IN THE
UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

U N I T E D S T A T E S, *Appellee,* *-versus-* Airman (E-2) **JONATHAN M. MARTINEZ,** United States Air Force, *Appellant.*	Case Number ACM 39973 Panel No. 3 DATE: 10 July 2021

AMICUS CURIAE BRIEF OF THE

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

IN SUPPORT OF *APPELLANT*

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INTEREST OF *AMICUS CURIAE*

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

NACDL is keenly interested in military justice in general, and on behalf of its military criminal defense counsel members. NACDL is dedicated to advancing the proper, efficient, and just administration of justice to include military justice issues. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal (to include military) and state courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants–to include military defendants–especially where there are constitutional issues, such as presented in this case.[1]

Finally, the decision that precipitated the "unanimous verdict" issue here, *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020), was argued by NACDL member, Jeffrey L. Fisher, Esq., and NACDL itself (along with numerous other *amici curiae*) filed an *amicus* brief in *Ramos*.[2] NACDL's interest in this

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[1] A sample of military-related *amicus curiae* briefs filed by NACDL is at Appendix "A."

[2] These may be accessed via the Court's website for the *Ramos* case; available at:

(continued...)

issue continues because members of our Armed Forces accused and tried by courts-martial under the UCMJ are not second-class citizens and do not forfeit their Sixth Amendment rights upon donning a uniform of our Armed Forces.

Pursuant to Joint CCA Rule 22(c), our *amicus curiae* brief "bring[s] relevant matter to the attention of the Court not already brought to its attention by the parties . . . ." First, there is an underlying *procedural* issue, *viz.,* who bears the burden of proof? Here that burden was on the *government,* not the Accused/Appellant, as the Military Judge below erroneously held.[3]

Second, the *substantive* issue, i.e., does the Sixth Amendment's guarantee of a unanimous verdict in a criminal case, apply to non-capital courts-martial convened within the territorial limits of the United States under the UCMJ? The Military Judge below ruled that it did not, even though virtually all other significant Sixth Amendment guarantees have been incorporated within military jurisprudence, as we demonstrate below. The issue needs to be resolved, and this Court with its powers under Article 66(d)(1), UCMJ, is in the best position to address it.[4]

Our *amicus* brief, while addressing the issue of the UCMJ's non-unanimity provisions for non-capital cases, does not duplicate Appellant's argument. NACDL takes a different path in arriving at the same conclusion–non-unanimous verdicts in non-capital courts-martial tried in the United States

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[2] (...continued)
https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-5924.html [Last accessed: 26 June 2021].

[3] Appellant's *Motion for Appropriate Relief* below, the Government's Response, and the Military Judge's Findings and Decision are in the *Record of Trial* [RoT] at Appellate Exhibits [AE] V, VI, and VII, respectively.

[4] To head off an anticipated argument that this Court is bound by CAAF precedents (an argument the government made below), that is generally true. But, here, the question is more nuanced–did *Ramos* abrogate those amorphous CAAF precedents? *Amicus* suggests that no subordinate federal court–civilian or military–can deflect or ignore the Supreme Court's *constitutional* decisions.

violate the Sixth Amendment. NACDL's position is that Congress, when enacting Article 52(a)(3), UCMJ, statutorily provides for non-unanimous verdicts–as in *Ramos*, i.e., by "the concurrence of at least three-fourths of the members present when the vote is taken,"[5]–contravened what the Constitution commands, *viz.,* a unanimous verdict.

I. INTRODUCTION

This case raises significant questions of constitutional law. Specifically, the issues here address the interrelationships between the "Make Rules" and "Necessary and Proper" Clauses of Article I, § 8, U.S. Const.; the "Jury Trial" Clause of Article III, § 2; the Fifth Amendment's "Due Process" Clause as to fundamental fairness; the Fifth Amendment's "Grand Jury" clauses; and the Sixth Amendment's right to an "impartial jury;" all as applied to U.S. servicemembers facing trial by courts-martial within the territorial limits of the United States for serious offenses.[6]

More specifically, the issue here is not only the interplay between the Constitutional provisions noted above, but their *application* to the Congressional exercise of its legislative power in enacting the *Uniform Code of Military Justice* [UCMJ], 10 U.S.C. § 801 *et seq.* Congress–without any Constitutional exemption such as the Fifth Amendment's Grand Jury exclusions for the military–is directly responsible for *creating* a *non-unanimous* verdict procedure for *non-capital* convictions by courts-martial. In Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), Congress expressly authorized non-unanimous verdicts in non-capital courts-martial by a three-fourth's percentage. Yet, the next section, Article 52(b)(2), UCMJ, 10 U.S.C. § 852(b)(2), mandates a unanimous verdict by 12 members in capital cases. While the adage "death is different" is true in a capital case, NACDL

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[5] Article 816(b)(1), UCMJ, generally requires a panel of 8 members.

[6] As opposed to "petty offenses." *See, e.g., Lewis v. United States,* 518 U.S. 322, 323-34 (1996)["The Sixth Amendment's guarantee of the right to a jury trial does not extend to petty offenses . . . ."]

submits that where, e.g., the UCMJ provides for a sentence of life without parole (or its functional equivalent), to allow such to be premised on a non-unanimous verdict by 3/4 of the voting members, is and must be unconstitutional in any system advocating justice.

