IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, *Appellee*,	)	FINAL BRIEF ON BEHALF OF THE UNITED STATES
v.	)	
	)	Crim. App. Dkt. No. 39969
Master Sergeant (E-7), ANTHONY A. ANDERSON, USAF, *Appellant.*	)	USCA Dkt. No. 22-0193/AF

FINAL BRIEF ON BEHALF OF THE UNITED STATES

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

ISSUE PRESENTED

WHETHER APPELLANT WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS VERDICT AS GUARANTEED BY THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, AND THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

STATEMENT OF STATUTORY JURISDICTION

The Air Force Court of Criminal Appeals (AFCCA) reviewed this case under Article 66(d)(1), UCMJ, 10 U.S.C. § 866(d)(1) (2019). This Court has jurisdiction to review this case under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3)(2019).

STATEMENT OF THE CASE

In 2020, Appellant was tried by a general court-martial composed of officer and enlisted members. (JA at 30.) Contrary to his pleas, he was convicted of two specifications of attempted sexual abuse of a child in violation of Article 80, UCMJ, 10 U.S.C. § 880 (2016 and 2019). (JA at 30-31.) He was sentenced by the military judge to confinement for twelve months for each offense, to run concurrently; reduction to the grade of E-1; and a dishonorable discharge. (Id.) The Air Force Court of Criminal Appeals affirmed the findings and sentence. United States v. Anderson, 2022 CCA LEXIS 181 (A.F. Ct. Crim. App. 25 March 2022) (unpub. op.). (JA at 25.)

STATEMENT OF FACTS

At his court-martial, Appellant made a timely motion asking the court to "require a unanimous verdict for any finding of guilty and to modify the instructions accordingly." (JA at 34.) In the alternative, he requested the military judge instruct that "the President must announce whether any finding of guilty was or was not the result of a unanimous vote without stating any number or names." (Id.) Appellant claimed he had a right to a unanimous guilty verdict based on the Sixth Amendment,[1] the Fifth Amendment[2] Due Process Clause, and the Fifth

[1] U.S. Const. amend. VI.
[2] U.S. Const. amend V.

Amendment's guarantee of equal protection. (JA at 34-60.) The United States opposed the motion. (JA at 61-77.) The military judge denied the motion. (JA at 78-80; 98-109.) The military judge instructed the eight-member panel that Appellant could be convicted upon a three-fourths vote. (JA at 131.)

SUMMARY OF ARGUMENT

Appellant did not have a Sixth or Fifth Amendment right to a unanimous guilty verdict at his court-martial. Military members have never had a Sixth Amendment right to a jury trial. *See, e.g.*, Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1886); United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012). Instead, since before the Founding, American servicemembers have been tried by military courts-martial that do not require unanimous verdicts. *See* Mendrano v. Smith, 797 F.2d 1538, 1546 (10th Cir. 1986).

In Ramos v. Louisiana, 140 S. Ct. 1390 (2020), the Supreme Court held that the Sixth Amendment right to a jury trial includes the right to a unanimous verdict. But the Ramos majority opinion made no mention at all of military courts-martial. So Appellant, having no Sixth Amendment right to a jury trial, cannot show that he had the corresponding Sixth Amendment right to a unanimous verdict. Appellant alleges that he has a Sixth Amendment right to an *impartial* panel and that Ramos held that a unanimous verdict is required to ensure impartiality. But that claim extends the holding of Ramos well beyond what the Supreme Court actually said.

Appellant's Fifth Amendment arguments fare no better. Although Ramos incorporated the Sixth Amendment right to a unanimous verdict to the States through the Fourteenth Amendment's[3] Due Process Clause, 140 S. Ct. at 1391-92, that did not convert the right to a unanimous verdict into a Fifth Amendment due process right. *See* United States v. Sanford, 586 F.3d 28, 35 (D.C. Cir. 2009). Instead, to determine whether a right applies to the military through the Fifth Amendment's Due Process Clause, this Court asks "whether the factors militating in favor of [the proposed right] are so extraordinarily weighty as to overcome the balance struck by Congress" in making rules for the Armed Forces. Weiss v. United States, 510 U.S. 163, 177 (1994). Considering the significant deference afforded to Congress in legislating on military matters, Appellant – who has the burden here – fails to show that the right to a unanimous verdict is so "extraordinarily weighty" that it overcomes Congress's decision not to extend that right to servicemembers. Nor can Appellant show that a unanimous verdict is an essential due process requirement of proving guilt beyond a reasonable doubt. The Supreme Court held otherwise in Johnson v. Louisiana, 406 U.S. 356, 360, 362 (1972). And Ramos – which was decided solely on Sixth Amendment grounds – did nothing to undermine that part of the Johnson opinion.

[3] U.S. Const. amend. XIV.

Appellant also had no Fifth Amendment equal protection right to a unanimous verdict. As a military member, Appellant was not similarly situated to a civilian defendant who is entitled to a unanimous verdict; so Appellant's equal protection rights were not violated by his court-martial allowing conviction upon a three-fourths majority vote. United States v. Begani, 81 M.J. 273, 280-81 (2021). Even if Appellant were similarly situated to civilian defendants, he cannot meet his heavy burden to show that Congress had no rational basis for instituting the three-fourths conviction rule. Heller v. Doe, 509 U.S. 312, 320 (1993). Congress could have reasonably determined that the goals of military efficiency and avoiding unlawful influence during deliberations require nonunanimous verdicts in courts-martial.

Ramos did not extend its jury-unanimity holding to courts-martial, and so it did nothing to change the existing law allowing nonunanimous verdicts in military trials. This Court should therefore affirm the decision of the Air Force Court of Criminal Appeals.

ARGUMENT

APPELLANT WAS NOT ENTITLED TO A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT, THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE, OR THE FIFTH AMENDMENT'S RIGHT TO EQUAL PROTECTION.

Standard of Review

The constitutionality of a statute – in this case Article 52, UCMJ, 10 U.S.C. § 852 (2019) which allows for conviction upon a three-fourths vote in courts-martial – is reviewed de novo. United States v. Wright, 53 M.J. 476, 478 (C.A.A.F. 2000).

Law and Analysis

The United States Constitution gives Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. Accordingly, Congress has "plenary control over . . . regulations, procedures, and remedies related to military discipline." Chappell v. Wallace, 462 U.S. 296, 301 (1983). Because of the military's warfighting function, the Supreme Court has recognized that "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." United States ex rel. Toth v. Quarles, 350 U.S. 11, 17 (1955).

Historically, courts-martial in the American military have never required unanimous verdicts of guilt as the general rule; military codes have always had

provisions allowing for nonunanimous verdicts.[4] Around the time of the framing of the Constitution, conviction required only a majority of votes of the panel members. *See* Mendrano v. Smith, 797 F.2d 1538, 1546 (10th Cir. 1986) (citing the 1776 Articles of War and summarizing the historical scholarship on military voting requirements). In 1920, Congress instituted a two-thirds conviction requirement for the Army, which was later codified for all services in the 1951 Uniform Code of Military Justice. Id. At the time of Appellant's 2020 non-capital court-martial, the Uniform Code of Military Justice required a vote of three-fourths of the panel members for conviction. Article 52(a)(3), UCMJ. By implication, anything less than a three-fourths vote for a conviction would result in an acquittal. Id.

In 2020, the Supreme Court decided Ramos v. Louisiana, which overturned Apodaca v. Oregon, 406 U.S. 404 (1972) and held that the Sixth Amendment right to a jury trial includes a requirement for a unanimous verdict. 140 S. Ct. 1390 (2020). Appellant claims that Ramos's holding also applies to military courts-martial and that he was therefore denied his Sixth and Fifth Amendment rights to a

[4] Before 2019, Article 52(a)(1), UCMJ (2016) required a unanimous conviction for any offense "for which the death penalty is made mandatory by law." Currently, in a capital case, the verdict as to guilt must be unanimous for the death penalty to be imposed. Article 52(b)(2), UCMJ; Rule for Courts-Martial (R.C.M.) 1004(a)(2)(A). But in a capitally referred case, a nonunanimous verdict as to guilt will not invalidate the conviction – it simply means that death is no longer a punishment option. Id.

unanimous verdict at his own trial. But Appellant's arguments are unpersuasive, and this Court should reject Appellant's claims.

A. Appellant had no Sixth Amendment right to a unanimous verdict.

1. This Court and the Supreme Court recognize that the Sixth Amendment right to a jury trial does not apply to courts-martial.

As relevant to Appellant's claims, the Sixth Amendment states that "[i]n 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." Yet this Court has repeatedly said that the Sixth Amendment right to a jury trial does not apply to courts-martial. *See, e.g.*, United States v. Riesbeck, 77 M.J. 154, 162 (C.A.A.F. 2018); United States v. Easton, 71 M.J. 168, 175 (C.A.A.F. 2012); United States v. McClain, 22 M.J. 124, 128 (C.M.A. 1986).

Supreme Court precedent buttresses that assessment. In 1886, the Supreme Court stated that the Sixth Amendment right to trial by jury did not apply to cases "arising in the land or naval forces." Ex parte Milligan, 71 U.S. (4 Wall.) 2, 123 (1886). The Court explained that "[e]very one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." Id. In 1942, the Court reiterated that "'[c]ases arising in the land or naval forces' . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." Ex parte Quirin, 317 U.S. 1, 40

(1942). Members of the Armed Forces of the United States in such cases have no right to a trial by jury. Id.

Quirin and Milligan both dealt with individuals being tried by military commissions. But their broad reference to "cases arising in the land and naval forces" would also encompass courts-martial. And if those cases left any doubt about whether servicemembers had a right to a jury in a trial by court-martial specifically, the Supreme Court clarified that point in Whelchel v. McDonald, 340 U.S. 122 (1950). Citing Quirin and Kahn v Anderson, 255 U.S. 1, 8 (1921), the Supreme Court said explicitly, "the right to trial by jury guaranteed by the Sixth Amendment is not applicable to trial by courts-martial or military commissions." Whelchel, 340 U.S. at 127. Again, the Court recognized that "[t]he constitution for courts-martial, like other matters relating to their organization and administration, is a matter appropriate for congressional action." Id.

2. Historical records from the time of the Founding indicate that the Framers did not intend the Sixth Amendment jury clause to apply to courts-martial.

The Supreme Court's recognition that the Sixth Amendment right to a jury trial does not apply to the military finds significant support in history. Based on texts and records contemporary to the Founding, scholars have concluded that the Framers did not intend the Sixth Amendment jury clause to apply to courts-martial. *See e.g.* Gordon D. Henderson, *Courts-Martial and the Constitution: The Original*

Understanding, 71 Harv. L. Rev. 293, 300, 304 (1957); Frederick B. Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 49 (1958); Eugene M. Van Loan, *The Jury, The Court-Martial, and The Constitution*, 57 Cornell L. Rev. 363, 372, 412-14 (1972).

Van Loan points to a congressional Act passed in September 1789 that prescribed that troops "shall be governed by the rules and articles of war" which Congress had established and which did not provide for trial by jury. Van Loan, 57 Cornell L. Rev. at 413. He describes the Act as the "manifestation of Congress's recognition – during the very period in which it passed the Bill of Rights – that the army was to continue to be governed by its traditional and separate system of courts-martial, unaffected by the proposed new constitutional amendment guaranteeing the right to a trial by petit jury." Id. at 414.

Likewise, several of the Framers of the Constitution also contributed to the contemporary drafting of articles of war for the military – and those articles of war did not provide for unanimous verdicts for courts-martial. As Henderson notes, George Washington was a member of the committee appointed by the Continental Congress in 1775 "to prepare rules and regulations for the government of the army." Henderson, 71 Harv. L. Rev. at 298. That same year, Congress adopted the Articles of War created by the Washington committee, which included a provision for majority verdicts in regimental courts-martial. Id.; Winthrop,

Military Law & Precedents 488 n.36 (2d ed. 1920).[5] In 1776, Washington told Congress that the 1775 Articles of War needed revision. Henderson, 71 Harv. L. Rev. at 298. John Adams and Thomas Jefferson were both involved in the drafting and adoption of these new articles in 1776. Id. With its Act of 1789, Congress "continued the [court-martial] in existence as previously established," Winthrop, *supra*, at 47, and the extant Articles of War remained "in force with only minor alteration until 1806." Henderson, 71 Harv. L. Rev. at 298. The Articles of War from this Founding era provided for majority verdicts, and that provision would remain unchanged for the Army until 1920, when the two-thirds requirement superseded it. Mendrano, 797 F.2d at 1546. The fact that the same Framers who adopted the jury clause of the Sixth Amendment did not provide for unanimous verdicts for courts-martial in the contemporary Articles of War serves as strong evidence that the Framers did not believe that the Sixth Amendment jury clause applied to the military. *See also* Wiener, 72 Harv. L. Rev. at 49 (observing that the jury clause of the Sixth Amendment "was never thought or intended or considered, by those who drafted the sixth amendment or by those who lived

[5] Although these Articles of War did not specify the number of votes required for conviction at a general court-martial, Winthrop confirms that, in practice, only a majority vote was required. Winthrop, *supra*, at 377. At any rate, the Articles of War from 1775 and 1776 and beyond contained no provision requiring a unanimous verdict.

contemporaneously with its adoption, to apply to prosecutions before courts-martial.")

