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Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?

By MURL A. LARKIN*

The Army, Navy and Air Force systems of administering criminal justice were unified and substantially improved by the enactment of the Uniform Code of Military Justice in 1951. Since that date, continuing efforts have been exerted to make the pervasive code a truly enlightened system, carefully balanced between the requirements of discipline and duty in the military society and the dictates of fairness and justice as implemented in the federal courts. The latest accomplishment was the enactment of the Military Justice Act of 1968, designed to correct the most significant of the deficiencies not previously removed by legislation or by judicial construction since adoption of the 1951 Code.

As early as 1956, Mr. Justice Clark commented that:

In addition to the fundamentals of due process, [the Uniform Code of Military Justice] includes protections which this Court has not

* Professor, Texas Tech University School of Law; Capt., U.S. Navy, Ret.; Ass't Judge Advocate Gen. of the Navy, Wash. D.C., 1967-1968; Coauthor, MILITARY EVIDENCE.


required a State to provide and some procedures which would compare favorably with the most advanced criminal codes. Subsequent improvements have truly made the system an approximation to the "most advanced criminal code." In fact, the system has recently been described as comparable to the corresponding substantive and procedural provisions in the civilian community.

Significant differences still remain. One of the more important differences is that, except in trials of crimes which carry a mandatory death penalty, unanimous agreement is not required for the court-martial "jury" to return a finding of guilty. Curiously, virtually no critical analysis of this aspect of military law has been made, even though it is, as Mr. Justice Douglas might say, clearly "less favorable to defendants" than the civilian unanimous verdict requirement.

7. Only in Oregon and Louisiana can a less-than-unanimous jury convict the defendant of an offense with a maximum penalty greater than one year. Montana, Oklahoma, and Texas allow misdemeanor convictions based upon nonunanimous jury verdicts. MONT. CONST. art. III, § 23; OKLA. CONST. art. II, § 19; TEX. CONST. art. 5, § 13. Idaho has a constitutional provision permitting legislative enactment of non-unanimous jury verdicts for misdemeanors. IDAHO CONST. art. I, § 7.
8. The highest military court, the general court-martial, is composed of a military judge, who has no fact-finding powers whatever respecting the question of guilt or innocence, and five or more members (usually seven, nine or eleven, and occasionally more) who function in all important respects as a jury. They must determine the facts, apply the facts to the law as provided them by the military judge, and return a verdict either of guilty, guilty of a lesser included offense, or not guilty. 10 U.S.C. §§ 825-29 (Supp. V, 1970).

The intermediate military court, the special court-martial, functions identically: (1) except that the number of members need only be three or more and (2) except that the convening authority may decline to appoint a military judge. In the latter case the punishment jurisdiction of the court may be materially lessened. Of course, if none is appointed, the members of the court nevertheless function as fact-finders, but they are instructed on the law of the case from the senior member or President. Id.
9. Article 52 of the Uniform Code of Military Justice, 10 U.S.C. § 852, provides, in part: "(a)(2). No person may be convicted of any other offense [than offenses for which the death penalty is made mandatory by law], except as provided in section 845 (b) . . . (which permits findings to be entered in guilty plea cases without a vote) or by the concurrence of two thirds of the members present at the time the vote is taken."
11. Mr. Justice Douglas has adverted to it as one of the indicia that courts-martial are inferior tribunals. Id. at 263. See also United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955) (Black, J.).
the basis, legality and necessity of this less stringent rule of military law is in order.

I. History and Constitutionality

The Constitution vests in the Congress the power "[to] make Rules for the Government and Regulation of the land and naval forces." Originally, congressional enactments under this power did not place any requirements on court-martial verdicts of conviction; however, a limitation was placed upon the power of a court-martial to adjudge a penalty of death. Consequently, at least for conviction, a simple majority was sufficient for all crimes.

This practice continued in the Army until the enactment of the Articles of War of 1920. The Articles required a two-thirds majority vote to convict for all offenses except those in which the death penalty was mandatory. The simple majority practice persisted in the Navy until the Uniform Code of Military Justice became effective in 1951.

What has been the relationship of these practices to the guarantees of the Constitution? Article III of the Constitution provides that:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

And the sixth amendment provides that:

13. The American Articles of War of 1776, enacted by the second Continental Congress to govern the Continental Armies, prescribed in section XIV, article 5, that no sentence of a general court-martial extending to death could be given unless two-thirds of the officers present should concur therein. The Articles were silent as to any vote required for findings. In section XIV, articles 10 and 11, however, the Articles expressly permitted both findings and sentence of the inferior regimental court-martial to be based upon a simple majority of votes. G. Davis, Military Law of the United States app. C (3d rev. ed. 1915); W. Winthrop, Military Law and Precedents, app. 10 (War Dep't reprint 1920). Similarly, in An Act for the Government of the Navy of the United States, enacted March 2, 1799, 1 Stat. 709, no provision was made as to votes required for either findings or sentence, but in the following year, in An Act for the Better Government of the Navy of the United States, enacted April 23, 1800, 2 Stat. 45, article XLI provided that no sentence to death could be imposed by a general court-martial except with concurrence of two-thirds of the members present. These provisions were carried forward in the Articles of War of 1786, 1806 and 1874, and in the Articles for the Government of the Navy of 1838 and 1862.
15. Id. at 795-96.
16. See note 9 supra.
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 . . . .

