

**IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

UNITED STATES,  
Petitioner

**MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBITS 1– 8**

v.

Case No. ARMY Misc. 20220001

Colonel (O-6)  
**PRITCHARD, CHARLES L.,**  
Military Judge,  
Respondent

Lieutenant Colonel (O-5)  
**DIAL, ANDREW J.,**  
U.S. Army  
Real Party in Interest

**TO THE HONORABLE, THE JUDGES OF THE  
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

COMES NOW the United States, by and through undersigned appellate government counsel, pursuant to the Joint Rules of Appellate Procedure for the Courts of Criminal Appeals [J.R.A.P. R.] 23(b), and moves to attach the following government appellate exhibits [GAE] to the record:

GAE 1. Signed charge sheet.

GAE 2. Defense Motion for Appropriate Relief (Unanimous Verdict).

GAE 3. Government Response to Defense Motion for Appropriate Relief.

GAE 4. Order to Brief Specified Issues.

GAE 5. Government Response to Order to Brief Specified Issues.

GAE 6. Defense Response to Order to Brief Specified Issues.

GAE 7. Military Judge's Ruling on Unanimous Verdict Request.

GAE 8. Defense Notice of Forum and Pleas.

These government appellate exhibits provide the underlying basis for the government's petition for extraordinary relief. These documents are also referenced throughout the writ of prohibition, and included in the appendix of the writ of prohibition. Accordingly, they are appropriate and necessary to attach to the record for resolution of this matter.

WHEREFORE, the government requests this Honorable Court grant this motion.

**Panel No. 3**

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 1

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_



KAREY B. MARREN  
CPT, JA  
Branch Chief,  
Government Appellate Division

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 2

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 4

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 6

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 8

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 3

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 5

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

MOTION TO ATTACH  
GOVERNMENT APPELLATE  
EXHIBIT 7

GRANTED: \_\_\_\_\_

DENIED: \_\_\_\_\_

DATE: \_\_\_\_\_

# **Government Appellate Exhibit**

**1**

# CHARGE SHEET

## I. PERSONAL DATA

1. NAME OF ACCUSED (Last, First, Middle Initial) Dial, Andrew J.		2. SSN [REDACTED]	3. GRADE OR RANK LTC	4. PAY GRADE O-5
5. UNIT OR ORGANIZATION Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752			6. CURRENT SERVICE a. INITIAL DATE 02 June 2001 b. TERM Indef	
7. PAY PER MONTH a. BASIC \$9,556.00 b. SEA/FOREIGN DUTY \$0.00 c. TOTAL \$9,556.00		8. NATURE OF RESTRAINT OF ACCUSED NONE		9. DATE(S) IMPOSED N/A

## II. CHARGES AND SPECIFICATIONS

### 10. CHARGE I: VIOLATION OF THE UCMJ, ARTICLE 134.

THE SPECIFICATION: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, commit indecent conduct, to wit: after providing [REDACTED] with alcohol, enter the hotel room she shared with [REDACTED] with a cell phone flashlight on, lift the covers [REDACTED] put his hand on her side, and then move his hand under her clothes toward her breasts when he believed she was asleep, and that, under the circumstances, such conduct was of a nature to bring discredit upon the armed forces.

### CHARGE II: VIOLATION OF THE UCMJ, ARTICLE 120.

SPECIFICATION 1: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, touch the breast of [REDACTED] with Lieutenant Colonel Andrew J. Dial's body part, to wit: his hand, with an intent to arouse and gratify the sexual desire of himself, without the consent of [REDACTED]

SPECIFICATION 2: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, touch the vulva of [REDACTED] with Lieutenant Colonel Andrew J. Dial's body part, to wit: his hand, with an intent to arouse and gratify the sexual desire of himself, without the consent of [REDACTED]

SPECIFICATION 3: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 26 December 2019, commit a sexual act upon [REDACTED] by penetrating [REDACTED] vulva with Lieutenant Colonel Andrew J. Dial's body part, to wit: a finger, with an intent to arouse and gratify the sexual desire of himself, without the consent of [REDACTED]

(SEE CONTINUATION SHEET)

## III. PREFERRAL

11a. NAME OF ACCUSER (Last, First, Middle Initial) [REDACTED]		b. GRADE O-3	c. ORGANIZATION OF ACCUSER Alpha Company, Allied Forces North Battalion
d. SIGNATURE [REDACTED]	e. DATE (YYYYMMDD) 20210406		

AFFIDAVIT: Before me, the undersigned, authorized by law to administer oath in cases of this character, personally appeared the above named accuser this 6<sup>th</sup> day of April, 2021, and signed the foregoing charges and specifications under oath that he/she is a person subject to the Uniform Code of Military Justice and that he/she either has personal knowledge of or has investigated the matters set forth therein and that the same are true to the best of his/her knowledge and belief.

Typed Name of Officer  
[REDACTED]

21st Theater Sustainment Command  
Organization of Officer

Article 136(a)(1), UCMJ  
Official Capacity to Administer Oath  
(See R.C.M. 307(b), must be commissioned officer)

On <u>6 April</u> , <u>2021</u> , the accused was informed of the charges against him/her and of the name(s) of the accuser(s) known to me (See R.C.M. 308(a)). (See R.C.M. 308 if notification cannot be made.)			
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div> Typed Name of Immediate Commander	Alpha Company, Allied Forces North Battalion Organization of Immediate Commander		
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div> O-3			
IV. RECEIPT BY SUMMARY COURT-MARTIAL CONVENING AUTHORITY			
13. The sworn charges were received at <u>1445</u> hours, <u>6 Apr</u> , <u>2021</u> at _____ <small>Designation of Command or</small> Allied Forces North Battalion <small>Officer Exercising Summary Court-Martial Jurisdiction (See R.C.M. 403)</small>			
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div> Typed Name of Officer	FOR THE _____ Commander <small>Official Capacity of Officer Signing</small>		
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div> Signature			
V. REFERRAL SERVICE OF CHARGES			
14a. DESIGNATION OF COMMAND OF CONVENING AUTHORITY HQ, 21st Theater Sustainment Command	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td style="width: 50%; padding: 2px;">b. PLACE Kaiserslautern, Germany</td> <td style="width: 50%; padding: 2px;">c. DATE (YYYYMMDD) 20210820</td> </tr> </table>	b. PLACE Kaiserslautern, Germany	c. DATE (YYYYMMDD) 20210820
b. PLACE Kaiserslautern, Germany	c. DATE (YYYYMMDD) 20210820		
Referred for trial to the <u>General</u> court-martial convened by <u>Court-Martial Convening Order</u> Corrected Copy Number 7, this headquarters dated <u>7 April</u> , <u>2021</u> , subject to the following instructions: <sup>2</sup>			
By <u>Command</u> of <u>Brigadier General James M. Smith</u> <small>Command or Order</small>	Chief, Military Justice <small>Official Capacity of Officer Signing</small>		
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div> Typed Name of Officer			
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div>			
15. On <u>20 August</u> , <u>2021</u> , I (caused to be) served a copy hereof on (each of) the above named accused.			
<div style="border: 1px solid black; width: 100px; height: 15px; margin-bottom: 5px;"></div>	O-3 <small>Grade or Rank of Trial Counsel</small>		
FOOTNOTES: 1 - When an appropriate commander signs personally, inapplicable words are stricken. 2 - See R.C.M. 601(e) concerning instructions. If none, so state.			

CONTINUATION SHEET, DD Form 458 - LTC Andrew J. Dial, [REDACTED] U.S. Army, Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752

Item 10 Continued:

CHARGE III: Violation of the UCMJ, Article 80.

THE SPECIFICATION: In that Lieutenant Colonel Andrew J. Dial, U.S. Army, did, at or near Bailly-Romainvilliers, France, on or about 22 December 2019, attempt to commit the offense of sexual assault upon [REDACTED] by penetrating her vulva with his body part with an intent to arouse and gratify his sexual desire, without her consent and when he believed she was asleep, in that Lieutenant Colonel Andrew J. Dial did certain acts, to wit: entered the hotel room of [REDACTED] with a cell phone flashlight on; walked past [REDACTED] bed to the far side of [REDACTED] bed; and lifted the covers off of [REDACTED]

(END OF CHARGES)

# **Government Appellate Exhibit**

**2**



**IN A GENERAL COURT MARTIAL  
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

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**UNITED STATES OF AMERICA**

**v.**

**Dial, Andrew J.  
LTC, U.S. ARMY  
Alpha Company,  
Allied Forces North Battalion,  
United States Army North Atlantic  
Treaty  
Organization Brigade, APO AE 09752**

**DEFENSE MOTION FOR  
APPROPRIATE RELIEF: UNANIMOUS  
VERDICT**

**15 November 2021**

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**RELIEF SOUGHT**

The Defense in the above case respectfully moves this Court to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. This motion is made pursuant to the Fifth Amendment to the United States Constitution; the Sixth Amendment to the United States Constitution; Rules for Courts-Martial (RCM), 906, 920, and 921; and applicable case law. If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names.

**HEARING**

The Defense does not request an Article 39(a) session to present oral argument for this motion.

### **BURDEN OF PERSUASION AND BURDEN OF PROOF**

As the moving party, the Defense has the burden of persuasion and proof on any factual matters by a preponderance of the evidence. R.C.M. 905(c)(1). However, the “burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.]” *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012).

### **FACTS**

LTC Dial is charged with one specification of indecent conduct (Art. 134, UCMJ), three specifications of Article 120, UCMJ, and one specification of Article 80, UCMJ, (attempted sexual assault).

### **WITNESSES/EVIDENCE**

The Defense will rely on the charge sheet.

### **LEGAL AUTHORITY AND ARGUMENT**

In *Ramos v. Louisiana*, 206 L. Ed. 2d 583 (2020), the Supreme Court recently held that “[t]here can be no question . . . that the Sixth Amendment’s unanimity requirement applies to state and federal criminal trials equally.” *Id.* at 591. The Court’s decision involved two cases out of the states of Louisiana and Oregon. Both states allowed convictions for serious offenses without a unanimous verdict, requiring a concurrence of 10 of 12 jurors. In reaching its holding, a majority of the Court agreed that “[t]he text and structure of the Constitution clearly suggest that the term ‘trial by an impartial jury’ carried with it *some* meaning about the content and requirements of a jury trial.” *Id.* at 589. After discussing the common law origins of the unanimous jury verdict, a majority of the Court concluded that “at the time of the [Sixth] Amendment’s adoption, the right to

a jury trial *meant* a trial in which the jury renders a unanimous verdict.” *Id.* at 595.

The Defense acknowledges that military appellate courts have repeatedly stated that “[t]he Sixth Amendment right to trial by jury does not apply to courts-martial.” *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002). See also *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001) (“The Sixth Amendment right to trial by jury does not apply to courts-martial.”); *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (“The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial.”); *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991) (“Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment[.]”).

However, due to the combination of the Supreme Court’s recognition of how fundamental the unanimous verdict is to the American scheme of criminal justice and the Supreme Court’s recognition of how trials by court-martial have gradually changed to be truly judicial in character, the law supports the conclusion that the unanimity requirement, an essential element of the right to a trial by a fair and impartial jury, applies to courts-martial for serious offenses. In light of *Ramos v. Louisiana*, the Defense is raising three distinct objections to allowing a non-unanimous verdict for the conviction of a serious offense at this court-martial: Sixth Amendment; Due Process Clause of the Fifth Amendment; and Equal Protection under the Fifth Amendment. While readily recognizing that *Ramos* was decided upon the Sixth Amendment right to a trial by jury, to the extent this Court finds that none of the elements of the right to a trial by jury apply to courts-martial, the Defense also separately objects on Fifth Amendment grounds, which the Supreme Court was not asked to consider.

### **Sixth Amendment**

A full understanding of the *Ramos* opinion requires a review of the text of the Sixth Amendment to the United States Constitution:

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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Note that the text of the Sixth Amendment says nothing about unanimity. The unanimity requirement has been read into the text based upon a historical understanding of trials by jury at the time the amendment was adopted.

The *Ramos* opinion anchors the right to unanimity in a historical understanding of the text of the Sixth Amendment's guarantee to an "impartial jury." The Defense understands that courts have previously held there is no Sixth Amendment right to trial by jury in courts-martial. However, the origins of these rulings stem from cases that were decided during Reconstruction after the Civil War and in the midst of World War II, within the context of military commissions rather than courts-martial. Given the significant changes to the military justice system since that time, and the fact that over time every other right under the Sixth Amendment has been found to apply at courts-martial, the law now supports the requirement of unanimity for the conviction of serious offenses<sup>1</sup> at courts-martial.

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<sup>1</sup> The Supreme Court provided a standard for determining whether an offense is serious or petty. "An offense carrying a maximum prison term of six months or less is presumptively petty, unless the legislature has authorized additional statutory penalties so severe as to indicate the legislature considered the offense serious." *Lewis v. United States*, 518 U.S. 322, 326 (1996).

In those cases where military appellate courts have determined that the Sixth Amendment's guarantee of a jury trial does not apply to courts-martial, they have routinely relied on the Supreme Court's decisions in *Ex parte Milligan*, 71 U.S. 2 (1866) and *Ex parte Quirin*, 317 U.S. 1 (1942). In *Milligan*, which was a case that arose during the Civil War but was not decided until after its conclusion, Mr. Milligan – an active member of the Sons of Liberty, a group seeking to overthrow the United States government – was arrested for conspiracy against the United States and other offenses. After a trial by a military commission in Indiana, he was convicted and sentenced to be hanged. However, the Supreme Court held that trying a civilian in a military commission, under the circumstances that existed at that location and time, was a denial of his right to trial by jury under the Sixth Amendment. *Milligan*, 71 U.S. at 130. In reaching that conclusion, the Court contrasted the status of a civilian with that of a person serving in the military, who surrenders his right to be tried in a civil court. *Id.* at 123. The Court went on to provide this often-quoted dictum: “[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.” *Id.* The Court did not explain that inferential leap about the intent of the framers, besides observing that “[t]he discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts.” *Id.*

*Quirin* also involved a military commission. During World War II, the FBI arrested several German nationals, and one individual who arguably had a claim to United States citizenship, who traveled by submarine to the United States as part of a conspiracy to commit sabotage and espionage in support of the war effort of the

German Reich. The Court held that “the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission.” *Id.* at 40.

The *Quirin* Court explained that, because the Fifth Amendment expressly excepts “cases arising in the land or naval forces,” such cases “are deemed excepted by implication from the Sixth [Amendment].” *Id.* The Court further noted that this exception “was not aimed at trials by military tribunals, without a jury, of such offenses against the law of war. Its objective was quite different – to authorize the trial by court martial of the members of our Armed Forces for all that class of crimes which under the Fifth and Sixth Amendments might otherwise have been deemed triable in civil courts.” *Id.* at 43. However, this language from *Quirin* is dicta, and the justices on the *Milligan* and *Quirin* Courts would not even recognize the current military justice system. Moreover, *Quirin* has since been described as “not this Court’s finest hour” and in light of the history behind the ultimate resolution of the case, should be viewed with a skeptical lens. *Hambdi v. Rumsfeld*, 542 U.S. 507, 569 (Scalia, J., dissenting).

