IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, *Appellee,* *-versus-* Master Sergeant (E-7) **ANTHONY A. ANDERSON,** United States Air Force, *Appellant,*	CAAF Dkt. No: 22-0193/AF AFCCA Dkt. No: 39969 **DATE: 1 September 2022** ***CORRECTED COPY***

AMICUS CURIAE BRIEF OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
In Support of *Appellant*

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for all criminal defense lawyers.

NACDL is keenly interested in military justice in general, and on behalf of its military criminal defense counsel members. NACDL is dedicated to advancing the proper, efficient, and just administration of justice to include military justice issues. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal (including military) and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants–to include military defendants–especially where there are constitutional issues presented.

In the decision that precipitated the "unanimous verdict" issue here, *Ramos v.*

Louisiana, 140 S. Ct. 1390 (2020), NACDL (among others) filed an *amicus* brief.[1] NACDL's interest in this issue continues because members of our Armed Forces tried by courts-martial under the *Uniform Code of Military Justice* [UCMJ] are not second-class citizens and do not forfeit their Fifth or Sixth Amendment rights to a unanimous verdict upon donning a military uniform.

Pursuant to CAAF Rule 26(b), our *amicus curiae* brief "bring[s] relevant matter to the attention of the Court not already brought to its attention by the parties . . . ." NACDL's approach is different regarding the *substantive* issue, i.e., does the *Sixth* Amendment's guarantee of a unanimous verdict in a criminal case, apply to non-capital courts-martial for serious offenses? Alternatively, does the Fifth Amendment's Due Process Clause require unanimity?

Our *amicus* brief does not duplicate Appellant's arguments. NACDL takes a different path in arriving at the same conclusion–non-unanimous verdicts in non-capital courts-martial violate the Constitution. NACDL's position is that Congress, when enacting Article 52(a)(3), UCMJ, provided for non-unanimous verdicts–as in *Ramos*–by "the concurrence of at least three-fourths of the members present when the

[1] Available at: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-5924.html [Last accessed: 29 August 2022].

vote is taken,"[2]–which contravenes what the Constitution commands, *viz.*, a unanimous verdict. Article 52(a)(3), UCMJ, is therefore unconstitutional on its face.

I. PRELIMINARY MATTER.

A. Misstating the Issue.

Both the government and the AFCCA conflate the issue into something that it is not–the defense Motion was for a *unanimous verdict*, not for a civilian "jury trial." This distortion is not an accident as evidenced by the CCA's decision below and its repeated references implying that Appellant seeks a "jury trial" when that was simply false:[3]

> ! The Government opposed the motion [for a unanimous verdict], asserting that binding precedent from the Supreme Court and the CAAF held that the Sixth Amendment *right to a jury trial* did not apply to courts-martial. . . . *Id.* at *16;
>
> ! The military judge denied the motion in a written ruling which he supplemented after the court-martial adjourned. He found *Ramos* neither explicitly nor implicitly overruled prior Supreme Court and CAAF precedent holding that the Sixth Amendment *right to a jury trial* did not apply to courts-martial. . . . He further explained that a unanimous verdict in *a jury trial* was not a fundamental right guaranteed in a court-martial because *the right to a jury trial* did not apply to court-martial panels . . . . *Id.*
>
> ! [T]here is no Sixth Amendment right to *trial by jury* in courts-martial. (Citations omitted). *Id.* at *17;
>
> ! *Ramos* does not purport, explicitly or implicitly, to extend the

[2] Article 16(b)(1), UCMJ, mandates a panel of 8 members, while Article 52(a)(3), allows convictions for non-capital cases by three-fourths of the members.

[3] *United States v. Anderson*, 2022 WL 884314 (AF CCA 2022)(unpub.).

> scope of the Sixth Amendment *right to a jury trial* to courts-martial; nor does the majority opinion in *Ramos* refer to courts-martial at all. Accordingly, after *Ramos*, this court remains bound by the plain and longstanding precedent from our superior courts that the Sixth Amendment *right to a jury trial* does not apply to trial by courts-martial—and, by extension, neither does the *unanimity requirement* announced in *Ramos*. (Footnote omitted). *Id.* at *18, [Emphasis added in above quotations].

The Sixth Amendment, as relevant, provides: "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . ." [Emphasis added]. The parties and the Court below ignore Article III, § 2, cl. 3: "The trial of *all crimes* . . . shall be by jury . . . ." [Emphasis added]. It is undisputable that Appellant was convicted of "crimes" under the UCMJ. There is no exception here as in the Fifth Amendment's "Grand Jury" Clauses.

