DEPARTMENT OF THE AIR FORCE
UNITED STATES AIR FORCE TRIAL JUDICIARY

UNITED STATES OF AMERICA	)	
	)	DEFENSE MOTION FOR
v.	)	UNANIMOUS VERDICT
	)	
	)	
1ST LT TRAVIS C. BAKER	)	
Delta 4 Detachment 2 (SpOC)	)	
Buckley Space Force Base, Colorado	)	15 May 2023
	)	

MOTION

COMES NOW the Accused, 1st Lt Travis C. Baker, by and through counsel, pursuant to Fifth and Sixth Amendments to the United States Constitution; Rules for Courts-Martial (RCM) 906, 920, and 921; and applicable case law, and respectfully moves this Honorable Court to require that any finding of guilt beyond a reasonable doubt must be by a unanimous verdict. If this Court does not grant this request, the Defense requests the Court provide an instruction that the President must announce whether any finding of "guilty" was the result of a unanimous vote, without stating any numbers or names. The Defense does not request an Article 39(a) session to present evidence or make argument.

SUMMARY

1st Lt Baker faces one charge and two specifications in violation of Article 107, Uniform Code of Military Justice (UCMJ), one charge and two specifications in violation of Article 113, UCMJ, and one charge and two specifications in violation of Article 133, UCMJ.

In *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), the Supreme Court "repudiated [its] 1972 decision in *Apodaca v. Oregon*, 406 U.S. 404 (1972), which had allowed non-unanimous juries in state criminal trials." *Edwards*, 141 S. Ct. at 1551. Instead, *Ramos* held that the Due Process Clause of the Fourteenth Amendment required applying the same jury-unanimity rule to state convictions for criminal offenses that already applied to federal (civilian) convictions under the Jury Trial Clause of the Sixth Amendment. 140 S. Ct. at 1397. As the Supreme Court reiterated this past May, in so holding, *Ramos* unequivocally broke "momentous and consequential" new ground. *See Edwards*, 141 S. Ct. at 1559; *see also id*. at 1555–56 (noting that "[t]he jury-unanimity requirement announced in *Ramos* was not dictated by precedent or apparent to all reasonable jurists" beforehand). Undeniably, the *Edwards* majority recognized that *Ramos* was

on par with other "landmark" cases of criminal procedure "like *Mapp, Miranda, Duncan, Batson,* [and] *Crawford . . . .*" *Id.* at 1559.

For decades, the prevailing assumption has been that, as was true for state courts until last year, the Constitution does not require unanimous verdicts for non-capital courts-martial.[1] *See, e.g.*, *United States v. Lebron*, 46 C.M.R. 1062, 1068–69 (A.F.C.M.R. 1973). This purportedly followed from the Supreme Court's recognition in cases such as *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), and *Ex parte Quirin*, 317 U.S. 1 (1942), that the Sixth Amendment's jury-trial right does not extend to military tribunals. *See Lebron*, 46 C.M.R. at 1068–69; *see also United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986) ("[C]ourts-martial have never been considered subject to the jury-trial demands of the Constitution.").

Ramos turns that assumption on its head. It does this not by applying the Sixth Amendment Jury Trial Clause to courts-martial, but by emphasizing two features of the unanimity requirement that *do* apply to military trials, whether through the Sixth Amendment or the Fifth Amendment. First, *Ramos* makes clear that the right to a unanimous verdict is an essential aspect of the Sixth Amendment right to an *impartial* jury—a right that, as the Court of Appeals for the Armed Forces (CAAF) has recognized, both the UCMJ and the Constitution provide to the accused in a court-martial. *See, e.g., United States v. Richardson*, 61 M.J. 113, 118 (C.A.A.F. 2005). Second, *Ramos* recognizes that unanimity is central to the fundamental *fairness* of a jury verdict—as opposed to a verdict rendered by a judge. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide Appellant with the right to be tried by a panel in the first place. But as CAAF has long held, "[a]s 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); *see also Richardson*, 61 M.J. 113, 118. Thus, whether under the Sixth Amendment or the Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions for the offenses with which 1st Lt Baker is charged.

FACTS

1. On 9 December 2022, [redacted], preferred one charge and two specifications in violation of Article 107, Uniform Code of Military Justice (UCMJ), one charge and two specifications in violation of Article 113, UCMJ, and one charge and two specifications in violation of Article 133, UCMJ. On 18 January 2023, the charges were referred to trial by a General Court-Martial. For these offenses, 1st Lt Baker faces federal convictions, a substantial amount of confinement, a dismissal, forfeiture of pay and allowances, and a reprimand. Manual for Courts-Martial (MCM), 2019 ed., Appx. 12.

[1] The UCMJ and the Constitution both require unanimous verdicts as to the conviction and sentence in capital cases. *See* 10 U.S.C. § 852(b)(2); *United States v. Gray*, 51 M.J. 1, 61 (C.A.A.F. 1999).

2. According to a 2018 article from the Council on Foreign Relations, "now, there are about 1.3 million active-duty personnel, or less than 0.5 percent of the U.S. population."[2]

3. Under the previous "10-2" systems employed by Louisiana and Oregon until they were ruled unconstitutional in *Ramos*, 140 S. Ct. 1390 (2020), an accused could be convicted so long as ten members of a twelve-person jury voted to convict. Statistically speaking, these systems required more than 83% of the jury to vote in favor of guilt in order to convict the accused.

4. Under the system which 1st Lt Baker faces in this court-martial, assuming he elects trial by members, the panel will be composed of eight members. However, it is possible for a general court-martial panel to be reduced to either seven or six members in this case. Regardless, in order to convict 1st Lt Baker of an offense, three-fourths of the panel must vote to convict. *See generally*, 10 U.S.C. §§ 829(d)(2) and 852(a)(3); R.C.M. 921(c)(2)-(3). Under the standard eight-member panel, only six members, or 75 percent of the panel, are required to concur on a finding of guilt in order to obtain a conviction. 10 U.S.C. § 852(a)(3); R.C.M. 921(c)(2).

BURDEN

5. 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" which would be the Government. *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012).

LAW AND ARGUMENT

Application of the Constitution to Military Members

6. "Constitutional rights identified by the Supreme Court generally apply to members of the military unless by text or scope they are plainly inapplicable." *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004); see also, *United States v. Strombaugh*, 40 M.J. 208, 211-12 (C.A.A.F. 1994) ("The protection of the United States Constitution and Federal laws apply to members of the armed forces except those protections which are expressly or by necessary implication inapplicable[,] includ[ing] the fundamental right to a fair trial[.]").

7. "Even though the Bill of Rights applies to persons in the military, 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.'" *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976) (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)). Such an exemption includes "where the express terms of the Constitution make such application inapposite." *Marcum*, 60 M.J. at 205 (citation omitted).

[2] Demographics of the U.S. Military, Council on Foreign Relations, [redacted]

8. "[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney*, 1 M.J. at 270.

Constitutional Overview

9. The Sixth Amendment to the United States Constitution 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.

10. 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.

U.S. Const. amend. V.

History of the Jury Trial Clause

11. Notably, the Supreme Court has never squarely *held* that the Sixth Amendment Jury Trial Clause is inapplicable to courts-martial. The oft-quoted statements to that effect in *Milligan* and *Quirin*, both cases about military *commissions* rather than courts-martial, were dicta at best. *Cf. Ortiz v. United States*, 138 S. Ct. 2165, 2179 ("[N]ot every military tribunal is alike."). Nor did the Supreme Court *hold* that the Sixth Amendment Jury Trial right is inapplicable to courts-martial in *Whelchel v. McDonald*, 340 U.S. 122 (1950). First, the *Whelchel* Court's statement that "[t]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial" (*id*. at 127) was made in reference to the *composition* of the court-martial. Additionally, *Whelchel* came to the Court by way of a writ of habeas corpus and solely focused upon whether or not his court-martial possessed jurisdiction over him. *See id.* at 123. Because it was not necessary to the disposition of the case, the Court's fleeting reference to the jury trial right at courts-martial which existed prior to enactment of the UCMJ does not constitute a "holding." Even if this dictum were persuasive, it would only be so with respect to an argument premised upon the *composition* of the panel, not its function.[3]

[3] The Supreme Court has never explained how the Framers' decision to free military commanders from the grand jury requirement suggests an intent to allow for the prosecution of

12. The right to unanimity, unlike the rights encompassed within the Vicinage Clause, goes to the very function of what a criminal fact-finding body is charged to undertake in the first place. The Defense does, however, recognize that CAAF has held that there is no constitutional right to jury trial in a court-martial. *Wiesen*, 57 M.J. at 50; *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[.]"). This Court is, of course, bound by those rulings of CAAF. Thus, the Defense first argues that CAAF should reverse itself and find the right to a jury trial applicable to the military due to the evolution of both the constitutional landscape and military practicalities as outlined below and because there is no binding precedent on CAAF which requires this provision to remain. Additionally, this counsel notes that, the Air Force Court of Criminal Appeals (AFCCA) has already considered and resolved the issues presented in this Defense's motion (see *United States v. Anderson*, 2022 CCA LEXIS 181 (AFCCA 2022)),[4] and has followed that decision at least 10 times since. As such, understanding the trial courts need to follow established precedent, this motion serves to preserve the issues contained within for purposes of AFCCA and to urge all appellate courts overrule these prior findings due to the presentations outlined within this motion. Ultimately, the Defense is seeking relief through a finding that under either the Fifth or Sixth amendment the Accused is entitled to a unanimous verdict once he or she exercises his or her statutory right to select a panel of members. See *Richardson*, 61 M.J. at 118. ("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 *Wiesen*, 56 M.J. at 174); *See also*, e.g., *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (explaining why, even if a criminal defendant has only a statutory—rather than a constitutional—right to appeal a conviction, "the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Constitution").

Evolving Nature of the Military Justice System

13. Since *Ex parte Quirin* was decided the Supreme Court has found occasion to question the applicability of various protections to courts-martial. For example, in *Middendorf v. Henry*, 425 U.S. 25, 33-48 (1976), the Court considered whether servicemembers maintained a right to counsel at summary courts-martial under either the Fifth or Sixth Amendments. The Court

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an accused service member for a serious offense without benefit of an impartial jury and is thus ripe for review and correction at that level. The grand jury performs a function that is wholly unrelated to the jury charged with resolving the guilt or innocence of the accused at trial. *United States v. Williams*, 504 U.S. 36, 51 (1992) ("[T]he grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge.") "In fact, the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people." *United States v. Williams*, 504 U.S. at 47 (citation omitted). *See also, Hurtado v. California*, 110 U.S. 516 (1884).

[4] The Defense notes that a review of *Anderson* is pending with the Court of Appeals for the Armed Forces and that oral argument was heard by that court on 25 October 2022.

ultimately concluded that no such right existed under these amendments, but before it did so it made several observations regarding the demands of the military justice system. *Id.*

14. For one, at the time the Court decided *Middendorf*, it observed, "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. After examining that history, the Court declined to take that step. In *Middendorf*, the Court noted that "[d]icta in *Ex parte Milligan*, 4 Wall. 2, 123 (1866), 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.'" The Court also cited to *Ex parte Quirin*'s discussion 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 33-34. Ultimately, the Court concluded that it was "unnecessary in [*Middendorf*] 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.* at 34. 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 (emphasis added).

