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UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before the Court Sitting *En Banc*[1]

UNITED STATES, Petitioner
v.
Colonel CHARLES L. PRITCHARD, Military Judge,
United States Army, Respondent
and
Lieutenant Colonel ANDREW J. DIAL
United States Army,
Real Party in Interest

ARMY MISC 20220001

Headquarters, 21st Theater Sustainment Command
Charles L. Pritchard, Military Judge
Colonel Tony Y. Kim, Staff Judge Advocate[2]

For Petitioner: Captain Karey B. Marren, JA (argued); Colonel Christopher B. Burgess, JA; Lieutenant Colonel Craig J. Schapira, JA; Captain Cynthia A. Hunter, JA; Captain Karey B. Marren, JA (on brief, reply brief, and brief on specified issue)

For Respondent and Real Party in Interest: Captain Julia M. Farinas, JA (argued); Colonel Michael C. Friess, JA; Jonathan F. Potter, Esquire; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Lauren M. Teel, JA; Captain Andrew R. Britt, JA; Captain Julia M. Farinas, JA (on brief); Jonathan F. Potter, Esquire; Lieutenant Colonel Dale C. McFeatters, JA; Major Joyce C. Liu, JA; Captain Lauren M. Teel, JA; Captain Andrew R. Britt, JA; Captain Julia M. Farinas, JA (on brief on specified issue).

Amicus Curiae:[3]

For Protect Our Defenders: Peter Coote, Esquire.

For the Air Force Appellate Defense Division: Major Jenna M. Arroyo, JA; Major Ryan S. Crnkovich, JA.

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[1] Judge HAYES was disqualified from participating in this case.

[2] Corrected.

[3] Corrected.

For National Association of Criminal Defense Lawyers: Donald G. Rehkopf, Jr., Esquire; Barbara E. Bergman, Esquire.

9 June 2022

OPINION OF THE COURT AND ACTION ON PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF PROHIBITION

BROOKHART, Senior Judge:

On 20 August 2021, the convening authority referred the charges to a general court-martial alleging, generally, three specifications of sexual misconduct. The military judge ordered briefings following a defense motion for appropriate relief, requesting a unanimous verdict in light of the Supreme Court's decision in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020). On 3 January 2022, the military judge issued his ruling, granting the defense motion. The government requested this Court issue a stay of proceedings, which was granted on 5 January 2022. On 23 January 2022, the government filed a writ of prohibition, alleging:

> The military judge erroneously ruled that Article 52(a)(3), Uniform Code of Military Justice, [UCMJ], violates the accused's Constitutional Due Process rights by denying him equal protection of the law, and intends to issue an *ultra vires* instruction to the panel.

On 23 February 2022, this Court specified the following issue:

> WHETHER CONVICTIONS OF SERVICEMEMBERS WITHOUT A UNANIMOUS VERDICT FOR OFFENSES UNDER CLAUSE THREE OF ARTICLE 134, UNIFORM CODE OF MILITARY JUSTICE IMPLICATES THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

The Court received briefs from the parties, as well as several amicus briefs. Oral argument was held on 14 April 2022. For the reasons set forth below, the writ of prohibition is *granted.*

DISCUSSION

In the pending general court-martial of LTC Andrew Dial, real party in interest, the government petitions this court for extraordinary relief in the nature of

a writ of prohibition. The government begs this court to prohibit the military judge from instructing the panel that they must reach a unanimous verdict in order to find the real party in interest guilty in contravention of Article 52(c), UCMJ.

The facts relevant to resolution of this writ are relatively limited and not in dispute. The real party in interest faces several charges alleging violations of Articles 80, 120, and 134 UCMJ. In a pretrial motion for appropriate relief, trial defense counsel asked the military judge to modify his findings instructions to require that the panel reach a unanimous verdict in order to find the real party in interest guilty of any charge or specification. In the alternative, trial defense counsel asked the military judge to require the members to disclose whether any finding of guilty was unanimous. Trial defense counsel argued that a unanimous verdict is required by the Supreme Court's 2020 decision in *Ramos v Louisiana*, holding that 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. *Ramos v. Louisiana,* 140 S. Ct. at 1394. They also argued that the same result is required by the Fifth Amendment's guarantees of Due Process and Equal Protection.