The government's reaction is that Congressional power under the "Make Rules" Clause of Article I, § 8, cl.14, permits Congress to enact a law which provides for *nonunanimous* verdicts in courts-martial for serious offenses. That argument is wrong, historically and constitutionally, and this Court respectfully, must reject it.[4]

B. The Correct Issue.

The Record from Appellant's Motion and the Military Judge's decision below,

[4] The AFCCA below recognized (but rejected) the premise that "in the instant case Appellant would have us, in effect, declare Article 52, UCMJ, unconstitutional, notwithstanding Article I, Section 8." *Anderson, supra,* at *18, n.12. But, that *is* the issue here.

demonstrates that the correct framing of the issue here, is this:

> Is Article 52(a)(3), UCMJ, which permits non-unanimous verdicts by only a three-fourths majority, in non-capital courts-martial involving serious offenses, unconstitutional after *Ramos v. Louisiana*?

This is addressed in detail *infra.*

II. SUMMARY OF ARGUMENT.

. . . Congress cannot legislate away the Constitution.[5]

This case presents the panoptic issue of whether or not the Constitution requires unanimous verdicts in military courts-martial for *serious* offenses. Three different, but interrelated constitutional issues are presented:

1. Unanimous verdicts are required under the "Trial by Jury" Clause of Article III, § 2, Clause 3;

2. Unanimous verdicts are mandated by the Fifth Amendment's Due Process Clause;

3. Unanimous verdicts are also mandated by the Sixth Amendment's Impartiality Clause; and

NACDL submits that unanimity is required pursuant to *Ramos v. Louisiana*, 140 S.Ct. 1390 (2020), in courts-martial for serious offenses.

NACDL submits that Article 52(a)(3), UCMJ, which authorizes non-unanimous verdicts by three-fourths of the voting members in a court-martial for serious

[5] VanLandingham, *Ordering Injustice: Congress, Command Corruption of Courts-Martial, and the Constitution*, 49 Hofstra L. Rev. 211, 212 (2020).

offenses, is facially unconstitutional. Military law has long recognized that a military accused has a right to "a fair and impartial panel" which is "a matter of due process" under the Fifth Amendment. *United States v. Wiesen,* 56 M.J. 172, 174 (CAAF 2001). That is because "[i]mpartial court members are the *sine qua non* for a fair court-martial." *United States v. Modesto,* 43 M.J. 315, 318 (CAAF 1995).

Additionally, there is a long *judicial* history of "incorporating" various other Sixth Amendment rights into our military justice system–without damaging discipline, justice, or national security. Other than the Grand Jury Clauses in the Fifth Amendment and the Vicinage Clause in the Sixth,[6] all of the trial rights in the Sixth Amendment–with the exception being unanimous verdicts–are already judicially incorporated into military practice.

While disorder and chaos have not infected the ranks due to the incorporation of other Sixth Amendment rights, an over-expansive premise has long infected military law, i.e., "courts-martial have never been considered subject to the jury-trial demands of the Constitution." *McClain,* 22 M.J. at 128. That conclusion is accurate

[6] *Amicus* suggests that this clause is likely the basis for the long-standing claims that the Sixth Amendment's Jury Trial Clause does not apply to courts-martial. *See, e.g., United States v. McClain,* 22 M.J. 124, 128 (CMA 1986). But, the Supreme Court has never squarely held that the Sixth Amendment's Jury Trial Clause is *inapplicable* to courts-martial.

only if limited to the Vicinage Clauses of Article III, § 2, and the Sixth Amendment.[7] However, *McClain's* conclusions are not accurate today. While giving Congress its due under the "Make Rules" and "Necessary and Proper" clauses of the Constitution, there is an important caveat to that admittedly broad power: "Congress . . . 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." *Weiss v. United States*, 510 U.S. 163, 176 (1994).

United States v. Lambert, 55 M.J. 293, 295 (CAAF 2001), held:

> [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. [citation and internal footnote omitted] This case involves the latter aspect of impartiality . . . .

The holding that the Sixth Amendment's requirement of *impartiality* applies to courts-martial is the key and mandates following *Ramos*. As Justice Gorsuch stated in *Ramos,* ". . .the term 'trial by an impartial jury' carried with it some meaning about the content and requirements of a jury trial. *One of these requirements was unanimity.*" 140 S. Ct. at 1395. [emphasis added].

The decision in *Lambert*, coupled with *Ramos's* holding that from a

[7] The Grand Jury Clauses are expressly excluded from military practice, and in any event, have nothing to do with unanimous verdicts.

constitutional perspective, impartiality means unanimity for criminal verdicts in serious cases, must likewise mandate unanimous court-martial verdicts. Article 52(a)(3), UCMJ's non-unanimity provision, is unconstitutional on its face.