The broad constitutional question here is: Is the "Make Rules" Clause in Article I, § 8, of the Constitution subject to the subsequently ratified Sixth Amendment's incorporated right to a *unanimous* verdict under *Ramos*?[7]

A. The Unanimity Issue Through a Different Lens.

NACDL has no disagreement with Appellant's framing of his Sixth Amendment, unanimity issue. But, we suggest that there is a narrower way to examine that issue from a constitutional perspective. Prior to addressing the *substantive* issue, NACDL submits that this Court should first address a crucial *procedural* issue, i.e., who had the burden of proof regarding Appellants Motion?

The Military Judge ruled as follows: "Pursuant to RCM 905(c)(2), the Defense as the moving

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[7] The Military Judge's reliance upon a trio of *military commission* cases (discussed below) was misplaced. Likewise, older CMA/CAAF decisions discussing Sixth Amendment "jury trial" rights, paint the issue with too broad of a brush. The Grand Jury clauses are inapplicable as appellant made no claims to such below. Furthermore, the underlying issue surrounding the scope of the Sixth Amendment's *inapplicability* is not about fundamental fairness or unanimity. Rather, it is the *vicinage* clause that *Amicus* agrees is inapplicable to courts-martial. As originally understood:

> [One] great right is that of trial by jury. This provides, that neither life, liberty nor property, can be taken from the possessor, until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character, and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, in open Court, before as many of the people as chuse to attend, shall pass their sentence upon oath against him. . . ."

1 Journals of the Continental Congress (1774-1789), as quoted in *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 568-68 (1980).

party has the burden of proof." [AE VII, at 2, ¶ 2].[8] While generically correct, within the *factual* context of Appellant's pretrial unanimity Motion, it was clearly erroneous as a matter of law. It ignored valid precedents from the Court of Military Appeals [CMA] and the U.S. Court of Appeals for the Armed Forces [CAAF], "[T]he burden of showing that military conditions require a different rule than that prevailing in the civilian community is upon the party arguing for a different rule." *Courtney v. Williams,* 1 M.J. 267, 270 (CMA 1976), citing *Kauffmann v. Sec'y Air Force,* 415 F.2d 991 (DC Cir. 1969), *cert. denied* 396 U.S. 1013 (1970); and quoted in *United States v. Easton,* 71 M.J. 168, 175 (CAAF 2012). Here, that burden was on the *government,* not the Accused/Appellant, as the Military Judge below erroneously held. The Military Judge was bound by the precedents of CMA/CAAF–a foundational issue which respectfully must be addressed.

NACDL posits that the better approach here is to examine the source of the problem, *viz.,* the provision in the UCMJ, which expressly allows a non-unanimous verdict in *non-capital* courts-martial. Thus, we would frame the issue substantially as follows:

> Is Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), which permits non-unanimous verdicts by only a three-fourths majority, in non-capital courts-martial involving serious offenses, unconstitutional under *Ramos v. Louisiana*?

To properly address this approach, some historical discourse is warranted.

B. Historical Context

Prior to the Founding, when the Colonies were under both British rule and military occupation, where what we would today classify as general "common law" crimes–murder, robbery, burglary, etc.,–even when committed by uniformed members of the British Army, Soldiers were tried in

[8] Subparagraph (A) of that RCM reads in full: "Except as otherwise provided in this Manual the burden of persuasion on any *factual* issue the resolution of which is necessary to decide a motion shall be on the moving party." [Emphasis added]. The problem is (and was)–a *legal* issue.

British *civilian* courts in the American Colonies–not in British courts-martial–which afforded the defendants the right to a unanimous verdict. The most famous example of this practice was John Adams' defense of the British Soldiers in both of the so-called "Boston Massacre" cases.[9] That practice continued when the Continental Congress enacted the first American Articles of War, essentially adopting the British version in our pre-Constitutional jurisprudence, i.e., general, non-military offenses were tried in *civilian* courts.[10] That procedure existed until the early 20th Century.

Indeed, the Seventh Amendment, which likewise provides for an "impartial jury" in *civil* cases has long been interpreted as requiring unanimous verdicts.[11] *See, American Publ'g Co. v. Fisher,* 166 U.S. 464, 468 (1897)[a civil suit], where the Court held:

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

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[9] *See generally, Famous Trials: Boston Massacre Trials (1770),* available at: https://famous-trials.com/massacre [Last accessed: 29 June 2021].

[10] This was clarified in the American *Articles of War* (1776), Section X, Article I, which provided in relevant part:

> Whenever any officer or soldier shall be accused of a capital crime, or of having used violence, or committed any offense against the persons or property of the good people of any of the United American States, such as is punishable by the known laws of the land, the commanding officer . . . [is] hereby required, upon application duly made by or in behalf of the party or parties injured, to use his utmost endeavors to deliver over such accused person or persons to the ***civil magistrate***; and likewise to be aiding and assisting to the officers of justice in apprehending and securing the person or persons so accused, in order to bring them ***to a trial***. [Emphasis added].

Winthrop, *Military Law and Precedents*, 964 (2nd ed., 1920 Reprint ed.).

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

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

In 1916, Congress radically overhauled the Articles of War to include virtually all forms of crime–common law and military. 39 Stat. 619, 650 *et seq.* (1916).[12] While it was (and continues to be) the assumption that Congress has plenary power under the Make Rules Clause of Article I, § 8, and the genesis for the "military deference" concept,[13] that assumption is misguided–if not demonstrably wrong when applied to core, constitutional rights.

