

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Petitioner

**GOVERNMENT REPLY
TO THE REAL PARTY IN
INTEREST'S ANSWER**

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.], (1 Jan. 2019) 19(f)(1), and replies to the Brief in Opposition from the Real Party in Interest [RPI]. The government hereby incorporates the statement of jurisdiction, the facts, and the specific relief sought from its brief, filed on 24 January 2022, in support of the writ of prohibition pursuant to 28 U.S.C. § 1651, the All Writs Act.

Law and Argument

A. The narrow question before this court is whether the military judge exceeded his authority by requiring a unanimous verdict based upon equal protection of the law.

The RPI makes an assertion even broader than the military judge's ruling—that a unanimous guilty verdict is a “fundamental right guaranteed to service members through the Fifth and Sixth Amendments.” (RPI Br. 7). In doing so, the RPI cites a heightened standard of review: strict scrutiny. (RPI Br. 7). Not only is this inconsistent with the military judge's ruling, and therefore not relevant to this court's determination as to whether to grant the writ of prohibition, but it is also incorrect as a matter of law.

First, the procedural posture of this case forecloses any argument the RPI wishes to make as it relates to the Sixth Amendment or Fifth Amendment Due Process Clause. The military judge did not grant the defense motion on these grounds. He held the Sixth Amendment right to a jury trial does not apply to military courts-martial and a non-unanimous guilty verdict satisfies Fifth Amendment Due Process requirements. (Gov't App. Ex. 7, p. 7). Following the doctrine of stare decisis, the military judge noted he “cannot and will not depart from binding precedent.” (Gov't App. Ex. 7, p. 7). Instead, the military judge relied on the equal protection guarantee of the Fifth Amendment to find that unanimous guilty verdicts are required, and applied the rational basis test. (Gov't

App. Ex. 7, p. 8). The government’s writ simply requests this court to “confine an inferior court to a lawful exercise of its prescribed jurisdiction.” *Dettinger v. United States*, 7 M.J. 216, 220 (C.M.A. 1979) (quoting *Roche v. Evaporated Milk Ass’n*, 319 U.S. 21, 26 (1943)). Thus, this court need only analyze whether the military judge exceeded his authority in his application of equal protection—not the expanded legal question the RPI presents to this court. (RPI Br. 7).

Second, as a matter of current and binding law, a unanimous guilty verdict is not a “fundamental right guaranteed to service members through the Fifth and Sixth Amendments,” (RPI Br. 7), and thus rational basis is the proper lens for this court’s analysis. “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.” *United States v. Begani*, 79 M.J. 767, 776 (N-M Ct. Crim. App. 2020), *aff’d*, 81 M.J. 273, 282 (C.A.A.F. 2021). The Sixth Amendment right to jury trial does not apply to the military. *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (quoting *Ex parte Quirin*, 317 U.S. 1, 39 (1942)) (“[T]here is no Sixth Amendment right to trial by jury in courts-martial.”). Also, the Fifth Amendment treats “those in the profession of arms” differently as it relates to fundamental constitutional rights. *Begani*, 79 M.J. at 776.

The recent Supreme Court opinion in *Ramos v. Louisiana* left this Fifth Amendment Due Process untouched. 140 S. Ct. 1390, 1394 (2020) (“We took this case to decide whether the *Sixth Amendment* right to a jury trial . . . requires a unanimous verdict to convict a defendant of a serious offense.”) (emphasis added). In fact, the *Ramos* majority does not even mention the Fifth Amendment in its analysis. 140 S. Ct. at 1393–1408. As the military judge correctly noted, *Johnson* “remains binding precedent,” and the Due Process Clause of the Fifth Amendment allows for a non-unanimous guilty verdict before a military tribunal. (Gov’t App. Ex. 7, p. 7); *see also Johnson v. Louisiana*, 406 U.S. 356, 362 (1972) (holding that a non-unanimous guilty verdict does not violate the Due Process Clause of the Fifth Amendment).

For these reasons, it is incorrect for the RPI to use the term “fundamental right” within the “rational basis” test. (RPI Br. 24). This blurs the constitutional analysis required when a statute makes distinctions between civilian defendants and accused servicemembers. *See Fcc v. Beach Communications, Inc.*, 508 U.S. 307, 309 (1993) (“[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if any reasonably conceivable state of facts could provide a *rational basis* for the classification.”) (emphasis added); *see also United States v. Hoard*, 12 M.J. 563, 568 (A.C.M.R. 1981) (“For the Government to make

distinctions does not violate equal protection guarantees unless constitutionally suspect classifications 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. The only requirement is that reasonable grounds exist for the classification used.”). Consequently, the narrow issue before this court is whether there is any “plausible reason” for the law, and if so, whether the military judge exceeded his authority by requiring a unanimous verdict. *Heller v. Doe*, 509 U.S. 312, 320 (1993); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938)).

B. There is no one-size-fits-all definition of “impartial.”

The RPI urges this court to find that the word “impartial” equates to “unanimous.” (RPI Br. 11, 24). In so doing, the RPI extends the meaning of “impartial” beyond prior military court decisions. In military justice, the term “impartial” has different definitions in different contexts. For instance, the CAAF discusses the constitutional and regulatory right to “a fair and impartial panel” in the context of panel member bias. *United States v. Commisso*, 76 M.J. 315, 319 (C.A.A.F. 2017) (holding a panel member who already had knowledge of the case, and asked himself “Did I lie? Maybe I did. I don’t think I did,” regarding voir dire, cast substantial doubt as to the “legality, fairness, and impartiality” of the court-martial). Alternatively, the CAAF uses this very same term to describe the

convening authority’s duty to appoint “fair and impartial members” pursuant to Article 25, UCMJ. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (discussing the duties of identifying “a pool of members” from which the convening authority will select future panel members, forbidding impermissible court “packing.”). Used in another context entirely, the CAAF also describes judicial duties with this term. *United States v. Quintanilla*, 56 M.J. 37, 39 (C.A.A.F. 2001) (noting “[a] judge must perform judicial duties impartially and fairly”). Even members on an R.C.M. 706 board have obligations of serving impartially—a term that did not carry with it a unanimous definition. *United States v. Best*, 61 M.J. 376, 389 (C.A.A.F. 2005) (Baker, J., concurring) (discussing whether the doctors were “capable of impartially serving” on the appellant’s R.C.M. 706 board following a potential “conflict of interest”). None of these decisions—nor any decision the RPI points to—uses the term “impartial” to also mean “unanimous.”