These provisions have been held to guarantee to all people the essential elements of trial by jury as they were recognized both in England and in the United States when the Constitution was adopted;\(^\text{18}\) that is, (1) the trial jury should consist of a number of lay persons sufficient to interpose an effective, common-sense judgment between the accused and his accuser;\(^\text{19}\) (2) the trial should be under the control of a judge having power to instruct and to advise the jury;\(^\text{20}\) and (3) that the verdict of the jury should be unanimous.\(^\text{21}\) If this final element is held to be an integral part of the constitutional guarantee of a jury trial, how can the military less-than-unanimous verdict be permitted?

The question was first answered in the landmark decision in \textit{Ex parte Quirin}.\(^\text{22}\) The court approached the interrelationship of articles I and III with the fifth and sixth amendments, and then answered the question in this manner:

\textit{First}, courts-martial are not “courts” within the meaning of Article III of the Constitution, the ‘Judiciary Article,” and therefore they are not directly bound by the provisions of that article relating to jury trials.\(^\text{23}\) Rather, Congress was given the power to provide for the trial and punishment of military and naval offenses in the manner “practiced by civilized nations,” and this power was granted “without any connection between it and the third article of the Constitution defining the judicial power of the United States . . . .”\(^\text{24}\) Thus, courts-martial

\(^{19}\) Williams v. Florida, 399 U.S. 78, 100 (1970), rev’g Patton v. United States, 281 U.S. 276 (1930), and Thompson v. Utah, 170 U.S. 343 (1898), both to the effect that a petit jury must consist of twelve men, neither more nor less.
\(^{21}\) Patton v. United States, 281 U.S. 276, 289 (1930), & cases cited therein. Whether or not this aspect of the right to trial by jury is guaranteed to the accused before state courts by virtue of the Fourteenth Amendment is apparently still an open question. In Williams v. Florida, 90 S. Ct. 1893, 1906 n.46 (1970), Mr. Justice White stated: “We intimate no view whether or not the requirement of unanimity is an indispensable requirement of the Sixth Amendment jury trial. While much of the above historical discussion applies as well to the unanimity as to the 12-man requirement, the former, unlike the latter, may well serve an important role in the jury function, for example, as a device for insuring that the Government bear the heavier burden of proof.”
\(^{22}\) 317 U.S. 1 (1942).
\(^{23}\) \textit{Id.} at 39 & cases cited therein. See note 17 & accompanying text \textit{supra}.
are more properly considered to be article I courts vice article III courts, or as Colonel Winthrop has explained: Courts-martial are simply instrumentalities of the executive power created by Congress for the President as Commander-in-Chief to aid him in commanding the Army and Navy and enforcing discipline.\textsuperscript{25}

Second, it was not the purpose of either the judiciary article or the sixth amendment to \textit{enlarge} the then existing right to a jury trial in any court. The purpose was only to prevent impairment of the right to be tried by a jury in all cases in which the right had been recognized by the common law and in all cases of a like nature that might arise in the future.\textsuperscript{26} Since trial by jury was a procedure unknown to military tribunals at the time of the adoption of the Constitution, neither article III nor the sixth amendment were thought to have extended the right of trial by jury to members of the armed forces.\textsuperscript{27}

Finally, the fifth amendment cannot be ignored. It provides in part that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . .\textsuperscript{28}

Quirin apparently argued that since criminal cases arising in the land or naval forces are expressly excepted in the fifth amendment, all other guarantees of the Bill of Rights not similarly excepted are applicable to tribunals convened in the land or naval forces.\textsuperscript{29} As early as \textit{Ex parte Milligan},\textsuperscript{30} however, this exception within the fifth amendment was extended by implication to include the sixth amendment guarantee of a trial by jury.\textsuperscript{31} This is true, notwithstanding the unequivocal language of the sixth amendment, because:

[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth [amendment].\textsuperscript{32}

Insofar as the constitutional provisions just discussed are applicable, it is clear that less-than-unanimous verdicts by courts-martial are not prohibited by article III or the sixth amendment. This conclusion does
not, however, foreclose the possibility that the practice in question may also be closely related to, or even a component of, some other constitutional principle that is indispensable to courts-martial.

For example, the principle that it is the duty of the Government to establish the guilt of an accused beyond a reasonable doubt is a notion that is so basic in our law that it has become a requirement and a safeguard within "the historic, procedural content of 'due process' " of the fifth amendment. Is the unanimous jury verdict so intertwined with the concept of due process that it too is guaranteed by the fifth amendment, the grant jury indictment provision notwithstanding?

II. Due Process and the Unanimous Verdict

In Billeci v. United States, Judge Prettyman described the connection between proof beyond a reasonable doubt and the unanimous jury verdict in these words:

An accused is presumed to be innocent. Guilt must be established beyond a reasonable doubt. All twelve jurors must be convinced beyond that doubt; if only one of them fixedly has a reasonable doubt, a verdict of guilty cannot be returned. These principles are not pious platitudes recited to placate the shades of venerated legal ancients. They are working rules of law binding upon the court. Startling though the concept is when fully appreciated, those rules mean that the prosecutor in a criminal case must actually overcome the presumption of innocence, all reasonable doubts as to guilt, and the unanimous verdict requirement.

