DEPARTMENT OF THE AIR FORCE
TRIAL JUDICIARY

UNITED STATES	)	GOVERNMENT RESPONSE
	)	TO DEFENSE MOTION FOR
v.	)	APPROPRIATE RELIEF:
	)	UNANIMOUS VERDICT
1ST LT TRAVIS C. BAKER	)	
Delta 4 Detachment 2 (SpOC)	)	
Buckley SFB, Colorado	)	30 May 2023

MOTION RESPONSE

The Government respectfully requests this Honorable Court deny the Defense Motion for Appropriate Relief: Unanimous Verdict.

SUMMARY

The Sixth Amendment right to a unanimous jury verdict does not apply to trial by court-martial. Clear and binding precedent from the Supreme Court and the Court of Appeals for the Armed Forces holding that there is no right to a jury trial at a court-martial is dispositive on this issue. *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942) (the Sixth Amendment right to trial by jury does not apply to courts-martial); *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018) (same).

The United States Supreme Court's recent decision in *Ramos v. Louisiana* does not change the decades of precedent that bind this Court. First, the holding in *Ramos* is based only on the Sixth Amendment right to trial by jury that does not even apply to courts-marital. Nowhere does the Court hold or even suggest that *Ramos* should operate to re-write the UCMJ or the rules for courts-martial to require unanimous verdicts. Second, for the military, *Ramos* is not new. The Supreme Court has required that verdicts in civilian courts with only six jurors be unanimous since 1979 under *Burch v. Louisiana*, 441 U.S. 130 (1979), and General Courts-Martial had a minimum of five members from 1951 through 2018. Yet, in the four decades since *Burch*, no court has ever imposed unanimity on the military. And it was not for lack of defense counsel's efforts.

Unanimous verdicts cannot be shoe-horned into courts-martial using Fifth Amendment due-process. The Air Force Court of Criminal Appeals has repeatedly rejected such arguments and held that the Fifth Amendment does not require unanimous verdicts, both before and after the ruling in *Ramos*. *United States v. Roblero*, 2017 CCA LEXIS 168, *19–20 (A.F.C.C.A. 17 Feb 2017); *United States v. Canada*, 2016 CCA LEXIS 610, *33–34 (A.F.C.C.A. 20 Oct 2016) *aff'd without opinion on review of another question*, 76 M.J. 127 (C.A.A.F. 2017); *United States v. Spear*, 2015 CCA LEXIS 310, *8 (A.F.C.C.A. 30 Jul 2015); *United States v. Daniel*, 2014 CCA LEXIS 224, *7–10 (A.F.C.C.A. 1 Apr 2014) *aff'd without opinion*, 73 M.J. 473 (C.A.A.F. 2014);

United States v. Palma, 2015 CCA LEXIS 444, *30 (A.F.C.C.A. 2015); *United States v. Novy*, 2015 CCA LEXIS 289, *7 (A.F.C.C.A. 14 July 2015); *United States v. Albarda*, 2021 CCA LEXIS 346 (A.F.C.C.A. 7 July 2021); *United States v. Westcott*, 2022 CCA LEXIS 156 (A.F.C.C.A. 17 March 2022); *United States v. Martinez*, 2022 CCA LEXIS 212 (A.F.C.C.A. 2022); *United States v. Anderson*, 2022 CCA LEXIS 181 (A.F.C.C.A. 25 March 2022). The Army Court has reached the same conclusion. *United States v. Mayo*, 2017 CCA LEXIS 239, *20-23 (A.C.C.A. 2017); *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A. 2022). In doing so, these Courts repeatedly rejected requests to use Fifth Amendment due process to import the *Burch* unanimity requirement for six-juror civilian trials into the military. In addition, the Navy-Marine Corps Court of Criminal Appeals recently published two opinions holding that the *Ramos* decision does not apply to military courts-martial. *United States v. Causey*, 82 M.J. 574 (N.M.C.C.C. 2022); *United States v. Vance*, 2022 CCA LEXIS 374 (N.M.C.C.A. 2022).

Vertical stare decisis binds this Court to established precedent compelling the denial of the Defense motion. Under vertical stare decisis, lower courts "must strictly follow the decisions handed down by higher courts." The binding precedents in this case come from higher courts, so vertical stare decisis applies, and this Court must follow precedent. Indeed, the Supreme Court has warned lower courts that "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Here, the cases which directly control hold that there is no jury trial right at a court-martial, so the motion must be denied.

FACTS

1. On 9 December 2022, Col Miguel A Cruz, the Delta 4 Commander, preferred one charge and two specifications of violations of Article 107, Uniform Code of Military Justice (UCMJ), one charge and two specifications of violations of Article 113, UCMJ, and one charge and two specifications of violations of Article 133, UCMJ, against 1st Lt Travis C Baker.

BURDEN

2. The burden of proof and persuasion is on the Defense as the moving party, and the burden as to any factual issue necessary to resolve this motion is a preponderance of the evidence. R.C.M. 905(c)(1)–(2).

3. Concerning the due process claim, the Defense bears the "heavy burden to demonstrate that Congress' determinations about . . . unanimity should not be followed." *United States v. Spear*, 2015 CCA LEXIS 310, *8 (A.F.C.C.A. 30 Jul 2015) (*citing Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Weiss v. United States*, 510 U.S. 163, 181 (1994)). The Defense "must show the factors weighing in favor of [the accused's] interest are so 'extraordinarily weighty' that they overcome the balance struck by Congress in making these determinations." *Id.* This burden under *Weiss* is directly contrary to Defense's claim that

the burden rests with the Government. *Id.*; *see also United States v. Sanford*, 586 F.3d 28, 35 (D.C. Cir. 2009) (specifically faulting the defense for claiming the same burden as cited by the Defense here, and instead applying the higher burden set forth in *Weiss*).