Appellant has cited no scholarship or case law that draws conclusions to the contrary.

3. The Ramos opinion did not equate the concepts of jury unanimity and jury impartiality. So even if Appellant had a right to an impartial panel, that does not mean he also had a right to a unanimous panel.

Ramos v. Louisiana provides this Court no reason to overturn the established judicial precedent recognizing that servicemembers have no right to a jury trial. The majority opinion never mentions courts-martial or the military justice system. While the Ramos opinion spends much time discussing the original meaning of the Sixth Amendment jury clause at the time of the Founding, 140 S. Ct. at 1395-96, it says nothing to undermine the widely accepted premise that the Framers did not intend the jury clause to apply to courts-martial. So Appellant premises a large part of his argument on his contention that, in defining the right to an "impartial jury," Ramos "explicitly equated the term impartial with unanimity." (App. Br. at 14). And since this Court has said in United States v. Lambert, 55 M.J. 293, 295 (C.A.A.F. 2001) that servicemembers have a Sixth Amendment right to an impartial panel, according to Appellant, Ramos means he also had a right to a unanimous verdict. (App. Br. at 14.) But Appellant overextends what Ramos actually says.

Nothing in Ramos ties the concept of unanimity to the word "impartial," as used in the Sixth Amendment. The opinion contains no discussion of why (historically or otherwise) the concepts are linked. Appellant focuses on a solitary sentence in the Ramos opinion: "If the term 'trial by an impartial jury' carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity." 140 S. Ct. at 1396. But Appellant offers no proof that the Supreme Court believed the Sixth Amendment's unanimity requirement applied to both the words "impartial" and "jury," rather than just to the term "jury." Indeed, everywhere else in the opinion, the Supreme Court tied the concept of unanimity specifically to the words "jury" or "jury trial." *See e.g.*:

- "Wherever we might look to determine what the term 'trial by an impartial jury trial' meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A **jury** must reach a unanimous verdict in order to convict." Id. at 1395 (emphasis added).

- "[S]tate courts appeared to regard unanimity as an essential feature of the **jury trial."** Id. at 1396 (emphasis added).

- "So if the Sixth Amendment's right to a **jury trial** requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." Id. at 1397 (emphasis added).

- "[A]s we've seen, 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 (emphasis added).

As Justice Kavanaugh recognized in his concurring in part opinion in Ramos, impartiality and unanimity are two complementary – not inseparable – guarantees: "After all, the 'requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.'" Id. at 1418 (Kavanaugh, J., concurring in part) (quoting Johnson, 406 U.S. at 398 (Stewart, J., dissenting)).[6] This distinction makes sense based on common sense definitions of "impartial" and "unanimous." Each individual jury member could be impartial, and not biased or prejudiced towards either party in the case. But together as a whole, these impartial jurors might still be unable to reach a unanimous verdict. A defendant's right to an *impartial* jury would be fulfilled, even without a unanimous verdict. The fact that all the jurors cannot agree on a verdict does not imply that any or all of them are biased or prejudiced. Appellant has offered no proof from modern or Founding era dictionaries that the words "impartial" and "unanimous" are related in any way.

[6] Here, Justice Kavanaugh was explaining how unanimity could help counter the racist intentions of the nonunanimous jury rules in Louisiana and Oregon. Ramos, 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring in part). Yet Appellant has pointed to no evidence that the American military adopted nonunanimous verdicts for racist purposes. So unanimous court-martial verdicts are not required to right any historical wrong. In any event, Justice Kavanaugh was not arguing that nonunanimous verdicts are fundamentally unfair. He continued on to clarify that "one could advocate for and justify a nonunanimous jury rule by resort to neutral and legitimate principles. England has employed nonunanimous juries, and various legal organizations in the United States have at times championed nonunanimous juries." Id. at 1418.

In fact, Founding era dictionaries reveal that "impartial" and "unanimous" are not related. Members of this Court have turned to Founding era dictionaries to resolve disputes over the Constitution's original meaning. Begani, 81 M.J. at 285-86 n.3 (C.A.A.F. 2021) (Maggs, J., concurring) (citing review of nine English language and four legal dictionaries). A review of the nine English language dictionaries shows that the definitions of impartial differed from the definitions of unanimous. For example, James Barclay's Universal English Dictionary from 1792 defined "impartial" as meaning "just; without any bias or undue influence," while "unanimous" meant "of one mind; agreeing in opinion."[7]

Founding era legal dictionaries did not define "impartial" or "unanimous," but their definitions of "jury" and "juror" are instructive. In its definition of "jury," one legal dictionary noted that "the Petit Jury convicts them by Verdict, in the Giving whereof all the Twelve must agree" and that "Jurymen are to be Freemen, indifferent, and not outlawed or infamous." Giles Jacob, A New Law Dictionary (The Savoy, Henry Lintot, 6th ed. 1750). Similarly, in its definition of "juror," another legal dictionary stated that a petit jury must have "all assenting to the verdict," but also that certain jurors could be challenged "if such juror be interested in the cause" or "hath taken money of either party." Richard Burn &

[7] A full comparison of the definitions of "impartial" and "unanimous" from the nine English language dictionaries is located in the Appendix.

John Burn, A New Law Dictionary, 407-09 (London, A. Strahan & W. Woodfall 1792). None of these legal dictionaries treated unanimity as an inseparable component of impartiality. Nor did they suggest that arriving at a unanimous verdict is what made a jury impartial. Instead, they revealed that impartiality and unanimity were separate guarantees. It follows that the original public meaning of the word "impartial" as used in the Sixth Amendment would not require unanimity.

Under this Court's prior precedent, Appellant had a constitutional right to an impartial panel. United States v. Wiesen, 56 M.J. 172, 174 (C.A.A.F. 2001). But it does not matter whether a military member's right to an impartial panel derives from Fifth Amendment due process guarantees or the Sixth Amendment. *Compare* Wiesen, 56 M.J. at 174 *with* Lambert, 55 M.J. at 295. Ramos simply does not hold that only unanimous panels can be "impartial." As described above, such a

holding would have been inconsistent with original meaning of the terms "impartial" and "unanimous" at the time of the Founding.[8]

At bottom, Ramos says nothing about the Sixth Amendment requirement for unanimous verdicts applying to courts-martial. Indeed, the Supreme Court pointed out that "only two states are potentially affected by our judgment." Ramos, 140 S. Ct. at 1406. So Appellant must extrapolate his argument from subtext and concurring and dissenting opinions. He fails to make a convincing case. Ramos

[8] In what appears to be more of a Fifth Amendment due process argument, Appellant also contends that Ramos reinforced unanimity as an essential requirement for procedural fairness in criminal trials. (App. Br. at 27.) He essentially argues that because this Court has held that servicemembers have a right to a "fair and reliable determination of guilt," they must also be entitled to a unanimous verdict. (Id. at 27-28) (citing United States v. Commisso, 76 M.J. 315, 321(C.A.A.F. 2017)). But the Ramos majority focused heavily on the originalist understanding of the word "jury" as the reason the Sixth Amendment right to a jury trial includes a guarantee of a unanimous verdict. 140 S. Ct. at 1395-96. Ramos never said that a unanimous verdict was the only way to ensure a fair trial. This may be why Appellant is left to cite the dissenting opinion in Edwards – rather than the Ramos majority opinion – to support his argument. (App. Br. at 27.) In any event, Appellant's due process arguments will be discussed in more detail below.

does not create a Sixth Amendment right to a unanimous verdict for military members such as Appellant.[9]

B. Appellant had no Fifth Amendment due process right to a unanimous verdict.

Ramos and its follow-on, Edwards v. Vannoy, 141 S. Ct. 1547 (2021),[10] do not create a Fifth Amendment due process right to a unanimous verdict. In fact, the words "Fifth Amendment" are not present at all in Edwards. To the extent that they are present in the Ramos majority opinion, they are mentioned in passing and not in a context helpful to Appellant's argument. While Ramos addresses the Fourteenth Amendment because it was deciding the applicability of the Sixth Amendment to the States, that just underscores the holding's inapplicability to courts-martial. The Fourteenth Amendment does not apply to courts-martial.

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[9] Amicus curiae argues that Appellant has a right to a unanimous verdict through Article III of the Constitution. (Am. Br. at 4-5; 10.) This argument is both outside the granted issue and foreclosed by Supreme Court precedent. In Dynes v. Hoover, 61 U.S. (20 How.) 65, 79 (1858), the Supreme Court recognized that Article I gives Congress the power "entirely independent" of Article III to make rules for the trial and punishment of military offenses. And just recently, the Supreme Court referred to the "non-Article III court-martial system." Ortiz v. United States, 138 S. Ct. 2165, 2169 (2018). Article III simply does not apply to courts-martial.

[10] In Edwards, the Supreme Court declined to find that the Sixth Amendment jury unanimity rule announced in Ramos was a "watershed rule of criminal procedure," and therefore the Court held that Ramos did not apply retroactively to cases that had completed direct appellate review. 141 S. Ct. at 1551-59. Edwards then concluded that no new rules of criminal procedure could ever satisfy the watershed exception and declared that exception "moribund." Id. at 1559-60.

United States v. Meakin, 78 M.J. 396, 401 n.4 (C.A.A.F. 2019). Ramos did not purport to create a Fifth Amendment due process right to a unanimous verdict that might expressly or implicitly apply to courts-martial, and so Appellant stretches the opinion well past any of its explicit language to make his arguments.

Appellant makes several arguments about why he has a Fifth Amendment due process right to a unanimous verdict. First, he implies that because Ramos incorporated the right to a unanimous verdict to the States through the Fourteenth Amendment's Due Process Clause, military members now have a Fifth Amendment due process right to a unanimous verdict. (App. Br. at 32-33.) He then advances various arguments suggesting that the right to unanimity is "extraordinarily weighty," that nonunanimous verdicts are unfair, and that Congress has struck the wrong balance because:

- the risk of convicting an innocent person is already greater with a general court-martial's eight-member panel, rather than a twelve-member jury (Id. at 37; 40.);
- nonunanimous panels can silence or ignore minority viewpoints (Id. at 40-43.);
- nonunanimous verdicts are no longer critical to military exigency (Id. at 43.);
- Congress could constitutionally implement a voting scheme requiring unanimous guilty verdicts, but nonunanimous acquittals (Id. at 43-45); and
- military accused in capital trials are entitled to unanimous verdicts (Id. Br. at 39-40.).

He also posits that unanimity is essential to the requirement that guilt be proved beyond a reasonable doubt. (App. Br. at 33-35.) None of these arguments should persuade this Court.

1. Appellant has not met his burden to show that the right to a unanimous verdict is so extraordinarily weighty that it overcomes the balance struck by Congress and applies to military members through the Fifth Amendment Due Process Clause.

Courts owe Congress much deference when determining what measure of due process is afforded to military members. Weiss v. United States, 510 U.S. 163, 177 (1994). When a court faces a Fifth Amendment "due process challenge to a facet of the military justice system," the court asks, "whether the factors militating in favor of [the proposed right] are so extraordinarily weighty as to overcome the balance struck by Congress." Id. (citing Middendorf v Henry, 425 U.S. 25, 44 (1976)). The Supreme Court placed the burden of making this showing on Appellant. Id. at 181.

a. The Fourteenth Amendment incorporation doctrine does not create a Fifth Amendment due process right and has no application to the military.

Appellant intimates that because Ramos incorporated unanimous verdicts to the States through the Fourteenth Amendment's Due Process Clause, that means Appellant now has a Fifth Amendment due process right to a unanimous verdict. (App. Br. at 32-33.) But by Appellant's logic, he would have had a due process right to a jury trial in the first place. After all, in 1968 the Supreme Court

incorporated the right to a jury trial to the States through the Fourteenth Amendment, calling the right "fundamental to the American scheme of justice" and a "fundamental right essential to a fair trial." Duncan v. Louisiana, 391 U.S. 145, 148-150 (1968). Yet, as detailed above, this Court has repeatedly declined to hold that military members have a right to a jury trial as contemplated by the Sixth Amendment. So incorporation of a right to the States through the Fourteenth Amendment Due Process Clause has not historically created a corresponding Fifth Amendment due process right for military members.

