

## AMICC Fact Sheet: There Is No Right to Trial by Jury for US Military Personnel

There are three types of court-martial proceedings: general, special, and summary. General courts-martial (providing for the highest level of punishment) and special courts-martial (providing the next level of severity) must consist of not less than five and three members respectively, unless the accused requests to be tried by a military judge only.<sup>1</sup> Summary courts-martial provide for the lowest level of punishment and consist of only one commissioned officer.<sup>2</sup>

Court-martial proceedings are not subject to the jury trial requirements of the Sixth Amendment.<sup>3</sup> The Fifth Amendment specifically exempts “cases arising in the land or naval forces” from the requirement that a defendant be indicted by a grand jury, and the Supreme Court has held that the Framers also “meant to limit the right to trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”<sup>4</sup> The Court has held that neither Art. III, § 2, nor the Sixth Amendment, require trial by jury for military personnel because those provisions were intended “to preserve unimpaired trial by jury in all those cases in which it had been recognized by common law... but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.”<sup>5</sup>

Congress has the power to determine the constitution of courts-martial under Art. I, § 8, cl. 14 of the Constitution.<sup>6</sup> The criteria for criminal trials of military personnel are governed by the Uniform Code of Military Justice (UCMJ). UCMJ case law recognizes the applicability of the Fifth Amendment due process and equal protection guarantees to court-martial proceedings and provides that every accused has the right to a fair and impartial jury.<sup>7</sup> However, jury-selection methods and voting requirements vary greatly from Sixth-Amendment standards.

Under the UCMJ and its implementing rules, accused military members are tried not by a jury of their peers selected from a cross-section of the community, but by a panel of their superiors chosen by the convening authority—the accused’s commanding officer—who also refers the charges to the court-martial for trial.<sup>8</sup> The convening authority chooses panel members he or she considers the “best qualified for the duty,” using the criteria of age,

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<sup>1</sup> UCMJ Art. 16(1)-(2), 10 U.S.C. § 816(1)-(2).

<sup>2</sup> UCMJ Art. 16(3), 10 U.S.C. § 816(3).

<sup>3</sup> *Ex parte Quirin*, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942).

<sup>4</sup> *Ex parte Milligan*, 71 U.S. [4 Wall.] 2, 123, 18 L. Ed. 281 (1866).

<sup>5</sup> *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 16, 87 L. Ed. 3 (1942).

<sup>6</sup> *See also Whelchel v. McDonald*, 340 U.S. 122, 126-127, 71 S. Ct. 146, 95 L. Ed. 141 (1950).

<sup>7</sup> *See, e.g., United States v. Sears*, 20 C.M.R. 377, 384 (C.M.A. 1956); *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (citing *United States v. Hedges*, 29 C.M.R. 458 [C.M.A. 1960]); *United States v. Santiago-Davila*, 26 M.J. 380, 390-393 (C.M.A. 1988).

<sup>8</sup> UCMJ Arts. 22-25, 34, 10 U.S.C. §§ 822-825, 834.

education, training, experience, length of service, and judicial temperament.<sup>9</sup> The method of selection is not regulated by law, and varies greatly in practice within and between the branches of service. If an enlisted member personally requests that enlisted members be included, at least one-third of the members of the court-martial are required to be enlisted.<sup>10</sup> Although systematic exclusion of lower ranking enlisted officers is prohibited, in practice, usually only senior enlisted personnel are selected.<sup>11</sup>

In *Ballew v. Georgia*, the Supreme Court ruled that the minimum number of persons who may sit on a jury is six, whose decision must be unanimous.<sup>12</sup> However, the UCMJ provides for a five-person minimum for general courts-martial, and a three-person minimum for special courts-martial, with decisionmaking and sentencing to be based on at least a two-thirds majority vote.<sup>13</sup> A sentence exceeding 10-years confinement requires a three-fourths majority vote, and a sentence of death requires a unanimous vote.<sup>14</sup>

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<sup>9</sup> UCMJ Art. 25(d)(2), 10 U.S.C. § 825(d)(2).

<sup>10</sup> UCMJ Art. 25(c)(1), 10 U.S.C. § 825(c)(1).

<sup>11</sup> See *United States v. Crawford*, 15 U. S. C. M. A. 31, 35 C. M. R. 3, *motion for leave to file petition for certiorari denied*, 380 U.S. 970.

<sup>12</sup> 435 U.S. 223 (1978).

<sup>13</sup> UCMJ Art. 52(a)(2), (b)(3), 10 U.S.C. § 852(a)(2), (b)(3); *United States v. Guilford*, 8 M.J. 598, 602 (A.C.M.R. 1979) (rejecting claim that five-member panel violated due process or equal protection).

<sup>14</sup> UCMJ Art. 52(b)(1)-(2), 10 U.S.C. § 852(b)(1)-(2).