

WHY ARE NON-UNANIMOUS (COURT-MARTIAL) GUILTY VERDICTS STILL ALIVE AFTER *RAMOS*?

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The Supreme Court’s 2020 landmark decision in Ramos v. Louisiana¹ finally confirmed that the Fourteenth Amendment incorporates the Sixth Amendment’s guarantee of unanimous verdicts in criminal jury trials against States, ending the last vestiges of Jim Crow-era juror racial disenfranchisement remaining in two States’ criminal procedures. It was not a shocking decision, and it was well past due: 400 years of common law practice reflected in the laws of forty-eight States and the federal rules of criminal procedure already required unanimous guilty verdicts, along with thirteen prior Court decisions validating this fundamental attribute of jury fact-finding.

Nevertheless, one holdout remains: it is a niche federal jurisdiction that tries cases nationwide and in foreign countries, makes no distinction between misdemeanor and felony offenses, and invests many prosecutorial and some judicial powers in lay officials by virtue of their relative employment seniority and positional authority. Our lone holdout is the military justice system – erected under federal law and managed by both civilian and uniformed elements of the Executive Branch. Ramos did not – indeed, no Supreme Court decision has – determined

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¹ 140 S. Ct. 1390 (2020).

the constitutionality of this court-martial procedural rule. No matter one's understanding of military justice's purpose, this procedural rule stands out. But depending on that understanding, it stands out as either a necessary idiosyncrasy of a necessarily idiosyncratic system or as an unnecessary anachronism of an increasingly civilian due process-driven system.

The dominate reason for this single outlier is best understood as a combination of long-entrenched theories. First, that military courts-martial are implicitly excepted from the demands of the Sixth Amendment's jury requirement because they are explicitly excepted from the grand jury requirement of the Fifth Amendment and, in general, from Article III. Second, that Congressional determinations of what "military necessity" requires, even in its justice system and over questions of due process, should be given strong deference by the courts.²

*This Article suggests that Congress can and should amend the Uniform Code of Military Justice to conform how its jury-like "panels" determine guilt of an accused with every other American jurisdiction. Squaring a circle this is not. No drastic reinterpretation of the Court's Sixth Amendment-as-applied-in-the-military need take place, and the argument that follows assumes that current doctrine regarding the military's carve-out from the jury requirement remains static.³ Instead, Ramos provides the Court's latest validation of this protection's worth, and it should be read in light of the 2018 decision in *Ortiz v. United States*, in which the Court articulated a new "civilianized" vision of what military justice's primary purpose actually is. While departing from its previous descriptions of the character of military law, the Court nonetheless is now consistent with the overall arc of due process evolution required by Congress in the last seventy years of amendments to the UCMJ.*

Congress can now turn to Ramos and Ortiz as principled justifications for a belief that any distinction made between the Sixth Amendment right to an impartial jury (which service members do not have) and the statutory right to an impartial panel (which service members do have) is a distinction without a difference when it comes to unanimity of guilty verdicts.

INTRODUCTION

Fifty years ago, an argument was made to better align military criminal trials – courts-martial – with civilian legal requirements by abolishing non-unanimous guilty verdicts.⁴ Criticizing the way in which the military had, to that point, eluded evolving social and judicial conceptions of fundamental fairness, the scholar wrote: "the stakes in the matter are far too important to be won or lost by arguments or concepts that have become outmoded."⁵ His argument never persuaded Congress, or the U.S. Supreme Court, to intervene in the case of courts-martial verdicts, leaving military justice an extreme outlier on the American judicial due process graph.

Yet, when that argument was made in the early 1970s, the Supreme Court had not addressed whether a unanimous jury was to be incorporated against the States by the Fourteenth

² *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (regarding Congress's authority over national defense and military affairs: "perhaps in no other area has the Court accorded Congress greater deference").

³ This is not to say the Court's carve-out is correct. See Part III.C., *infra*.

⁴ Murl A. Larkin, *Should the Military Less-than-Unanimous Verdict of Guilt be Retained?*, 22 HASTINGS L. J. 237 (1971) (Larkin was then a law professor but had previously served as a Navy captain and Assistant Judge Advocate General of the Navy).

⁵ *Id.* at 258.

Amendment. Moreover, the Court was – at that time – of the view that the military’s legal system was necessarily “separate” and “cannot be equated” with civilian criminal justice.⁶ Neither interpretation is still maintained by the Court; neither the Executive nor the Legislative branches – both of which assume various responsibilities for managing military justice – can articulate a reasonable justification for retaining non-unanimous voting on a finding of guilty. With the Court’s recent jury voting decision in *Ramos v. Louisiana* and its recent description of the “purpose” of military law and its function as analogous to state criminal codes in *Ortiz v. United States*, the time is right for Congress to reconsider its piecemeal, but largely deferential, approach to this key element of an American criminal trial – whether called a “court-martial” or not. The “arguments and concepts” underlying this rule have not aged well – they were “outmoded” half-a-century ago but now their obsolescence is thoroughly inconsistent with both the modern practice of military justice and how the Supreme Court has interpreted the unanimity requirement.

The post-*Ramos* literature on this direct question is scant, in part because that case is extremely recent.⁷ Nevertheless, the question of unanimity in court-martial panel verdicts is not new.⁸ Moreover, military appellate courts continue to reject Sixth Amendment jury right applicability to courts-martial, but do so relying (without discussion) on Supreme Court precedent from the Civil War and World War II,⁹ both of which pre-date the Uniform Code of Military Justice (UCMJ) and had nothing to do with the rights of service members at courts-martial. Rather, those cases dealt with civilians and unlawful enemy combatants being tried by military *commissions*, long-held to be practically and legally distinct adjudicatory systems from courts-martial.¹⁰ Congress, beginning with the UCMJ, has spent recent decades dramatically civilianizing major components of military justice.¹¹ And while military appellate courts have

⁶ See *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“the military constitutes a specialized community governed by a separate discipline from that of the civilian”); *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1950) (“military tribunals have not been and probably can never be constituted in such a way that they have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts”); *Parker v. Levy*, 417 U.S. 733, 743, 749-50 (1974) (“this Court has long recognized that the military is, by necessity, a specialized society”); the first instance of the Court remarking on the “separate” community theory of military criminal jurisdiction appears to be *Carter v. McClaughry*, 183 U.S. 365 (1902) (addressing the president’s power to review and, at his discretion, approve the court-martial findings and sentence of dismissal of an officer, affirming lower court’s discharge of the petitioner’s writ of habeas corpus, challenging the validity of his sentence).

⁷ *E.g.*, Captain Nino C. Monea, *Reforming Military Juries in the Wake of Ramos v. Louisiana*, LXVI NAV. L. REV. 67 (2020) (arguing that *Ramos* is reason to give this rule a “fresh look” but ultimately suggesting that reform to the rule should be based on the empirical data in support of unanimous jury verdict reliability and empirical data suggesting there are no meaningful differences between how civilians and military members would think about evidence presented at a trial).

⁸ *See, e.g.*, Richard J. Anderson & Keith E. Hunsucker, *Is the Military Nonunanimous Finding of Guilt Still An Issue?*, 1986 ARMY LAW. 57 (1986); Robert F. Holland, 97 J CRIM. L. & CRIMINOLOGY 101 (2006) (arguing that civilian systems adopt the non-unanimous rule from courts-martial).

⁹ *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018); *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1 (1942) for the proposition that there is no Sixth Amendment right to trial by jury for military cases. As discussed in Part III.B., *infra*, there is room to debate whether *Quirin* can be interpreted so broadly).

¹⁰ *Ortiz v. United States*, 585 U.S. ___, 138 S. Ct. 2165, 2179 (2018) (“not every military tribunal is alike”) (citing *Ex parte Vallandigham*, 1 Wall. 243 (1864)).

¹¹ *See generally* Frederic I. 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); EVOLVING MILITARY JUSTICE

not definitively addressed whether *Ramos* changes the landscape of panel member voting, at least one court-martial trial judge has and concluded that the Fifth Amendment’s Equal Protection clause guarantees servicemembers must be found guilty only by a unanimous panel.¹² All this should lead us to conclude the question is a ripe one, long overdue for a definitive and rational answer. With *Ramos* in the books, this article centers around three essential claims: that both the *Ramos* and *Ortiz* cases undermine any remaining foundation for a rule that permits a non-unanimous panel finding of guilt; that requiring unanimity induces no reasonably foreseeable effect on a commander’s ability to maintain “good order and discipline” (the historical justification for a separate criminal code that gives commanders significant prosecutorial and judicial-like authority¹³); and that unanimity is actually consistent with other due process requirements already structuring courts-martial and protecting accused service members, even if the *Sixth Amendment*’s jury trial requirement itself remains inapplicable to courts-martial.

Part I is a hypothetical account of a service-member in the midst of a court-martial under today’s rules, describing the myriad ways in which the investigation and prosecution of his alleged offense is nearly identical to any conventional state criminal court, notwithstanding other administrative idiosyncrasies of military justice. We start here if only to disabuse readers unfamiliar with courts-martial of any misconceptions about a jargon-laden and often opaque-seeming system.¹⁴ Part II frames the question of the non-unanimous military “jury” by juxtaposing it against an evolving and growing consensus that military justice is less about the *military* and more about *justice*, reinforced by recent decisions by the Court and reforms from Congress, and suggesting that Congress should not ignore the relevance of the ostensibly nonapplicable *Ramos* rule. Part III briefly surveys the history of the military’s rule on verdicts (“findings”) and how the Court has traditionally approached the challenge of construing jury protections for accused service members by categorically carving away courts-martial from the scope of Article III and certain civil liberties amendments. Part IV introduces the recent *Ramos* and *Ortiz* decisions and argues that – while neither case was about court-martial panels – both should be read together as suggesting older precedent is no longer persuasive reason for Congress not to amend this anachronistic piece of the Uniform Code of Military Justice.¹⁵

This article deliberately avoids litigating whether the Sixth Amendment directly, or the Fifth Amendment’s due process or equal protection principles indirectly, means courts-martial

(Eugene R. Fidell & Dwight Sullivan, eds., 2002); Eugene R. Fidell, *Military Justice Since 1950: A Pyrrhic Victory?*, J. NAT. SEC.’Y L. & POL’Y ONLINE (Apr. 29, 2021).

¹² United States v. Dial, U.S. Army Trial Judiciary, Fifth Judicial Circuit, *Findings and Conclusions Re: Defense Motion for Appropriate Relief (Unanimous Verdict)*, Jan. 3, 2022 (unpublished) (on file with the author); John Vandiver, *Sexual assault trial postponed over Army judge’s unanimous verdicts order*, STARS & STRIPES, Jan 6., 2022, <https://www.stripes.com/branches/army/2022-01-06/army-judge-pritchard-kaiserslautern-unanimous-verdict-4200701.html>.