4. Every time the Air Force Court has considered attempts to impose unanimity on the military under the guise of the Fifth Amendment due process, the Court has applied the "heavy burden" to the defense. *Roblero*, 2017 CCA LEXIS 168, at *19–20; *Canada*, 2016 CCA LEXIS 610, at *33–34; *Spear*, 2015 CCA LEXIS 310; *Daniel*, 2014 CCA LEXIS 224 at *7–10; *Palma*, 2015 CCA LEXIS 444 at *30; *Novy*, 2015 CCA LEXIS 289 at *7.

5. The Defense's citation to *Easton* in a generalized attempt to put the burden on the Government in the due process analysis is incorrect. First, *Easton* applied only to constitutional rights applicable to service members in the first place, and the Court in *Easton* recognized that there is no right to a jury trial at a court-martial. *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012) ("there is no Sixth Amendment right to trial by jury in courts-martial"). Second, *Easton* did not involve a due process analysis. Instead, *Easton* involved the difference in when jeopardy attaches in military and civilian courts—i.e. after presentation of evidence in the military versus after empanelment in civilian courts. The Court held that these differences were constitutional in light of the differences between the structure and purpose of the UCMJ and civilian law. *Id.* at 175-177. The Court did not conduct a "due process" analysis. Rather, the Court defaulted to the more generalized case-law holding that when constitutional rights apply to service members, the party arguing for a differing application in the military has the burden to justify the difference. *Easton* does not change the more specific burden governing due process claims. Indeed, since *Easton*, the C.A.A.F. has simultaneously cited *Easton* and reaffirmed that *Weiss* and its heavy burden on the Defense is the appropriate standard for due process claims. See *United States v. Vasquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (Applying the *Weiss* "heavy burden" while citing *Weiss* and *Easton*).

6. Military courts have repeatedly affirmed that the Defense bears the burden of meeting the exacting standard set forth in *Weiss*. *See, e.g., Vasquez*, 72 M.J. at 19 ("like the petitioners in *Weiss*, Appellee has the burden to demonstrate that Congress' determination should not be followed"); *Mitchell*, 39 M.J. at 137 (holding that the appellant's argument failed to satisfy the *Weiss* standard "because he has not met his heavy burden to show the Constitutional invalidity of this facet of the military justice system").

LAW

Court-Martial Conviction Requirement

7. Article 52(a)(3), Uniform Code of Military Justice (UCMJ), requires a concurrence of at least three-fourths of the members present in order for an accused to be convicted of an offense.

8. R.C.M. 922 (b) only allows the announcement of a unanimous verdict in the narrow situation of capital cases. R.C.M. 922(e) prohibits the polling of members about their voting.

The Sixth Amendment Right to a Jury Trial Does Not Apply to the Military

9. The United States Supreme Court and superior military courts have repeatedly held that the Sixth Amendment right to a jury trial is inapplicable to trials by courts-martial. *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942); *Ex Parte Milligan*, 71 U.S. 2 (1866); *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018); *United States v. Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States v. Smith*, 27 M.J. 242, 248 (C.M.A. 1988); *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012).

10. 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. The Court held that military tribunals were exempted from the Sixth Amendment requirement for a jury trial and that 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." 317 U.S. at 43. Similarly, in *Milligan*, the Supreme Court in dicta noted 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."[1] 71 U.S. at 123.

11. The Supreme Court has regularly and consistently distinguished between civilian law and military law. "The military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). Just as military society is distinct from civilian society, so too the Supreme Court has recognized that military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Id. quoting Burns v. Wilson*, 346 U.S. 137, 140 (1953). Thus, the UCMJ "cannot be equated to a civilian criminal code." *Id.* at 749.

12. While Article III of the U.S. Constitution 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 to 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.

13. "The primary business of armies and navies is to fight or be ready to fight wars should the occasion arise . . . judicial deference is given to the determination of Congress, made under its authority to regulate the land and naval forces." *United States v. Curtis*, 44 M.J. 106, 130 (C.A.A.F. 1996). This constitutional divide between civilian juries being required by Article III, and Congress having authority to legislate the rules for military tribunals in Article I, demonstrates again the difference between military law and civilian law, as it pertains to the right to a jury.

Fifth Amendment Due Process

14. The Air Force Court of Criminal Appeals has repeatedly found no due process violation concerning non-unanimous verdicts in courts-martial based on the Supreme Court's

[1] The Fifth Amendment requirement for an indictment explicitly "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger." U.S. CONST. amend. V.

holdings on the matter. Indeed, the Court has so held in numerous cases since 2014 to the present. *Roblero*, 2017 CCA LEXIS 168, *19–20 (A.F.C.C.A. 17 Feb 2017); *Canada*, 2016 CCA LEXIS 610, *33–34 (A.F.C.C.A. 20 Oct 2016) *aff'd without opinion on review on other grounds*, 76 M.J. 127 (C.A.A.F. 2017); *Spear*, 2015 CCA LEXIS 310, *8 (A.F.C.C.A. 30 Jul 2015); *Daniel*, 2014 CCA LEXIS 224, *7–10 (A.F.C.C.A. 1 Apr 2014) aff'd without opinion, 73 M.J. 473 (C.A.A.F. 2014); *Palma*, 2015 CCA LEXIS 444, *30 (A.F.C.C.A. 2015); *Novy*, 2015 CCA LEXIS 289, *7 (A.F.C.C.A. 14 July 2015); *United States v. Albarda*, 2021 CCA LEXIS 346 (A.F.C.C.A. 7 July 2021); *United States v. Westcott*, 2022 CCA LEXIS 156 (A.F.C.C.A. 17 March 2022); *United States v. Anderson*, 2022 CCA LEXIS 181 (A.F.C.C.A. 25 March 2022); *United States v. Martinez*, 2022 CCA LEXIS 212 (A.F.C.C.A. 6 April 2022).