III. INTRODUCTION.

"When we assumed the soldier, we did not lay aside the citizen. . . ."[8]

This case raises significant constitutional questions. The issue here is not only the interplay between the Constitutional provisions noted above, but their *application* to the Congressional exercise of its legislative power in enacting the UCMJ. Congress–without any Constitutional exemption such as the Fifth Amendment's Grand Jury exclusions for the military–is directly responsible for *creating* a *non-unanimous* verdict procedure for *non-capital* convictions by courts-martial. In Article 52(a)(3), UCMJ, Congress expressly authorized non-unanimous verdicts in non-capital courts-martial by a three-fourth's percentage. Yet, the next section, Article 52(b)(2), UCMJ, *mandates* a unanimous verdict by 12 members in capital cases. While the adage "death is different" is true, NACDL submits that where, e.g., the UCMJ provides for a sentence of life without parole (or its functional equivalent), to allow such to be premised by a non-unanimous verdict by 3/4 of the *eight* voting members, is unconstitutional in any system advocating equal justice.

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[8] George Washington, June 26, 1775, speech to the New York Provincial Congress.

The constitutional question here is: Is the "Make Rules" Clause in Article I, § 8, of the Constitution subject to the subsequently ratified Sixth Amendment's incorporated right to a *unanimous* verdict under *Ramos*?[9]

A. The Unanimity Issue Through a Different Lens.

NACDL has no disagreement with Appellant's framing of his unanimity issue. But, we suggest that there is a narrower way to examine that issue from a constitutional perspective. Here the better approach is to examine the source of the problem, *viz.*, the provision in the UCMJ, which expressly allows a non-unanimous verdict in *non-capital* courts-martial. Thus, the issue is better framed as:

> Is Article 52(a)(3), UCMJ, which permits non-unanimous verdicts by only a three-fourths majority, in non-capital courts-martial involving serious offenses, unconstitutional after *Ramos v. Louisiana*?

The government and the AFCCA both ignored the basics of *constitutional construction*.[10] As in statutory construction, the canon of ordinary meaning requires that words be given just that. It is axiomatic that specific words have specific

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[9] Older decisions discussing Sixth Amendment "jury trial" rights, paint the issue with too broad of a brush. Furthermore, the underlying issue surrounding the scope of the Sixth Amendment's *inapplicability* is not about fundamental fairness or unanimity. Rather, it is the *vicinage* clause that *Amicus* agrees is inapplicable to courts-martial. *See generally* 1 Journals of the Continental Congress (1774-1789), as quoted in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 568-68 (1980).

[10] *See generally* Antieau, *Constitutional Construction: A Guide to the Principles and Their Application*, 51 Notre Dame L. Rev. 357 (1976).

meanings and by all historical accounts, the Constitution's Drafters were "wordsmiths." One only needs to peruse Article I, § 8, of the Constitution to see this. For example, clause 10 gave Congress the power "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," "Felonies" and "Offenses" are far different words with significantly different meanings than "Rules" and "Regulations" as used in the Make Rules Clause.[11] If the Drafters had intended to give Congress the power to "define and punish" military felonies and offenses, they would have said so–they didn't, and one cannot extrapolate rules and regulations into such.

Article III, Section 2, Clause 3, provides in relevant part, that "The Trial of all Crimes . . . shall be by Jury. . . ." Again, the Drafter's use of the word "crimes" is far different than "rules" and "regulations." But, there can be no doubt that the Appellant has been convicted of violations of the UCMJ that in ordinary usage, are considered both crimes and felonies. But, this clause prompted part of the provisions of the Sixth Amendment by adding the adjective "impartial" before the word "jury." As *Ramos* holds, an impartial jury has for centuries incorporated the concept of unanimity. The failure to recognize this principle is both the flaw and error of AFCCA's decision below.

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[11] Article I, Section 8, cl, 14, provides, "The Congress shall have Power ... To make Rules for the Government and Regulation of the land and naval Forces."

B. Historical Context

Prior to the Founding, when the Colonies were under both British rule and military occupation, what we would today classify as general "common law" crimes–murder, robbery, burglary, etc.,–even when committed by uniformed members of the British Army, Soldiers were tried in British *civilian* courts in the American Colonies–not in British courts-martial–which afforded the defendants the right to a unanimous verdict. The most famous example of this was John Adams' defense of the British Soldiers in the so-called "Boston Massacre" cases.[12] That practice continued when the Continental Congress enacted the first American Articles of War, essentially adopting the British version in our pre-Constitutional jurisprudence, i.e., general, non-military offenses were tried in *civilian* courts. That procedure existed until the early 20th Century.

