82 Stat. 1335 (1968). When the Act of 1920 was enacted,
the purpose was “to radically change the philosophy . . . of the system of administra-
tion of military justice.” Hearings, 1919, supra note 141, at 374. The passage of the
U.C.M.J. in 1950 was indeed a fundamental change. It not only effected the contin-
ued evolution of the law officer but also the potential participation of enlisted person-
nel, Act of 1950, supra note 169, at art. 25(c)(1), as well as the elimination of the
Articles of Government of the Navy, see supra notes 170-171 and accompanying text.
Likewise, the Act of 1968 was a “dramatic change” from the original 1950 U.C.M.J.
and practice under the former is like “night and day” compared to the latter. Re-
marks of Chief Judge Robinson Everett, Court of Military Appeals, to West Coast
tailed to a special court-martial, which has become common practice. Third, the accused may request, in noncapital cases, a trial by a military judge sitting alone. Fourth, except in the very rare circumstance of a court-martial convened by the President or the Secretary of a service, no convening authority or member of his staff may prepare or review any report concerning the effectiveness, fitness or efficiency of a military judge. And fifth, the rulings of the military judge on all interlocutory and law questions, except the mental responsibility of the accused, are final and conclusive. Similarly, the judicial power of the president of a special court-martial, sitting without a military judge, was substantially increased vis-à-vis the general membership. Except on challenges and upon a motion for a finding of not guilty, his/her rulings are final and conclusive.

After little or no change in military judicial procedures over centuries, the American military judicial system, spurred on by apparent abuses of process during the world wars, has evolved comparatively rapidly in the past half-century to where the members of a court-martial, for all intents and purposes, function in similar mode to their civilian counterpart, the jury. Under such circumstances, the existing two-thirds quotient for guilt can no longer remain a constitutionally valid rule. The time is ripe for the military appellate courts to examine the true evolution of the function of the members and determine that the great similarities between juries and courts-martial outweigh the insignificant differences, so as to require the same verdict rule.

CONCLUSION

When the evolutionary changes of the courts-martial are viewed with retrospection, it becomes clear that the role of the law member, and then the law officer, and currently the military judge, has increasingly ascended. The role of the members, however, has eroded from quasi-judges to virtually no judicial role at all. Hence, the historical reason for utilizing first a majority vote and currently a two-thirds vote for guilt, namely the members' role as judges or quasi-judges, is no longer valid. Similarly, the U.C.M.J. Article 25 criteria, drafted with the judicial function in mind,

178. 10 U.S.C. §§ 816(2)(B), 826 (1982). In general practice, a military judge is assigned to a special court-martial, for the special court-martial without a military judge is without jurisdiction to adjudge a bad conduct discharge (except in the case of adverse physical condition or military exigencies). Id. at § 819.
179. Id. at § 816 (1)(B), (2)(C).
180. Id. § 826(c).
181. Id. at § 851(b).
182. Id.
should have little import, if any, on the proper quotient of votes necessary to convict. In reality, once it is perceived that the role of the members of a court-martial differs in no remarkable degree, either in function or performance from a civil jury, then the same constitutional standard for a proper verdict rule should apply.

This is not to say that a court-martial is exactly the same as a civilian jury, nor that all of the rights that a civilian defendant has under the sixth amendment are applicable. For example, given rank structure and demographic limitations, a military accused cannot have the luxury of a randomly chosen court-martial nor necessarily constituted of persons of the vicinity wherein an alleged crime was committed.

What it does mean, however, is that the reasonable doubt standard required by due process will be thwarted unless a substantial majority of a court-martial vote for guilt. Given the short-comings of any small group as a deliberative body, a substantial majority—to give reasonable doubt a significant meaning—would require unanimity of courts-martial comprised of as few as six, or even seven, members. Due process, when examined historically and analytically, requires no less.

183. Very recently, in Chappell v. Wallace, 103 S.Ct. 2362 (1983) the United States Supreme Court held that military personnel "may not maintain a suit to recover damages from a superior officer for alleged constitutional violations." Id. at 2368 (footnote omitted). In the course of the opinion, Chief Justice Burger wrote that: "The special status of the military has required, the Constitution contemplated, Congress has created and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel". Id. at 2367 (citation omitted). This sentence should not be read out of context. The omitted citation was Burns v. Wilson, 346 U.S. 137, 140 (1953), the very same case which the military courts cite to establish that the Bill of Rights are applicable to military personnel. See supra note 84 and accompanying text. In addition, the Chief Justice expressly stated that: "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." Id at 2367 (citations omitted). Nothing contained within Chappell could be said to denigrate against the concept that the reasonable standard, required in both the civilian and military context, should be qualitatively different.

184. In Chappell, the Court recognized that:

The need for special regulations in relation to military discipline, and the consequent need and justification for a special and exclusive system of military justice, is too obvious to require extensive discussion; no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.

Id. at 2365 (citations omitted).

