

IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

United States

Appellee

v.

Private

Sivar Y. COX

U.S. Marine Corps

Appellant

Amicus Curiae Brief

Crim. App. Dkt. No. 202400194

USCA Dkt. No. 26-0090/MC

Brief on Behalf of the National Institute of Military Justice
in Partial Support of Appellant

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**TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE ARMED FORCES**

INTEREST OF AMICUS

The National Institute of Military Justice (NIMJ) is a private, nonprofit organization founded in 1991, dedicated to ensuring the fair administration of justice within the armed forces and improving public understanding of military justice. NIMJ's leadership includes former judge advocates, private practitioners, and legal scholars.

GRANTED ISSUE

The Court granted three issues. This brief concerns only the second.

- II. Whether Appellant's constitutional rights were violated when the military judge replaced the entire court-martial panel mid-trial pursuant to Article 29, Uniform Code of Military Justice.

RELEVANCE OF THE BRIEF

Amicus argues that Article 29(f), Uniform Code of Military Justice (UCMJ), is unconstitutional, at least as applied to Appellant.

BACKGROUND

Because *Amicus* does not have access to the record, this brief is based on the following facts drawn from Appellant's supplement to his petition for review and the lower court's opinion.

After learning that the court members had begun deliberating during recesses before the close of evidence, the military judge excused all court members. He impaneled new members detailed by the convening authority and, over defense objection, played recordings of the prior

testimony of 12 witnesses, including that of the alleged victim, for the new panel. Except for the sole witness present during the alleged criminal conduct, whom the military judge had found unavailable under Mil. R. Evid. 804(a)(4)—“because of death or a then-existing infirmity, physical illness, or mental illness”—the witnesses sat in the witness box while their recorded testimony was played. Counsel were not permitted to question any of those witnesses unless a court member asked a question first; none did.

The defense objected to this procedure as violating the accused’s Sixth Amendment right to confront the witnesses against him, arguing that the new members, relying on the recordings, would be unable to observe the witnesses’ demeanor. The defense also noted that the audio recordings included the distracting sound of the court reporter’s typing. Appellant was convicted of one of the four charged offenses.

On appeal before the Navy-Marine Corps Court of Criminal Appeals (CCA), Appellant’s appellate defense counsel raised only one issue: the factual sufficiency of the conviction. *United States v. Cox*, No. 202400194, 2025 WL 2717649, at *1 (N-M. Ct. Crim. App. Sept. 24, 2025). In its opinion, the NMCCA acknowledged the “unusual turn” at trial—namely, the excusal of the initial panel and the seating of new members. *Id.* at *2. Although a CCA may affirm a conviction only if it is “correct in law,” Article 66(d)(1)(A), UCMJ, 10 U.S.C. § 866(d)(1)(A),

the CCA specifically declined to review the legality of replacing the court members because Appellant failed to raise the issue on appeal. *Cox*, No. 202400194, at *2 n.28. It affirmed Appellant’s conviction.

ARGUMENT

1. Standard of Review.

The constitutionality of an act of Congress is a question of law that this Court reviews de novo. *United States v. Vazquez*, 72 M.J. 13, 17 (C.A.A.F. 2013) (citation omitted).

2. The Constitution v. Article 29, UCMJ.

This case concerns the tension between the Fifth and Sixth Amendments on the one hand and Article 29(f), UCMJ, on the other.

- 2.1. The Sixth Amendment guarantees the accused the right to compel a witness to face the fact-finder.

“In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” U.S. Const. amend. VI.

The primary object of the [Sixth Amendment] was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

California v. Green, 399 U.S. 149, 158 (1970) (quoting *Mattox v. United States*, 156 U.S. 237, 242-43 (1895)); see *Maryland v. Craig*, 497 U.S. 836, 851 (1990); *United States v. Bench*, 82 M.J. 388, 390 (C.A.A.F. 2022). The “demeanor and tone of voice ... bear ... heavily on the listener’s understanding of and belief in what is said.” *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

- 2.2. Article 29(f), UCMJ, provides an extraordinary procedure for presenting testimony of witnesses who are present at trial.