Since *Quirin* was decided, however, the Supreme Court has entertained the possibility that at least some clauses of the Fifth and Sixth Amendments apply to courts-martial. For example, in *Middendorf v. Henry*, 425 U.S. 25 (1976), it was tasked with determining whether or not servicemembers maintained a right to counsel at summary courts-martial under either the Fifth or Sixth Amendments. The Court ultimately concluded that no such right existed under these amendments, but based its conclusion on the unique nature of summary courts-martial and made several observations regarding the demands of the military justice system in different proceedings.

At the time the Court decided *Middendorf*, it stated, “The question of whether an

accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved.” *Id.* at 33. The Court noted that “[d]icta in *Ex parte Milligan* said that ‘the 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.’” *Id.* at 33-34 (citation omitted). The Court also cited to *Quirin*’s comment that cases arising out of the armed forces “are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.” *Id.* at 34. However, the Court concluded that it was “unnecessary in this case to finally resolve the broader aspects of this question, since we conclude that even were the Sixth Amendment to be held applicable to court-martial proceedings, the summary court-martial provided for in these cases was not a ‘criminal prosecution’ within the meaning of that Amendment.” *Id.* However, the Court in *Middendorf* also saw fit to point out that “the Sixth Amendment makes absolutely no distinction between the right to a jury trial and the right to counsel.” *Id.* at 32 n.13.

Since then, not only has the Sixth Amendment right to counsel question been squarely resolved in favor of an accused servicemember, but so has every other protection afforded by the Sixth Amendment, except the right to a jury trial. A plain reading of the text of the Sixth Amendment reveals that it confers eight distinct protections: (1) the right to a speedy trial, (2) the right to a public trial, (3) the right to an impartial jury, (4) the right to a jury of the state and district wherein the crime allegedly occurred, (5) the right to be informed of the nature and cause of the accusation, (6) the right to be confronted with witnesses against the accused, (7) the right to compulsory process for obtaining favorable witnesses, and (8) the right to counsel.

Of these eight rights contained within the text of the Sixth Amendment, the Court of Appeals for the Armed Forces (CAAF) and its predecessor court have determined that six of them explicitly apply to courts-martial and are grounded in the Sixth Amendment itself rather than some other regulatory, statutory, or constitutional provision. An accused is entitled to a speedy trial pursuant to the Sixth Amendment separate and apart from the protections afforded by Article 10, UCMJ. See e.g., *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014). An accused is entitled to a public trial pursuant to the Sixth Amendment. See *United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985) (“Without question, the sixth amendment right to a public trial is applicable to courts-martial.”). An accused is entitled to rely upon the guarantees of the Sixth Amendment’s confrontation clause. See e.g., *United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010) (expressly and repeatedly citing to the Sixth Amendment’s confrontation clause). An accused is entitled to the right to be informed of the nature and cause of the accusation for which he faces a court-martial. See *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011) (applying the protections of the Fifth and Sixth Amendments to set aside convictions under Article 134, UCMJ). An accused is entitled to the right of compulsory process under the Sixth Amendment. See *United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016) (“Under the Compulsory Process Clause a defendant has a ‘right to call witnesses whose testimony is material and favorable to his defense.’”) (quoting *Rock v. Arkansas*, 483 U.S. 44, 52 (1987)). An accused is entitled to counsel under the Sixth Amendment. See *United States v. Watternbarger*, 21 M.J. 41, 43 (C.M.A. 1985) (discussing when the Sixth Amendment right to counsel attaches in the military). An accused is likewise entitled to the *effective assistance* of counsel



under the Sixth Amendment. See *United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011) (“The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel.”). As will be discussed below, CAAF has repeatedly stated that an accused has a constitutional right, as a matter of due process, to a “fair and impartial panel.” See *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001). The only Sixth Amendment right that CAAF and its predecessor court have not recognized as applying to courts-martial is the right to a jury of the state and district wherein the crime allegedly occurred.

In sum, the evolution of courts’ understanding of the applicability of the Sixth Amendment to courts-martial has evolved considerably since *Quirin* and *Milligan* to the point that their logic regarding the applicability of the Sixth Amendment no longer prevails. This point is most apparent in a footnote in *Reid v. Covert*, 354 U.S. 1 (1957), wherein the Court cited *Quirin* as the basis for the grand jury clause preclusion being read into the Sixth Amendment while simultaneously asserting that similar logic compelled the conclusion the double-jeopardy clause of the Fifth Amendment also does not apply. *Id.* at 37 n.68. If the logic of the latter has been abandoned, there is no reason that same logic should continue to prevail with respect to the right to juror unanimity.

This evolution of increasingly applicable constitutional rights has closely tracked the increasing convergence of contemporary courts-martial and civilian criminal prosecutions. This phenomenon was most recently recognized in *Ortiz v. United States*, 138 S. Ct. 2165 (2018), where the evolving character of the modern day court-martial

and its newfound likeness to state and federal criminal courts was dispositive to the Court's conclusion it was merely exercising appellate jurisdiction when reviewing cases emerging from the CAAF. In holding that it did have appellate jurisdiction, and that it was not exercising original jurisdiction, the Supreme Court reasoned that the military justice system's essential character is, in a word, "judicial." *Id.* at 2174. The Court explained that "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Id.* (citing 1 D. Schlueter, *Military Criminal Justice: Practice and Procedure* §1-7, p. 50 (9<sup>th</sup> ed. 2015) (Schlueter)).

The Court also stated, "The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review. Although their jurisdiction has waxed and waned over time, courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service." *Id.* Moreover, the jurisdiction to try various crimes "overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 2174-75. Finally, "[t]he sentences meted out are also similar[.]" *Id.* at 2175.

The majority in *Ortiz* also took aim at the dissent's characterization of courts-martial as a function of mere military command. *Id.* Instead, the majority adopted the position that courts-martial exercise judicial power "of the same kind wielded by civilian courts." *Id.* In its opinion, the Court discussed its 1864 decision in *Ex parte Vallandigham*, 68 U.S. 243, wherein it "held that it lacked jurisdiction over decisions of a temporary Civil War-era military commission." *Id.* at 2179. The majority distinguished *Vallandigham* by explaining that such a case "goes to show that not every military tribunal is alike." *Id.*

Today's courts-martial not only stand in stark contrast to their ancestors which existed in 1866 and 1942, but they certainly reflect an entirely different system than a military commission – the type of tribunal from which *Milligan* and *Quirin* arose.

Justice Kagan's description of the judicial character of courts-martial is in stark contrast to how the Court viewed courts-martial in *Milligan*, *Quirin*, and *Middendorf*. In 1957, on its way to holding that it was unconstitutional to prosecute United States citizen-dependents overseas under the UCMJ, the Supreme Court clearly articulated the way it viewed the character of the court-martial. "Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice." *Reid*, 354 U.S. at 38. As another commenter recognized, "None of the travesties of justice perpetrated under the UCMJ is really very surprising, for military law has always been and continues to be primarily an instrument of discipline, not justice." Glasser, Justice and Captain Levy, 12 Columbia Forum 46, 49 (1969). Although the same term of "court-martial" is used to refer to the tribunal that tried cases arising out of the armed forces at the time of the Bill of Rights as well as now, the characteristics of that tribunal has changed drastically over time. It is more than a difference in degree; it is a difference in kind.

The current court-martial is more akin to a civilian federal criminal trial than it is to a court-martial of the late Eighteenth Century. Focused on military offenses necessary to maintain discipline, the Articles of War at the time of the Bill of Rights authorized flogging as one of the punishments to be adjudged by a court-martial. See Article 3 of Section XVIII, Articles of War (1776) ("nor shall more than one hundred lashes be inflicted on any offender, at the discretion of the court-martial"). Until the Twentieth

Century, the court-martial was presided over not by a military judge but by the president of the court-martial, who was one of the officers on the panel. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 248-51 (2d ed. 1896). As another example, until it was amended in 2014, Article 60(c)(1) of the Uniform Code of Military Justice stated, “The authority under this section to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority.” That provision was deleted, and Congress added restrictions to render the convening authority virtually powerless to modify the findings and sentence of a court-martial. Also, as of 1 January 2019, sentences no longer require the approval of the convening authority to be executed, and the judge enters the judgement of the court in the record of trial. See Articles 60a-60c, UCMJ. As Congress has taken away the power of the commander in the military justice system, Congress and the appellate courts have provided many of the procedural protections that exist in civilian criminal trials.<sup>2</sup> Over time, these developments have changed the character of the court-martial from a military tribunal that is a disciplinary tool of the commander into a court that is truly judicial in character. This proposition that courts-martial now mirror federal and state civilian criminal trials is also reflected in the comprehensive reforms brought on by the Military Justice Act of 2016, which were effective on 1 January 2019.

One of the increasingly “judicial” components of courts-martial has been the increase in jurisdictional breadth such that “courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to

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<sup>2</sup> Congress has directed that the President’s regulations on pretrial, trial, and post-trial procedures for courts-martial shall “apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” to the extent the President considers practicable and not inconsistent with the UCMJ. Art. 36(a), UCMJ.

military service.” *Ortiz*, 138 S. Ct. at 2174. A comparison of the crimes enumerated in the Articles of War in the late Eighteenth Century with those enumerated in the current UCMJ demonstrates a vast expansion of the scope of non-military offenses. As the Supreme Court observed in *Reid*, “The jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.” 354 U.S. at 21.

Accordingly, to the extent that *Milligan* and *Quirin* relied on the logic of “rough justice” applied to a narrow class of military-specific offenses, that logic no longer applies. The right to trial by jury “ranks very high in our catalogue of constitutional safeguards.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (holding that Congress cannot subject a former airman, who has been wholly separated from service, to trial by court-martial). This protection should not be lightly abrogated, and any implied exception to the jury trial right rooted in dicta from a mid-nineteenth century case no longer meets that high burden. As the Supreme Court recognized in *Toth*, the power to authorize trial by court-martial, and thereby abrogate the full panoply of otherwise available constitutional rights, should be limited to “‘the least possible power adequate to the end proposed.’” *Id.* at 23 (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)). As the “end proposed” has transitioned to that of a traditional civilian criminal trial, it is no longer constitutional to deprive Soldiers of the right to a unanimous verdict.

To the extent that CAAF’s pre-*Ramos* cases that insisted that the Sixth Amendment

right to a trial by jury and all of its elements do not apply to courts-martial relied on *Milligan* and *Quirin*, the true character of a court-martial has changed tremendously since then. Considering that *Ortiz* has reflected a willingness to depart from rules adopted within the context of military commissions and its simultaneous recognition of the fact that our system has evolved to mirror its state and federal counterparts, servicemembers are entitled under the Sixth Amendment to a unanimous verdict before being convicted of a serious offense at a court-martial. The Supreme Court, in *Ramos*, made it clear that the unanimity requirement is an essential element of the right to trial by jury. *Ramos*, 206 L. Ed. 2d at 591. Also, it is so fundamental to the American scheme of justice that even the doctrine of *stare decisis* did not stop the Supreme Court from overruling its own precedent<sup>3</sup> and holding that the unanimity requirement for conviction of serious offenses applies equally to federal and state courts. *Id.* at 591-92. In order to satisfy the American sense of justice, the unanimity requirement must also apply to courts-martial for serious offenses. The right to a trial by jury, with all of its essential elements, does not have to be applied as a package deal. In the spirit of *Toth* and *Easton*, this Court can conclude the right to a jury composed of a fair cross-section of the community or to be tried in the district of the offense remain implausible with the purpose and requirements of contemporary courts-martial. On the other hand, there is no such reason to deprive Soldiers of the right to a unanimous verdict, particularly where every other component of the Sixth Amendment—many of which impose much

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<sup>3</sup> When confronted with this same issue in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), a four-justice plurality concluded that unanimity's costs outweighed its benefits and questioned whether the Sixth amendment required unanimity, and a fifth justice agreed with the other four justices that the Sixth Amendment did require unanimity but concluded under a dual-track approach of incorporation through the Fourteenth Amendment that the right did not apply to the states. *Ramos*, 206 L. Ed. 2d at 592.

more onerous requirements on the command, e.g. right to counsel—have been found to apply as much to courts-martial as civilian criminal trials.

***Due Process Clause under the Fifth Amendment***

If this Court concludes that the accused has no *Sixth* Amendment right to a unanimous verdict during a trial by court-martial, the accused does have that right as a matter of due process under the Fifth Amendment. The Fifth Amendment to the United States Constitution states:

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, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

CAAF has repeatedly stated that an accused has a Fifth Amendment right, as a matter of due process, to an “impartial panel.” See *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005) (“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel.”) (quoting *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001)). Just as the “impartial” element of the right to trial by jury applies through the Due Process Clause of the Fifth Amendment, so too the unanimity requirement applies through the Due Process Clause to courts-martial.

After the Supreme Court found in *Middendorf* that the summary court-martial was not a “criminal prosecution” within the meaning of the Sixth Amendment, as discussed above, the Court shifted its focus from the Sixth Amendment to the Due Process Clause

of the Fifth Amendment. 425 U.S. at 34. It recognized that, even in a summary court-martial, servicemembers “may be subjected to the loss of liberty or property, and consequently are entitled to due process of law guaranteed by the Fifth Amendment.” *Id.* at 43. However, whether due process required the assistance of counsel “depends upon an analysis of the interests of the individual and those of the regime to which he is subject.” *Id.* The Court expressed that it “must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces” under the Constitution. *Id.* The Court reasoned that it “need only decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* at 44.

*Middendorf* concluded that the factors weighed against overturning Congress’s determination that counsel was not required at a summary court-martial, because it is a brief, informal proceeding for relatively insignificant offenses, and the accused has the right to object to it. *Id.* at 45-48. The result of the analysis is very different for the unanimity requirement for courts-martial of serious offenses. The factors weighing in favor of requiring a unanimous verdict at courts-martial for serious offenses are extraordinarily weighty.

In the majority opinion in *Ramos*, Justice Gorsuch stated, “If the term ‘trial by an impartial jury’ carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.” *Id.* at 590. The opinion described the unanimity requirement as “fundamental to the American scheme of justice.” *Id.* at 591 (citing *Duncan v. Louisiana*, 391 U.S. 141, 148-50 (1968)). In her concurring opinion, Justice Sotomayor explained why it is so fundamental. “[T]he constitutional protection here



ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment.” *Id.* at 605.

If one member of the jury – or the court-martial panel – has a reasonable doubt after deliberations, then the prosecution’s burden has not been met, and the government cannot convict and impose on an individual a serious deprivation of life, liberty, or property.

This interplay between the unanimity requirement and the beyond a reasonable doubt standard has been recognized in the federal courts for decades.

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 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.

*Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950). Less than three years after the D.C. Circuit’s opinion in *Billeci*, the Sixth Circuit Court of Appeals found occasion to offer similar sentiments.

The humanitarian concept that is at the base of criminal prosecutions in Anglo-Saxon countries, and which distinguish 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.

*Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). As the Sixth Circuit recognized, the unanimity of the verdict is inextricably interwoven with the burden of proof, and there can be no doubt about the importance of the reasonable-doubt standard at criminal trials. “Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold 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.” *In re Winship*, 397 U.S. 358, 364 (1970).

In addition, as mentioned above, CAAF has more than once held that the accused has the right to a fair and impartial panel under the Due Process Clause of the Fifth Amendment. If that has any meaning, it surely includes a requirement that is fundamental to the American scheme of justice. The factors militating in favor of the unanimity requirement are extraordinarily weighty, and they do demand overturning any determination by Congress, in Article 52(a)(3), to permit the conviction of a serious offense at a court-martial without requiring a unanimous verdict.