One of the complaints against the British King made in our *Declaration of Independence* (1776), was that "He has affected to render the military independent, of, and superior to the civil power." Thus, it is clear that judicial "deference" to the military was a toxic concept to the Founding Fathers. This is especially so since it comes just a few clauses after the complaint that the King "has obstructed the administration of justice, by refusing to assent to laws for establishing judiciary powers."[14]

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[12] Thus, military cases decided prior to 1916, would have no occasion to address the proper jurisdictional parameters of non-military offenses as they generally were not tried by courts-martial, in the United States. However, during the Civil War, Congress had expanded courts-martial jurisdiction committed "in time of war, insurrection, or rebellion . . . ." for serious felonies. 12 Stat. 736, § 30 (1863).

[13] *See, e.g.,* Lichtman, *The Justices and the Generals: A Critical Examination of the U.S. Supreme Court's Tradition of Deference to the Military, 1918-2004*, 65 Md. L. Rev. 907 (2006); explaining that "the Court has a long history of deferring to military judgment. While other litigants are often required to submit proof of whatever assertions they are making before the Court, the Justices invariably accept arguments put forth by the military without subjecting them to constitutional scrutiny." *Id.*

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

(continued...)

In *Reid v. Covert,* 354 U.S. 1, 24 n.44 (1957), the Court observed: "The Common Law made no distinction between the crimes of soldiers and those of civilians in time of peace. All subjects were tried alike by the same civil courts." The Court went on to say:

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

Id. at 29.

C. The "Specialized Society" Premise Does Not Resolve or Assist in Interpreting the Unanimous Verdict Issue.

The government's response to the defense motion below, claimed:

> "The military is, by necessity, a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974). Just as military society is distinct from civilian society, so too the Supreme Court has recognized that military law "is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Id.*

Gov't Response, at 4, ¶ 12 [AE VI]. Justice Rehnquist's opinion in *Parker* is the drum that the government beats on every challenge made to the UCMJ or *Manual for Courts-Martial,* and has become a mantra for courts (and courts-martial) to deny relief, as did the Military Judge below. But, it is not the talisman the government claims it to be, as we discuss below.

The Court first used the "specialized" community or society concept in *Orloff v. Willoughby,*

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[14] (...continued)

> [I]t is always safe to read the letter of the constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Id. at 160.

345 U.S. 83, 94 (1953), when it stated, "The military constitutes a specialized community governed by a separate discipline from that of the civilian." Shortly after *Orloff* was decided, the Court decided *Burns v. Wilson,* 346 U.S. 137 (1953)(plurality) and stated: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.* at 142. A majority of the Justices did not dispute this premise. Hence, the import of *Ramos* here.

From a historical perspective, at one point the "specialized community" concept may have been true, *viz.,* in the earlier days of our Republic when Army posts were literally on the frontiers of society, and days away from supplies or to higher headquarters. The Army and Navy's enlisted corps were mostly uneducated and oft-times "encouraged" to enlist to avoid judicial action by civilian courts. Since the advent of the All Volunteer Force, to cargo planes being able to resupply remote outposts in hours, to virtual instantaneous electronic and digital communication, that premise is a "relic of a bygone era." *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 365 (1973).

Parker v. Levy relied upon *Orloff*, but that reliance was distorted.. Law Professor (and former Air Force judge advocate), Diane Mazur, addressed the *Parker* "problem" in a detailed law review article.[15] She notes:

> [In *Parker,* Justice] Rehnquist reached back to the *Orloff v. Willoughby* of his clerkship and rewrote–in fact *misrepresented the language of that opinion in order to substantiate a presumption of judicial deference to all exercises of military discretion.* Rehnquist took a case that had relied on uncontroversial principles of constitutional separation of powers and transformed it into one that relied instead on the Vietnam-era cultural division between those who

[15] Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 Indiana L. J. 701 (2002), [available online at: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1911&context=ilj]; *accord,* . Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 Wis. L. Rev. 839, 945.

> supported the military and those who did not. In *Orloff v. Willoughby*, Justice Jackson had made the relatively simple observation that the military was a "specialized community governed by a separate discipline," referring to the Article I delegation of power that permits Congress to make rules for the internal governance of the military. Rehnquist cited the authority but changed its language, stating that the Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society" and "a society apart from civilian society."[16]

The government continues this inaccurate deviation from *Orloff's* actual holding.

Another legal commentator has addressed this from a different perspective:

> This "separate society" view, however, is no longer an accurate view of the modem day military establishment. In its present peacetime form, the military functions much like a large civilian corporation, with officers playing the role of managers and enlisted personnel playing the role of employees. Both the public's and the Supreme Court's perceptions, however, have not caught up with the changes in the military. Not that the military's system of disciplinary rules is separate and distinct from the rules that control in civilian courts, *but that military society itself is separate from civilian society*, and that this in and of itself requires civilian courts to forego review of military decisions.[17]

That author also notes, "[t]he only right from which servicemembers are expressly excluded is the right to indictment by a grand jury." *Id.* at 284.

The late Justice Ginsburg, concurring in *Weiss v. United States,* 510 U.S. 163, 194 (1994)(Ginsburg, J., concurring), also recognized this, observing:

> The care the Court has taken to analyze petitioners' claims demonstrates once again that ***men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter military service***. Today's decision upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally trained officers preside or even participate as judges. [emphasis added].

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[16] Mazur, *supra* at 743 [emphasis added; footnotes omitted].

[17] Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 Chi.-Kent L. Rev. 265 (1994).

One must then ask, where in the Constitution or Bill of Rights are our servicemembers *exempted* from unanimous verdicts? *Cf.,* the Grand Jury Clauses of the Fifth Amendment.

