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Anatomy of a Random Court-Martial Panel

Lieutenant Colonel Bradley J. Huestis¹
Chief, United States Army Claims Service, Europe
Mannheim, Germany

Introduction

Lieutenant General (LTG) Ricardo S. Sanchez selected a random court-martial panel for V Corps on 10 January 2005. This court-martial panel utilized a pool of 100 members who were selected using Article 25's best qualified criteria² but were randomly seated according to a unique, case-specific random number sequence (RNS).

Under the automatic replacement system, currently in use throughout the U.S. Army, the convening authority selects a standing court-martial panel that hears cases over a set period of time, for example six months.³ The panel consists of primary and alternate members. Prior to each trial, the convening authority may excuse members for operational needs or any other reason.⁴ Excused members are automatically replaced by alternate members. The alternate members always sit in the same designated order that was set by the convening authority when the panel was originally selected. Under this system, the same members tend to sit case after case.⁵

The V Corps randomly seated panel builds upon the automatic replacement system but eliminates the distinction between primary and alternate members. Instead, the convening authority selects a single pool of members. Prior to each trial, the convening authority excuses members in the same manner as described above.⁶ The difference is that the remaining members sit according to an order, which is set at random, for each specific case. Under this system, different members sit in different combinations on every case.

This article discusses the policy and legal background pertaining to random panels, explains why the V Corps Commanding General chose to select a random court-martial panel, examines the mechanics used to select and seat this panel, reviews the trial judge's ruling in the first case tried before the random panel, and recounts the discussions that took place during the in-progress review of the new system. This article does not argue that the randomly seated panel is the best forum before which to try all military cases.⁷ Rather, this article encourages judge advocates (JAs) to consider the V Corps method as a workable alternative to the automatic replacement system.

¹ Judge Advocate, U.S. Army. LL.M., 2001, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia; J.D., 1995, *Cum Laude*, University of Arizona, Tucson, Arizona; B.S., 1989, *Distinguished Military Graduate*, Arizona State University, Tempe, Arizona. Presently assigned as Chief, United States Army Claims Service, Europe. This article was submitted for publication while the author was assigned as the Chief, Military Justice Division, Multi-National Corps – Iraq. The idea of seating a random court-martial panel grew out of the author's assignment at The Judge Advocate General's Legal Center and School where he was a military justice professor and taught pretrial procedures. The idea was refined while brainstorming with his Senior Trial Counsel at V Corps, Major (MAJ) Chris Graveline, who had argued *United States v. Wiesen*, discussed *infra* note 31, for the government at the appellate level.

² UCMJ art. 25(d)(2) (2005) ("When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

³ See Craig S. Schwender, *One Potato, Two Potato . . . A Method to Select Court Members*, ARMY LAW., May 1984, at 12; Karen V. Johnson, *In His Opinion—A Convening Authority's Guide to the Selection of Panel Members*, ARMY LAW., Apr. 1989, at 43.

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 505(c) (2005) [hereinafter MCM].

⁵ See Schwender, *supra* note 3, at 12.

⁶ *Id.*

⁷ There are many outstanding academic articles that debate the best method to select and seat court-martial panels. See, e.g., Major Christopher Behan, *In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003) (providing a comprehensive list of academic writings in this controversial area at footnote 25).

Background

Criticism of the military's justice system is not new and can be especially harsh when military procedure diverges from civilian practice.⁸ When the U.S. Congress enacted the Uniform Code of Military Justice (UCMJ)⁹ in 1951, it required the President to prescribe rules of procedure and evidence at courts-martial, "which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts, but which may not be contrary to or inconsistent with this chapter."¹⁰

Congress chose not to mirror U.S. district court practices when it prescribed the method to convene, or call together, members for court-martial duty. In enacting Article 25, UCMJ, Congress mandated that convening authorities personally, rather than randomly, select panel members. Article 25 specifically requires convening authorities select only those members who, in the convening authority's opinion, are best qualified by virtue of their "age, education, training, experience, length of service, and judicial temperament."¹¹ Predictably, this divergence from civilian practice has generated heated debate.¹²

Military case law illustrates that convening authorities retain broad discretion in how to adhere to Article 25, UCMJ, when selecting the best qualified members. For example, "a commander is free to require representativeness in his court-martial panels and to insist that no important segment of the military community—such as blacks, Hispanics, or women—be excluded from service on court-martial panels."¹³

When reviewing a convening authority's selection of members, military courts look to the *motivation* of the convening authority in the court-martial selection process. The selection will not be disturbed by appellate courts unless the selection is based on rank,¹⁴ based on non-Article 25 criteria, which was used as an unauthorized shortcut to exclude potential members,¹⁵ or made with a view of achieving a particular result or a harsh sentence.¹⁶

The relevant military case law on the subject condones the use of randomly seated court-martial panels. The Court of Military Appeals (CMA), the predecessor to the military's highest court, which is now called the Court of Appeals for the Armed Forces (CAAF), has issued two published opinions relating to random panels. In *United States v. Smith*,¹⁷ the CMA stated in dicta:

We are aware that at times there have been experiments in the armed services with some form of random selection of court-martial members. In view of [*United States v.*] *Crawford*, it would appear that even this method of selection is permissible if the convening authority decides to employ it in order to obtain representativeness in his court-martial panels and if he personally appoints the court members who have been randomly selected.¹⁸

In *United States v. Yager*,¹⁹ the CMA dealt directly with the issue of a randomly selected military panel. In *Yager*, the accused was tried before a random panel. The defense challenged the categorical exclusion of Soldiers in the grade of E-3 and below and non-citizens of the United States as potential members for the panel. The CMA affirmed the case and, in

⁸ See, e.g., Arthur E. Farmer & Richard H. Wels, *Command Control—Or Military Justice?*, 24 N.Y.U. L.Q. REV. 263, 264 (1949).