¹³ In re Grimley, 137 U.S. 147, 153 (1890); Burns v. Wilson, 346 U.S. 137, 140 (1953) (“the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”); ACCORD MAJOR-GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 13 (1898); and WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2nd ed., 1920).

¹⁴ This public educational goal is not limited to the opaqueness of military courts. See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 913 (2006).

¹⁵ Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (current version at 10 U.S.C. §§ 801-946a).

non-unanimous guilty verdicts are unconstitutional. Instead, this article beats a new path by analyzing whether Congress – using its “make rules for the government and regulation of the land and naval forces” power – should update its courts-martial verdict rule in light of how the Court has increasingly come to view military justice in civilian terms, which in no small part is due to (and credits) Congress’s own reforms of the UCMJ since the middle of the twentieth century.

I. A “TOTALLY DIFFERENT SYSTEM OF JURISPRUDENCE”?¹⁶

Imagine that you are a thirty-year-old Army staff sergeant, presently serving as a squad leader in a field artillery battery, part of an infantry division stationed at Fort Hood, in Texas. Imagine you have been charged with murder, entered a plea of not guilty on a claim of self-defense, and faced a trial of the facts. Your alleged crime, regardless of where it occurred or who the victim was, brought you within the Army’s military justice jurisdiction solely because of your status as a soldier on active duty.¹⁷ Thus, you were charged with violating Article 118 of the Uniform Code of Military Justice, and your case was referred to General Court-Martial, tried in the courthouse on Fort Hood.¹⁸ Now that the court-martial’s prosecutor¹⁹ and your defense attorney have rested their cases, and the judge has instructed the panel members on the applicable law²⁰ and their responsibilities, you sit with your family anxiously awaiting a verdict from the eight army officers and senior non-commissioned officers charged with determining whether you are guilty, and – if so – determining your sentence.

It may not provide much consolation, but up to this point you have benefited from decades of so-called “civilianization” of military justice – the gradual but inevitable shrinking of the unilateral discretion of commanding officers over the military’s disciplinary penal system, and that system’s adoption of methods, procedures, and due process protections increasingly similar to civilian criminal courts.²¹ No longer can officers summarily punish soldiers – physically or financially – without notice of the offense, an opportunity to defend oneself, or a proper professional investigation; no longer can commanders – with enough seniority – intervene to reject the findings or sentence of a properly-constituted court-martial, hand-select the prosecutor and defense counsel, reassign panel members (akin to the jury) in the middle of a

¹⁶ William Tecumseh Sherman, testimony before Congress (1879) (quoted in *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS, 1775-1975* (1975).

¹⁷ 10 U.S.C. § 802 (Article 2, UCMJ); UNITED STATES MANUAL FOR COURTS-MARTIAL (2019) (M.C.M.), Rule for Court-Martial (R.C.M.) 201; *Solorio v. United States*, 483 U.S. 435 (1987).

¹⁸ Any offense listed in Articles 77 – 134 of the UCMJ is triable by court-martial, including if it has no relationship to military service and had no effect on military readiness, personnel, property, or mission. Most military installations have either a specially-designed, sole-function courthouse or courtrooms built into existing headquarters facilities.

¹⁹ Courts-martial prosecutors are military officers with law degrees and licenses to practice, assigned as “judge advocates” serving in the position duty title of “trial counsel.” 10 U.S.C. § 827(b) (Art. 27(b), UCMJ) (describing qualifications); 10 U.S.C. § 838(a) (Art. 38(a), UCMJ) (describing duties).

²⁰ Murder is prohibited under 10 U.S.C § 918 (Art. 118, UCMJ); see also M.C.M. (Part IV), *supra* note 17, at IV-76 to IV-78 (describing the elements of the offense and explaining its terms and maximum punishment).

²¹ EUGENE R. FIDELL, *MILITARY JUSTICE: A VERY SHORT INTRODUCTION* 22-26 (2016); see generally Walter T. Cox III, *The Army, the Courts, and the Constitution: The Evolution of Military Justice*, 118 MIL. L. REV. 1 (1987).

trial, and no longer approve and order executed a death sentence within days of a capital conviction and before any semblance of an appellate review.²²

Your “civilianized”²³ rights began well before your time in the courtroom itself. You were formally charged by your commanding officer, but only after a professionalized law enforcement investigation that included: an official protection of your privilege against self-incrimination (you did not waive your rights, but chose rather to remain silent upon questioning by the military police investigators);²⁴ a protection of your right to be free from unreasonable searches and seizures (the investigators wanted access to your personal email accounts; they needed a probable-cause based “search authorization” akin to a search warrant granted by an independent magistrate);²⁵ and a protection from the chain-of-command’s unlawful pre-trial punishment,²⁶ including protection from unjustified pre-trial confinement.²⁷ The prosecution was bound by a speedy-trial clock as well, required to bring you to trial within 120 days of being charged.²⁸ Further restraining the prosecution were rules creating a statute of limitations,²⁹ a prohibition of double jeopardy,³⁰ and protections from both multiplicitous charging³¹ and an “unreasonable multiplication of charges.”³²

Indeed, the case against you did not move from investigation to court-martial without first a senior, neutral, judge advocate military attorney opining that the allegations were supported by enough evidence to form at least probable cause.³³ Before trial even commenced, you were given full opportunity to consult with and engage the services of a licensed defense

²² Fred L. Borch, “*The Largest Murder Trial in the History of the United States*”: *The Houston Riots Courts-Martial of 1917*, ARMY LAW. (Feb 2011), at 1-3.

²³ I prefer the less pejorative term “de-militarized,” but “civilianization” has a well-understood meaning within the armed services’ Judge Advocate General’s Corps. See Dan Maurer, *Is De-Militarizing Military Justice an Ethical Imperative for Congress, the Courts, and the Commander-in-Chief?*, 49 HOFSTRA L. REV. 1 (2020) (introduction to symposium issue on “legal ethics and modern military justice”).

²⁴ 10 U.S.C. § 831(a) (Art. 31(a), UCMJ) (“no person . . . may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him”); see *United States v. Evans*, 75 M.J. 302 (C.A.A.F. 2016) (describing the relationship between Article 31 and the Fifth Amendment).

²⁵ M.C.M. (Part III), *supra* note 17, Military Rules of Evidence (M.R.E.) 311-317; see *United States v. Hernandez*, 81 M.J. 432 (C.A.A.F. 2021) (describing the relationship between M.R.E. 311-317 and the Fourth Amendment).

²⁶ 10 U.S.C. § 813 (Art. 13, UCMJ).

²⁷ M.C.M. (Part II), *supra* note 17, R.C.M. 305; see *United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006).

²⁸ M.C.M. (Part II), *supra* note 17, R.C.M. 707(a); see *United States v. Danylo*, 73 M.J. 183 (C.A.A.F. 2014) (explaining relationship between R.C.M. 707 and the Sixth Amendment).

²⁹ 10 U.S.C. § 843 (Art. 43, UCMJ); see *United States v. Briggs*, 592 U.S. ___ (2020) (interpreting Article 43 in light of capital punishment’s inapplicability to rape convictions under the Eighth Amendment).

³⁰ 10 U.S.C. § 844 (Art. 44, UCMJ); *United States v. Rice*, 80 M.J. 36 (C.A.A.F. 2020) (explaining relationship between Article 44 and the Fifth Amendment).

³¹ *United States v. Cardenas*, 80 M.J. 420 (C.A.A.F. 2021).

³² *United States v. Quiroz*, 55 M.J. 334 (C.A.A.F. 2001).

³³ 10 U.S.C. §§ 832, 834 (Art. 32 and Art. 34, UCMJ); it should be noted however, that the judge advocate giving advice to the convening authority under Article 34 is almost always the Staff Judge Advocate is not only the senior legal advisor to that commanding officer but also the supervisor and rater of the judge advocates assigned as trial counsel (prosecutors). Though not directly involved in the court-martial proceedings, and therefore “neutral,” this senior military lawyer’s neutrality is not as obvious or apparent when looking at organizational diagrams depicting the chain-of-command and supporting staff.

counsel – in fact, because you could not afford one, you relied on the free services of a military defense counsel assigned from the Trial Defense Service, the Army’s public defender equivalent-office completely outside the chain-of-command that charged you.³⁴ That attorney was subject to the rules of professional responsibility of the state in which she was licensed,³⁵ the Army Judge Advocate General’s Corps regulation on professional responsibility,³⁶ and constitutional requirements for effective, competence assistance of counsel.³⁷ Your attorney was provided equal access to all potentially incriminating and exculpatory evidence, and was able to raise motions to the military judge to exclude certain evidence even before trial.³⁸

You were provided an opportunity to plead guilty, which you elected not to do,³⁹ and you were provided an opportunity to have your case decided by a neutral, fully-qualified judge⁴⁰ alone, rather than jury-like panel – you chose the latter.⁴¹ Before the prosecution called its first witness, your counsel conducted an effective *voir dire* and several members were excused for cause.⁴² You were later afforded the right to confront adverse witnesses against you,⁴³ to call experts on your behalf,⁴⁴ and to raise alternative defenses – you claimed obedience to orders, justification, and self-defense.⁴⁵ As you heard during your counsel’s opening statement, the prosecution had the burden to prove – just as in any civilian jurisdiction – the government’s case against you, and it had to prove it “beyond a reasonable doubt,”⁴⁶ and it had to prove that your defenses do not exist by the same high standard.⁴⁷ You also know that, if found guilty, you have the right to argue that the government abridged some statutory or constitutional right during your

³⁴ 10 U.S.C. § 827(b) (Art. 27(b), UCMJ) (describing qualifications of defense counsel); 10 U.S.C. § 838(a) (Art. 38(a), UCMJ) (describing duties of defense counsel); *see* United States v. Watkins, 80 M.J. 253 (C.A.A.F. 2020) (describing relationship between Articles 27 and 38 and the Sixth Amendment).

³⁵ 10 U.S.C. § 827(b) (Art. 27(b), UCMJ).

³⁶ UNITED STATES ARMY REGULATION 27-26, *Rules of Professional Conduct for Lawyers* (2018).

³⁷ United States v. Furth, 81 M.J. 114 (C.A.A.F. 2021) (applying framework for “ineffective assistance of counsel” framework from Strickland v. Washington, 466 U.S. 668 (1984)).

³⁸ 10 U.S.C. § 846 (Art. 46, UCMJ); M.C.M. (Part II), *supra* note 17, R.C.M. 906 and R.C.M. 701 (discovery process); *see* United States v. Hernandez, 81 M.J. 432 (2021) (discussing M.R.E. 311(a)).

³⁹ 10 U.S.C. § 845 (Art. 45, UCMJ).