15. The Air Force Court repeatedly and specifically rejected the appellants' attempts to use the Fifth Amendment to import to the military the unanimity requirement for six-juror civilian trials from *Burch v. Louisiana*, 441 U.S. 130 (1979). In *Daniel*, the Air Force Court held that "We find the authorities cited by appellant to buttress his claim of a due process violation, *Ballew* and *Burch*, do not in any way limit the power of Congress to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution." 2014 CCA LEXIS 224, *7–8. Similarly, in *Palma*, the Air Force Court specifically rejected the appellant's citation to *Burch* and *Ballew* for a unanimity requirement in military courts, reasoning that military voting requirements were permitted by Article I, Section 8 and "A long line of case precedence recognized that courts-martial are not subject to the same general constitutional requirements as civilian jurisdictions." 2015 CCA LEXIS 444, *30-31 (citing *Ex parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. 2 (1866); *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004)). Likewise, in *Roblero*, the Air Force Court considered the appellant's citation to *Burch* arguing for a unanimous verdict for a smaller panel, but the Court rejected this argument, concluding that "Appellant here has failed to meet his heavy burden to demonstrate that Congress' determinations should not be followed." 2017 CCA LEXIS 168, *20. Along the same lines, in *Spear*, the Court again rejected "The appellant's argument in this case focuses on due process under the Fifth Amendment, contending that the Supreme Court's decisions in *Ballew* and *Burch* are based in due process," explaining that "[w]ith our deference to Congress at its apogee, we find the appellant has failed to meet his heavy burden of showing the existence of any extraordinarily weighty factors that would overcome the balance struck by Congress between the needs of the military and the rights of service members." 2015 CCA LEXIS 310 at *5. In *Novy*, the Court held "We find the authorities cited by appellant to buttress her claim of a due process violation, *Ballew* and *Burch*, do not limit the power of Congress to create rules for courts-martial pursuant to Article I, Section 8, of the Constitution. Consistent with our superior court's precedent, courts-martial are not subject to the same jury requirements as other criminal trials." 2015 CCA LEXIS 289, at *9.

16. Sister-services have also rejected challenges to non-unanimous verdicts on Constitutional grounds. *United States v. Mayo*, 2017 CCA LEXIS 239, *20-23 (A.C.C.A. 7 April 2017) (rejecting arguments for unanimity based on the Fifth, Sixth, and Eighth Amendments); *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A. 2022); *United States v. Causey*, 82 M.J. 574 (N.M.C.C.C. 2022); *United States v. Vance*, 2022 CCA LEXIS 374 (N.M.C.C.A. 2022).

17. The United States Court of Appeals for the D.C. Circuit has also held that an accused could not use Fifth Amendment due process to import a Sixth Amendment jury trial right into a court-martial. *Sanford*, 586 F.3d at 29. In *Sanford*, the appellant was convicted by a special court-martial with four members. The appellant filed a habeas petition challenging his conviction by a court-martial consisting of less than six members. The appellant relied upon *Ballew v Georgia*, 435 U.S. 223 (1978), where the Supreme Court required a six-person jury in civilian trials, and argued that his conviction by less than six members violated his Fifth Amendment Due Process rights. The D.C. Circuit rejected the appellant's attempts to use the Fifth Amendment to impose a jury trial right on the military. First, the Court reasoned that the appellant's argument would be inconsistent with *Quirin*, because it would use the Fifth Amendment to import a right that the Supreme Court had found inapplicable. Second, the Court held that the right to a jury trial could not simply be "converted into a procedural due process right by incorporation." *Id.* Third, the Court found that the appellant had not met his heavy burden under *Weiss*. As the Court explained, given the differences between the military and civilian systems, it was not enough to simply point to *Ballew*. In *Ballew*, the Court explained, the petitioners had presented actual empirical evidence based upon studies of juries and group dynamics showing that there were constitutional deficiencies with juries that were too small. In *Weiss*, by contrast, the petitioners simply pointed to the holding and studies in *Ballew* and asserted that it was up to the government to prove that those did not apply in a court-martial. As the Court explained, this was not sufficient to meet the petitioner's burden. The burden was on the petitioners to show that the evidence in *Ballew* or comparable empirical evidence about the military justice system would show a due process violation—not on the government to provide evidence that *Ballew* applied differently to the military. In so holding, the Court specifically noted that the military justice process "has features to ensure accurate fact finding not found in the civilian justice system." Id. In particular, the Court notes that "court members are not selected at random" but rather "selected from the military population on the basis of who is best qualified for the position," that court members are required to be "fair and impartial," and that the military system provides robust appellate review. *Id.*

18. The test for the Defense's due Fifth Amendment claim is "whether the factors militating in favor of [the asserted right] are so weighty as to overcome the balance struck by Congress" in exercising its Article I authority to legislate how courts-martial are processed. *Weiss v. United* States, 510 U.S. 163, 177-78 (1994). Indeed, in every case where the Air Force Court has addressed Fifth Amendment arguments for imposing unanimity on the military, the Court has applied the test from *Weiss*. *Roblero*, 2017 CCA LEXIS 168, *19–20 (A.F.C.C.A. 17 Feb 2017); *Canada*, 2016 CCA LEXIS 610, *33–34 (A.F.C.C.A. 20 Oct 2016); *Spear*, 2015 CCA LEXIS 310, *8 (A.F.C.C.A. 30 Jul 2015); *Daniel*, 2014 CCA LEXIS 224, *7–10 (A.F.C.C.A. 1 Apr 2014); *Palma*, 2015 CCA LEXIS 444, *30 (A.F.C.C.A. 2015) review denied 75 M.J. 233 (C.A.A.F. 2016); *Novy*, 2015 CCA LEXIS 289, *7 (A.F.C.C.A. 14 July 2015).