⁹ 10 U.S.C.S. §§ 801-946 (LEXIS 2006).

¹⁰ UCMJ art. 36(a) (2005).

¹¹ *Id.* art. 25.

¹² See, e.g., Kenneth J. Hodson, *Courts-Martial and the Commander*, 10 SAN DIEGO L. REV. 51 (1972-1973) (advocating the removal of commanders from the court-martial member selection process and substituting random selection based on the American Bar Association Standards for Criminal Justice); see also Major Guy P. Glazier, *He Called for His Pipe and He Called for His Bowl, and He Called for His Members Three—Selection of Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1 (1998).

¹³ *United States v. Smith*, 27 M.J. 242, 249 (1988).

¹⁴ *United States v. Daigle*, 1 M.J. 139 (1988).

¹⁵ *United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964).

¹⁶ *United States v. Lewis*, 46 M.J. 338 (1997).

¹⁷ 27 M.J. 242 (1988).

¹⁸ *Id.* at 249 (citation omitted).

¹⁹ 7 M.J. 171 (1979).

doing so, the 1st Infantry Division and Fort Riley's random jury program.²⁰ Unfortunately, the opinion sheds little light on the mechanics used by the 1st Infantry Division to seat its random panel.²¹

In 1998, Congress directed the Secretary of Defense (SECDEF) to study alternate methods of panel selection.²² This mandate required the SECDEF to develop and report on a random selection method of choosing members to serve on court-martial panels. The Department of Defense General Counsel requested that the Joint Service Committee (JSC)²³ conduct a study and prepare a report on random selection.²⁴ The JSC sought opinions from each service and reviewed random court-martial panel selection practices in Canada and the United Kingdom. After considering six alternatives, the JSC reported that the current practice "insures fair panels of court-martial members who are best qualified" and that there is "no evidence of systematic unfairness or unlawful command influence."²⁵

In 2001, to commemorate the fiftieth anniversary of the UCMJ, the National Institute of Military Justice (NIMJ)²⁶ sponsored a commission to write a report on the state of military justice. Senior Judge Walter T. Cox, III, chaired this effort.²⁷ The commission's report is directly at odds with the JSC's conclusions on panel selection. The commission stated bluntly, "[t]here is no aspect of military criminal procedures that diverges further from civilian practice, or creates a greater impression of improper influence, than the antiquated process of panel selection."²⁸ The commission concluded, "[t]here is no reason to preserve a practice that creates such a strong impression of, and opportunity for, corruption of the trial process by commanders and staff judge advocates."²⁹ The commission called on Congress to immediately strip convening authorities of their authority to select panel members. The commission recommended that members of courts-martial "should be chosen at random from a list of eligible servicemembers prepared by the convening authority, taking into account operational needs as well as the limitations on rank, enlisted or officer status, and same-unit considerations currently followed in the selection of members."³⁰

Five years have passed since the Cox Commission Report was sent to Congress, and there has been no legislative change. Does this mean that the policy considerations that might drive a change in this area are dormant or dead? Two recent cases from the CAAF indicate the opposite conclusion.

²⁰ *Id.* at 173.

²¹ In the opinion, the *Yager* court makes the following statement:

This appeal involves the validity of a random jury selection program established by the convening authority, 1st Infantry Division and Fort Riley, Fort Riley, Kansas. In accordance with procedures promulgated by a local directive . . . names for a list of prospective jurors were selected from personnel data files and placed on a "Master Juror List" and thereafter screened by having each individual whose name appeared on the list complete a questionnaire regarding qualifications to serve as a court-martial member. Upon completion of the screening process and the elimination of unqualified and exempt personnel, the remaining persons were considered "Qualified Jurors," and they were eligible for selection, at random, for court-martial duty. In cases involving enlisted accused who wished to have enlisted court members, the directive provided that each panel of jurors would be comprised of at least one-third enlisted personnel.

Id. at 171.

²² See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 1, 112 Stat. 1920 (1998).

²³ UCMJ art. 146 (defining the composition and role of the code committee); see also U.S. DEP'T OF DEFENSE, DIR. 5500.17, ROLE AND RESPONSIBILITIES OF THE JOINT SERVICE COMMITTEE (JSC) ON MILITARY JUSTICE, at A26 (2005) (designating the role and responsibilities of the Joint Service Committee).

²⁴ See the JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE METHODS OF SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURT-MARTIAL (1999) [hereinafter JCS REPORT] (on file with the Office of The Judge Advocate General, U.S. Army).

²⁵ *Id.* at 45.