Further, the DC Circuit has rejected a similar argument, saying it "misapprehends the doctrine of incorporation." United States v. Sanford, 586 F.3d 28, 35 (D.C. Cir. 2009). As the Court explained, "[t]he right to a jury trial is not . . . converted into a procedural due process right by incorporation." Id. And indeed, the Fourteenth Amendment incorporation doctrine is a poor mechanism for determining whether any of the Bill of Rights guarantees also apply to courts-martial. Although the doctrine of Fourteenth Amendment incorporation has shifted over the years, the Supreme Court now considers a Bill of Rights protection to be incorporated to the States if it is "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and traditions." Timbs v. Indiana, 139 S. Ct. 682, 687 (2019); McDonald v. Chicago, 561 U.S. 742, 767 (2010). In Duncan, the Supreme Court clarified that the right at issue need not be "necessarily

fundamental to fairness in every criminal system that might be imagined," but must be "fundamental in the context of the criminal processes maintained by the American States." 391 U.S. at 149, n.14.

The military justice system is one of those other "criminal system[s] that might be imagined." Id. After all, the court-martial – which is older than the Constitution, Ortiz, 138 S. Ct. at 2175 – is itself deeply rooted in American history and tradition, yet distinct from civilian criminal processes historically maintained by the States. As recognized by the concurring Justices in Middendorf, "Court-martial proceedings, as a primary means for the regulation and discipline of the Armed Forces, were well known to the Founding Fathers. The procedures in such courts were never deemed analogous to, or required to conform with, procedures in civilian courts." 425 U.S. 25, 49-50 (Powell, J. concurring). And "[j]ust 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 v. Levy, 417 U.S. 733, 744 (1974) (citing Burns v. Wilson, 346 U.S. 137, 140 (1953) (plurality opinion)). It follows that even if a right is deeply rooted in American civilian history and traditions, it might not be so deeply rooted in American military history and traditions. Indeed, the lack of juries and unanimous verdicts are traditions so firmly rooted in military practice that they extend back to before the time of the Founding. *Cf.* Weiss, 510

U.S. at 199 (Scalia, J., concurring in part and concurring in judgment) ("No procedure firmly rooted in the practices of our people can be so 'fundamentally unfair' as to deny due process of law.") (internal citations and quotations omitted). To apply the Fourteenth Amendment incorporation doctrine to the military would ignore the historical differences between civilian and military society and jurisprudence that the Supreme Court has long recognized.

Appellant also cites United States v. Santiago-Davila, 26 M.J. 380, 390 (C.M.A. 1988) to argue that "if a right applies because of due process, it applies to courts-martial just as it does to civilian juries." (App. Br. at 33) (internal quotation marks omitted). The problem with Appellant's reliance on Santiago-Davila is two-fold. First, Santiago-Davilla speaks only to one particular right, the right to equal protection, and does not purport to make a blanket proclamation about how any other constitutional right must be applied to military members. Second, the opinion pre-dates the Supreme Court's controlling 1994 decision in Weiss. Weiss reaffirmed that Congress has the authority to determine "what process is due" to servicemembers when Congress institutes "regulations, procedures, and remedies related to military discipline." 510 U.S. at 177. And rather than importing all civilian due process rights wholesale to military members, the Supreme Court acknowledged once again that "the tests and limitations of [due process] may differ because of the military context." Id. (citing Rostker v. Goldberg, 453 U.S. 57, 67

(1981)). This Court should therefore reject the notion that Fourteenth Amendment due process incorporation of a right to the States means that the Fifth Amendment Due Process Clause also incorporates the same right to the military.

b. Appellant has not shown that nonunanimous verdicts are fundamentally unfair.

Since Ramos did not announce a Fifth Amendment due process right, Appellant has the burden to independently show that Fifth Amendment due process requires a unanimous verdict – in other words, that a nonunanimous verdict "undermine[s] a fair trial in a fair tribunal." Sanford, 586 F.3d at 37 (citing Weiss, 510 U.S. at 178). He cannot do so.

(1) Supreme Court precedent contemplates that other criminal justice systems that do not use juries can still be fundamentally fair.

The Supreme Court has never held that nonunanimous verdicts are fundamentally unfair or inaccurate such that they violate due process. In fact, in Duncan, the Supreme Court acknowledged that the standard American jury trial was not the only way to guarantee a fair adjudication of guilt: "A criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternate guarantees and protections which would serve the purposes that the jury serves in the English and American systems." Duncan, 391 U.S. at 149, n.14. The military court-martial is such a process that, while required to be "fair and impartial," "is essentially different [compositionally and functionally] from the

jury envisioned by the Sixth Amendment." United States v. Guilford, 8 M.J. 598, 602 (A.C.M.R. 1979).

(2) Appellant cites no empirical data to support his argument that nonunanimous court-martial verdicts are unfair.

Keeping in mind that Appellant has the burden under Weiss to show a due process violation, Appellant has not presented evidence that the "alternate guarantees and protections" in place in the military justice system do not satisfy due process. "In urging a new due process right" to a unanimous verdict, Appellant must point to some studies or other evidence that "show that the design of the military system is so incompatible with [the principle of accurate fact finding] as to violate due process." Sanford, 586 F.3d at 29, 36; *see also* Mendrano, 797 F.2d at 1547. But Appellant has offered no data or other studies to show that nonunanimous court-martial verdicts are unreliable or unfair to servicemembers in practice.[11] Instead, he merely speculates, without evidence, that nonunanimous military panels produce unfair results.

For example, citing Ballew v. Georgia, 435 U.S. 223, 234 (1978), which found five-person juries to be unconstitutional, Appellant suggests the risk of

[11] In fact, in 1946 – when two-thirds courts-martial verdicts were the rule in the Army – a War Department advisory committee appointed to evaluate the court-martial system concluded that "the innocent are almost never convicted and the guilty seldom acquitted." Note, *Constitutional Rights of Servicemen Before Courts-Martial*, 64 Colum. L. Rev. 127, 134 (1964) (internal citations omitted).

convicting an innocent person rises as the size of the jury diminishes, making unanimous verdicts all the more important since general courts-martial currently require only eight members. (App. Br. at 37, 40.) Yet courts have repeatedly discounted the applicability of the empirical studies relied upon in Ballew to the military. *See* United States v. Wolff, 5 M.J. 923, 925 (N-M.C.M.R. 1978) (expressing unwillingness to "adopt and apply the empirical data referred to in Ballew"); Guilford, 8 M.J. at 601 ("data indicating that jurors supposed to represent a cross-section of a local civilian community do not adequately perform their function under certain conditions cannot be taken to mean that the purpose and function of courts-martial are similarly impaired").[12]

As the DC Circuit explained, the Ballew studies do not consider certain features of the military justice system "not found in the civilian justice system" that Congress instituted "to ensure accurate fact finding." Sanford, at 586 F.3d at 29. Such features include the selection of court members who are "best qualified" for

[12] The Supreme Court's decision Burch v. Louisiana, which held that 5-to-1 verdicts in state courts were unconstitutional, was based on "much the same reasons that led [the Court] in Ballew to decide that use of a five-member jury threatened the fairness of the proceeding." Burch v. Louisiana, 441 U.S. 130, 138 (1979). To the extent the Supreme Court has said the 5-to-1 verdicts prohibited by Burch "raise[] serious doubts about the fairness of [a] trial" and fail to "assure the reliability of a verdict," (App. Br. at 22) (citing Brown v. Louisiana, 447 U.S. 323, 334, n.13 (1980)), the data underlying those conclusions does not support that the same conclusions should be drawn about courts-martial. *See* Guilford, 8 M.J. at 602. At any rate, Appellant's panel had eight members, not six.

duty and the ability of the panel members themselves to question witnesses. Sanford, at 586 F.3d at 36; Guilford, 8 M.J. at 602. In sum, empirical studies about accuracy in the civilian jury system prove insufficient for Appellant to meet his burden to show that nonunanimous verdicts in military courts-martial offend due process.

(3) Appellant disregards other procedural safeguards that ensure servicemembers a fair and accurate determination of guilt.

Appellant similarly fails to address the other safeguards in the military justice system that ensure servicemembers a fair proceeding. One such safeguard is de novo appellate review of a panel's guilty verdict, which allows a Service court of criminal appeals to overturn a conviction for factual insufficiency. Sanford, at 586 F.3d at 36; Article 66(d), UCMJ; 10 U.S.C. § 866(d) (2019). And Congress has offered "a significant recompense to the [military] defendant, in that failure of [three-fourths] to vote for conviction results in acquittal" rather than a hung jury. Mendrano, 797 F.2d at 1547. While a civilian defendant under a unanimous jury rule could be subject to another prosecution after a 5-to-3 vote for guilty, the military servicemember, who has been acquitted after a 5-to-3 vote for guilty, cannot. *See* Article 44(a), UCMJ, 10 U.S.C. § 844(a) (2019) ("No person may, without his consent, be tried for a second time for the same offense.")

Through Article 51(a), UCMJ; 10 U.S.C. § 851(a), Congress has also provided for vote by secret written ballot at courts-martial, a practice that "appears to be unique" within American criminal justice systems. Robert F. Holland, *Improving Criminal Jury Verdicts: Learning From the Court-Martial*, 97 J. Crim. L. & C. 101, 141 (2006). This is another "valuable right accorded an accused." United States v. Boland, 42 C.M.R. 275, 277 (C.M.A. 1970). Secret ballots help insulate members with minority views against peer pressure and "increase[] the likelihood that having listened to the viewpoints of all members of the jury, each juror will finally vote based on her own conscientious evaluation of the merits." Holland, 97 J. Crim. L. & C. 101 at 142. A member may vote his conscience "even if he agreed to a contrary position during the oral deliberative process." Id. (citing United States v. Martinez, 17 M.J. 916, 919 (N.-M.C.M.R. 1984)).

Secret written ballots may therefore have some advantages over open deliberations to unanimity. Some commentators argue that "the pressure for unanimous agreement can result in preference falsification." Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 Hastings Const. L. Q. 141, 145 (2006). Minority jurors may "simply lie and go along with a verdict or decision they do not prefer, either because they are intimidated, they are embarrassed, they collapse from peer pressure or they are eager to reach a decision – any decision." Id. *See also* Jere W. Morehead, *A "Modest" Proposal for Jury*

Reform: The Elimination of Required Unanimous Jury Verdicts, 46 U. Kan. L. Rev. 933, 937 (1998) ("jurors' initial positions generally are not changed through reasoning and thoughtful deliberation, but only through intimidation and peer pressure"). And similar concerns apply to courts-martial. *See* United States v. Chaplin, 8 M.J. 621, 627 (N.C.M.R. 1979) (recognizing that secrecy protects court members "from pressures, whether by seniors, juniors or peers" both during and after trial). In that respect, the secret balloting procedures employed by military courts-martial may provide greater protection to the accused, since that method ensures that every court member may vote his or her conscience. Imagine a scenario where three out of eight court members believed the accused not guilty. Under a unanimous decision rule, those three panel members might eventually be coerced or might otherwise acquiesce to join the majority and vote for the accused's guilt. But under the military's three-fourths rule, those three members are under no pressure to reach a consensus with their fellow members. The three members can anonymously vote their conscience, which would result in the accused's acquittal – no doubt a more favorable result for the servicemember.

The bottom line is that Appellant must show that the right to a unanimous jury is so extraordinarily weighty that the other procedural safeguards instituted by Congress are still insufficient to guarantee him "a fair trial in a fair tribunal." Weiss, 510 U.S. at 178. Considering the other robust procedural protections

afforded servicemembers – such as de novo appellate review, minority-vote acquittals, and secret balloting – Appellant has not met that burden.

(4) Appellant has not established that the military's voting rules silence minority voices.

Citing Justice Kavanaugh's concurring in part opinion in Ramos, Appellant next expresses concern that nonunanimous verdicts can silence the voices and negate the votes of panel members of a different race or class. (App. Br. at 41.) Ramos, 140 S. Ct. at 1417-18 (citing Kavanaugh, J., concurring in part). Ensuring minority voices are heard in the deliberation room is a worthwhile and important objective for the military justice system. But Appellant has not shown that military panels ignore or suppress the votes of minority panel members in practice. It is not enough for Appellant to cite statistics on racial demographics in the military and speculate that the minority members will be ignored (App. Br. at 42); he must provide something more concrete, such as "studies of the military justice system [that] would show a due process violation." Sanford, 586 F.3d at 36.