The need for a unanimous verdict is even greater at a trial by court-martial for two reasons. First, the members of the court-martial panel are hand-picked by the convening authority. Art. 25, UCMJ. The defense does not argue that the accused is entitled under the Sixth Amendment to a jury composed of a fair cross-section of the community, which would be inconsistent with the nature of a court-martial. However, the

convening authority's selection of panel members has been an aspect of the court-martial that favors the prosecution and has been criticized for decades. Correcting that was one of the main recommendations of the Cox Commission in 2001.

There 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. The current practice is an invitation to mischief. It permits – indeed, requires – a convening authority to choose the persons responsible for determining the guilt or innocence of a servicemember who has been investigated and prosecuted at the order of that same authority.

*Report of the Commission on the 50<sup>th</sup> Anniversary of the Uniform Code of Military Justice* (May 2001) page 7.

Second, Article 52(a)(3) requires only three-fourths of the eight panel members in a general court-martial to convict. This required concurrence of just three-fourths in a court-martial is a much greater deprivation of due process than the defendants faced in Louisiana or Oregon prior to *Ramos*. Those state systems used a 12-person jury and required a minimum of 10 votes in order to convict, so their 83% required concurrence was higher than the 75% required concurrence at a court-martial. Accordingly, not only is the lack of unanimity a problem from a burden of proof standpoint, but the convening authority's selection of the members and the lower percentage of required concurrence exacerbate the problem.

Moreover, as CAAF stated in *Easton*, the “burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for the different rule[.]” 71 M.J. at 175. On the issue of unanimity, the prosecution cannot satisfy that burden, because denying that right to individuals who

volunteered to serve their country is not justified in any way by military exigency. This is not like *Parker v. Levy* where the Court noted how the military can criminalize conduct in a way that would be impermissible in the civilian world; rather, this is a matter of criminal procedure. Given the decision in *Ramos*, the military justice system is now the only system of criminal law within the United States that authorizes non-unanimous verdicts. The government is likely to present an argument of efficiency – with a deployable system of justice, criminal trials need to be conducted in an efficient manner. Ultimately, this boils down to a question of whether the Constitution permits Congress to lower the prosecution's burden to convict American servicemembers of a serious offense, simply for the sake of efficiency. Considering the interests on both sides, the individual's interest in the fundamental right of requiring unanimity before conviction of a serious offense, which is enjoyed by criminal defendants in all other criminal courts in the United States, is extraordinarily weighty and overcomes any determination that Congress made about the proper balance of individual rights in a court-martial.

### **Equal Protection under the Fifth Amendment**

The Due Process Clause also guarantees equal protection under federal laws. See *Bolling v. Sharpe*, 347 U.S. 497 (1954) (finding that racial discrimination in the Washington, D.C. public schools violated due process of law protected by the Fifth Amendment, which does not have an Equal Protection Clause like the one in the Fourteenth Amendment); *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (“An ‘equal protection violation’ is discrimination that is so unjustifiable it violates due process.”) (quoting *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985)). “For the government to make distinctions does not violate equal protection guarantees

unless constitutionally suspect classification like race, religion, or national origin are utilized *or unless there is an encroachment on fundamental constitutional rights like freedom of speech or of peaceful assembly.* *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981) (emphasis added). When an equal protection claim does touch upon a fundamental right, it “may withstand constitutional scrutiny only upon a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest.” *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972) (quoting *Oregon v. Mitchell*, 400 U.S. at 238 (Brennan, White, and Marshall, JJ., writing separately)). In other words, the test in a “fundamental rights case” would be strict scrutiny.

In *United States v. Santiago-Davilla*, 26 M.J. 380 (C.M.A. 1988), the Court of Military Appeals (CMA) considered an equal protection objection within the context of a *Batson* challenge. The Court acknowledged that *Batson* “is not based on a right to a representative cross-section on a jury” (i.e., a Sixth Amendment right); rather, *Batson* emanates from “an equal-protection right to be tried by a jury from which no ‘cognizable racial group’ has been excluded.” *Id.* at 389. Furthermore, the CMA explained the applicability of the right to equal protection to courts-martial. “This right to equal protection is a part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries.” *Id.* at 390.

The right to a unanimous verdict before conviction of a serious offense is a fundamental right, and the government may overcome this claim only if it survives strict scrutiny. The government must establish a compelling and substantial interest and demonstrate that the burden of depriving the accused of the protection of the unanimity requirement is necessary to achieve that interest. The government will likely argue that

hung juries hinder the efficient resolution of courts-martial in a way that interferes with the military mission. In *Ramos*, the Supreme Court criticized its “badly fractured set of opinions” in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v. Louisiana*, 406 U.S. 356 (1972), which established the precedent that it overruled. The Court took issue with the fact that the *Apodaca* plurality “subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place.” *Ramos*, 206 L. Ed. 2d at 586. However, the Court also went on to question the cost-benefit analysis in *Apodaca*’s plurality decision.<sup>4</sup> “And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries?” *Id.* at 592.

In addition, the composition of the court-martial panel actually makes it less prone to hung juries, if guilt has been proven beyond a reasonable doubt. The court-martial panel has been described as a blue-ribbon panel, because the convening authority selects the members who, in the convening authority’s opinion, are the best qualified under the Article 25 criteria of age, education, training, experience, length of service, and judicial temperament. This homogenous group of educated and experienced members is far less likely to have individuals who are unreasonable or closed to the persuasion of logic. These educated and experienced members are accustomed to receiving information and listening to different viewpoints before making important

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<sup>4</sup> This faulty analysis in *Apodaca* and *Johnson* and the Supreme Court’s prior refusal to hold that the Constitution requires a unanimous verdict by a jury, which has been overturned, had been cited and relied on by appellate courts in rejecting the application of the unanimity requirement at courts-martial. See e.g., *Mendrano v. Smith*, 797 F. 2d 1538, 1545 (10<sup>th</sup> Cir. 1986) (deferring to the “policy preference by Congress for lessening the hung-jury problem in courts-martial”).

decisions.<sup>5</sup> If any one of the eight members of a general court-martial has a reasonable doubt, then the prosecution has failed to prove guilt beyond a reasonable doubt, and a criminal conviction and punishment based on that would violate due process. See, e.g., *Hibdon*, 204 F.2d at 838. Furthermore, the lower number of eight versus twelve makes it easier for the prosecution in the military to achieve a unanimous verdict and requires fewer court-martial members who are diverted from their military mission.

In those rare cases where a trial by court-martial in an active combat zone results in a “hung jury,” the Army has several options: order an immediate rehearing; transfer the case to a command that is not decisively engaged in combat; wait until the operational tempo decreases before ordering a rehearing; order alternative disposition; or dismiss the charges. The inconvenience to the prosecution for some rare situations does not justify denying all servicemembers of the protection of the requirement for a unanimous verdict for conviction of a serious offense, a protection that is granted in all other criminal trials in the United States. Because depriving servicemembers of this fundamental right is not necessary to achieve a compelling interest, Article 52(a)(3) does not survive strict scrutiny. This is especially true in cases, such as this one, involving non-military offenses that could be prosecuted in a civilian court with all the fundamental rights guaranteed by the Constitution. When it is not necessary, depriving a servicemember at a court-martial of a fundamental right that is constitutionally

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<sup>5</sup> In *Sanford v. United States*, 586 F.3d 28 (D.C. Cir. 2009), the D.C. Circuit found that the “differences between civilian jurors and court-martial members” was significant to the challenge of the constitutionality of a conviction by four members at a special court-martial. *Id.* at 308. Although having only four jurors would be impermissible, a court-martial with only four members is permissible, because the court-martial members are selected as best-qualified rather than a cross-section of society. *Id.* at 310. While the qualifications of a court-martial panel allow for fewer members, they also remove any fears about hung juries based upon unreasonable doubts.

guaranteed in every other criminal trial in the United States is unacceptable in the American scheme of justice.

### **Announcement of Unanimity**

If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names. This announcement of unanimity is consistent with Article 51 and RCM 922. The announcement concerning unanimity does not reveal any member's vote or deliberations, so it is consistent with Article 51(a)'s requirement for a secret ballot. It would be similar to what is expressly required by RCM 922(b) for capital offenses. Without disclosing any member's deliberations or vote, it is not prohibited polling under RCM 922(e). Finally, as a matter of judicial economy, an announcement of unanimity would moot any appeal based on the issue in this motion.

### **CONCLUSION**

In summary, Americans tolerated a certain level of injustice at traditional courts-martial when they were a disciplinary tool of commanders. However, as the Supreme Court recognized in *Ortiz*, courts-martial have transformed into courts that are judicial in character rather than disciplinary tools of the commander. Congress has recognized this as it has gradually reduced the role of the commander in courts-martials for serious offenses. As modern courts-martial are judicial in character, they must adhere to the American scheme of justice. Because the Supreme Court recently overturned its own precedent and held that the unanimity requirement applied to the states because it was fundamental to the American scheme of justice, the United States Constitution requires



a unanimous verdict for the conviction of a serious offense at a court-martial. This truth is inescapable, whether approached through the Sixth Amendment, due process under the Fifth Amendment, or equal protection under the Fifth Amendment.

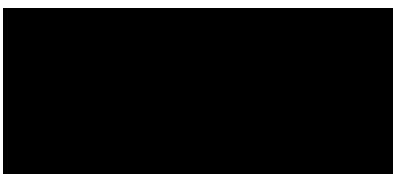
Based on the above, the Defense respectfully moves this Court to require a unanimous verdict for any finding of guilty and to modify the instructions accordingly. If this Court does not grant this motion, the Defense requests that the Court provide an instruction that the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any numbers or names.



ROBERT MIHAIL  
CPT, JA  
Trial Defense Counsel

**CERTIFICATE OF SERVICE**

I certify that I have served an electronic copy of the above on the court and trial counsel on 15 November 2021.



ROBERT MIHAIL  
CPT, JA  
Trial Defense Counsel

# **Government Appellate Exhibit**

**3**

**IN A GENERAL COURT-MARTIAL  
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

<b>UNITED STATES OF AMERICA</b>	)	<b>GOVERNMENT RESPONSE TO</b>
<b>v.</b>	)	<b>DEFENSE MOTION FOR</b>
<b>DIAL, Andrew J.</b>	)	<b>APPROPRIATE RELIEF:</b>
<b>LTC, U.S. Army</b>	)	<b>UNANIMOUS VERDICT</b>
<b>Alpha Company, Allied Forces North</b>	)	
<b>Battalion, United States Army North</b>	)	
<b>Atlantic Treaty Organization Brigade,</b>	)	
<b>APO AE 09752</b>	)	<b>18 November 2021</b>

**RELIEF SOUGHT**

The Government moves this Court to deny the Defense's motion to require a unanimous verdict for a finding of guilty.

**HEARING**

The Government does not request an Article 39(a) session to present oral argument for this motion.

**BURDEN OF PERSUASION AND BURDEN OF PROOF**

As the moving party, the Defense has the burden of persuasion and proof on any factual matters by a preponderance of the evidence. RCM 905(c)(1).<sup>1</sup>

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<sup>1</sup> The Defense's citation to *United States v. Easton* is inapplicable in this case. *Easton* described the burden on appeal and described it as: "The constitutionality of a statute is a question of law we review de novo." *United States v. Easton*, 71 M.J. 168, 171 (C.A.A.F. 2012). The language the Defense cites to is a citation by the court to *Courtney v. Williams*, 1 M.J. 267, 271 (C.M.A. 1976) (a case where statute and regulation were silent as to whether a Supreme Court ruling on a constitutional right applied similarly in the military context). At the trial court level, RCM 905(c)(1) supplies the correct burden.

## LAW AND ARGUMENT

### **Sixth Amendment**

According to binding precedent from the Supreme Court and C.A.A.F., there is no Sixth Amendment right to trial by jury in courts-martial. *Ex Parte Quirin*, 317 U.S. 1 (1942); *United States v. Wiesen*, 57 M.J. 48 (C.A.A.F. 2002). “The constitutional question here relates to [whether a unanimous jury verdict is required] in the military context. This is an issue addressed by case law, the Uniform Code of Military Justice (“UCMJ”), and the Rules for Courts-Martial (“RCM”), not the text of the constitution.” *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012). While *Easton* dealt with when the Constitutional protection against double jeopardy attaches, the logic applies equally to the Sixth Amendment right to trial by jury.

Looking then to case law, military appellate courts have repeatedly stated that “[t]he Sixth Amendment right to trial by jury does not apply to courts-martial.” *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002). See also *United States v. New*, 55 M.J. 95, 103 (C.A.A.F. 2001) (“The Sixth Amendment right to trial by jury does not apply to courts-martial.”); *United States v. Loving*, 41 M.J. 213, 285 (C.A.A.F. 1994) (“The Sixth Amendment right to trial by a jury which is a fair cross-section of the community has long been recognized as inapplicable to trials by court-martial.”); *United States v. Curtis*, 32 M.J. 252, 267 (C.M.A. 1991) (“Appellant recognizes that courts-martial are not subject to the jury-trial requirements of the Sixth Amendment[.]”). Unanimous panel verdicts are not required in Courts-Martial. *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007); *United States v. Rollins*, No. 201700039, 2018 CCA LEXIS 372, 25 (N-M. Ct. Crim. App. 2018)

The UCMJ does not require unanimous panel verdicts. “No person may be convicted of an offense in a general or special court-martial, other than...in a court-martial with members...by the concurrence of at least three-fourths of the members present when the vote is taken.” Art. 52, UCMJ.

The Rules for Courts-Martial do not require unanimous verdicts either. “A finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty.” RCM 921(c)(2).

The opinion in *Ramos* itself supports the position that a panel at a court-martial is not a Sixth Amendment jury. While surveying the history of the right to trial by jury, the majority looks to 14th Century English Common law for the proposition that a conviction is required to “be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen” and “a verdict, taken from eleven, was no verdict at all.” *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020). The UCMJ, promulgated under Congress’s power “[t]o make rules for the government and regulation of the land and naval forces” has, since its inception, applied different rules. U.S. Const. art. I, § 8. That is because the Sixth Amendment right to a trial by jury does not apply at courts-martial. *Wiesen*, 57 M.J. at 50, *Brown*, 65 MJ at 359. Unanimity is not required, three-fourths (formerly two-thirds) is sufficient to convict. Art. 52, UCMJ. Except in a capital case, twelve panel members are not required. RCM 501. In a general court-martial, eight members are sufficient. The court-martial panel is not composed of the accused’s peers, in fact, the UCMJ provides that the panel should be senior in rank to the Accused. Art. 25(e)(1), UCMJ. The convening authority is required to detail members who are “best qualified for the duty by reason of age, education, training, experience,

length of service, and judicial temperament.” Art. 25(e)(2), UCMJ. While *Ramos* dealt only with unanimity in deciding a verdict, the differences between a Sixth Amendment jury and a court-martial panel make clear that the holding in *Ramos* is inapplicable to courts-martial.