After considering briefs from the parties, including additional briefings on specified issues, the military judge issued a lengthy written ruling in which he found neither the Sixth Amendment nor the Due Process Clause of the Fifth Amendment guaranteed service members the right to a unanimous verdict in trials by courts-martial. However, the military judge did find that by requiring members to reach only a three-fourths majority concurrence for a conviction in courts-martial, Art. 52(a)(3), UCMJ, unconstitutionally violated the real party in interest's right to Equal Protection under the Fifth Amendment. Therefore, the military judge agreed to instruct the members that they must reach a unanimous verdict. The military judge also agreed to poll the members to ensure any finding of guilty was by a unanimous vote.

A. Jurisdiction

The All Writs Act grants all courts "established by acts of congress" the power to issue those writs necessary or appropriate in aid of their respective jurisdictions. *United States v. Howell*, 75 M.J. 386, 390 (C.A.A.F. 2016). Accordingly, to issue a writ under the Act, a service court must find the writ is in aid of its jurisdiction and that issuance of the writ is necessary and appropriate. *United States v. Brown*, 81 M.J. 1, 3 (CAAF 2021) (citing *Denedo v. United States*, 66 M.J. 114, 119 (C.A.A.F. 2008)). Here we find that both prerequisites for issuance of a writ have been met.

A writ of prohibition is issued by a superior court to prevent an inferior court from exceeding its powers and authority.[4] *United States v Gross*, 73 M.J. 864, 867 (Army Ct. Crim. App. 2014). However, it is a "drastic instrument which should be invoked only in truly extraordinary situations." *Howell*, 75 M.J. at 390 (citing *United States v. Labella*, 15 M.J. 228, 229 (C.M.A. 1983). This court will issue a writ of prohibition only if the petitioner demonstrates: 1. There is no other adequate means of relief; 2. The right to issuance of the writ is clear and indisputable; and 3. Issuance of a writ is appropriate under the circumstances. *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004).

B. Analysis

i. Writ Relief is Appropriate in this Case

The real party in interest elected to be tried by a panel composed of officer members. In 2016, Congress modified Article 52(a)(3) to require the concurrence of three-fourths of all members present in order to find an accused guilty of any offense at a special or general court-martial. *See* National Defense Authorization Act for FY2017, Pub. L. No. 114-328, div. E, §§ 5001-5542, 130 Stat. 2000, 2894 (2016) (10 U.S.C. §§ 801-946a, effective January 1, 2019). Rule for Courts-Martial [R.C.M.] 921(c)(2), implements that statute, stating: "a finding of guilty results only if at least three-fourths of the members present vote for a finding of guilty." Section (c)(3) of the same rule addresses the converse; if fewer than three-fourths of the members vote for guilty on any specification, then a finding of not guilty, or an acquittal, has resulted. R.C.M. 921(c)(3). When computing the number of votes needed to convict based on the number of panel members, any fraction of a vote is rounded up. R.C.M. 921(c) discussion. Applying these rules, the difference between three-fourths and unanimity will always be one or more votes regardless of the size of the panel. Accordingly, enforcement of the incorrect standard by the military judge may result in an acquittal when there would otherwise be a conviction. *United States v. Gross*, 73 MJ 864, 867 (Army Ct. Crim. App. 2014) (citing *United States v. Wexler*, 31 F.3d 117, 129 3d Cir. 1994) (writ appropriate where inapplicable defense "entails a high probability of failure of prosecution). In that eventuality, double jeopardy would prevent petitioner from seeking relief from this, or any other court. Article 44, UCMJ, and *United States v. Easton*, 71 M.J. 168, 172 (C.A.A.F. 2012).

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[4] The government has asked that in the alternative we issue a writ of mandamus. A writ of mandamus is an order by a superior court, to confine an inferior court to a lawful exercise of prescribed jurisdiction, or when there is a usurpation of judicial power. *See Schlagenhauf v. Holder,* 379 U.S. 104 (1964). While either form of writ might ultimately achieve petitioner's desired end, we believe a writ of prohibition is the correct form.

Additionally, we find that the government does not have grounds to appeal under Art. 62, UCMJ, as that statute only provides the government a right of interlocutory appeal under limited circumstances. *United States v. Jacobsen*, 77 M.J. 81, 84 (C.A.A.F. 2017) (citing *United States v. Wuterich*, 67 M.J. 63, 70-71 (C.A.A.F. 2008)); Art. 62, UCMJ. and R.C.M. 902. In this case, the military judge's pretrial decision to instruct the members that they must reach a unanimous verdict does not terminate the proceedings as to any specification, exclude any material evidence, nor impact disclosure of classified evidence. *Id.* Accordingly, in the absence of a writ, petitioner[5] is without any alternative means of seeking relief. *Denedo*, 66 M.J. at 119.