15. The Court in *Middendorf* also contrasted the nature of the summary court-martial forum with that of special and general courts-martial. *Id.* at 32. It described the summary court-martial as "an informal proceeding conducted by a single commissioned officer with jurisdiction only over noncommissioned officers and other enlisted personnel . . . [where] [t]he presiding officer acts as judge, fact finder, prosecutor, and defense counsel." *Id.* It also noted that "[t]he accused must consent to trial by summary court-martial; if he does not do so, trial may be ordered by special or general court-martial." *Id.* at 32-33. Moreover, "a summary court-martial is procedurally quite different from a criminal trial . . . it is not an adversary proceeding. Yet the adversary nature of a civilian criminal proceeding is one of the touchstones of the Sixth Amendment's right to counsel[.]" *Id.* at 40. Noting the parallels between a summary court-martial and probation/parole revocations, the Court concluded that "a summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment." *Id.* at 42.

16. Because the summary court-martial was not a "criminal prosecution" within the meaning of the Sixth Amendment, the Court stated that whether a military member is entitled to counsel at such a proceeding shifts the focal point from the Sixth Amendment to the due process clause of the Fifth Amendment. *Id.* 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. But 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.

17. In finding that these factors did not weigh in favor of requiring counsel, the Court first explained that "presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried." *Id.* at 45. The Court then explained that if an accused believes he has a colorable legal defense and "a formal, counseled proceeding is necessary he may simply refuse trial by summary court-martial and proceed to trial by special or general court-martial at which he may have counsel." *Id.* at 47. For these reasons, the Court concluded that "neither the Sixth nor the Fifth Amendment to the United States Constitution empowers us to overturn the congressional determination that counsel is not required in summary courts-martial." *Id.* at 48.

Current Parallels between Military Justice and Civilian Criminal Justice Systems

18. In *Solorio v. United States*, 483 U.S. 435, 436 (1987), the Supreme Court rejected the notion that a prerequisite to trial by court-martial was a "service connection" of the offense charged. Rather, the Court concluded, "[T]he requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Id.* at 450-51.

19. In light of *Solorio*, it is now Air Force policy to seek to "maximize[e] Air Force jurisdiction" when cases may otherwise be prosecuted by state or local authorities. Air Force Instruction (AFI) 51-201, *Administration of Military Justice*, dated 18 January 2019, para. 4.18.1; *see also id.*, para. 4.18.2 (When a member is subject to both the UCMJ and state or foreign jurisdiction, Air Force authorities must determine whether the exercise of jurisdiction is in the best interests of the Air Force. If the exercise of jurisdiction is sought, Air Force authorities . . . contact appropriate civilian authorities; notify them of the Air Force desire to exercise jurisdiction; and, if civilian authorities have primary jurisdiction, request a waiver of jurisdiction to the Air Force . . . . If state or foreign authorities decline or waive the right to exercise jurisdiction, the Air Force may proceed with action, up to and including court-martial or nonjudicial punishment.).

20. The Supreme Court more recently recognized the evolving nature of the modern-day court-martial and its newfound likeness to state and federal criminal courts in *Ortiz v. United States*, 128 S. Ct. 2165, 2170 (2018). In that case, it considered, *inter alia*, whether it maintained jurisdiction to review decisions by CAAF. 128 S. Ct. 2165, 2170 (2018). In holding that it did, 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*.

21. The Court also recognized that "[t]he jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions [it] reviews." *Id.* It noted that while jurisdiction to try offenses at courts-martial has "waxed and waned over time, courts-martial today can try service members for a vast swatch 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.

22. The majority in *Ortiz* also rejected the dissent's characterization of courts-martial as a function of mere military command. *Id.* Instead, the majority adopted the position that "courts-martial have long been understood to exercise judicial power of the same kind wielded by civilian courts." *Id.* (internal quotations omitted). Later on in the 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 *Vallandingham* by explaining that such a case "goes to show that not every military tribunal is alike." *Id.*

Enter Ramos' Holding that Unanimous Verdicts are Central to a Fair and Impartial Jury

23. The increasing parallels between military and civilian courts are what make *Ramos* clearly applicable to military courts-martial. The Supreme Court's landmark decision in *Ramos* was based upon "a fundamental change in the rules thought necessary to *ensure fair criminal process*." *Edwards*, 141 S. Ct. at 1574 (Kagan, J., dissenting) (emphasis added). As Justice Gorsuch explained, "[w]herever we might look to determine what the term 'trial by an *impartial* jury' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict." *Id.* at 1395 (emphasis added). After discussing the common law origins of the unanimous jury verdict, the Court then noted that it "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity." *Id.* at 1395-97. The Court surmised that it had "commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years." *Id.* at 1397.

24. Likewise, the Court has further long made clear that constitutional provisions incorporated against the states through the Fourteenth Amendment's Due Process Clause, *including* the Sixth Amendment Jury Trial Clause (incorporated in *Duncan v. Louisiana,* 391 U.S. 145 (1968)), necessarily have the same scope and meaning as applied to states as they do directly against the federal government. *See Ramos,* 140 S. Ct. at 1397.[5] Neither of these principles were in dispute in *Ramos*. *Id.* Rather, the question was whether, taken together, they justified overruling the Court's decision in *Apodaca*.

25. The Court's central justification for relegating *Apodaca* "to the dustbin of history," *id*. at 1410 (Sotomayor, J., concurring in part), was the extent to which it was inconsistent with

[5] Because courts-martial are federal creatures, technically speaking, the Fourteenth Amendment's equal protection clause does not strictly apply. Rather, pursuant to the doctrine of "reverse incorporation" as set forth in *Bolling v. Sharpe*, 347 U.S. 497 (1954), "the Fifth Amendment's Due Process Clause . . . picks up the equal protection guarantee of the Fourteenth Amendment." *United States v. McIntosh*, 414 F. App'x 840, 842 (6th Cir. 2011); *see also United States v. Meakin*, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019) (explaining the applicability of the Fourteenth Amendment to the military through the Fifth Amendment).

fundamental understandings of *procedural fairness*. In her concurring opinion, Justice Sotomayor reinforced the connection between unanimity and fairness. As she wrote, non-unanimous verdicts can give rise to at least a "perception of unfairness," especially when there are racial disparities in the pool of defendants and/or the composition of the jury. *See id*. at 1418 (Sotomayor, J., concurring in part).[6] Ultimately, 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 1400. Although the majority questioned the wisdom of the *Apodaca* plurality's suggestion that the decrease in hung juries is always necessarily a good thing, the Court went on to explain that its objection to *Apodaca* was not so much that its "cost-benefit analysis was too skimpy." *Id.* at 1399-1401. Rather, the *Ramos* majority took issue with "the deeper problem" posed by the fact that the *Apodaca* plurality "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Id.* at 1401-02. In that respect, *Ramos* did more than just overrule *Apodaca* and incorporate the unanimous jury requirement against the states; it reinforced that unanimous juries are part-and-parcel of the Constitution's *separate* requirements to *impartial* juries and *fair* verdicts. *See, e.g.*, *Edwards*, 141 S. Ct. at 1575 (Kagan, J., dissenting) ("[T]he [*Ramos*] Court took the unusual step of overruling precedent for the most fundamental of reasons: the need to ensure, in keeping with the Nation's oldest traditions, fair and dependable adjudications of a defendant's guilt."). Finally, the majority considered *stare decisis*, but concluded that it failed to justify adherence to override the erroneous nature of the *Apodaca* plurality. *Id.* at 1402-08.

Stare Decisis Considerations after Ramos

26. In *Ramos*, the Court significantly splintered on how the doctrine of *stare decisis* is to be applied. Although a majority of the Court concluded that the governing rule announced in *Apodaca* should be overturned in favor of requiring unanimous verdicts in serious cases, at various points throughout the opinion the Court fractured into different camps.

27. A five-justice majority agreed with the following proposition: "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true," 140 S. Ct. at 1405, and

[6] The historical origins of non-unanimous verdicts in courts-martial do not share the troubled, racially motivated underpinnings behind the Louisiana and Oregon statutes that *Ramos* struck down. *See* Murl A. Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?*, 22 HASTINGS L.J. 237, 239 & n.13 (1971). Many of the concerns about racial disparities to which Justice Sotomayor adverted to in her *Ramos* concurrence are, however, undeniably present in contemporary courts-martial. *See* Air Force Inspector General, Report of Racial Inquiry, Independent Racial Disparity Review, December 2020. The military also recognizes not only a racial disparity but a gender disparity in regard to those holding senior ranking positions within the military which is precisely the type of commander who is given authority to convene courts-martial. [redacted]. Higher ranking individuals are more likely to sit on panels as well given the requirement that any member be senior in grade to the accused. In any event, the majority opinion in *Ramos* made explicit that "a jurisdiction adopting a nonunanimous jury rule, *even for benign reasons*, would still violate the Sixth Amendment." *Ramos*, 140 S. Ct. at 1440 n.44 (emphasis added).

that it "has never been treated as an inexorable command." *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 233 (2009)). The *Ramos* majority went on to explain that this "doctrine is 'at its weakest when we interpret the Constitution' because a mistaken judicial interpretation of that supreme law is often 'practically impossible' to correct through other means." *Id.* It noted that when revisiting precedent, the following considerations should be taken into account: (1) the quality of the decision's reasoning, (2) its consistency with related decision, (3) legal developments since the decision, and (4) reliance on the decision. *Id.* (citing *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. ___, ____, slip op. at 17 (2019)).

28. Justice Sotomayor wrote a separate concurring opinion in *Ramos* to express that she would overrule the *Apodaca* plurality not because it used "different interpretive tools from the majority here" but because *Apodaca* "is a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision." *Id.* at 1409 (Sotomayor, J., concurring in part). She also emphasized that "the force of *stare decisis* is at its weakest in cases concerning criminal procedure rules that implicate fundamental constitutional protections." *Id.*

29. Justice Sotomayor's concurrence went on to explain that "the 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.* In Justice Sotomayor's words, "[w]here the State's power to imprison those like Ramos rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its precedents." *Id.* She concluded her concurrence by reiterating that "[w]hile overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance." *Id.* at 1410 (Sotomayor, J., concurring in part).

30. Justice Kavanaugh also wrote separately to express his view on *stare decisis*. After citing to a litany of landmark cases that overruled prior precedent, he opined that these examples show "the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never* overrule erroneous precedent." *Id.* at 1411 (Kavanaugh, J., concurring in part) (citations omitted, emphasis in original). Justice Kavanaugh later acknowledged that "[t]he difficult question, then, is when to overrule an erroneous precedent." *Id.* at 1412.

31. In setting forth his view of how to apply the doctrine, Justice Kavanaugh began by noting that there is a difference between "statutory cases" and "constitutional cases." *Id.* Whereas in the former, the doctrine is "comparatively strict," in the latter, it is "not as 'inflexible.'" *Id.* at 1413. (Kavanaugh, J., concurring in part) (citations omitted). This is due to the fact that it is simply easier to remedy an erroneous interpretation of statute than an erroneous interpretation of the Constitution. *Id.* Even still, Justice Kavanaugh expressed that there must still be a "special justification" or "strong grounds" to overrule constitutional precedent – "something 'over and above the belief that the precedent was wrongly decided.'" *Id.* at 1413-14 (Kavanaugh, J., concurring in part).