19. In *Weiss*, the United States Supreme Court explained this high burden and the deference due to Congress as follows:

> 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. . . .
>
> [T]he tests and limitations of due process may differ because of the military context. The difference arises from the fact that the Constitution contemplates that 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. Judicial deference thus is at its apogee when reviewing congressional decision making in this area. Our deference extends to rules relating to the rights of service members: Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. . . . We have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated.
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> . . . In determining whether the Due Process Clause requires [a perceived right], we asked whether the factors militating in favor [of the perceived right] are so extraordinarily weighty as to overcome the balance struck by Congress.

510 U.S. at 176–77 (quotations and citations omitted).

20. The Court in *Weiss* also considered the long history of court-martial practice and Congress's repeated legislative choices in deciding that the practice of not having fixed terms for military judges was constitutional. As the Court explained:

> Although a fixed term of office is a traditional component of the Anglo-American civilian judicial system, it has never been a part of the military justice tradition. The early English military tribunals, which served as the model for our own military justice system, were historically convened and presided over by a military general. No tenured military judge presided. *See Schlueter*, The Court-Martial: An Historical Survey, 87 Mil. L. Rev. 129, 135, 136-144 (1980).
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> In the United States, although Congress has on numerous occasions during our history revised the procedures governing courts-martial, it has never required tenured judges to preside over courts-martial or to hear immediate appeals therefrom. *See* W. Winthrop, Military Law and Precedents, 21-24, 953-1000 (2d ed. 1920) (describing and reprinting the Articles of War, which governed court-martial proceedings during the 17th and 18th centuries); F. Gilligan & F. Lederer, 1 Court-Martial Procedure 11-24 (1991) (describing 20th-century revisions to Articles of War, and enactment of and amendments to UCMJ). Indeed, as already mentioned, Congress did not even create the position of military judge until 1968. Courts-martial thus have been conducted in this country for over 200 years without the presence of a tenured judge, and for over 150 years without the presence of any judge at all.

Id. at 179.

21. Military and civilian courts have repeatedly affirmed that the *Weiss* standard applies to due process claims at courts-martial challenging Congress's express exercise of its Article I authority. E.g. *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) ("The *Weiss* standard controls Appellee's [due process] claim that Article 29(b), UCMJ, and the procedures to implement it set forth in R.C.M. 805(d)(1) are unconstitutional as applied to him."); *Spear*, 2015 CCA LEXIS 310, at *6 (citing *Vazquez*, 72 M.J. at 18) ("[t]he *Weiss* standard is the appropriate test to determine whether a due process violation has occurred in the court-martial setting."); *United States v. Gray*, 51 M.J. 1, 49-50 (C.A.A.F. 1999) (holding that the *Weiss* standard was "the appropriate test to determine due process violations in court-martial procedure"); see also *Easton*, 71 M.J. at 174-76 (holding that Article 44(c), UCMJ, is constitutional as applied to trials by court members when Congress appropriately exercised its Article I power).

The History of Courts-Martial & Non-Unanimous Verdicts

21. As the preamble to the MCM states, "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."

22. Non-unanimous verdicts have been a fixture of courts-martial since the Revolutionary War. Non-unanimous verdicts were part of the British Articles of War prior to the Revolutionary War and in the first United States Articles of War enacted in 1776. *See* W. Winthrop, Military Law and Precedents, 931 (2d ed. 1920).

23. Since those first Articles of War, Congress has repeatedly enacted laws governing military justice that permit non-unanimous verdicts throughout the history of the United States. *See*, Winthrop, Military Law and Precedents (2d ed. 1920). Additionally, with respect to unanimity in the modern UCMJ, Congress has specifically provided for unanimity only in the particular instance of imposing the death penalty. UCMJ Art. 52; R.C.M. 1004(a)(2)(A).

24. As the Supreme Court recognized in *Ortiz v. United States*, courts-martial pre-date the constitution, and the Framers recognized and sanctioned courts-martial. 138 S. Ct. 2165, 2175 (2018). As the Court explained:

> The court-martial is in fact "older than the Constitution," 1 Schlueter §1-6(B), at 39; the Federalist Papers discuss "trials by courts-martial" under the Articles of Confederation, see No. 40, p. 250 (C. Rossiter ed. 1961). When it came time to draft a new charter, the Framers "recogni[zed] and sanction[ed] existing military jurisdiction," W. Winthrop, Military Law and Precedents, 48 (2d ed. 1920) (emphasis deleted), by exempting from the Fifth Amendment's Grand Jury Clause all "cases arising in the land or naval forces." And by granting legislative power "[t]o make Rules for the Government and Regulation of the land and naval Forces," the Framers also authorized Congress to carry forward courts-martial.

> Art. I, §8, cl. 14. Congress did not need to be told twice. The very first Congress continued the court-martial system as it then operated. See Winthrop, supra, at 47. And from that day to this one, Congress has maintained courts-martial in all their essentials to resolve criminal charges against service members. *See* 1 Schlueter §1-6, at 35-48.

Id. at 2175.

25. "[F]ounding-era courts-martial adjudicated a long list of offenses, some carrying capital punishment, including for crimes involving homicide, assault, and theft." *Ortiz v. United States*, 138 S. Ct. 2165, 2199 (2018) (Alito, J., dissenting) (citing Winthrop, Military Law and Precedents, 1495-1498 (2d ed. 1806)).

26. The Court's recognition in *Ortiz* that Courts-Martial are judicial in character was not new. Indeed, the Court in *Ortiz* cites authorities describing courts-martial as judicial in character from the founding of the United States, to the Civil War, to the present. *Ortiz*, 138 S. Ct. at 2175 (citing Winthrop, Military Law and Precedents, 54 (2d ed. 1920); *Runkle v. United States*, 122 U.S. 543, 558 (1887); Caleb Nelson, *Adjudication in the Political Branches*, 107 Colum. L. Rev. 559, 576 (2007)).