²⁶ The National Institute of Military Justice (NIMJ) is a private non-profit organization based in Washington, D.C. The NIMJ website is at <http://www.nimj.com> (last visited Sept. 6, 2006).

²⁷ Judge Cox was the Chief Judge of the CAAF. An Army veteran, he was a judge on the South Carolina Circuit Court and an Acting Associate Justice of the Supreme Court of South Carolina, before being appointed to the COMA, the predecessor to the CAAF. COX COMMISSION REPORT, *infra* note 19, at 4-5.

²⁸ NATIONAL INSTITUTE OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), available at http://www.badc.org/html/militarylaw_cox.html [hereinafter COX COMMISSION REPORT].

²⁹ *Id.*

³⁰ *Id.*

In *United States v. Wiesen*,³¹ the military's highest appellate court used an implied bias theory to reverse a case where the senior officer on the panel supervised six of the ten members.³² The three-judge majority concluded that "[w]here a panel member has a supervisory position over six of the other members, and the resulting seven members make up the two-thirds majority sufficient to convict, we are placing an intolerable strain on public perception of the military justice system."³³ The court held that "the military judge abused his discretion when he denied the challenge for cause against [the senior officer on the panel]."³⁴ Finding prejudice, the court reversed the Army Court of Criminal Appeals and set aside the findings and sentence.

By finding that the public would objectively view command relationships among members as unfair, the *Wiesen* court certainly expanded the doctrine of implied bias to include inter-panel chain-of-command issues. Some, however, view *Wiesen* as a direct attack on commanders' discretion to select panels. For example, in a spirited defense of the status quo, MAJ Chris Behan wrote:

There should be no doubt that the *Wiesen* majority intended to strike a blow at the convening authority's discretionary ability to appoint court-martial panel members. In the penultimate sentence of its per curiam denial of the government's petition for reconsideration, the majority wrote, "The issue is appropriately viewed in the context of public perceptions of a system in which the commander who exercises prosecutorial discretion is the official who selects and structures the panel that will hear the case." The *Wiesen* majority's true policy concern, then, hearkens back to the objections that Congress heard and considered when enacting the UCMJ over fifty years ago. Viewed in that context, *Wiesen* is a prime example of an activist appellate court arrogating to itself the power to change constitutionally sound legislation with which it does not agree.³⁵

*United States v. James*³⁶ was similar to *Wiesen* in that the CAAF ruled on a *voir dire* issue that encroached upon the convening authority's responsibility and discretion to select panel members. The issue in *James* was whether the liberal grant mandate for causal challenges should apply equally to the government and defense.³⁷ The *James* court reasoned, "[u]nlike the convening authority, who has the opportunity to provide his input into the makeup of the panel through his power to detail 'such members of the armed forces as, in his opinion, are best qualified for the duty,' . . . the defendant has only one peremptory challenge at his or her disposal."³⁸ The court again relied on an implied bias theory announcing that the "liberal grant rule protects the 'perception or appearance of fairness of the military justice system. . . . Given the convening authority's broad power to appoint, we find no basis for application of the 'liberal grant' policy when a military judge is ruling on the Government's challenges for cause."³⁹ Like *Wiesen*, *James* was more an erosion rather than a direct attack on Article 25's dictate that commanders personally select military panel members. The court's implied bias theory certainly legitimizes the need to view the military system from the vantage point of civilian notions of due process and fundamental fairness.

Change from Within

What motivated V Corps to randomly seat an Article 25 selected panel? First, the Staff Judge Advocate (SJA), Colonel (COL) Michele M. Miller, and the Commanding General, LTG Ricardo S. Sanchez, believed that the change would benefit Soldiers. At a minimum, by adapting a random seating system that more closely mirrored the popular American notion of

³¹ 56 M.J. 172 (2001).

³² *Id.* at 177. Implied bias is an appearance test viewed through the objective eyes of the public, whereas actual bias is a credibility test viewed through the subjective eyes of the trial judge. In other words, implied bias equates to a military appellate court's objective estimate about the public's perception of the military justice system. See, e.g., *United States v. Minyard*, 46 M.J. 229 (1997).

³³ *Id.* at 175.

³⁴ *Id.* at 172.

³⁵ Behan, *supra* note 7, at 275.

³⁶ 61 M.J. 132 (2005).

³⁷ *Id.* at 139.

³⁸ *Id.*

³⁹ *Id.*

how a fair trial should work, Soldiers' impressions of the military justice system would improve.⁴⁰ Second, by doing this from within, V Corps could control the details of execution and fine-tune the new process over time.

Negative media coverage and recent international developments in military law have the potential to fuel Congressional interest and could result in wholesale reform imposed from above. In the recent past, the popular media has paid considerable attention to the military justice system.⁴¹ For example, in a *U.S. News and World Report* cover story, the author went far beyond focusing on the facts of sensational cases and commented on the mechanics of how the military handles justice.⁴² In particular, the article gravitated to pretrial procedures, such as convening authority discretion to select panels, refer cases to the courts they select, bind the government to pretrial agreements, and take final action on the findings and sentences.⁴³ The recent past has also seen significant international developments in military law that may influence domestic developments.⁴⁴ Beginning in 1992, there have been major military justice reforms in both the United Kingdom⁴⁵ and Canada.⁴⁶ These changes were compelled by a series of cases in the European Court of Human Rights⁴⁷ and decisions of the Canadian Supreme Court and Court-Martial Appeal Court.⁴⁸ As a result, both nations have switched to randomly selected military court-martial panels.