⁴⁰ 10 U.S.C. § 826 (Art. 26, UCMJ) (describing qualifications and duties of military judges).

⁴¹ 10 U.S.C. § 825 (Art. 25, UCMJ) (describing selection and qualifications of panel members); *see* United States v. Moreno, 63 M.J. 129 (C.A.A.F. 2006) (explaining a servicemember’s right to “qualified, properly selected, and impartial members”); *but see* United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (distinguishing the Sixth Amendment right to a jury from the Article 25 right to a panel), *accord* United States v. Riesbeck, 77 M.J. 154 (C.A.A.F. 2018).

⁴² R.C.M. 912(d) and (f)(1) (listing fourteen grounds for removing a member “for cause”).

⁴³ *See* United States v. Baas, 80 M.J. 114 (C.A.A.F. 2020) (discussing applicability of the Sixth Amendment to courts-martial).

⁴⁴ M.C.M. (Part II), *supra* note 17, R.C.M. 703(a) and (d); *see* United States v. Blazier, 69 M.J. 218 (C.A.A.F. 2010) (explaining relationship between Sixth Amendment and Article 46 and R.C.M. 703).

⁴⁵ M.C.M. (Part II), *supra* note 17, R.C.M. 916(c), (d), and (e).

⁴⁶ *Id.* at R.C.M. 905(c) and R.C.M. 920(e)(5); *see* United States v. Prather, 69 M.J. 338 (C.A.A.F. 2011) and United States v. Neal, 68 M.J. 289 (C.A.A.F. 2010) (explaining the applicability of the due process clause to the burden of proof for conviction in courts-martial).

⁴⁷ M.C.M. (Part II), *supra* note 17, R.C.M. 916(b)(1).

prosecution or sentencing through an appellate system that ultimately culminates at the U.S. Supreme Court.⁴⁸

You have been accused of a capital offense, but the prosecution has elected to not pursue this matter as a capital crime and therefore will not ask for the death penalty if the panel returns a verdict of guilty.⁴⁹ The Court-Martial Convening Authority – the two-star, Major General commanding the famed 82nd Airborne Division to which you are assigned⁵⁰ – decided not to refer the case “capital” after consulting with the subordinate chain-of-command and the unit’s staff judge advocate, and considering a list of prosecutorial factors that mirror – in most regards – the prosecutorial standards and norms found in the American Bar Association’s *Criminal Justice Standards for the Prosecution Function*, the National District Attorneys Association’s *National Prosecution Standards*, and the Department of Justice’s *Principles of Federal Prosecution*.⁵¹

So now here you sit, awaiting your fate. After six hours of deliberation, the eight panel members announce, through the foreman (called the “president” of the panel⁵²), to the judge that they have reached a verdict. You and your counsel return to the courtroom, and you stand at attention as the “president” of the panel reads the verdict. Two members have voted “not guilty.” Under *Ramos*, and in every state and federal courthouse across the country, this would have acquitted you, releasing you from government custody. Unfortunately for you, you are not in a state courthouse and neither Congress nor the Supreme Court has drawn the logical implication of the court-martial’s due process-centered civilianization for panel member verdicts.

II. RISING CONTRADICTIONS

Under the Uniform Code of Military Justice and the criminal law it creates and regulates applicable to a discrete population based on their employment status,⁵³ Congress and presidents have long felt that a unanimous panel was not necessary or warranted, just as an “impartial jury”

⁴⁸ 10 U.S.C. § 866 (Art. 66, UCMJ) (establishing intermediate “Courts of Criminal Appeals”) and § 867 (Art. 67, UCMJ) (establishing review by the U.S. Court of Appeals for the Armed Forces); and see 28 U.S.C. § 1259 and 10 U.S.C. § 867a (Art. 67a, UCMJ) (establishing limited certiorari review by the U.S. Supreme Court); *but see* Eugene R. Fidell, Brenner M. Fissell, & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, YALE L. J. FORUM (May 31, 2021), https://www.yalelawjournal.org/pdf/FidellFissellCaveFinal_oryo61do.pdf (criticizing the narrow jurisdiction Congress has afforded the Supreme Court over military justice).

⁴⁹ M.C.M. (Part II), *supra* note 17, R.C.M. 103(3) and (4); R.C.M. 201(f)(1)(A)(iii); R.C.M. 1004.

⁵⁰ 10 U.S.C. § 822(a) (Article 22(a), UCMJ) (identifying the military and small number of civilian positions with discretionary authority to convene general courts-martial). In the National Defense Authorization Act for Fiscal Year 2022, Congress removed from generals and admirals in command their authority to refer courts-martial over several “covered offenses,” including murder, transferring the prosecutorial disposition decision over such allegations to a new “special trial counsel” – a uniformed judge advocate officer outside of the accused’s the chain-of-command. This change will go into effect no earlier than December 2023. Dan Maurer, *What the FY 22 NDAA Does, and Does Not Do, to Military Justice*, LAWFARE, Dec. 30, 2021, <https://www.lawfareblog.com/what-fy-2022-ndaa-does-and-does-not-do-military-justice>.

⁵¹ M.C.M. (Part II), *supra* note 17, App. 2.1.

⁵² M.C.M. (Part II), *supra* note 17, R.C.M. 502(b).

⁵³ 10 U.S.C. § 802 (Art. 2, UCMJ); see *Solorio v. United States*, 483 U.S. 435 (1987) (ending a “service-connection” test for court-martial jurisdiction, holding jurisdiction to be based solely on a person’s status within the military rather than the nature of the misconduct, overruling *O’Callahan v. Parker*, 395 U.S. 258 (1969))

itself was not required for such courts-martial, apparently excepted from the guarantee in the Sixth Amendment.⁵⁴ However, the Supreme Court has never answered this question of unanimous guilty verdicts in courts-martial, and Congress has only incrementally fine-tuned the court-martial rule over time, leaving accused service members' legal fate in the hands of three-quarters of the empaneled members.⁵⁵ This is so despite the fact that the Supreme Court's recent decision that the Constitution demands unanimous guilty verdicts in criminal trials,⁵⁶ despite the fact that other federal criminal jurisdictions already require it,⁵⁷ despite the fact that, in form and function, the court-martial system has "increasingly come to resemble ordinary civilian courts;"⁵⁸ and despite the fact that courts-martial rules are intended to apply ("so far as [the president] considers practicable") the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."⁵⁹

What accounts for – let alone justifies – this diminished due process in courts-martial, now completely unique and alone among all criminal justice systems? Generally, if Congress and the President want the military's justice system to depart away from the civil liberties protected by the Constitution, they need to identify, at a minimum, how "military necessity" makes it reasonable to do so.⁶⁰ But this "military necessity" is as vague and mutable as it seems. Over time, several theories of "separateness" have given the Court sufficient grounds to validate either the basic distinction between military and civilian justice, or comment approvingly on specific attributes unique to the former and repugnant to the latter.⁶¹

The literal physical separation between military units and civilian communities offered an *initial* rationale for granting commanders investigative, prosecutorial, and judicial authorities: misconduct needed swift adjudication from those already vested with command authority.⁶² As the number of military bases grew, many of them in existing municipalities with fully functioning civil court systems, and methods of communication and transportation made distance less of an obstacle, this theory has dimmed in relevance.⁶³ The second theory holds that there

⁵⁴ *Supra* note 41, and see *Johnson v. Sayre*, 158 U.S. 109, 115 (1895).

⁵⁵ 10 U.S.C. § 852 (Article 52(a)(3) and (b)(2), UCMJ); R.C.M. 921(c)(2). Three-fourths of the panel is computed by rounding up to the next whole number. In a case with seven members, three-fourths equals the guilty vote from 5.25, rounded up to six.

⁵⁶ *Ramos*, 140 S. Ct. 1390 (2020).

⁵⁷ Fed. R. Crim. Pro. 31(a).

⁵⁸ Stephen I. Vladeck, *Military Courts and Article III*, 103 Geo. L. J. 933, 941 (2015).

⁵⁹ 10 U.S.C. § 836(a) (Article 36(a), UCMJ); see discussion in Part IV.E., *infra*.

⁶⁰ See Part III.D., *infra*; Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962) (reprinted in 4 U.S.A.F. JAG BULL. 6, 9 (1962)).

⁶¹ *Ex parte Reed*, 100 U.S. 13, 23 (1879) (the court-martial "is the organism provided by law and clothed with the duty of administering justice in this class of cases . . . its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals"); *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885) ("In the United States, the line between civilian and military jurisdiction has always been maintained"); *Runkle v. United States*, 122 U.S. 543, 555-56 (1887); *Swaim v. United States*, 166 U.S. 553, 555 (1897); *Burns v. Wilson*, 346 U.S. 137, 140-42 (1953).

⁶² *In re Grimley*, 137 U.S. 147, 153 (1890); *Carter v. McClaghry*, 183 U.S. 365, 390 (1902); *United States ex rel. Creary v. Weeks*, 259 U.S. 336, 343 (1922); Edward F. Sherman, *Military Justice Without Military Control*, 82 YALE L.J. 1398, 1400 (1973); REPORT OF THE JOINT SERVICE SUBCOMMITTEE PROSECUTORIAL AUTHORITY STUDY 92 (2020), <https://drive.google.com/file/d/11Pq2a9iOi0jPAg6CAStUmSLZ3hkSGmUY/view>.

⁶³ Vladeck, *supra* note 58, at 949.

are “innate experiential and philosophical differences” between civilians and those charged with maintaining standards of discipline in the military, and so civilian – whether jurors or judges – should keep their distance, or – to use a military aphorism, “stay in their lane.”⁶⁴ But even this argument has been inconsistent at the Court. As far back as 1950, just as Congress was enacting the first version of the UCMJ, the Court opined:

Other considerations require a substantial degree of civilian deference to military tribunals. In reviewing military decisions, we must accommodate the demands of individual rights and the social order in a context which is far removed from those which we encounter in the ordinary run of civilian litigation, whether state or federal. In doing so, we must interpret a legal tradition which is radically different from that which is common in civil courts . . . [however] after the Second World War, Congress became convinced of the need to assure direct civilian review over military justice, [so] it deliberately chose to confide this power to a specialized Court of Military Appeals so that disinterested civilian judges could gain, over time, a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces.⁶⁵

And as described in Part IV.A., *infra*, the Court’s recent *Ortiz* decision coupled with Congress giving Article III oversight of the military justice system to the Supreme Court in 1983 render the ground underneath this philosophical distinction rather shaky.