There is critical, scholarly analysis of the premise for "civilizing" military justice. Law professor and retired Army JAG Colonel, Fredric Lederer, acknowledges: "the modem history of military criminal law largely is defined by its increasing civilianization."[18] He continues by noting: "[T]he policy justifications traditionally used to defend a military criminal legal system that is separate and distinct from civilian law increasingly appear less compelling than in the past." *Id.* at 512-13. This assumes that the military justice system is indeed "separate and distinct"–in general, that cliche is simply no longer true.[19]

D. *Vallandigham, Milligan,* and *Quirin*: The Military Commission Cases

These cases were cited and relied upon by the Military Judge at the government's urging. The first problem is that all three of these cases originated in trials by *military commissions*–not courts-martial. Second, Part IV of Justice Stevens' opinion in *Hamdan v. Rumsfeld,* 548 U.S. 557, 590 (2006), traces the history and legal bases for military commissions–something alien to our courts-martial system until recently.[20] Lastly (and perhaps most importantly), the issues before the Court

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[18] Lederer, *From Rome to the Military Justice Acts of 2016 and beyond: Continuing Civilianization of the Military Criminal Legal System.* 225 Mil. L. Rev. 512 (2017). *But see,* Sherman, *The Civilianization of Military Law,* 22 Maine L. Rev. 3 (1970).

[19] *See, e.g., Reid v. Covert,* 354 U.S. 1, 24 n.44 (1957), "The Common Law made no distinction between the crimes of soldiers and those of civilians in time of peace." *See also,* Article 36(a), UCMJ, where Congress delegated to the President the power "so far as he considers practicable, [to] apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts . . . ."

[20] *See also, Ortiz v. United States,* 138 S. Ct. 2165, 2171 n. 1 (2018):

> In contrast to courts-martial, military commissions have historically been used to substitute for civilian courts in times of martial law or temporary military government, as well as to try members of enemy forces for violations

(continued...)

in each of these three cases had nothing specifically to do with unanimous verdicts; *Milligan* was illegally denied his right to indictment and trial in federal court, encompassing his right to a unanimous verdict, as noted below.

Ex Parte Vallandigham, 68 U.S. 243 (1863). Vallandigham, was a civilian, Rebel sympathizer, who was tried, convicted, and sentenced by a military commission. He then sought a *writ of certiorari* from the Supreme Court directed to the Judge Advocate General of the Army. But, the issue before the Court was more basic: did the Supreme Court have jurisdiction to review the case via *certiorari*? In denying the writ, the Court concluded: "[T]here is no original jurisdiction in the Supreme Court to issue a writ of *habeas corpus ad subjiciendum* to review or reverse its proceedings, or the writ of *certiorari* to revise the proceedings of a military commission." *Id.* at 253. Jurisdiction, not unanimity, was the issue.

Ex Parte Milligan, 71 U.S. 2 (1866). Like Vallandigham, Milligan was a civilian, tried, convicted, and sentenced to death by a military commission. Unlike Vallandigham, he sought a *writ of habeas corpus* in federal court, arguing that, among other things, as a civilian, a military commission had no jurisdiction to try him when the local federal court was open, functioning normally, and he could have been indicted and tried there with all of his constitutional rights protected. The Court unanimously held that the local federal court had jurisdiction and that Milligan was entitled to be discharged from custody, because as a civilian where the courts were open and functioning, he was thus denied his Fifth and Sixth Amendment rights.[21]

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[20] (...continued)
of the laws of war. [citing *Hamdan*].

[21] *See also, Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946)(Murphy, J., concurring):

> Those who founded this nation knew full well that the arbitrary power of
> (continued...)

Ex Parte Quirin, 317 U.S. 1 (1942)[the Nazi Saboteurs case]. Again, this was a military commissions case where the defendants likewise challenged their detention and trial by military commission. The Court held that the military commission had jurisdiction under the "laws of war" to proceed with their trial. While they argued that they were entitled to trial in the civilian courts, the Court rejected their claims.[22] But, the issue was jurisdiction, not unanimity. The following language from the Court's decision has been distorted to apply to courts-martial:

> [W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by *military commission*, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts. [emphasis added].

Id. at 40. Such a broad extrapolation to courts-martial simply was not warranted. *Reid v. Covert* warned in 1957: "As yet it has not been clearly settled to what extent the Bill of Rights and other protective parts of the Constitution apply to military trials." 354 U.S. at 37. *Ramos* has now settled the issue in the context of a Constitutional command for unanimous verdicts in courts-martial for serious offenses.

E. Dealing With Deference: Judges versus Congress.

Hamilton, in *Federalist* No. 78, noted: "liberty can have nothing to fear from the judiciary

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[21] (...continued)

> conviction and punishment for pretended offenses is the hallmark of despotism. . . . They shed their blood to win independence from a ruler who they alleged was attempting to render the 'military independent of and superior to the civil power' and who was 'depriving us of the benefits of trial by jury.' [internal citation omitted].

[22] Of note, one of the *civilian* co-defendants to the *military* defendants in *Quirin*, was indicted and tried in federal court: *Haupt v. United States,* 330 U.S. 631 (1947). Justice Scalia in *Hamdi v. Rumsfeld,* 542 U.S. 507, 569 (2004)(Scalia, J., dissenting) characterized the holding in *Quirin* as "not this Court's finest hour."

alone, but would have every thing to fear from its union with either of the other departments. . ." [23]

He went on to state:

> It is far more rational to suppose, that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. *Id.*

That was the premise for Chief Justice Marshall's opinion in *Marbury v. Madison,* 5 U.S. (1 Cr.) 139 (1803). Here, the question is simply, what deference is due to Congress when it enacts a statute in direct conflict with the Constitution, such as Article 52(a)(3), UCMJ? The answer is, none. *Marbury's* famous conclusion declared, "a law repugnant to the constitution is void." *Id.* at 180.