In Hibdon v. United States, the question arose as to whether an accused might waive the third element of a constitutional trial by jury (the requirement of a unanimous verdict) and consent to being convicted by a vote of nine to three on one count and ten to two on another. Judge Simons reviewed the United States Supreme Court holding that the first element of trial by jury (i.e., the jury must consist of twelve persons) could be waived, and an accused could lawfully submit to trial by a jury of less than twelve. He concluded, however, that this element and the third element (unanimous verdict) were not equally essen-

33. Leland v. Oregon, 343 U.S. 790, 802-03 (1952). For a collection of cases and quotations, see In re Winship, 397 U.S. 358, 362 (1970), which holds "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 1073.
34. 184 F.2d 394 (D.C. Cir. 1950).
35. Id. at 403 (dictum).
36. 204 F.2d 834 (6th Cir. 1953).
37. Id. at 837, reviewing Patton v. United States, 281 U.S. 276 (1930).
tial to the administration of justice. He characterized the latter as "the inescapable element of due process that has come down to us from earliest time" and stated that:

The humanitarian concept that is at the base of criminal prosecutions in Anglo-Saxon countries, and which distinguishes them from those of most continental European nations, is the presumption of innocence which can only be overthrown by proof beyond a reasonable doubt. The unanimity of a verdict in a criminal case is inextricably interwoven with the required measure of proof. To sustain the validity of a verdict by less than all of the jurors is to destroy this test of proof for there cannot be a verdict supported by proof beyond a reasonable doubt if one or more jurors remain reasonably in doubt as to guilt. It would be a contradiction in terms. We are of the view that the right to unanimous verdict cannot under any circumstances be waived, that it is of the very essence of our traditional concept of due process in criminal cases, and that the verdict in this case is a nullity because it is not the unanimous verdict of the jury as to guilt.

It is arguable that different jurors necessarily bring to the jury room widely varying backgrounds of experience, general knowledge and emotional susceptibility. They may, therefore, "reasonably" differ as to whether the testimony and other evidence in the case is such as to meet the test of proof beyond a reasonable doubt. For example, possibly because of unconscious impulses or unremembered experiences, one juror may refuse to place full credence in the testimony of a particular witness and conclude, at least in his own mind, that there is a doubt. The fact that the remaining jurors find no such doubt, however, does not ineluctably render the conclusion of the single juror unreasonable.

The concept of reasonable doubt, far from being precise or certain, further compounds the problem. It is doubtlessly viewed with differing shadings by different jurors. According to Wigmore, "there can be yet no successful method of communicating intelligibly to a jury a sound method of self-analysis of one's belief." On the other hand, if we could assume that the fact finders possess a high order of intelligence and open-mindedness, the dissent of even one who will stand firm against the pressure of the majority indicates that there is a "reasonable doubt" in the case.

The argument that the requirement of a unanimous verdict is inex-

38. 204 F.2d at 838.
39. Id.
40. Id. (emphasis added).
42. 9 J. Wigmore, Evidence § 2497, at 325 (3d ed. 1940).
tricably interwoven with the element of proof beyond a reasonable doubt has considerable appeal. The fundamental purpose underlying both elements is to prevent the conviction of innocent men. Relaxation of either element may create the risk of an unfair or unjust conviction. Thus, proof beyond a reasonable doubt and a unanimous verdict requirement appear to be complementary safeguards of due process.

III. The Application of "Military Due Process" to Courts-Martial

Even if the unanimous verdict requirement were recognized as a fundamental of due process, the question remains whether due process, as guaranteed by the fifth amendment, is applicable to courts-martial. In United States v. Jacoby, the United States Court of Military Appeals stated: "It is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." It would seem that this "military due process" doubtlessly includes the requirement of proof beyond a reasonable doubt. The code itself recognizes this and expressly provides that the court be instructed: "[T]hat in the case being considered if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and he must be acquitted. . . ."

Military tribunals have not analyzed this right beyond this point; consequently, no case has decided whether the reasonable doubt element is a constitutional guarantee or merely a congressional one. If it is a constitutional guarantee, then the question becomes closely analogous to Billeci and Hibdon discussed above. That is, how can an accused be guilty, beyond a reasonable doubt, if one-third of the court votes to acquit?

An alternative approach to the same question is to consider either the reasonable doubt element or the unanimous verdict element to be required by the congressional mandate just quoted or by the military common law. If this approach were to be adopted, the Billeci-Hibdon analogy would also apply—unless the congressional recognition of less-than-unanimous verdicts elsewhere in the code would qualify this

45. Id. at 430-31, 29 C.M.R. at 244.
47. Uniform Code of Military Justice art. 51(c), 10 U.S.C. § 851(c) (1964) [hereinafter cited as UCMJ].
rule. The question remains unresolved.

It is not, however, the purpose of this discussion to establish the constitutionality of the less-than-unanimous verdict requirement presently applied in courts-martial. The purpose is to consider the propriety of such a requirement within the context of the present law. This requires a clear understanding of the precise terms of the common law—and therefore of constitutional practice.

The constitutional practice is restated by Rule 31(a) of the Federal Rules of Criminal Procedure: "The verdict shall be unanimous." This means that all jurors must agree, regardless of whether the verdict is (1) guilty of the offense charged, (2) guilty of an offense necessarily included in the offense charged, or (3) not guilty. If even one juror refuses to join the others in any of the three verdicts, a "hung" jury will result. The case must then be dismissed without a verdict. Consequently:

When twelve jurors sit down to deliberate upon their solemn duty of pronouncing innocence or guilt upon a fellow human each exposes his own particular views of the evidence to the sound judgment of all with the result that tangential views have little chance of survival and practically none of getting eleven approving votes. And, of course, joint consultation, deliberation and argument are part of the practice.

The jury have the duty of making a diligent effort to arrive at a verdict, and for the purpose of arriving at an agreement as to their verdict if reasonably possible, it is the duty of the jurors to consult with each other, to keep their minds open to every reasonable argument that may be presented by their fellow jurors, and to harmonize their views if possible by discussion of the evidence.

In other words, except in those cases where the evidence clearly indicates either guilt or innocence, the jurors must, often exhaustively, disclose their preliminary views; compare their inferences, evaluations and subordinate judgments; discuss the relative import of specific items of evidence; and argue the application of the total factual picture to the carefully identified legal questions. All of this must be done with the joint deliberation necessary to secure unanimity.