Indeed, the Seventh Amendment,[13] which likewise provides for an "impartial jury" in *civil* cases has long been interpreted as requiring unanimous verdicts. *See* F.R.Civ.P 48(b); and *American Publ'g Co. v. Fisher*, 166 U.S. 464, 468 (1897)[a civil suit], where the Court held:

> [U]nanimity was one of the peculiar and essential features of trial

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[12] *See generally*, *Famous Trials: Boston Massacre Trials (1770)*, available at: https://famous-trials.com/massacre [Last accessed: 30 August 2022].

[13] While not expressly applicable to criminal trials (or courts-martial), it is relevant to the Drafter's thoughts regarding unanimous verdicts.

> by jury at the common law. No authorities are needed to sustain this proposition. Whatever may be true as to legislation which changes any mere details of a jury trial, *it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.* It follows, therefore, that the court erred in receiving a verdict returned by only nine jurors, the others not concurring. [Emphasis added].[14]

Article 52(a)(3), UCMJ, is such a statute. Or, as the Court concluded in *Stogner v. California*, 539 U.S. 607, 632 (2003), "It is difficult to believe that the Constitution grants greater protection . . . to property than to human liberty."

It is also dubious that the Drafters intended to give Congress unlimited power over what is now termed "military justice." One of the complaints made against the British King in our *Declaration of Independence* (1776), was that "He has affected to render the military independent, of, and superior to the civil power." Thus, it is clear that judicial "deference" to the military was a toxic concept to the Founding Fathers.[15]

When the Revolutionary War started, General Washington persuaded the Continental Congress of the need for military disciplinary procedures, which led to

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[14] *See also Andres v. United States*, 333 U.S. 740, 748 (1948): "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply."

[15] While the Declaration does not carry the force of law–*see Gulf, C.&S. F. Ry. Co. v. Ellis*, 165 U.S. 150, 160 (1897)–it is powerful evidence of the legal thinking and philosophy of the time, and not at all remote from the Constitution's ratification in 1789.

their adopting the British Articles of War, known as the *Articles of War of 1775*.[16] Of significance here is that what we today refer to as "common law" crimes, i.e., serious offenses such as murder, rape, robbery, burglary, etc., were *not* tried by the military, but rather by civilian courts with the right of a *unanimous* jury. This is best exemplified by John Adams' defense of the British Soldiers in the "Boston Massacre" cases, tried–not in a British Court-Martial–but rather in a Colonial Court with a unanimous jury.

Constitutional Law professor, A.R. Amar, in his book entitled, *The Bill of Rights: Creation and Reconstruction* (1998),[17] delves into the historical background of the Amendments in the Bill of Rights. In Chapter Three (at 46) he discusses "*The Military Amendments,"*[18] specifically:

> a. "[The Second] amendment reflects a deep anxiety about a potentially abusive federal military, an anxiety also reflected in the Third Amendment," *Id.* at 46;
>
> b. "In 1789, the word *army*–in contradiction to *militia*–connoted a mercenary force . . . . [emphasis in original] These men, full-time soldiers who had sold themselves into virtual bondage to the government, were typically considered the dregs of society–men without land, homes, families, or principles. Full-time

[16] *See* Winthrop, *Military Law and Precedents*, 953 (2nd ed., 1920 Reprint ed.).

[17] This elaborated on his earlier work, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131 (1991).

[18] These amendments served to curtail what appeared to be the unlimited power ostensibly flowing from the Make Rules Clause.

service in the army further weakened their ties to civil(ized/ian) society . . . ." *Id.* at 53;

c. "If the [Second] amendment is not about the critical difference between the vaunted 'well regulated militia of the people' and the disfavored standing army, it is about nothing." *Id.* at 56;

d. "[T]he Second Amendment takes the expansive word *necessary* . . . and puts that word to work as a restriction on Congress. It is a well-regulated militia, and not an army of conscripts, that is '*necessary* to the security of a free state'; the Second Amendment estops Congress from claiming otherwise." *Id.* at 57;

e. "[T]he Third Amendment was needed to deal with military threats too subtle and stealthy for the Second's 'well regulated militia.'" *Id.* at 59;

! Its language is a direct restriction on the government's military powers in Article I, § 8.

More than fifty years ago a retired Navy Captain Judge Advocate (turned law professor) addressed the non-unanimity issue in non-capital courts-martial.[19] Professor Larkin noted that "unanimous agreement is not required for a court-martial 'jury' to return a finding of guilty. Curiously, virtually no critical analysis of this aspect of military law has been made . . . ."[20] *That day is here*. Larkin continues:

> [Historically] the verdict of the jury should be unanimous. If this . . . element is held to be an integral part of the constitutional

[19] Larkin, *Should the Military Less-Than-Unanimous Verdict of Guilt Be Retained?* 22 Hastings L. J. 237 (1971).