SUMMARY OF ARGUMENT

. . . Congress cannot legislate away the Constitution.[24]

NACDL, as *amicus curiae,* submits that Article 52(a)(3), UCMJ, which authorizes non-unanimous verdicts by three-fourths of the voting members in a court-martial for serious offenses, is unconstitutional on its face. First, military law has long recognized that a military accused has a right to "a fair and impartial panel" which is "a matter of due process" under the Fifth Amendment. *United States v. Wiesen,* 56 M.J. 172, 174 (CAAF 2001). That is because "[i]mpartial court members are the *sine qua non* for a fair court-martial." *United States v. Modesto,* 43 M.J. 315, 318 (CAAF 1995).

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[23] Available through the Library of Congress's website at: https://guides.loc.gov/federalist-papers/full-text [Last accessed: 10 June 2021].

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

Additionally, there is a long *judicial* history of "incorporating" various other Sixth Amendment rights into our military justice system–without damaging discipline, justice, or national security. With the exception of verdict unanimity, CAAF recognizes that most Sixth Amendment rights apply to courts-martial under the UCMJ, as noted in detail below. With the exceptions of the Grand Jury Clauses in the Fifth Amendment and the Vicinage Clause in the Sixth,[25] all of the trial rights in the Sixth Amendment–with the exception being unanimous verdicts–are already incorporated into military practice.

While disorder and chaos have not infected the ranks due to the above incorporation of other Sixth Amendment rights, an over-expansive premise has long infected military law, i.e., "courts-martial have never been considered subject to the jury-trial demands of the Constitution." *McClain,* 22 M.J. at 128. That conclusion is accurate only if limited to the Vicinage Clauses of Article III, § 2, and the Sixth Amendment.[26] However, *McClain's* conclusions are not accurate today. While giving Congress its due under the "Make Rules" and "Necessary and Proper" clauses of the Constitution, there is an important caveat to that admittedly broad power: "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings." *Weiss v. United States,* 510 U.S. 163, 176 (1994).

In a subtle, but significant change, CAAF in *United States v. Lambert,* 55 M.J. 293, 295

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[25] *Amicus* suggests that this clause is most likely the basis for the long-standing claims that the Sixth Amendment's Jury Trial Clause does not apply to courts-martial. *See, e.g., United States v. McClain,* 22 M.J. 124, 128 (CMA 1986). But, as Appellant accurately points out in his Brief, "the Supreme Court has never squarely *held* that the Sixth Amendment's Jury Trial Clause is inapplicable to courts-martial." App.Br. at 13 n. 8.

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

(CAAF 2001) held:

> [T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during the trial proceedings and the subsequent deliberations. [citation and internal footnote omitted] This case involves the latter aspect of impartiality . . . .

Its holding that the Sixth Amendment's requirement of *impartiality* applies to courts-martial is the key to opening the military courthouse doors, which in turn, allows *Ramos* to march in. As Justice Gorsuch stated in writing for the Court in *Ramos,* ". . .the term 'trial by an impartial jury' carried with it some meaning about the content and requirements of a jury trial. *One of these requirements was unanimity.*" 140 S. Ct. at 1395. [emphasis added].

CAAF's decision in *Lambert*, coupled with *Ramos's* holding that from a constitutional perspective, impartiality means unanimity for criminal verdicts in serious cases, must likewise mandate unanimous court-martial verdicts. The Military Judge's ruling below was clearly erroneous as a matter of constitutional law and this Court respectfully should declare Article 52(a)(3), UCMJ's non-unanimity provision, unconstitutional on its face.

ARGUMENT

> Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), which permits non-unanimous verdicts by only a three-fourths majority, in non-capital courts-martial involving serious offenses, is unconstitutional under *Ramos v. Louisiana*.

While Article I, § 8, cl. 14, gives Congress the power to "make rules for the government and regulation" of our Armed Forces, and the "Necessary and Proper" Clause provides the constitutional authorization, as relevant here, for Congress to enact the UCMJ, including Article 52(a)(3), UCMJ, that alone does not answer the constitutional question presented. As *Weiss*, held, Congress is also "subject to the requirements of the Due Process Clause when legislating in the area of military

affairs. . . .” 510 U.S. at 176. There can be no debate that in enacting Article 52(a)(3), UCMJ, Congress was “legislating in the area of military affairs.” That then raises the question: is the non-unanimous verdict procedure for non-capital, but serious, military offenses fundamentally fair under the Fifth Amendment–a precursor to any Sixth Amendment analysis.

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

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

See also, United States v. Clay, discussing “military due process.” To properly analyze fundamental fairness within the court-martial process, requires one to examine the nature of a court-martial under our UCMJ.

A. U.S. Courts-Martial Have Been Considered “Judicial” for Almost 135 Years: The Impact of *Ortiz.*[27]

In *Runkle v. United States,* 122 U.S. 543, 557 (1887), a back-pay suit by a military officer convicted by a General Court-Martial [GCM], but, *not* acted upon by the President as procedurally required, the court held, “the action required of the president ***is judicial in its character***, not administrative.” [emphasis added]. Thus, the Court’s decision in *Ortiz* should have been no surprise to anyone familiar with the history of American military justice.