We further find that the right to issuance of a writ is clear and indisputable. The military judge determined that *Ramos v. Louisiana* did not alter the longstanding holdings of both the Supreme Court and our superior court that the Sixth Amendment right to a jury trial does not apply to service members facing court-martial.[6] Nonetheless, he determined that the Fifth Amendment's guarantee of equal protection requires courts-martial reach a unanimous verdict in order to convict, thereby declaring an act of Congress unconstitutional. We disagree.

ii. Equal Protection – The Groups in Question are not Similarly Situated

The constitutionality of a statute is a question of law which we review de novo. *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021) (citing *United States v. Wright,* 53 M.J. 476, 478 (C.A.A.F. 2000)). The party alleging a violation of equal protection has the burden of proving purposeful discrimination. *United States v. Boie*, 70 M.J. 585, 590 (A.F. Ct. Crim. App. 2011) (citing *McClesky v. Kemp*, 481 U.S. 279, 292 (1987).

The Equal Protection Clause of the Fourteenth Amendment guarantees all like persons or groups are treated equally by the respective States. It is a "shield against arbitrary classifications" by the government. *Begani*, 81 M.J. at 280 (citing *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 598 (2008)). Although not explicitly enumerated in the Bill of Rights, the right to due process under the Fifth Amendment affords the same protection from unjustified discrimination by the United States. *United States v. Schoof*, 37 M.J. 96, 99 n.4 (C.A.A.F. 1993) (citing *Billing v. Sharpe*, 347 U.S. 497 (1954)). *See also United States v. Rodriguez-Amy*, 19 M.J. 177, 178 (C.M.A. 1985) ("An 'equal protection

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[5] Corrected.

[6] *Ex parte Quirin*, 317 U.S. 1, 39, 63 S. Ct. 2, 87 L. Ed. 3 (1942); *United States v. Begani*, 81 M.J. 273, 280 n.2 (C.A.A.F. 2021); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012); *United States v. Weisen*, 57 M.J. 48, 50 (C.A.A.F. 2002); *United States v. Kemp*, 22 U.S.C.M.A. 152, 154, 46 C.M.R. 152, 154.

violation' is discrimination that is so unjustifiable as to violate due process.") (citing *United States v. Larner,* 1 M.J. 371, 375 (C.M.A. 1976)). Equal Protection does not prohibit the government from drawing distinctions among its citizens, it simply requires appropriate justification for any such discrimination. *United States v. Gray*, 51 M.J. 1, 22-23 (C.A.A.F. 1999) (citing *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1981). The tests used by courts to determine whether equal protection has been breached are the same under either the Fourteenth Amendment, or as in this case, the Fifth Amendment. *See, e.g., Troxel v. Granville,* 530 U.S. 57, 65 (2000); *Bolling v. Sharpe,* 347 U.S. 497, 500 (1954) (incorporating the Fourteenth Amendment into the Fifth Amendment, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.").

A law violates equal protection when it discriminates in its treatment of similarly situated individuals or groups. *Begani*, 81 M.J. at 280 (*citing United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999)). Accordingly, the threshold inquiry is whether appellant has been treated differently than a similar group. *Id.* at 280 (C.A.A.F. 2021) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)). Members of two groups are similarly situated for equal protection purposes if they are "in all relevant respects alike." *Id.* "Similarly situated" does not demand they be identical, "but there should be a reasonably close resemblance of facts and circumstances." *Lizardo v. Denny's, Inc.*, 270 F.3d 94 (2d. Cir. 2001) (citing *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000); *See also McGuinness v. Lincoln Hal*, 263 F.3d 49 (2d Cir. 2001).

As there is no precise formula for determining the scope of comparison, courts must rely on their reasoning and judgment when deciding whether groups are similarly situated for Equal Protection purposes. *Barrington Cove, Ltd. P'ship v R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001) (citing *Dartmouth Review v Dartmouth Coll.,* 889 F.2d 13, 19 (1st Cir. 1989). In this case, we agree with the real party in interest that the appropriate comparison is between military and civilian criminal trials generally, rather than on some more narrow aspect of the trial process.[7]

Nevertheless, we are not persuaded by the argument, presented in amicus and by defense appellate counsel, that the similarity between rights and procedures available at both courts-martial and civilian trials is sufficient to satisfy the

[7] In his ruling, the military judge endeavored to constrict his similarly situated analysis between civilian and military accused down to the point of deliberations by the jury or panel members respectively. Petitioner, in turn seeks to expand the scope beyond military justice matters to military service more broadly. We reject both efforts.