The third theory is one of “legal separation” – that legal standards, norms, and duties for the military community must depart from those of civilian communities.⁶⁶ But, as described in

⁶⁴ *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters”); *Burns v. Wilson*, 346 U.S. 137, 140-44 (1953); *United States ex rel Toth v. Quarles*, 350 U.S. 11, 18 (1955) (at least with respect to military-type offenses); *Reid v. Covert*, 354 U.S. 1, 39 (1957) (“Military law is, in many respects, harsh law which is frequently cast in sweeping and vague terms . . . [i]t emphasizes the iron hand of discipline more than it does the even scales of justice. . . [i]n part, this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society”); and *Solorio v. United States*, 483 U.S. 435, 448 (1987); Arthur W. Lane, *The Attainment of Military Discipline*, 55 J. MIL. SERV. INST. 1, 15 (1914). (“every breach of discipline decreases the efficiency of the army; hence it is the duty as well as the right of those in command to administer such punishment as will tend to prevent a repetition of the offense by anyone in the military service . . . [p]unishment has three objects: retribution, deterrence and reform [but] [d]eterrence is the primary object”).

⁶⁵ *Gusik v. Schilder*, 340 U.S. 128 (1950).

⁶⁶ *See, e.g., Ex parte Milligan*, 71 U.S. 2, 123 (1866) (“the discipline necessary to the efficiency of the army and navy required other and swifter modes than those furnished by the common law courts”); *United States ex rel Creary v. Weeks*, 259 U.S. 336, 343 (1922) (“the experience of our government for now more than a century and a quarter, and of the English government for a century more, proves that much more expeditious procedure is necessary in the military than is thought tolerable in civil affairs”); *Burns v. Wilson*, 346 U.S. at 140 (“ . . . the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”), and *Burns*, 346 U.S. at 149 (Frankfurter, J., dissenting) (“the content of due process in civil trials does not control what is due process in military trials”); *United States ex rel Toth v. Quarles*, 350 U.S. 11, 15-18 (1955); *Parker*, 417 U.S. at 743 (“this Court has long recognized that the military is, by necessity, a specialized society separate from civilian society . . . [and] the military has, again by necessity, developed laws and traditions of its own during its long history”); *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) (“Congress has . . . established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define military structure”); and *United States v. Kazmierczak*, 16 U.S.C.M.A. 594 (C.M.A. 1967) (“We start with the fundamental principle that persons

Part I, *supra*, and as various studies of the “civilianization” of military law over time argue,⁶⁷ such departures are increasingly marginalized or have stopped altogether, or are based on flat misunderstanding of the facts.⁶⁸ The grand jury indictment and trial by petit jury of a fair cross-section of the community, however, remain the significant exceptions to the general trend.⁶⁹ The fourth theory is related to the first two and the reason behind the third: in part due to geographic or physical constraints, and in part due to assumed “inherent differences in values and attitudes”⁷⁰ between civilians and service members, the “goals” of the two systems necessarily and justifiably differ. Where civilian justice is about justice, deterrence, and protection of individual liberties, military justice is about (at least until *Ortiz*) preserving good order and discipline for the sake of military readiness and operations. The legal “means” and “methods” to achieve this “end” or goal, therefore, are necessarily dissimilar.

All four of these theories for separateness are normative, not grounded in Constitutional text or the framers’ intentions. Yet they have long held the Court’s attention and enabled the Congressional design of the military justice system (and the claims of military leaders favoring the status quo) to survive judicial scrutiny.⁷¹ All of them are inherently arguments about what is, in essence, a “military necessity.”

As far back as *Martin v. Mott*⁷² in 1827, one of the first Supreme Court opinions originating from a court-martial, the Court recognized that military service is different from every-day life and employment to such an extent that even long-valued constitutional protections may be overborne by practical reality:

A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature, and in such cases every delay and every obstacle to an efficient and immediate compliance necessarily tend to jeopardy the public interests.⁷³

With this maxim-like approbation, the Court’s justification of securing the “public interests” (re: public safety) has been the backbone supporting the particulars of military justice, whether it be the kinds of behaviors the system punishes or the methods by which commanders

serving on active duty in the armed forces of our country are not divested of all their constitutional rights as individuals. However, the Constitution itself recognizes that certain individual rights cannot appropriately be exercised in a military setting to the extent they can in the civilian community”).

⁶⁷ See, e.g., Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); Stephen I. Vladeck, *The Civilianization of Military Jurisdiction*, in *THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA* 287 (John T. Parry & L. Song Richardson eds., 2013).

⁶⁸ Rachel VanLandingham, *Professional Criminal Prosecution Versus The Siren Song of Command: The Road to Improve Military Justice*, JUST SEC’Y, June 21, 2021, <https://www.justsecurity.org/77025/professional-criminal-prosecution-versus-the-siren-song-of-command-the-road-to-improve-military-justice/> (noting that popular defenses of retaining court-martial convening authority, over major felonies like sexual assault, in senior generals and admirals, fail to acknowledge that the vast majority of commanders (including generals and admirals) have no such authority already, yet are able to sustain some measure of “good order and discipline” without it).

⁶⁹ Vladeck, *supra* note 58, at 950.

⁷⁰ *Reid*, 354 U.S. at 39.

⁷¹ Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. R. 669, 707-23 (2021).

⁷² 25 U.S. 19 (1827).

⁷³ *Id.* at 30.

enforce good order and discipline.⁷⁴ It is not stretch, under this logic, to view the duration and difficulty of securing a unanimous verdict to be such an “obstacle.” This theory, though, would ignore some other contradictory observations about military justice the Court and others have made over the years: the court-martial is “the organism provided by law and clothed with the duty of administering justice in a class of cases . . . its judgments, when approved as required, rest on the same basis and are surrounded by the same considerations which give conclusiveness to other legal tribunals.”⁷⁵ Therefore, its “legal cognizance” is over the “exercise of judicial functions.”⁷⁶ In a letter to President Lincoln in 1864, Attorney General Bates opined:

The whole proceeding [of a court-martial] from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of the thing, can never be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law.⁷⁷

Yet, the Supreme Court has long subscribed to a theory: that the Fifth and Sixth Amendments, read in concert with the Judiciary’s Article III and Article I’s “make rules for the government and regulation of the land and naval forces” clause, exempt military courts from the petit and grand jury requirements imposed on all other criminal jurisdictions.⁷⁸ Some argue that the Court has also made the President’s role as Commander-in-Chief under Article II part of this general theory of military exceptionalism.⁷⁹ But the reasoning in those cases is, at best, suspect

⁷⁴ M.C.M., *supra* note 17, pt. I (Preamble) (identifying three “purposes” of military law, including “efficiency and effectiveness in the military establishment”); *Curry v. Secretary of the Army et al.*, 595 F.2d 873, 878 (D.C. Cir. 1979) (“The power of the convening authority to refer charges to the court-martial is justifiable on two grounds. First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second, as we previously have stated, maintenance of discipline and order is imperative to the successful functioning of the military”).

⁷⁵ *Ex parte Reed*, 100 U.S. 13, 23 (1879) (upholding the denial of writ of habeas corpus on the grounds that the petitioner cannot collaterally attack a legitimate military court decision by going to another non-military federal appellate court for a remedy).

⁷⁶ *Smith v. Whitney*, 116 U.S. 167, 176 (1886); *see also Runkle v. United States*, 122 U.S. 543, 557 (1887) (describing the “findings” and the president’s authority and responsibility to approve a sentence of dismissal in an officer’s court-martial as “judicial in its character” and an “important judicial power”).

⁷⁷ Quoted in *Runkle*, 122 U.S. at 558.

⁷⁸ *See* Part III, *infra*.

⁷⁹ *Vladeck*, *supra* note 58, at 952; *United States v. Eliason*, 41 U.S. 291, 301-02 (1842) (“the power of the executive to establish rules and regulations for the government of the army is undoubted”); *Swaim v. United States*, 156 U.S. 553, 558 (1897) (discussing that the “very nature” of the office yields inherent authority to convene general courts-martial, separate and apart from any Congressional authorization to do so); *and see United States v. Scheffer*, 523 U.S. 303, 312 (1998) (discussing deference to the President’s decision to promulgate a particular rule of court-martial procedure: “the approach taken by the President in adopting Rule 707—excluding polygraph evidence in all military trials—is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence”).

because their premises are now ineluctably outdated or unequivocally wrong.⁸⁰ And now that the Court has described the fundamental, primary purpose of the UCMJ to be about *justice* (not “good order and discipline”) by positively analogizing the function *and* forms of courts-martial to conventional state criminal justice systems, Congress ought to reconsider its reluctance to move military law on this matter. Likewise, now that Congress is enacted a dramatic revision of the UCMJ that removes court-martial convening authority for specific types of serious felonies from non-lawyer commanders,⁸¹ there is a window of opportunity to reorient this body of law to follow the same trail of its civilian cousins. It is simply not clear whether even “military necessity” or the fact that a military service member has a *statutory* right to a *panel* rather than a *constitutional* right to a *jury* could defend a non-unanimous deliberation rule any longer.

III. JUDICIAL DEFERENCE TO MILITARY DISTINCTIVENESS: PLACING THE EMPHASIS ON “MILITARY” IN MILITARY JUSTICE

A. *A Short History of the Military’s Panel Member Deliberation Rule*

Between the Continental Congress’s adoption of the first Articles of War in 1775 (mirroring the British Articles of War nearly verbatim) and 1786, the number of panel members was fixed at thirteen officers. But Congress soon realized that the number was impractically high when the total active army consisted of just a few dozen officers at any one time. Indeed, under some circumstances, courts-martial would necessarily be conducted in remote locations, sometimes in the midst of combat conditions. Given the nature of the certain criminal allegations, commanders might have a rational desire to impose a swift and sure general deterrent message by conducting the prosecution and sentence as quickly as possible as in, for example, desertion cases. When these two conditions combined, against a backdrop of an already-miniscule potential “jury pool,” it was sensible to permit the convening authority to adapt the size of the panel to the context in which the court-martial would take place.⁸² So, between the late eighteenth century and 2016, a panel at a general court-martial flexibly consisted of between five and thirteen members, at the discretion of the court-martial convening authority⁸³ who assigned them.⁸⁴

⁸⁰ Vladeck, *supra* note 58, at 936 (referring to cases like *Dynes v. Hoover*, 61 U.S. 65, 78-80 (1858); but this theory was repeated in later cases, without debate, in *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885); *Burns v. Wilson*, 346 U.S. 137, 140 (1953); and *Solorio v. United States*, 483 U.S. 435, 438 (1987).

⁸¹ Dan Maurer, *What the FY 2022 NDAA Does, and Does Not Do, to Military Justice*, LAWFARE (Dec. 30, 2021), <https://www.lawfareblog.com/what-fy-2022-ndaa-does-and-does-not-do-military-justice>.

⁸² See Captain Nino C. Monea, *Reforming Military Juries in the Wake of Ramos v. Louisiana*, LXVI NAV. L. REV. 67, 89 (2020); Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 5-6, n. 18 (1998).

