

Proposal for Increasing Peremptory Challenges in Military Capital Cases

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Agenda

- The UCMJ's Single Peremptory Challenge
- Post-*Batson* Debate
- Capital Sentencing
 - Decreased Anonymity
 - Group Dynamics / Social Conformity
- Panel Selection, Voir Dire, Challenges, and Gaps
- Historical Rationale for Single Peremptory Challenge under the UCMJ
- Asymmetric Increase Proposal – Suitability and Feasibility
- Discussion

Underlying Article: *Voir Dire, Voir Dire, Everywhere, But Not A Strike to Spare: A Defense-Focused Proposal to Increase Peremptory Challenges in Military Capital Cases*, 231 *MILITARY LAW REVIEW* 579 (2025)

The UCMJ's Single Peremptory Challenge

- Creation of the 1920 amendments to the Articles of War (Army); 1951 UCMJ (all services)
- Calls for expansion and resistance to reform
- The Disparity:
 - Federal: 20 defense peremptories
 - Capital State Average (as of 2023): 12.2 defense peremptories
 - No state (except for Arizona) offers fewer than 8 defense peremptories
 - Trend away from defense-favored asymmetry
- The Proposal:
 - Increase to 10 defense peremptories and 5 government peremptories

Post-*Batson* Debate

- Baseline: no constitutional requirement for peremptories
- *Batson* and its progeny
- Debate over abolition and reform of peremptories
- An imperfect tool, but a necessary tool in capital courts-martial

Capital Sentencing Procedures: Individual Member Impact

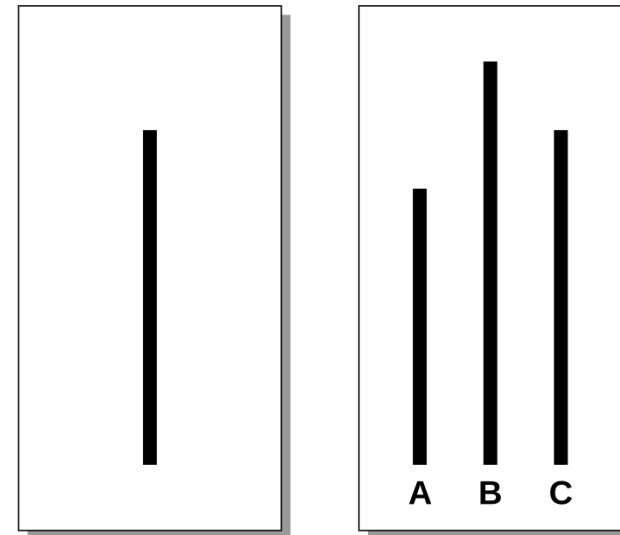
- Three Required Unanimous Findings:
 - Aggravating Factor(s)
 - Extenuation / mitigation substantially outweighed by aggravating circumstances
 - Death sentence
- Panel member must propose a sentence to trigger vote
- Voting continues until sentence threshold met (3/4 or unanimous)
- Panel could vote on death multiple times
- Single member can trigger reconsideration of unanimous votes
- Likelihood of reconsideration in capital sentencing

Capital Sentencing Procedures: Decreased Anonymity

- Baseline anonymity in courts-martial panels
- Breakdown of anonymity in capital sentencing:
 - Anonymity can break down during deliberations
 - Iterative process of proposing, voting, re-proposing, and re-voting on sentences
- Key Takeaway: Persistent life proposers cannot remain unanimous for long

Capital Sentencing Procedures: Group Dynamics / Social Conformity

- Solomon Asch Conformity Experiment
 - Single dissenter vs. a dissenting partner
- California case study – collapse of the last hold-out
- Capital Jury Project Study
 - 3 or fewer life voters
 - 4 or more life voters
- Loving, Thomas, and Hennis



Panel Selection, Voir Dire, Challenges, and Gaps

- Voir dire – gathering information and operationalizing through excusals and challenges
- Capital voir dire – requires gathering information on attitudes and perspectives towards death penalty (constitutional / prudential)
- Defense Bar Advanced Methods - Colorado Method (and Others)
 - Identify constitutional impairments (challenges for cause)
 - Identify pro-death penalty views short of constitutional impairment (peremptory challenges)
 - Educate jurors
 - All but required under the learned counsel standard

Panel Selection, Voir Dire, Challenges, and Gaps

- Routine military appellate litigation of improper denial of challenges for cause
- Capital Juror Project: frequency of constitutionally-impaired jurors on capital jurors
- Military capital counsel cannot fully operationalize Colorado method
- Challenges for cause insufficient for non-constitutionally impaired jurors
- **Peremptories are the last line of defense**

Historical Rationale for Single Peremptory Challenge under the UCMJ

- Single peremptory challenge persists due to:
 - UCMJ inertia
 - Deference to military efficiency
- Post-World War I Articles of War Reforms – debate and introduction of single peremptory challenge
- Post-World War II Reforms – debate and *stasis* rooted in efficiency concerns
- 2015 Military Justice Review Group – summary acknowledgment of disparity, no recommendation
- **Common thread – peremptory debate in Congress devoid of discussion of capital cases**

Asymmetric Increase Proposal - Suitability

- Military Capital Case Proposal: Increase to 10 defense peremptories and 5 government peremptories
- Increase in peremptories is consistent with trend towards increased procedural alignment with federal system
- Although federal system is symmetric (20/20), asymmetry warranted in military capital cases:
 - Perceptions of Convening Authority member selection, despite randomization
 - Address post-*Batson* debate concerns of discriminatory use of peremptories

Asymmetric Increase Proposal - Feasibility

- De minimis impact on command efficiency
- Military capital cases rare and becoming rarer – 8 in 25 years (1997-2022)
- Capital courts-martial will not be tried in theater – See United States v. Akbar (C.A.A.F. 2015)
 - Pvt. Eddie Slovik case unimaginable today
- Increased peremptories may actually decrease appellate litigation over denied causal challenges
 - The current “hard choice” in preserving appellate review of denied challenges
 - Ten peremptories would alleviate “hard choice” dilemma

Asymmetric Increase Proposal - Feasibility

- Theoretical Application – United States v. Henson
 - Over 2.5 years between arraignment and trial
 - 45 court session days
 - 9.5 days of voir dire and challenges (39 prospective members; 14 actual members), or ~ 4 days per member
 - Over a decade of direct appeals
 - Proposed increase (fifteen add'l peremptories) would have lengthened process by just 4-5 days

Closing and Questions

“As is often said, death is different. It is different in kind. It is different in finality.”

United States v. Akbar, 74 M.J. 354, 425 (C.A.A.F. 2015)
(Baker, J., dissenting)