Appellant has likewise not shown that military panels do not adequately deliberate before voting. The *Military Judges' Benchbook* contains an instruction, "Your deliberation should include a full and free discussion of all the evidence that has been presented. After you have completed your discussion, then voting on your findings must be accomplished by secret, written ballot, and all members of the court are required to vote." Department of the Army Pamphlet 27-9 (29

December 2020), para. 2-5-14. Indeed, the military judge in Appellant's case gave that instruction. (JA at 131.) Appellant provides no reason to believe that panel members do not follow that instruction in practice and that they do not consider all viewpoints during their deliberations.

Besides, the military's secret written ballot procedures also protect minority viewpoints. Since no member knows for certain how another member will vote, members who might appear to be in the majority cannot necessarily assume that they will have enough votes for conviction or acquittal. They have an incentive to continue to engage with members who appear to have different opinions. Under the military's voting rules, members favoring acquittal who perceive themselves to be in the minority may also have "a greater incentive to continue to press their position." Holland, 97 J. Crim. L. & C. 101. These members will know that they may be able to sway the outcome of the voting "if they can manage to convince just one or more [members] to accept their viewpoint." Id. And in any event, unanimity may not be the panacea for quality and inclusive deliberations that some proponents claim. Because juries can hang, a unanimity requirement "does not guarantee that juries will tolerate opposing views or listen to reason and consider the evidence." Morehead, 46 U. Kan. L. Rev. at 944.

In short, in the absence of any concrete data pertaining to court-martial deliberations specifically, Appellant's concerns about the suppression of minority

viewpoints on court-martial panels prove insufficient to establish a due process violation.

(5) England's adoption of nonunanimous verdicts undermines Appellant's argument that they are fundamentally unfair.

Finally, there is good reason why Appellant cannot point to anything in the Ramos majority opinion that characterizes nonunanimous verdicts as so fundamentally unfair as to violate due process: as Justice Kavanaugh acknowledged in his concurring in part opinion in Ramos, nonunanimous verdicts may be "justified" by "legitimate purposes." 140 S. Ct. at 1417-18 (Kavanaugh, J., concurring in part). In fact, "England has employed nonunanimous juries." Id. *See also* Maryland v. McKay, 280 Md. 558, 574 (Md. 1997) (noting that the unanimous verdict "is no longer regarded as essential to liberty in England, where it has been abandoned in certain specified instances"). Given the longstanding ties between English and American jurisprudence (*see, e.g.*, Ramos, 140 S. Ct. at 1395-97), it would be a striking assertion for an American court to proclaim nonunanimous verdicts – including those now sanctioned in England – to be so fundamentally unfair as to be unable to provide a reliable determination of guilt. The Supreme Court has never made such an assertion, and this Court should decline to make one as well.

At bottom, Appellant's arguments about the supposedly fundamental flaws of nonunanimous verdicts prove unpersuasive. He has not shown that

nonunanimous verdicts are so fundamentally unfair that they raise Fifth Amendment due process concerns.

c. Congress had compelling reasons for choosing a nonunanimous verdict scheme for the military.

Because Appellant cannot prove that nonunanimous verdicts are fundamentally unfair, he also cannot show that Congress struck the wrong balance in implementing nonunanimous verdicts in the military justice system. Simply put, Congress struck an appropriate balance.

(1) Nonunanimous verdicts promote military efficiency.

The most obvious reason for nonunanimous verdicts involves the military's need to swiftly uphold discipline among its ranks. Historically, the absence of a jury in the military justice system was "thought to be necessary if the armed services were to have the rapid judicial enforcement of rules that is essential to discipline." Henderson, 71 Harv. L. Rev. at 319. While the military must maintain internal discipline, diverting its resources to try criminal cases detracts from the military's "primary fighting function." *See* Toth, 350 U.S. at 17. Requiring military panels to deliberate to a unanimous verdict and making the military re-try cases after "hung juries" would be time-consuming processes and would take military members away from their primary warfighting duties. *See, e.g.*, Mendrano, 797 F.3d at 1546 (a nonunanimous verdict "lessens the problem of the hung jury"). In 1916, The Judge Advocate General of the Army explained to

Congress, "[n]either can we have the vexatious delays and failures of justice incident to the requirement of a unanimous verdict. Our code, and I think all military codes that have preceded it, have recognized the principle of majority verdicts." Revision of the Articles of War, United States Senate, Subcommittee on Military Affairs, Statement of Brig. Gen. Enoch H. Crowder, United States Army, Judge Advocate General of the Army (1916) at 35.[13]

Appellant argues that this thinking is obsolete because "military necessity today does not require [courts-martial] held near foxholes" or "adjacent to battlefields." (App. Br. at 43.) But despite his burden under Weiss, Appellant offers no empirical data to support his argument and essentially asks this Court to substitute its judgment about military efficiency for that of Congress. Since "it is difficult to conceive of an area of governmental activity in which the courts have less competence," Gilligan v. Morgan, 413 U.S. 1, 10 (1973), this Court should refuse Appellant's invitation.

Appellant then suggests that Congress could resolve the efficiency problem by requiring unanimous guilty verdicts, but still allowing nonunanimous acquittals. (App. Br. at 43-45.) But requiring a unanimous guilty verdict and anything more than one not-guilty vote for an acquittal could still result in a hung jury. And one

[13] Available at: https://www.loc.gov/rr/frd/Military_Law/pdf/RAW-vol1.pdf#page=53.

can readily understand why Congress would not choose a rule allowing an acquittal based on only one not-guilty vote: allowing a solitary member to scuttle a conviction when seven other members are firmly convinced of guilt does not seem to achieve an accurate result and may allow an intolerable number of guilty servicemembers to go free. Not only has no jurisdiction adopted such a rule United States v. Pritchard, 82 M.J. 686 n.9 (A. Ct. Crim. App. 2022); Richard H. Menard Jr, *Ten Reasonable Men*, 38 Am. Crim. L. Rev. 179, 198 (2001); the rule seems to have no scholarly proponents either. Leib, 33 Hastings Const. L. Q. at 165 ("No one I have ever come across professionally or otherwise endorses this rule. . .") The lack of support for such a one-way unanimity rule may be because "the doubts of a lone holdout are not regarded (institutionally) as reasonable." Menard, 38 Am. Crim. L. Rev. at 198.

Returning to Appellant's burden under Weiss, he must establish that Congress struck the wrong balance in choosing efficiency over unanimity. The unfeasibility of Appellant's proposed alternatives to the current military system just underscores that Congress got the current balance right.[14]

[14] Appellant's quotation from Justice Gorsuch admonishing that we must not "perpetuate something we all know is wrong," is inapposite to this Fifth Amendment analysis. (App. Br. at 45) (citing Ramos, 140 S. Ct. at 1390.) The "wrong" identified in Ramos was allowing nonunanimous verdicts in contravention of the Sixth Amendment, which does not apply to courts-martial. Nothing about Justice Gorsuch's comment weighs in favor of instituting a one-vote acquittal rule in any jurisdiction.

(2) Nonunanimous verdicts guard against unlawful influence during deliberations.

Along with ensuring timely implementation of military discipline, nonunanimous verdicts also protect against unlawful influence in the deliberation room. United States v. Mayo, 2017 CCA LEXIS 239, at *20 (Army Ct. Crim. App. 7 Apr. 2017) (unpub.). As the Army Court of Criminal Appeals has described, current military rules allowing nonunanimous verdicts also provide for secret written ballot, which enable "a panel member to more freely vote his or her conscience." Id. at *22. This procedure proves especially important since "[m]ilitary life and custom may condition a panel member to be wary of questioning the reasoning of senior members, or a senior panel member may be unaccustomed to having his or her reasoning or decisions questioned." Id. at *21. In contrast, "unanimity requires continued debate until all agree." Id. at *22. Any dissenters will be known and could be improperly influenced by senior members to change their vote to the detriment of the accused. Id. Given the realities of the military hierarchical structure, Congress has wisely chosen procedures to minimize the influence of rank on a court-martial verdict. This Court owes significant deference to Congress's determination. *See* Weiss, 510 U.S. at 177 (judicial deference "is at its apogee" when reviewing congressional decision-making on matters of military discipline and rules relating to the rights of servicemembers) (internal citations omitted).

(3) Congress's unanimity requirements in military capital proceedings do not undermine military efficiency or tolerate unlawful influence.

Contrary to Appellant's arguments (App. Br. at 39-40; 43-44), Congress's requirement of a unanimous verdict before a court-martial can adjudge the death penalty does not show that the military is willing to tolerate inefficiency and the danger of unlawful influence in capital cases. A panel in a capital case need not reach a unanimous verdict to proceed to the sentencing phase. If at least three-fourths of the panel votes to convict, but not unanimously, then sentencing proceedings follow – the panel just cannot issue a death sentence. *See Military Judges' Benchbook* at para. 8-3-14. Also, a panel could impose a sentence lesser than death by a three-fourths vote. *See* id. at para. 8-3-25; R.C.M. 1006(d)(4)(B). So a capital case does not require extra time to deliberate to unanimity for findings or sentencing. Nor does any member have to reveal his vote on findings or sentence, since the vote is still by secret written ballot. *Military Judges' Benchbook* at para. 8-3-14; R.C.M. 1004(b)(7); R.C.M. 1006(d)(2). Unless the panel announces a unanimous verdict of guilt or sentence to death, no one will know for certain how any member voted. As a result, military capital voting procedures still protect against the specter of unlawful influence.

In light of the above, the military's capital case voting rules do not suggest that Congress has deemed inefficiency and the possibility unlawful influence "tolerable" in capital cases. (App. Br. at 40.) To claim otherwise fundamentally

misunderstands the procedural rules in capital cases. And even if Congress did decide to tolerate those concerns in capital cases by providing different rights to those being capitally tried, Appellant has not shown that balance would be unreasonable given the seriousness of capital cases and the number of them tried in the military each year.

In the end, Appellant has failed to show that after Ramos, the factors militating in favor of unanimous verdicts are so extraordinarily weighty as to overcome Congress's decision to eschew such verdicts in military trials. Non-unanimity has forever been the general rule in American military courts-martial. Yet even after affirming the fundamental nature of the civilian right to a jury trial in Duncan in 1968, the Supreme Court rejected the idea that a court-martial (which has no jury) "lacks fundamental integrity in its truth-determining process" or is otherwise "basically unfair." Gosa v. Mayden, 413 U.S. 665, 680-81 (1973) (plurality opinion). Appellant has pointed to nothing in the Ramos majority opinion that would change that assessment. Considering the significant deference this Court owes to Congress in the regulation of military affairs, this Court should conclude that Congress struck the right balance in requiring a three-fourths vote for conviction in courts-martial. As the Supreme Court reminded us in Rostker, "the Constitution itself requires such deference to congressional choice." 453 U.S. at 67.

2. A unanimous verdict is not required for the government to prove a military member's guilt beyond a reasonable doubt.

As for Appellant's next contention, neither Ramos nor Edwards suggests, much less holds, that a unanimous verdict is essential to a finding of proof beyond a reasonable doubt. To support his argument that unanimity is integral to the beyond a reasonable doubt requirement, Appellant cites two circuit court cases from the 1950s[15] and the dissenting opinion in Johnson v. Louisiana, 406 U.S. 356, 360 (1972).[16] (App. Br. at 33-35; 37.) Needless to say, the dissenting opinion in Johnson is not controlling law. And the logic of the 1950's circuit cases was rejected by the Supreme Court in the Johnson majority opinion.

Johnson reasoned that, under the Due Process Clause, a nonunanimous verdict does not mean that "guilt was not in fact proved beyond a reasonable doubt." Id. at 360, 362. The Supreme Court explained why dissenting jurors on a nonunanimous panel "raise[] no question of constitutional substance about either the integrity or the accuracy of the majority verdict of guilt." According to the Court, the fact "[t]hat rational men disagree is not in itself equivalent to a failure of

[15] Billeci v. United States, 184 F.2d 394 (D.C. Cir. 1950); Hibdon v. United States, 204 F.2d 834, 838 (6th Cir. 1953).

[16] A more contemporary First Circuit case also criticized the holding in Hibdon. Fournier v. Gonzalez, 269 F.2d 26 (1st Cir. 1959), cert. denied, 359 U.S. 931 (1959). The First Circuit commented that Hibdon's finding that "proof beyond a reasonable doubt is part of due process of law, and implicitly requires a unanimous verdict . . . is wholly unsupported by authority." Id. at 29.

proof by the State, nor does it indicate infidelity to the reasonable-doubt standard." Id. at 362. As the Supreme Court pointed out, in federal courts, if jurors cannot unanimously agree on a verdict, the defendant is given a new trial, not acquitted. Id. at 363. The Court noted that "[i]f the doubt of a minority of jurors indicates the existence of a reasonable doubt, it would appear that a defendant should receive a directed verdict of acquittal rather than a retrial." Id. But since that is not the rule, the Court concluded that a nonunanimous panel did not equate to a failure of proof and did not deprive a defendant of due process of law. Id.