In Canada's first random panel case, a central military office in Ottawa generated panel member lists from a world wide database.⁴⁹ One of the randomly selected members was stationed in Australia. To prosecute a relatively small barracks larceny case that was tried in Ottawa, the Canadian military had to fly the member half-way around the world to participate in the proceedings. No consideration was given to the specific member's geographic location or duty requirements. By cutting the command completely out of the panel selection and seating process, affected Canadian commanders could not exempt members of their commands from court-martial duty. While this system appeased civilian critics of the Canadian military justice system, it did not recognize the unique needs of a worldwide organization. By proactively making sensible changes from within, the United States military can avoid such illogical outcomes.

By testing the panel seating system within the framework of Article 25, V Corps sought to modernize military pretrial procedures while preserving the best aspects of the system—the commanding general or general court-martial convening authority (GCMCA) selection of a venire⁵⁰ of best qualified members and flexible rules for convening authority excusal of members for operational reasons or other good cause.⁵¹ It was feared that turning a blind eye to the issues related to panel selection and seating might result in drastic changes forced upon the military without the luxury of fine-tuning the random selection process incrementally over time.⁵²

⁴⁰ The belief was that the proposed change would not impact the results of courts-martial because the automatic replacement system in use was being implemented in a fair manner. The big gain sought was to improve Soldiers' perceptions about the fundamental fairness of the military justice system.

⁴¹ See, e.g., Beth Hillman, *Chains of Command: The U.S. Court-Martial Constricts the Rights of Soldiers—And That Needs to Change*, LEGAL AFFAIRS, May/June 2002, at 50-52.

⁴² Edward T. Pound, *Unequal Justice*, U.S. NEWS & WORLD REP., Dec. 16, 2002, at 19-30.

⁴³ *Id.*

⁴⁴ Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. REV. 195 (2000) (discussing world-wide changes in various military justice systems and suggesting that the UCMJ fall in with major world trends).

⁴⁵ Armed Forces Act 1996, ch. 46 (Eng.), available at <http://www.opsi.gov.uk/acts/acts1996/1996046.htm> (last visited Sept. 6, 2006).

⁴⁶ Act of Dec. 10, 1998, S.C. 1998, c. 35 (Can.), *proclaimed in force*, Stat. Inst. No. 99-74, 133 C. GAZ. 1959 (1999).

⁴⁷ *Findlay v. United Kingdom*, 24 Eur. Ct. H.R. 221 (1997) (invalidating the role of the convening authority in the British military justice system as a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms guarantee of an independent and impartial tribunal).

⁴⁸ *R. v. Genereux*, [1992] S.C.R. 259 (invalidating role of convening authority in Canadian military justice system as a violation of the Canadian Charter of Rights and Freedoms guarantee of an independent and impartial tribunal).

⁴⁹ The details of this case were told to the author by the Canadian member of the 50th Judge Advocate Officer Graduate Course, Lieutenant Colonel Robert Holland, who prosecuted Canada's first random panel case.

⁵⁰ Venire refers to the common law process by which jurors are summoned to try a case. See BLACK'S LAW DICTIONARY 862 (7th ed. 1999).

⁵¹ MCM, *supra* note 5, R.C.M. 505 (c).

⁵² Memorandum, MAJ Bradley J. Huestis, Chief, Criminal Law Division, V Corps, U.S. Army, to COL Michele M. Miller, Staff Judge Advocate, V Corps, U.S. Army, subject: Article 25 Randomly Seated Panel (29 Oct. 2004) (on file with author).

The V Corps Random Panel System

Lieutenant General Sanchez, the V Corps GCMCA, selected the random panel members from nearly 500 nominees submitted to him by his subordinate commanders. His randomly seated court-martial panel was memorialized in Court-Martial Convening Order (CMCO) Number 3.⁵³ The panel had 100 members whom LTG Sanchez personally assigned a number, from 1 to 100. In selecting this panel, LTG Sanchez made the following statement:

I have selected these members using the selection criteria of Article 25, UCMJ. I selected panel members who were, in my opinion, best qualified for the duty based on their age, education, training, experience, length of service and judicial temperament, and no other criteria. I did not exclude soldiers of particular ranks from consideration, nor did I exclude anyone based upon gender or ethnic background.

I have selected a large pool of panel members, both officer and enlisted, from which panels for particular courts-martial will be randomly selected. This large pool of panel members ensures that more soldiers are actively involved in the military justice system, and that the military justice system in V Corps is as representative of the community as possible, while still adhering to the high standards of having the best qualified panel members under Article 25, UCMJ.⁵⁴

In describing how this panel would be assembled, LTG Sanchez issued the following directive:

I have assigned each of the members that I have personally selected a number; officer members (1-50) and enlisted members (51-100). Before I review a case for possible referral to either a GCM or [special court-martial], the Staff Judge Advocate (SJA) will provide me a unique, case specific random number sequence (RNS). This 100 number RNS will be attached to the SJA's Article 34, UCMJ, pretrial advice.