If the membership of a court-martial panel falls below the statutory minimum, the convening authority may detail additional members for the military judge to impanel. Article 29(d), UCMJ, 10 U.S.C. § 829(d). Regarding evidence admitted before the new members were impaneled, Article 29(f) provides:

Evidence.-(1) In the case of new members under subsection (d), the trial may proceed with the new members present after the evidence previously introduced is read or, in the case of audiotape, videotape, or similar recording, is played, in the presence of the new members, the military judge, the accused, and counsel for both sides.

Article 29(f), UCMJ, 10 U.S.C. § 829(f). The President’s implementation of that statute is currently set forth in Rule for Courts-Martial (R.C.M.) 804(c)(2). Notably, Article 29(f) and R.C.M. 804(c)(2) do not require the military judge to present prior recorded witness testimony when the witnesses are available to testify before the new members.

These provisions are not new. They merely restate military practice that has been in effect since at least 1814. William Winthrop, *Military Law and Precedents* 78 & n.53 (2d ed. 1920) (procedure sanctioned by the Secretary of War in Gen. Hull’s trial); *see also Manual for Courts-Martial U.S. Air Forces* ¶ 38b (1949 ed). But Colonel Winthrop cautioned that this practice “must be in general of doubtful policy, and is not to be resorted to unless the demands of justice and the interests of the service clearly require it.” Winthrop, *supra*, at 78.

During debates on the UCMJ, the American Legion argued that the procedure outlined in Article 29(b) (now Article 29(f)) “is not conducive to confidence that the conviction, if any, handed down by such a court would be correct.” Statement of John J. Finn on behalf of the American Legion, Index and Legislative History, Uniform Code of Military Justice 684 (Mar. 8, 1949).

- 2.3. The Fifth Amendment guarantees servicemembers the right to due process.

“Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.... Judicial 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) (internal quotation marks and citations omitted). Although Congress

is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, ... [i]n 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, 177 (1994). In applying this deference, the Court asks “whether the factors militating in favor of” the accused “are so extraordinarily weighty as to overcome the balance struck by Congress.” *Id.* at 177–78.

3. *United States v. Vazquez* provides limited guidance in determining Article 29(f)’s constitutionality as applied to Appellant.

In *United States v. Vazquez*, this Court analyzed whether Article 29 was unconstitutional as applied to the accused. 72 M.J. 12 (C.A.A.F. 2013). Unlike in Appellant’s case, Vazquez did not object to the impaneling of two new court members under Article 29, nor did he request that any witnesses be recalled to testify in their presence. *Id.* at 16.

To determine whether the statute was unconstitutional as applied, this Court “conduct[ed] a fact-specific inquiry.” *Id.* at 17 (internal quotation marks and citation omitted). In reversing the CCA’s dismissal of the charge against Vazquez, the Court relied on several factors, including judicial deference to Congress’s enactment of Article 29 and the President’s implementation in R.C.M. 805(d)(1) (now R.C.M. 804(c)(2));

Vazquez's failure to object at trial; his failure to identify any unfairness among the members who returned the verdict; and the admissibility of the evidence under Mil. R. Evid. 804(b)(1) if the witnesses had been unavailable. *Vazquez*, 72 M.J. at 20–21.

Amicus does not consider the *Vazquez* framework helpful in determining whether, in light of the deference afforded to Congress, Article 29 is constitutional as applied, and invites the Court to revisit its analysis. First, whether an accused objects at trial may affect the standard of review, but it does not affect the constitutionality of the alleged right as applied. Second, the question is not whether the accused established any unfairness among the members, but whether the members could properly assess the witnesses' credibility without observing their demeanor; they could not. Finally, prior testimony of a witness not present at trial may be admissible, but only if the Government establishes that she is unavailable under Mil. R. Evid. 804(b)(1).

4. Appellant's conviction should be set aside due to constitutional error; it was obtained after depriving the court members of an opportunity to assess the witnesses' credibility by observing their demeanor.

- 4.1. Applying the *Vazquez* factors demonstrates that Appellant was deprived of due process and the right to confront witnesses in the presence of the new court members.