### **Due Process Clause under the Fifth Amendment**

Congress establishes courts-martial procedures pursuant to its enumerated power to regulate the land and naval forces. “Congress has plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.” *Weiss v. United States*, 510 U.S. 163, 177-178 (1994). “Judicial deference thus is at its apogee when reviewing congressional decisionmaking in [the area of military justice].” *Id.* “Our deference extends to rules relating to the rights of servicemembers[.]” *Id.* The test to be used in a due process challenge to a court-martial proceeding is whether the factors militating in favor of the claimed procedural right are so extraordinarily weighty as to overcome the balance struck by Congress. *Id.*

Congress struck a balance in the UCMJ where due process for an accused requires three-fourths of a panel in order to convict. UCMJ Art. 50(a)(2). A Supreme Court ruling that Louisiana and Oregon’s jury voting scheme does not satisfy the Sixth Amendment is not so extraordinarily weighty in a military context where there is no Sixth Amendment to right to a trial by jury as to overcome that balance.

The Defense argues that the right to a unanimous verdict is a fundamental right triggering strict scrutiny analysis. As discussed above, the right to a trial by jury does

not apply at a court-martial. A long history of case law, statutes, and the rules for courts-martial bear this out. *Ramos* was decided on Sixth Amendment grounds as made applicable to the states through the Fourteenth Amendment. The implications for courts-martial are minimal given that there is no right to a jury trial in a court-martial. There is no fundamental right at issue and no suspect classification, therefore strict scrutiny analysis is not required. The proper test is that from *Weiss*, laid out above. Congress already struck a balance in the UCMJ. The recent decision in *Ramos*, a decision not considering the military context, does not overcome that balance.

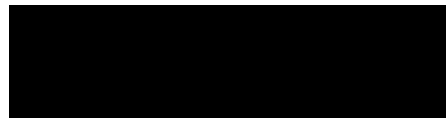
### **Announcement of Unanimity**

There is no need to deviate from the Military Judges' Benchbook in announcing the verdict in this case. RCM 922(b) does require an announcement of unanimity in a capital case if the finding was, in fact, unanimous but otherwise the rule is silent on announcing the vote. The fact that unanimity is to be announced specifically in a capital case implies that the President was aware of the ability to announce unanimity and deliberately chose to promulgate rules only requiring such an announcement in a capital case and in no others. Panel instructions in the Military Judges' Benchbook similarly differ between capital cases and non-capital cases. In non-capital cases the pattern instructions direct the members that either two-thirds or three-quarters of members, depending on when the case was referred, must concur in order to find the accused guilty. Dep't of Army Pam. 27-9, Military Judges' Benchbook (10 January 2020) (Unofficial Update), 69. In a capital case the pattern instructions require a finding of guilt by nine out of twelve votes and specifically provide for an announcement of

unanimity for a unanimous vote. *Id.* at 1846-1847. The Benchbook is not a binding source of primary law, but it is a guide to existing law. *United States v. Rush*, 51 M.J. 605, 609 (A. Ct. Crim. App. 1999) (“an individual military judge should not deviate significantly from these instructions without explaining his or her reasons on the record”); *United States v. Riley*, 72 M.J. 115, 122 (C.A.A.F. 2013) (“the Benchbook is intended to ensure compliance with existing law”); *United States v. Cornelison*, 78 M.J. 739, 745 (A. Ct. Crim. App. 2019) (“The Benchbook is not a source of law, but represents a snapshot of the prevailing understanding of the law, among the trial judiciary, as it relates to trial procedure...military judges are usually well-advised to follow the standard instructions in the Benchbook”).

### **CONCLUSION**

The Sixth Amendment Right to a trial by jury does not apply at courts-martial. Congress has provided rules borne out by case law on how a court-martial panel determines a verdict. There is no need to deviate from the law as established by Congress.



TABER HUNT  
CPT, JA  
Trial Counsel



# **Government Appellate Exhibit**

**4**

**United States Army Trial Judiciary  
Fifth Judicial Circuit, Kaiserslautern, Germany**

**UNITED STATES**

**v.**

**DIAL, Andrew J.  
LTC, U.S. Army  
A Co., Allied Forces North Bn.  
United States Army NATO Bde.  
APO AE 09752**

**ORDER TO BRIEF SPECIFIED ISSUES  
RE: DEFENSE MOTION FOR  
APPROPRIATE RELIEF (UNANIMOUS  
VERDICT)**

**17 DECEMBER 2021**

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The Defense filed a motion requesting the Court to require the court-martial panel to vote unanimously for any findings of guilty. If the Court denies the request for a unanimous verdict, the Defense requests the Court require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government opposes the request. Neither party requested oral argument.

The Court finds that the parties' briefs do not adequately address certain aspects of this issue. Therefore the Court **ORDERS** the parties to file briefs addressing the following specified issues:

1. Did Ramos v. Louisiana, 140 S. Ct. 1390 (2020), overrule Johnson v. Louisiana, 406 U.S. 356 (1972)? If so, did it do so only with respect to the Johnson Court's decision regarding due process and the burden of proof, did it do so only with respect to the Johnson Court's decision regarding the Equal Protection challenge, or did it do so with respect to both? If Ramos did not overrule Johnson with respect to the Johnson Court's decision regarding the Equal Protection challenge, is that decision binding law on the Equal Protection issue raised before this Court?

2. Are service members and civilians "in all relevant aspects alike" (United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021)) for the purpose of unanimity of verdicts?

3. Does an accused have a constitutional due process right to a court-martial panel or only a constitutional right to panel impartiality if the accused exercises the statutory right to a court-martial panel? See United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).

4. Do court-martial panels and juries serve the same or different purposes? If they serve the same purpose, is unanimity of verdicts a critical aspect of that purpose?

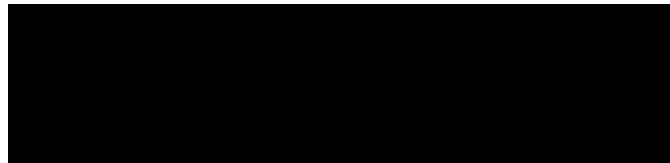
United States v. LTC Andrew J. Dial, Order to Brief Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict)

5. Does the Ramos opinion state that “impartiality” and “unanimity” are legal equivalents or, alternately, that “unanimity” is a critical aspect of “impartiality”? If so, does that have the same meaning in the context of court-martial panel impartiality?

6. Does Congress have a plausible reason for the non-unanimous verdict requirement?

7. If a unanimous verdict of guilty is required for courts-martial, is a unanimous verdict of acquittal also required?

The parties will file briefs no later than **31 December 2021**. There will be no Response or Reply briefs.



CHARLES L. PRITCHARD, JR.  
COL, JA  
Military Judge

# **Government Appellate Exhibit**

**5**

**IN A GENERAL COURT-MARTIAL  
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

**UNITED STATES OF AMERICA**

**v.**

**DIAL, Andrew J.  
LTC, U.S. Army  
Alpha Company, Allied Forces North  
Battalion, United States Army North  
Atlantic Treaty Organization Brigade,  
APO AE 09752**

**GOVERNMENT BRIEF ON  
SPECIFIED ISSUES RE: DEFENSE  
MOTION OF APPROPRIATE RELIEF  
(UNANIMOUS VERDICT)**

**31 December 2021**

The Court ordered the parties to file briefs addressing seven specified issues regarding the Defense's motion requesting the Court to require the court-martial panel to vote unanimously for any findings of guilty, and should the Court deny that request, for it to require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government respectfully submits the following responses to the Court's specific questions.

**1. Did Ramos v. Louisiana, 140 S. Ct. 1390 (2020), overrule Johnson v. Louisiana, 406 U.S. 356 (1972)? If so, did it do so only with respect to the Johnson Court's decision regarding due process and the burden of proof, did it do so only with respect to the Johnson Court's decision regarding the Equal Protection challenge, or did it do so with respect to both? If Ramos did not overrule Johnson with respect to the Johnson Court's decision regarding the Equal Protection challenge, is that decision binding law on the Equal Protection issue raised before this Court?**

*Ramos* overruled *Johnson* with respect only to the *Johnson* Court's decision regarding due process and the burden of proof under the Sixth Amendment. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020); *Johnson v. Louisiana*, 406 U.S. 356, 92 S. Ct. 1620 (1972). *Ramos* did not overrule *Johnson* in respect to the *Johnson*'s Court's decision regarding the Equal Protection challenge. Further, *Johnson* is not binding on the Equal Protection issue raised before this Court.

The Equal Protection issue in *Johnson* was whether the State may treat capital offenders differently from those charged with lesser crimes. *Johnson*, 406 U.S. 356. The distinction put under Equal Protection scrutiny in that case was the distinction between otherwise similarly situated capital offenders and non-capital offenders within the civilian criminal justice system. *Id.* Nowhere in *Johnson* was the distinction between otherwise similarly situated civilian defendants at civilian jury trial and military accused at military court-martial addressed. Congruently, the Equal Protection challenge in the present case says nothing of the distinction between capital and non-capital offenders at issue in *Johnson*. *Id.*

The Court's holdings in both *Ramos* and *Johnson* do not apply to military courts-martial. Rather, they apply to criminal jury trials. *Ramos*, 140 S. Ct. 1390; *Johnson*, 406 U.S. 356. The Equal Protection issue raised before this Court – whether it is a denial of the equal protection of the law to treat a service member accused at court-martial differently from a civilian defendant in a criminal jury trial – is distinct from the issue raised in *Johnson* – whether it was a denial of equal protection of the law for the State to treat capital offenders differently from those charged with lesser crimes. *Johnson*,

406 U.S. 356. The Court's holding in *Johnson* is neither binding on the issue at hand, nor is it applicable.

**2. Are service members and civilians “in all relevant aspects alike” (United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021)) for the purpose of unanimity of verdicts?**

Service members and civilians are not “in all relevant aspects alike” (*United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021)), for the purpose of unanimity of verdicts.

The military justice system and the civilian criminal justice system are distinct, and the former's jurisdiction over service members brands them unlike their civilian counterparts for the purpose of unanimity of verdicts. It is well-established that one's status as a military service member carries different protections and different procedural safeguards than those that exist in the civilian realm. *See Id.* at 780.

The *Ramos* Court made clear that unanimity of verdicts is central to the nature of the Sixth Amendment right to trial by jury. *Ramos*, 140 S. Ct. 1390. Therein, the Court stated that the very nature of a jury, as guaranteed by the Constitution and as molded by centuries of common law, includes unanimity. *Id.* The assertion that service members and civilians are in all relevant aspects alike, as applied to Equal Protection analysis, for the purpose of unanimity of verdicts, presupposes that both civilians and service members alike are entitled to the jury trial wherein unanimity is required. Within the context of the "military society," the right to a jury trial at a court-martial is not a

"fundamental right' under the Fifth Amendment. See *Parker v. Levy*, 417 U.S. 733, 743 (1974); see also *Begani*, 79 M.J. at 777 (N-M.C.C.A. 2020). "While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place." *Begani* at 776. A service member is by his or her very status as such "depriv[ed] of certain fundamental rights ... that is often the very nature of the profession of arms. *Id.* at 778.

There is precedent for military courts to find discrimination between service members and their similarly situated civilian counterparts to be justifiable. See *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (holding Equal Protection was not violated when military members in capital cases did not receive the same death penalty protocols as civilians in federal courts). The court in *Akbar* stated, "[w]e do not find any unjustifiable discrimination in the instant case because Appellant, as an accused servicemember, was not similarly situated to a civilian defendant." *Id.* at 406 (citing *Parker*, 417 U.S. at 743). Likewise, discrimination as to the provision of unanimous verdicts is justifiable based on an accused's status as a service member and the differing rights, privileges, and procedures afforded him as such.

**3. Does an accused have a constitutional due process right to a court-martial panel or only a constitutional right to panel impartiality if the accused exercises the statutory right to a court-martial panel? See United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001).**



An accused does not have a constitutional due process right to a court-martial panel. In the armed forces, “there is no Sixth Amendment right to trial by jury in courts-martial.” See *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex Parte Quirin*, 317 U.S. 1, 39 (1942)); *United States v. Wiesen*, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). See also *Reid v. Covert*, 354 U.S. 1, 37 n.68 (1957) (“The exception in the Fifth Amendment has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.”).

The Court in *Quirin* further held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception extended “to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law.” *Quirin*, 317 U.S. at 43.

An accused does have a right to trial by members, but that right derives from statute – specifically 10 U.S.C. § 829 (Article 29, UCMJ) – not from the Constitution. Should an accused elect to exercise his statutory right to a court-martial panel, however, he then has a constitutional (as well as a statutory) due process right for it to be a “fair and impartial” one. See *United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005); *Wiesen*, 56 M.J. 172, 174.

**4. Do court-martial panels and juries serve the same or different purposes?  
If they serve the same purpose, is unanimity of verdicts a critical aspect of that purpose?**

Court-martial panels and juries serve largely the same purposes, but juries lack one key purpose central to court-martial panels – the purpose of promoting the organization's primary fighting function.

Both juries and court-martial panels serve the purpose of acting as fair and impartial fact finders and verdict renderers. Prevention of "oppression by the Government by providing a safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge" (*Apodaca v. Oregon*, 406 U.S. 404 (1972) (internal quotations omitted)) is the province of both juries and court-martial panels alike. Public trust in the judicial system requires fairness and the appearance of fairness, regardless of civilian or military application. However, in a broader context, the military justice system is unique and distinct from the civilian system and must be free to remain different to serve its unique mission of preserving good order and discipline as a lethal fighting force.

In addition to serving the fact-finding and verdict-rendering purposes served by juries, though, court-martial panels also serve the distinct and fundamental purpose of promoting good order and discipline within the ranks of the armed forces. The military justice system exists, at its core, for the primary purpose of supporting the armed forces' ability to execute their larger primary purpose – to fight and win this country's wars. *Parker*, 417 U.S. at 743 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)). "[T]rial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Quarles*, 350 U.S. at 17. Executing courts-martial is

not the primary purpose of the armed forces, within which the military justice system wholly exists; consequently, courts-martial, and the rest of the military justice regime serve primarily to promote the military's ability to serve its primary fighting purpose. Such a purpose – ensuring good order and discipline within the community *in order to accomplish a larger concerted collective function* – is not the province of juries in the American civilian criminal justice system.

Charged with winning our nation's wars, commander must have tools to enforce good order and discipline, at home and on the battlefield. As such, the military justice system allows for panel members to be selected by the convening authority and need not be representative of a cross-section of society. While the specific role of the panel and jury are the same between the two systems, the broader purpose of the two systems are distinct and thus, variances are necessary to accomplish distinct goals. Requiring unanimity does not further the fair and impartial goal of a military panel and instead detracts from the military's need for swift justice. A unanimous verdict requirement will inevitably lead to hung juries in the military justice system. Hung juries significantly impair efficiency and effectiveness, returning accused back to their units and the time consuming, expensive process of trying them again, thus thwarting the central role of military justice. Because there is a difference in the broader context, unanimity of verdicts is not required to achieve a fair trial in the military system. Not only is unanimity of verdicts not a critical aspect of the distinct purposes served by court-martial panels, it stands in direct obstruction to their primary purpose of enabling fair but swift justice in furtherance of the military's ability to carry out its larger purpose.

**5. Does the Ramos opinion state that “impartiality” and “unanimity” are legal equivalents or, alternately, that “unanimity” is a critical aspect of “impartiality”? If so, does that have the same meaning in the context of court-martial panel impartiality?**

While the *Ramos* Court appears to state that “unanimity” is a critical aspect of “impartiality” in application to juries, it does not go so far as to declare “impartiality” and “unanimity” legal equivalents. See *Ramos*, 140 S. Ct. 1390.