On the other hand, compare the Uniform Code provision: "No person may be convicted of any other offense, except . . . by concurrence

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49. Sue Hoo Chee v. United States, 163 F.2d 551, 553 (9th Cir. 1947).
of two-thirds of the members present at the time the vote is taken. This provision establishes a requirement for conviction only—not for acquittal. Thus an acquittal would result if the vote were five to four for conviction in a nine member court-martial. This stems from the Manual for Courts-Martial statement that "[a] finding of not guilty results as to any specification or charge if no other valid finding is reached thereon. . . ." Consequently, there are no mistrials resulting from "hung" juries.

Conversely, an initial vote of six to three for conviction could possibly result in a guilty verdict without further deliberation. In other words, even in cases where the evidence may be extensive, highly complicated, unclear, and seriously controverted, there is no real requirement for discussion if two-thirds or more vote to convict.

Superficially, it would appear that if the accused could succeed in implanting a reasonable doubt in the minds of more than one-third of the court, the accused would be acquitted. Actually, he may be required to implant a reasonable doubt in the minds of a majority. This persuasion requirement evolved from United States v. Nash and similar United States Court of Military Appeals cases allowing a court-martial to reconsider any finding before it is formally announced in open court. The latest Manual for Courts-Martial has further expanded this, providing:

Any member of a court may propose that a finding be reconsidered . . . . [T]he question shall be determined by a secret written ballot, and a reballot shall be taken on a prior not guilty finding when a majority of the members vote in favor thereof or on a prior guilty finding if more than one-third of the members favor reballoting.

51. UCMJ art. 52(a)(2), 10 U.S.C. § 852(a)(2) (1964). The offenses referred to in this provision are all offenses other than those for which the death penalty is made mandatory by law, in which case the concurrence of all the members of the court-martial present at the time the vote is taken is required. UCMJ art. 52(a)(1), 10 U.S.C. § 852(a)(1) (1964). The only offenses for which the death penalty is mandatory, however, are those in violation of article 106 (10 U.S.C. § 906 (1964)), which proscribes lurking as a spy or acting as a spy in time of war in or about places under the jurisdiction of the armed forces or employed in aid of the prosecution of war. Such offenses are, of course, so extremely rare that the unanimous verdict requirement in military law may be disregarded for the purposes of this discussion.


The effect of this rule is illustrated by specific examples. Assume a general court-martial with nine members appointed and sitting. If upon the first ballot on the question of guilt or innocence the vote is five to four for acquittal, the four members who would convict probably could not force a reballoting because they do not constitute a majority. The accused would be acquitted. On the other hand, if the vote were five to four for conviction, the five who would convict may force reballoting repeatedly until one or more of the four accedes and votes for conviction—or until it becomes apparent that none of the four will change his vote. Of course, in the latter case or if one or more of the five who would convict should relent and not vote for the continued reballoting, a finding of not guilty would be required.

The total effect, therefore, is that in any case where a simple majority of the members favor conviction, they may be able to force reballoting until a conviction results. To accomplish the conviction, it is only necessary to persuade enough members to make the difference between a simple majority and two-thirds of those voting. In actual figures this means the majority must convert only one more member if the court consists of either five, seven, eight, nine, ten or twelve members, and only two if the court consists of eleven or thirteen members. The question is moot in the case of a court with only six members since the two-thirds required to convict will also be a simple majority.

Since more than one-third of the members is required to force reballoting, a vote to reballot after an initial vote to convict would indicate that less than the required two-thirds remained convinced beyond a reasonable doubt of the guilt of the accused. In this situation, however, a vote to reballot is most unlikely and a deadlock with its corresponding acquittal is not even possible in the absence of caprice or obstructionism by some member.

IV. The Net Effect of a Less-Than-Unanimous Verdict

What then are the significant effects of the military system vis-a-vis the civilian unanimous verdict requirement? At least four effects adverse to the accused are readily perceived: (1) a materially lesser

57. UCMJ art. 36, 10 U.S.C. § 836 (1964) delegates to the President the authority to prescribe procedures, which unless conflicting with the code itself or higher authority have the force and effect of law. Thus, the quoted rule has that stature in the military system. E.g. United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962).

58. In computing the number of votes required to convict, if a fraction results it will be counted as one. 1969 Manual ¶ 74(d)(3).
degree of jury discussion, (2) an increase in the danger of precipitancy in arriving at a verdict, (3) an erosion of the reasonable doubt standard, and (4) a lessening of the burden upon the prosecution.

A. A Lack of Discussion

The examples of the military system discussed above clearly illustrate that in most cases the system itself neither compels nor encourages any substantial discussion or argument between the members in determining guilt or innocence. Admittedly, there are factors which do motivate discussion and analysis of the proof by the court in every case, but these are probably common to both systems. These include the conscientious approach of the fact finders to their duties, their sense of individual integrity and their fear of convicting an innocent man. Certainly, these are all generally deep-seated convictions in military men. But they are not necessarily an integral part of the system. They are extrinsic to it.

Even before the reballoting rule was adopted, this author participated in numerous cases in which exhaustive deliberations on guilt or innocence which could have been avoided by a single ballot were conducted, but this is not necessarily the rule. Infrequently there may be a concerted or extended effort on the part of some members to persuade the others to adopt their belief in the “jury” room. For those who are senior in rank, the specter of undue influence is always a deterrent.59

Those who are junior usually experience a natural reluctance to argue their conclusions at any length for the purpose of convincing their superiors. In fact, it is somewhat surprising that the military cases reveal such a quantity of “jury” room discussions.