27. The Army Court in *Mayo* further explained that Congress legislated non-unanimous verdicts in crafting the modern UCMJ as a bulwark against unlawful command influence. As the Court explained:

> The decision to allow non-unanimous verdicts was a policy decision made by Congress during the crafting of the UCMJ. In those post-World War years a preeminent concern was the danger posed by unlawful command influence. *See* House Armed Services Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session (1949) at 606 (statement of Prof. Edmund M. Morgan). A requirement for a unanimous panel decision, while having obvious advantages in truth-determination, would also undercut several protections against unlawful command influence that exist under current military justice practice. As these may be non-obvious considerations, we address them briefly.
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> First, a requirement for a unanimous panel verdict would necessarily require the public disclosure of each panel member's vote. Panel members are not anonymous; most obviously to the convening authority who detailed them to the court-martial. Currently, regardless of the verdict, an individual panel member's vote cannot be determined. The non-unanimous vote allows a panel member to cast what they might perceive to be an unpopular vote. In a system of unanimous panel verdicts, each panel member's superior, subordinate, and peer would know exactly how each panel member voted in each case. Consider the current oath taken by a panel member requires them not to divulge the vote or opinion of any member—an oath which would become pointless when the unanimous verdict is read in open court. *See* R.C.M. 807(b)(2) discussion.

> Second, unanimous verdicts in the civilian system require repeated voting until a unanimous decision is reached or the jury is "hung." Currently, absent the relatively rare request to reconsider a finding, a panel member's formal vote is conducted by a single secret written ballot. By contrast, unanimity requires re-voting and—when there is sharp disagreement between two panel members—one panel member's views usually must yield to the other. When deliberations must continue until there is unanimity, secret ballots would only frustrate the goal of deliberating until all panel members are in agreement. As a result, a requirement to keep deliberating until all members agree poses special concerns when one panel member outranks the other.
>
> Military life and custom may condition a panel member to be wary of questioning the reasoning of senior members, or a senior panel member may be unaccustomed to having his or her reasoning or decisions questioned. It is unlikely that the lessons learned during a lifetime of service in a rigid hierarchical system can always be briefly suspended during deliberations. The current practice of a single secret written ballot, collected and counted by the junior member of the panel, allows a panel member to more freely vote his or her conscience. By contrast, unanimity requires continued debate until all agree. While we might presume that panel members could deliberate a case fairly without the influence of rank or position in most cases, such deliberations would proceed without the current protections provided by single a secret written ballot. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 2-5-14 (10 Sept. 2014)
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> In short, current practice helps reduce the possibility of impermissible influences on panel members both inside and outside the deliberation room. These pernicious concerns of improper influence will be most acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

Mayo, 2017 CCA LEXIS 239 at *19-22.

Stare Decisis

28. *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 there is a compelling reason to overrule itself. *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018) (quoting *United States v. Quick*, 74 M.J. 332, 343 (Stucky, J., dissenting) (C.A.A.F. 2015)).

29. *Stare decisis* reflects "a policy judgment that 'in most matters it is more important that the applicable rule of law be settled than it be settled right.'" *Agostini v. Felton*, 521 U.S. 203, 235 (1997) (quoting *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 306 (1932) (Brandies, J., dissenting)). "Unless we wish anarchy to prevail within the federal judicial system, a precedent

of the Supreme Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370 (1982).

30. 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. As the Supreme Court has explained on the occasion of overruling its own precedent:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing [the Supreme Court precedent]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989).

ARGUMENT

Under Established Supreme Court and C.A.A.F. Precedent, The Sixth Amendment Right to a Jury Trial Still Does Not Apply to the Military

31. In addition to the still-binding precedent of the Supreme Court of *Quirin*, this Court is further bound by the precedent of the C.A.A.F., which has repeatedly held that the Sixth Amendment right to a jury trial has never been incorporated to the military. *Riesbeck*, 77 M.J. at 162; *see also United States v. Loving*, 41 M.J. 231, 285 (C.A.A.F. 1994) (recognizing that Article 25, UCMJ, contemplates that a court-martial panel will not be a representative cross-section of the military, as required under the Sixth Amendment).

32. No court has ever held that the Sixth Amendment right to a jury trial has extended to the military. In fact, every court to address that question has held that the Framers intended for military tribunals to be exempt from that requirement. That same holding has applied to all the requirements attendant to jury trials—from declining to require that they represent a fair cross-section, to finding that Article 25, UCMJ, by which a convening authority selects members, is constitutional. *Riesbeck*, 77 M.J. at 162–63. Similarly, no court has ever held that a service-member has a constitutional right to a unanimous verdict at a court-martial, and in light of binding precedent that there is no jury right to begin with, this Court has no authority to hold otherwise.

33. Challenges to the constitutionality of the findings of other similarly composed courts-martial have been repeatedly rejected. *See, e.g.*, *United States v. Brown*, 65 M.J. 356, 359 (C.A.A.F. 2007) ("[M]ilitary criminal practice requires neither unanimous panel members, nor panel agreement on one theory of liability, as long as two-thirds of the panel members agree that the government has proven all elements of the offense."); *United States v. Viola*, 27 M.J. 456 (C.M.A. 1998) (summ. disp.); *United States v. Wilt*, 2015 CCA LEXIS 57, *24–25 (N.M.C.C.A. 19 Feb 2015) (unpublished); *United States v. Rollins*, 2018 CCA LEXIS 372, *25 (N.M.C.C.A.

30 Jul 2018); *United States v. Easton*, 71 M.J. 168, 169 (C.A.A.F. 2012) ("[I]n courts-martial there is no right to indictment by a grand jury . . . in addition, there is no Sixth Amendment right to a trial by jury in courts-martial).