⁸³ According to Winthrop, the leading military law treatise writer at the turn of the twentieth century, the convening commander’s discretion on the size of the panel should account for “such circumstances as the rank of the accused, the importance of the case, the character of the offense, the supply of available officers, and the exigencies of the service.” WINTHROP, *supra* note 13 at 78. He does not explain any rationale for why the accused’s rank, the case’s “importance,” or the character of the crime have any relevance to the number of fact-finders on a panel.

⁸⁴ Article 25(e)(2), UCMJ, describes the qualifications those members must possess, but whether an individual possesses these qualities is determined at the recommendation of two groups: the convening authority’s subordinate chain-of-command that nominates potential members and the staff judge advocate for each convening authority,

Between the first Articles of War in 1775 and the end of World War I, a simple majority of the panel was required to convict a soldier, sailor, or Marine accused of an offense tried by court-martial.⁸⁵ The 1920 revisions to the Articles of War (the first substantive changes since 1806) imposed a slightly more rigorous demand that a two-thirds majority vote to both convict and sentence (though any sentence of ten years in prison or longer required concurrence of three-fourths of the panel, and both a capital conviction and imposition of a death sentence required unanimity).⁸⁶ This remained the rule until 2016 when Congress required three-fourths of the panel members to convict in a general or special court-martial.⁸⁷

There is no explanation in the military treatises of the time, nor in cases nor in the Articles of War themselves, for the non-unanimity standard. But a plausible justification for it is most likely similar to the justification for the variable panel size. In military contexts, like a geographically-remote base or even during a combat deployment, finding more panel members to sit in judgment may be logistically challenging and thus militarily inefficient. This inefficiency adds risk to mission accomplishment.⁸⁸ Likewise, requiring *all* of those panel members to agree before they can return to their normal duties – most of which involved the direct command and control of tactical units – would risk prolonged deliberations and delay these key leaders' return to duty.

The reforms to panel size and panel vote percentage in 2016 may seem like a growing respect for norms of civilian due process, but the reality is more pragmatic than principled. Congress adopted this change upon the recommendation of the blue-ribbon Military Justice Review Group (MJRG),⁸⁹ which also recommended finally fixing the number of panel members at a general court-martial at eight. Up to that point, the actual percentage of the panel required to vote “guilty” for a conviction was actually not equal to a static two-thirds, per the rule, but rather

who will advise on selection. The ultimate decision is neither arbitrary nor random but is specifically intended to create a pool of “best qualified” factfinders for a given court-martial. For the debate on this most unusual of authorities, see Peter L. Colt, “*Military Due Process*” and *Selection of Court-Martial Panels: An Illogical Gap in Fundamental Protection*, 2 HAST. CONST. L. Q. 547 (1975); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 MIL. L. REV. 103 (1992); Matthew J. McCormack, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 GEO. MASON L. REV. 1013 (1999); Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 170 MIL. L. REV. 190 (2003); Bradley J. Huestis, *Anatomy of a Random Court-Martial*, ARMY LAW. 22 (2006).

⁸⁵ Article XXXVII, Articles of War 1775; see also DAVIS, *supra* note 13, at 142 (1913); United States Manual for Courts-Martial (1917) 46 (para. 90). Winthrop, in his own oft-cited treatise, spends no time discussing the reason why a simple majority vote on guilt was acceptable, even for cases carrying a possible death sentence. He only discusses what the rule on findings says, not its history or justification. WINTHROP, *supra* note 13, at 377.

⁸⁶ Articles of War 1920, June 4, 1920, Article 43.

⁸⁷ Military Justice Act of 2016, § 5235 (National Defense Authorization Act of 2017, Pub. L. No. 114-328, 130 Stat. 2000 (2016) (amending Article 52, UCMJ). Among most of the other changes in this Act, this rule did not become effective until the beginning of 2019. *Id.* at § 5542.

⁸⁸ Reid v. Covert, 354 U.S. 1, 36 (1957) (“Because of its very nature and purpose the military must place great emphasis on discipline and efficiency. . . . [Therefore] there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.”).

⁸⁹ The MJRG was established in early 2014 by Stephen Preston, then the General Counsel for the Department of Defense. The Group consisted of senior judge advocates from all the armed services, a former Court of Appeals for the Armed Forces judge, a senior judge on the U.S. Court of Appeals for the D.C. Circuit, and others. DEP'T OF DEFENSE PRESS RELEASE no. NR-185-14 (Apr. 15, 2014), https://ogc.osd.mil/Portals/99/press_release.pdf.

varied.⁹⁰ For example, in a panel of five members, the government needed to convince 3.35 members, two-thirds of the panel, beyond a reasonable doubt. The numerical but fictional fractional person is rounded up⁹¹ to a total four members: four out of five is 80%. This rule applied to such a small population meant that two votes of “not guilty” would be enough to trigger an acquittal. Two of five is 40% of the panel failing to find guilt beyond a reasonable doubt. For a panel of six members, the government needed to convince 4.02 members, rounded up to five, or 83.33%. This means that two “not guilty” votes from the six members, or 33.33% would be enough to acquit. Hence, a defendant would have an advantage if she were judged by a panel of six rather than five; the government would have an advantage if the panel consisted of five rather than six members. But it gets stranger still, for simply adding panel members does not necessarily increase the advantage to the defendant nor make the government’s job harder: in a panel of seven members, three “not guilty” votes would be required – a heftier 42.8% of the members. Alternatively, in a panel of eight members, the government needs to convince six (5.36 members). Therefore, a vote of not guilty by three members (37.5% of the panel) would acquit the accused. In contrast, in a panel of thirteen members, the government needed to convince nine of them (mathematically, 8.71 members). This meant that reasonable doubt within the minds of five members, or 38% of the panel, was enough to acquit. Altogether, this meant that either the defense or the prosecution would be incentivized to “game” the *voir dire* process to produce an optimally sized panel based on a statistical degree of difficulty (the number panel members they each need to convince). This in turn was a function solely of how many panel members were originally designated by the convening authority for that court-martial.

By finally fixing the percentage required for a guilty finding at 75%, the Group – and Congress thereafter – meant to fix this gaming opportunity and “conform” Article 52 of the UCMJ with revisions to Article 16, which did away with variable panel member size and locking it at eight members for general courts-martial.⁹² The intent of the MJRG and Congress was, it may be inferred, more about maintaining internal consistency as the statute underwent revisions, and far less about civilianizing the process of finding an accused service member guilty.

B. Ex Parte Quirin and Ex Parte Milligan Military Commission Dicta Became Doctrine

Though never discussing court-martial verdict unanimity, the Supreme Court has discussed the *nature* of the court-martial generally and its relationship to certain jury-related due process protections before. The Court’s dominating description, however, was made while addressing the constitutional irregularities not of a court-martial trying regular offenses allegedly committed by U.S. service members, but of a specialized type of military prosecution of *enemy combatants* conducted *during armed conflict*, called a “commission.”

⁹⁰ MILITARY JUSTICE REVIEW GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 30, 110 (2015); *see also* Sullivan, *supra* note 41, at 33-34, n. 158; United States v. Newson, 29 M.J. 17, 19, n.1 (C.M.A. 1989).

⁹¹ R.C.M. 921(c), Discussion (“In computing the number of votes required to convict, any fraction of a vote is rounded up to the next whole number. For example, in general court-martial with eight members, the concurrence of at least six members is required to convict” – two-thirds of eight is 5.28, rounded up to six).

⁹² David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L. J. 1, 61-62 (2017).

In *Ex parte Quirin*,⁹³ not long after the United States entry into World War II, a group of German-American citizens on a mission from Nazi Germany's High Command were captured inside the United States and tried as "unlawful combatants" by a military commission on charges of espionage, conspiracy, and sabotage. Their mission was to destroy American war industry and property on behalf of the German Reich.⁹⁴ The defendants had been trained by the German military, wore German military uniforms when they crossed the Atlantic by German submarine, and then changed into civilian clothes and carried explosives and other equipment ashore when they landed in Long Island and in Florida. This decision to prosecute via military commission was pursuant to an earlier Presidential Proclamation that any such cases would be tried under the Law of War, consistent with authority expressly granted by Congress in its Articles of War, rather than in a civilian federal court.⁹⁵ The accused filed a motion for leave to file a petition for writ of habeas corpus with the U.S. District Court for the District of Columbia while their trial was underway. They argued that the President had no statutory right or constitutional authority to try them by a military commission, that they were entitled to a civil trial with a jury under the Fifth and Sixth amendments, and that the trial procedures of the commission actually violated the Articles of War. The motion was denied, and they appealed.⁹⁶

By the time the matter arrived before the U.S. Supreme Court, the question presented at first was narrow: in a *per curiam* opinion, the Court held that charges were in fact authorized to be tried before a military commission, the commission was lawfully constituted, the accused were held in custody lawfully, and it affirmed the lower courts' decisions to deny the motion for leave. The Court subsequently published an opinion on the merits of the constitutional issue: "whether the detention of the prisoners . . . for trial by Military Commission . . . on charges preferred against them purporting to set out their violations of the law of war and the Articles of War, is in conformity to the laws and the Constitution of the United States."⁹⁷

The Court decided against the petitioners. The justices made several points of particular relevance to the jury trial and what it means in this *particular* military context – that is, for a trial prosecuting alleged war crimes by enemy combatants. Indeed, the Court distinguished this matter from the historic Civil-War era *Ex Parte Milligan*, in which that Court struck down a military commission trial of a *civilian* for a *civilian offense in civilian, unoccupied territory* where *civil* courts were open and accessible.⁹⁸ The earlier *Milligan* Court emphasized the distinction between the ways in which civilian courts protect fundamental liberties from the mechanisms by which military courts address misconduct, and described why the "inestimable privilege of trial by jury" was lawfully denied to military members: the "discipline necessary to the efficiency of the army and navy required other and swifter modes than those furnished by the common law courts."⁹⁹

They key and essential differences, those that triggered Mr. Milligan's constitutional right to a civilian trial by jury but not that of the *Quirin* petitioners, were that the latter were

⁹³ 317 U.S. 1 (1942).

⁹⁴ *Id.* at 22.

⁹⁵ *Id.* at 24.

⁹⁶ *Id.* at 17.

⁹⁷ *Id.* at 18-19.

⁹⁸ *Ex Parte Milligan*, 71 U.S. 2 (1866).

⁹⁹ *Id.* at 123.

unlawful enemy belligerents under the meaning of international law¹⁰⁰ and were charged with offenses under the Law of War.¹⁰¹ Such offenses were, per the Congressionally-enacted Articles of War, triable by commission and, importantly, justified by a fair reading of the Constitution itself. The Court observed that, at the time of the Constitution’s ratification, trial by jury in a military *commission* was not part of the legal “machinery” and concluded that the framers did not intend to extend such protections to persons accused of law of war violations (whether they were “alien or citizen offenders”).

