

SELECTING COURT-MARTIAL MEMBERS

In the military justice system, the Convening Authority is responsible for personally selecting Members to serve on a court-martial panel. Article 25 of the UCMJ directs the Convening Authority to select those who, in his or her opinion, “are **best qualified** for the duty by reason of **age, education, training, experience, length of service, and judicial temperament.**”

Convening Authorities are accorded broad discretion when a court-martial panel is selected in accordance with the rules below. These rules ensure an accused is provided “both (1) a fair panel and (2) the appearance of a fair panel.”

RULES FOR SELECTING COURT-MARTIAL MEMBERS

The Convening Authority MUST:

- Consider all unit personnel equal to (by date of rank) or senior in grade to the accused when selecting a panel. A Convening Authority may ultimately select a panel consisting of senior sailors and officers, but only after considering all members of the unit equal to (by date of rank) or senior in grade to the accused and applying the Article 25 criteria.
- Personally select all Members.
- Select Members **best qualified for the duty** by age, education, training, experience, length of service, and judicial temperament (Article 25 criteria).
- When requested by the accused, ensure 1/3 enlisted representation on the panel.

The Convening Authority MAY:

- Consider race and gender of Members for the purpose of inclusivity (e.g. detailing a Member so that:
 - the court-martial panel is representative of the accused’s race or gender and/or
 - the court-martial panel is representative of the military population).
- Request commanders of external and subordinate units nominate personnel for consideration (e.g. the accused is an E-8 and the unit has a limited number of personnel senior to the accused).

The Convening Authority MAY NOT:

- Exclude any potential Members (all unit personnel equal to (by date of rank) or senior in grade to the accused) from consideration based solely on rank (e.g. “I only want to consider questionnaires from field grade officers and E-9s”).
- Delegate the authority to select Members.
- Select Members to achieve a specific result (e.g. “stacking” a panel with predominately women in a sexual assault case).
- Select a Member based on the individual being a “volunteer.”
- Select a Member who personally nominated another Member detailed to the case (e.g. a Squadron Commanding Officer personally identifies and nominates Senior Chief X from his or her unit for consideration by the Convening Authority. Either, but not both, may be detailed).
- Select a Member who is a government witness; counsel in the case; the Article 32 Preliminary Hearing Officer; or accuser (the individual who preferred a charge or directed someone else to prefer a charge, or any person who has an interest other than an official interest in the case).

Encl: (1) Guide for Legal Officers
(2) Case law summaries for Commander & SJA discussions

GUIDE FOR LEGAL OFFICERS

Standing & Modified Convening Orders. Commands should, at least yearly, prepare a standing court-martial convening order. The standing convening order will be used during the referral process, though will likely be modified before a trial to reflect forum elections by the accused and current command membership. When an accused elects to be tried by Members (vice a Military Judge), the standing court-martial order will be modified to account for the unavailability of previously detailed Members and to ensure enlisted representation when requested by an enlisted accused. The Legal Officer should:

1. Task subordinate units to nominate personnel and submit completed Members' questionnaires for consideration by the Convening Authority. Task subordinate units so that the Convening Authority is presented approximately five (5) questionnaires per paygrade senior to the accused or all in a paygrade if there are fewer than five (e.g. the unit has (3) E-9s; all should complete a questionnaire). If the unit has fewer than five personnel in a particular paygrade, consider seeking additional personnel for consideration from outside the command. As previously noted, the Convening Authority may not select a Member based on the individual being a volunteer. Consequently, action officers must not solicit volunteers. Unit administrators may inform personnel they are being considered for court-martial duty in order to identify issues that may affect an ability to serve, such as TAD or medical conditions. However, only the Commanding Officer may determine that an individual is not available for consideration. [see sample tasking message below]

2. Pull a MCTFS roster of all personnel equal to (by date of rank) or senior in grade to the accused in the unit with the following information:

Name; Paygrade; Date of Birth; Armed Forces Active Duty Base Date; MOS; and Education Level.

3. Prepare a memorandum documenting the information considered during the selection process. The memorandum should include:

- MCTFS roster;
- List of nominees; and
- Members' questionnaires [see sample memorandum below].

4. After the CA selects Members, prepare a modified court-martial convening order that (1) deletes personnel from the initial court-martial order who will not participate in the court-martial; (2) adds new personnel to the court-martial panel; and (3) publishes the panel (both old and new Members) who will actually participate in the court-martial.

NOTE: All correspondence, including emails, that relates to the selection of Members may be provided to defense counsel and reviewed by the Military Judge to ensure a fair and impartial selection process.