B. A Hasty Verdict

Concomitant with any reduction of full discussion of the case by the fact finders, and perhaps in direct proportion to such reduction, there is an increase in the danger of a precipitant verdict. It must be remembered that each member of the court is influenced by personal desires and social pressures.

Innumerable and incalculable shifts, most frequently in the direction of reason and justice, flow from extended discussion. For example, a member may misunderstand some aspect of the proof that might be

59. See United States v. Deain, 5 U.S.C.M.A. 44, 17 C.M.R. 44 (1954): “A court member’s freedom and independence of action must remain inviolate. For his actions and his motives he should be responsible only to God and his conscience.” Id. at 53, 17 C.M.R. at 53.
clarified by discussion; or perhaps his evaluation of the credibility of a witness might have been unfairly based upon emotions or prejudices that even brief introspection would modify. Discussion may subdue normal human reactions such as compassion for the victim or antipathy for the accused. Discussion might even temper a prejudice fostered by the defendant's demeanor.

Examples of the undesirability of hasty verdicts could be recited almost indefinitely. The question remains, however, that if a verdict may be reached with little or no discussion, how often are cases decided unfairly against an accused because of hasty, impulsive or inadequately considered ballots? No definite answer is possible, but perhaps an axiom frequently invoked by the United States Court of Military Appeals should be paraphrased here: Not only must a court-martial's judgment actually be untainted, but it must in every respect avoid the very appearance of being precipitant.60

C. Erosion of a Reasonable Doubt

To what extent if any is the reasonable doubt standard eroded by less-than-unanimous verdicts of guilty? Again, no empirical or mathematical answer is possible; however, logic and experience suggest that this erosion may be significant.

The problem is that under the two-thirds requirement, the trial counsel need not convince a predesignated two-thirds of the court. He needs only to persuade the most credulous two-thirds.

On the basis of an extensive study of the American jury conducted at the University of Chicago Law School over a period of years, Professors Harry Kalven and Hans Zeisel concluded that civilian judges held identifiably different standards of reasonable doubt than juries. Generally speaking, judges required lower thresholds of proof before they would convict in criminal cases.61 The thresholds held by the judges were so markedly below those held by juries that at least 11 percent of the judge-jury disagreements examined were attributed to the juries' propensity to take "more generously than the judge the law's admonition not to convict unless guilt is proved beyond a reasonable doubt."62 Although the investigators could only speculate as to the causes of this phenomenon, they referred to the requirement of unanim-

62. Id. at 187.
ity by the jurors as the most probable factor. If they are correct, it follows that proof sufficient to convince only two-thirds of any group is probably more certain to be of lesser persuasive quality than that required to convince all members of the same group.

This whole matter can be viewed yet another way. Most persons recognize that as you increase the number of jurors necessary for a conviction you decrease the probability that an innocent man will be convicted. This was tacitly recognized by the Congress when it required a unanimous verdict to convict for any offense requiring the death penalty. Why else would unanimity have been necessary in these exceptional cases if the two-thirds concurrence verdict of guilt had offered complete or even adequate assurances of a proper conviction?

In Oregon a circuit court is permitted to enter a verdict of guilty or not guilty with the concurrence of ten of the twelve jury members, which, because of both the greater percentage and the requirement of concurrence to acquit, is more restrictive than the military rule. Nevertheless:

For whatever savings, if any, are afforded Oregon taxpayers by the less-than-unanimous jury-verdict provision, corresponding costs are borne by anyone prosecuted for a crime in Oregon. The primary cost is that the traditional requirement that a defendant must be proven guilty beyond a reasonable doubt before he can be punished has been eroded in Oregon. There is a definite interrelationship between this burden-of-proof requirement and the number of jurors required to return a verdict. Reasonable minds could differ as to whether it takes one, two, or five dissenting jurors before there is "reasonable doubt" as to guilt. But it is at least clear that reducing the number of jurors required to return a verdict lessens the burden on the prosecutor.

D. Lessening of the Burden of Proof

Even if we were to assume that all fact finders define "proof beyond a reasonable doubt" in exactly the same manner, it is almost axiomatic that a lesser quality and quantity of proof will be required to induce that degree of persuasion in just two-thirds of the group than in the whole. As stated in Hibdon v. United States:

63. Id. at 189 n.5.
64. UCMJ art. 52(a)(1), 10 U.S.C. § 852(a)(1) (1964). See note 51 supra. In addition, a three-fourths vote is required to sentence an accused to confinement for more than 10 years, and a unanimous vote is required to sentence an accused to death. UCMJ art. 52(b), 10 U.S.C. § 852(b) (1964).
65. ORE. CONST. art. I, § 11.
It need hardly to be demonstrated that [under a less-than-unanimous jury verdict rule] to secure conviction a zealous prosecutor would carry a far lighter burden of persuasion in convincing a majority of the jury than all of its members, that unjust convictions would be increased rather than reduced, and the traditional measure of proof in criminal cases completely destroyed.67

V. The Argument for the Military Rule

Why must military law authorize conviction of servicemen upon a standard of proof that may be significantly less exacting than that required in most courts? As yet no significant effort68 has been exerted by any group to reform the military less-than-unanimous verdict rule; consequently, the military has not yet marshalled its justification. At least one argument seems probable—military necessity.