As *Ramos* points out, the emergence of a unanimous jury emerged from 14th century English common law rooted in the idea that “the truth of every accusation...should...be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion. *Id.* at 1395 (quoting W. Blackstone, Commentaries on the Laws of England 343 (1769)). Indeed, the “impartial jury” promised by the Sixth Amendment, and where the concept of unanimity is derived, guarantees that a defendant is judged by his equals and neighbors, indifferently chosen, and superior to all suspicion. Thus, impartiality complements unanimity in endowing the right to a jury trial, yet the two are not synonyms. Unanimity is the promise that all impartial jurors agree as to guilt before a defendant can be convicted. *Ramos* makes it clear that both impartiality and unanimity are key to the very nature of a jury verdict, but their joint necessity does not render them legal equivalents. *Id.*

Regardless of how the *Ramos* Court characterized “unanimity” and “impartiality,” the legal meanings ascribed therein to those two words do not apply in the context of courts-martial. In *Ramos* the Court held the right to an impartial jury trial includes the

right to a unanimous verdict in order to convict the defendant. The Court's holding in *Ramos* is centered on the right to a civilian jury trial, which an accused in the military justice system does not possess. The Court's holding in *Ramos* does not apply to military courts-martial, and consequently its characterizations of the respective roles of "unanimity" and "impartiality" for a distinct entity (a jury) are not relevant to a panel. See *Id.*

#### **6. Does Congress have a plausible reason for the non-unanimous verdict requirement?**

Congress has two specific reasons for choosing not to subject military courts-martial to a unanimous verdict requirement: (1) to ensure the finality of verdicts, and (2) to circumvent unlawful command influence.

The military justice system has a uniquely strong interest in the finality of verdicts. One of the key purposes of the military justice system, as discussed above, is to promote good order and discipline within the ranks. Congress built the military justice system to instill discipline, for "[d]iscipline is the soul of an army. It makes small numbers formidable; procures success to the weak and esteem to all." (G. Washington, letter to the captains of the Virginia Regiments, 1759). The finality of judgments in this system is especially important; the need to resolve cases quickly and efficiently without hung juries (or more appropriately, "hung panels") and the ensuing retrials is paramount in allowing the military writ large to focus on its primary fighting function.

Additionally, the specter of unlawful command influence in the military justice system is a unique condition against which Congress chose to protect by enabling non-unanimous verdicts. As the Army Service Court explained in *United States v. Mayo*, Congress legislated non-unanimous verdicts in the modern UCMJ to guard against unlawful command influence. *Mayo*, 2017 CCA LEXIS 239, at \*20. Unlawful command influence is the “mortal enemy” of military justice. *United States v. Thomas*, 22 M.J. 388, 393 (1986). The availability of non-unanimous verdicts (and the lack of an announcement by the court identifying them where they occur) protects the anonymity of panel members’ votes, and thus protects them from potential reprisal should their vote not coincide with their superiors’ own wishes. Should panel members be given reason to fear the possibility of such reprisal, by removing the veil of anonymity provided by non-unanimous verdicts, the threat of unlawful command influence would loom much larger in the military justice system.

**7. If a unanimous verdict of guilty is required for courts-martial, is a unanimous verdict of acquittal also required?**

A unanimous verdict of guilty is not required for courts-martial, and neither is a unanimous verdict of acquittal.

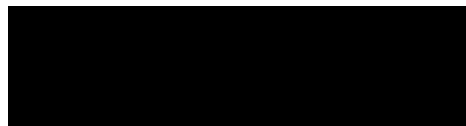
All States except Oregon require unanimity for an acquittal. Similar to how unanimity for conviction reduces the error rate for a wrongful conviction, unanimity for acquittal reduces the error rate for a wrongful acquittal. Society has an equal interest in ensuring the innocent go free and the guilty punished. There are clear benefits within

the civilian criminal justice system to requiring unanimous acquittals, especially where unanimous guilty verdicts are required.

On the other hand, imposing unanimity for both convictions and acquittals will inevitably yield higher rates of hung juries and mistrials. This efficiency concern is uniquely salient regarding the regulation of military courts-martial and their purpose of executing fair but swift justice. The possibility of creating hung juries is justification for Congress's judgment that a non-unanimous verdict requirement is necessary to regulate the land and naval forces. The purpose of military justice is to "promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." MANUAL FOR COURTS-MARTIAL (MCM), United States (2019 ed.), Part I, ¶ 3

Hung juries significantly impair efficiency and effectiveness, returning accused back to their units and the time consuming, expensive process of trying them again. Congress appropriately struck a fair balance by giving them a shot at a 3/8-vote acquittal in exchange for a possibility of a 6/8 vote conviction.

For the same legitimate reasons Congress chose not to subject courts-martial to a unanimous verdict requirement for findings of guilty, these military tribunals should not be subject to such a requirement in order to acquit.



TABER HUNT  
CPT, JA  
Trial Counsel

# **Government Appellate Exhibit**

**6**



**IN A GENERAL COURT MARTIAL  
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

<b>UNITED STATES OF AMERICA</b>  <b>v.</b>  <b>Dial, Andrew J.</b> <b>LTC, U.S. ARMY</b> <b>Alpha Company,</b> <b>Allied Forces North Battalion,</b> <b>United States Army North Atlantic</b> <b>Treaty</b> <b>Organization Brigade, APO AE 09752</b>	<b>DEFENSE BRIEF OF SPECIFIED ISSUES RE: MOTION FOR APPROPRIATE RELIEF: UNANIMOUS VERDICT</b>  <b>31 December 2021</b>
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Pursuant to this Court's Order to Brief Specified Issues RE: Defense Motion for Appropriate Relief (Unanimous Verdict), dated 17 December 2021, the Defense in the above case respectfully submits this brief for those seven specified issues. The law and argument for each of those issues will be addressed in the order specified by this Court.

**1. *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), effectively overruled the decision in *Johnson v. Louisiana*, 406 U.S. 356 (1972), with respect to the Equal Protection challenge; and, whether or not it overruled the decision with respect to the Due Process challenge, the holding on the Due Process challenge was merely that the reasonable-doubt standard does not, in and of itself, require unanimity.**

In *Ramos*, the Supreme Court disapprovingly referred to the badly fractured set of opinions in both of the 1972 companion cases of *Apodaca v. Oregon*, 406 U.S. 404 (1972), and *Johnson*, which allowed Oregon and Louisiana's schemes for non-unanimous verdicts for serious offenses to continue. See *Ramos*, 140 S. Ct. at 1397.

However, the Supreme Court's opinion in *Ramos* relied on the constitutional protections in the Sixth Amendment, which were at issue in *Apodaca*, and not the Due Process Clause or Equal Protection Clause of the Fourteenth Amendment, which were at issue in *Johnson*. Therefore, while directly overruling the decision in *Apodaca*, the impact of *Ramos* on *Johnson* is less clear.

Concerning the Due Process challenge, the Court in *Johnson* concluded that a conviction based on nine of 12 jurors satisfied the State's burden of proving guilt beyond a reasonable doubt and that the disagreement of the three jurors did not alone establish reasonable doubt. *Johnson*, 406 U.S. at 362. The Defense acknowledges there is an argument that the Court's decision in *Ramos* does not overrule that part of the decision in *Johnson*. See *State v. Ramos*, 367 Ore. 292, 309, 478 P.3d 515, 527 (2020) (finding that "[t]he *Johnson* reasonable-doubt holding remains good law after *Ramos*").

However, the court in *Johnson* did not consider whether the relationship between unanimity and impartiality, as described in *Ramos* (See *Ramos*, 140 S. Ct. at 1396), requires a different result. Regardless of whether the part of the *Johnson* decision regarding the reasonable-doubt standard is still good law, it would only stand for the principle that a non-unanimous verdict does not per se violate that standard. Although the Defense's motion quoted opinions from the D.C. Circuit and Sixth Circuit and acknowledged the interplay between unanimity and the burden of proof beyond a reasonable doubt, the Defense's Due Process argument is broader than and unresolved by the decision in *Johnson*.

The majority of the Defense's motion is devoted to the primary argument that unanimity is a core aspect of the impartiality guaranteed in the Sixth Amendment. That

impartiality is distinct from the rights concerning the composition of the jury, and that impartiality applies with equal meaning to court-martial panels. As mentioned in the motion, an accused at a court-martial enjoys most of the rights under the Sixth Amendment. In addition, a right under the Sixth Amendment may apply to a court-martial through the Due Process Clause of the Fifth Amendment. See e.g., *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court's decision in *Batson v. Kentucky* applies to courts-martial by virtue of due process). This concept, which was the primary Due Process argument in the Defense's motion, was not at issue in *Johnson*.

Concerning the Equal Protection challenge in *Johnson*, the decision that Louisiana's scheme did not constitute a denial of equal protection under the law does not survive *Ramos*. The Court analyzed the issue, and found a rational basis for Louisiana denying the requirement for unanimity for conviction of serious offenses in certain types of cases. After *Ramos*, a rational basis is not sufficient for a state to deny a certain classification of defendants the fundamental right of requiring unanimity to convict of a serious offense. The government interest provided in *Johnson* would clearly not satisfy a strict-scrutiny analysis. In addition, even if *Ramos* did not overrule that part of the *Johnson* decision, the Equal Protection challenge in *Johnson* was an attack on Louisiana's statutory scheme that required unanimity for capital and five-person jury cases, but requiring the concurrence of at least nine of 12 for other cases. See *Johnson*, 406 U.S. at 263. Those classifications were categories based on the seriousness of the crime and severity of the punishment that may be imposed, which bears no similarity to the classification at issue before this Court.

In summary, *Ramos* effectively overruled *Johnson*, with the only possible exception being the part of the decision concerning the holding that a non-unanimous verdict does not per se violate the reasonable-doubt standard under the Due Process Clause. Such a holding would not address the Defense’s argument that unanimity is a required aspect of impartiality under either the Sixth Amendment or the Due Process Clause of the Fifth Amendment. The part of the decision in *Johnson* on the Equal Protection challenge does not survive *Ramos*; and, even if it did, it would not apply to the vastly different classification in this case. Either way *Johnson* is not binding law on the Equal Protection issue raised before this Court.

**2. Servicemembers and civilians are “in all relevant aspects alike” for the purpose of unanimity of verdicts.**

The Court of Appeals for the Armed Forces (CAAF) recently applied the analysis for the due process right to equal protection of the laws. In *United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021), CAAF held that subjecting members of the Fleet Reserve and not retired reservists to UCMJ jurisdiction did not violate Equal Protection. *Id.* at 281. The first step of the analysis is “whether the groups are similarly situated, that is, are they ‘in all relevant respects alike.’” *Id.* at 280 (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

This Court has posed the question of whether service members and civilians are in all relevant aspects alike for the purpose of unanimity of verdicts. The Defense acknowledges the obvious fact that there are substantial differences between military society and civilian society, but the key phrase is “relevant aspects.” When the different

treatment involves whether the verdict of guilt for a serious offense requires unanimity, the relevant aspects involve how the different individuals are situated in regard to the determination of the verdict.

A civilian, or even a servicemember, being prosecuted by the United States in a Federal district court for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the 12-member impartial jury of her or his peers. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the jury. If convicted, the civilian is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and possess firearms and registration as a sex offender, if applicable.

A servicemember being prosecuted by the United States in a general court-martial for a non-capital serious offense is innocent until proven guilty beyond a reasonable doubt, as determined by the eight-member impartial panel selected by the convening authority. After the individual exercised the constitutional right to confront witnesses and present a defense, with the assistance of counsel, the decision of whether or not the individual is guilty is in the hands of the panel. If convicted, the servicemember is subject to substantial deprivation of liberty and property, along with a host of possible collateral consequences, such as the loss of the rights to vote and to possess firearms and registration as a sex offender, if applicable.

Although there are good reasons for why certain procedural rules, including the composition of the tribunal, differ depending on the forum, the same is not true for a

different required concurrence by the tribunal before the individual is convicted of a serious offense. The Defense acknowledges there are some differences in the goals of the military justice system as a whole, but those differences are not at play in the determination of the verdict. At that relevant time, the singular purpose is justice; maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not a consideration. As mentioned in the Defense's discussion of *Ortiz v. United States* in its motion, the Supreme Court found that the military justice system's essential character is "judicial." 138 S. Ct. 2165, 2174 (2018). "The procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding, whether state or federal." *Id.* The American scheme of justice does not tolerate making it easier to convict a Soldier at a court-martial for the purposes of efficiency in the military establishment.

**3. An accused has a statutory right to a court-martial panel; and, once Congress granted that statutory right to a court-martial panel, it must be implemented in a manner that complies with the Due Process Clause of the Fifth Amendment.**

An accused has a statutory right to a court-martial panel, under Article 16 of the Uniform Code of Military Justice (UCMJ). However, once Congress grants a statutory right related to the procedures by which courts-martial are conducted, that right must be implemented in a manner consistent with fundamental notions of procedural fairness. By analogy, the Court of Military Appeals (CMA) recognized that the right to appeal certain courts-martial is a statutory right; but, once it is granted, it is protected by the

safeguards of constitutional due process. *United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) (“[A] military criminal appeal is a creature ... solely of statutory origin, conferred neither by the Constitution nor the common law. However, once granted, the right of appeal must be attended with safeguards of constitutional due process[.]”)

(internal citations and quotations omitted). The Supreme Court has also provided Due Process protection to statutory appellate rights that states granted in their discretion.

“[W]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause.” *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). In other words, Congress could not create a court-martial panel system in which the panel decides guilt or innocence on the flip of a coin. Although that is an extreme example, it highlights the significance of the determination of guilt or innocence.

#### **4. Court-martial panels and juries serve the same function, and unanimity of verdicts is a critical aspect of that function.**

The purpose of military justice differs in important respects from civilian criminal justice. “The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.” MANUAL FOR COURTS-MARTIAL, pt. I, para. 3. However, the aims of the military justice system and the criminal justice system are separate and distinct from the roles and responsibilities of court-martial members and jurors.

The function of the court-martial panel during deliberations differs depending on

whether it is for findings or the sentence. While deliberating on findings, the court members' sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations. The sole purpose at that time is to adjudicate the merits in the interest of justice. The military judge instructs the court members as follows: "As court members, it is your duty to hear the evidence and to determine whether the accused is guilty or not guilty and, if required, to adjudge an appropriate sentence." Dep't of Army, Pam. 27-9, Legal Services, Military Judges' Benchbook ch. 2, § V, para. 2-5 (2020). The military judge also instructs the members on the presumption of innocence and the burden of proof, in accordance with Article 51(c) of the UCMJ.

The Defense acknowledges that, during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the armed forces. Article 56(c)(1). Deliberations on sentence are not at issue in this motion. Focusing on the relevant moment of determining guilt or innocence demonstrates that the function served by court-martial panel members and jurors is identical – presuming innocence and determining whether the prosecution proved each element beyond a reasonable doubt.