prerequisite for equal protection analysis.[8] Rather, we adhere to the well-established view that "the military is a specialized society separate from civilian society" which has "by necessity, developed laws and traditions of its own during its long history." *Parker v. Levy*, 417 U.S. 733, 742 (1974). To the extent there are similarities between the two systems, it is because Congress, in its discretion, struck a balance between the interests of justice and the distinct purposes of the military, not because accused service members and civilians are alike before the law. *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Solorio* v. *United States*, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); *Middendorf v. Henry*, 425 U.S. 25, 46, (1976) (quoting *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("military tribunals . . . probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts."). Accordingly, despite many notable commonalities, we agree with our superior court that an accused service member and a civilian defendant are not similarly situated for equal protection purposes. *United States v. Akbar*, 74 M.J. 364, 406 (C.A.A.F. 2015) (citing *Parker v Levy*, 417 U.S. at 743). Because the government cannot violate equal protection where the groups in question are not similarly situated, the military judge's ruling was in error and our inquiry is at an end.

iii. Even if Similarly Situated, there is a Rational Basis for the Distinction

Even if our inquiry were not otherwise at an end and we were to instead conclude the real party in interest and civilian criminal defendants are similarly situated, we would still find no equal protection violation. Unless a suspect class is involved or a fundamental constitutional right is at stake, a law that discriminates between like groups does not violate equal protection as long as there is a rational basis for the distinction. *United States v. Means*, 10 M.J. 162, 165 (C.M.A. 1982) (*Cf. Oyler v. Boles,* 368 U.S. 448 (1962); *United States v. Batchelder,* 442 U.S. 114 1979). Courts-martial accused are not a suspect class, nor do they have a Sixth Amendment right to a jury trial. *Begani*, 81 M.J. at n.2. Therefore, if we find Congress had a rational basis for requiring only majority verdicts in courts-martial, there is no equal protection violation.

Classifications by the legislature are presumed to be valid. *Lying v. Int'l Union*, 485 U.S. 360, 370 (1988). To that end, rational basis analysis requires maximum deference to Congress. *Dallas v. Stanglin*, 490 US 19, 26-27 (1989) (rational basis scrutiny is the most relaxed and tolerant form of judicial scrutiny);

[8] Essentially mirroring the military judge's findings, defense appellate counsel provides an anecdotal list of similar rights afforded to a defendant in the civilian and the military system, i.e., right to attorney representation, a presumption of innocence, and rights to confront witnesses.

Easton, 71 M.J. 178, 183-84 n.12 (citing *United States v. Weiss*, 36 M.J. 224, 226 (C.M.A. 1992) (judicial deference is at its "apogee" when evaluating authority of Congress to govern the armed forces). It is not our place to "judge the wisdom, fairness, or logic of legislative choices." *New Orleans v. Dukes*, 427 US 297, 303 (1976). Nor is it even necessary for Congress to expressly articulate its reasoning for those choices. *U.S. R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (quoting *Flemming v. Nestor,* 363 U.S, 603, 612 (1960)). As long as we can discern plausible reasons for Congress's decision, we are bound to accept them. *Heller v. Doe by Doe,* 509 U.S. 312, 321 (1993). Finally, in making our inquiry, it is imperative that we not "substitute our judgment of what might be desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker v. Goldberg*, 453 U.S. 57, 67-68 (1981).

The party alleging the equal protection violation bears the burden of showing there is no plausible reason for the challenged distinction. *United States v. Paulk*, 66 M.J. 641, 643 (A.F. Ct. Crim. App. 2008) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)). Here, the parties have debated the merits of two proffered bases for Congress's decision to require only majority verdicts in courts-martial. The first is that a requirement for unanimous verdicts would impair military justice by heightening the prospect of unlawful command influence during deliberations. The reasoning generally being that the undue influence of rank is more likely to surface in the lengthy and heated deliberations often necessary to reach unanimity. There does appear to be at least some tangential support for this particular rationale in the legislative history. House Armed Services Committee Report, H.R. Doc. No. 491, 81st Cong., 1st Session (1949) at 606 (statement of Prof. Edmund M. Morgan). It was also this view that persuaded an earlier panel of this court in upholding a constitutional challenge to non-unanimous verdicts prior to *Ramos*. *United States v. Mayo*, ARMY 20140901, 2017 CCA LEXIS 239, at *22 (Army Ct. Crim. App. 7 Apr. 2017) (citing the same).