32. Justice Kavanaugh proceeded to explain that, in his view, three broad considerations have emerged over time which guide whether or not there is a "special justification" or "strong grounds" to overrule a prior constitutional decision:

a. *First, is the decision not just wrong, but grievously wrong?* In assessing this factor, he suggests "the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and workability, among other factors." *Id.* at 1414-15 (Kavanaugh, J., concurring in part). He explained that a case such as *Korematsu v. United States*, 323 U.S. 214 (1944), or *Plessy v. Ferguson*, 163 U.S. 537 (1896) may be egregiously wrong when decided, "or may be unmasked as egregiously wrong based on later legal or factual understandings or developments[.]" *Id.*

b. *Second, has the prior decision caused significant negative jurisprudential or real-world consequences?* Here, "the Court may consider jurisprudential consequences . . . such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system." *Id.* at 1415.

c. *Third, would overruling the prior decision unduly upset reliance interests?* "In conducting [this] inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors." It focuses upon "the legitimate expectations of those who have reasonably relied on the precedent." *Id.*

33. True to his jurisprudential approach toward *stare decisis*, Justice Thomas expressed that because the Court's previous interpretation of the Sixth Amendment's guarantee to a unanimous jury verdict "are not demonstrably erroneous" he would apply those prior precedents. *Id.* at 1425 (Thomas, J., concurring in the judgment).

34. In contrast to the majority and concurring opinions, the dissent noted that the "majority" is "divided into four separate camps" as to how *stare decisis* should apply. *Id.* at 1432 (Alito, J., dissenting). After taking issue with how the majority characterized the *Apodaca* plurality, the dissent explained that the convincing consideration for retaining *Apodaca* "are the enormous reliance interests of Louisiana and Oregon." *Id.* at 1432-40 (Alito, J. dissenting). The dissent concluded by stating that in "striking down a precedent in which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*." *Id.* at 1440 (Alito, J. dissenting).

CAAF Should Reverse Its Prior Rulings Instead Finding a Right to a Jury Trial Under the Sixth Amendment As It Relates to Unanimous Verdicts

35. The Defense acknowledges the precedents that bind this Court regarding the applicability of the Sixth Amendment right to a jury trial. *Wiesen*, 57 M.J. at 50; *New*, 55 M.J. at 103; *Loving*,

41 M.J. at 285; *Curtis*, 32 M.J. at 267. However, to inform potential appellate review of this issue, discussion remains warranted as to why that right does, indeed, apply to service members and, in turn, why those prior decisions are wrong and should be overturned as to unanimous verdicts.

36. The starting point is the text of the Sixth Amendment itself, which, unlike the Fifth Amendment, lacks any explicit exclusion of that right for the Armed Forces. U.S. CONST. amend. VI. Admittedly, Congress's authority is at its highest when it exercised its authority under Article I, § 8, clause 14. *See* 10 U.S.C. § 852(a)(3); *Weiss*, 510 U.S. at 177. But such legislation must always yield to the Constitution itself, and history shows that the Sixth Amendment to the Constitution has long been erroneously deemed to deprive servicemembers of the right to a unanimous verdict. *See United States v. Romano*, 46 M.J. 269, 274 (C.A.A.F. 1997). The origins of this rule stem from cases which 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 (including the accessibility of changing venues of courts-martials, the administrative ability to move individuals from one military unit to another, and given recent updates to more closely align military prosecutions for covered offenses by introducing binding recommendations by professional prosecutors), and the fact that almost every single other right under the Sixth Amendment has been found to apply at courts-martial, this rule should no longer apply.

37. As discussed above, the notion that the Sixth Amendment right to a jury trial does not extend to courts-martial was first announced in dicta in *Ex parte Milligan*, 4 Wall. 2, 123 (1866), and then accepted by *Ex parte Quirin*, 317 U.S. 1 (1942). At the time those cases were decided, our present-day military justice system would be utterly unrecognizable to the authors of those opinions. Even as late as 1976, when *Middendorf* was decided by the Supreme Court, Justice Rehnquist observed that the question of "whether an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved." *Middendorf*, 425 U.S. at 33. Since then, not only has this Sixth Amendment right to counsel question been squarely resolved in favor of an accused servicemember, but so has almost every single other protection afforded by the Sixth Amendment, the only notable exception being a right to a jury trial.

38. 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, CAAF (or its predecessor court) has determined that seven of them explicitly apply to courts-martial and are grounded in the Sixth Amendment itself rather than some other regulatory, statutory, or constitutional provision: (1) a speedy trial, *see United States v. Cooper, 58 M.J. 54, 57 (C.A.A.F. 2003) and United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014); (2) a public trial, *see United States v. Hershey*, 20 M.J. 433, 435 (C.M.A. 1985)(citing *United States v. Grunden*, 25 C.M.A. 327 (C.M.A. 1977)); (3) *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."); (4) N/A; (5) notice of the factual and legal bases for the charges, *see United States v. Girouard*, 70 M.J. 5, 10 (C.A.A.F. 2011) and *United States v. Fosler*, 70 M.J. 225, 229 (C.A.A.F. 2011); (6) the ability to confront witnesses, *see United States v. Blazier*, 69 M.J. 218 (C.A.A.F. 2010); (7) the ability to compel testimony that is material and favorable to the defense, *see United States v. Bess*, 75 M.J. 70, 75 (C.A.A.F. 2016); and (8) counsel and effective assistance thereof, *see United States v. Wattenbarger*, 21 M.J. 41, 43 (C.M.A. 1985) and*United States v. Gooch*, 69 M.J. 353, 361 (C.A.A.F. 2011).

39. Additionally, although not grounded in the Sixth Amendment, CAAF has repeatedly stated that an accused has a *Fifth* Amendment right, as a matter of due process, to an "impartial panel." *See Richardson*, 61 M.J. at 118 ("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 *Wiesen*, 56 M.J. at 174). Therefore, outside of a unanimous verdict, the only constitutional right which has not been recognized to apply in courts-martial by CAAF or its predecessor court which is otherwise applicable to the civilian world is the right to a jury of the state and district wherein the crime allegedly occurred.

40. Moreover, as the Supreme Court quite recently recognized in *Ortiz v. United States*, and in abject contrast to what the *Milligan, Quirin*, and perhaps even *Middendorf* Courts would have believed at the time they were decided, our military justice system is "judicial" in nature. *Ortiz*, 128 S. Ct. at 2174. In contrast to its historical origins, in today's courts-martial, "[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.* Likewise, and although this was not always the case, courts-martial jurisdiction now "overlaps significantly with the criminal jurisdiction of federal and state courts." *Id.* at 2174-75. The proposition that courts-martial now mirror their federal and state sister courts is also reflected in the reforms brought on by the 2016 Military Justice Act. As just one example, Appendix 17 of the 2019 Manual for Courts-Martial explains that the offense of aggravated assault through the use of a deadly weapon was amended to "align it more closely with federal civilian practice under 18 U.S.C. § 113." Additionally, the National Defense Authorization Act of 2022, further brought the military courts-martial into alignment with the Federal system by providing for binding review by a professional prosecutor over covered offenses thereby limiting command authority over these enumerated serious offenses. These similarities are further adduced by the rules themselves. MRE 1102 specifically says that "Amendments to the Federal Rules of Evidence—other than Articles III and V—will amend parallel provisions of the Military Rules of Evidence by operation of law 18 months after the effective date of such amendments, unless action to the contrary is taken by the President." Meaning by operation of law, the military system will mirror the Federal system procedurally without direct intervention and contravention suggesting that they are functionally similar in application.

41. It is also worth noting that in *Ortiz*, the Supreme Court distinguished its prior decision in *Ex parte Vallandingham* (another Civil War era commissions case like *Ex parte Milligan*), where it held that it lacked jurisdiction. As Justice Kagan noted in her majority opinion, *Vallandingham* just "goes to show that not every military tribunal is alike." *Ortiz*, 128 S. Ct. at 2179. This

echoes *Middendorf*'s contrast of the non-adversarial nature of summary courts-martial with special and general courts-martial. *Middendorf*, 425 U.S. at 32-33, 40. Clearly there can be no dispute that general and special courts-martial qualify as "criminal proceedings" within the context of the Sixth Amendment – particularly in light of *Ortiz*. Even *Middendorf* seemed to recognize this without explicitly stating so given that it used special and general courts-martial as foils to contrast the summary courts-martial, and further suggested that if an accused believes he has a colorable legal defense and "a formal, counseled proceeding is necessary he may simply refuse trial by summary court-martial and proceed to trial by special or general court-martial at which he may have counsel." By virtue of their nature, an accused is not afforded the same opportunity to opt out of special and general courts-martials and thus needs the added protections afforded to him in the constitution. In sum, today's general and special 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 and which *Vallandingham* recognizes were distinct from courts-martial.

42. The most important aspect of the *Middendorf* opinion, however, is where it states, "the Sixth Amendment makes absolutely no distinction between the right to jury trial and the right to counsel." *Middendorf*, 425 U.S. at 32 n.13. In order to properly appreciate the Court's verbiage, it is critical to understand its placement within the opinion. This statement, although contained within a footnote, is included in the same basic portion of the opinion that observed "[t]he question of an accused in a court-martial has a constitutional right to counsel has been much debated and never squarely resolved." *Id.* at 33.

43. If we accept the insistence of the Court 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, then that creates a syllogism. If an accused is entitled to counsel pursuant to the Sixth Amendment, and there is "absolutely no distinction" between the right to counsel and the right to a jury trial, then logically and necessarily, that same accused is also entitled to the protections afforded by the Sixth Amendment's jury trial guarantee. Again, at the time *Middendorf* was decided whether a military member was entitled to counsel under the Sixth Amendment was unresolved. Today, however, CAAF has repeatedly insisted that servicemembers are entitled to such a right *pursuant to* the Sixth Amendment (along with every single other Sixth Amendment protection apart from a jury trial in the district of the alleged offense). *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); *see also Gooch*, 69 M.J. at 361 ("The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel."). This lines up with *Ortiz*'s recognition 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." *Ortiz*, 128 S. Ct. at 2174.

44. Given CAAF's pre-*Ramos* insistence that the Sixth Amendment right to a jury does not apply to courts-martial ultimately emanates from *Milligan* by way of *Quirin*, is this rule still good law? Considering that *Ortiz* has reflected a willingness to depart from rules adopted within the context of military commissions and the Courts recognition in *Vallandingham* that commission law is not courts-martial law, its simultaneous recognition of the fact that our system

has evolved to mirror her state and federal counterparts, and *Middendorf*'s contention that the Sixth Amendment draws "absolutely no distinction" between the right to a jury and the right to counsel, the fact that our servicemembers are now entitled to almost every single other protection under the Sixth Amendment weighs in favor of abandoning this rule given that it was based on a system which has so dramatically evolved to the point that the *Quirin* Court would not be able to recognize it. Consistent with the other 99.5% of the population in America who now enjoy the right to a unanimous verdict under the Sixth Amendment pursuant to *Ramos*, the Accused in this case should be afforded this same guarantee under the Sixth Amendment by virtue of recognition of the servicemember's right to an impartial jury trial outright.

Regardless of a Finding the Jury Trial Clause Applies to Servicemembers, once a Panel is Selected the Servicemember is Entitled to a Unanimous Verdict By Virtue of the Impartiality Requirement

45. Regardless of a finding that the Jury Trial clause applies to service members, service members maintain a statutory right to elect a panel of members. By virtue of that election, once selected they are entitled to an *impartial panel* and CAAF precedent has reflected this for decades. In this case, adhering to CAAF precedent in light of the Supreme Court's decision in *Ramos* requires that any conviction in this case be based on a unanimous decision.