The unanimity of the verdict is a critical aspect of the determination of guilt or innocence, affecting the accuracy and reliability of verdicts. In *Ramos*, Justice Gorsuch quoted Justice Story's explanation of unanimity of verdict as "indispensable." *Ramos*, 140 S. Ct. at 1396 ("Justice Story explained in his Commentaries on the Constitution that 'in common cases, the law not only presumes every man innocent, until he is proved guilty, but unanimity in the verdict of the jury is indispensable.'"). With the



fallibility of human beings, it is beyond cavil that unanimity decreases the dangers of wrongful convictions. Each member's perception of the evidence and personal experiences add to the collective wisdom of the court-martial panel, but that benefit is fully realized only with unanimity of the verdict. In her dissenting opinion in a case about the retroactivity of the new unanimity rule from *Ramos*, Justice Kagan explained how the unanimity rule "is central to the Nation's idea of a fair and reliable guilty verdict" and "only then is the jury's finding of guilt certain enough – secure enough, mistake-proof enough – to take away the person's freedom." *Edwards v. Vannoy*, 141 S. Ct. 1547, 1576 (2021) (holding that the *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review) (Kagan, J., dissenting). Such concerns about the fairness and reliability of a non-unanimous verdict are even greater with a court-martial panel. With the convening authority selecting the best qualified court members by reason of age, education, training, experience, length of service, and judicial temperament, in accordance with Article 25, a reasonable doubt in the mind of a member of such a blue-ribbon panel casts uncertainty on the accuracy and reliability of a verdict of guilty. The American scheme of justice cannot tolerate such uncertainty with a conviction for a serious offense at a court-martial.

**5. In *Ramos v. Louisiana*, the Supreme Court found that unanimity is a critical aspect of "impartiality," and such a meaning would be the same in the context of court-martial panel impartiality.**

In *Ramos*, the Supreme Court was emphatic in its novel recognition that a unanimous guilty verdict is an indispensable feature of an impartial jury. "If the term 'trial

by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." *Ramos*, 140 S. Ct. at 1396. The Supreme Court has recently had the opportunity to discuss its holding in *Ramos*, when it addressed the retroactivity of the new rule requiring unanimity for conviction of serious offenses. In the majority opinion for *Edwards v. Vannoy*, Justice Kavanaugh acknowledged that the *Ramos* holding that "a state jury must be unanimous to convict a defendant of a serious offense" was a new rule. 141 S. Ct. at 1555. Dissenting from the majority's conclusion that it did not meet the legal standard for the narrow exception for a new procedural rule to be retroactive, Justice Kagan summarized how the Court described the unanimity rule in *Ramos*. "Citing centuries of history, the Court in *Ramos* termed the Sixth Amendment right to a unanimous jury 'vital', 'essential,' 'indispensable,' and 'fundamental' to the American legal system." *Id.* at 1573 (Kagan, J., dissenting).

The critical aspect of impartiality involving unanimity has the same meaning in the context of court-martial panels. A long line of CAAF decisions recognizes constitutional rights to an impartial and fair decision. "Constitutional due process includes the right to be treated equally with all other accused in the selection of impartial triers of the fact." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *see also United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954) ("Fairness and impartiality on the part of the triers of fact constitute a cornerstone of American justice."). That right to an impartial court-martial panel has more recently been found not only in the Due Process Clause of the Fifth Amendment but also in the Sixth Amendment itself. *See, e.g., United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection

of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations.”). As demonstrated by the cases cited on pages 8 through 9 of the Defense’s Motion for Appropriate Relief: Unanimous Verdict, this is not the only Sixth Amendment protection that applies to an accused at a court-martial. Also, in *United States v. Castellano*, 72 M.J. 217 (C.A.A.F. 2013), CAAF held that the military judge violated “Appellant’s due process rights under the Fifth and Sixth Amendments” by finding a *Marcum* factor himself rather than presenting it to the court members. *Id.* at 219.

As shown above, the Accused has a right to a unanimous guilty verdict as part of his right to an impartial panel under the Sixth Amendment. He also has a right to a unanimous guilty verdict as part of this right to due process under the Fifth Amendment. “Impartial court-members are a *sine qua non* for a fair court-martial.” *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995). In addition, CMA stated that, when a right applies by virtue of due process, “it applies to courts-martial, just as it does to civilian juries.” *United States v. Santiago-Davilla*, 26 M.J. 380, 390 (C.M.A. 1988) (holding that the Supreme Court’s decision in *Batson v. Kentucky* applies to courts-martial).

**6. Congress does not have any plausible reason for allowing a conviction on a non-unanimous verdict, other than the impermissible reason of making a conviction and deprivation of liberty and property easier at a court-martial.**

The Government’s response states that the unanimity right from *Ramos* is not so extraordinarily weighty as to overcome the balance struck by Congress. However, there was no discussion of the interests on either side of the scales during the balancing. If

there was a valid reason for denying servicemembers this fundamental right concerning the determination of guilt, it is curious that it was not included in the Government's response. Instead the Government relied on citing to cases that predated the Supreme Court's new rule that, under the Fourteenth Amendment, states must require unanimity before conviction of a serious offense. The Government's response fails to appreciate the newly elevated status of this fundamental right.

In addition, the military justice system has evolved from the Founding-era in both scope and due process. Courts-martial can now convict individuals for offenses with no service connection. *Solorio v. United States*, 483 U.S. 435 (1987). Also, courts-martial can convict individuals who are not servicemembers on active duty. *See, e.g., United States v. Begani*, 81 M.J. 273 (C.A.A.F. 2021) (holding that a retired servicemember in the Navy's Fleet Reserve was subject to court-martial jurisdiction); *United States v. Ali*, 71 M.J. 256 (C.A.A.F. 2012) (holding that Article 2(a)(10)'s extension of jurisdiction to persons serving with or accompanying an armed force in the field in time of a contingency operation did not violate the Constitution). With this expansion of the scope of court-martial jurisdiction, far more due process has been required over time. The Government's best reason for preserving non-unanimity is the historical practice, but that is inconsistent with all of the ways in which courts-martial have evolved from the rough form of justice criticized by the Supreme Court in *Toth v. Quarles*, 350 M.J. 11 (1955) to the judicial system the Supreme Court approved of in *Ortiz*.

The Government may argue that military necessity requires making it easier to convict at courts-martial and having guilty verdicts with less certainty and reliability, regardless of the concerns expressed by Justice Kagan. However, the Government has

other reasonable courses of action for any rare cases in which conducting another trial would have a significant impact on the military mission. After *Ramos*, adhering to the status quo of non-unanimous guilty verdicts at courts-martial cannot be tolerated in the American scheme of justice.

**7. Although a unanimous verdict of guilty is required for courts-martial, a unanimous verdict of acquittal is not required.**

The Defense is not arguing that all verdicts in a court-martial must be unanimous but only that convictions require unanimity. The right to a unanimous verdict is an individual right held by an accused, so it is not required that acquittals be unanimous. The Oregon Supreme Court came to this same logical conclusion after *Ramos*. “*Ramos* does not imply that the Sixth Amendment prohibits acquittals based on non-unanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals.” *State v Ross*, 367 Ore. 560, 573, 481 P.3d 1286, 1293 (2021). Even if Article 52(a)(3) of the UCMJ is unconstitutional to the extent it authorizes less than unanimous guilty verdicts, it is constitutional to the extent that failing to obtain the concurrence of at least three-fourths of the members present results in a finding of not guilty.

This interpretation alleviates any concerns about unlawful command influence. An acquittal could be the result of anywhere from zero to five out of eight votes of guilty. Although a conviction would effectively reveal the vote of every member, just like it does in capital cases, there can be no serious argument that court members would be apprehensive of displeasing the convening authority by voting to convict of a charge or

specification the convening authority referred for trial by court-martial.

### **CONCLUSION**

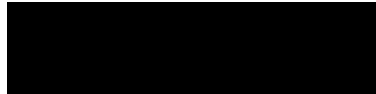
As the Supreme Court recognized in *Ortiz*, courts-martial have transformed into courts that are judicial in character rather than disciplinary tools of the commander. As such, they must adhere to the American scheme of justice. The Supreme Court's recent holding in *Ramos* that the unanimity requirement applies to the states because it is fundamental to the American scheme of justice, requires this Court to conduct a fresh analysis and come to the conclusion that the United States Constitution requires a unanimous verdict for the conviction of a serious offense at a court-martial. This conclusion is unmistakable, whether the right exists by virtue of the Sixth Amendment, Due Process under the Fifth Amendment, or Equal Protection under the Fifth Amendment.



CPT, JA  
Trial Defense Counsel

**CERTIFICATE OF SERVICE**

I certify that I have served an electronic copy of the above on the court and trial counsel on 31 December 2021.



CPT, JA  
Trial Defense Counsel

# **Government Appellate Exhibit**

**7**





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**IV. Law.**

**A. Burden of Proof.**

The burden of proof and persuasion rests with the Defense as the moving party. Rules for Courts-Martial (R.C.M.) 905(c)(1) and (c)(2)(A), Manual for Courts-Martial (2019).

“[J]udicial deference...is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.” Solorio v. United States, 483 U.S. 435, 447 (1987). This principle applies even when the constitutional rights of a service member are implicated by a statute enacted by Congress. Id. at 448. Accord United States v. Easton, 71 M.J. 168, 180 n.12 (C.A.A.F. 2012) (citing United States v. Weiss, 36 M.J. 224, 226 (C.M.A. 1992)).

With regard to Due Process challenges to Congressional enactments regulating the armed forces, the Supreme Court of the United States imposes upon the Defense the heavy burden to demonstrate that “the factors militating in favor of [the accused’s interest] are so extraordinarily weighty as to overcome the balance struck by Congress.” See Middendorf v. Henry, 425 U.S. 25, 44 (1976); Weiss v. United States, 510 U.S. 163, 177 (1994).

**B. Constitutional Overview.**

The Constitution gives Congress the power “[t]o make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const., art. I, § 8, cl. 14.

While Article III provides for the right to jury trials in the civilian system, the foundation of the military court-martial system arises in Article I, which grants Congress the authority to make rules for governing and regulating the land and naval forces. Compare U.S. Const., art. 1, § 8, with U.S. Const., art. 3, § 2.

The Fifth Amendment provides:

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, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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U.S. Const. amend. V.

The Sixth Amendment provides:

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, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

C. Military Courts-Martial.

In Dynes v. Hoover, the Supreme Court confirmed the constitutionality of military courts-martial. See 61 U.S. 65 (1857).

The Supreme Court has “long recognized that the military is, by necessity, a specialized society separate from civilian society.... The differences between the military and civilian communities result from the fact that ‘it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.’” Parker v. Levy, 417 U.S. 733, 743 (1974) (citing United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955)).

“[T]rial of soldiers to maintain discipline is merely incidental to an army’s primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served.” Quarles, 350 U.S. at 17.

Just as military society has been a society apart from civilian society, so ‘military law ... is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.’” Parker, 417 U.S. at 743 (citing Burns v. Wilson, 346 U.S. 137 (1953)). While the Parker Court said the UCMJ “cannot be equated to a civilian criminal code,” id. at 749, the Supreme Court in Ortiz v. United States, 138 S. Ct. 2165 (2018), recognized how similar they are. Id. at 2174-75.

Under the “Military Deference Doctrine,” courts defer to Congress’ exercise of its powers under Article I, Section 8, Clause 14, to regulate the military justice system. The Courts have noted, “Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.” Solorio v. United

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States, 483 U.S. 435, 447 (1987). In fact, the Supreme Court has described Congress' authority as "plenary" in this area. Chappell v. Wallace, 462 U.S. 296, 301 (1983).

Expounding on this deference, the Court in Parker stated, "For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter." 417 U.S. at 756; Loving v. United States, 517 U.S. 748, 759, 768 (1996).

#### D. Sixth Amendment.

In Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Supreme Court held the rules in Louisiana and Oregon that permit non-unanimous jury verdicts in criminal cases violate the Sixth Amendment as incorporated against the States through the Fourteenth Amendment.

In the armed forces, "there is no Sixth Amendment right to trial by jury in courts-martial." Easton, 71 M.J. at 175 (citing Ex Parte Quirin, 317 U.S. 1, 39 (1942)); United States v. Wiesen, 57 M.J. 48, 50 (C.A.A.F. 2002) (per curiam)). See also Reid v. Covert, 354 U.S. 1, 37 n.68 (1957) ("The exception in the Fifth Amendment...has been read over into the Sixth Amendment so that the requirements of jury trial are inapplicable.").

In Quirin, the Supreme Court addressed the constitutional history behind the creation of military tribunals, addressing both the authority to try enemy combatants for law of war violations as well as the application of the Bills of Rights to military courts-martial. 317 U.S. 1 (1942). The Court held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and this deliberate exception, which dated back to the Continental Congress of 21 August 1776, was to extend that exception "to trial of all offenses, including crimes which were of the class traditionally triable by jury at common law." Id. at 43.

#### E. Fifth Amendment Due Process.

In Weiss v. United States, 510 U.S. 163 (1994), the Supreme Court addressed the requirements of the Due Process Clause when Congress legislates in military affairs: "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. But in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8.' Weiss v. United States, 510 U.S. 163, 176-177 (1994). To evaluate a Due Process challenge, the Court evaluated "whether the factors militating in favor of" the claimed right "are so extraordinarily weighty as to overcome the balance struck by Congress." Id. at 177-78.

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Military and civilian courts have repeatedly affirmed that the Weiss standard applies to courts-martial due process claims challenging Congress' exercise of its Article I authority. See e.g., United States v. Vazquez, 72 M.J. 13, 19 (C.A.A.F. 2013); United States v. Gray, 51 M.J. 1, 50 (C.A.A.F. 1999); see also, United States v. Easton, 71 M.J. 168, 174-76 (C.A.A.F. 2012) (holding Article 44(c), UCMJ, is constitutional as applied to trials by court members when Congress appropriately exercised its Article I power).

In Johnson v. Louisiana, 406 U.S. 356 (1972), the Supreme Court stated that a non-unanimous jury verdict of guilty does not indicate that the prosecution failed its burden to prove guilt beyond a reasonable doubt. Id. at 360.

In United States v. Bramel, 32 M.J. 3 (C.M.A. 1990), the Court of Military Appeals granted review of the issue whether the appellant was denied a fundamentally fair criminal trial as guaranteed by the Fifth and Sixth Amendments where the findings of guilty were announced by less than a unanimous verdict of eight members. The Court summarily affirmed the findings of guilt and published no opinion. Id.

R.C.M. 922(e) prohibits polling panel members; however, M.R.E. 606 allows the military judge to conduct an inquiry into the validity of the findings or sentence, so long as the deliberative process is not invaded.

F. Fifth Amendment Equal Protection. In court-martial jurisprudence, any right to equal protection is based on the Fifth Amendment Due Process clause. United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021). Under the Fifth Amendment, an "equal protection violation" is "discrimination that is so unjustifiable as to violate due process." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (quoting United States v. Rodriguez-Amy, 19 M.J. 177, 178 (C.M.A. 1985)).