Simply stated, the argument is that in a military society, the maintenance of discipline is essential to the effectiveness of any fighting force. Since this is partially maintained through punishment, the punishment must be prompt and sure. Administration would be seriously impeded by a unanimous verdict rule for several reasons. The Manual for Courts-Martial would have to be amended to provide for hung juries and resulting mistrials. The number of mistrials would probably create an intolerable burden to the military in expenditures of time and money for retrials. Retrials, in turn, would have an adverse impact upon the efficient accomplishment of military missions.69

No one seriously disputes that discipline is the primary purpose of military justice,70 and most agree, therefore, that the system of mili-

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67. 204 F.2d 834, 839 (6th Cir. 1953).
68. The so-called Chamberlain bill, S. 64, 66th Cong., 1st Sess. (1919), drafted by Brigadier General Samuel T. Ansell and sponsored by Senator George E. Chamberlain, would have required concurrence of three-fourths of the members of Army courts-martial for conviction, but this provision of the bill was not enacted in the revised Articles of War of 1920.
69. This omits the occasionally heard complaint that corrupt or unreasonably obstinate jurors may seriously disrupt procedures under the unanimous verdict rule, which was advanced as a significant argument during recent English reform proposals, inasmuch as corruption or unreasoned obstinacy are unlikely to be encountered among the select group which comprises the membership of a court-martial. Kalven & Zeisel, Notes for an English Controversy, 48 CHI. B. RECORD 1951 (1967). In those few cases in which they might occur, moreover, the price of conducting a retrial should not be considered too costly an alternative to letting a presumptively guilty accused go free.
tary justice should remain separate from the civilian system. Still, vast social changes have taken place in the Armed Forces in recent years, and it is quite possible that the traditional interrelationship between military discipline and military justice is no longer valid.

Most of the early voices in this area espoused a markedly different system of justice because the aim of an armed force, i.e., successfully combating the enemy, was clearly distinguishable from that of the civilian community. Perhaps the traditional view, which prevailed until World War I, was most forcefully expressed by a Union general in testimony before a congressional committee in 1879. General Sherman said:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practice in civil courts, which belong to a totally different system of jurisprudence.

The object of civil law is to secure to every human being in a community all the liberty, security, and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation.

These objects are as wide apart as the poles, and each requires its own separate system of laws, statute and common. Any army is a collection of armed men obliged to obey one man. Every enactment, every change of rules which impairs this principle weakens the army, impairs its values, and defeats the very object of its existence. All the traditions of civil lawyers are antagonistic to this vital principle, and military men must meet them on the threshold of discussion, else armies will become demoralized by engrafting on our code their deductions from civil practice.

Even Dean John H. Wigmore, one of the most eminent legal scholars of this century, said in 1919:

The prime object of military organization is victory, not justice. In that death struggle which is ever impending, the Army, which defends the nation, is ever strained by the terrific consciousness that the nation’s life and its own is at stake. No other objective than victory can have first place in its thoughts, nor cause any remission of that strain. If it can do justice to its men, well and good. But justice is always secondary, and victory is always primary.

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71. The separateness described in Burns v. Wilson, 346 U.S. 137 (1953), is necessary because “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment.” Id. at 140. See also O’Callahan v. Parker, 395 U.S. 258, 265 (1968).


73. 24 MD. ST. B. ASS’N TRANSACTIONS 183, 188 (1919), which reports an address of Dean Wigmore.
And General Dwight Eisenhower echoed the same thought as recently as 1948 when in a speech at the New York Lawyers' Club he said:

I should like to call your attention to one fact about the Army, about the armed services. It was never set up to insure justice. It is set up as your servant, a servant, of the civilian population of this country to do a particular job, to perform a particular function; and that function, in its successful performance, demands within the Army somewhat, almost of a violation of the very concepts upon which our government is established.\(^7\)

As broad generalizations, there is doubtless some merit in these pronouncements. But in what specific manner and to what extent would a unanimous verdict rule in military courts detract from General Sherman's pronouncement that soldiers are obliged to obey, Wigmore's insistence upon victory, or Eisenhower's pragmatic or functional approach?

The relationship between prompt and sure punishment and the maintenance of discipline is significant only when the offense involved is of a nature to be directly and palpably inimical to the relationship between superiors and subordinates, such as disobedience of a command or disrespect toward a superior. In such cases the deterrent and rehabilitative effects of punishment should be effective. When, however, other types of offenses are being tried by courts-martial, considerations other than the maintenance of discipline form the backdrop. For example, the trial of a military person for an offense such as burglary is conducted primarily as a means of protecting the civilian or military community from being victimized, terrorized, or ravaged by the members of an armed force.\(^7\) The trial of a military person for an offense such as presenting a false claim has as its primary purpose the protection of the government itself from fraudulent or perverted practices.\(^7\) Military prosecutions for an offense such as bigamy are intended to protect the armed forces of the United States from discredit and disgrace.\(^7\)

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\(^7\) Reported in a letter from the New York State Bar Association to the Congressional Committee on Military Justice, dated January 29, 1949, now among the "Morgan Papers" in the Harvard Law School Library. Even Mr. Justice Black in United States \textit{ex rel. Toth v. Quarles}, 350 U.S. 11 (1955), voiced a version of this argument in these words: "To the extent that those responsible for performance of this primary function [the fighting function] are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." \textit{Id.} at 17.


