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

U N I T E D S T A T E S	)	
	)	
v.	)	**FINDINGS AND CONCLUSIONS RE: DEFENSE MOTION FOR APPROPRIATE RELIEF (UNANIMOUS VERDICT)**
DIAL, Andrew J. **LTC, U.S. Army** **A Co., Allied Forces North Bn.** **United States Army NATO Bde.** **APO AE 09752**	)	**3 JANUARY 2022**

The Defense filed a motion requesting the Court to impose a requirement on the court-martial panel in this case to reach any guilty finding by unanimous vote. If the Court denies the request for a unanimous verdict, the Defense requests the Court require the president of the court-martial panel to announce whether the findings were unanimous or non-unanimous. The Government opposes the request. Neither party requested oral argument. The Court thereafter directed both parties to file briefs addressing specific issues identified by the Court. Both parties filed the directed briefs.

I. Issues Presented.

A. Does the Sixth Amendment jury trial right include the requirement for a unanimous verdict of guilty in a military court-martial in light of the Supreme Court's holding in Ramos v. Louisiana, 140 S. Ct. 1390 (2020)?

B. Does the Fifth Amendment Due Process clause require a unanimous verdict of guilty to meet the prosecution's burden of proving guilt beyond a reasonable doubt?

C. Does the Fifth Amendment Equal Protection guarantee require a unanimous verdict of guilty in a military court-martial given that every state and the Federal government (except for the U.S. military) requires a unanimous verdict to secure a criminal conviction?

II. Summary. This Court answers the first two issues in the negative and answers the third issue in the positive.

III. Facts.

The Court adopts the facts set forth in the Facts section of the Defense motion, to which the Government stipulated.

IV. Law.

A. Burden of Proof.

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

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

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

B. Constitutional Overview.

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

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

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

C. Military Courts-Martial.

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

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

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

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

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

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

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

D. Sixth Amendment.

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

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

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

E. Fifth Amendment Due Process.

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

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

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

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

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

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

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

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

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

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

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

G. Stare Decisis.

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

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

V. Analysis and Conclusions.

A. Sixth Amendment.

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

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

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

[1] 140 S. Ct. at 1397.

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

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

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

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

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

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

[3] Compare United States v. Mara, 410 U.S. 19, 48 (1973) ("the very purpose of the grand jury process is to ascertain probable cause") with Article 32(a)(2)(B), UCMJ, 10 U.S.C. § 832(a)(2)(B) (the purpose of the preliminary hearing includes determining whether probable cause exists).
[4] See section V.C.3., infra.

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

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

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

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

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

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

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

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

---

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

[6] The Ramos Court noted the historical underpinnings and wide acceptance of the unanimous verdict. 140 S. Ct. at 1395-96.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PRITCHARD.CHARLES.LESTER.JR.1064023086

Digitally signed by PRITCHARD.CHARLES.LESTER.JR.1064023086
Date: 2022.01.03 09:44:39 +01'00'

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

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