46. The Court of Military Appeals in 1964 recognized that even if servicemembers do not have a constitutional right to trial by jury, "[c]onstitutional due process includes the right to be treated equally with all other accused in the selection of *impartial* triers of the facts." *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964) (emphasis added); *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.").

47. More recently, CAAF has suggested that the right to an impartial court-martial panel comes not only from the Due Process Clause of the Fifth Amendment, as in *Crawford*, but from the Sixth Amendment *itself*. *See, e.g.*, *v. Lambert*, 55 M.J. at 295 ("[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." (emphasis added)). Thus, once an accused elects to be tried by a panel, *Lambert* establishes that he or she has a *constitutional* right to *impartiality* under the Sixth Amendment with respect to both how the panel members are selected and how they deliberate their verdict. *Ramos* holds that unanimous convictions are necessary to impartiality; thus, it follows that an accused in a court-martial who elects to be tried by a panel has a Sixth Amendment right to a unanimous guilty verdict as a subset of that right to impartiality.

Applying Ramos to Military Courts through under the Due Process Clause of the Fifth Amendment

48. Beyond the guarantee of an impartial panel under the Sixth Amendment, the Fifth Amendment also affords servicemembers a due process right to a unanimous guilty verdict. Under *Milligan* and *Quirin*, Congress may not have been under a constitutional obligation to provide Appellant with the right to be tried by a panel in the first place. But as CAAF has long

held, "[a]s a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel." *Wiesen*, 56 M.J. at 174**;** *see also. Richardson*, 61 M.J. at 118 ("As a matter of due process, an accused has a constitutional right, as well as a regulatory right to a fair and impartial panel."). "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); *see also United States v. Witham*, 47 M.J. 297, 301 (C.A.A.F. 1997) ("[A] military accused has no right to a trial by jury under the Sixth Amendment. He does, however, have a right to due process of law under the Fifth Amendment, and Congress has provided for trial by members at a court-martial." (citations omitted)). Thus, whether under the Sixth Amendment or the Fifth, Congress's choice to provide a statutory right to trial by a panel necessarily triggered constitutional requirements of fairness and impartiality—requirements that, after *Ramos*, can no longer be satisfied by non-unanimous convictions for the offenses with which are charged in this case. The Supreme Court has also recognized 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*, 476 U.S. 79 (1986), applied to courts-martial).[7]

49. Once Congress chose to offer the option of trial by a panel, it had to do so in a manner consistent with fundamental notions of procedural fairness, as criminal trials necessarily implicate the accused's liberty. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 221–24 (2005). Put another way, Congress could hardly rely upon an accused's lack of a constitutional right to a trial by jury to provide a panel that reaches its verdict by flipping a coin or based upon race or nationality. *See Evitts*, 469 U.S. at 393; *see also 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 quotations and citations omitted).

50. Nearly 70 years ago, the United States Court of Appeals for the District of Columbia Circuit recognized the interplay between the "beyond a reasonable doubt standard" and the unanimity requirement in jury trials:

> 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 shares of venerated legal ancients. They are working rules of law biding 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 (1950).

[7] Since *Santiago-Davilla* was decided, CAAF "has repeatedly held that the *Batson* line of cases . . . applies to the military justice system." *United States v. Witham*, 47 M.J. 297, 300 (C.A.A.F. 1997).

51. Less than three years after *Billeci* was decided, the United States Court of Appeals for the Sixth Circuit found occasion to offer similar sentiments regarding how the unanimous verdict requirement "is inextricably interwoven with the required measure of proof." *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953). The Court explained:

> 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.

Id. See also United States v. Hills, 75 M.J. 350, 256 (C.A.A.F. 2016) ("A foundational tenet of the Due Process Clause, U.S. Const. amend. V., is that an accused is presumed innocent until proven guilty. An accused has an absolute right to the presumption of innocence until the government has proven every element of every offense 'beyond a reasonable doubt,' and members may only determine that the accused is guilty if the government has met that burden.") (internal quotations and citations omitted); *In re Winship*, 397 U.S. 358, 364 (1970)(" 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."). This burden of proof unequivocally applies to courts-martial as well as civilian criminal proceedings. *Meakin*, 78 M.J. at 401 n.4. As these federal appellate courts observed, *all* members must be convinced beyond a reasonable doubt in order to sustain a conviction.[8]

52. This case presents an even more glaring deprivation of due process than that which those in Louisiana or Oregon faced prior to *Ramos*. In those state systems, they utilized a 12-member panel and required a minimum of 10 votes in order to convict. Not only was the pool from which the defense could obtain a not-guilty vote larger than the eight-member maximum panel

[8] Similar sentiments were echoed in *Ramos*. As Justice Sotomayor explained in her concurrence, "the 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 1409 (Sotomayor, J., concurring in part). Although referring to the Sixth Amendment, her reference to the State's "burden" demonstrates the due process concern at issue as well. Additionally, as the majority noted, "who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what . . . it should—deliberating carefully and safeguarding against overzealous prosecutions?" The majority went on to observe that other professors have suggested "requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations[.]" *Ramos*, 140 S. Ct. at 1400.

size for non-capital general courts-martial, but from a statistical perspective those defendants enjoyed a greater benefit than accused facing courts-martial. Put another way, in those states a prosecutor would need to convince approximately 83% of the panel to arrive at guilt. In the military justice system, a prosecutor need only convince 75% of the panel.

53. Whereas in the unconstitutional systems previously employed in Louisiana and Oregon, a prosecutor needed to obtain ten votes to convict, in the military an accused is not even entitled to ten votes to begin with. Therefore, the need for unanimity is especially important in the military justice system because from a pure mathematics perspective the military's smaller panels make it easier for the prosecution to obtain the requisite number of vote (i.e., establish proof beyond a reasonable doubt) with an eight-member panel let alone the lower statistical burden of 75%.

54. Moreover, per *Easton*, 71 M.J. at 174, the burden is on the government to show why "military conditions require a different rule than that prevailing within the civilian community." The defense fails to see how departing from the same burden of proof utilized within the civilian world would in any way be justified by military exigency. This is not like *Parker v. Levy*, 477 U.S. 733, where the Court noted how *conduct* that is permissible within the civilian world may be criminalized in the military; rather, this is a matter of criminal procedure. There is hardly any rational relation between ensuring conformity with military standards and the necessary number of individuals required to convict an accused if brought before courts-martial. This is further demonstrated by the fact that as recently as 2019, the quorum necessary to convict an accused was raised from two-thirds to three-fourths with hardly any fanfare to include concerns about straining military unit's operational capabilities. This is also evident with passage of the National Defense Authorization Act (NDAA) For Fiscal Year 2022, 117 P.L. 81 2021 Enacted S 1506. In this NDAA, military commanders were severely stripped of command authority to pursue courts-martial for covered offenses.[9] These offenses align significantly with the type and nature of charges that would be taken to a special or general courts-martial. Congress has spoken and stated that these actions themselves warrant a binding review by a professional prosecutor, termed a special trial counsel,[10] despite the history of command authority and

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[9] Under 10 USCS § 801, the term "covered offense" means—

> (A) an offense under section 917a (article 117a), section 918 (article 118), section 919 (article 119), section 920 (article 120), section 920b (article 120b), section 920c (article 120c), section 925 (article 125), section 928b (article 128b), section 930 (article 130), section 932 (article 132), or the standalone offense of child pornography punishable under section 934 (article 134) of this title [10 USCS § 917a, 918, 919, 920, 920b, 920c, 925, 928b, 930, 932, or 934];
>
> (B) a conspiracy to commit an offense specified in subparagraph (A) as punishable under section 881 of this title [10 USCS § 881] (article 81);
>
> (C) a solicitation to commit an offense specified in subparagraph (A) as punishable under section 882 of this title [10 USCS § 882] (article 82); or
>
> (D) an attempt to commit an offense specified in subparagraph (A), (B), or (C) as punishable under section 880 of this title [10 USCS § 880] (article 80).

[10] The term "special trial counsel" as defined in 10 USCS § 801 means a judge advocate detailed as a special trial counsel in accordance with section 824a of [10 USCS § 824a] (article 24a) and

concerns over maintaining good order and discipline within any particular military unit.

55. A possible counterargument to the one set out above is something akin to the notion that "you cannot take a guarantee from the Sixth Amendment and attribute it to the Fifth Amendment." Such a contention, even grounded in *Milligan* and *Quirin*, would fail upon close inspection. The Supreme Court has recognized that the Fifth Amendment can independently guarantee an even broader set of rights otherwise guaranteed by the text of a different provision of the Constitution. *See* e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (recognizing an implicit Fifth Amendment right to counsel separate and distinct from the Sixth Amendment's explicit right to counsel). Perhaps the best example of this can be seen in the case of *Middendorf v. Henry*, wherein the Court recognized that even though there is no Sixth Amendment right to counsel in a summary court-martial, it nevertheless needed to consider whether the Fifth Amendment's Due Process Clause provided such a guarantee given that servicemembers who are "subjected to loss of liberty or property . . . are entitled to the due process of law guaranteed by the Fifth Amendment." *Middendorf*, 425 U.S. at 42-43.

56. Because the defense is raising this objection on traditional due process grounds under the Fifth Amendment, the question is what standard should apply. For this, *Weiss*, 510 U.S. 163, is instructive. In *Weiss*, the Supreme Court clearly stated that "Congress is of course, 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." *Id.* at 176. After considering a Fifth Amendment objection to the fact that military judges are not afforded a fixed term of office, the Court concluded that this was not required as a matter of due process based, at least in part, upon the fact that "it has never been a part of the military justice tradition." *Id* at 179. However, the Court made sure to clarify that by this rationale that "[w]e do not mean to say that any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today." *Id.* *Ramos*, in contrast, establishes the precise connection that the *Weiss* Petitioners could not. It is impossible to read *Ramos*—or the Court's subsequent discussion of it in *Edwards*—and *not* come away with the conclusion that "the factors militating in favor of [unanimous verdicts] are . . . extraordinarily weighty." *Weiss*, 510 U.S. at 177. If unanimous verdicts are necessary in the civilian criminal justice system "to ensure impartiality," as *Ramos* held, it ought to follow that they are equally necessary in a court-martial.