Sample Memorandum to Solicit Nominees from Subordinate Commands

From: Commanding Officer, 2d Marines
To: Commanding Officer, 1st Battalion, 2d Marines (Attn: S-1)
Commanding Officer, 2d Battalion, 2d Marines (Attn: S-1)
Commanding Officer, 3d Battalion, 2d Marines (Attn: S-1)
Commanding Officer, H&S Company, 2d Marines

Subj: NOMINATIONS FOR COURT-MARTIAL SERVICE

Ref: (a) Article 25, UCMJ (2019 edition)

Encl: (1) Member Questionnaire

1. A court-martial is scheduled for July, 20XX. You are hereby directed to nominate personnel for consideration as court-martial Members, in accordance with the guidance below.

2. Commanding Officers will personally nominate only those personnel who are best qualified for court-martial membership "by reason of age, education, training, experience, length of service, and judicial temperament." [Art. 25, UCMJ].

3. Commanding Officers will nominate personnel as follows:

- a. 1/2: (1) O-4; (2) O-3; (3) O-2 or O-1; (1) E-8; (1) E-7; (2) E-6; (3) E-4
- b. 2/2: (1) O-4; (1) O-3; (1) O-2 or O-1; (2) E-7; (3) E-5
- c. 3/2: (1) O-4; (2) O-3; (1) E-9; (2) E-8; (2) E-6; (2) E-5; (2) E-4
- d. H&S: (2) O-4; (1) O-2 or O-1; (2) E-9; (1) E-8; (2) E-7

4. Unit administrators may inform personnel they are being considered for court-martial duty in order to identify issues that may affect an ability to serve, such as TAD or medical conditions. However, only the Commanding Officer may determine that an individual is not available for consideration. Further, unit administrators may not ask personnel whether they would like to be selected for the duty, and may neither solicit nor accept volunteers.

5. Nominated personnel will submit a completed copy of the enclosed Member Questionnaire to the Regimental Adjutant by 15 June, 20XX.

Adjutant

By direction

Sample Memorandum on Members Selection

From: Legal Officer (or Staff Judge Advocate)
To: Commanding Officer

Subj: MODIFICATION OF COURT-MARTIAL CONVENING ORDER 1-20 FOR THE SPECIAL COURT-MARTIAL OF LCPL Y, USMC

Ref: (a) Article 25, UCMJ (2019 edition)

Encl: (1) Roster of Unit Personnel Eligible to Serve as Court-Martial Members
(2) List of Nominees
(3) Members Questionnaires for Consideration

1. Lance Corporal Y has elected to be tried by Members with enlisted representation. Therefore, you are required to modify your standing court-martial panel. Additionally, Major Z, an officer detailed to your standing court-martial panel, has changed duty stations and should be replaced.
2. Pursuant to the reference, you are required to personally select Members who, in your opinion, are “best qualified” by reason of “age, education, training, experience, length of service and judicial temperament.”
3. In making your decision, you must consider all unit personnel equal to (by date of rank) or senior in grade to the accused. You may not select Members to achieve a specific result in the case. Additionally, personnel who volunteer to serve as a Member may not be selected.
4. Enclosure (1) is a roster of all rank-eligible personnel. Enclosure (2) is a list of personnel nominated by units for your consideration. The Members’ questionnaires of those nominees are in enclosure (3). You may select from enclosure (1), enclosure (2), or direct additional questionnaires be provided for your consideration.
5. For a special court-martial in which enlisted representation has been requested, there must be four (4) Members remaining after challenges, at least two (2) of whom are enlisted. Therefore, I recommend you select at least ten (10) Members, five (5) of whom are enlisted.** Please indicate your selections on enclosure (2) by either initialing next to the names or by writing-in the names of other personnel in the blank spaces at the bottom of the page.
6. I recommend you authorize me to excuse up to 1/3 of the Members, should they become unavailable before the court-martial begins. Additionally, I recommend you authorize the military judge to impanel one (1) alternate.

[**For a special court-martial to proceed, there must be four (4) Members remaining after challenges. To ensure the court-martial proceeds as scheduled, I recommend you select ten (10) Members.]

[**For a general court-martial to proceed, there must be eight (8) Members remaining after challenges. To ensure the court-martial proceeds as scheduled, I recommend you select sixteen (16) Members.]

[**For a general court-martial in which enlisted representation has been requested, there must be eight (8) Members remaining after challenges, at least three (3) of whom are enlisted. Therefore, I recommend you select at least sixteen (16) Members, eight (8) of whom are enlisted.]