One may ponder whether the retention within the military of an accused who would be acquitted by a five to one or six to three vote for guilt, would be a problem for military discipline or preparedness. At least two rejoinders may be made to that rhetorical question. First, under the current verdict rules, acquittals in which a majority vote for guilt, e.g., five to three or six to four are tolerated. Second, and more important, that rhetorical question confuses retention with conviction. A civilian defendant who is acquitted of a battery charge may be successfully sued by a plaintiff-victim, notwithstanding the criminal acquittal. Similarly, there is no apparent consti-
The author sent a survey concerning the asking of questions by courts-martial members to thirty-seven naval general and special court-martial judges. Of the thirty-seven, thirty-three responded. The overwhelming majority (88%) stated that they always advised members of their privilege to ask questions although of these one volunteered that his advice was aimed at deterring questions and another stated that he admonishes the members of the role of counsel. Another two judges (6%) responded that they usually or almost always advise the members of their privilege, while two responded that they never advise the members concerning questioning.

One of the inquiries to the judges concerned the frequency within which members do ask questions. Nine (27%) answered that the frequency was one-third of the time or less, four (12%) opined that it was about half the time, and the remainder (61%) felt that the frequency exceeded two-thirds the total.

In regard to the quantity of questions posed, more than half (19) thought the amount of questions asked were neither extensive nor insignificant. Of the remainder, however, far more believed the quantity to be insignificant (38%) than extensive (5%).

In addition to the quantitative data, many of the judges offered narrative comments. While lengthy, a selected summary of certain observations is instructive. Some of the judges had positive comments, e.g., “generally, the questions posed by members are helpful and work to clarify issues . . . ,” “questions are generally good to excellent,” “members typically ask questions relating to military details which reflect knowledge of shipboard routine and Navy life,” “it is remarkable how many times a member will discover a significant line of questioning overlooked (for whatever reason) by counsel,” and “most often, [questions] are highly relevant and fill in voids . . . . I would not want to take this right from them.”

In contrast to the foregoing, however, the majority of comments were to the contrary: “most [questioning is] insignificant or irrelevant [and] impacts unfairly on accused, because members do not really appreciate the government’s burden,” “[questioning] does not usually elicit information of great value . . . but does telegraph [the members’] thinking . . . ,” “It’s hairy . . . some unusual [questions, for example] . . . Is there a pre-trial agreement in this case? If so, what are the terms?,” “the most significant prob-

utional provision to prevent an armed service from terminating an individual’s service on a burden of proof less than beyond a reasonable doubt.
lem is the time consuming practical procedure . . . with the possible resultant need to clear the courtroom of members to litigate the propriety of the posed question,” “members seem to have difficulty with relevant questions; (examples given), these are questions of senior officers! . . . this is a ‘dangerous’ area; when one member asks a question, they all want to; when you discourage the number of questions, they seem dismayed; however, if you advise that a question is ‘not relevant,’ they will back off and not ask any questions” (emphasis in original), “. . . I do not like a court member to become an examiner—do not allow it,” “about 40-50% of members’ questions are not allowed by reason of irrelevance. On sentencing, a substantial number of members inquire about misconduct not charged. I am continually challenged to find imaginative ways to disallow members’ questions without alienating the members . . . ,” “it is not uncommon for me to be baffled as to the relevance . . . of the questions,” “I consider the practice of allowing members to question witnesses a dangerous one [that] we would do well to eliminate.”

The most exhaustive and insightful commentary is quoted in greater detail:

In the overwhelming majority of instances, the questions are either cumulative or irrelevant, or, at best, concern trivialities that are inconsequential to the central issue of the case, . . . [serving] only to prolong the trial needlessly . . . . Questions during the presentation of the cases on the merits are virtually worthless. However, during the sentencing portion of the trial, the questions tend to be more insightful. When a witness testifies, for example, about an accused’s worth to this command, members generally ask very perceptive questions about the accused’s specific duties and how they relate to the commands overall mission . . . . The only unfortunate aspect of this sharp contrast between findings and sentencing is that . . . members tend to ask relatively few questions during sentencing.

I would applaud the abolition of members’ questions during the case on the merits . . . . However, as long as courts-martial retain sentencing by members, I favor retaining members’ questions [which] would be consistent with the contemporary philosophy of providing the sentencing authority with as much information as possible about the accused.

(The survey is on file in the offices of California Western Law Review).
APPENDIX B


Certain primary changes relate to the appellate process. First, review of decisions of the Court of Military Appeals directly by the Supreme Court by writ of certiorari is authorized. Second, except in death cases, the accused may waive review or withdraw his appeal from consideration by the Court of Military Review or, as appropriate, the applicable Judge Advocate General. Third, the United States may appeal certain orders or rulings by a military judge to the Court of Military Review.

Other changes include, inter alia: (1) specific pretrial recommendations must be made to a general court-martial convening authority by his staff judge advocate, (2) significant changes have been made concerning the initial post-trial action and review by a convening authority, and (3) a punitive article concerning controlled substances has been added.

Most of the provisions of the act become effective August 1, 1984.