Its evidence was the lack of mention of such trials in Article III, § 2,¹⁰² coupled with two facts: that the Fifth Amendment excludes “cases arising in the land or naval forces” from the *grand jury* indictment protection; and that the Sixth Amendment speaks of the right to jury trial only in “criminal prosecutions.”¹⁰³ But *Quirin* was not actually about courts-martial involving the trial of U.S. service members accused of criminal offenses like homicide that would have been similarly subject to prosecution in any civilian jurisdiction. Nor were these cases about the specific question of unanimity amongst those charged with fact-finding. Moreover, *Milligan* itself was also not a case involving a court-martial of a servicemember, and that Court was addressing rights of servicemembers only by way of contrasting them against those guaranteed expressly to civilians. *Milligan* made an assumption: that, because military cases were excepted from the Fifth Amendment’s grand jury guarantee, the Framers must have meant that exception to *apply to jury trials under the Sixth Amendment too*.¹⁰⁴ That assumption was both unnecessary to make and based entirely on unchallenging deference to Congress’s apparent determination that “swifter modes” of adjudication are necessary in all military cases. Yet, the Court of Military Appeals (CMA) (now known as the Court of Appeals for the Armed Forces) has long relied on this assumption in categorically excepting courts-martial from the “jury-trial demands of the Constitution.”¹⁰⁵

Nevertheless, even without the military judiciary’s stamp of approval, the dicta in the *Quirin* holding and the *Milligan* assumption could be taken as applying equally well to *other* types of military tribunals, such as courts-martial, established by Congress. Much earlier, in 1857, the Court famously wrote in *Dynes v. Hoover* that Article I, § 8’s “make rules” clause (clause 14) means that “Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations; and that power to do so is given without any connection between it and 3d Articles of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.”¹⁰⁶ For the *Quirin* Court, then, the purpose of the judiciary power in light of the two Amendments was to preserve the protections afforded by juries under common law then well-entrenched: and non-unanimity was the norm for petty misdemeanors and

¹⁰⁰ *Quirin*, 317 U.S. at 35-38.

¹⁰¹ *Quirin*, 317 U.S. at 29.

¹⁰² “The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.” U.S. Const. art. II, § 2, cl. 3.

¹⁰³ *Quirin*, 317 U.S. at 39-44.

¹⁰⁴ *Milligan*, 71 U.S. at 123.

¹⁰⁵ *McClain*, *supra* note 41, at 128. The errors in *Milligan*, arguably undercutting this conclusion of law, are explained in greater detail in Part III.C., *infra*.

¹⁰⁶ *Dynes v. Hoover*, 61 U.S. 65, 78-79 (1857); accord

contempts, among others.¹⁰⁷ For at least one concerned scholar, this meant that the Court has well-worn reasons to conclude that “less-than-unanimous verdicts by court-martial are not prohibited” but was careful to note that permissiveness of this practice was implied by Article III and the Sixth Amendment – other constitutional grounds, such as the Fifth Amendment’s “due process” requirement, he wrote would suggest otherwise.¹⁰⁸

Quirin was not the last word from the Supreme Court on the applicability of juries to military cases. Of note, when it has opined on various *personal jurisdiction* puzzles of military law, the Supreme Court has evaluated the *juryless* court-martial panel system favorably. In the 1956 case of *Kinsella v. Krueger*,¹⁰⁹ the civilian wife an Army Colonel, then living with her husband stationed in Japan, was tried by court-martial for murdering her husband. She was convicted and sentenced to life in federal prison.¹¹⁰ In her habeas petition, she argued that a court-martial had no jurisdiction over her because Article 2(11) of the UCMJ violated her constitutional right to a trial by a (civilian) jury under Article III and the Sixth Amendment. At the time, Article 2(11) authorized trial by court-martial for civilians accompanying forces outside the continental United States, provided that either treaty or other international law permitted it – in her case, a treaty between the United States and Japan granted the U.S. exclusive criminal jurisdiction over servicemembers and their dependents stationed there.¹¹¹ The District court eventually discharged the writ and she appealed to the Fourth Circuit. The government, on the other hand, petitioned the Supreme Court directly for certiorari “because of the serious constitutional question presented and its far-reaching importance to our Armed Forces stationed in some sixty-three different countries throughout the world.”¹¹² The Court found Article 2(11)’s jurisdictional reach to be constitutional:

The Code was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice. However, courts-martial are not required to provide all the protections of constitutional courts.¹¹³

The Court first addressed whether a U.S. citizen located in a foreign country is constitutionally entitled to a trial by an Article III court for a crime committed in that country. Citing to precedent affirming the validity of “legislative courts,” without the procedural guarantees of Article III courts, outside the territorial bounds of the U.S., courts-martial fit a certain model of adjudicatory body that was knowingly different – arguably far less neutral let alone defense-friendly – than traditional criminal courts in the U.S.¹¹⁴ Second, the Court concluded that “in all matters of substance,” there was functionally no meaningful difference between those in uniform

¹⁰⁷ *Quirin*, 317 U.S. at 39-40 (internal citations omitted).

¹⁰⁸ Larkin, *supra* note 4, at 241-42.

¹⁰⁹ 351 U.S. 470 (1956).

¹¹⁰ *Id.* at 472.

¹¹¹ *Id.* at 474.

¹¹² *Id.* at 473.

¹¹³ *Id.* at 474.

¹¹⁴ *Id.* at 474-76.

and their family members co-located with them abroad: the government pays for their housing, provides their medical care, funds their travel in moving to and from the foreign country.¹¹⁵

Today, this point is less than compelling and borderline ludicrous; the dependent family members were not employed by the armed forces, and certainly not tasked with providing the kind of professional services and duties, including the duty to potentially risk one's own life in combat, assigned to those members. However, the Court offered this explanation: that Congress enacted Article 2(11) to enable commanders to better regulate the conduct of the *service-members* assigned to their units: in other words, a service-member was more likely to be obedient and trustworthy if his commander had legal leverage over his family members as well.¹¹⁶

To soften the blow of this unexpected reach of criminal jurisdiction to largely unsuspecting civilians, the Court reiterated its approval of a system that – in its view – “would afford more safeguards to an accused than any other available procedure.”¹¹⁷ Not only would this be likely the case in many foreign jurisdictions,¹¹⁸ but also compared to courts in the States: a protection from coerced confessions and unwitting self-incrimination was then already encoded in Article 31 of the UCMJ, in the form of a “rights warning,” in force almost two decades before *Miranda v. Arizona* established its requirement. In fact, the *Miranda* Court cited to the UCMJ positively as an illustration of how the government can and should protect the constitutional privilege against self-incrimination.¹¹⁹ For the *Krueger* Court, all the most important due process concerns, like double jeopardy and exclusion of unlawfully obtained evidence, were accounted for and adequately protected under the UCMJ for both military and civilian citizens within its reach. Importantly, the Court noted: “we find no constitutional defect in the fact that the Code does not provide for indictment by grand jury or trial by petit jury.”¹²⁰

But the Court very soon thereafter, in *Reid v. Covert*,¹²¹ reconsidered its opinion in *Krueger* and ultimately reversed course in favor of the prosecuted family member. The *Reid* Court did not, however, alter its view on whether the absence of a jury and grand jury were constitutional defects. Rather, it only held that the natural meaning of the “make rules for the government and regulation of the land and naval forces” clause in Article I does *not* include civilians, even those living on military bases,¹²² and that the Constitution and American “heritage” can be read as saying that trial by jury drawn from the accused's community is a “fundamental right” that cannot be abridged by an organ of the U.S. government just because the

¹¹⁵ *Id.* at 477.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 478-79.

¹¹⁸ *Id.* at 479.

¹¹⁹ *Miranda v. Arizona*, 384 U.S. 436, 489 (1966).

¹²⁰ 351 U.S. at 478-79 and n. 10.

¹²¹ 354 U.S. 1 (1957). This was an unusually fast turn-around for the Court to make, and the grant of a rehearing after the Court has decided an issue is “literally infinitesimal” and usually requires a justice, “beset by controlling doubts,” from the majority opinion in the original case to agree, along with a majority of the remainder of the Court. FREDERICK BERNAYS WIENER, *CIVILIAN UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689 ESPECIALLY IN NORTH AMERICA* 239 (1967) (describing the *Reid v. Covert* case, in which Wiener was counsel for the victorious civilian petitioners, in relation to subsequent practice in Great Britain).

¹²² *Id.* at 19-20.

accused is living overseas.¹²³ Specifically, the *Reid* Court criticized the government’s arguments premised on efficiency:

the concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and, if allowed to flourish, would destroy the benefit of a written Constitution and undermine the basis of our Government.¹²⁴

Nevertheless, in holding that Article 2(11) was actually unconstitutional, the only beneficiaries of the Court’s animus toward the military’s expediency and efficiency arguments were those civilians listed in the UCMJ: “we have no difficulty in saying that such persons do not lose their civilian status and their right to a civilian trial because the Government helps them live as members of a soldier’s family.”¹²⁵ *Reid* did not address any other question beyond this personal jurisdictional reach, and therefore did not claim that the jury was a fundamental right the protection of which was owed to *all* those subject to the UCMJ.

The jurisdiction of military tribunals [here, they mean courts-martial] is a very limited and extraordinary jurisdiction derived from the cryptic language in Article I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law.¹²⁶

But this was justifiable, in the cases of actual service-members, according to the Court: “because of its very nature and purpose, the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts.”¹²⁷ The primary example the Court used to distinguish the two systems was the “absence of trial by jury before an independent judge after an indictment by grand jury.”¹²⁸ Thus, while *Reid* criticizes diminishing constitutional protections for military members on grounds of efficiency, it nevertheless continued to permit them.

O’Callahan v. Parker,¹²⁹ a 1969 *habeas* case arising from a court-martial conviction, further emphasized the distinction between civilian courts and military tribunals first made in *Dynes v. Hoover*. It used some of the same rationale justifying diminished constitutional applicability in personal jurisdiction cases, like *Krueger* and *Reid*, in a case involving subject-matter jurisdiction. Sergeant O’Callahan was stationed in Hawaii and taking an evening pass off-post, in Oahu. Wearing civilian clothes, he broke into a private hotel room where he assaulted and attempted to rape the civilian occupant. He was later caught by local police, identified as a soldier, and turned over to the military police authorities. O’Callahan confessed,

¹²³ *Id.* at 9.

¹²⁴ *Id.* at 14.

¹²⁵ *Id.* at 23.

¹²⁶ *Id.* at 21.

¹²⁷ *Id.* at 36.

¹²⁸ *Id.* at 37.