57. In assessing what framework should apply to Fifth Amendment due process objections within the military context, the Court cited to *Middendorf* and concluded that the appropriate standard for analyzing whether or not a facet of the military justice system violates the Due Process Clause is "whether the factors militating in favor of [the matter at issue] are so extraordinarily weighty as to overcome the balance struck by Congress." *Weiss* at 177. When the Court applied this same standard in *Middendorf* and concluded that there is no Fifth Amendment right to counsel in a summary court-martial, that Court placed near-exclusive emphasis on how introducing counsel to such proceedings may impact the forum. *Middendorf*, 425 U.S. at 45. It noted that doing so would "turn a brief, informal hearing which may be

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includes a judge advocate appointed as a lead special trial counsel pursuant to section 1044f(a)(2) of this title [10 USCS § 1044f(a)(2)].

quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried." *Id.*

58. In this case, the factors militating in favor of unanimous verdicts are so extraordinarily weighty as to overcome the balance struck by Congress:

a. The most obvious factor militating in favor of unanimous verdicts is as an extension of the "proof beyond a reasonable doubt" jurisprudence because the two concepts are "inextricably interwoven." *See*, *e.g.*, *Hibdon*, 204 F.2d at 838. At the most fundamental level, if eight people go into a room and one of them thinks there is a reasonable doubt as to guilt, does that not necessarily mean the government has failed to meet its burden?[11] This is especially true in the military where panels are chosen based upon a convening authority's determination that the members meet Article 25, UCMJ, 10 U.S.C. § 825, criteria (i.e., they are the most suitable individuals for such service based upon factors such as judicial temperament). Put another way, the Article 25 criteria used to select members demonstrates that panels are not just randomly selected from the throws of society; rather, they are comprised of highly educated and intelligent individuals to a far greater degree than is common in civilian society. To the extent even one of these highly capable individuals possesses a reasonable doubt, this should be afforded more credence than a run-of-the-mill juror in a civilian case. But going back to the fundamental nature of the issue, to say that we require proof beyond a reasonable doubt but do not require unanimity would be a "contradiction in terms." *Hibdon*, 204 F.2d at 838. For decades, federal civilian courts have recognized a direct connection between this right and the requirement of jury unanimity as to guilt. *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950) ("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."). More recently, the three dissenting Justices in *Edwards* recognized the interplay between a unanimous guilty verdict and the right to have one's guilt proven beyond a reasonable doubt. Repeatedly citing to *Winship*, Justice Kagan observed that unanimity was "similarly integral" to the jury-trial right that requires proof beyond a reasonable doubt. *Edwards*, 141 S. Ct. at 1576–77 (Kagan, J., dissenting). As she elaborated:

> Allowing conviction by a non-unanimous jury "impair[s]" the "purpose and functioning of the jury," undermining the Sixth Amendment's very

[11] This problem is exacerbated by the fact that in a standard eight-member panel, 25% of the panel could have such a doubt and vote to acquit. Yet, in our system, that is still somehow taken to be "proof beyond a reasonable doubt." It is hard to see how anyone could seriously think that if 25% of the panel votes to acquit, the government has nevertheless "exclude[d] every fair and reasonable hypothesis of the evidence except that of guilt" or established "proof to an evidentiary certainty." *See* DA Pam 27-9 (the Military Judge's Benchbook). By contrast, in the standard American academic grading scale, 75% typically amounts to a C-average.

> "essence." It "raises serious doubts about the fairness of [a] trial." And it fails to "assure the reliability of [a guilty] verdict." So when a jury has divided, as when it has failed to apply the reasonable-doubt standard, "there has been no jury verdict within the meaning of the Sixth Amendment."

Id. at 1577 (alterations in original; citations omitted). When *Apodaca* was the law of the land, there was at least a plausible argument that this understanding applied only in federal civilian courts—because the gravamen of Justice Powell's solo opinion (filed in the companion case, *Johnson v. Louisiana*, 406 U.S. 366 (1972)), was that the unanimity right did *not* have the same application in all courts—and that other tribunals retained "freedom to experiment with variations in jury trial procedure." *Id.* at 376 (Powell, J., concurring in the judgment); *see also Mendrano v. Smith*, 797 F.2d 1538, 1547 (10th Cir. 1986) (rejecting the "close and troubling question[]" of whether non-unanimous court-martial convictions violate due process).[12] It is this exact functional approach that *Ramos* rejected. *See* 140 S. Ct. at 1398–1400. Because *Ramos* makes clear that unanimity is central to the underlying *fairness* of a criminal proceeding in *any* U.S. forum, it likewise makes clear that military accused have a due process right to a unanimous guilty verdict.[13] There is no doubt that the proof beyond a reasonable doubt standard is applicable in military courts-martial and given the intertwined nature between unanimous verdicts and the beyond a reasonable doubt standard it must be applied uniformly to include within a court-martial to uphold this fundamental right within a military courts-martial. *See United States v. Gay*, 16 M.J. 475, 477 (C.M.A. 1983) ("Due process requires proof beyond a

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[12] **The central conclusion in *Johnson*—that the Fourteenth Amendment's Due Process Clause did not independently prohibit nonunanimous verdicts—is no longer good law following *Ramos***. A five-justice majority in *Ramos* applied the Sixth Amendment guarantee to a unanimous verdict *by way of* the Fourteenth Amendment's Due Process Clause through the doctrine of due process incorporation. Therefore, while the Supreme Court did not explicitly state in *Ramos* that "unanimous verdicts are required as a matter of due process" it did not have to. This was implicit by virtue of the fact that it incorporated the right against the states. A determination that a right is required as a matter of due process is a fundamental prerequisite to incorporating that right it in the first place: the relevant question asks whether the right at issue "is fundamental to *our* [i.e., American] scheme of ordered liberty . . . or as [the Supreme Court has] said in a related context, whether this right is deeply rooted in the Nation's history and tradition." *McDonald v. City of Chi.*, 561 U.S. 742, 767 (2010) (internal quotations omitted).

[13] Because the right to a unanimous verdict is an individual right held by the accused, it does not require that *acquittals* be unanimous. As the Oregon Supreme Court explained earlier this year, "*Ramos* does not imply that the Sixth Amendment prohibits *acquittals* based on nonunanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021) (emphasis added). Thus, recognizing that the Constitution requires a panel to return a unanimous verdict to *convict* is not akin to invalidating all non-unanimous verdicts. Even if Article 52(a)(3), UCMJ, is unconstitutional to the extent that it authorizes less than unanimous guilty verdicts, *Ross* makes clear that it is very much constitutional to the extent that it authorizes 5-3 acquittals.

reasonable doubt for conviction of a crime." (citing *In re Winship*, 397 U.S. 358 (1970))); *see generally United States v. Hills*, 75 M.J. 350, 356 (C.A.A.F. 2015).

b. Another factor militating in the defense's favor is that, at the time the current military panel system was devised, *Ramos* had not yet been decided and Congress would have been under the impression that non-unanimous verdicts were constitutional in other systems. Since then, the Supreme Court has roundly rejected this practice for everyone who does not comprise the 0.5% of the population who serve in the military.[14] The fact that the Supreme Court has so recently recognized the imperative nature of a unanimous verdict for the civilian population is an extraordinarily weighty factor, in and of itself, which overcomes the balance struck by Congress. As perhaps put best by Justice Kavanaugh's concurrence in *Ramos*, a system of non-unanimous verdicts "sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule." The unanimity requirement is even more important in jurisdictions, like courts-martial, that utilize panels with fewer than twelve members where the increased risk of convicting an innocent person occurs. *See Ballew v. Georgia,* 435 U.S. 223, 234 (1978) (noting that "the risk of convicting an innocent person [] rises as the size of the jury diminishes.").

c. For another, as discussed in further detail below, Congress has already recognized the importance of unanimous verdicts in capitally referred cases within the military system. Our system only allows for the possibility of the death penalty when a panel of twelve members *unanimously* agree upon the findings. *See* R.C.M. 1004(a)(2)(A). It is not as though our system is utterly foreign to the concept of unanimous verdicts; it is a practice which we rely upon in the most serious of cases and the long-term viability of this practices shows that the concerns raised against imposition of unanimous verdicts are not as weighty as first appears because they are routinely met with regards to death penalty cases when they arise. Nor is this counsel arguing that the panel must be increased for non-death penalty cases to conform to the twelve members required in such cases. The lower panel size with the requirement of unanimous verdict adequately strikes the balance between the Accused's rights and the impact on the military units of taking such number of people out of official duties and ensures no additional burden is placed on the military through imposition of this ruling.

d. This is especially true when we consider not only the evolution of the court-martial system, but also the evaluation of our modern military. Courts-martial are not conducted outside of battlefields and military necessity today does not require such tribunals be held near foxholes. While that may have been the case in days past, in our present circumstances we could not be further from that truth by virtue of normal circumstances attendant to the modern-day courts-martial. Taking this

[14] To be clear, *Ramos* was silent on the issue of whether or not unanimous verdicts apply in the military. However, the the reason and logic employed by the Court demonstrate that they are constitutionally required.

proposition to its logical conclusion, it is highly inconvenient for courts-martial to be delayed based upon witness availability and these delays undoubtedly have tangential impacts on the efficiency and efficacy of our mission. But to not require in-person cross-examination of adverse witnesses in courts-martial on the grounds of "the military is different" would be to violate the confrontation clause – a Sixth Amendment right which CAAF has held applies in courts-martial.[15] Here it is again routine practice for changes of venue to be ordered to hold trials in the United States whether to authorize the Government subpoena power or to ensure active participation of an alleged victim who refuses to travel to the European circuit. Trials are also held in foreign countries within Europe when alleged victims refuse to travel to the court-martial in another country. If the military is willing to move courts to accommodate its own interests, it should likewise do the same to accommodate a constitutional right of the accused whose life and liberty is at stake and where it would be necessary to find military members with sufficient availability to sit on the panel and give it the full weight and attention it deserves.

e. Finally, this case stands in stark contrast to *Middendorf* where the Court applied the *Weiss* test and determined that the factors did not weigh in favor of guaranteeing counsel in summary courts-martial. After expressly distinguishing the seriousness of offenses tried at summary courts-martial with those tried in the formalized proceedings of special and general courts-martial, the Court relied almost exclusively upon the fact that introducing counsel in such a forum would create an attenuated proceeding which consumes military resources to an unwarranted degree given the "relative insignificance of the offenses being tried" and where participation in such a proceeding was wholly voluntary. The same cannot be said for offenses tried a special, and especially general courts-martial, let alone this case. The charges are much more significant, the consequences are higher, and the proceeding is not voluntary. Additionally, adding a unanimous verdict requirement to courts-martial will not fundamentally change the nature of an "informal" tribunal like the Court feared in *Middendorf*. To everyone who is not present in the deliberation room, the proceeding will remain unchanged, and it will exactly mirror those deliberations that already occur in capital cases.

59. To be clear, the Defense is not seeking to adopt every constitutional guarantee wholesale. It would be untenable for the military to require a cross-section of the population from the state and district where the crime occurred to sit as panel members. Congress has reached an appropriate balance in this regard given the impracticability of such a requirement in the military context where individuals retain their domiciles and travel throughout the country on a regular basis and where operational impacts could result in venues being changed for military purposes.

60. Rather, the defense's request is much more narrowly tailored, seeking only the requirement

[15] *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).

of unanimity. Unlike the right to a unanimous verdict, the right to a fair cross-section of individuals from a particular state/district is not "inextricably interwoven" with the burden of proof required by the Fifth Amendment. Moreover, the Court of Military Appeals has recognized that as a matter of due process, some protections afforded by nature of the right to a jury are imputed to courts-martial. *See Santiago-Davilla*, 26 M.J. at 390 (C.M.A. 1988) (recognizing that within the context of a *Batson* challenge, the "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.").

61. For the foregoing reasons, the Defense requests that this Honorable Court grant the requested relief on the grounds of the Due Process Clause of the Fifth Amendment.

Applying Ramos to Military Courts under the Equal Protection Clause of the Fifth Amendment

62. This Court should find that a unanimous verdict is also required under the equal protection clause of the Fifth Amendment. This would not be the first military court to take such a position. A Military Judge assigned to the Army's Fifth Judicial District determined on 3 January 2022 that the Equal Protection Clause of the Fifth Amendment requires a unanimous verdict as to guilt for courts-martial concerning serious offenses.[16] Attachment 1. Specifically, he found that service members and civilians are similarly situated groups, not a suspect class, and there was no apparent or logical reason for the disparate treatment. *Id.* at 8-12. In making this determination, he considered "all possible reasons" which have been said to support non-unanimity, but determined, "[n]one of the reasons are plausible." *Id*. at 14. In so holding, the military judge rejected that such a system is defensible based upon any raised societal differences between the military and the civilian sphere. *See id*. at 9 n.5. He further directly refuted the Government's alleged interests in "safeguarding against UCI" and "finality" such that they would allow departure from requiring unanimous guilty verdicts. *See generally id*. at 14-16. For the same reasons as articulated by the military judge in that case, this case is likewise entitled to a unanimous verdict.