Sample Special Court-Martial Convening Order

SPECIAL COURT-MARTIAL CONVENING ORDER 1-20

Pursuant to authority contained in Article 23, UCMJ, and paragraph 0120b(3), Judge Advocate General of the Navy Instruction 5800.7F, CH-1, of 1 Jan 2019, a special court-martial is convened with the following members:

Lieutenant Colonel Henry X. XXX, USMC;
Lieutenant Colonel Trevor X. XXX, USMC;
Major Bruce X. XXX, USMC;
Major James X. XXX, USMC;
Captain Steven X. XXX, USMC;
Captain Susan X. XXX, USMC;
First Lieutenant Anthony X. XXX, USMC;
First Lieutenant Margaret X. XXX, USMC;
Chief Warrant Officer 3 Thor X. XXX, USMC; and
Chief Warrant Officer 2 Peter X. XXX, USMC.

One alternate member is authorized if sufficient members remain available upon the completion of the voir dire process.

Colonel, U.S. Marine Corps
Commanding Officer

Sample Court-Martial Amending Order

SPECIAL COURT-MARTIAL AMENDING ORDER 1A-20

The following members are detailed to the Special Court-Martial convened by Special Court-Martial convening order 1-20, dated DD MMM YYYY, for the trial of *U.S. v. LCpl Y, USMC*.

Major X. X. XXX, USMC;
First Sergeant X. X. XXX, USMC;
Master Sergeant X. X. XXX, USMC;
Gunnery Sergeant X. X. XXX, USMC;
Gunnery Sergeant X. X. XXX, USMC; and
Staff Sergeant X. X. XXX, USMC.

The following members previously detailed to the Special Court-Martial convened by order 1-20, dated DD MMM YYYY, have been relieved for the trial of *U.S. v. LCpl Y, USMC*.

Lieutenant Colonel Henry X. XXX, USMC;
Major Bruce X. XXX, USMC;
Captain Steven X. XXX, USMC;
First Lieutenant Anthony X. XXX, USMC;
First Lieutenant Margaret X. XXX, USMC; and
Chief Warrant Officer 2 Peter X. XXX, USMC.

The court-martial as amended and relieved is comprised of:

Lieutenant Colonel Trevor X. XXX, USMC;
Major X. X. XXX, USMC;
Major James X. XXX, USMC;
Captain Susan X. XXX, USMC;
Chief Warrant Officer 3 Thor X. XXX, USMC; and
First Sergeant X. X. XXX, USMC;
Master Sergeant X. X. XXX, USMC;
Gunnery Sergeant X. X. XXX, USMC;
Gunnery Sergeant X. X. XXX, USMC; and
Staff Sergeant X. X. XXX, USMC.

One alternate member is authorized if excess members remain upon completion of the voir dire process.

Colonel, U.S. Marine Corps
Commanding Officer

Rank. Rank may not be used a criteria to systematically include or exclude potential Members.

United States v. Bartee, 76 M.J. 141 (C.A.A.F. 2016) The systemic exclusion of otherwise qualified Members based on an impermissible variable such as rank is improper. The convening authority was able to correct a taint in the first Members selection process (that systemically excluded E-4s and E-5s) by expressly considering the Article 25, UCMJ, criteria; personally selecting the new panel only on the basis of that criteria; and confirming he was cognizant of the roster of other service members from which he could have drawn Members. The staff judge advocate can assist the convening authority in selecting Members as long as this help does not improperly exclude any potential Members.

United States v. Sullivan, 74 M.J. 448 (C.A.A.F. 2014) In a general court-martial of an O-6 accused for wrongful use of cocaine, although the convening authority's categorical exclusion of flag officers from the member pool violated Article 25, UCMJ, there was no appearance of an unfair panel, where (1) the accused was provided with a venire of fellow senior captains who were fully qualified to sit on a court-martial panel, (2) there was no basis to conclude that the convening authority selected the Members on any factors other than their age, education, training, experience, length of service, and judicial temperament, and (3) the convening authority's motivation in excluding flag officers from this case was not to stack the panel against the accused, but rather the convening authority relied on his experience in concluding that the flag officers would not be available to actually sit on the panel and hear the case.

United States v. Upshaw, 49 M.J. 111, 113 (C.A.A.F. 1998) Although finding no prejudice to the accused for an administrative error in the nomination of Members, the court opined, "[w]hile it is permissible to look first at the senior grades for qualified Members, the lower eligible grades may not be systematically excluded." *Id.*

United States v. Nixon, 33 M.J. 433, 434 (C.M.A. 1991) The accused at trial raised the issue that Members below E-8 had been impermissibly excluded from court-martial participation. The convening authority testified at trial affirming his use of Article 25 criteria. In affirming the accused's conviction, the court cautioned, however, that "a convening authority and his staff judge advocate must make sure that they neither consciously nor subconsciously use military grade as a test for court membership (with the sole exception of assuring that court members outrank the accused.)" *Id.* at 435.