Ortiz did not appear in the legal universe from a vacuum, as *Runkle,* illustrates. In the Sixth Amendment environment, the former Court of Military Appeals held in *United States v. Jacoby,* 29 C.M.R. 244, 249 (CMA 1960), in the context of confrontation [a precursor to *Crawford*]: “it was provided in Article 10, Articles of War, 1786, that depositions might be taken in cases not capital,

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

"provided the prosecutor and person accused are present at the taking of the same." So, there is a long history of applying civilian trial rights to courts-martial.

The *Ortiz* Court held: "The military justice system's essential character—in a word, [is] judicial . . . ." 138 S. Ct. at 2174. Thus, "procedural protections" should, by definition, include unanimity in verdicts. The Court then made an interesting observation: "[C]ourts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service. . . . The sentences meted out are also similar: Courts-martial can impose, on top of peculiarly military discipline, terms of imprisonment and ***capital punishment***. *Id.* at 2174-75. [emphasis added]. Of note, in 2001, Congress added Article 25a, UCMJ, 10 U.S.C. § 825a,[28] to the UCMJ, which provided that where "the accused may be sentenced to death, the number of members shall be 12." Thus, in the context of potential capital cases, Congress recognized (without Supreme Court "prodding") the constitutional framework utilized in federal and state capital cases–a *unanimous* panel of 12. One of the goals of any principled system of criminal justice must be to avoid "wrongful convictions" and illegal sentences, something that unanimity promotes, and something that in non-capital cases the UCMJ forsakes without good reason.

Ortiz continued:

> Each level of military court decides criminal "cases" as that term is generally understood, and does so in strict accordance with a body of federal law (of course ***including the Constitution***). The procedural protections afforded to a service member are "virtually the same" as those given in a civilian criminal proceeding, whether state or federal. [internal citation omitted;

[28] 115 Stat. 1124. That occurred after NACDL filed an *amicus curiae* brief on behalf of an Army Petitioner who had been sentenced to death in *United States v. Gray,* 51 M.J. 1 (CAAF 1999), urging the Supreme Court to grant *certiorari* to determine whether a conviction and death sentence by an Army General Court-Martial with a panel of only six members was constitutional. *Certiorari* was denied at 532 U.S. 919 (2001). *Habeas* litigation continues; *see, Gray v. Gray,* 645 Fed.Appx. 624 (10th Cir. 2016) [Mem. Opn.]

emphasis added].

138 S. Ct. at 2174.[29] "Strict accordance" with the Constitution, absent the express exemptions contained, e.g., in the Fifth Amendment's "Grand Jury" clauses, necessarily implies unanimous verdicts–the very *premise* of *Ramos.* That is bolstered by *Ortiz's* conclusion that: "[T]he judgments a military tribunal renders, as this Court long ago observed, "rest on the same basis, and are surrounded by the same considerations[, as] give conclusiveness to the judgments of other legal tribunals." [internal citation omitted]. *Id.*

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

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

Shortly after the UCMJ became effective in 1951, the then Court of Military Appeals [CMA] decided *United States v. Clay,* 1 C.M.R. 74 (CMA 1951), the seminal "military due process" case. There, the Court held:

> There are certain standards in the military accusatorial system which have been specifically set by Congress and which we must demand be observed in the trials of military offenses. Some of these are more important than others, but all are of sufficient importance to be a significant part of military law. ***We conceive these rights to mold into a pattern similar to that developed in federal civilian cases***. For lack of a more descriptive phrase, we label the pattern as "military due process" and then point up the minimum standards which are the framework for this concept and which must be met before the accused can be legally convicted. ***The Uniform Code of Military Justice,***

[29] *But see, Kurtz v. Moffitt,* 115 U.S. 487, 500 (1885), ["Courts-martial form no part of the judicial system of the United States. . . ."] *Kurtz* is abrogated by *Ortiz.*

> ***supra, contemplates that he be given a fair trial and it commands us to see that the proceedings in the courts below reach that standard.*** [Emphasis added]

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

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

In *United States v. Jacoby,* 29 C.M.R. 244, 247-48 (CMA 1960), the Court stated, "it is apparent that the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." [citations omitted]. *Jacoby* was a Sixth Amendment Confrontation Clause decision, predating *Crawford v. Washington,* 541 U.S. 36 (2004), by 44 years.

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

life, liberty, and property."[30]

There is no rational, much less constitutional, reason for non-unanimous verdicts for serious offenses tried by courts-martial within the territorial limits of the United States.[31] Indeed, one military author notes that "in the twenty-first [Century], we know there is a great deal of value in an unanimity requirement for juries. Non-unanimous verdicts allow minority viewpoints to be ignored during deliberation, a hallmark of bad decision making." [Footnote omitted].[32]

C. The Sixth Amendment and Its Application to Military Justice.

> *As it stands, a court-martial is now the only place in America where a criminal defendant can be convicted without consensus among the jury*.[33]

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

One aspect of the Sixth Amendment's jury trial right is not (because it cannot be) applicable

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[30] VanLandingham, *supra* at 238.

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

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

[33] *Id.* at 72.

to courts-martial. That is the requirement of mandating jurors be from "the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," i.e., the Vicinage Clause. The "jury of one's peers" concept. But, that has nothing to do with unanimous verdicts and a "fair trial."[34]

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

There is a long legal history of "incorporating" various other Sixth Amendment rights into our military justice system. Specifically, this includes servicemembers' rights to:

1. ***Speedy Trial:*** *United States v. Cooper,* 58 M.J. 54, 57 (CAAF 2003): "In the military justice system, an accused's right to a speedy trial flows from various sources, including the ***Sixth Amendment***, Article 10 of the Uniform Code of Military Justice, and R.C.M. 707 of the Manual for Courts–Martial." [emphasis added].