63. Understanding that the Trial Judge referenced above was later overruled when the Army Court of Criminal Appeals (ACCA) issued a writ of prohibition finding service members are not similarly situated it did so with minimal analysis without particularizing it to the narrow issue of criminal prosecutions, as such it based its opinion on incorrect interpretations of the law. *United States v. Pritchard*, 2022 CCA LEXIS 349 (A.C.C.A. 2022); *See also United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015)(finding military and civilians not similarly situated as to questions related to death penalty cases but distinguishable as the holding was as to death penalty cases specifically). The Trial Judge, on the other hand, elicited a number of specific facts to support his decision including that such individuals are in fact similarly situated for the specific purpose of facing criminal convictions for serious offenses because the consequences for convictions are similar, the procedures are similar and the differing purposes of the institutions in

[16] 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).

prosecuting them are not so dissimilar as to create different classes. Attachment 1 at 8-9. Similarly, Judge Meginley in her dissent in *United States v. Westcott*, 2022 CCA LEXIS 156 (A.F.C.C.A. 2022) (unpub. op.),[17] found service members and civilians facing criminal prosecutions to be similarly situated due to the inherent similarities in procedures and potential consequences faced by both parties. This is in line the Supreme Court recent recognition that the evolving nature of the modern-day court-martial resembles state and federal criminal courts in *Ortiz*, 128 S. Ct. at 2170. In that case, it considered, *inter alia*, whether it maintained jurisdiction to review decisions by CAAF. 128 S. Ct. at 2170. In holding that it did, 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*.

64. In determining that the equal protection clause does not apply, ACCA applied a rational basis test for Congress's disparate treatment of military members at trial noting that their main concerns stemmed from extended debate required to achieve a unanimous verdict increasing the likelihood that rank would come into play in the deliberations, impact of hung juries in taking military members from their primary duties, and length of deliberation. *Pritchett* at 12-14. However, this ruling and that majority in *Westcott* is flawed in many respects.

a. First, the ruling's concern that a higher-ranking individual within the majority may sway a junior member into joining them resolves this by silencing the voice of the junior ranking individual entirely in direct contrast to one of the reasons *Ramos* chastised previous caselaw. See *Ramos*, at 1418 (Judge Kavanaugh concurrence citing to how Justice Thurgood Marshall forcefully explained in dissent in Apodaca, that to "fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests." *Johnson*, 406 U. S., at 402, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (Marshall, J., dissenting in both Johnson and Apodaca)). Additionally, unlawful use of rank by a panel member is in direct contradiction to the Military Judge's instructions and such behavior would itself be a violation of the UCMJ for which the panel member could be punished. These members are hand selected by the convening authority for their judgement and are entrusted to moderate their own behavior to conform with the UCMJ. The members are admonished by the Military Judge that they are to make their own decisions not based on rank. Additionally, all panel members have a duty to bring to the Military Judge's attention any violations of his or her instructions. Much the same as would occur if a cellphone was used or an improper resource was consulted in the deliberation room contrary to the Military Judge's orders. As such, there are already built-in protections to prevent this from occurring and additional protections are not necessary especially when balanced against the weighty reasons for unanimous verdict as recognized by the court in *Ramos* and as stated above.

[17] The Court in Westcott did not take up the issue of whether individuals are similarly situated instead finding that because the Appellant could not demonstrate he was convicted upon less than a unanimous vote of the members he did not have standing to raise the issue on appeal. Westcott, 2022 CCA LEXIS *6-7.

b. Not only does this rule ***pre-emptively*** silence the minority opinion to avoid a ***possibility*** of unlawful influence based on rank resulting in the same verdict which is being brought forth now with the non-unanimous verdict it does so in a setting which it is not necessary to do it. Military panels are chosen based upon a convening authority's determination that the members meet Article 25, UCMJ, 10 U.S.C. § 825, criteria (i.e., they are the most suitable individuals for such service based upon factors such as judicial temperament). Panels are comprised of highly educated and intelligent individuals to a far greater degree than is common in civilian society. These educated members are trusted to be able to set aside the opinions of others to include the convening authority and the Squadron Commander in constituting the court and are charged by the Military Judge to make their own fair and impartial decisions based only on the facts presented to them and the law provided to them. This concern is addressed though the voir dire process both as to unlawful influence by the convening authority but also as to anyone who is in the same command chain with another panel member. Such reference to the convening authority or a finding that two members are in the same command chain are not themselves de facto grounds for a "for cause" excusal of a member. Rather, the law recognizes that military members are highly trained to follow instructions and that instructions alone may be sufficient to resolve such an instance of potential unlawful influence based on the presumption that the members conform to the requirements of Article 25. The purpose of voir dire is to determine if that particular individual is susceptible to such influences, or whether they will otherwise be able to follow the Military Judge's instructions and set those concerns aside. The inherent risk of unlawful influence in the above noted situation clearly is at best negligible if not non-existent regarding a unanimous verdict discussion, and those are permitted and addressed through these protections which are already in place, making it unnecessary to use a non-unanimous verdict to get to similar protections. As to concerns of outside unlawful command influence on potential members, Article 37(a)(1), UCMJ, plainly makes it illegal for a convening authority, commanding officer, etc, to censure, reprimand, or admonish the court or any member for their participation in the court and is enforceable by punishment as directed by the court under Article 131f, UCMJ. Again, there are ancillary protections in place to address these issues.

c. To the extent that one of the concerns is a hung jury, the court in *Ramos* squarely addressed that matter. First, the Court held the possibility of a hung jury is not necessarily a negative thing stating, "who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what . . . it should—deliberating carefully and safeguarding against overzealous prosecutions?" The majority went on to observe that other professors have suggested "requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations[.]" *Ramos*, 140 S. Ct. at 1400. Although the majority questioned the wisdom of the *Apodaca* plurality's suggestion that the decrease in hung juries is always necessarily a good thing, the Court went on to explain that its objection to *Apodaca* was not so much that its "cost-benefit analysis was too skimpy." *Id.* at 1399-1401. Rather, the *Ramos* majority took issue with "the deeper

problem" posed by the fact that the *Apodaca* plurality "subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the first place." *Id.* at 1401-02. Overall, the Supreme Court did not find a hung jury analysis persuasive or appropriate and for the same reasons it should not serve as a basis for military courts to find unanimous verdicts inapplicable.

d. Furthermore, because the right to a unanimous verdict is an individual right held by the accused, it does not require that *acquittals* be unanimous. Even if Article 52(a)(3), UCMJ, is unconstitutional to the extent that it authorizes less than unanimous guilty verdicts, *Ross* makes clear that it is very much constitutional to the extent that it authorizes 5-3 acquittals. *State v. Ross*, 481 P.3d 1286, 1293 (Or. 2021)("*Ramos* does not imply that the Sixth Amendment prohibits *acquittals* based on nonunanimous verdicts or that any other constitutional provision bars Oregon courts from accepting such acquittals." (emphasis added)).

e. Additionally, while a hung jury is not a uniquely military problem the military has unique solutions which other jurisdictions do not to mitigate against any potential hardship to its units. First, unlike civilian courts, the military can and often does change venue of courts or move a military accused to any appropriate location world-wide for a myriad of reasons to include military necessity, military convenience, and to produce witnesses. As such, should a hung jury result in returning a military member back to a unit who is incapable of utilizing his or her services until the matter is re-tried then the military need only move the member to a unit who can utilize the member's service and fill the existing spot with someone who meets the unique mission requirements. The Air Force does this as part of the court-martial process, for example, an accused can be expedited transferred outside of his home unit merely for the ease of and at the request of an alleged sexual assault victim. *See* DAFI 90-6001, paragraph 11.1.3.2. The problem of having an individual out of service is not unique to military courts-martial and is utilized throughout the military for medical, administrative, or disciplinary reasons to include creation of "T" flights where members can be assigned while they are pending any of the above matters. Furthermore, the NDAA for Fiscal Year 2022 specifically provides that a military commander will no longer be making determinations on re-trying cases based on military needs for covered offenses, stating instead "If a case was referred to trial by a special trial counsel, a special trial counsel shall determine if a rehearing is impracticable and shall dismiss the charges if the special trial counsel so determines." 117 P.L. 81, 2021 Enacted S 1605. As such, a special trial counsel, will determine whether a re-trial is necessary, taking into consideration mission impact, and/or the feasibility or requirement for a change of venue as authorized by the convening authority. This change recognizes that military criminal procedures and an accused's rights can still be protected despite a military unit's requirements for good order and discipline and for similar reasons a unanimous verdict can be accommodated within this new system and is already consistent with current practice of the military in conducting courts-martial.

f. To the extent that the concern is that it will take the panel members longer in any given deliberation, that should be viewed as a good thing. The majority in *Ramos* recognized that as a benefit of unanimous verdicts stating that "requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations[.]" *Ramos*, 140 S. Ct. at 1400. To the extent that such longer deliberations pull military members away from their other military duties, such impact can be mitigated through the Convening Authority's selection of members and then again through the voir dire process. The Convening Authority has unique experience in command. They are entrusted under Article 25, UCMJ, to select appropriate members from their command or from other commands (with the concurrence of the commander involved). As such, they are in a unique position to know what is going on within the military units that the individuals nominated for selection are experiencing regarding workload and tempo. Especially in the Air Force, where panels are hand selected for each court-martial and excusals are reviewed and approved by the convening authority for each court (as opposed to standing panels), the Convening Authority can select from units that can spare the personnel and or spread the panel members across various units to ensure one is not disproportionately affected. The Convening Authority can also authorize travel of panel members from other units that have more availability to ensure that members are selected who will truly be able to provide the court with their full attention throughout the period their service is required. The Convening Authority, unlike civilian courts, has the full military roster at his or her disposal to select from and can adjust or request additional personnel as needed. Additionally, as a routine practice in voir dire, individuals are asked whether there is anything that would distract them from their duties as a panel member. Military necessity or inability to focus due to operational requirements are ripe grounds for dismissal during the voir dire process to ensure a panel is set which will provide the request services for the period it is required.

g. Where concerns about unlawful influence, length of delay, and the impact of a hung jury should exist this seems to be even more applicable in capital cases, however, under that jurisprudence military courts-martial trust that instructions, voir dire, and the convening authority are enough to counteract any rank disparity, hung jury, or length of deliberation issue. As such, it makes little logical sense to say that individuals entrusted with a similarly albeit lesser crime in non-capital case would suddenly swoon at the concept of rank in discussions during deliberations or be any more or less likely to engage in longer deliberations or produce a hung jury result. Furthermore, the inherent uncertainty of returning an alleged murderer or other criminal charged with a capital crime is inherently more obtrusive on military units then standard felony level charges or those taken to special courts-martial. Again, any such hesitation can be found and addressed on an individual basis through voir dire prior to member empanelment the same way that such concerns are dealt with in capital cases. You ask members if they are uncomfortable voicing an opinion to someone of higher rank, you ask if military unit operations will permit their stay through the extent of the trial without distraction, and you ask whether they are

comfortable evaluating the case and could find an Accused guilty if the Government meets their burden of proof.

h. The courts in *Pritchett* and *Westcott*, furthermore, applied the wrong standard in finding a rational basis existed. Rather the dissent in *United States v. Westcott*, 2022 CCA LEXIS 156 (A.F.C.C.A. 2022)(unpub. op.) is correct in applying the strict scrutiny standard because *Ramos* articulated that the right to a unanimous verdict is a fundamental right which would trigger the higher level of review. ACCA and AFCCA gives no thought or discussion as to appropriateness of the rational basis standard before applying it and it fails to capture this development in the law.