34. The Defense errs by relying on dicta in *Middendorf v. Henry*, 425 U.S. 25 (1976) concerning the right to counsel. *Middendorf* did not hold that the Sixth Amendment applied to courts-martial, and no court has so held since. On the contrary, in *Riesbeck*, 77 M.J. at 162, the C.A.A.F. clearly recognized that "courts-martial are not subject to the jury trial requirements of the Sixth Amendment" after over 40 years with *Middendorf* on the books. Even assuming *arguendo* that *Middendorf* does somehow question *Quirin*, that is just the type of "appears to rest on reasons rejected in some other line of decisions" argument that the Supreme Court warned lower courts not to indulge in *Rodriguez*. *Id.*

The Supreme Court's Holding in Ramos v. Louisiana Does Not Apply to the Military

35. The Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020) in no way diminishes the holding in *Quirin* or its progeny. *Quirin* acknowledged the common law right of jury trials, in the same way as *Ramos,* but explicitly declined to extend that common law right to military members facing court-martial.

36. In *Ramos*, the Supreme Court focused upon the right to a unanimous jury as being part and parcel of the Sixth Amendment right to a jury trial. Notably, the Court addresses that the Sixth Amendment and Article III provide for a right to a jury trial. Military courts-martial, as discussed above, were founded under Article I, and the Sixth Amendment does not apply. Therefore, because the jury right at issue in *Ramos* has not been incorporated into the military, and indeed has been expressly exempted, the subsect of the unanimous jury verdict has similarly not been incorporated to the military.

37. Further, it is notable that *Ramos* relies heavily upon a review of the historical and common law application of the unanimous jury verdict—something which the Court in *Quirin* and *Milligan* acknowledged did not exist for military tribunals. Indeed, both the British Articles of War of 1765, which were in force at the beginning of the Revolutionary War, and the first Articles of War of the United States in 1776 provided for non-unanimous verdicts in courts-martial. *See* W. Winthrop, Military Law and Precedents, 931 (2d ed. 1920).

38. Military courts have previously addressed the question of whether a non-unanimous verdict within the military context was constitutional and have found that it was—despite the then-pending question at the Supreme Court of whether unanimous verdicts were required in state criminal trials. As far back as 1973, the Air Force Court of Military Review explained that "whatever the Supreme Court's decision may ultimately be with regard to unanimous verdicts in the federal jury system, it would appear to affect only trials in courts whose jurisdiction is founded under Article III of the Constitution, and not to military courts which exist by virtue of Article I." *United States v. Lebron*, 46 C.M.R. 1062, 1068 (A.F.C.M.R. 1973). The Court then continued to find that Article 52(a)(2) of the UCMJ is "nothing more than a valid exercise of congressional powers under Article I, § 8, clause 14 of the Constitution." *Id.* at 1069.

39. Nothing in the *Ramos* decision implies any intention to overturn the long line of precedent holding that military law is separate and distinct from civilian law. In fact, there is not a single mention of the military system in the five separate authored opinions in *Ramos*. Given the constitutional and statutory differences between military law and civilian criminal law, this Court should decline to extend *Ramos* to this Court-Martial.

40. Additionally, under *Rodriguez*, even if this Court believes that *Quirin* or its progeny "appear[] to rest on reasons rejected in some other line of decisions" like *Ramos*, this Court should still follow *Quirin* and "leav[e] to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez*, 490 U.S. at 484. Under vertical *stare decisis*, this Court "must strictly follow the decisions handed down by higher courts." *United States v. Andrews*, 77 M.J. 393 (C.A.A.F. 2018) (quoting *United States v. Quick*, 74 M.J. 332, 343 (C.A.A.F. 2015) (Stucky, J., dissenting)). Therefore, this Court should follow the well-established and binding precedent holding that there is no right to a unanimous verdict in courts-martial.

Congressionally-Mandated, Non-Unanimous Verdicts in Courts-Martial Are Not a Violation of Fifth Amendment Due Process

41. The Air Force Court of Criminal Appeals has repeatedly found no due process violation concerning the Congressionally-mandated, non-unanimous verdicts in courts-martial. Indeed, since 2014, the Air Force Court has so held in ten separate cases. *Roblero*, 2017 CCA LEXIS 168, at *19–20; *Canada*, 2016 CCA LEXIS 610, at *33–34; *Spear*, 2015 CCA LEXIS 310; *Daniel*, 2014 CCA LEXIS 224 at *7–10; *Palma*, 2015 CCA LEXIS 444 at *30; *Novy*, 2015 CCA LEXIS 289 at *7; *Albarda*, 2021 CCA LEXIS 346; *Westcott*, 2022 CCA LEXIS 156; *Anderson*, 2022 CCA LEXIS 181); *United States v. Martinez*, 2022 CCA LEXIS. While these opinions are unpublished, they are numerous, recent, and instructive. Moreover, the Defense has not cited a single opinion holding that unanimous verdicts are required in courts-martial.

42. And it is not just the Air Force. The Army Court has also held that the Fifth Amendment does not require unanimous verdicts in courts-martial. *United States v. Mayo*, 2017 CCA LEXIS 239, *20-23 (A.C.C.A. 2017) (Rejecting arguments for unanimity based on the Fifth, Sixth, and Eighth Amendments, and recognizing that "the requirement for non-unanimous verdicts in the military justice system is long-standing and well-settled law which we are obligated to follow.").

43. Civilian Courts have also rejected attempts to incorporate Sixth Amendment jury rights into courts-martial under the guise of the Fifth Amendment. *Sanford*, 586 F.3d at 35 (holding a Sixth Amendment jury trial right made applicable to the states by the Fourteenth Amendment cannot then automatically convert to a Fifth Amendment due process right applicable to courts-martial); *United States v. Mayo*, 2017 CCA LEXIS 239, *23 (A.C.C.A. 2017)).