Certainly, *Ramos* stated “[i]f the term ‘trial by an impartial jury’ carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.” 140 S. Ct. at 1395. However, further examination of the surrounding analysis demonstrates the Court specifically evaluated this clause in the context of a “jury trial,” focusing on the features of a jury. *See, e.g.*, 140 S. Ct. at 1395 (noting “[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*”) (emphasis added). Simply put, *Ramos* does not provide grounds to fuse together the definitions of impartiality and unanimity. Notably, in the two pages where the Court took steps to clarify that its analysis of “trial by an impartial jury trial” fell underneath the Sixth Amendment, *Ramos*, 140 S. Ct. at 1396–97, it only used the term “impartial” once—and only to quote the Sixth Amendment. *Id.* at 1396. In contrast, the Court referred to a “jury trial” eight times. *Id.* at 1396–87. Therefore, *Ramos* focused on the features of a “jury trial,” 140 S. Ct. at 1395–97, not the definition of impartiality.¹

Undeniably, the right to a trial by jury as contemplated in the Sixth Amendment does not apply to military trials of members of the armed forces. *O’Callahan v. Parker*, 395 U.S. 258, 261 (1969); *United States v. Ezell*, 6 M.J. 307, 327 (C.M.A. 1979) (Fletcher, C.J., concurring); *see also United States v. Witham*, 47 M.J. 297, 304 (C.A.A.F. 1997) (Effron, J., concurring) (noting “significant structural differences between court-martial panels and civilian juries” including, among a number of differences, “courts-martial are not subject to jury

¹ In his concurrence, Justice Kavanaugh seemed to suggest that unanimity and impartiality are two different concepts. *Ramos*, 140 S. Ct. at 1418 (Kavanaugh, J., concurring) (quoting *Johnson v. Louisiana*, 406 U.S. 356, 398, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (Stewart, J., dissenting)) (“In my view, *Apodaca* warrants the same fate as *Swain*. After all, the ‘requirements of unanimity *and* impartial selection thus compliment each other in ensuring the fair performance of the vital functions of a criminal court jury.’”) (emphasis added).

trial requirements of the Constitution”). In this regard, *Ramos* becomes less persuasive to military courts-martial than the RPI suggests. (RPI Br. 1).

Like the military judge, however, the RPI incorrectly applies a one-size-fits-all definition of “impartial.” (RPI Br. 10) (“A guilty verdict would only be valid if issued by an impartial, thus unanimous finder-of-fact.”). For example, the RPI notes that servicemembers have a constitutional right “to a fair and impartial panel,” just as the Court of Appeals for the Armed Forces [CAAF] held in *United States v. Wiesen*. 56 M.J. 172, 174 (C.A.A.F. 2001) (discussing a challenge for cause based on a panel member’s supervisory position over six panel members). The military judge equally relies on this term, noting the CAAF in *Wiesen*, *Bess*, *Kirkland*, and *Riesbeck* all hold that an accused has a constitutional right to an impartial panel. (Gov’t App. Ex. 7, p. 6). The problem is that the CAAF uses the term “impartial” in these contexts related to discrete issues as it relates to voir dire, bias, and panel composition. *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).

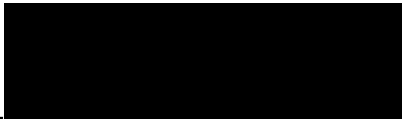
Contrary to the RPI’s contention, nothing in the CAAF’s holdings bestows unanimity into the definition of “impartial,” even in a Sixth Amendment context. (RPI Br. 9); 55 M.J. 293, 295 (C.A.A.F. 2001) (noting that “the right to an impartial court-martial panel comes . . . from the Sixth Amendment *itself*”)

(emphasis in original).² Therefore, the mere use of “impartiality” throughout military jurisprudence—especially in cases that predated *Ramos*—does not establish that a servicemember accused is entitled to a unanimous verdict.

² The RPI cites to *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001), to support his argument, but this is misplaced. (RPI Br. 9–10). *Lambert* does not provide any additional definitions for the word “impartiality,” as the CAAF closely addressed a single “aspect of impartiality: specifically, the conduct of an individual member during deliberations who may have introduced extraneous information into the deliberative process.” 55 M.J. at 295 (where a panel member maintained a book called “guilty as sin” throughout deliberations.). This does not fairly mean *Lambert* can be read to also require unanimous verdicts at a military court-martial.

Conclusion

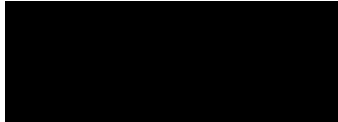
WHEREFORE, the question before this court remains narrow: whether the military judge exceeded his authority in requiring a unanimous verdict on the basis of equal protection under the Fifth Amendment. The United States respectfully asks this court grant this writ of prohibition, preventing the military judge from issuing his unanimous verdict instruction.



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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]

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