Although *Amicus* does not consider the factors set forth in *Vazquez* helpful, it feels compelled to follow precedent and apply them as

described in Section 3, *supra*. First, as in *Vazquez*, the statute (Article 29) and its implementing rule remain in effect. Second, unlike *Vazquez*, Appellant objected at various times to the implementation of Article 29 procedures, arguing that doing so deprived him of his Sixth Amendment confrontation rights. Third, Appellant has not alleged that any individual court member was unfair, only that his court-martial was unfair because the court members could not fully assess the witnesses' credibility, as they had no opportunity to observe the witnesses' demeanor during their testimony. Finally, 11 of the 12 witnesses whose recorded testimony was played to the court members were not "unavailable" within the meaning of Mil. R. Evid. 804(a). Each sat in the witness box while their recorded testimony was played. Thus, the recordings were inadmissible.

The only logical rationale for Article 29(f) is to return witnesses to their military duties as soon as possible. In Appellant's case, that was not an issue. Eleven witnesses whose recorded testimony was played were present in the courtroom. It is unlikely that requiring them to testify again would have delayed the trial's completion or their return to their primary military duties. The military judge could have, and constitutionally should have, required them to testify again so the new court members could observe their demeanor under the pressure of cross-examination. Indeed, the members' assessment of witness credibility is critical in cases like Appellant's that rely heavily on witness testimony to establish guilt. *See*

Vazquez, 72 M.J. at 22 (Baker, C.J., concurring). Instead, the court members could observe only the witnesses' demeanor while listening to recordings of their prior testimony. That is insufficient to satisfy either the Confrontation Clause or the due process concerns Appellant raised at trial.

4.2. Appellant's conviction should be set aside due to the unconstitutional application of Article 29(f)(1).

"A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused." Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Generally, "a constitutional error does not automatically require reversal of a conviction." *Weaver v. Massachusetts*, 582 U.S. 286, 294 (2017). The accused is not entitled to relief if the Government shows "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* (quotation marks and citations omitted).

However, some constitutional errors, labeled structural errors, defy harmless error analysis. Structural errors undermine "the framework within which the trial proceeds, rather than being simply an error in the trial process itself." *Id.* at 295 (internal quotation marks and citation omitted). In the civilian context, federal courts have declined to categorize

Confrontation Clause violations as structural errors. *See, e.g., United States v. Jenkins*, 128 F.4th 885, 891 (7th Cir. 2025). But the Article 29 procedures at issue in this case are unique to courts-martial and go beyond a typical Confrontation Clause violation. As the Supreme Court has stated, “[A]n error has been deemed structural if the effects of the error are simply too hard to measure.” *Weaver*, 582 U.S. at 295. The error in this case certainly meets that definition.

Nevertheless, this Court need not decide whether the error in Appellant’s case is structural because it is prejudicial under the general constitutional standard. As the Supreme Court noted in *Green*, a primary purpose of the Sixth Amendment was to “[compel the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” *Green*, 399 U.S. at 158. Observing a witness while she testifies is critical to assessing her credibility. It is impossible to measure what, if any, effect the failure to do so had on the court members’ decision. It is difficult to believe that the Government will be able to establish that this error was harmless beyond a reasonable doubt.

CONCLUSION

Appellant did not receive a fair trial. Despite the deference owed to Congress in its constitutional role to “make Rules for the Government and

Regulation of the land and naval Forces,” U.S. Const. art. I, § 8, cl. 14, Article 29(f), UCMJ, was unconstitutional as applied to Appellant under both the Winthrop and *Weiss* standards. The demands of justice and the interests of the service clearly did not require it, and the factors favoring Appellant under these circumstances “are so extraordinarily weighty as to overcome the balance struck by Congress.”

This Court should set aside Appellant’s conviction.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE

I certify that this *amicus* brief complies with the maximum length authorized by Rule 26(d); it contains fewer than 6,500 words. This brief complies with the typeface and typestyle requirements of Rule 37. It was prepared using the 14-point EB Garamond font.

/s/
James A. Young
Colonel, USAF (Ret.)

CERTIFICATE OF FILING AND SERVICE

I certify that:

(1) Appellant consented to *Amicus* filing a brief in this case. *See* C.A.A.F. R. 26(b). By email, *Amicus* sought consent from the three Government counsel assigned to the case and the Government Appellate Division. *Amicus* received only an automated reply from LCDR Philip Corrigan, dated July 15, 2026, stating that he would be out of the office until July 20, 2026.

(2) A copy of the foregoing was transmitted by electronic means on August 4, 2026, to the Clerk of the Court; Government Appellate Division; Counsel for the Government; and Counsel for Appellant.

/s/
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