2. ***Public Trial:*** *United States v. Grunden,* 2 M.J. 116, 120 (CMA 1977) [superceded on other grounds]; and *United States v. Hershey,* 20 M.J. 433, 435 (CMA 1985). "Without question, the sixth-amendment right to a public trial is applicable to courts-martial."

3. ***Confrontation:*** *United States v. Blazier,* 69 M.J. 218, 222 (CAAF 2010): "We hold that where testimonial hearsay is admitted, the Confrontation Clause is satisfied only if the declarant of that hearsay is either (1) subject to cross-examination at trial, or (2) unavailable and subject to previous cross-examination." [Extensive discussion of Sixth Amendment's Confrontation Clause].

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

The rights at issue in this case are constitutional in nature.

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

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

5. ***Compulsory Process:*** *United States v. Bess,* 75 M.J. 70, 75 (CAAF 2016): "The right to present a defense has many aspects. Under ***the Compulsory Process Clause***, a defendant has a 'right to call witnesses whose testimony is material and favorable to his defense.'" [quoting *Rock v. Arkansas,* 483 U.S. 44, 52 (1987); emphasis added].

6. ***The Right to Counsel:*** *United States v. Wattenbarger,* 21 M.J. 41, 43 (CMA 1985): "The first question we address is when did appellant's right to counsel under the sixth amendment attach. . . . In the military, this sixth-amendment right to counsel does not attach until preferral of charges."

7. ***The Right to the Effective Assistance of Counsel:*** *United States v. Gooch,* 69 M.J. 353, 361 (CAAF 2011): "The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel."

With the exception of unanimous verdicts, servicemembers facing a court-martial for serious offenses, receive the core panoply of constitutional trial rights and the military justice system is none the worse-for-wear because of that.

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

Independence and the ratification of the Constitution and Bill of Rights?

E. Enter *Ramos.*[35]

Writing for the Court, Justice Gorsuch begins:

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

Id. at 1394. Here, there is no question that Airman Martinez was convicted of serious offenses under the UCMJ–no one disputes that. Digging into history, the *Ramos* opinion continues:

> Still, the promise of a jury trial surely meant something—otherwise, there would have been no reason to write it down. . . . The text and structure of the Constitution clearly suggest that the term "trial by an impartial jury" carried with it some meaning about the content and requirements of a jury trial.
>
> One of these requirements was unanimity. Wherever we might look to determine what the term "trial by an impartial jury trial" meant at the time of the Sixth Amendment's 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.
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> The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law. As Blackstone explained, no person could be found guilty of a serious crime unless "the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion." A " 'verdict, taken from eleven, was no verdict' " at all. [internal footnotes omitted].

Id. at 1395.

Nailing the point down, Justice Gorsuch again states, "as 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. And then, "[a] right mentioned twice in the Constitution would be reduced to

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[35] *Ramos v. Louisiana,* 140 S. Ct. 1390 (2020).

an empty promise. ***That can't be right***." *Id.* [emphasis added]. Indeed, it wasn't and there is nothing from a historical perspective to suggest otherwise, especially in the context of "serious crimes" allegedly committed by servicemembers at the time of the Founding.

He then postulates: "[T]hat others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations? *Id.* at 1401 [Footnote omitted]. That is a viable concern in courts-martial proceedings, i.e., fundamental fairness. Next, in rejecting Louisiana's arguments for non-unanimity, he observed:

> All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury included a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. *Id.* at 1402.

He concludes as follows: "But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Id.* at 1408. Here, the consequences of being right is to accept unanimous verdicts in courts-martial.

F. Non-unanimity *Promotes* Unlawful Command Influence Rather Than Prevent It, Contrary to the Military Judge's Ruling Below.

The Military Judge below ruled:

> Defense also argues that they fail to see how departing from the civilian world in this context is justified by any military exigency. . . . Non-unanimous verdicts provide a system where a specific court-member's vote remains anonymous and any member can leave deliberations without concern their vote will be known by superiors, potentially subjecting them to unlawful command influence or reprisal.[36]

He continued by noting: "Congress explicitly enacted a non-unanimous system, the Accused is not denied due process through application of the same non-unanimous panel system which has long

[36] AE VII, ¶ 30.

been used in the military.[37]

Unless one lives in a cave high in the Andes, anyone with a modicum of military justice experience knows that the cancer of *unlawful command influence* [UCI] frequently infects the court-martial arena. *See, e.g., United States v. Proctor,* 2021 WL 2303457 (CAAF 2021); and *United States v. Bergdahl,* 80 M.J. 230 (CAAF 2020). In contested cases with members, without unanimity (especially with Enlisted members), this specter frequently appears during the members' deliberations.[38]

Furthermore, using the standard of 8 members for a General Court-Martial (except for capital cases), Article 52(a)(3), UCMJ, 10 U.S.C. § 852(a)(3), requires the concurrence of at least three-fourths of the voting members, or 6 votes to convict. Thus, even if the defense convinced two members of either reasonable doubt or factual innocence, the Accused would still be convicted. The Accused would need at least ***three*** "not guilty" votes to obtain a "not guilty" verdict, or 37.5% of the voting members.

The government's argument about *preventing* UCI, and the Military Judge's acceptance of it, is simply a "red herring."[39] It also ignores the law. Article 37(a)(1), UCMJ, plainly states:

> No court-martial convening authority, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court . . . .