44. Defense notes that this motion has been granted by an Army trial judge, and therefore this court would not be the first to do so. (Def. Mtn. at 8). However, this is not precedent this Court should follow as the Army Criminal Court of Appeals overturned that judge's ruling on 9 June 2022. *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A. 2022).

44. *Ramos* does not change the Fifth Amendment analysis for courts-martial for two reasons. First, *Ramos* was based on the Sixth Amendment, which does not apply to the military. Second,

the Supreme Court has required unanimous verdicts trials with six jurors since *Burch* in 1979, yet courts have consistently and specifically rejected attempts to impose such a unanimity requirement on the military with Fifth Amendment Due Process. *See Daniel* ("*Ballew* and *Burch*, do not in any way limit the power of Congress to create rules for courts-martial pursuant to Article I, Section 8 of the Constitution."); *Palma*, 2015 CCA LEXIS 444, *30-31 (same); *Roblero,* 2017 CCA LEXIS 168, *20 (Appellant's citing to *Burch* failed to carry the "heavy burden to demonstrate that Congress' determinations should not be followed."); *Spear*, 2015 CCA LEXIS 310 at *5 (Arguments based on the unanimity requirement from *Burch* "failed to meet his heavy burden of showing the existence of any extraordinarily weighty factors that would overcome the balance struck by Congress between the needs of the military and the rights of service members."); *Novy,* 2015 CCA LEXIS 289 at *9 ("We find the authorities cited by appellant to buttress her claim of a due process violation, *Ballew* and *Burch*, do not limit the power of Congress to create rules for courts-martial pursuant to Article I, Section 8, of the Constitution. Consistent with our superior court's precedent, courts-martial are not subject to the same jury requirements as other criminal trials.").

45. Because Congress is constitutionally charged with regulating courts-martial, Congress's repeated decisions to mandate non-unanimous verdicts demand deference. Applying *Weiss*, no arguments in favor of unanimous court-martial verdicts made by the Defense are "so extraordinarily weighty as to overcome the balance struck by Congress." 510 U.S. at 177. On this point, the Air Force Court's reasoning in *Roblero* and *Spear* and the D.C. Circuit's Court's reasoning in *Sanford* is instructive. In *Roblero* and *Spear*, the appellants simply relied on civilian opinions including *Burch* and *Ballew* to argue that a unanimous verdict with six members was "so weighty" as to overcome Congress's judgment. The Air Force Court rejected these arguments, noting that with deference to Congress at its apogee, the appellants had not carried their burden to overrule Congress. *Roblero,* 2017 CCA LEXIS 168, *20; *Spear*, 2015 CCA LEXIS 310 at *5. The Defense here failed to do what the appellants in *Bellew* did—provide actual evidence that smaller juries are detrimental in courts-martial in light of the differences between the civilian and military justice systems. Accordingly, the Court in *Sandford* found that the appellant had not carried the heavy burden under *Weiss*.

46. The Defense's appeal to a Sixth Circuit opinion that did not even mention the military to assert that the Fifth Amendment requires unanimity at courts-martial due to the burden of proof must fail for the same reasons. (*See* Def. Mtn. at 7 citing *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). First, this is a Fifth Amendment argument. As discussed above, a litany of A.F.C.C.A. and sister-service-court cases post-*In Re Winship*, 379 U.S. 358 (1970), have rejected Fifth Amendment due process challenges to court-martial voting. Second, here again, *Ramos* should not impact this Court's analysis, as *Ramos* is decided entirely on Sixth Amendment grounds not applicable to the military and did not even mention the military or the burden of proof. Third, the Defense's citation to *Hibdon* does not help the Defense meet its heavy burden under *Weiss*. Whereas the petitioners in *Ballew* and *Burch* satisfied their burden with reliance upon empirical evidence and testimony concerning civilian juries, the Defense here relies on *Hibdon* merely to make rhetorical assertions about a supposed logical inconsistency between non-unanimous verdicts and the "beyond a reasonable doubt" standard. What the Defense still lacks is actual evidence of the kind the D.C. Circuit found wanting in *Sanford*—i.e. actual evidence that non-unanimity in courts-martial verdicts fails to comport with the reasonable doubt standard, or otherwise deprives the Accused of due process of law.

47. Additionally, as a practical matter, it is a logical fallacy to assert that if a single member votes to acquit, that necessarily means the Government has not met its burden of proof. Prior to closing for deliberations, the Court instructs members that "proof beyond a reasonable doubt is proof that leaves *you* firmly convinced of the Accused's guilt." *See Military Judge's Benchbook*, ¶ 2-5-12. The panel is further instructed that proof beyond a reasonable doubt is "not proof that overcomes every possible doubt." Finally, the members are given this charge: "Each of you must impartially decide whether the accused is guilty or not guilty according to the law I have given you, the evidence admitted in court, and your own conscience." *Id*. As these instructions demonstrate, the proof beyond a reasonable doubt standard allows an indefinite level of certitude achieved by the thoughtful consideration and deliberation of each member exercising his or her own independent judgment. It does not and cannot guarantee that guilt is established to any level of mathematical certainty. Neither a three-fourths' vote of eight members nor a unanimous vote of twelve can guarantee with absolute certainty the Accused's guilt. But the opposite is true as well—that a thirteenth juror may have doubted a defendant's guilt does not invalidate the otherwise unanimous verdict of twelve, and that two of eight have doubt does not *per se* invalidate the determination of the other six. There is no mathematical formula for the standard of proof, and no court has ever imposed one on the military. This Court should decline Defense's invitation to do so here.