¹²⁹ 395 U.S. 258 (1969).

was tried by court-martial and convicted of assault, attempted rape, and housebreaking; his sentence was subsequently affirmed by the Army Board of Review (at the time, akin to an intermediate appellate court) and then by the Court of Military Appeals. In his *habeas* petition, he argued that the military had no jurisdiction to try him for non-military crimes committed off-post and off-duty. The district court denied relief, and the Court of Appeals affirmed.

But when his argument came before the Supreme Court, the justices disagreed. Just as in *Krueger* and *Reid*, “the exigencies of military discipline require the existence of a special system of military courts in which not all of the specific procedural protections deemed essential in Article III courts apply.”¹³⁰ In fact, the Court was somewhat pejorative: “the court-martial is singularly inept in dealing with the nice subtleties of constitutional law.”¹³¹ One of the reasons why, according to the Court, was that panel members were susceptible to undue influence from the convening authority that assigned them to the panel duty, rendering it far less independent than a jury trying normal criminal matters envisioned by the Framers.¹³² Noting that courts-martial had no jurisdiction over civilians (for the most part), the Court acknowledged that military status is a necessary condition for jurisdiction to attach. However necessary, it was alone not sufficient. “It does not follow that ascertainment of ‘status’ completes the inquiry, regardless of the nature, time, and place of offense.”¹³³ Instead, the Court reasoned that the test for jurisdiction was status *plus* something that made the offense “service-connected.”¹³⁴

While the decision in *O’Callahan*, and the narrow jurisdictional test it announced, was later overruled in the late 1980s,¹³⁵ the gist of the Court’s impression of the nature of military justice was not something casually dismissed. In fact, this was in keeping with a general attitude toward military justice held by the public¹³⁶ and by the courts: even after the dramatic reforms coming with the enactment of the UCMJ in 1950, the *Reid* Court opined that:

military law is, in many respects, harsh law . . . [i]t emphasizes the iron hand of discipline more than it does the scales of justice . . . this is attributable to the inherent difference in values and attitudes that separate the military establishment

¹³⁰ *Id.* at 261.

¹³¹ *Id.* at 265.

¹³² *Id.* at 264-65.

¹³³ *Id.* at 268.

¹³⁴ The Court did not completely establish the parameters of “service-connection,” only determining that *O’Callahan*’s crimes were not so. This question was taken up in *Relford v. Commandant*, 401 U.S. 355 (1971), involving an Army Corporal’s rape of two civilian women on the property of Fort Dix, in New Jersey. The Court disagreed with *Relford*’s claims that his crimes were not sufficiently “military in nature” and articulated a non-dispositive list of factors relevant to the “service-connection” determination, including where the offense occurred, the duty status of the accused, the identity or military status of the victim, the connection between the accused’s military duties and the crime, the presence and availability of civilian courts, whether “military authority” was “flouted,” and whether the crime created a threat to the military post or military property. *Id.* at 365-69.

¹³⁵ *Solorio v. United States*, 483 U.S. 435 (1987) (discarding the “service-connection” test from *O’Callahan* and *Relford* establishing that personal jurisdiction of the UCMJ attaches based solely on the accused’s “status” – if within the confines of Article 2 of the UCMJ, then it did not matter where the offense occurred or whether it had any other kind of “military nexus”).

¹³⁶ See, e.g., ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AND MILITARY MUSIC IS TO MUSIC* (1970); but see Joseph W. Bishop, *Against the Evidence*, COMMENTARY (June 1971), available at <https://www.commentarymagazine.com/articles/joseph-bishop-2/military-justice-is-to-justice-as-military-music-is-to-music-by-robert-sherrill/> (rebutting many of the “fishy” journalistic claims in Sherrill’s book).

from civilian society . . . in the military, by necessity, emphasis must be placed on the security and order of the group, rather than on value and integrity of the individual.¹³⁷

This low regard, therefore, was explained as acceptable, at least in part, by historical relevance: “the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty.”¹³⁸ But it also rested on facts about courts-martial no longer true, namely that presiding officers at courts-martial of the time were not licensed attorneys serving as judges, and that the “possibility of influence by the convening authority who convenes a courts, selects its members and counsel on both sides is pervasive.”¹³⁹ Now, attorneys for both sides are *not* selected by the convening authority, the members of the panel are *not* chosen arbitrarily and without legal oversight by the courts, and trials themselves are presided over by judges (who are licensed attorneys, serving as judge advocate officers) ensuring that rules of evidence and procedure – in *most* ways akin to those of federal courts – are followed.¹⁴⁰ It can no longer be said, as the Court did in 1955, that “military tribunals have not been and probably never can be constituted in such a way that they have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”¹⁴¹ In fact, as described in Part IV.A. *infra*, this very sentiment was tacitly rejected by the Court as recently as 2018.

C. *The Loose Logic of Milligan*

The most recent military case reiterating the long-held belief that the Sixth Amendment jury right does not apply to courts-martial is *United States v. Reisbeck*.¹⁴² But *Reisbeck* only cites to *McClain*¹⁴³ for this proposition. *McClain*, in turn, cites only *Ex Parte Milligan*,¹⁴⁴ the case dealing with military commission jurisdiction over civilians, not courts-martial jurisdiction over servicemembers. According to *Milligan*:

*this right [to a jury] — one of the most valuable in a free country — is preserved to every one accused of crime who is not attached to the army, or navy, or militia in actual service.*¹⁴⁵

The problem *Reisbeck* and *McClain* fail to acknowledge is that this conclusion relies on the categorization of a subset of the population, drawn from the text of the Fifth, specifically:

¹³⁷ *Reid v. Covert*, 354 U.S. 1, 38-39 (1957).

¹³⁸ 395 U.S. at 265.

¹³⁹ *Id.* at 264. See also WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 184-98* (1973) (discussing the genesis, intent, and effect of the Military Justice Act of 1968, and how it had fixed many of the structural issues that the justices complained of in *O’Callahan*).

¹⁴⁰ See notes accompany Part I, *supra*.

¹⁴¹ *United States ex rel Toth v. Quarles*, 350 U.S. 11, 18 (1955).

¹⁴² *United States v. Riesbeck*, 77 M.J. 154 (C.A.A.F. 2018).

¹⁴³ 77 M.J. at 162-63 (citing *McClain*, 22 M.J. at 128-29).

¹⁴⁴ 71 U.S. 2 (1866).

¹⁴⁵ *Id.* at 123.

“every one accused of a crime . . . attached to the army, or navy, or militia in actual service.” In other words, the Court wrote there is a *status-based connection* test for the applicability of this protection. This is not, however, where the text of the Fifth Amendment actually stops. It actually stops with: “...when in actual service in time of war or public danger.”¹⁴⁶ Why did the Court fail to mention this important timing caveat? One theory is that the Court fundamentally *misquoted* the actual Fifth Amendment. The Court wrote:

The sixth amendment affirms that “in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,” language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before any one can be held to answer for high crimes, “*excepts* cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;” and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.¹⁴⁷

In quoting the text of the Fifth Amendment, however, the Court added a comma where there is not one in the original text – right after the phrase “actual service.” With the comma, their interpretation makes some sense: that the carve-out applies to those “in service” *whether or not* in time of peace or war. But when you remove the trespassing comma, the plain reading of the text is that “when in actual service in time of war or public danger” is one single modifier, and it modifies two classes of possible defendants: those in the land or naval forces and those in the militia. In other words, the Court should have interpreted the exception to the grand jury indictment as applying only to a certain subset of courts-martial (or military commissions, as in *Milligan*): for *only those whose facts “arise” from the accused’s “actual service in time of war or public danger.”* The Court then ties the applicability of the *Sixth* Amendment right to a jury trial to the applicability of the (erroneously interpreted) Fifth: those who benefit from the latter are only those who benefit from the former.

The other case often cited for the idea that the jury and grand jury rights do not apply to courts-martial is of course *Ex Parte Quirin*,¹⁴⁸ which only addressed trying unlawful enemy combatants for war crimes by a military commission, not servicemembers for violations of the domestic criminal law, whether it was the Articles of War or later the UCMJ. But the *Quirin* Court only cited for this conclusion to *Ex Parte Vallandingham*¹⁴⁹ (a trial of a civilian by military commission in time of war), *In re Vidal*¹⁵⁰ (regarding the Supreme Court’s lack of certiorari jurisdiction over a military tribunal convened in Puerto Rico during the Spanish-American War, and not citing any case authority), and *Williams*¹⁵¹ (a case addressing the Supreme Court’s jurisdiction over the Court of Claims).¹⁵² Then *Quirin* goes on to say:

¹⁴⁶ U.S. Const. amend. V.

¹⁴⁷ 71 U.S. at 123.

¹⁴⁸ 317 U.S. 1 (1942).

¹⁴⁹ 1 Wall. 243 (1864).

¹⁵⁰ 179 U.S. 126 (1900).

¹⁵¹ 289 U.S. 553 (1933).

¹⁵² *Ex Parte Quirin*, at 39.

we 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. The fact that “cases arising in the land or naval forces” are excepted from the operation of the Amendments does not militate against this conclusion. Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.¹⁵³

First, the text here should distinguish the case’s rationale from any involving courts-martial of service-members – the facts, the Court’s concerns, were arising from a war crimes prosecution of foreign nationals during an active conflict using a commission, rather than a court-martial. Second, the second sentence (beginning with “The fact that...”) is a non-sequitur. Cases arising in the land or naval forces are not categorically identical to cases tried by military commission for offenses against the law of war.

But assuming we can and should conflate courts-martial and commission fora, the only case *Quirin* cites for this categorical “status-based” exclusion is *Milligan*.¹⁵⁴ If the *Milligan* Court grounded its reasoning off a fundamental mis-quoting of the text of the Fifth Amendment, and *Quirin* is clearly distinguishable (because it deals *solely* with commissions trying civilians in time of war for war crimes), then it is beyond reasonable to conclude that all subsequent court determinations (by the CMA and CAAF) that the Fifth and Sixth Amendments do not apply to servicemembers (that their inapplicability is status-connected) are wrong.

This “jury right doesn’t apply in the military” is one of those oft-repeated “thoughtless mantras” (as one author wrote in 1998 about a Convening Authority’s power to select the members)¹⁵⁵ that seem to be reluctantly-accepted gospel. But anyone citing the authority for this conclusion cites to *Milligan* or *Quirin* (or both), which are both factually-distinguishable from “regular” courts-martial of servicemembers for violations of domestic law and based on a mis-quotation of the text of the Fifth Amendment, which fundamentally changes the meaning of the words and thus their applicability. For example, a Congressional Research Report about the reforms of the Military Justice Act of 2016 makes this mistake, and it too only cites to *Milligan* as supporting the Court’s conclusion.¹⁵⁶ *Middendorf v. Henry* (described in more detail below) also mentions this as axiomatic, but as dicta in concluding that the right to counsel does not apply to summary courts-martial.¹⁵⁷ That Court interpreted the applicability to be status-connected, whereas the plain reading of the Fifth means applicability is status-connected *but only when* in time of “war or public danger” – membership in the armed services is necessary but not sufficient to justify excluding them from the jury right. Sufficiency exists only when those

¹⁵³ *Id.* at 40.