Echoing Johnson, some scholars have highlighted that a unanimous verdict does not necessarily signify that every juror was, in fact, personally convinced beyond a reasonable doubt of the accused's guilt. "Some perhaps acquiesced to a [guilty verdict] out of weariness after inconclusive deliberations, or some may have simply been unable to withstand the pressures exerted by the rest of the jurors." Holland, 97 J. Crim. L. & C. 101 at 132. *See also* Leib, 33 Hastings Const. L. Q. at 194. (arguing that we should question "our security in the 'certainty' afforded by unanimity," because "there is substantial evidence that people are willing to falsify their preferences" when trying to reach a unanimous verdict). In that sense, a unanimous verdict may not be a better guarantor of fidelity to the reasonable doubt standard than a nonunanimous verdict.

After Ramos, the Supreme Court's ultimate conclusion in Johnson – that nonunanimous juries are permitted in state criminal trials – is no longer applicable. Ramos, 140 S. Ct. at 1397. But the Supreme Court decided Ramos on Sixth Amendment grounds alone, and did not discuss, criticize, or overrule Johnson's determination that nonunanimous juries do not offend due process.

Johnson's reasoning remains on solid ground. Criminal defendants have a constitutional due process right to have their guilt proven beyond a reasonable doubt. In re Winship, 397 U.S. 385, 364 (1970). This constitutional due process guarantee also extends to military members. United States v. Czekala, 42 M.J. 168, 170 (C.A.A.F. 1995). But as several commentators have noted, whether *unanimity* is essential to ensuring that due process right depends on whether "the jury finds its verdict as an entity or as a collection of individuals." Recent Cases, 26 Vand. L. Rev. 340, 370 (1973); *see also* Comment, *Waiver of Jury Unanimity – Some Doubts About Reasonable Doubt*, 21 U. Chi. L. Rev. 438, 441-42 (1954). If juries reach their verdict as an entity, then one might argue that a nonunanimous verdict has failed to guarantee the accused his right to have his guilt proved beyond a reasonable doubt. Recent Cases, 26 Vand. L. Rev. at 371. On the other hand, if jury members reach their verdict as individuals, then the accused's due process rights have been ensured so long as the requisite number of jurors required to

convict believes his guilt has been proven beyond a reasonable doubt. Comment, 21 U. Chi. L. Rev. at 441.

The weight of authority supports the latter understanding: jurors reach their verdict as individuals, and a nonunanimous verdict can still satisfy the beyond a reasonable doubt requirement. "Historically, the requirements of unanimity and reasonable doubt arose separately for different reasons." Case Comment, 112 U. Pa. L. Rev. 769, 771 (1964). While Ramos explained that, at the time of the Sixth Amendment's adoption, the term "jury trial" required unanimity, 140 S. Ct. at 1395-96, 1400, the beyond a reasonable doubt requirement for criminal cases may not have crystalized until 1798 – a few years after the 1791 ratification of the Bill of Rights. *See* Winship, 397 U.S. at 361. The independent evolution of the unanimity and reasonable doubt requirements reinforces that the Framers would not have seen unanimity as an essential facet of proving proof beyond a reasonable doubt. A present-day interpretation of the Constitution should therefore avoid entangling the two concepts.

Both before and after the 1972 Johnson decision, considerable support has existed for the view that the concept of reasonable doubt applies to the mind of the individual juror. An American Law Reports annotation from 1942 gathered many sources on "the question whether the rule as to reasonable doubt in a criminal case contemplates a reasonable doubt in the mind of an individual juror as distinguished

from one shared by a majority of the jury." 137 A.L.R. 394 (1942). The annotation concluded:

> The reasonable doubt standard to which the foregoing rule refers is, of course, reasonable doubt in the mind of any juror, rather than the collective doubt shared by the majority of the jury. If one juror has a reasonable doubt of the guilt of the accused, he cannot vote for a conviction, with the result *under the rule requiring a unanimous verdict*, that there can be no conviction so long as one juror has a reasonable doubt of the guilt of the defendant.

Id. (Emphasis added). *See also* Comment, 21 U. Chi. L. Rev. at 422 (1954) ("Proof beyond a reasonable doubt should be confined to the subjective standard applied by the individual juror, and unanimity – a group concept – must be justified in some other terms."); Recent Cases, 26 Vand. L. Rev. at 371 (1973) ("under the weight of authority, the [Supreme] Court's assumption [in Johnson] that the jury reaches its verdict individually appears to be correct"); Alec Samuels, *Criminal Justice Act*, 31 Modern L. Rev. 16, 24 (1968) (The duty of the prosecutor "is morally to convince" beyond a reasonable doubt "those who are empowered to decide," i.e., the required majority for conviction).

Like the Supreme Court in Johnson, several of these commentators found the criminal justice system's acceptance of hung juries to be determinative. As one source explained, "If any juror has a reasonable doubt, the 'group mind' has a reasonable doubt, and the group should also vote a not guilty verdict. But the law is that the jury is 'hung' and a new trial is necessary." Comment, 21 U. Chi. L.

Rev. at 422. *See also* 137 A.L.R. 394 (1942); Recent Cases, 26 Vand. L. Rev. at 371; Case Comment, 112 U. Pa. L. Rev. at 772, n.22. In short, the existence of hung juries leaves no question that the requirement of proving guilt beyond a reasonable doubt applies to the mind of the individual juror and not the jury verdict as a whole.

Newer scholarship also supports this same thesis. Professor James Q. Whitman argues that, historically, the reasonable doubt standard arose not as a protection for the accused or a way to determine factual proof, but as a moral comfort provision for the juror. James Q. Whitman, The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial 2-4, 6, 25 (2008). He describes that the reasonable doubt concept "was originally a theological doctrine, intended to reassure jurors that they could convict the defendant without risking their own salvation, so long as their doubts about guilt were not 'reasonable.'" Id. at 3. Whitman further contends that this formulation of reasonable doubt as moral comfort continued into the eighteenth century and that "beyond a reasonable doubt

was not a rule for [factual proof] at the time of the framing of the American Constitution."[17] Id. at 202-03.

In the end, Whitman's scholarship provides more support that the reasonable doubt requirement applies to the mind of the individual juror, not to the jury's verdict as a whole. Because the standard developed so that the individual juror would have a personal framework for assessing guilt, a nonunanimous guilty verdict does not mean the government has failed to establish sufficient factual proof of guilt or that the accused's due process rights have been violated.

Appellant has given this Court no reason to believe the Supreme Court's due process reasoning in Johnson is no longer good law. Instead, the weight of authority establishes that unanimous verdicts and proof beyond a reasonable doubt are separate constitutional guarantees – only the latter of which has been held to apply to military courts-martial. Given this judicial landscape, Appellant cannot show he was entitled to a unanimous verdict.

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[17] Whitman also argues that unanimity arose as a moral comfort rule unrelated to accuracy in factfinding. Id. at 204. He explains, "There is no reason to suppose that an uncertain fact is more securely established because twelve out of twelve laypeople agree on it, rather than nine out of twelve, or ten out of twelve. The unanimity rule serves a different purpose: it allows the twelve to share the heavy moral responsibility of judgment, and therefore to diffuse it among themselves." Id. This understanding of unanimity would also diminish Appellant's argument that the guarantee of unanimity is so extraordinarily important to the *accused's* right to a fair trial that it must apply to military members through the Fifth Amendment Due Process Clause.

C. Nonunanimous court-martial verdicts do not violate the equal protection guarantee of the Fifth Amendment.

Appellant next contends he was entitled to a unanimous verdict because it is a "fundamental constitutional right under the Fifth Amendment Equal Protection Clause."[18] (App. Br. at 46.) Appellant's argument is unavailing.

1. Accused servicemembers and civilian defendants are not similarly situated.

The "core concern" of equal protection is to act "as a shield against arbitrary classifications." United States v. Begani, 81 M.J. 273, 279 (C.A.A.F. 2021). Equal protection is therefore "designed to ensure that the Government treats similar persons in a similar manner." Id. (quoting United States v. Gray, 51 M.J. 1, 22 (C.A.A.F.) (internal quotation marks and citation omitted)); *see also* United States v. McGraner, 13 M.J. 408, 418 (C.M.A. 1982) ("equal protection is not denied when there is a reasonable basis for a difference in treatment.") The threshold question here, as it was in Begani, is whether accused servicemembers and civilian defendants are "in all relevant respects alike." Begani, 81 M.J. at 280 (quoting Nordlinger v. Han, 505 U.S. 1, 10 (1992)). They are not.

[18] "While the concept of equal protection of the laws applies only to the States through the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment includes the concept of equal protection for actions of the United States." United States v. Schoof, 37 M.J. 96, 99 n.4 (C.M.A. 1993) (citing Bolling v. Sharpe, 347 U.S. 497, 499-500 (1954)).

This Court has held that "an accused servicemember" is "not similarly situated to a civilian defendant." United States v. Akbar, 74 M.J. 364, 406 (C.A.A.F. 2015) (citing Parker, 417 U.S. at 743). Indeed, that conclusion reflects what the Supreme Court has long said about the differences between military members and civilians: "the military constitutes a specialized community governed by a separate discipline from that of the civilian," and "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." Parker, 417 U.S. at 744 (internal citations and quotations omitted).

Appellant is correct that the Supreme Court in Ortiz recognized that military courts "closely resemble[] civilian structures of justice," and that the procedural protections afforded to service members are "virtually the same" as those given in a civilian criminal proceeding. 138 S. Ct. at 2170, 2174. But Appellant takes the Court's discussion about the nature of the court-martial system out of context, since the Court was not talking about equal protection. The same Court likened the court-martial to other "non-Article III judicial system[s] created by Congress," Id. at 2176. The Court ruled that the military justice system was sufficiently "judicial" for the Court to exercise its appellate jurisdiction, id. at 2180, but the Court never once declared that a court-martial was the same as a state or federal court, or that the Constitution applied in the same manner as it does to state and federal courts.

And, contrary to Appellant's claim, the Court did not insinuate that because of its "judicial" nature, the court-martial no longer has the distinction from civilian trials of being an essential tool for ensuring good order and discipline in the military. (App. Br. at 50.) In the end, Ortiz's aside about military members having "virtually the same" rights as civilian defendants did not make the two groups similarly situated. Since Appellant and civilian defendants are not similarly situated, Appellant's Fifth Amendment equal protection right was not violated by denying him a unanimous verdict.

2. The fact that servicemembers can be charged with non-military specific offenses within the military justice system does not make such servicemembers similarly situated to civilian defendants.

Appellant also posits that he was entitled to a unanimous verdict because the military can convict servicemembers for violating non-military specific laws, and federal laws via Clause 3 of Article 134, UCMJ, 10 U.S.C. § 834. (App. Br. at 52-57.) He argues that if a civilian had been charged with the same crimes and "tried in federal district court on that same allegation, he could not have been convicted unless his twelve-person jury was unanimous." (Id. at 56.) He continues, "[u]nder any standard of similarly situated … a servicemember tried at a court-martial [would be] similarly situated to a civilian defendant." (Id.) Appellant's argument misses the mark.

Contrary to Appellant's claim, a servicemember is not "similarly situated" to a civilian defendant merely because the military charged the member under Clause 3 of Article 134, UMCJ for a federal crime. (App. Br. at 56.) No matter how a servicemember is charged under the UCMJ, as a military member, he or she is part of "a specialized society separate from civilian society." Parker, 417 U.S. at 743. That specialized society's "primary business" is "to fight or be ready to fight wars." Id. To that end, the military's system of laws has the distinct purpose "to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." Part I, *Preamble,* Manual for Courts-Martial, United States, 2019. And the fact that a servicemember may have committed a crime under a federal statute does not change the military's need to maintain good order and discipline by court-martialing members who commit serious crimes. Thus, even when prosecuted at a court-martial for violating non-military federal statutes, military members are not similarly situated to civilians.

3. The fact that military and civilian convictions may have similar collateral consequences does not make military members and civilian defendants similarly situated for purposes of an equal protection analysis.

Appellant also contends that he is similarly situated to a civilian defendant because he is subject to the same collateral consequences as someone with a civilian conviction. But Appellant provides no authority to support the suggestion

that collateral consequences of a law can render the law itself constitutionally invalid. Assuming, for the sake of argument, that the lack of required unanimity in the court-martial system called into question the fairness of the collateral consequences that flow from a military conviction, then the answer would be for Congress or the States to change the prerequisites to the specific collateral consequence, not to fundamentally reshape the military system to exactly mirror its civilian counterpart.