65. Notably, the Air Force Court of Criminal Appeals, originally took up this in various ***unpublished, and thus not binding, opinions***. *See United States v. Westcott*, 2022 CCA LEXIS 156 (A.F.C.C.A. 2022); *United States v. Albarda*, No. ACM 39734 (f rev), 2021 CCA LEXIS 347, at *2 (A.F.C.C.A. 7 July 2021)(unpub. op.); *United States v. Brown*, No. ACM 39728, 2021 CCA LEXIS 414, at *9 (A.F.C.C.A. 16 August 2021)(unpub. op.). The Air Force Court of Criminal Appeals later provided binding rulings on this matter in *United States v. Anderson*, 2022 CCA LEXIS 181 (AFCCA 2022)) and its progeny. While the majority found that the unanimous verdict issue was not properly raised because no poll was ordered to prove the verdict was unanimous and stated it would not apply the Fifth or Sixth Amendment requirements of a unanimous verdict to military court-martials it did so by providing minimal analysis as to the mechanisms in which they reached that conclusion. However, more informative, and descriptive as to the legal development of this issue is the dissent by Judge Meginley. Having found no Sixth Amendment right implicated, Judge Meginly goes on to lay out the following standard in evaluating the Fifth Amendment claim by the appellant:

> Given that our military justice system is "judicial"—as described in Ortiz [*v. United States*, 138 S. Ct. 2165, (2018)]—I find the right to a unanimous verdict is a fundamental constitutional right, as articulated in Ramos. As such, the denial of this right is subject to strict scrutiny, and not rational basis. See [*United States v.*] Begani, 79 M.J. [767,] 777 [N.M.Ct.Crim.App. 2020] (noting that restrictions "burdening fundamental rights are subjected to strict scrutiny"). "Strict scrutiny analysis requires the challenged statute to serve a 'compelling governmental interest,' and the means taken to be 'narrowly tailored' to accomplish this goal." Begani, 79 M.J. at 793 (Crisfield, C.J., dissenting) (citing Grutter v. Bollinger, 539 U.S. 306, 326, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)). As the dissent articulated in Begani, "I do not see any contradiction in performing a strict scrutiny analysis while providing Congress with great deference. Judicial deference does not mean abdication." Id. at 792 (internal quotation marks and citation omitted).

Westcott at 126-127. There can be little doubt that is the right standard after *Ramos,* where a five-justice majority noted that "[t]his Court has long explained that the Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice[.]'" *Ramos,* 140 S. Ct. at 1397. Even before *Ramos* announced the fundamental nature of unanimity, the Court had already expressed the underlying fundamental right to a jury as far back as 1968 in *Duncan v. Louisiana*, 391 U.S. 145 (1968). In that case, the Court plainly stated, "[W]e believe that trial by jury in any

criminal case is *fundamental* to the American scheme of justice[.]" *Id.* at 149 (emphasis added). Eleven years later, in *Burch v. Louisiana*, the Supreme Court clarified that not only is the right to trial by jury "fundamental to the American Scheme of Justice," but that it is, in fact "*essential to due process of law*." 441 U.S. 130, 134 (1979) (emphasis added). The significance of this verbiage in *Burch* cannot be understated because it recognizes that those rights commensurate with a jury trial do not only apply by nature of the Sixth Amendment, but *also* by nature of the Fifth (or Fourteenth) Amendment's due process clause. In light of *Ramos*, there can, therefore, be no dispute that the right to a unanimous verdict is "fundamental" not just to our federal scheme of justice, or a particular state's scheme of justice – but it is "fundamental to the *American* scheme of justice." *Ramos* clearly announced that the fundamental right to a unanimous verdict is part and parcel with the fundamental right to a jury.

66. Accordingly, the Government may only overcome this claim if it can pass strict scrutiny (i.e., establish a compelling interest and demonstrate that this differentiation is necessary to achieve that interest). In order for the Government to overcome strict scrutiny it bears the burden of demonstrating that it has a "compelling state interest" and the differentiation at issue is "narrowly tailored" to achieve said interest. *See generally, Johnson v. California*, 543 U.S. 499, 514 (2005). Put another way, the Supreme Court has explained that even if the Government can provide a "compelling state interest" it is "still constrained in how it may pursue that end: [T]he means chosen to accomplish the [Government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Grutter v. Bollinger*, 549 U.S. 306, 333 (2003) (internal citations omitted).[18]

67. Even if the Government could provide a compelling interest to justify non-unanimous verdicts in courts-martial, the current system set forth by Congress is not narrowly tailored. Pursuant to Air Force policy, the Air Force voluntarily assumes jurisdiction over cases to the greatest extent possible pulling these cases from Federal or State jurisdiction, with unanimous verdict protections. If the Air Force doesn't have the resources to meet the needs of those courts because of undue strain caused by requiring unanimous verdicts, the solution is not to deny the unanimous verdict, rather it is for the Air Force to balance its assumption of jurisdiction to take only such cases as it can maintain while also maintaining the fundamental constitutional right to unanimity.

68. Another aspect which proves this process is not narrowly tailored is that the UCMJ is "under inclusive" because it does nothing whatsoever to further such a government interest within the

[18] Even though equal protection applies by nature of reverse incorporation and therefore, technically sounds in the Due Process Clause of the Fifth Amendment, this objection should be analyzed within the unique framework set forth for considering an equal protection claim (i.e., once a fundamental right has been encumbered based upon a differentiation, the government bears the burden of overcoming strict scrutiny). This particular objection should, therefore, not be analyzed under the framework set forth by *Weiss*, 510 U.S. at 177, for other due process objections raised within the military context (i.e., "whether the factors militating in favor of [a unanimous verdict requirement] are so extraordinarily weighty as to overcome the balance struck by Congress.").

context of our most serious cases – those which are referred as capital. To suggest that the military justice system does not implicitly acknowledge the benefit conferred upon those facing courts-martial by the unanimous verdict would be to patently ignore the fact that a death sentence may only be adjudged in a capital case tried before members if the "accused was convicted of such an offense by . . . the unanimous vote of all twelve members of the court-martial[.]" R.C.M. 1004(a)(2)(A); *see also*, 10 U.S.C. § 852(b)(2) (2019). In such situations, "if a finding of guilty is unanimous with respect to a capital offense, the president shall so state." R.C.M. 922(b). Similarly, "[a] sentence may include death only if the members unanimously vote for the sentence to include death." R.C.M. 1006(d)(4)(A). Thus, any suggestion by the Government that the current system must remain out of a need for voting anonymity or for fear of unlawful command influence concerns fails to account for the fact that our system has apparently deemed such interests wholly insufficient to override those of an accused facing a potential death sentence where the risk of unlawful command influence and hung juries are necessarily greater. Congress has already determined, pursuant to 10 U.S.C. § 852(b)(2), that an accused whose cases has been referred as capital is entitled to a unanimous verdict in spite of any countervailing interest along the lines of voting secrecy, unlawful command influence, or anything else for that matter. *Ramos* draws no distinction between cases in which the death penalty is on the table; rather, it merely says the unanimity requirement applies to any "serious offense." *Ramos*, 140 S. Ct. at 1394. There can be little doubt that the weighty felony-level offenses at issue in this case fall within that category and warrant similar protections.

69. Again, it is important to reiterate the Court of Military Appeals' decision in *Santiago-Davilla*, 26 M.J. at 390, wherein it stated the "right to equal protection is part of due process under the Fifth Amendment . . . and so it applies to courts-martial, just as it does to civilian juries." Although that case arose within the context of a *Batson* challenge, it demonstrates that to the extent an accused in the civilian system enjoys a benefit by nature of the jury system, as a matter of due process that right should be conferred upon an accused servicemember facing courts-martial as well. Applying that principle to this case, if state authorities had jurisdiction over the Accused for the exact same offenses, he would be entitled to a unanimous verdict. However, simply because he is being tried by a general court-martial, he is being denied the same constitutional guarantee he otherwise would have been afforded if he had been tried just in either the federal or the state system. Especially as it relates to sexual assaults, which is alleged to have occurred in various jurisdictions, but for the Air Force's jurisdiction he would be subject to trial in a place which requires a unanimous verdict to find him guilty of the offenses alleged.

70. Having determined the appropriate standard is strict scrutiny, Judge Meginly in *Westcott* then analyzes the potential Governmental interests which revolve around impermissible influences on panel members, expediency, and procuring panel members at remote locations during war. *Id.* at 127-131 (citing, in part, to *United States v. Mayo,* ARMY 20140901, 2017 CCA LEXIS 239, at *22 (A.Ct.Crim.App. 7 Apr. 2017)). Judge Meginley then aptly notes that there is already a protection for the accused from unlawful command influence by virtue of the law prohibiting such actions finding that "[t]o say that one protection for an accused servicemember is a reason to diminish another protection is a non-sequitur." *Id.* (quoting *Dial*). Similarly, she notes that the question of expedience does not exist when there is no requirement for unanimous verdicts to acquit and that the world has changed thereby allowing panel members to be easily traveled to locations as necessary to hold trials. *Id.* at 130-132.

71. Judge Meginley then aptly weighted these interests against the benefit to the accused by stating:

> The dynamics of the jury process are such that often only one or two members express doubt as to [the] view held by a majority at the outset of deliberations. A rule which insists on unanimity furthers the deliberative process by requiring the minority view to be examined and, if possible, accepted or rejected by the entire jury. The requirement of jury unanimity thus has a precise effect on the fact-finding process, one which gives particular significance and conclusiveness to the jury's verdict. Both the defendant and society can place special confidence in a unanimous verdict, and we are unwilling to surrender the values of that mode of fact-finding, or to examine the constitutional implications of an attempt to do so, absent a clear mandate in the Rules or a controlling statute.

Id. at 129-130 (quoting Un*ited States v. Lopez*, 581 F.2d 1338, 1341-42 (9th Cir. 1978)). Ultimately this boils down to the fact that through a military court-martial a member is exposed to DNA processing, firearm prohibitions, voting restrictions, potential domestic violence implications under Lautenberg, and potential sex offender registration requirements. However, although they are subject to similar punishments and collateral consequences as their civilian counterparts in that service member faces these same potential consequences with the significant disadvantage of not being afforded the right to a unanimous verdict merely because they took an oath to serve and defend this country. This is made all the worse due to the Air Force's current policy to take jurisdiction from civilian jurisdictions whenever possible to maximize its own jurisdiction. Thus cases, but for the Air Force actively seeking to assume jurisdiction over them, would be tried under similar civilian rules are now being subject to the military rules and a lower standard of proof because the Government need not only convince less people (e.g. smaller panels) but can have more panel members disagree with them for a finding of guilty to be adjudged.