That, coupled with what is now Article 131f, UCMJ, [previously Article 98, UCMJ], prohibits:

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[37] *Id.* at ¶ 31. *But see,* LCDR Jacob Meusch, USN, *A "Judicial" System in the Executive Branch:* Ortiz v. United States *and the Due Process Implications for Congress and Convening Authorities,* 35 J. L. & Pol. 19 (2019), for a contrary analysis.

[38] *See* Monea, *supra* at 68.

[39] "A fact, idea, or subject that takes people's attention away from the central point being considered." https://dictionary.cambridge.org/us/dictionary/english/red-herring [viewed: 8 July 21].

> Any person subject to this chapter who—
>
> * * * * *
>
> (2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused;
>
> shall be punished as a court-martial may direct.

But, what if an Accused, who is Enlisted, exercises her right under Article 25(c)(2)(B), UCMJ, to have "at least" one-third of the members also be enlisted? Even if there were two "hold out" members, their arguments could be simply ignored by the remaining members, enlisted or not. Appellant's suggestion below that having the President of the Panel simply also announce that the panel's verdict was not unanimous, without more, would eliminate the government's concern about (illegal) retaliation, etc.

The government below relied upon an *unpublished* case, *United States v. Mayo,* 2017 WL 1323400 (ACCA), *rev. denied,* 77 M.J. 72 (CAAF 2017), which begins with the language: "***This opinion is issued as an unpublished opinion and, as such, does not serve as precedent***." [emphasis in original]. We take no position as to this Court's decision as to its precedential value, if any. But, the Court noted something interesting for purposes of this case: "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." *Id.* at *8 [emphasis added]. The UCI reasons given by the Army Court may be superficially attractive, but they all ignore the obvious–UCI is a criminal *offense* under the UCMJ. Furthermore, that Court then concluded: "As a result, a requirement to keep deliberating until all members agree poses special concerns when one panel member outranks the other." *Id.* But, for any practitioner, that has been a concern since the UCMJ went into effect in 1951. We note anecdotally, that it would be a very rare occurrence for all members to be of equal rank. Rule 921(a), *Rules for Courts-Martial*

(2019 ed.), addresses this: "Superiority in rank shall not be used in any manner in an attempt to control the independence of members in the exercise of their judgment." It is also the reason that Military Judges are required to instruct the members as to Findings, as follows:

> The following procedural rules will apply to your deliberations and must be observed. The influence of superiority in rank will not be employed in any manner in an attempt to control the independence of the members in the exercise of their own personal judgment. Your deliberation should include a full and free discussion of all the evidence that has been presented.[40]

The only value *Mayo* has is its candid observation that unanimous verdicts have "obvious advantages in truth-determination. . . ." If a trial by court-martial is indeed a "search for the truth,"[41] then non-unanimous verdicts cannot be upheld under our Constitutional scheme.

Furthermore, contrary to the government's and Military Judge's implications below, when, e.g., a federal criminal jury indicates non-unanimity, that does not automatically necessitate a "mistrial." Rather, in our experience it generally results in the judge's directing "the jury to deliberate further" pursuant to Rule 31(d), F.R.Crim.P.

The issue is *not* as the government asserts, the "right to a jury trial," [AE VI, at 13] the issue is, is a military accused tried by a court-martial for serious offenses, entitled to a unanimous verdict? Appellant did not seek a "jury trial" in the Sixth Amendment sense below, he merely asserted that he had a right to a *unanimous verdict*–something that the Fifth and Sixth Amendments guarantee him, and something that Congress would seek to preclude.

Lastly, the government claims that "*Quirin* acknowledged the common law right of jury trials, in the same way as *Ramos*, but explicitly declined to extend that common law right to military

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

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

members facing court-martial." [AE VI, at 14,¶ 48]. *Quirin,* as discussed above, had nothing to do with courts-martial, predated the UCMJ in any event, provides no guidance nor precedent for this Court, and is irrelevant to the issues here.[42]

* * *

Congressional powers are enumerated in the Constitution. In the area of military affairs, they are necessarily broad–but they are not absolute or unlimited. The Court in *Weiss* stated, "Congress . . . is subject to the requirements of the Due Process Clause." 510 U.S. at 176. Whether found under the Due Process Clause or, as *Ramos* holds, under the Sixth Amendment's Impartial Jury Clause, the right to a unanimous verdict in a criminal prosecution is constitutionally mandated. It does not matter what label is attached to the fact finder–"jurors" or "court Members"–the result must be the same. Contrary to the government's argument and the Military Judge's ruling below, it is the Constitution that controls, not a provision within the UCMJ.

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

CONCLUSION

Ramos mandates unanimous verdicts in courts-martial for serious offenses. The Appellant is respectfully entitled to a new trial, one compliant with that constitutional requirement.

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[42] *Amicus* is aware of this Court's recent opinion in *United States v. Albarda,* No. ACM 39734 (f rev) (AFCCA 7 Jult 2021) (Mem. Op.; unpub.). NACDL respectfully submits that the Court's analysis in footnote 3 of the Opinion, is erroneous for the reasons and upon the authorities cited above.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 17.3, AFCCA Rules, this Brief is in compliance as it contains **9,666** words, as counted by WordPerfect's "word count" function. Furthermore, this Brief is in compliance with Rule 17.1(a), AFCCA Rules, as it uses **Times New Roman** proportional type with 12 point font.

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CERTIFICATE OF FILING and PROOF OF SERVICE

The undersigned certifies that a true and accurate digital copy ["pdf"] of this pleading was filed electronically with the Court and filed electronically with Counsel for the Government and Counsel for the Appellant, this 10th day of July, 2021.

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