4. Military members do not have a fundamental right to a jury trial.

Appellant next asserts that Ramos and Edwards created a fundamental right to a unanimous verdict in all circumstances and, by denying a unanimous verdict to military members, Congress's denial is subject to strict scrutiny. (App. Br. at 47, 57.) Appellant correctly identifies that courts have applied strict scrutiny when classifications affect fundamental rights. *See e.g.* Clark v. Jeter, 486 U.S. 456, 461 (1988). But this Court has already rejected that strict scrutiny review applies to the military in the context of the Sixth Amendment right to a jury trial. In Begani, 81 M.J. at 280, n.2, a post-Ramos and Edwards case, this Court acknowledged that members of "the land and naval forces" have no Sixth Amendment right to a jury trial, so "no fundamental right is implicated" by treating them differently from groups who are tried by juries. And, indeed, nothing in Ramos or Edwards mandated that its holding about jury unanimity should stretch to the military justice

system, well beyond the limits of the Sixth Amendment's jury trial provision. So, in the end, even if military members were similarly situated to civilian defendants, this Court would apply rational basis review – not strict scrutiny. Begani, 81 M.J. at 280, n.2.

5. Appellant is not asking for equal protection – he is advocating for rights that exceed those afforded to civilian defendants.

While Appellant claims he merely wants the same "right" that civilians are afforded, he is asking this Court for a remedy that is more favorable than any right given to defendants in federal and state courts. Appellant seeks a unanimous verdict for guilt only, but an undelineated, nonunanimous verdict for an acquittal: "the military justice system can legitimately proceed with its present system allowing for nonunanimous acquittals so long as it requires a unanimous conviction." (App. Br. at 43-44.) Appellant does not explain how this would work in practice. Even so, Appellant cites Oregon v. Ross, 367 Ore. 560, 573 (Or. 2021),[19] where the Oregon Supreme Court held that Ramos did not imply that the Sixth Amendment prohibits acquittals based on nonunanimous verdicts. Yet, in Oregon, a supermajority vote of 11-to-1 or 10-to-2 is required for an acquittal. Id.

[19] To date, Louisiana has not squarely addressed this same issue. *See* Louisiana v. Gasser, No. 2022-K-00064, 2022 La. LEXIS 1290, at *32 (La. 2022) ("We … find it unnecessary to address the issue of whether a nonunanimous verdict is required for an acquittal post-Ramos.").

at 565. In the military system, unlike any other criminal justice system in American jurisprudence (including the federal system),[20] an acquittal can be secured by a minority vote of 3-to-5 for not guilty. *See* Article 52(a)(3), UCMJ; Article 16, UCMJ, 10 U.S.C. § 816(b)(1) (a general court-martial consists of "a military judge and eight members …."). In other words, in the military system, a majority of the members can vote for guilt, but the accused can still be acquitted. If the vote for guilt versus acquittal is 4-to-4 the accused would also be acquitted. Id. The court-martial system has other safeguards unavailable in state or federal jury trials, and Appellant fails to address the lopsided windfall an accused would receive compared to civilian defendants if this Court were to mandate unanimous verdicts for guilt, but then not require unanimity or a supermajority for acquittals.[21] At any rate, Appellant's desired outcome would not amount to equal protection.

6. Congress has a rational basis for implementing nonunanimous verdicts.

Even if Appellant and civilian defendants were similarly situated, this Court must apply rational basis review. *See* United States v. Means, 10 M.J. 162, 165 (C.M.A. 1982). As a result, the military's nonunanimous verdict rule "must be

[20] *See* FED. R. CRIM. P. 31(a) ("The jury must return its verdict to a judge in open court. *The verdict* must be unanimous.") (emphasis added).

[21] Presumably, even with a unanimous verdict requirement in place, Appellant would not want to give up other military-specific procedural safeguards, such as the secret written ballot requirement, factual sufficiency review, and the like.

upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). The accused bears a heavy burden to show that there is no rational basis for the rule he is challenging. *See* Heller v. Doe, 509 U.S. 312, 320 (1993). When conducting equal protection analyses, the Supreme Court looks at what "would have been plausible for the [legislature] to believe," not what they actually believed. Id. at 326; *see also* Nordlinger, 505 U.S. at 25 (1992) (holding that equal protection "does not demand for purposes of rational-basis review that a legislature . . . actually articulate at any time the purpose or rationale supporting its classification").

Here, Appellant has not met his heavy burden to show that there is no rational basis for allowing nonunanimous verdicts for military members when unanimous verdicts are guaranteed for civilians. There are several rational reasons why Congress would have chosen a different rule for the military. These reasons include military efficiency and concerns for unlawful influence,[22] as discussed in Part B.1.c. above. Although Appellant claims that this Court need not wait for

[22] Appellant's quotation from United States v. Loving, 41 M.J. 213, 296 (C.A.A.F. 1994) – "Where the vote is unanimous, [the] concerns about command influence would appear to be unfounded," – is taken out of context. (App. Br. at 59.) In Loving, this Court said that *polling* the members after they announced a unanimous vote on a sentence would raise no concerns of unlawful influence. Id. Loving did not speak to the deliberative process itself.

Congress to apply Ramos to courts-martial (App. Br. at 63), this argument disregards the deference this Court must give to Congress in military affairs. As the Supreme Court has cautioned in the equal protection context, this Court should be "particularly careful not to substitute [its] judgment of what is desirable for that of Congress." Rostker, 453 U.S. at 68. Since Congress had a rational bases for instituting nonunanimous verdicts in courts-martial, this Court should find no Fifth Amendment equal protection violation.

CONCLUSION

Appellant has failed to show that he had a constitutional right to a unanimous verdict at his court-martial. Ramos based its Sixth Amendment unanimous verdict requirement on a Founding era understanding of the term "jury trial." But American courts-martial have never required unanimous verdicts as the general rule, including at the time of the Founding. Since the Framers of the Constitution exempted military members from the Sixth Amendment right to a jury trial, they did not contemplate that those servicemembers had a constitutional right to a unanimous verdict – even if civilian defendants did. This is the exact circumstance the Supreme Court spoke of in Toth, when the Court acknowledged that "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to a fair trial of civilians in federal courts." 350 U.S. at 17.

Instead, since the Founding, Congress has implemented different safeguards to ensure servicemembers receive a fair proceeding. Ramos – which said nothing about military courts-martial – gives this Court no reason to upend over 200 years of court-martial practice.

What the Framers *did* contemplate was that Congress was best-positioned to create rules for administering military justice, and if Congress later saw fit to extend certain procedural rights to military members, it could do so. In keeping with the Framers' intentions, Congress remains the proper authority to decide whether to require unanimous verdicts at courts-martial. The Court should therefore reject Appellant's call to judicially create a right to a unanimous court-martial verdict.

Appellant is not entitled to relief. This Court should affirm the decision of the Air Force Court of Criminal Appeals.

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APPENDIX

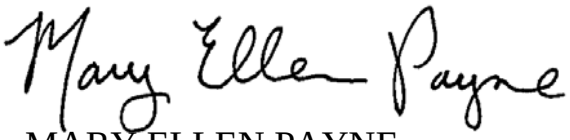
Comparison of the definitions of "impartial" and "unanimous" from nine Founding era English language dictionaries.

Dictionary	Word	Definition
James Barclay, Universal English Dictionary (1792)	Impartial	Just; without any bias or undue influence.
	Unanimous	Of one mind; agreeing in opinion.
John Walker, A Critical Pronouncing Dictionary (3d ed. 1790)	Impartial	Equitable, free from regard or party, indifferent, disinterested, equal in distribution of justice.
	Unanimous	Being of one mind, agreeing in design or opinion.
Noah Webster, An American Dictionary of the English Language (1828)	Impartial	1. Not partial; not biased in favor of one party more than another; indifferent; unprejudiced; disinterested. 2. Not favoring one party more than another; equitable; just.
	Unanimous	1. Being of one mind; agreeing in opinion or determination. 2. Formed by unanimity.
Samuel Johnson, A Dictionary of the English Language (10th ed. 1792)	Impartial	Equitable; free from regard or party; indifferent; disinterested; equal in distribution of justice; just.
	Unanimous	Being of one mind; agreeing in design or opinion.
John Ash, New And Complete Dictionary of the English Language (1775)	Impartial	Free from any undue regard to party, equitable, just, disinterested.
	Unanimous	Having one mind, agreeing in opinion, agreement in a design.
Nathan Bailey, The New Universal Etymological English Dictionary (4th ed. 1756)	Impartialness	Disinterested, a not favouring or inclining to one party, [unknown] more than to another.
Thomas Dyche & William Pardon,	Impartial	Unbiased, fair, just, honourable.

A New General English Dictionary (18th ed. 1781)	Unanimous	With one consent or agreement, a company all of one mind.
Thomas Sheridan, A Complete Dictionary of the English Language (3d ed. 1790)	Impartial	Equitable, free from regard or party, indifferent, disinterested, equal in distribution of justice.
	Unanimous	Being of one mind, agreeing in design or opinion.
William Perry, The Royal Standard English Dictionary (1788)	Impartial	Equal, equitable.
	Unanimous	Being of one mind.

CERTIFICATE OF FILING AND SERVICE

I certify that a copy of the foregoing was delivered to the Court, civilian appellate defense counsel, and the Air Force Appellate Defense Division on 21 September 2022.



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/s/
MARY ELLEN PAYNE
Attorney for USAF, Government Trial and Appellate Operations Division

Date: 21 September 2022

United States v. Mayo

United States Army Court of Criminal Appeals

April 7, 2017, Decided

ARMY 20140901

Reporter
2017 CCA LEXIS 239 *

UNITED STATES, Appellee v. Sergeant MONTRELL L. MAYO United States Army, Appellant

Notice: NOT FOR PUBLICATION

Subsequent History: Reconsideration denied by *United States v. Mayo, 2017 CCA LEXIS 412 (A.C.C.A., June 16, 2017)*

Motion granted by *United States v. Mayo, 2017 CAAF LEXIS 896 (C.A.A.F., Aug. 16, 2017)*

Motion granted by *United States v. Mayo, 2017 CAAF LEXIS 861 (C.A.A.F., Sept. 1, 2017)*

Review denied by *United States v. Mayo, 2017 CAAF LEXIS 1018 (C.A.A.F., Oct. 23, 2017)*

Prior History: [*1] Headquarters, Fort Carson. Douglas K. Watkins, Military Judge. Lieutenant Colonel Stephanie D. Sanderson, Staff Judge Advocate (pretrial). Colonel Paul J. Perrone, Jr., Staff Judge Advocate (post-trial).

Counsel: For Appellant: Captain Joshua G. Grubaugh, JA (argued), Lieutenant Colonel Charles D. Lozano, JA; Captain Heather L. Tregle, JA; Captain Joshua G. Grubaugh, JA (on brief); Colonel Mary J. Bradley, JA; Major Christopher D. Coleman, JA; Captain Joshua G. Grubaugh, JA (on reply brief).

For Appellee: Captain John Gardella, JA (argued); Colonel Mark H. Sydenham, JA; Lieutenant Colonel A.G. Courie III, JA; Major Cormac M. Smith, JA; Captain John Gardella, JA (on brief).

Judges: Before RISCH, FEBBO, and WOLFE Appellate Military Judges. Chief Judge RISCH and Judge FEBBO concur.

Opinion by: WOLFE

Opinion

MEMORANDUM OPINION

WOLFE, Judge:

Appellant pleaded not guilty to the murder of his fiancée, Sergeant (SGT) KW. However, the fact appellant killed SGT KW was not seriously contested at trial. The opening statement of appellant's defense counsel included the following concession: "Members, there is *no doubt* that either through a combination of Sergeant Mayo's actions or his inactions, that he killed Sergeant [KW]." (emphasis added). **[*2]** The evidence (which included forensic evidence and appellant's multiple confessions) overwhelmingly demonstrated appellant struck SGT KW over the head with an object and then caused her death through strangulation or suffocation.

Instead, the defense's focus at trial was to minimize appellant's *mens rea* and avoid the mandatory minimum sentence that accompanies a conviction for premeditated murder. Appellant was ultimately unsuccessful, and a panel of officers convicted appellant, contrary to his pleas, of one specification of premeditated murder and one specification of assault consummated by a battery in violation of *Articles 118* and *128, Uniform Code of Military Justice*, *10 U.S.C. § 918*, *928 (2012)* [hereinafter UCMJ]. The convening authority approved the adjudged sentence of a dishonorable discharge,

confinement for life without eligibility for parole, forfeiture of all pay and allowances, and reduction to the grade of E-1.

On appeal, appellant raises two assignments of error. We address in depth appellant's argument the military judge erred when he denied appellant's challenge for cause of Major (MAJ) MC and also address appellant's claim that the lack of requirement of unanimity in panel verdicts **[*3]** violates the Constitution.

