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

UNITED STATES OF AMERICA **v.** **DIAL, Andrew J.** **LTC, U.S. Army** **Alpha Company, Allied Forces North Battalion, United States Army North Atlantic Treaty Organization Brigade, APO AE 09752**	)	**GOVERNMENT BRIEF ON SPECIFIED ISSUES RE: DEFENSE MOTION OF APPROPRIATE RELIEF (UNANIMOUS VERDICT)** **31 December 2021**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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