"This question of unjustifiable discrimination in violation of due process is not raised, however, unless the Government makes distinctions using 'constitutionally suspect classifications' such as 'race, religion, or national origin...or unless there is an encroachment on fundamental constitutional rights like freedom of speech or...assembly.'" Rodriguez-Amy, 19 M.J. at 178. Otherwise, a rational basis suffices for treating similarly situated people differently. See, e.g., Rostker v. Goldberg, 453 U.S. 57, 80 (1981) (asking whether the disparate treatment is "not only sufficiently but also closely related" to Congress' purpose in legislating); Akbar, 74 M.J. at 406 ("equal protection is not denied when there is a reasonable basis for a difference in treatment") (internal citation omitted); but see United States v. Hennis, 77 M.J. 7, 10 (C.A.A.F. 2017) (suggesting that when there is interference with a fundamental constitutional right, something more than a rational basis for the disparate treatment is necessary). Under a rational basis test, the burden is on the appellant to demonstrate that there is

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no rational basis for the rule he is challenging. The proponent of the classification “has no obligation to produce evidence to sustain the rationality of a statutory classification.” Heller v. Doe, 509 U.S. 312, 320 (1993). “As long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it.” Id.; United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).

The initial question is whether the groups are similarly situated, that is, are they “in all relevant respects alike.” Begani, 81 M.J. at 280 (quoting Nordlinger v. Hahn, 505 U.S. 1, 10 (1992)).

While civilians have a constitutional right to a jury trial, service members have a statutory right to its military equivalent. Article 25(c)(2), UCMJ; 10 U.S.C. § 825(c)(2). Service members also have a constitutional right to have a panel that is impartial: “As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001) (emphasis added); United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020); United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Riesbeck, 77 M.J. 154, 163 (C.A.A.F. 2018); see also, Rodriguez-Amy, 19 M.J. at 178 (stating that once Congress grants a statutory court-martial right to service members, that right “must be attended with safeguards of constitutional due process”).

Prior to 2019, a two-thirds concurrence of court-martial panel members was required to convict and sentence an accused in a trial with members; if a sentence included confinement for more than 10 years, a three-fourths concurrence was required. A sentence of death required the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2016). As a result of the Military Justice Act of 2016, a three-fourths concurrence of court-martial panel members is now required to convict and sentence an accused in a trial with members. A sentence of death requires the unanimous concurrence of all members. 10 U.S.C. § 852 (Article 52, UCMJ) (2019).

G. Stare Decisis.

*Stare decisis* encompasses two distinct concepts: (1) vertical *stare decisis* – the principal that courts “must strictly follow the decisions handed down by higher courts,” and (2) horizontal *stare decisis* – the principal that “an appellate court[] must adhere to its own prior decisions, unless it finds compelling reasons to overrule itself.” United States v. Andrews, 77 M.J. 393, 399 (C.A.A.F. 2018).

Lower courts should not assume that a new higher court decision implicitly overrules precedent. Instead, lower courts should follow the precedent that directly controls, and leave overruling precedent to the higher court that created the precedent. See Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

## **V. Analysis and Conclusions.**

### **A. Sixth Amendment.**

Ramos v. Louisiana neither explicitly nor implicitly overruled prior Supreme Court precedent regarding the inapplicability of the Sixth Amendment jury trial right to courts-martial. The Defense acknowledges this Court is bound by precedent regarding the applicability of the Sixth Amendment right to a jury trial but argues prior court decisions are incorrect and should not be followed.

Under the doctrine of *stare decisis*, this Court is required to uphold the precedent established by its superior courts. Absent explicit holdings by CAAF and the Supreme Court regarding the scope of their own precedents, this Court cannot and will not depart from binding precedent holding the right to a jury trial inapplicable to military courts-martial.

B. The Fifth Amendment: Due Process. The Supreme Court squarely addressed the question whether the due process requirement of proving guilt beyond a reasonable doubt is satisfied by a non-unanimous guilty verdict in Johnson v. Louisiana in 1972. The Court concluded it was. Although the Ramos Court called the Johnson and Apodaca opinions “badly fractured,”<sup>1</sup> it only addressed the Sixth Amendment question resolved in Apodaca (and overruled it). It did not address the Fifth Amendment question resolved in Johnson which remains binding precedent.<sup>2</sup> Under the doctrine of *stare decisis*, this Court is required to uphold the precedent.

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<sup>1</sup> 140 S. Ct. at 1397.

<sup>2</sup> In its response to the Court’s Order to brief this issue, the Government stated that Ramos overruled this portion of the Johnson opinion. However, the Government offered no analysis or law to support its position. The Defense asserted that Ramos did not overrule this portion of the Johnson opinion. If the Government is correct and Ramos did overrule Johnson, this Court would find that the due process requirement of proving guilt beyond a reasonable doubt requires a unanimous guilty verdict and that this Fifth Amendment right is so extraordinarily weighty a right that it overcomes “the balance struck by Congress” in determining what constitutional rights service members would be permitted in light of countervailing interests of military necessity. Weiss v. United States, 510 U.S. 163 (1994). For the reasons set forth in section V.C.4., below, it is clear that Congress did not conduct such a balancing and that there is no plausible reason for Congress to authorize a non-unanimous guilty verdict in courts-martial. The Johnson analysis of the interplay between unanimity and the reasonable doubt standard was based on a logical fallacy (that a single vote of not guilty would automatically equate to a hung jury rather than an acquittal) and inconsistent with Supreme Court precedent regarding the nature of the jury (the Johnson Court treated the jury as a single, objective entity, but the Court in In re Winship, 397 U.S. 358 (1970), stated that the jury is subjective in nature, *id.* at 364). However, because of this Court’s determination that Ramos did not overrule Johnson and the Government offered no law or analysis to support their position, a full analysis of the underlying Fifth Amendment due process/burden of proof/unanimity issue is omitted.

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C. The Fifth Amendment: Equal Protection. There is no rational basis for Congress' different treatment of U.S. service members and civilians regarding voting requirements for convictions.

1. Congress treats U.S. service members and civilians differently with respect to this aspect of criminal trials. Civilians may only be convicted by a unanimous verdict. FED. R. CRIM. P. 31(a) (2021). Service members need only be convicted by a three-fourths vote. Art. 52(a)(3), UCMJ; 10 U.S.C. § 852(a)(3) (2019).

2. Service members and civilians are similarly situated groups for the purpose of criminal trials. They are “in all relevant aspects alike.” Although the military is a “specialized society,” there is very little difference between civilian criminal trials and military courts-martial—in subject matter jurisdiction, in procedure, in rights afforded the accused, and in the consequences of conviction.

a. Service members are subject to prosecution for a wider array of crimes than civilians. Not only do the punitive articles of the UCMJ include the typical gamut of civilian crimes, they also include military-specific crimes, all Federal crimes in Title 18 of the U.S. Code, and any state crime when committed on a Federal installation in that state (by virtue of Article 134, UCMJ, and 18 U.S.C. § 13). The Supreme Court recognized the expansive nature of court-martial subject matter jurisdiction in Ortiz v. United States. 138 S. Ct. 2165, 2170, 2174 (2018) (characterizing military subject matter jurisdiction as including “a vast swath of offenses, including garden-variety crimes unrelated to military service”).

b. The Rules for Courts-Martial reflect criminal procedure almost identical to the Federal Rules of Criminal Procedure. They depart from the Federal Rules in those instances where the Constitution has exempted the military: grand jury indictment and trial by jury. Even where the rules diverge, Congress has narrowed that gap in almost every instance: the Article 32 preliminary hearing serves the same purpose as a grand jury<sup>3</sup>; and the court-martial panel serves the same purpose as a jury.<sup>4</sup> Even the court-martial panel and jury have similar characteristics: while the jury is selected from the state and district in which the accused resides, the panel is typically selected from the accused's unit (albeit from outside the accused's company-level unit) and normally from the accused's duty station; and while an accused's “peers” on a jury are randomly selected from eligible adults in the community, the court-martial panel is selected from the best qualified service members in the accused's military community. Article 25, UCMJ; 10 U.S.C. § 25 (2019). The only instance where Congress has not narrowed the

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<sup>3</sup> Compare United States v. Mara, 410 U.S. 19, 48 (1973) (“the very purpose of the grand jury process is to ascertain probable cause”) with Article 32(a)(2)(B), UCMJ, 10 U.S.C. § 832(a)(2)(B) (the purpose of the preliminary hearing includes determining whether probable cause exists).

<sup>4</sup> See section V.C.3., infra.



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gap between civilian and military procedural protections is in the voting requirement for the court-martial panel's findings.

c. In all respects other than grand jury indictment and trial by jury, service members have the same constitutional rights as civilians, including the 5<sup>th</sup> Amendment rights to due process, to protection against self-incrimination, and to protection from double-jeopardy, and all 6<sup>th</sup> Amendment rights except jury trial—to speedy trial (United States v. Danylo, 73 M.J. 183, 186 (C.A.A.F. 2014)); to a public trial (United States v. Hershey, 20 M.J. 433, 435 (CMA 1985)); to be informed of the nature and cause of the accusation (United States v. Girouard, 70 M.J. 5, 10 (C.A.A.F. 2011)); to confrontation (United States v. Blazier, 69 M.J. 218, 222 (C.A.A.F. 2010)); to compulsory process (United States v. Bess, 75 M.J. 70, 75 (C.A.A.F. 2016)); and to counsel (United States v. Wattenbarger, 21 M.J. 41, 43 (CMA 1985)). While civilians have a right to a jury trial, service members have a statutory right to its military equivalent. Like the civilian right to a jury that is “impartial,” service members have a constitutional right to a court-martial panel that is impartial. United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000); United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). The Supreme Court has recognized the virtual parity between constitutional protections for service members and for civilians. Ortiz, 138 S. Ct. at 2174 (“The procedural protections afforded to a service member are ‘virtually the same’ as those given in a civilian criminal proceeding, whether state or federal”).

d. The consequences of conviction at a special or general court-martial are no less serious than for civilian criminal convictions. A convicted service member has a lifetime Federal conviction that results in the same loss of voting and gun rights that a civilian conviction brings. If the conviction is for a sex offense, a service member has the same sex offender registration requirements and restrictions that result from a civilian conviction. Convicted service members are subject to sentences that can include confinement for a term of years or for life, with or without parole, and death. In addition to those punishments that are similar in nature and severity to civilian punishments, service members can also lose their pay and lose their jobs with a punitive discharge that can stigmatize them for life and prevent them from attaining future employment or receiving any benefits from the Department of Veterans’ Affairs for which they would otherwise have been eligible.

e. The only distinction between service members and civilians highlighted by the Government is in the purposes of the entities prosecuting both.<sup>5</sup> For civilians, a State or

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<sup>5</sup> Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 3. The Government stated that “it is well established” that the military and civilian societies are different. This is no more than a Parker platitude that poorly masks a lack of analysis on the issue. To take the Government’s apparent position to its logical conclusion, Congress could dispense entirely with the court-martial simply because the military is a specialized society. The question the Government did not answer is: “how are service members different than civilians for the purpose of voting

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the Federal government has justice as its primary concern; for service members, the military has warfighting (and readiness and preparation for the same) as its primary function. The military must be able to conduct courts-martial anywhere in the world, including during military contingencies and war, in an expeditious manner that ensures it does not lose its ability to conduct its mission. But this is a distinction without a difference in the context of voting requirements on guilt; a non-unanimous verdict does not further the military mission and a unanimous verdict requirement would not hinder it. See para. V.C.4.(d)(2), infra.

2. U.S. service members are not a suspect classification.

3. Congress encroaches on service members' fundamental 5<sup>th</sup> Amendment due process right to an impartial panel by authorizing the panel to find guilt by a non-unanimous vote. While an accused's right to a court-martial panel is grounded in statute, an accused's right to have the panel be impartial is grounded in the Due Process clause of the Constitution. Rodriguez-Amy, 19 M.J. at 178. The Supreme Court said that the requirement for unanimity in voting is an essential feature of the jury. Ramos, 140 S. Ct. at 1396. The unanimity requirement is not merely a function of history or popularity<sup>6</sup>; rather, it was integrally woven into the function of the jury—that of “safeguarding a person accused of crime against the arbitrary exercise of power by prosecutor or judge.” Batson v. Kentucky, 476 U.S. 79, 86 (1986) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968)). In order for the jury to do this, every member of it must confirm the truth of every accusation. Ramos, 140 S. Ct. at 1395; Williams v. Florida, 399 U.S. 78, 100 (1970) (tying the unanimity requirement to the purpose of the jury in interposing “between the accused and his accuser ... the commonsense judgment of a group of laymen”); see also, Winship, 397 U.S. at 364 (stating the jury makes a subjective determination of the facts). The court-martial panel serves the same purpose as a jury—to safeguard service members accused of crime against the arbitrary exercise of power by the commander.<sup>7</sup> In order for the court-martial

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requirements on guilt?” The Defense brief on this issue correctly narrows the focus to “relevant” differences and says that the differences between service members and civilians must be analyzed “at the relevant time” of rendering the verdict. This Court agrees with that analysis.

<sup>6</sup> The Ramos Court noted the historical underpinnings and wide acceptance of the unanimous verdict. 140 S. Ct. at 1395-96.

<sup>7</sup> In response to the Court's Order to brief this issue, the Government conceded that “the specific role of the panel and jury are the same between the two systems ....” Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 7. However, the Government also asserted that the broader purposes of the military and civilian justice systems are distinct—the former promotes good order and discipline while the latter does not. Id. While true to an extent, the court-martial panel itself does not further good order and discipline in its role as a factfinder. As the Defense pointed out in its brief on this issue, “While deliberating on findings, the court members’ sole purpose is justice, and maintaining good order and discipline in the armed forces and promoting efficiency and effectiveness in the military establishment are not considerations...”, but “during deliberations on the sentence, there is an additional purpose of promoting good order and discipline in the

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panel to serve that same purpose, it must also be unanimous in voting for guilt.<sup>8</sup> Impartiality of the panel members means more than freedom from biases and prejudices for or against the counsel, the accused, the command, the witnesses, or the judge's instructions on the law. It must also mean the ability to independently decide free from the biases and prejudices (firmly fixed views and determinations) of other panel members. This is inherent in the subjective determination discussed by the Winship Court and is required for individual panel members to fulfill their purpose. Where a panel member votes not guilty but the accused is convicted by a non-unanimous verdict, that panel member necessarily submits to the biases and prejudices of other panel members and is, essentially, discarded as an independent, impartial member. That panel member continues to serve on the panel as a tool of the guilty-voting members and may be required to sentence an accused for a crime the panel member does not believe the Government proved beyond a reasonable doubt.

There is no equal protection precedent regarding this issue. The Supreme Court said in Johnson that Louisiana's different voting requirements (some unanimous, some non-unanimous) for offenses of differing severity did not violate the Equal Protection Clause of the Fourteenth Amendment. 406 U.S. at 363. The Court concluded that Louisiana had a rational basis for the different voting requirements: to "facilitate, expedite, and reduce expense in the administration of criminal justice..." Id. at 364. However, the Court focused not on unanimity as a critical aspect of the jury but on reasonable doubt; it said that whether the verdict is unanimous or not, a guilty verdict still meets the beyond a reasonable doubt standard. Id. Johnson is not precedential on the issue before this Court for three reasons. First, the question presented in Johnson was different than the one presented here—whether unanimity is tied to the purpose of the jury and the court-martial panel. Second, the decision was based on Louisiana's specific rationale for the statutory scheme, so the decision was limited to the facts of that case. Third, the reasoning has been mooted by the Ramos Court's decision that unanimity is a constitutional function of the jury.

The Court of Appeals for the Armed Forces rejected a Fifth Amendment challenge to non-unanimous verdicts in courts-martial. Bramel, 32 M.J. at 3. However, the Court issued no opinion, so there is no development of the law or reasoning from which this

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armed forces." Defense Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 8. In other words, the court-martial itself is one of a commander's disciplinary tools to achieve good order and discipline, but the court-martial panel as factfinder does not further that end; in fact, a faster way to discipline would be to dispense with the panel.