72. Even if somehow the right to a unanimous verdict were not a fundamental right and, in turn, if this Court were not to find that a "fundamental right" has been implicated, the Government would need to pass the rational basis test (i.e., it has a legitimate objective, and this differentiation is rationally related to achieve said objective). As with strict scrutiny, that, too, should fail. Unlike matters which regulate criminal *conduct* (e.g., Article 86, UCMJ makes failing to show up for work a crime in the military community whereas it could not be punishable in the civilian world), the lack of a unanimous verdict for military accused touches upon a matter of criminal *procedure* which does not justify disparate treatment between the two populations for all of the above noted reasons. Simply put, unlike *Parker v. Levy*, et. al., there is no legitimate interest served by this differentiation such that it causes military members to conform themselves to appropriate lifestyle standards. It would take more than an act of Congress to change the right to a unanimous verdict; it would quite literally require a Constitutional amendment. That is an encroachment on a fundamental constitutional right, as established in *Ramos*, which differentiates two bodies of the population in violation of the Equal Protection Clause of the Fifth Amendment because there is no compelling Government interest in doing so as applied through the lens of either the strict scrutiny or rational basis tests. *Id.* at

135-142.

73. Although not necessary to the resolution of this issue, the intersection between the Supreme Court's decision in *Ramos* and the Air Force's policy of maximizing its jurisdiction raises questions concerning the continued viability of *Solorio*, particularly cases like this one which have exact counterparts on the civilian side regarding prosecutions. Under the policies set out in AFI 51-201 encouraging prosecutors to maximize their jurisdiction, it would seem the Air Force is seeking to burden itself and employ its own resources on prosecutions that the civilian sector is willing and capable of handling. The Government can hardly argue that the unique nature of the military justice system requires a departure from the right to a unanimous verdict by nature of military necessity when they are faced with a problem of their own creation by taking on additional cases which it is not necessary for them to take on. This only reinforces the points established earlier in this section that the military justice system is not an aberration compared to civilian criminal justice systems throughout the nation. Rather it closely mirrors them, especially under the guise of the most recent NDAA for Fiscal Year 2022 with the removal of command authority over most court-martial offenses and instead creating a series of professional prosecutors again aligning it with the federal system in its adjudication of these issues. The military has created a system that mirrors these other jurisdictions, it is volunteering to take additional cases so there is clearly no evident impediment on military courts and to the extent there is any minimal impact, those can be resolved through other options available to the Government and inherent in the courts-martial processing, or through a change in the Air Force policy to maximize jurisdiction.

74. Understanding the backdrop of Article I, § 8, cl. 14, it is the government's burden to establish that the military environment requires a different rule than that enjoyed by civilian society, *Easton*, 71 M.J. at 174, the Government has not done that under the strict scrutiny nor the rational basis tests. There is no legitimate reason which justifies a departure from requiring a unanimous finding of guilt as a prerequisite to a criminal conviction in light of *Ramos*' recognition that this right is of such importance it applies not only to the federal government but has been incorporated to the states, and thereby 99.5% of the population by default.

75. Justice Gorsuch's sentiments in *Ramos*, in rejecting Louisiana's arguments, capture the ultimate calculus that the military now finds itself facing:

> All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury included a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed.

Id. at 1402. He concludes as follows: "But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.* at 1408. Here, the consequences of being right is to accept unanimous verdicts in courts-martial as the drafters intended it to be universal and amend the military justice system accordingly as it is capable of doing.

Stare Decisis Does Not Weigh in Favor of Retaining Quirin*'s Rule*

76. It bears recognition again this motion calls for overturning precedent, and that this Court is bound by the precedents of its superior courts. However, based upon the myriad of opinions in *Ramos*, the doctrine of *stare decisis* appears to be in flux and, should this case be subject to appellate review, it warrants emphasis that this doctrine does not weigh in favor of applying the rule first announced in *Milligan* and then adopted in *Quirin* or other subsequent decisions denouncing the unanimous verdict requirement in courts-martial or finding that military and civilian criminal defendants are not similarly situated. For one, a majority of the *Ramos* Court agreed that *stare decisis* is at its weakest in questions of constitutional interpretation—which is at issue here, as opposed to statutory interpretation. For another, Justice Sotomayor's concurrence indicates that this doctrine is weaker still where it concerns "criminal procedure rules that implicate fundamental constitutional protections." *Ramos*, 140 S. Ct. 1409 (Sotomayor, J., concurring in part).

77. Despite the number of opinions, a majority of the Court recognized four key factors in determining whether to apply *stare decisis*: (1) the quality of the decision's reasoning, (2) its consistency with related decisions, (3) legal developments since the decision, and (4) reliance interests. *Id.* at 1405. Justice Kavanaugh's concurrence similarly focused on three primary questions: (1) is the decision grievously wrong, (2) has the prior decision caused significant negative jurisprudential or real-world consequences, and (3) would overruling the prior decision upset reliance interests? *Id.* 1414 (Kavanaugh, J., concurring in part). Applying these factors, *stare decisis* does not weigh in favor of retaining the rule announced in *Quirin* – at least not to the extent that it would be read to preclude a right to a unanimous verdict.

78. Quality of the Reasoning: It is important to recognize that there are really two separate and distinct jury rights contained within the text of the Sixth Amendment. The first is the right to an "impartial" jury, and the second is a right to a jury composed of persons from the state and district where the crime allegedly occurred (i.e., a fair cross section of the accused's peers from his community). Because courts-martial recognize a right to an "impartial panel" under the Fifth Amendment, *Richardson*, 61 M.J. at 118, it is not necessary for this Court to overturn precedent in this case—particularly if the Court grants the defense's Fifth Amendment objections. Moreover, while *Qurin* et. al., referred to a blanket prohibition on the Sixth Amendment's right to a jury trial in courts-martial, it did not specifically examine the more insular question of whether unanimity in a verdict is required. Accordingly, there was no reasoning or discussion of this narrow question in any of these opinions. As such, it would be a stretch to say that *Quirin* or its progeny really conducted a thorough analysis as to whether the narrower right to a unanimous verdict applies to courts-martial, but to the extent it is found to control on this question it is no longer good law and should be overturned.

79. Consistency with Related Decisions: *Quirin* and its progeny also conflict with subsequent precedent, both expressly and by implication. As already discussed at length, *Middendorf* stated that there is "absolutely no distinction" between the Sixth Amendment right to a jury trial and the Sixth Amendment right to Counsel. Similarly, *Ortiz* acknowledged that not every military tribunal is the same and our system has come a long way, particularly in recent years, such that

the protections afforded by courts-martial and in civilian courts are "virtually the same." *Ortiz*, 128 S. Ct. at 2174, 2179. *Vallandigham* specifically acknowledges that the law of commissions, namely *Quirin* and *Milligan* is not the law of courts-martial. Moreover, there is a litany of CAAF precedent in recent years finding all other Sixth Amendment rights applicable to courts-martial. *See* para. 48, *supra.* Accordingly, the foundation upon which *Quirin* was built is hardly solid ground anymore given the evolution of our military justice system even should it be extended beyond the commissions context where it arose.

80. Legal Developments Since *Quirin*; This factor weighs most heavily in finding that *stare decisis* should not be applied. First, *Milligan* and *Quirin* were decided well before the military justice system was reformed by the UCMJ. They were also decided within the context of war-time military commissions. It would be an understatement to say that the military justice system which existed in that time looks anything whatsoever like the military justice system we know now. Whereas it was still an open question even in 1976 whether members were entitled to counsel in a court-martial pursuant to the Sixth Amendment, *Middendorf*, 425 U.S. at 33, that question has been squarely resolved in the accused's favor since that time. *Watternberger*, 21 M.J. at 43; *Gooch*, 69 M.J. at 361. Again, the *Ortiz* is particularly instructive given that it recognized our system now essentially mirrors the civilian criminal justice system. Now that both the federal government and the states require unanimous verdicts, this observation by *Ortiz* would no longer be true if this court were to instead adhere to a rule first announced during the Civil War. *See Ortiz*, 128 S. Ct. at 2174. As already noted, military members are entitled to almost every single other protection of the Sixth Amendment – a significant legal development since *Milligan*, *Quirin*, and even *Middendorf*. And military necessity is no longer viewed to trump legal rights as proven by the development of the special trial counsel function and the ability to balance those competing interests through changes of venue, selection of members, voir dire, and instructions.

81. Reliance Interests: Like the majority concluded in *Ramos*, the reliance interests in this case do not weigh in favor of *stare decisis*. First, within the last few years the UCMJ made it so that the necessary concurrence required to convict an individual was raised from two-thirds to three-fourths. It would hardly cause any disruption to now require an increased quorum given that the Armed Forces clearly were capable of accomplishing this exact same thing within the last few years and has been doing so in death penalty cases for years. Additionally, under the NDAA for Fiscal Year 2022, the process by which cases are taken to trial was completely rewritten to create the Office of Special Trial Counsel. The military is capable of changing and adapting its policies where warranted, and it is so warranted here. Second, like in *Ramos*, the requested relief does not amount to the overhaul of a system which impacts the entire country – just a small subset of the population. It is obvious that the states of Louisiana and Oregon will have to retry far more individuals than the military justice system. If the Supreme Court has deemed them capable of doing so, then it stands to reason the much smaller military justice system is likewise reasonable.

82. Justice Kavanaugh's Separate Concern – Real World Consequences: Finally, not allowing for unanimous verdicts for service members will result in the same real-world consequences that Justice Kavanaugh recognized in his *Ramos* concurrence. Namely, it "sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule." *Ramos*, 140 at 1417 (Kavanaugh, J., concurring). This process has allowed

the Government to lighten its burden to convict both statistically and when viewed historically which necessarily prejudices the Accused's rights.

Announcement of Unanimity

83. In the event that this Court rules against requiring a unanimous guilty verdict and instructing the members accordingly, the Defense asks 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. The announcement of unanimity is consistent with Article 51 and R.C.M. 922. An announcement of unanimity is the only way 1st Lt Baker may fully preserve an objection on verdict unanimity grounds. *See Westcott supra.* The requested announcement 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 R.C.M. 922(b) for capital offenses. Without disclosing any member's deliberations or vote, it is not prohibited polling under R.C.M. 922(e).

Conclusion

84. Modern courts-martial 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 Fifth or Sixth Amendments. Specifically, the standard of review is strict scrutiny and there is no compelling Government interest which outweighs the accused interest in a unanimous verdict to support a fair and impartial verdict as the realities of any military necessity are created by their own policy to maximize jurisdiction, overturned with the advancements of the technology and current criminal processing within the military, can be resolved through other mechanisms such as member selection and voir dire, and are inconsistent given there apparent success in the field of capital courts-martial.

RELIEF REQUESTED

85. WHEREFORE, the Defense respectfully requests this Honorable Court require a unanimous verdict for any finding of "guilty" and to modify the instructions accordingly. Should this Court deny that request, the Defense requests that the Court provide an instruction that the President must announce whether any finding of "guilty" was the result of a unanimous vote, without stating any numbers or names. The Defense does not request an Article 39(a) session to introduce additional evidence or provide argument.

86. Respectfully submitted 15 May 2023.

[redacted]
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Defense Counsel

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CERTIFICATE OF SERVICE

I certify that I served this Defense Motion for Appropriate Relief: Unanimous Verdict on the Military Judge and Trial Counsel by email and JAT E-Filing on 15 May 2023.

[redacted]
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