48. Moreover, the "if just one member/juror has a doubt" argument must also fail because there is no question that perfectly constitutional convictions can result where more than one member/juror has a reasonable doubt. A court-martial convening authority may detail alternate members who hear all of the evidence in the case, yet the alternates are not asked for their vote, and an Accused may be convicted even if multiple alternate members had a reasonable doubt. Moreover, in civilian courts, where mistrials are a possibility, it is possible to convict where more than one properly empaneled juror has a reasonable doubt. In civilian court, an Accused is convicted even if the first trial's jury votes 11 to 1 to acquit, causing a mistrial and a new trial, and the second trial's jury votes 12 to 0 to convict. In that case, only 13 of 24 properly empaneled jurors voted to convict—less than the percentage required at a court-martial—but the Accused is nevertheless found guilty. Yet, in either of these cases, there is no question that the conviction is constitutional. The Supreme Court pointed out just this logical inconsistency in *Johnson v. Louisiana*, 406 U.S. 356, 363 (1972), which came 22 years after *Hibdon*, explaining "That want of jury unanimity is not to be equated with the existence of a reasonable doubt emerges even more clearly from the fact that when a jury in federal court, which operates under the unanimity rule and is instructed to acquit a defendant if it has a reasonable doubt about his guilt, cannot agree unanimously upon a verdict, the defendant is not acquitted, but is merely given a new trial. If the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial." While overruling *Johnson's* Sixth Amendment analysis, the Supreme Court in *Ramos* did not question, whatsoever, *Johnson's* analysis of the Fifth Amendment and the beyond a reasonable doubt standard. Rather, *Ramos* was based on historical analysis of the language "trial by an impartial jury" in the Sixth Amendment. In fact, the majority in *Ramos* does not even mention the Fifth Amendment. Moreover, the *Johnson* Court's analysis of the Fifth Amendment and the burden of proof quoted above was done assuming the federal unanimous jury voting rules, which were in place at the time of *Johnson*. Thus, there is no reason *Ramos* would alter the *Johnson* court's analysis of the standard of proof. Had the Court in *Ramos* wished to

question the Court in *Johnson's* analysis of the standard of proof, the Court in *Ramos* could have done so, but it did not. Indeed, had *Ramos* overruled *Johnson's* analysis of the Fifth Amendment and the beyond a reasonable doubt standard, there would now be no such thing as mistrials in civilian courts in the United States—but that is clearly not the case.

49. *Burch* and *Ballew* also belie any "if only Congress had known about *Ramos* when enacting the UCMJ" arguments. *Ballew* has been on the books since 1978. *Burch* has been on the books since 1979. So, since 1979, Congress has known that civilian courts must have a minimum of six jurors and that six-juror civilian courts must be unanimous. Yet, from 1979 to MJA 2016, Congress provided for minimum five-member GCMs with two-thirds voting. And, beginning on 1 January 2019, Congress provided for eight-member GCMS with three-fourths voting. In short, there is no reason to believe *Ramos* would have changed Congress's reasoned judgment in enacting the UCMJ. Moreover, even if this Court thinks *Ramos* will change Congress's mind, that is Congress's prerogative under Article I, Section 8, not this Court's prerogative.

The History of the Military Justice System Re-Affirms Congress's Broad Authority to Legislate Voting Requirements at Courts-Martial and Other Military Justice Matters

52. The history of courts-martial demonstrates the extraordinary discretion afforded to Congress in designing a system of military justice and the extraordinary judicial deference afforded to Congress's judgement. Congress's statutory changes to the military justice system over time demonstrate that Congress has broad authority to fashion such a system. The fact that the system now more resembles civilian justice systems is not inevitable or the result of constitutional limitations on the authority of Congress. Rather, it is the result of policy considerations affecting the exercise of Congress's broad discretion. *Mayo* provides an example. After the extraordinary mobilization required for the Second World War, unlawful command influence was preeminent policy concern that motivated Congress to include non-unanimous verdicts in the design of the modern UCMJ. The history of Congress's military justice legislation is more properly viewed as an indication that there is a broad left and right to Congress's authority to design a military justice system. The fact that Congress has moved more to one side of that authority now does not mean that the other side of that authority has ceased to exist. It just means that Congress has made a reasoned policy choice, not that the military justice system has somehow "evolved" into inapplicable jury trial rights, and not that Congress lacks the authority to make different choices in the future.

53. The Court's opinion in *Ortiz* did not signal the application of new constitutional rights at Court-Martial. Indeed, the holding of *Ortiz* merely re-affirmed the status-quo at the time—that the Supreme Court could exercise appellate jurisdiction to review cases that had passed up through the military courts of appeals. While the Court in *Ortiz* pointed out similarities between the military and civilian justice system, the Court also pointed out that the judicial character of courts-martial was not new but had been consistently recognized over the history of the United States. The Court in *Ortiz* thus did not hold that the judicial character of courts-martial was a new principal of law signaling the application of new rights. Rather, the Court merely found that the judicial character of courts-martial which had been long-recognized sufficed as the basis for the Court's appellate jurisdiction.

The Findings Worksheet Should Not Be Changed

52. The members should not be questioned about the unanimity of the verdict as prohibited by R.C.M. 922(e). *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A. 2022). Simply amending the findings worksheet does not change the fact that this is an inquiry into the voting decisions of the members. Nor does is alleviate the valid concerns the *Mayo* court raised.

CONCLUSION

WHEREFORE, the Government respectfully requests this Honorable Court deny the Defense Motion for Appropriate Relief: Unanimous Verdict. The Government does not request an Article 39(a) session to introduce additional evidence or provide argument.

Respectfully submitted,

[redacted]

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CERTIFICATE OF SERVICE

I certify that a copy of this Government Response to Defense Motion for Appropriate Relief: Unanimous Verdict was served upon the Military Judge and Defense Counsel via electronic mail on 30 May 2023.

[redacted]

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