General courts-martial will be assembled with ten members, and SPCM will be assembled with eight members. The first ten or eight officer members randomly selected by RNS order will sit as panel members, unless excused. The remaining officers will be available in RNS order as alternate members.

If enlisted members are required for a court-martial, the same process outlined above will be utilized, with the following variations. Using RNS order, the first five officer members and the first five enlisted members will sit as panel members for GCMs, the first four officer members and the first four enlisted members will sit as panel members for SPCMs, unless excused. All other officer and enlisted members will be available as alternate members in RNS order.⁵⁵

When recommending a case for referral to the random panel, COL Miller, the V Corps SJA, provided LTG Sanchez with a unique, case specific 100-digit RNS. Colonel Miller logged on to Random.org⁵⁶ and generated a 100-number RNS. She printed, dated, and signed the two page printout in the presence of witnesses. She listed the document as an enclosure to her pretrial advice to the GCMCA, and included the following language:

Per your Selection of Court-Martial Panel Members for the V Corps Jurisdiction Memorandum, dated 10 January 2005, I have generated and enclosed the one, and only one, unique Random Number Sequence (RNS) for this case. I generated this RNS using the Random.org random number generator evaluated for use by the V Corps Science Advisor.⁵⁷

⁵³ Headquarters, V Corps, Heidelberg, Germany, Court-Martial Convening Order Number 3 (26 Jan. 2005) (on file with author).

⁵⁴ Memorandum, LTG Ricardo S. Sanchez, Commanding General, V Corps, U.S. Army, to COL Michele M. Miller, Staff Judge Advocate, V Corps, U.S. Army (Jan. 10, 2005) (on file with the author).

⁵⁵ *Id.*

⁵⁶ Random.org: True Random Number Service, <http://random.org/>. The Random.org website offers true random numbers, in real time, to anyone on the internet free of charge. It was built and is being maintained by Dr. Mads Haahr, Ph. D., Department of Computer Science, Trinity College, Dublin, Ireland.

⁵⁷ Memorandum, COL Michele M. Miller, Staff Judge Advocate, V Corps, U.S. Army, to LTG Ricardo S. Sanchez, Commanding General, V Corps, U.S. Army, subject: Advice on Disposition of Court-Martial Charges (5 Apr. 2005) (on file with author).

In his selection memorandum, LTG Sanchez had not specified how COL Miller should generate the RNS. Colonel Miller relied upon the recommendation of the V Corps science advisor, Mr. Robert Nestor, in selecting Random.org as her RNS generator. The RNS is at the heart of the V Corps randomly seated panel. The goal was to develop a transparent, simple, and truly random system to generate unique, case-specific RNS. Mr. Nestor stated:

A standard problem of courts at all levels is the selection of a panel of potential jurors from a jury pool, which is a list of people who are eligible to serve as jurors. The problem is to select N people out of the M possible people in a fair way. The V Corps Staff Judge Advocate (SJA) Office proposes to utilize the RNG [random number generator] located at internet website of "Random.com" to generate a group of N people out of the M people selected by the CG in accordance with Article 25 parameters. . . .

For the purpose of seating a jury panel from within a jury pool that was selected by the Commanding General (CG) of the V Corps, the use of the Random.org true RNG appears to be appropriate.

....

Random.org is a true RNG that is nonlinear. It is not generated from a computer code. Access for generating a random sequence is publicly available and outside of the control of the authority responsible for selecting the jury pool. Each of the members in the jury pool can be given a number. This list can serve as the sample size. Using the "Randomized Sequence" option from the website, a series of randomly generated numbers can be produced that represent both the primary and alternate members of the jury panel.⁵⁸

The RNS seating method is not unlike the standard primary or alternate member automatic replacement system used throughout the U.S. Army.⁵⁹ In fact, V Corps' random panel is based upon the automatic or "bump-up" model of seating members. Below is a comparison of the automatic replacement system and the random system (differences are listed in italics):

Automatic Replacement System

CA Requests Nominees
CA Selects Primaries IAW Art 25
CA Selects Alternates IAW Art 25
Charges Preferred
SJA Art 34 Advice
CA Refers Case
Accused Enters Plea/Forum
Members Request Excusal
Members Viced & Alternates Sit
Voir Dire & Challenges
Trial

Random Seating System

CA Requests Nominees
CA Selects *a Pool of Members* IAW Art 25
N/A
Charges Preferred
Art 34 Advice and Random Number Sequence
CA Refers Case
Accused Enters Plea/Forum
Members Request Excusal
Members Viced & *Others Sit Based on RNS*
Voir Dire and Challenges
Trial

The V Corps random panel was designed to be a UCMJ-compliant system that comes, as close as possible to the American ideal of due process and justice. This novel system sought to adhere to the high standards of Article 25, UCMJ, while at the same closely mirroring trial procedures used in Federal district courts.⁶⁰ Lieutenant General Sanchez and COL Miller hoped to benefit V Corps Soldiers by implementing a system that was not only fair in practice, but also appeared on its face to be fair. The die was cast. The next step was to refer a case to trial before the random panel.