[20] *Id.* at 238.

> guarantees of a jury trial, how can the military less-than-unanimous verdict be permitted? *Id.* at 240.

Ramos has resolved both prongs: unanimity is constitutionally mandated, and Article 52(b)(3), UCMJ, is thus unconstitutional.

Stated from a different perspective, how can an accused be guilty *beyond a reasonable doubt* when one-quarter of the panel is *not* convinced of guilt beyond a reasonable doubt? Larkin relied upon *Hibdon v. United States*, 204 F.2d 834, 838 (6th Cir. 1953), for his answer:

> It must be observed, however, that the requirement of a unanimous verdict is nowhere defined in the Constitution as "a privilege to be enjoyed." It is the inescapable element of due process that has come down to us from earliest time. No federal case has been cited and none can be found by independent research that holds or even remotely suggests that it may be waived.
>
> *** * ***
>
> 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 out traditional concept of due process in criminal cases*** . . . . [Emphasis added] *Id.*

C. No Deference is Due.

AFCCA concluded that it must give judicial "deference" to Congress in this

area.[21] Ordinarily that may be true where Congress has indeed "balanced" the constitutional rights of servicemembers against its military powers. In enacting Article 52(a)(3), UCMJ, Congress did *no* balancing, rather, it performed a bit of legislative slight-of-hand. While changing the percentage of votes required to convict from two-thirds to three-fourths *appears* to help an accused, by fixing the panel size at eight members, the net effect was to change nothing. With a panel of eight members, whether one uses two-thirds or three-fourths, both require six votes to convict or three votes for a not guilty verdict. No deference is due where nothing was done.

The "deference principle" (for lack of a better term) in its current form is, to some extent, a repudiation of *Marbury v. Madison's* core holding on *judicial* power.[22] From another perspective, it is an abdication of the Constitution's "checks and balances" foundation by granting the military as a component of the Executive branch undue influence over core constitutional values, constitutionally reserved for Article III, courts. In, *Reid v. Covert* 354 U.S. 1, 24 n.44 (1957), the Court observed: "The Common Law made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried alike by the same civil courts." The Court went on to say:

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[21] *Anderson, supra*, at *17.

[22] 5 U.S. (1 Cranch) 137 (1803).

> [I]t is not surprising that the Declaration of Independence protested that George III had 'affected to render the Military independent of and superior to the Civil Power' and that Americans had been deprived in many cases of "the benefits of Trial by Jury." And those who adopted the Constitution embodied their profound fear and distrust of military power, as well as their determination to protect trial by jury, in the Constitution and its Amendments. [footnote omitted].

Id. at 29.

VI. ARGUMENT

> Article 52(a)(3), UCMJ, which permits non-unanimous verdicts in non-capital courts-martial involving serious offenses, is unconstitutional. *Ramos v. Louisiana*.

While Article I, § 8, cl. 14, gives Congress the power to "make rules for the government and regulation" of our Armed Forces, and the "Necessary and Proper" Clause provides the constitutional authorization for Congress to enact the UCMJ, including Article 52(a)(3), UCMJ, that alone does not answer the question presented. As *Weiss* held, Congress is also "subject to the requirements of the Due Process Clause when legislating in the area of military affairs. . . ." 510 U.S. at 176. There can be no debate that in enacting Article 52(a)(3), UCMJ, Congress was "legislating in the area of military affairs." That then raises the question: is the non-unanimous verdict procedure for non-capital offenses, fundamentally fair under the Fifth Amendment–as well as any Sixth Amendment analysis?

United States v. Roland, 50 M.J. 66, 68 (CAAF 1999), held:

> [T]he military defendant does not have a right to a jury selected from the civilian community. [citations omitted] But, the military defendant does have a right to members who are fair and impartial. [citing, *Wainwright v. Witt*, 469 U.S. 412 (1985); and *Chandler v. Florida*, 449 U.S. 560 (1981)].

See also United States v. Clay, 1 C.M.R. 74 (CMA 1951), discussing "military due process." Another constitutional scholar notes:

> Without a doubt, a central function of the federal judiciary is upholding the Constitution of the United States. Due process, of course, is at the very core of the judicial mission.[23]

Hibdon v. United States, 204 F.2d 834 (6th Cir. 1953), is instructive, noting that:

> It must be observed, however, that the requirement of a unanimous verdict is nowhere defined in the Constitution as "a privilege to be enjoyed." It is the inescapable element of due process that has come down to us from earliest time. No federal case has been cited and none can be found by independent research that holds or even remotely suggests that it may be waived. *Id.* at 838.