However, we are ultimately more persuaded by the second basis which contends Congress determined that unanimous verdicts would unduly impede the efficiency of military operations. That is to say, deliberations towards unanimous verdicts are likely to take longer to achieve, thereby keeping participants from their military duties for greater periods of time. *See* 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), p. 27 [1916 Hearing]. Most importantly, when a unanimous verdict cannot be reached and a hung jury results, the command is faced with the prospect of either engineering a retrial or returning a service member with unresolved charges to its

ranks.[9] Verdicts with a three-fourths majority, on the other hand, can presumably be reached more quickly on average and provide greater finality for both the command and the accused. Regardless of whether the military judge might agree with the result, striking this type of balance between the demands of due process and the need for military efficiency is one which rests within the discretion of Congress. *See e.g. Mittendorf v. Henry*, 425 U.S. 25, 43 (1975) (expediency was valid justification for abrogating the right to counsel at summary courts-martial). As such, we are satisfied that military efficiency provides a rational basis for the longstanding decision of Congress to treat military accused differently than their civilian counterparts with regard to unanimous verdicts. Therefore, there is no violation of equal protection even if we were to find civilian and military defendants similarly situated.

CONCLUSION

The government has demonstrated the issuance of a writ is appropriate under the circumstances presented. The petition for extraordinary relief in the form of a writ of prohibition is GRANTED. Article 52(a)(3), UCMJ, and R.C.M. 921(c)(2) provide the appropriate standard for determining guilt in general and special courts-martial, regardless of the offense charge, and will be applied by the military judge. With extremely limited exceptions, R.C.M. 922(e) prohibits any inquiry into the deliberations of the panel and, as such, the military judge is likewise prohibited from inquiring into the unanimity of the verdict. Our stay is lifted and this case is returned for additional proceedings consistent with this opinion.

Chief Judge SMAWLEY, Senior Judge FLEMING, Judge PENLAND, and Judge PARKER concur.

EWING, Judge, joined by WALKER, Senior Judge concurring:

I concur with the Court's opinion. I write separately to note that, in my view, the concerns we addressed in *Mayo* also represent a rational basis for Congress's adoption of the current panel voting rules.

Court-martial panel members come from, and return to, a strict hierarchical system based on rank, where it is criminal to disobey lawful orders from superiors. This is a vastly different context and life experience from the one civilian jurors

[9] While the military judge's order envisioned an acquittal with a single not-guilty vote, we are unaware of any other court in the country where a single vote for acquittal results in an acquittal. Moreover, the military judge gave no rationale as to why the current definition of "acquittal" in R.C.M. 921(c)(3) should change in light of *Ramos*. Therefore, even under the military judge's rationale, we anticipate that votes for guilt between three-fourths and unanimity would result in a hung jury.

bring with them into court. The UCMJ seeks to ensure that all of the system's critical decision-makers—including panel members—are able to exercise true independence when performing their court-martial duties. The inherent potential for tension between the independence justice requires, and military hierarchy in virtually all other aspects, is why our superior court has repeatedly described unlawful command influence as "the mortal enemy of military justice." *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986); *see also, e.g., United States v. Boyce*, 76 M.J. 242, 246 (C.A.A.F. 2017); *United States v. Barry*, 78 M.J. 70, 76 (C.A.A.F. 2018); *United States v. Riesbeck*, 77 M.J. 154, 166 (C.A.A.F. 2018). Indeed, the CAAF's predecessor court explained that concerns about unlawful command influence were important to the very passage of the UCMJ itself. *United States v. Estrada*, 7 U.S.C.M.A. 635, 23 C.M.R. 99, 102 (C.M.A. 1957) ("It was against . . . command influence that the Code was initially directed.").

The current three-fourths to convict and three-fourths minus one to acquit rule works in concert with the rule requiring panel members to vote by secret written ballot during deliberations, as well as the rule that prohibits the questioning of panel members about their vote. R.C.M. 921(c) and 922(e). Together these rules form a system in which individual panel members' votes remain confidential both during deliberations and after the court-martial is over, thus providing the breathing room for independent voting. A requirement for panel unanimity would upend this system. Whether or not we believe that concerns about their votes becoming public would animate panel members' actions in practice, it was rational for Congress to seek to establish safeguards, including the current voting rules, against military justice's "mortal enemy." *Thomas*, 22 M.J. at 393.

FOR THE COURT:

[redacted]

JAMES W. HERRING, JR.
Clerk of Court