⁵⁸ Memorandum, Mr. Robert Nestor, V Corps Science Advisor, to COL Michele M. Miller, Staff Judge Advocate, V Corps, U.S. Army, subject: Evaluation of "Random.org" Random Number Generator (15 Jan. 2004) (on file with author).

⁵⁹ See Schwender, *supra* note 4, at 12; Johnson, *supra* note 4, at 43.

⁶⁰ This objective complies with the explicit statutory goal that trial by courts-martial mirror trial in civilian court as closely as possible. Congress expressed this goal in 10 U.S.C. § 836, by charging the President with prescribing rules for courts-martial that, "shall, so far as he considers practicable . . . apply the principles of law . . . generally recognized in the trial of criminal cases in the United States district courts[.]" 10 U.S.C.S. § 836 (LEXIS 2006).

The Test Case: *United States v. Beatty*⁶¹

On 5 April 2005, LTG Sanchez accepted the recommendation of COL Miller to refer the charges and specifications against Private (PVT) E-2 Christopher L. Beatty, Jr., to trial by Special Court-Martial convened by CMCO Number 3. On 1 June 2005, the detailed trial judge, COL Denise Lind, heard motions in the case in Hanau, Germany. In a defense motion to dismiss for want of jurisdiction, the defense argued that the randomly seated panel lacked jurisdiction to try the accused because the court was improperly convened.⁶² The government argued that the GCMCA had complied with Article 25, UCMJ, in convening the randomly seated panel.⁶³ In ruling that the court-martial convened by CMCO Number 3 was properly convened and had jurisdiction to try the accused,⁶⁴ COL Lind made fifteen distinct findings.

Colonel Lind stated that LTG Sanchez personally selected the 100 members listed on CMCO Number 3, in accordance with Article 25. Colonel Lind referred to LTG Sanchez's 10 January 2005 memorandum in which he instructed the SJA to provide him a unique, case specific RNS.⁶⁵ The SJA was to attach the RNS to the Article 34 pretrial advice. In the same memorandum, LTG Sanchez set forth procedures for seating of members using the RNS sequence, excusals, and replacement of excused members.⁶⁶

Colonel Lind noted that although LTG Sanchez did not direct the SJA, COL Miller, to use Random.org or any other specific random member selection method, COL Miller was nevertheless following the GCMCA's instructions when she logged on to Random.org, selected the numbers 1 to 100 as a range, and executed the launch option, generating a two-page printout of 100 numbers in random order. In the presence of witnesses, COL Miller wrote "U.S. v. Beatty M. Miller" and "5 April '05" on the two-page RNS document. She enclosed the RNS document, CMCO Number 3, and the science advisor's evaluation with her Article 34, UCMJ, pretrial advice.⁶⁷

Colonel Lind gave weight to the V Corps science advisor's examination of the website and written opinion concluding that the random sequence option from the website could produce a series of randomly generated numbers to randomly sequence the 100 members selected by LTG Sanchez. Colonel Lind found that LTG Sanchez did not delegate panel member selection to the SJA by utilizing the RNS process because LTG Sanchez had selected all 100 members on CMCO Number 3 using Article 25 criteria. Finally, COL Lind noted that prior to assembly, LTG Sanchez had the authority, under Article 25, to excuse any of the 100 selected panel members participating in this case. The vice order in *United States v. Beatty* was strikingly simple. The order simply excused all but the eight listed members who were randomly selected through the RNS process.⁶⁸

After making her findings of fact, COL Lind announced, "the government has demonstrated by a preponderance of the evidence that LTG Sanchez properly referred this case to a panel of qualified members detailed in accordance with Article 25, Rule for Court-Martial 503(a), and applicable case law. Accordingly, the defense motion to dismiss for want of jurisdiction is denied."⁶⁹

⁶¹ *United States v. Beatty* was the first case tried before the V Corps random panel convened by CMCO Number 3, dated 26 January 2005. The V Corps GCMCA referred fourteen courts-martial to trial before the first V Corps random panel court-martial. These fourteen cases include *United States v. Coursen* referred on 28 June 2005; *United States v. Rodriguez*, *United States v. Gulick*, *United States v. Kiezle*, and *United States v. Jones* referred on 15 July 2005; *United States v. Johnson*, *United States v. Rodriguez*, and *United States v. Swan* referred on 25 July 2005; *United States v. Post* referred on 11 August 2005; *United States v. Brown* referred on 13 September 2005; *United States v. Smith* and *United States v. Walker* referred on 20 October 2005; and *United States v. Wiesemann* referred on 10 November 2005.

⁶² Defense Motion to Dismiss for Want of Jurisdiction, CPT William M. Helixon, Senior Defense Counsel, Region VII, U.S. Army, to COL Denise R. Lind, Military Judge, Fifth Judicial Circuit, U.S. Army (May 25, 2005) (on file with author).

⁶³ Government's Response to Defense Motion to Dismiss for Want of Jurisdiction, CPT Christopher B. Buchanan, Senior Trial Counsel, V Corps, U.S. Army, to COL Denise R. Lind, Military Judge, Fifth Judicial Circuit, U.S. Army (May 31, 2005) (on file with author).