If an accused cannot waive a unanimous verdict, Congress cannot deny it.

A. U.S. Courts-Martial Have Been Considered "Judicial" for Almost 170 Years: The Impact of *Ortiz.*[24]

In 1854, the U.S. Attorney General rendered a formal Opinion regarding a Navy court-martial, concluding, "The decision of the President of the United States, in

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[23] E. Chemerinsky, *A Framework for Analyzing the Constitutionality of Restrictions on Federal Court Jurisdiction in Immigration Cases,* 29 U. Memphis L. Rev. 295, 313 (1999). U.S. Immigration Courts are likewise Article I courts within the Executive Branch.

[24] *Ortiz v. United States,* 138 S. Ct. 2165 (2018).

cases of this sort, is that of the ultimate judge provided by the Constitution and laws. Like that of any other court in the last resort of law, it is final as to the subject-matter." 6 Op. Att'y Gen. 369, 370 (1854). This was not an outlier. *See also* 11 Op. Att'y Gen. 19, 20-21 (1864), which concluded:

> . . . Congress intended that the officer who is authorized to approve and confirm the sentence of a court martial under this act, in revising its proceedings, *should act judicially* . . . .
>
> Undoubtedly the President, in passing upon the sentence of a court martial, and giving to it the approval without which it cannot be executed, *acts judicially*. The whole proceeding from its inception is judicial. The trial, finding, and sentence, are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are even placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be adjudged according to law. . . . When the President, then, performs this duty of approving the sentence of a court martial dismissing an officer, *his act has all the solemnity and significance of the judgment of a court of law*. [Emphasis added].

In *Runkle v. United States, supra,* a back-pay suit by a military officer convicted by a General Court-Martial, but, *not* acted upon by the President as procedurally required, the Court held, "the action required of the president ***is judicial in its character***, not administrative." [emphasis added]. Thus, the Court's decision in *Ortiz* should have been no surprise to anyone familiar with the history of American military justice.

In the Sixth Amendment environment, *United States v. Jacoby,* 29 C.M.R. 244,

249 (CMA 1960), held in the context of confrontation [a precursor to *Crawford*]: "it was provided in Article 10, Articles of War, 1786, that depositions might be taken in cases not capital, "provided the prosecutor and person accused are present at the taking of the same." So, there is a long history of applying civilian trial rights to courts-martial.

The *Ortiz* Court held: "The military justice system's essential character—in a word, [is] judicial . . . ." 138 S. Ct. at 2174. Thus, "procedural protections" should, by definition, include unanimity in verdicts. Of note, in 2001, Congress added Article 25a, UCMJ,[25] to the UCMJ, which provided that where "the accused may be sentenced to death, the number of members shall be 12." Thus, in the context of capital cases, Congress applied (without Supreme Court "prodding") the constitutional framework utilized in federal and state capital cases–a *unanimous* panel of twelve. One of the goals of any principled system of criminal justice must be to avoid "wrongful convictions" and illegal sentences, something that unanimity promotes, and something that in non-capital cases the UCMJ forsakes without good reason.

> *Ortiz* continued:
>
> Each level of military court decides criminal "cases" . . . in strict accordance with a body of federal law (of course ***including the***

[25] 115 Stat. 1124.

> ***Constitution***). The procedural protections afforded to a service member are "virtually the same" as those given in a civilian criminal proceeding, whether state or federal. [internal citation omitted; emphasis added].

138 S. Ct. at 2174. "Strict accordance" with the Constitution, absent the express exemptions contained, e.g., in the Fifth Amendment's "Grand Jury" clauses, necessarily implies unanimous verdicts–the very *premise* of *Ramos.* That is bolstered by *Ortiz's* conclusion that: "[T]he judgments a military tribunal renders, as this Court long ago observed, 'rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals.'" [internal citation omitted]. *Id.*

But the Court did not stop there when it held: "The jurisdiction and structure of the court-martial system likewise resemble those of other courts whose decisions we review. . . ." *Id*. The one exception of note–at issue here–is the lack of unanimity in courts-martial verdicts; something *not* the case in other Article I, courts exercising criminal jurisdiction, e.g., Territorial Courts, the District of Columbia, etc. *Ortiz,* 138 S. Ct. at 2168-69.

B. The Evolution of a "Fair Trial" in the Military.

Shortly after the UCMJ became effective in 1951, the Court of Military Appeals decided *United States v. Clay*, *supra,* the seminal "military due process" case. There, the Court held:

> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law. ***We conceive these rights to mold into a pattern similar to that developed in federal civilian cases***. . . . ***The Uniform Code of Military Justice, supra, contemplates that he be given a fair trial and it commands us to see that the proceedings in the courts below reach that standard.*** [Emphasis added].