\(^7\) See, e.g., UCMJ art. 134, 10 U.S.C. 934 (1964) (expressly proscribing "all
While it may be argued that the commission of such offenses might have some adverse effect upon the quality of discipline and the obedience to orders in the Armed Forces, any such effect is at most indirect and doubtlessly very limited. Clearly, basing the necessity for a less-than-unanimous verdict upon the premise that discipline and obedience must be maintained is nothing less than depriving all defendants of the greater safeguards of the civilian rule on the basis of an argument applicable to only some of them. And the number of trials for offenses of a purely "civilian" nature is not at all insignificant.78

The relationship between prompt and sure punishment of offenders and the effectiveness of a fighting force will be critically affected by the organization and structure of that force. But,

There is a certain anachronistic ring to arguments that a commander needs to control courts-martial to obtain instant and unthinking response from his men and that any lessening of his powers would weaken his ability to maintain discipline. The truth is that the nature of the military has changed dramatically since World War II and likewise the nature of discipline has had to change. Servicemen today have more technical jobs, better education, and more individual rights than ever before. Technology has transformed the military into a highly bureaucratic society. A whole new class of enlisted men, called specialists, came into being after the Korean War. They perform technical jobs and are not placed in a troop environment. Many servicemen work in jobs not much different from that of a civil servant or a corporation employee, and substantial numbers live off post. . . . Most servicemen are not given specialized combat training, and since some 20 men are now needed in support for every combat soldier, there is no need for them ever to be in combat. Seventy-five percent of enlisted men are serving their mandatory tour and will return to civilian life when it is completed. . . . This change in the nature of the military inevitably calls for a reevaluation of traditional military attitudes toward discipline and the role of the commander. . . . 79

conduct of a nature to bring discredit upon the armed forces . . . .") ; 1969 Manual § 213(c).

78. Although precise statistics are not available, it is to be noted that of the fifty-eight "punitive articles" of the Uniform Code of Military Justice, fifteen (arts. 118-32) proscribe well-known common law crimes, and article 134 not only covers numerous offenses which are common in civilian penal codes, such as bigamy, fleeing from the scene of an accident, pandering, unlawful entry, etc., but also numerous offenses which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts. 1969 Manual § 127(c) (Table of Maximum Punishments). But see O'Callahan v. Parker, 395 U.S. 258 (1969), which holds that these "common law" offenses such as rape and house-breaking must also be "service connected;" otherwise the court-martial lacks jurisdiction.

The threat of prompt and sure punishment may deter the service-
man who is contemplating a breach of discipline. The present judicial
and administrative practices of the Armed Forces, however, tend materi-
ally to diminish this effect. Certainly, death by hanging or a firing
squad in view of the culprit’s companions would have a marked impact
on discipline. So also would lesser punishments executed publicly to
the disgrace of the convicted offender, such as whipping or drumming
from the service. ⁸⁰

In today’s highly complex military society, however, when a com-
mander finds it necessary to resort to a general or special court-martial,
he will often separate the offender from his fellow servicemen by con-
finement. He may even find it possible to transfer the offender to an
entirely separate and often distant command for trial. ⁸¹ In either situ-
atation, the commander’s action regarding the court-martial and the pub-
lication of that fact within his command will probably constitute the only
deterrent or corrective impetus from the case. Later when the trial has
been completed and acted upon by the convening authority, a “court-
martial order” ⁸² will ordinarily be published within the command to
which the offender was assigned at the time of his offense. By then,
however, the mobility of personnel and the lapse of time often preclude
the order from having any appreciable “disciplinary” value. ⁸³

Critics have argued that the unanimous verdict rule has a deleteri-
ous effect upon law enforcement in its civilian application because it
prompts compromise verdicts and unduly lenient sentences. These, in
turn, are said to encourage rather than to deter potential offenders. ⁸⁴

⁸⁰ This practice in which the convicted accused, before an assembly of military
persons, was stripped of the insignia of his service and rank and was escorted from
the station to the roll of drums is seldom done in the armed services of today.

⁸¹ This is especially true since the enactment of the Military Justice Act of
1968, UCMJ arts. 1-140, 10 U.S.C. §§ 801-940 (Supp. V, 1970), which makes the as-
signment of a lawyer as counsel to the accused virtually mandatory in special courts-
martial. The services have found it more and more necessary to conduct courts-martial
in the few commands to which adequate lawyers have been assigned. See, e.g., Selman,
The Military Justice Act of 1968: Some Problems and Practical Solutions, 23 JAG

⁸² An abstract of charges, proceedings, findings and sentence of a court-martial,
and its initial appellate review. 1969 MANUAL app. 15.

⁸³ Of course it is also desirable, in the interests of discipline, to remove an in-
corrigible from continued close association with other members of the armed services.
United States v. Barrow, 9 U.S.C.M.A. 343, 345, 26 C.M.R. 123, 125 (1958). This is
hardly a valid argument, however, for making convictions easier or for lessening the
quantum of proof or standard of persuasion required to determine whether a particular
accused is or is not guilty of a specific offense.

⁸⁴ Haralson, Unanimous Jury Verdicts in Criminal Cases, 21 Miss. L.J. 185, 196
(1950): “It is not the comparatively few cases wherein the jury fails to agree that
this were true, adoption of the rule would of course have an adverse impact upon discipline in a military setting. But to attribute all the ills of our judicial system to this single, time-honored safeguard is a gross over-simplification. The assertion that a person inclined toward a breach of discipline or insubordination would calculate so precisely his chances of escaping appropriate punishment ignores modern studies in criminology and criminal psychology. Further, any such assertion is totally devoid of empirical support.

Any evaluation of the necessity or desirability of retaining the current two-thirds vote requirement for conviction in court-martial practice must ultimately recognize that a unanimous verdict rule, or even a less-than-unanimous vote rule which required the same percentage for acquittal as for conviction, would probably result in many hung jury cases. This may not be undesirable. In one sense, the possibility of a hung jury would be a "safeguard to liberty." Concededly, however, an appreciable number of hung juries might adversely affect the speedy and efficient administration of military justice in addition to raising its cost. How severe would this adverse effect and this additional burden probably be?