⁶⁴ *United States v. Beatty* (V Corps Aug. 15, 2005) [hereinafter *Beatty* Record of Trial]. Record of Trial authenticated by COL Denise R. Lind, Military Judge, Fifth Judicial Circuit, U.S. Army (Aug. 15, 2005) (on file with the Office of the Staff Judge Advocate, V Corps).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*; see also MCM, *supra* note 5, R.C.M. 505(c)(1)(A), "[b]efore the court-martial is assembled, the convening authority may change the members of the court-martial without showing cause." Under the V Corps system, the GCMCA also delegated one-third excusal authority to the SJA.

⁶⁹ *Beatty* Record of Trial, *supra* note 75.

At trial, PVT Beatty faced four specifications of larceny for allegedly stealing postal money orders.⁷⁰ He pleaded guilty to the lesser included offense of wrongful appropriation on each specification.⁷¹ Private Beatty selected members for the sentencing phase of the court-martial. The members sentenced PVT Beatty to reduction to the grade of E-1, forfeiture of \$335.00 pay per month for six months, confinement for 179 days, and a reprimand.⁷²

Deployment to Iraq and an In-Progress Review

Throughout 2005, V Corps was focused on preparing to deploy as the nucleus of the Multi-National Corps – Iraq (MNC-I) in January 2006. Prior to the deployment, one of the many legal issues needing resolution was how to best set up GCMCA jurisdictions in both Iraq and Germany. The designated rear-area SJA held an in-progress review of the V Corps random panel system as a preliminary step in determining the best way to convene and assemble courts-martial panels.⁷³

The rear-area SJA who joined V Corps in the summer of 2005, wanted to know why the random panel was instituted. He also wanted to know the goals of putting the random panel into place. The answers ranged from idealistic to pragmatic. First and foremost, the rear-area SJA was told that it was simply the right thing to do—conform panel selection as nearly as possible to civilian practice, while remaining within the requirements of Article 25. The random system exposes more members to the experience of participating in the military justice system. Random seating gives all of the selected members an opportunity to serve on courts-martial. Under the traditional system of maintaining a primary list and alternate list, the members near the bottom of the alternate list rarely sit as members.⁷⁴

On the practical side, it was explained that a large pool of members relieves the primary panel members of the duty of sitting on every case and spreads the responsibility amongst a large pool of eligible members. This sharing of responsibility helps avoid panel burnout that is experienced by a small group of primary members who are called upon, case after case. Due to the fact that statistically members would only sit on about one in ten cases, the GCMCA might have to select a panel only once a year. The GCMCA could also select his primary staff and commanders without fear of overtaxing his best and brightest with an onerous, time-consuming additional duty.⁷⁵

Focusing on results, the rear-area SJA then asked for the top three positives and negatives that stemmed from the implementation of the random panel. Judge advocates and paralegals who had worked with the new system had differing views on the pros and cons of the randomly seated panel.⁷⁶

As the current Chief of Military Justice, the author responded:

The V Corps random panel brought the military system more in line with the American ideal of justice. It relieved panel members of the duty of sitting on every case by spreading the responsibility amongst a pool of eligible members. It gave more members the experience of participating in the military justice system. On the down side, it created an increased logistical burden on the legal office. For example, there was a need to collect 100 questionnaires instead of 10 primary and 15 alternate questionnaires. There were also more members to track for excusals. We needed to litigate motions at trial in order to defend using a novel system.⁷⁷

⁷⁰ UCMJ art. 121 (2005).

⁷¹ *Beatty Record of Trial*, *supra* note 75.

⁷² *Id.*

⁷³ The goal of the in-progress review was to capture observations from the military justice managers, trial counsel, and paralegals who implemented the random seating system. Participants included the author, who was the chief of justice; the senior trial counsel, CPT Christopher B. Buchanan; trial counsel who had tried cases before traditional and random panels, CPT Gray B. Broughton and CPT Thomas E. Brzozowski; and the Criminal Law Division NCOIC, SFC Daryl Daniels and Pretrial NCOIC, SGT Chevaughn Gilbert.

⁷⁴ E-mail from CPT Gray B. Broughton, Trial Counsel, V Corps, U.S. Army, to LTC Norman F.J. Allen, III, Deputy Staff Judge Advocate, V Corps, U.S. Army (Dec. 6, 2005) (on file with author).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

The senior trial counsel felt that there was no opportunity for panels to develop a reputation as harsh or lenient. There was broader exposure of members to military justice. The senior trial counsel pointed out that V Corps had received endorsement at the trial court level. The negatives, however, included more difficulty with implementation, because the vice orders were done closer to trial. With 100 members, V Corps had incomplete receipt of member questionnaires. This made it more difficult for counsel to prepare for voir dire. Finally, due to the random nature of the seating, junior panels heard serious felony cases.⁷⁸

Two attorneys who tried cases before traditional and random panels observed that there was a larger variety of panel members who had a fresh start on each case. It seemed that the panel was less likely to burn out, and the random system exposed more Soldiers to the military justice system. These attorneys also noted, however, that the panels were too junior. Logistically, they stated that the collection of member questionnaires required more paralegal work, and the process of notifying panel members and processing excusals caused vice orders to come in at the last minute. Initially member questionnaires were not being filled out in advance, but this improved over time.⁷⁹