Id. at 77. The Court went on to say: "[W]e believe Congress intended, in so far as reasonably possible, to place military justice on the same plane as civilian justice, and to free those accused by the military from certain vices which infested the old system." *Id.* In the context of a unanimous verdict for non-capital cases, that language cannot be ignored.

Clay ended with the Court stating: "Previously adjudicated ***federal court cases*** are a source from which we can test the prejudicial effect of denying an accused the rights we have set out as our pattern of 'military due process.'" 1 C.M.R. at 78 [emphasis added]. *Ramos* is a "federal court" case from the Supreme Court, and "previously adjudicated" in the context of this case.

In *United States v. Jacoby, supra* at 247-48, the Court stated, "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." [citations omitted]. *Jacoby* was a Sixth Amendment Confrontation Clause decision, predating

Crawford v. Washington, 541 U.S. 36 (2004), by 44 years.

In *Kauffman v. Sec'y Air Force,* 415 F.2d 991 (DC Cir. 1969), *cert. denied,* 396 U.S. 1013 (1970), a case involving a court-martialed officer, the DC Circuit ruled: "We hold that the test of fairness requires that military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." *Id.* at 997. [footnote omitted]. *Accord*, *Courtney v. Williams,* 1 M.J. 267, 270 (CMA 1976).[26] Or, as Professor (and retired judge advocate) Rachel VanLandingham observes: "Procedural due process demands fairness in the procedures the government employs to deprive someone of their life, liberty, and property."[27]

There is no rational or constitutional reason for non-unanimous verdicts for offenses tried by courts-martial.[28] One military author notes that "in the twenty-first [Century], we know there is a great deal of value in an unanimity requirement for juries. Non-unanimous verdicts allow minority viewpoints to be ignored during

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[26] [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. (Citing *Kauffman, supra*).

[27] VanLandingham, *supra* at 238.

[28] Congress is the culprit here by enacting Article 52(a)(3), UCMJ, permitting non-unanimous guilty verdicts by only three-fourths of the voting members.

deliberation, a hallmark of bad decision making." [Footnote omitted].[29]

C. The Sixth Amendment's Application to Military Justice.

> *As it stands, a court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury*.[30]

Starting with the premise that the Drafters knew what they were doing, word choices became important, and by giving Congress the authority to "Make Rules" pertaining to the military, that does not *per se* rise to the level of giving Congress the power to "make . . . laws . . . ." Congress's power here flows from the "Necessary and Proper" Clause of Art. I, § 8. While that power is expansive, the question which needs to be addressed, is to what extent (if any), does the Sixth Amendment's right to a fair and impartial fact-finder limit the Congressional power in the context of its' "Make Rules" authority, to include its "Necessary and Proper" authority?

One aspect of the Sixth Amendment's jury trial right is not (because it cannot be) applicable to courts-martial. That is the requirement of mandating jurors be from "the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," i.e., the Vicinage Clause. But, that has

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[29] Monea, *Reforming Military Juries in the Wake of* Ramos v. Louisiana, LXVI Naval L. Rev. 67, 68 (2020).

[30] *Id.* at 72.

nothing to do with unanimous verdicts and a "fair trial."[31]

D. The Sixth Amendment Has Already Been Extensively Incorporated Into Our Military Justice System.

There is a long history of "incorporating" other Sixth Amendment rights into our military justice system. This includes rights to:

1. ***Speedy Trial:*** *United States v. Cooper*, 58 M.J. 54, 57 (CAAF 2003);

2. ***Public Trial:*** *United States v. Grunden*, 2 M.J. 116, 120 (CMA 1977) [superceded on other grounds]; and *United States v. Hershey*, 20 M.J. 433, 435 (CMA 1985);

3. ***Confrontation:*** *United States v. Blazier*, 69 M.J. 218, 222 (CAAF 2010);

4. ***Notice:*** *United States v. Girouard*, 70 M.J. 5, 10 (CAAF 2011):

> ***The rights at issue in this case are constitutional in nature***. The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law," U.S. Const. amend. V, and ***the Sixth Amendment provides that an accused shall "be informed of the nature and cause of the accusation,"*** U.S. Const. amend. VI. Both amendments ensure the right of an accused to receive fair notice of what he is being charged with. [Emphasis added];

5. ***Compulsory Process:*** *United States v. Bess*, 75 M.J. 70, 75 (CAAF 2016);

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[31] *See, Chenoweth v. Van Arsdall*, 46 C.M.R. 183, 185-86 (CMA 1973) [Mem. Opn.] for a discussion of the Vicinage Clause as being inapplicable to courts-martial. Of more importance is the Court's holding that "federal practice applies to courts-martial if not incompatible with military law or with the special requirements of the military establishment." *Id*. at 186. There is nothing "incompatible" with military law in requiring unanimous verdicts for serious crimes. Congress itself proves that by *statutorily* requiring *unanimous* verdicts in capital cases. Article 52(b)(2), UCMJ.