In their studies of the American jury, Professors Kalven and Zeisel reported that out of 3,512 jury cases that they analyzed from unanimous verdict jurisdictions, only 5.6 percent resulted in hung juries. Out of 64 jury cases from the remaining jurisdictions, 3.1 percent still resulted in hung juries. Since approximately 10 percent of the total trials resulting in convictions are tried before juries, only about one-half of

makes the difference. It is the bare fact that all twelve of the jury must agree that causes the mischief. . . . The law violator takes this into account when he wilfully breaks the law. The criminal lawyer knows this is his trump card in the event of a trial. The state realizes that even one juror can block its best efforts to carry out the will of the legislative majority. Therefore, unless the case is as 'strong as horse radish' there is usually a compromise. As a consequence, the guilty man takes a small fine instead of the heavy penalty contemplated by the law maker. In effect, the law violator is not suppressed, but simply licensed. Thus the rule of unanimity thwarts the enforcement of the law without even entering the jury box."

87. Huffman v. United States, 297 F.2d 754, 759 (5th Cir. 1962) (Brown, J., dissenting).
89. Professors Kalven and Zeisel, utilizing U.S. Bureau of Census Judicial Criminal Statistics for 1945, report that in trials for major crimes 75 percent involve guilty pleas, 10 percent waiver of juries, and 15 percent jury trials, but they comment that the jury waiver rate is much higher in trials for misdemeanors. Id. at 18. A
one percent of the total cases result in hung juries in unanimous verdict jurisdictions, and only about one-third of one percent in the less-than-unanimous civilian jurisdictions. Assuming for the moment that these statistics are applicable to courts-martial, the probability of any serious impact that they might have upon discipline or military efficiency is doubtful at best. Even if there is an effect on discipline, these disadvantages do not appear to be too great a price to pay for a full implementation of the concept of proof beyond a reasonable doubt.90

The frequency of hung juries in courts-martial, however, would in all probability not parallel the experience in civilian courts. This is because of the marked difference between court-martial members and their civilian counterparts. Civilian jurors are normally selected on the basis of voter registration listings, inclusion in telephone directories, tax rolls, etc. Court-martial members, on the other hand are individuals selected by the convening authority. The Uniform Code of Military Justice requires that the convening authority select those “best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.”991 Because of the random selection of civilian jurors, they usually, or optimally at least, represent a fair cross-section of the community or judicial district in which the court is sitting. The members of courts-martial, however, are generally commissioned officers.92 These officers normally hold at least one college

better breakdown of this nature is probably found in 1967 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, Table 4(D). There, of 26,344 criminal defendants who were convicted in United States district courts during the fiscal year which ended June 30, 1967, only 8.2 percent were convicted by jury, approximately 88 percent having involved pleas of guilty or nolo contendere and approximately 4 percent having involved a waiver of trial by jury. No comparable figures are available respecting trials by courts-martial since the privilege of waiving trial by members of a court-martial and being tried solely by a military judge was not granted in military law until August 1, 1969, the effective date of the Military Justice Act of 1968. UCMJ art. 16, 10 U.S.C. § 816 (Supp. V, 1970).

90. These percentages would equal respectively only about 15 and 10 trials by general court-martial out of the total of approximately 3,000 such trials conducted annually in all services which result in convictions.


92. Although enlisted members are eligible to sit in certain cases (UCMJ art. 25(c), 10 U.S.C. § 825(c) (1964)), the experience of the author is that accused rarely request their presence and that they sit in extremely few cases. Respecting officers as fact finders, it has been observed that “[m]en, in contrast with women, and persons of higher in contrast with lower status occupations have higher participation, influence, satisfaction and perceived competence for the jury task... .” Strodbeck, James & Hawkins, Social Status in Jury Deliberations, 22 AM. SOC. REV. 713, 718 (1957).

For a case involving the law applicable to the selection of enlisted persons as
degree, and often more than one. They have been indoctrinated with a concern for discipline, justice and its processes, and usually they have had broad experience in leadership. Logically, therefore, they may well be more competent jurors than the average civilian.93 Additionally, they are predominantly males who are allegedly less affected by sentiment, and they will suffer no financial detriment or other disadvantage from their service as a member of a court-martial.94 These differences would seem conducive to a greater probability of agreement among court-martial members than among civilian jurors with more diverse background and experiences.

As Professor Kalven observed, it is a miracle that juries are able to reach any agreement at all because of the divergent views held by the various jurors at the commencement of their deliberations.95 For this reason, hung juries would be expected if courts-martial were brought under the unanimous verdict rule, but the frequency of their occurrence and their consequences must remain the subject of conjecture. Neither appears to be a threat of any magnitude.

If there is any threat to the military, it lies in blindly following General Sherman's views and thus ignoring the vast differences between today's military organization and the Union army of 1860. Tremendous social changes have taken place; the stakes in the matter are far too important to be won or lost by arguments or concepts that have become outmoded. Recently, Mr. Justice Brennan wrote:

> It is critical that the moral force of the criminal law not be diluted by a standard of proof which leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.96

This "certainty" does not exist in the military. It is hardly unreasonable to extend this protection to the military man.

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93. Professors Kalven and Zeisel report that markedly different judgments commonly occur between judges and juries respecting the credibility of witnesses, whereas this would probably be reasonably consistent among members of a court-martial because of the broad similarity of their educational and experience backgrounds. H. Kalven & H. Zeisel, supra note 90, at 186.

94. They do not, of course, lose any pay or allowances while serving on courts-martial and are frequently relieved of all conflicting military duties.