The paralegal noncommissioned officers charged with the behind-the-scenes management of the random selection system stated that they had a bigger pool of personnel to choose from to hear cases. One paralegal noted that the different combinations of members, who bring something different to the cases, meant that V Corps did not have the same members sitting for all general and special court-martials. Rather, V Corps now has the ability to seat panels for more than six months, without wearing out the primary panel members. The other paralegal was more specific about the logistical hurdles, finding that it was not easy to deal with 100 people, all with different personalities and different questions about mileage and lodging reimbursement. In addition, she noted the difficulty in having to repeatedly explain that the randomly selected panel members were personally selected for court-martial duty by the V Corps Commanding General, not the Judge Advocate General's office, and how important this duty is to good order and discipline within the Corps. Finally, both noncommissioned officers believed that the random selection process required more work to complete because once the computer randomly selected the order in which the panel members were to be called, the pretrial paralegal had to do a case specific roster. This process allowed more room for mistakes and, if the wrong panel members hear a case, such a mistake could invalidate a guilty finding.⁸⁰

The officer in charge of the Darmstadt Legal Center, who opposed selecting another random panel, made the following observation:

Random panels are much more junior than with the regular selection and the more junior a panel, I believe the more defense friendly it will be. So, I actually find it highly ironic that the defense would object. Any time you have a first lieutenant as the board president, the government should be concerned. . . . I do think a junior panel is more like the civilian world, but I have concerns about violating Article 25. I do not think junior panels which have 1LTs, CW2s, and E5s, have the experience, age, education, length of service or judicial temperament to sit as best qualified members. They have simply not been around long enough.⁸¹

The rear-area SJA was concerned about the limited number of field grade panel members serving on the courts-martial tried in the four months he had been with V Corps.⁸² He was specifically concerned that by using a random seating system, the GCMCA surrendered the ability to ensure a senior officer would serve as the president of each panel. In addition, based on the large number of deploying personnel, the rear-area SJA feared that the rear-area would not have a large enough pool of qualified personnel available from which to nominate and select a random panel.⁸³

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² By rank CMCO Number 3 had the following composition: eight colonels, seven lieutenant colonels, eleven majors, twelve captains, four first lieutenants, one chief warrant officer-five, one chief warrant officer-four, four chief warrant officer-threes, two chief warrant officer-twos, three command sergeants major, five sergeants major, two first sergeants, eight master sergeants, fifteen sergeants first class, fifteen staff sergeants, and two sergeants. In future panels, the "juniorness" issue cited by the rear-area SJA could be addressed with more GCMCA focus on experience or other Article 25 criteria that favor selecting more senior members. This, however, cuts against the representativeness that LTG Sanchez sought in selecting his panel. As it stood, it was statistically possible for a V Corps random panel to seat with no member above the grade of first lieutenant or staff sergeant.

⁸³ Discussion with LTC Norman F.J. Allen, III, Acting Staff Judge Advocate, V Corps, U.S. Army, in Heidelberg, Germany (Dec. 19, 2005).

Based in part on the discussions generated by the in-progress review and in part on the limited number of rear-area personnel available for selection as members, the rear-area SJA recommended that the convening authority select a standing panel with an automatic replacement system for the rear-area.

Conclusion

By testing a randomly seated panel system, LTG Sanchez took a calculated risk to benefit his command. By using a pool of qualified members and the RNS seating system, he was able to seat random panels while still adhering to the high standards of having the best qualified panel members in accordance with Article 25, UCMJ. By selecting a large pool of panel members from which panels for particular courts-martial were randomly seated, LTG Sanchez actively involved more of his Soldiers in the military justice system. These courts-martial panels were also more representative of the V Corps community. By taking this risk and implementing a new method of seating panels, LTG Sanchez and COL Miller were able to move the V Corps panel selection and seating systems closer to the American ideal of fairness and due process without adversely impacting the Corps' good order and discipline or military mission.

New methods always involve some risk, but with military justice, the rewards accrue to the Soldiers and commanders who deserve the very best legal system possible. While the debate about the best way to select and assemble panels is sure to continue, V Corps has blazed a possible way ahead. In the final analysis, if JAs and convening authorities are not willing to test the UCMJ with new ideas that promote fairness and justice, who will?⁸⁴

⁸⁴ Many thanks to the V Corps Commanding General, LTG Ricardo S. Sanchez, and the Staff Judge Advocate, COL Michele M. Miller, for taking a calculated risk in seizing the opportunity to improve the administration of military justice. Thanks also to the V Corps Deputy Staff Judge Advocate, LTC Richard C. Gross, the V Corps Senior Trial Counsel, MAJ Christopher G. Graveline, and to all the trial counsel and paralegals who enthusiastically supported this project. Thanks are also in order for the Acting Rear-area SJA, LTC Norman F.J. Allen, III, whose rational, analytical approach to sorting out the best course of action for seating panels in the rear is a model for all JAs to follow. Finally, the author gratefully thanks CPT Allison M. Tulud for editing early drafts of this article.