6. ***The Right to Counsel:*** *United States v. Wattenbarger,* 21 M.J. 41, 43 (CMA 1985);

7. ***The Right to the Effective Assistance of Counsel:*** *United States v. Gooch,* 69 M.J. 353, 361 (CAAF 2011).

With the exception of unanimous verdicts, servicemembers facing a court-martial for serious offenses, receive the core panoply of constitutional trial rights.

Weiss also observed: "Congress has taken affirmative steps to make the system of military justice more like the American system of civilian justice . . . ." 510 U.S. at 179–consistent with our position here. *Weiss* was decided 24 years before the Court's decision in *Ortiz,* and its clarification from a *constitutional* perspective. Courts-martial are judicial proceedings, which include "procedural protections," which is something that unanimity in verdicts clearly provides. The question is not Congressional authority, but rather why are servicemembers who are facing "serious charges" being denied this fundamental right–something that, as the "Boston Massacre" cases pointed out, was afforded British Soldiers in Massachusetts long-prior to our Independence and the ratification of the Constitution and Bill of Rights?

E. Enter *Ramos.*

Writing for the Court, Justice Gorsuch begins:

> We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. [footnote omitted].

140 S.Ct. at 1394. Here, there is no question that Appellant faced trial for serious UCMJ offenses–no one disputes that. Digging into history, the *Ramos* opinion continues:

> The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.
>
> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's . . . the answer is unmistakable. A jury must reach a unanimous verdict in order to convict. [internal footnotes omitted].

Id. at 1395.

Justice Gorsuch then states, "at the time of the Amendment's adoption, the right to a jury trial meant a trial in which the jury renders a unanimous verdict." *Id.* at 1400. And next, "[a] right mentioned twice in the Constitution would be reduced to an empty promise. ***That can't be right***." *Id.* [emphasis added]. Indeed, it wasn't and there is nothing from a historical perspective to suggest otherwise, especially in the context of "serious crimes" allegedly committed by servicemembers. Again, for clarification purposes, NACDL is not advocating for a civilian-style "jury" system–only that courts-martial *verdicts* be unanimous.

Justice Gorsuch in rejecting Louisiana's arguments for non-unanimity, observed:

> 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.

We note anecdotally, that it would be a very rare occurrence for all members to be of equal rank. Rule 921(a), *Rules for Courts-Martial* (2019 ed.), addresses this: "Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment." It is also the reason that Military Judges are required to instruct the members as to Findings, as follows:

> The following procedural rules will apply to your deliberations and must be observed. 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.[32]

If a trial by court-martial is indeed a "search for the truth,"[33] then non-unanimous verdicts cannot be upheld under our Constitutional scheme.

* * *

Congressional powers are enumerated in the Constitution. In the area of military affairs, they are broad–but they are not absolute nor unlimited. The Court in *Weiss* stated, "Congress . . . is subject to the requirements of the Due Process Clause." 510

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[32] DA Pam. 27-9, *Military Judges' Benchbook*, at 69.

[33] *See, e.g., Nix v. Whiteside,* 475 U.S. 157, 171 (1986); *United States v. Johnson*, 41 M.J. 13, 16 (CMA 1994) ["The purpose of a trial is truthfinding within Constitutional, statutory, and ethical considerations."]

U.S. at 176. Whether found under the Due Process Clause or, as *Ramos* holds, under the Sixth Amendment's Impartial Jury Clause, the right to a unanimous verdict in a criminal prosecution is constitutionally mandated. Contrary to the government's argument and the courts' rulings below, it is the Constitution that controls, not a provision within the UCMJ.

Chief Justice Marshall's ruling in *Marbury* provides the criterion. The Constitution must take precedence–Article 52(a)(3), UCMJ, is in direct contravention and, as Marshall proclaimed, is void.

CONCLUSION

Ramos mandates unanimous verdicts in courts-martial for serious offenses. The Appellant is entitled to a verdict compliant with that constitutional requirement.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 24(c) because it contains **6,888** words per WordPerfect's "word count" function; and

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CERTIFICATE OF FILING and PROOF OF SERVICE

The undersigned certifies that a true digital ***corrected*** copy ["pdf"] of this pleading was filed electronically with the Court [efiling@armfor.uscourts.gov], Counsel for the Government and for the Appellant, this 1st day of September, 2022.

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