BACKGROUND

On Valentine's Day 2013 appellant planned a romantic getaway with his fiancée and fellow soldier, SGT KW. He rented a room at the Plaza Hotel, littered the floor with rose petals, bought multiple presents and chocolate treats, and prepared other romantic amenities. Appellant's romantic preparations, however, did not dissuade SGT KW from her plans to end the relationship.

When SGT KW told appellant she wanted to break up with him, he struck her on the head with a drinking glass several times. The blows caused lacerations to SGT KW's scalp, resulted in severe bleeding, and may have rendered her unconscious. However, the blows to the head were not fatal. Appellant would later tell other noncommissioned officers that he "thinks he killed his girlfriend," and he "strangled" her after she "threatened his career."

At trial, the parties presented and argued the evidence in support of their respective positions. The government attempted to string out the timeline in order to support its theory that appellant deliberated before deciding to finally kill SGT KW by suffocation. The defense, in contrast, attempted to shorten the timeline to support its theory that **[*4]** appellant was guilty of only un-premeditated murder or possibly manslaughter.

DISCUSSION

A. The Challenge for Cause of Major MC

On appeal, appellant asserts four reasons that either individually or together demonstrate that the military judge abused his discretion in denying appellant's challenge for cause to MAJ MC. However, only two of the bases asserted on appeal were preserved at trial.

1. Unpreserved Bases for Challenge for Cause

During individual voir dire the trial counsel elicited that she and MAJ MC had worked in the same building for about three months, MAJ MC had deployed with the trial counsel's father, and MAJ MC was aware she had been working on "a murder trial." The trial counsel further elicited she and MAJ MC would run into each other about once a week, and would have passing conversations about ". . . how are you doing? How was your weekend? That kind of thing." Major MC stated that he knew "nothing" about the case she had been working on, and nothing about their acquaintance would affect his impartiality.[1]

While being questioned by the trial counsel, MAJ MC volunteered that his wife's uncle had been murdered "several years ago." Major MC stated he was not close with this **[*5]** uncle-in-law, and his knowledge of the case was based on what his wife's family had told him. He stated the murderer admitted his crime to a "healthcare professional," but the prosecutor could not move forward with a case because the confession was privileged.

When asked how this result made him feel, MAJ MC was quite circumspect and stated, "It's a process and the way our Constitution is written, you know certain things about due process have to be adhered to no matter what. Sometimes you can't do anything about certain things." When asked if he

[1] It is possible, even likely, the "murder case" the trial counsel had been working on was the case at bar. However, it was never clarified. The defense counsel did not ask any questions regarding MAJ MC's relationship with the trial counsel.

felt frustrated by the prosecutor's inability to use the confession he stated, "I understood why. I mean, I've got several different professional folks in my family." When asked if "there was anything about this experience that would make it difficult for you to sit on this panel?" he stated, "No."

Appellant did not challenge MAJ MC based on his prior relationship with the trial counsel or assert that he was biased based on his wife's uncle's murder.

In *United States v. McFadden*, our superior court made clear that the burden of establishing a legal and factual basis to support a challenge for cause is on the party making the challenge. *74 M.J. 87 (C.A.A.F. 2015)*. The **[*6]** Court of Appeals for the Armed Forces (CAAF) specifically stated that while a military judge may remove a member for cause sua sponte, he has no duty to do so. *Id. at 90*.

More recently, the CAAF reaffirmed this framework in the case of *United States v. Dockery, 76 MJ , 76 M.J. 91, 2017 CAAF LEXIS 108 (C.A.A.F. 2017)*. In that case, the government challenged a panel member only for actual bias. The military judge removed the member because of his concerns for implied bias. The CAAF described the military judge's actions as being "sua sponte." *2017 CAAF LEXIS 108, [WL] at *2 and *8 n.3*. That is, consistent with *McFadden*, as the government's challenge was only to actual bias the military judge's removal of the member for implied bias was a sua sponte act and not a grant of the government's challenge.

Accordingly, the rules require "[t]he party making a challenge *shall* state the grounds for it" and "[t]he burden of establishing that grounds for challenge exist is upon the party making the challenge." Rule for Courts-Martial [hereinafter R.C.M.] 912(f)(3) (emphasis added). If the military judge had a duty to sua sponte exclude a member for reasons not asserted, then the burden would no longer be upon the moving party to establish the basis for a challenge. "[T]he burden of establishing grounds for a challenge for cause rests upon the party making **[*7]** the challenge." *United States v. Wiesen, 57 M.J. 48, 49 (C.A.A.F. 2002)*; *United States v. Hennis, 75 M.J. 796, 830 (Army Ct. Crim. App. 2016)*.

There is wisdom in this framework. At the voir dire stage of a court-martial, a military judge is poorly positioned to know what the significant issues in the case will be and must rely on the parties to develop the record and make an appropriate challenge. Here, for example, MAJ MC stated that he was not "close" to his wife's uncle. Perhaps they never met. Perhaps they had met numerous times but in MAJ MC's eyes were not "close." Similarly, what were the motives and circumstances surrounding the murder? Was it grossly similar or dissimilar to this case? These are the unanswered questions the parties could have developed at trial to support their respective positions.

Placing a sua sponte duty on the military judge to remove a panel member for cause for reasons unstated by counsel would necessarily create a duty for the military judge to inquire, at least on the margin, to try to answer these questions. If the military judge has a duty to remove a panel member because of a basis that the challenging party does not assert, the military judge will have a concomitant duty to probe into all unanswered questions. As is often the case, a military judge during voir dire **[*8]** knows little about the case, the evidence, or the parties' theories at trial, which makes a judge poorly positioned to determine whether any one issue is important to the case.

Consider in this case, shortly after the conclusion of voir dire, appellant's counsel would concede in his opening that statement appellant caused SGT KW's death (although, obviously, without conceding guilt to premeditated murder). Thus, the substantive issues the panel was required to resolve were substantially different than in a case where, for example, identity of the assailant or the applicability of self-defense is the key question for the members. Given the defense's theory of the case, which at the time of voir dire was perhaps

known only to them, it was the defense who was best-positioned to determine whether MAJ MC's wife's uncle's murder was a valid basis for a challenge for cause—or not.[2]

Accordingly, as appellant did not challenge MAJ MC for cause based on his prior relationship with the trial counsel or the murder of his wife's uncle several years prior, we find that the military judge did not err in failing to grant the challenge on grounds never raised. Additionally, even when a military judge **[*9]** does sua sponte remove a member for cause, our superior court has described this remedy as "drastic." *McFadden, 74 M.J. at 90*. Based on the undeveloped record such a remedy was not required.

2. Preserved Bases for Challenge for Cause

"This [c]ourt's standard of review on a challenge for cause premised on implied bias is less deferential than abuse of discretion, but more deferential than de novo review." *United States v. Bagstad, 68 M.J. 460, 462 (C.A.A.F. 2010)* (internal quotation marks omitted) (citations omitted). Under this standard, "[w]e do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *United States v. Downing, 56 M.J. 419, 422 (C.A.A.F. 2002)*. Indeed, "where the military judge places on the record his analysis and application of the law to the facts, deference is surely warranted." *Id.*

As the CAAF has previously made clear, however, "[w]e will afford a military judge less deference if an analysis of the implied bias challenge on the record is not provided." *United States v. Peters, 74 M.J. 31, 34 (C.A.A.F. 2015)*. In cases where less deference is accorded, the analysis logically moves more toward a de novo standard of review.

In short, we review an implied bias challenge for cause on a sliding scale of deference that depends on how thoroughly the military judge placed his findings on the record. Recently, the CAAF reaffirmed **[*10]** the standard of review in cases involving allegations of implied bias. *United States v. Woods, 74 M.J. 238, 243 n.1 (C.A.A.F. 2015)*.

"The core of the implied bias test is the consideration of the public's perception of fairness in having a particular member as part of the court-martial panel." *United States v. Rogers, 75 M.J. 270, 271 (C.A.A.F. 2016)* (internal citations omitted).

Appellant limited his challenge for cause of MAJ MC to an implied bias challenge based on two theories.[3] The first involved MAJ MC's allegedly close relationship to law enforcement. The second focused on MAJ MC's "sensitivity" to issues of domestic violence based on his wife's experience with her ex-husband. The military judge denied the challenge. In doing so, he made an extensive ruling regarding MAJ MC's sensitivity to domestic violence but did not address in any detail why he denied the challenge for cause with regards to MAJ MC's relationship to law enforcement. Accordingly, while we review the "totality of the circumstances" we give more deference to the military judge's assessment of MAJ MC's "sensitivity" to domestic violence and review nearly de novo the challenge based on his relationship with law enforcement.[4]

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[2] We note while appellant asserted issues of ineffective assistance of counsel, both as an assigned error and pursuant to *United States v. Grostefon, 12 M.J. 431 (C.M.A. 1982)*, appellant does not claim that his counsel was deficient in failing to either sufficiently voir dire MAJ MC or adequately state a challenge for cause. The assigned error of ineffective assistance of counsel (which concerned advice on post-conviction parole) was withdrawn prior to the completion of this appellate review. We determine the issues personally submitted by appellant do not merit relief.

[3] The military judge considered the challenge on the basis of both actual bias (though not specifically asserted) and implied bias, and stated that he considered the mandate to liberally grant defense challenges for cause.

[4] We address the two grounds for challenge separately because they are factually unrelated and because of the military judge's different treatment of the two issues. Nonetheless, we also consider the totality of the circumstances and their combined effect. *See United States v. Terry, 64 M.J. 295 (C.A.A.F. 2007)*.

a. Law Enforcement

Major MC informed the parties that he had some law enforcement training. He explained **[*11]** that he worked for the Kentucky Labor Department investigating "wages and hours" violations by employers. He did this job for about eighteen months and received training in investigative techniques. Specifically, he received training on interviewing the employer and gathering evidence such as "time cards." He also investigated working conditions and child labor practices. He described his work as "administrative," not criminal, and the investigative techniques were "basic common sense. . . . What would a reasonable person do sort of procedures." He also stated his father had served as a Fish and Game officer and a corrections officer while he was growing up, and his brother served in the Army Reserve as a Lieutenant Colonel in the Military Police. He clarified his brother had not "really worked a lot [sic] law enforcement," and "[m]ost of his stuff has been military command related and UCMJ-type things that nonjudicial punishments for different folks in his organization and so on." Major MC's explanation of his brother's duties is consistent with our understanding of the duties of a commissioned officer in the Military Police.

As the military judge did not explain his reason for denying the **[*12]** challenge, we review the denial of the challenge on this ground nearly de novo. Nonetheless, we find no error. Major MC's connection to law enforcement is tenuous and does not appear to be recent. To the extent that these issues were developed at trial—which is to say not much—they would not undermine the public's perception of fairness in having MAJ MC sit as a member of appellant's court-martial. Assisting the Kentucky Department of Labor in administrative investigations into labor law violations would not cause a reasonable member of the public to question the fitness of MAJ MC. Likewise, MAJ MC's father's service as a Fish and Game and corrections officer, and his brother's service as a Military Police officer (but not one conducting criminal investigations) would not call into question the appearance of fairness in the military justice system. We likewise find nothing to support that MAJ MC held actual bias against appellant based on his experience with law enforcement.

b. Sensitivity to Domestic Violence

In response to a question by the defense regarding "interactions with domestic violence," MAJ MC stated that his wife's "ex-husband had pushed her around a bit so that's some experience **[*13]** there[, a]s far as personal, no." When asked whether his wife's background "shaped or contributed to your attitudes at all about domestic violence," MAJ MC responded, "Somewhat, yes." When asked for further explanation, he told the military judge the following:

> I mean, it's a, I guess, a relationship in many cases can be a very emotional and for some people it's a very volatile experience especially in this particular--I--my wife's case her ex-husband was an alcoholic and when he would drink is when he would get physical and he only got physical with her a couple of times according to her, but it was enough for her to report it to his command at the time. So, I'm very sensitive to it.

The trial counsel rehabilitated MAJ MC by asking whether there was "anything about your sensitivity that would make it difficult for you to fairly listen to the evidence in this case and make a determination based on just the facts in this case?" Major MC responded, "No."

Appellant then challenged MAJ MC for cause, stating:

> [T]he defense would challenge [MAJ MC] on the basis of implied bias. Given . . . his wife's experience with domestic violence. While he did state that he would not let that affect his judgment **[*14]** in this case, he did state he was sensitive to it, that his wife would still be

> emotional about that particular aspect of her previous relationship and it's asking too much.