<sup>8</sup> In response to the Court's Order to brief this issue, the Government acknowledged that impartiality and unanimity are complementary requisites for a jury verdict but stated impartiality does not require unanimity for a court-martial verdict simply because the Supreme Court discussed impartiality in the context of the Sixth Amendment jury trial which does not apply to the military. The Government provided no reason why court-martial panel impartiality should mean anything different than jury impartiality. Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, pp. 8-9.

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Court can take guidance. It is not clear why that Court reached the result it did or upon what legal basis. Consequently, Bramel cannot be controlling law. See, e.g., United States v. Clifton, 35 M.J. 79, 81-82, 89, (C.M.A. 1992) (referring to several internal rules of other courts indicating that decisions without opinion have no precedential value).

4. There is no apparent or logical reason for the disparate treatment. The Government, in its response to the Defense motion seeking a unanimous verdict, offered no reason why Congress would have chosen to implement a non-unanimous verdict requirement. However, in its response to the Court's Order to brief this issue, the Government offered two reasons: finality of verdicts, and unlawful command influence (UCI). The Government, however, did not assert that Congress actually considered either of those reasons when authorizing or re-authorizing the non-unanimous verdict in the military. That is likely because Congress never provided a reason for doing so.

(a) It appears that the non-unanimous verdict in courts-martial simply slipped into congressional legislation pertaining to military justice without much thought. The original Articles of War were adopted from the British articles by George Washington. Hearing before the Committee on the Armed Forces, House of Representatives, 62d Congress, 2d Session, on H.R. 23638, Being a Project for the Revision of the Articles of War, p. 4 (1912) [hereafter 1912 Hearing], available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/hearing\\_comm.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/hearing_comm.pdf); see also A Study of the Proposed Legislation to Amend the Articles of War (H. R. 2575) and to Amend the Articles for the Government of the Navy (H. R. 3687; S. 1338), p. 2 (January 20, 1948) available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/CM-Legislation.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/CM-Legislation.pdf). The non-unanimous court-martial verdict was one of the features borrowed from the British. 1912 Hearing at 46. When Congress considered revising the Articles of War in 1912, the Judge Advocate General, Major General Enoch H. Crowder, recommended increasing the required majority vote to a two-thirds vote in order to convict on a death-eligible offense. Representative Kahn asked MG Crowder, "Is it not your experience in the examination of the laws of the States for the infliction of the death penalty, that the jury must bring in a unanimous verdict?" Major General Crowder responded, "Yes, sir; but that has never been a characteristic of our military law." Id. at 46. He said further that a unanimous verdict requirement would "[impair] the success of the field operations of an army", but he did not explain why that was the case. Id. at 47. This purported "impairment" was apparently unfounded, because Congress has since required a unanimous guilty verdict in capital courts-martial. Art. 52(b)(2), UCMJ; 10 U.S.C. § 852(b)(2) (2019). No further explanation was apparently needed, however, for Congress to justify continuation of the non-unanimous verdict in courts-martial. This adoption of past practice without addressing a specific military need or balancing that need against the due process rights of service members has apparently continued to the present day.

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(b) When Congress was contemplating the proposed Uniform Code of Military Justice in 1949, a report to the House Armed Services Committee gave the following explanation for the proposed Article 52 regarding number of votes required: "This article is derived from [Article of War] 43." H.R. Rept. No. 491, p. 26 (April 28, 1949), available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/report\\_01.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/report_01.pdf). The Senate Armed Services Committee Report said the same thing. S. Rpt. No. 486, p. 23 (June 10, 1949) available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/report\\_02.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/report_02.pdf). Between 1912 and 1948, Article of War 43 required a majority vote for conviction for all offenses except death-eligible ones (which required a two-thirds vote). H.R. Rept. No. 491, p. 49. Congress amended Article of War 43 in the 1948 Elston Act to require a two-thirds vote for all offenses other than death-eligible ones, but the Articles for the Government of the Navy maintained a majority vote. Compare H.R. Rept. No. 1034, p. 18 (July 22, 1947), available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/amend\\_articles.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/amend_articles.pdf), with H.R. Rept. No. 491, p. 74. In the Elston Act hearings, Brigadier General Hubert Hoover, Assistant Judge Advocate General, testified that, "An appeal was taken to the United States Circuit Court of Appeals, where it was decided that the article [43] provided that any finding of guilty, except for an offense for which the death penalty is made mandatory, might be reached by a two-thirds vote." He followed that by saying, "The changes that are now proposed in the article [43] are intended to clarify the wording of the article, but not to change the sense of it." Hearings before the Committee on the Armed Services on Sundry Legislation Affecting the Naval and Military Establishment, Eightieth Congress, First Session, Vol. I, p. 2056 (1947), available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/hearings\\_No125.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_No125.pdf). The proposed Article 52 of the UCMJ equalized the Articles of War and the Articles for the Government of the Navy at the higher, two-thirds vote requirement. H.R. Rept. No. 491, p. 93. In the Congressional hearings on the proposed UCMJ, Professor Edmund Morgan, the Chair of the Special Committee to Draft the UCMJ, made the following comment on the proposed Article 52: "In article 52, you will notice that the number of votes required for both conviction and sentence have been made uniform for all the services." Hearings Before a Subcommittee of the Committee on Armed Services, House of Representatives, Eighty-First Congress, First Session, On H. R. 2498, p. 43 (March 7 – April 4, 1949), available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/hearings\\_01.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/hearings_01.pdf). He said the same thing in the Senate hearings. Hearings before a Subcommittee of the Committee on Armed Services, United States Senate, Eighty-First Congress, First Session, on S. 857 and H. R. 4080, pp. 36, 50 (April 27 – May 27, 1949).

(c) Although Congress revisited the voting requirements for findings in the Military Justice Act of 2016 and increased the votes required in non-capital cases from two-thirds to three-fourths, the only apparent reason it did so was to "eliminate inconsistencies and uncertainties in court-martial voting requirements by standardizing the requirements for each type of court-martial." Report of the Military Justice Review Group, p. 457 (Dec. 22, 2015), available at <https://ogc.osd.mil/Links/Military-Justice-Review-Group/>. The Department of Defense General Counsel tasked the Military

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Justice Review Group to analyze the UCMJ and make recommendations for legislative changes to Congress, and the Group made the vote-change recommendation. It said the change would eliminate the “anomaly [of the] varying ... percentage required for a conviction based upon the happenstance of the number of members who remain on the panel after challenges and excusals.” Id. at p. 220. Congress said little on the subject. The House Report on the proposed bill merely said, “this would standardize the percentage of votes required.” House Report 114-537 (part 1), section 6613 (May 4, 2016). The Senate Report said nothing. See Senate Report 114-255, section 5235 (May 18, 2016). The historical public record indicates that Congress has never offered a reason for authorizing a non-unanimous vote for guilt. This is not a case where “[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent”; rather, it seems to be “an accidental by-product of a traditional way of thinking.” Rostker, 453 U.S. at 75.

(d) However, this Court’s inquiry does not end there, because the Government is not required to produce evidence of Congress’ reasoning and “[a]s long as there is a plausible reason for the law, a court will assume a rational reason exists for its enactment and not overturn it.” Heller, 509 U.S. at 320. The public record provides no reason for Congress’ original enactment of the non-unanimous verdict in the military other than a military officer’s assertion that that was just the way it had always been done and that to do otherwise would impair the military mission. The former is no reason at all, and the latter was unsupported and has been proven unfounded (as indicated by Congress later requiring a unanimous verdict in capital cases). Aside from the public record, this Court will consider all possible reasons including those offered by the Government, those identified by the Army Court of Criminal Appeals in United States v. Mayo, 2017 CCA LEXIS 239 (A.C.C.A. 2017) (unpub.), and others. None of the reasons are plausible.

(1) First, the Army Court said that a non-unanimous verdict protects against UCI by shrouding the individual votes in secrecy, thereby preventing external potential influencers from knowing a panel member’s vote. Id. at 20.<sup>9</sup> The announcement of a unanimous guilty verdict surely reveals that every member of the panel voted for guilt. However, while there is a constitutional requirement for a unanimous guilty verdict, there is no countervailing constitutional requirement for a unanimous acquittal verdict. See, e.g., State v. Ross, 367 Ore. 560, 573 (2021) (Oregon Supreme Court stated Ramos does not require unanimous not guilty verdicts). A non-unanimous acquittal verdict does not reveal the votes. Such a verdict could mean that one member, half the panel, or every member voted to acquit; the votes would not be revealed. Additionally, knowing that every member voted to convict does not present a concern of UCI. UCI is

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<sup>9</sup> While the Court implied that Congress legislated non-unanimous verdicts because it was concerned about UCI, the public record provides no support for that implication. A connection between the two was never mentioned in any preserved Congressional report or hearing.

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generally concerned with those who would manipulate the court-martial process to unlawfully obtain a guilty verdict.

Second, the Army Court said that a non-unanimous verdict permits freedom of expression through secret balloting and prevents a senior ranking member from pressuring a junior member to “get on board” for a unanimous vote. Id. A requirement for a unanimous vote for guilt is not inconsistent with secret balloting. Absent a statutory requirement for a unanimous vote for acquittal, there will be no hung jury or re-voting. If one member secretly votes for a not-guilty finding, the result the panel must announce is a not-guilty finding. Unless a member requests reconsideration of the vote, the decision is final when the votes are cast. This continues to mean that no member knows the vote of any other member (although they may have suspicions from the discussion before voting) and cannot pressure others to join a majority for a unanimous vote of guilty. Further, the military judge instructs the members that, “The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment.” Dep’t Army Pam. 27-9, Military Judges’ Benchbook, para. 2-5-14 (10 January 2020 unofficial update).

The prohibition of UCI protects the court-martial process which protects the accused. To say that one protection for an accused service member is a reason to diminish another protection is a non-sequitur. In fact, the Court of Appeals for the Armed Forces said, “Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded.” United States v. Loving, 41 M.J. 213, 296 (C.A.A.F. 1994).

(2) Congress could have been concerned with speedy justice in contingency operating environments—the Government’s “finality of verdicts” argument<sup>10</sup>. It could have believed that a non-unanimous guilty verdict requirement would prevent the re-voting and hung juries the Mayo Court highlighted in its reasoning; this expediency would allow commanders to dispose of a court-martial quickly and get back to warfighting. The problem with this speculation about Congress’ intent is that re-voting and hung juries are only issues if either the Constitution or congressional legislation requires a unanimous vote to acquit. The former does not, and Congress need not choose to legislate the latter. In fact, it is highly unlikely that Congress entertained this as a reason for authorizing non-unanimous verdicts. Such reasoning would have to proceed thusly: we (Congress) are concerned about hung juries and concomitant retrials in the military; one way to prevent them is to authorize a unanimous guilty verdict but not a unanimous not-guilty verdict and ensure secrecy of voting; another way to prevent them is to authorize a non-unanimous guilty verdict; both choices achieve the objective and take the same amount of time; one choice ensures a more-certain verdict

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<sup>10</sup> Government Brief on Specified Issues re: Defense Motion for Appropriate Relief (Unanimous Verdict), 31 December 2021, p. 9.

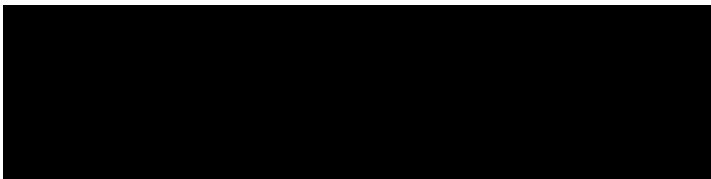
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(unanimity) while the other choice ensures a less-certain verdict (non-unanimity); so we choose less-certain verdicts that provide less protection to service members. Such reasoning is illogical and certainly not plausible.

(3) Congress could also have been concerned that providing a military accused a right to a jury trial would unduly burden military justice by requiring the military to choose jurors from the accused's state of residence, randomly selecting them, and ensuring 12 jurors for every trial—that is, importing one aspect of the jury would require importing all aspects of the jury. The latter two aspects of the jury are not grounded in the Constitution.<sup>11</sup> The former aspect—a requirement to choose jurors from a service member's state of residence—would be unworkable, but it has nothing to do with the separate aspect of unanimity. Further, Congress legislated parity for accused service members on the “of peers” aspect of the jury by creating a panel of military peers from the accused's military community and giving the accused some power to shape that venire. Article 25, UCMJ; 10 U.S.C. § 825 (2019). That aspect of the court-martial panel is not at issue here and is not inextricably tied to the aspect of unanimity; each aspect serves a different purpose.

5. By permitting the accused to be convicted by a non-unanimous vote, Article 52(a)(3), UCMJ, violates the accused's constitutional due process rights by denying him equal protection of the law.

**VI. Ruling.** ACCORDINGLY, the Defense Motion is GRANTED. The Court will instruct the panel that any finding of guilty must be by unanimous vote, and the Court will ask the panel president before announcement of findings if each guilty finding was the result of a unanimous vote.



CHARLES L. PRITCHARD, JR.  
COL, JA  
Military Judge

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<sup>11</sup> “The due process clause does not itself guarantee a defendant a randomly selected jury, but simply a jury drawn from a fair cross section of the community.” United States v. Kennedy, 548 F.2d 608, 614 (5<sup>th</sup> Cir. 1977). “In criminal cases due process of law is not denied by a state law which dispenses with ... the necessity of a jury of twelve ....” Jordan v. Massachusetts, 225 U.S. 167, 176 (1912); Johnson, 406 U.S. at 359; Williams v. Florida, 399 U.S. 78, 100 (1970) (“the 12-man requirement cannot be regarded as an indispensable component of the Sixth Amendment”).



# **Government Appellate Exhibit**

**8**

**IN A GENERAL COURT MARTIAL  
IN THE FIFTH JUDICIAL CIRCUIT, UNITED STATES ARMY**

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**UNITED STATES**

**v.**

**Dial, Andrew J.  
Lieutenant Colonel (O-5), U.S.  
ARMY  
Alpha Company,  
Allied Forces North Battalion,  
United States Army North Atlantic  
Treaty Organization Brigade,  
APO AE 09752**

**NOTICE OF PLEAS AND FORUM**

**6 December 2021**

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LTC Andrew J. Dial, by and through his counsel provides notice as follows:

1. Forum selection: Panel and sentencing by panel members in lieu of sentencing by military judge pursuant to Article 25(d)(1), UCMJ.
2. Notice of Pleas: To all Charges and Specifications, Not Guilty.

Respectfully Submitted

  
CPT, JA  
Military Defense Counsel

  
ROBERT MIHAIL  
CPT, JA  
Military Defense Counsel

**CERTIFICATE OF SERVICE**

Served on trial counsel and Court via electronic mail on 6 December 2021.



CPT, JA  
Military Defense Counsel

**CERTIFICATE OF SERVICE, U.S. v. COL PRITCHARD, CHARLES L., (Respondent); MSG DIAL, ANDREW J. (Real Party in Interest) (Misc 20220001)**

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at [REDACTED]

[REDACTED] on this 24th day of January 2022.

[REDACTED]

[REDACTED]

Senior Paralegal Specialist

[REDACTED]