United States v. Daigle, 1 M.J. 139, (C.M.A. 1975) The court held it was improper to obtain nominees from subordinate commanders solely on the basis of their rank and without consideration of the Article 25(d)(2), UCMJ criteria. *Id.* The court reversed the lower court's decision upholding the findings of guilty and the sentence and authorized a rehearing.

United States v. Kirkland, 53 M.J. 22 (C.A.A.F. 2000) The accused pleaded guilty to wrongful possession, use, and distribution of LSD and marijuana and was sentenced by Members to a bad-conduct discharge, confinement for 1 year, total forfeitures, and reduction to E-1. The court affirmed the findings, but reversed the sentence finding the exclusion of potentially qualified Members below E-7 was improper. *Id.* at 25.

Race and Gender. A convening authority may consider race or gender when seeking in good faith to make the panel more representative and inclusive of the accused's race or gender, or the military population.

United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2017) The accused was convicted of rape and sentenced to three months confinement, a reduction to E-2, and a bad-conduct discharge. The accused was male. *Id.* at 159. Seven of the ten Members detailed to his court-martial were women. *Id.* The Members came from a larger pool which reflected an officer pool consisting of 20 percent women and an enlisted pool consisting of 13 percent women. *Id.* The court dismissed the case with prejudice rejecting the argument that the convening authority sought to be more inclusive in its panel selection because the selection was not reflective of the accused gender and the venire consisting of 70 percent women was not reflective of the military community. *Id.* at 162. (*See also United States v. McClain, 22 M.J. 124 (C.M.A. 1986)*).

***United States v. Smith*, 27 M.J. 242 (C.M.A. 1988)** The accused was found guilty of conduct unbecoming an officer and a gentleman for forcing a female officer to touch his penis. *Id.* at 243. He was sentenced to confinement for 2 years, total forfeitures and a dismissal. The convening authority suspended all confinement in excess of 3 months pending appellate review. *Id.* As was his custom, the convening authority sought women to serve as court-martial Members specifically for sexual assault cases. The court concluded the convening authority's purpose in choosing women for sexual assault cases was because women would have "a unique ability to understand the testimony of the victim." *Id.* at 250. In setting aside the findings and sentence, the court found the convening authority's intentional selection of women to be improper because it was done to achieve a particular result. *Id.*

***United States v. Crawford*, 35 C.M.R. 3 (C.M.A. 1964)** The convening authority deliberately selected an African American Service member to serve as a potential Member in the accused's trial. *Id.* at 12. The accused was also African American. The court found that seeking to be inclusive of the accused's race was proper and held, "[i]f deliberately to include qualified persons is discrimination, it is discrimination in favor of, not against an accused. Equal protection of the law is not denied, but assured." *Id.* at 13.

Volunteers and Targeted Volunteers. Considering volunteers or soliciting volunteers is contrary to Article 25 factors.

***United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2014)** A command instruction erroneously restricted the personnel that could be nominated as Members. However, this did not result in error, in part, because the instruction was only to supplement the pool of potential Members from the convening authority's staff; the convening authority had all personnel on his staff complete a Members questionnaire when they checked-in; and the instruction was not used with an improper motive.

***United States v. Dowty*, 60 M.J. 163 (C.A.A.F. 2004)** Soliciting Members for court-martial service through an advertisement in the Plan of the Week is inappropriate. *Id.* at 172. Although ultimately affirming the accused's conviction, the court found error in nominating Members based on an irrelevant variable, such as whether the Member volunteered for the duty. *Id.*

Any factor to achieve a desired result. Having the motive of selecting a panel more disposed to adjudge harsh sentences, or trying to select Members with unique experiences – like being uniformed victim advocates – in order to have a panel more sympathetic to a victim, are both prohibited.

***United States v. Lewis*, 46 M.J. 338 (C.A.A.F. 1997)** In finding the large number of women detailed to the accused's court-martial to be an anomaly and failing to find any improper motive by the government, the court affirmed the findings and sentence. *Id.* at 342. The court, however, made clear that convening authorities are prohibited from assigning Members or excluding Members in order to achieve a particular result in the case (court packing). *Id.* at 341.

***United States v. Hilow*, 32 M.J. 439, 440 (C.M.A. 1991)** The accused pleaded guilty to wrongful use of marijuana and was sentenced by Members to a bad-conduct discharge, confinement for four months, total forfeitures, and reduction of pay grade. The court set aside the accused's sentence finding the convening authority's subordinates solicited only nominees who were commanders and supporters of a command policy of harsh discipline, even when the convening authority was unaware of stacking.