As we explain below, although the challenge was one only of implied bias, the defense counsel's argument raised both actual bias and implied bias. When MAJ MC stated he was sensitive to issues of domestic violence, this comment raised more the issue of actual bias. When MAJ MC explained his wife's prior experience regarding domestic violence, it raised more the issue of implied bias. The government objected to the challenge. The military judge properly considered the challenge as raising both actual and implied bias. "[A] challenge for cause . . . encompasses both actual and implied bias" as they are "separate legal tests, not separate grounds for challenge." *United States v. Armstrong, 54 M.J. 51, 53 (C.A.A.F. 2000)*.[5] The military judge denied the challenge for cause as follows:

> Now I've considered the challenge for cause on the basis of both actual and implied bias and the mandate to liberally grant defense challenges. That challenge is denied because of the reasons stated by the government and I'll also note that having observed MAJ [MC's] demeanor he was very emphatic **[*15]** that the issues in his wife's life that occurred in the 1990s would not affect him in this case. He was very open to the idea that domestic violence issues can be caused by either party and I interpreted that to mean gender. And very emphatic that he would only judge this case on the basis of the facts presented in this case. The fact that his wife would become sensitive to a domestic violence or sensitive and emotional if her domestic violence case was raised to her, it really has no impact on Major MC. He was very clear that he can decide this case fairly and impartially and that this issue won't affect him. So that challenge is denied.

As the test for implied bias and actual bias is substantially different—they are "separate legal tests" under *Armstrong* —on appeal we will attempt to parse the facts and law and address them separately.

Our superior court recently reiterated that where "actual bias is found, a finding of implied bias would not be unusual, but where there is no finding of actual bias, implied bias must be independently established." *Dockery, 75 M.J. at *18 n.6, 2017 CAAF LEXIS 108 (C.A.A.F. 2017)* (citing *Clay, 64 M.J. at 277*).

On appeal, appellant conflates the issues of actual and implied **[*16]** bias and argues MAJ MC's statement he is "very sensitive" to domestic violence is the basis for an implied bias challenge. Based on our understanding of the CAAF's case law on the matter, we disagree. We see the implied bias test as looking at how "most people" (i.e., an objective member of the public) would view the bias of someone in MAJ MC's shoes, "regardless" of MAJ MC's claims about how he actually feels. That is the difference between a test for actual bias and implied bias. Under appellant's view, the subjective impressions of a panel member could alone be the basis for an implied bias challenge. This view ignores the clear guidance the implied bias test looks from the perspective of an objective member of the public without regard to the personal feelings of the member, and the CAAF's requirement when "there is no finding of actual bias, implied bias must be independently established." *Clay, 64 M.J. at 277*. Moreover, under

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[5] As discussed above, the CAAF's recent decision in *Dockery* appears to contradict this holding in *Armstrong* but without specifically overruling it. In *Dockery*, the challenge for cause was only based on *actual* bias but the military judge granted the challenge for *implied* bias. *Dockery, 75 M.J. at *7, 2017 CAAF LEXIS 108*. The *Dockery* court repeatedly described this as a sua sponte removal of a member and perhaps implied the military judge was not required to consider the challenge for implied bias. *2017 CAAF LEXIS 108, [WL] at *2 and *9*. Under *Armstrong*, presented with a challenge for cause, the military judge would be required to consider a challenge for cause for both actual and implied bias, and the removal for cause would not be sua sponte. However, in any event, resolving the assigned error in this case does not turn on interpreting *Armstrong* in light of *Dockery*. As the military judge here considered the challenge as raising both actual and implied bias, whether it was required or discretionary consideration of both actual and implied bias is of no importance.

appellant's reasoning any test for actual bias would always be subsumed by the test for implied bias.

With that framework established, we understand the questions before for us on appeal to be as follows:

i. Is Major MC Actually Biased?

Major MC's statement he is "very sensitive" **[*17]** to issues of domestic violence raises the issue of actual bias. That is, is MAJ MC actually biased against persons accused of domestic violence? In reviewing questions of actual bias on appeal we are required to give deference to the military judge's assessment of MAJ MC's fitness and candor. *United States v. Briggs, 64 M.J. 285, 286 (C.A.A.F. 2007)* ("Because a challenge based on actual bias is essentially one of credibility, and because the military judge has an opportunity to observe the demeanor of court members and assess their credibility on voir dire, a military judge's ruling on actual bias is afforded deference) (internal citations and quotations omitted).

"[A] member is not per se disqualified because [the member] or a close relative has been a victim of a similar crime." *United States v. Daulton, 45 M.J. 212, 217 (C.A.A.F. 1996)* (citations omitted). Affording the military judge the deference due, and noting his specific findings regarding MAJ MC's demeanor, we find that the military judge did not abuse his discretion in finding no actual bias on the part of MAJ MC.[6]

ii. Is Major MC Impliedly Biased?

Major MC's statement his wife was "pushed around" a "couple of times" by her ex-husband in the mid-1990s also raises the question of implied bias. That is, "regardless of an individual member's **[*18]** disclaimer of bias," would an objective member of the public find that "most people in the same position would be prejudiced [that is, biased]." *United States v. Briggs, 64 M.J. 285 (CAAF 2007)*; *see also United States v. Napolitano, 53 M.J. 162, 167 (C.A.A.F. 2000)*. Here, we look less at MAJ MC's statements and focus on how a member of the general public would objectively perceive MAJ MC's statements. "The test for implied bias in the military has considered the public's perception of fairness since the earliest days [of the Court of Military Appeals.]" *Woods, 74 M.J. at 243*. "The question before us, therefore, is 'whether the risk that the public will perceive that the accused received something less than a court of fair, impartial members is too high.'" *Id. at 243-44* (internal citations omitted).

Again, we do not find that the military judge abused his discretion. An objective member of the public is unlikely to question the fitness of a panel member because, well over a decade ago, his wife was "pushed" around a "couple" of times by her then husband. In *Terry*, a panel member's participation in a rape trial did not create implied bias, despite that member's spouse having been sexually assaulted "at least ten, and perhaps as many as twenty years" before the court-martial. *64 M.J. at 304*. While we find that the military judge's ruling is **[*19]** likely due some deference under our superior court's sliding scale standard of review for issues of implied bias, it does not much matter. The passage of time and the dissimilarities in the degree of violence both weigh heavily against finding any implied bias. Major MC did not personally witness any domestic violence, the instances of domestic violence were very remote in time, and the conduct in question was "pushing" rather than being strangled or suffocated to death. On top of these facts, and to the extent we may consider it, we have the military judge's specific findings on MAJ MC's

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[6] There was little or no prior history of domestic violence between appellant and SGT KW. In objecting to the challenge, the trial counsel proffered as much to the military judge. Except for the trial counsel's rehabilitation efforts, no one developed at trial what MAJ MC meant when he said he was very sensitive to domestic violence. If he meant only that he thinks domestic violence is wrong, such a view would unlikely be a basis for challenge under either actual or implied bias. And, since murder was the case at bar, it is likely every panel member was, in that sense, sensitive to the issue of murder.

demeanor in answering questions.[7]

B. Non-unanimous Panel

Appellant assigns as error his rights under the *Fifth*, *Sixth*, and *Eighth Amendments* were violated when he was convicted and sentenced to life without the possibility of parole by a court-martial panel that was not obligated to return a unanimous verdict. Appellant dutifully noted contrary case law.

The decision to allow non-unanimous verdicts was a policy decision made by Congress during the crafting of the UCMJ. In those post-World War II years a preeminent concern was the danger posed by unlawful command influence. *See* House Armed Services **[*20]** Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session (1949) at 606 (statement of Prof. Edmund M. Morgan). A requirement for a unanimous panel decision, while having obvious advantages in truth-determination, would also undercut several protections against unlawful command influence that exist under current military justice practice. As these may be non-obvious considerations, we address them briefly.

First, a requirement for a unanimous panel verdict would necessarily require the public disclosure of each panel member's vote. Panel members are not anonymous; most obviously to the convening authority who detailed them to the court-martial. Currently, regardless of the verdict, an individual panel member's vote cannot be determined.[8] The non-unanimous vote allows a panel member to cast what they might perceive to be an unpopular vote. In a system of unanimous panel verdicts, each panel member's superior, subordinate, and peer would know exactly how each panel member voted in each case. Consider the current oath taken by a panel member requires them not to divulge the vote or opinion of any member—an oath which would become pointless when the unanimous verdict is read in open court. *See* R.C.M. 807(b)(2) discussion.

Second, unanimous verdicts in the civilian system require repeated voting until a unanimous decision is reached or the jury is "hung." Currently, absent the relatively rare request to reconsider a finding, a panel member's formal vote is conducted by a single secret written ballot. By contrast, unanimity requires re-voting and—when there is sharp disagreement between two panel members—one panel member's views usually must yield to the other. When deliberations must continue until there is unanimity, secret ballots would only frustrate the goal of deliberating until all panel members are in agreement. As a result, a requirement to keep deliberating until all members agree poses special

[7] In *Woods*, the court clarified what had long been a somewhat open question: when determining a question of implied bias may a military judge consider the panel member's demeanor when answering questions. *74 M.J. at 243*. Put differently, when considering a question of implied bias, is the objective test conducted from the viewpoint of a hypothetical member of the public sitting in the gallery (and seeing and hearing the panel member)? Or, is the objective member of the public reading a cold transcript? If the former, the member of the public has the same information as the military judge and the military judge's assessment of demeanor may, on the margin, make the difference between granting and denying the challenge for implied bias. If the latter, the military judge's assessment of demeanor is likely irrelevant. The CAAF appears to have answered this question when it stated that "resolving claims of implied bias involves questions of fact *and demeanor*, not just law." *Id.* (emphasis added); *see also United States v. Hines, 75 M.J. 734 (Army Ct. Crim. App. 2016)*. In this regard, the military judge ruled consistently on defense challenges. With regards to appellant's challenge for cause of Lieutenant Colonel (LTC) CK, the panel member's demeanor caused the military judge to *grant* the defense challenge for bias. Specifically, the defense argued LTC CK expected the defense to tell their side of the story and "would make the proceedings when looked from the outside in look unfair and impartial." The military judge's assessment of LTC CK's demeanor (that he was too emphatic) caused him to grant the defense's challenge.

[8] The only exception is when, in a capital case, the panel *convicts* the accused and when the panel sentences such an accused to death. *UCMJ art. 25a*; *UCMJ art. 52*. In this one instance, the required unanimity requires the effective public disclosure of every panel member's vote. However, a panel member's vote *against* ***[*21]*** conviction or a death sentence cannot be determined. If the public disclosure of a panel member's unanimous vote causes hesitation in casting a vote in favor of death, that hesitation can only inure to the benefit of the capital defendant.

concerns when one panel member outranks the other.

Military life and custom may condition a panel member to be wary of questioning the reasoning of senior members, or a senior panel member may be unaccustomed to having his or her reasoning or decisions questioned. It is unlikely that the lessons learned during a lifetime of service in a rigid hierarchical system can always be briefly suspended during deliberations. The current practice of a single secret written ballot, collected and counted by the junior **[*22]** member of the panel, allows a panel member to more freely vote his or her conscience. By contrast, unanimity requires continued debate until all agree. While we might presume that panel members could deliberate a case fairly without the influence of rank or position in most cases, such deliberations would proceed without the current protections provided by single a secret written ballot. *See* Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook [hereinafter Benchbook], para. 2-5-14 (10 Sept. 2014)

In short, current practice helps reduce the possibility of impermissible influences on panel members both inside and outside the deliberation room. These pernicious concerns of improper influence will be most acutely felt when the case involves high stakes, when the case involves infamous acts, or when the personalities involved are less likely to yield to prophylactic instructions. That is, concerns of improper influence are most likely to be a problem in the most problematic of circumstances.

Weighing the costs and benefits of unanimous or non-unanimous verdicts is a policy decision vested in the Congress. The Congress is specifically empowered to regulate the "land and naval **[*23]** forces." *U.S. Const. art. I, § 8, cl. 14*. Any change to the voting requirements contained in *Article 52, UCMJ*, will likely have to originate with that branch of government. If anything, the Congress's recent amendment to *Article 52, UCMJ*, (requiring three-fourths instead of two-thirds to convict) is a recent reaffirmation of the military practice of non-unanimous verdicts. *National Defense Authorization Act of Fiscal Year 2017, Pub. L. No. 114-328, § 5235* (2016) (amending *UCMJ art. 52*). Ultimately, however, the requirement for non-unanimous verdicts in the military justice system is long-standing and well-settled law which we are obligated to follow. *See e.g. United States v. Loving, 41 M.J. 213, 287 (C.A.A.F. 1994) cert. denied 562 U.S. 827, 131 S. Ct. 67, 178 L. Ed. 2d 22 (2010)*.

CONCLUSION

Finding no error, we AFFIRM the findings of guilty and sentence.

Chief Judge RISCH and Judge FEBBO concur.

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