¹⁵⁴ 317 U.S. at 40.

¹⁵⁵ Major Guy P. Glazier, *He Called for his Pipe, and He Called for His Bowel, and He Called for His Members Three – Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 MIL. L. REV. 1, 13 (1998).

¹⁵⁶ Jennifer K. Elsea & Jonathan M. Gaffney, CONG. RES. SER. REPORT R46503, *Military Courts-Martial Under the Military Justice Act of 2016* (Aug. 28, 2020), at 3, n. 25.

¹⁵⁷ *Middendorf v. Henry*, 425 U.S. 25, 33 (1976) (citing *Milligan* and *Quirin* without factually distinguishing those cases).

servicemembers are accused of a crime that occurs during war or public danger. If the Fifth Amendment has this exceptionally narrow meaning for grand juries, then the Sixth Amendment’s implied *inapplicability* to servicemembers also applies only in “time of war or public danger.” At the very least, there is nothing in the Sixth Amendment that carves out juries *altogether* from military cases.

Justice Marshall’s dissent in *Solorio* briefly highlights the possibility of an “alternative” reading of the phrase but does not suggest a grammatical ground for it; indeed, he metaphorically throws his hands up in despair by acknowledging that the Court has long read the “in time of war . . .” provision as applying *solely* to cases “arising in” the militia.¹⁵⁸ This was first steadfastly asserted in 1895 in *Johnson v. Sayre*¹⁵⁹ – a habeas case which *did* involve a court-martial, not a military commission, and which did accurately quote the text of the Fifth Amendment, *and* which did not cite to *Milligan*. Instead, the *Johnson* Court itself said a narrow reading of the grand jury indictment requirement was “grammatically possible” but not reasonable and turned, moreover, to a contextual analogy in the Constitution.¹⁶⁰ The Court analogized the syntactical construction of Article II’s commander-in-chief authority over the militia (which, semantically, *meant only when “called into the actual service of the United States,”* rather than their default control by the States) to the syntactical structure of the Fifth Amendment’s grand jury exception. The Court said the commander-in-chief’s authority over the *militia*, conditioned on it being activated to federal service, was *not* a limitation on the president’s unconditional authority over regular federal forces. Likewise, the Court reasoned, the “when in actual service in time of war or public danger” condition in the Fifth Amendment does not “restrict the jurisdiction of courts-martial in the regular land and naval forces” – the grand jury exception applied to regular forces being court-martialed, but to militia forces *only* “when in actual service in time of war or public danger.”¹⁶¹ And as *Johnson* recalls, this “necessary construction” of the phrase was so “plain and indisputable” that it had been “constantly assumed and acted on by this Court, without discussion.”¹⁶²

Given its recurrence in this a long line of cases, of both military commissions and courts-martial, this erroneous reading of the Fifth Amendment – reinforced perhaps on the Court’s mistaken inclusion of a comma where none existed – is unlikely to budge.

D. Parker v. Levy and the Court’s Validation of the Military Necessity Rationale

It was against this backdrop of the Court acknowledging the procedural differences between civilian and military courts, explaining their justification on grounds of military necessity, and grudgingly accepting their constitutionality that the Court decided *Parker v. Levy* in 1974.¹⁶³ In *Parker*, a young military doctor – an Army captain – stationed in South Carolina was charged with violating several military-specific crimes: disobeying an order, conduct unbecoming an officer, and conduct prejudicial to good order and discipline. Rather than running his clinic at Fort Jackson as directed, Dr. (Captain) Levy was instead found to have been

¹⁵⁸ *Solorio*, 483 U.S. at 453-54.

¹⁵⁹ 158 U.S. 109 (1895).

¹⁶⁰ 158 U.S. at 114.

¹⁶¹ 158 U.S. at 115.

¹⁶² 158 U.S. at 115 (citing five cases between 1858 and 1886) (internal citations omitted).

¹⁶³ 417 U.S. 733 (1974).

telling junior enlisted troops that the war in Vietnam was wrong, that he would refuse to go if ordered, that if he were a Black man he would refuse to deploy because of the government's discrimination against them, and that American Special Forces soldiers were liars, thieves, and murderers. These statements, the government charged, were "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful," and that Levy made them with intent to promote disloyalty and disaffection among the soldiers stationed there en route to combat deployments. He was convicted by a court-martial and sentenced to three years in prison. He then challenged the constitutionality of those particular UCMJ offenses, arguing that they were void for vagueness and "overbroad" constraints on his First Amendment rights. The Court ultimately disagreed with Levy, holding that those UCMJ prohibition satisfied the Constitution's requirements:

This Court has long recognized that the military is by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."¹⁶⁴

The Court asserted with axiomatic confidence that military justice "cannot be equated to a civilian code . . . [because] the UCMJ essays a more varied regulation of a much larger segment of activities of the more tightly knit military community."¹⁶⁵ The logic of the Court could be traced, beginning with three premises: (1) the military's primary business is war-fighting and preparation under the direction of a chain of command;¹⁶⁶ (2) history, tradition, culture, and the very purpose of the military has led to the development of a military criminal law system separate from that of civilians, thereby amplifying those differences;¹⁶⁷ and (3) the government relates to a service member not just as sovereign to citizen, but also as employer to employee.¹⁶⁸ These led the Court to its first of three conclusions: that military and civilian communities are different, and that distinction is based, ultimately, on the military's primary role or purpose.

The Court went on to articulate what might be called three more premises before another maxim-like conclusion: (1) that the military's effectiveness is a function of the "over-riding demands of discipline,"¹⁶⁹ (2) that certain conduct is criminalized in the military that could not be in the civilian communities;¹⁷⁰ and (3) that to be a valid criminal prohibition, it must of course be "constitutional" under some standard or test. This supported a conclusion that certain constitutional protections – in this case, First Amendment protections – must apply differently in military law.

Finally, the Court went on to argue that (1) criminal prohibitions on conduct in the military are constitutional provided that they relate to protecting a commander's ability to sustain discipline in the ranks; and (2) these prohibitions may include limits on what can be said by a service member like Dr. Levy. Therefore, the Court ultimately concluded, if speech undermines

¹⁶⁴ *Id.* at 743.

¹⁶⁵ *Id.* at 749-50.

¹⁶⁶ *Id.* at 743 (citing *Toth*, *supra* note 6).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 751.

¹⁶⁹ *Id.* at 744 (quoting *Burns*, *supra* note 13, at 140).

¹⁷⁰ *Id.* at 751 ("there is simply not the same autonomy as there is in the larger civilian community").

the effectiveness of response to legitimate military command, it is unprotected speech fully within the criminal jurisdiction of military justice and not an impingement of the soldier's First Amendment rights.¹⁷¹ By way of this logical train, the Court effectively carved out this sort of expression from the First Amendment, and thus did not employ strict scrutiny here, as would be expected in a criminalization of free speech.¹⁷² Rather, it employed what appears to be – if anything – a rational basis standard of review, one evidently consistent with the Court's long-standing deference to Congress in national security rulemaking, including in the field of military justice.¹⁷³ A few years later, the Court explained this deference:

Congress has exercised its plenary constitutional authority over the military, has enacted statutes regulating military life, and has established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define the military structure . . . Congress [is] the constitutionally authorized source of authority over the military system of justice.¹⁷⁴

So if Congress reigns supreme over what form military justice takes, and military necessity – if in Congress's view – rationally justifies departures from Constitutional demands of First Amendment protection and the grand jury and petit jury requirements generally, what about more specific due process requirements and norms like jury unanimity?

E. Middendorf's Due Process Balancing Test and Weiss's Standard of Deference

¹⁷¹ *Id.* at 761.

¹⁷² *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (applying strict scrutiny to the *Florida Code of Judicial Conduct* canon on political activity by Florida state judges).

¹⁷³ *See, e.g., United States v. Bevans*, 16 U.S. 336, 390 (1818) (“that a government which possess the broad power of war; which . . . ‘may make rules for the government and regulation of the land and naval forces,’ has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be questioned by this court”); accord *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878) (in light of Article I, § 8, cl. 14, the power of Congress over “the whole subject of the formation, organization, the government of the national armies, including the punishment of offenses committed by persons in the military service, would seem to be plenary”); *see generally Burns*, 346 U.S. at 140-41; *Kinsella v. Krueger*, 351 U.S. 470, 474 (1956) (“the Code was carefully drawn by Congress to include the fundamental guarantees of due process, and in operation it has provided a fair and enlightened system of justice. However, courts-martial are not required to provide all the protections of constitutional courts”); *Kinsella v. Singleton*, 361 U.S. 234, 244 (1960) (holding that court-martial jurisdiction over civilian dependents of service members, stationed overseas, in peacetime, for non-capital offenses was an unconstitutional abridgement of the civilian's rights under Article III and the Fifth and Sixth Amendments) (“the power to ‘make rules for the government and regulation of the land and naval forces’ bears no limitation as to offenses. The power there granted includes not only the creation of offenses, but the fixing of the punishment therefor”); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975) (“in enacting the Code, Congress attempted to balance these military necessities [“respect for duty and a discipline without counterpart in civilian life”] against the equally significant interest of ensuring fairness to servicemen charged with a military offense . . . as a result, Congress created an integrated system of military courts and review procedures”); *and Solorio v. United States*, 483 U.S. 435, 441 (1987).

¹⁷⁴ *Chappell v. Wallace*, 462 U.S. 296, 302-04 (1983) (in a case not involving a court-martial at all, the Court held that “enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations,” *id.* at 305).

The most recent (inferred) articulation of this principle of narrow, minimal review in a case involving military justice Due Process rights was in *Middendorf v. Henry*.¹⁷⁵ There, the Court determined that the Fifth and Sixth Amendment guarantees *of counsel* were inapplicable to service members facing a certain form of military discipline: a non-adversarial “summary court-martial.” This specialized court – addressing relatively minor criminal misconduct – has limited jurisdiction (only enlisted, not officer, personnel may be tried), is not presided over by a judge, may only be constituted upon the consent of the accused, and its possible punishment is capped at thirty days of confinement. Under such limitations, the Court held that this was not even a “criminal prosecution” within the meaning of the Amendments.¹⁷⁶ The Court further addressed whether the Fifth Amendment’s Due Process clause *implicitly* requires counsel for accused at such hearings. Holding that due process did not so require, the Court wrote that its analysis depended on balancing the interests of the accused “and those of the regime to which he is subject” – this, in turn, demands that the courts “give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces.”¹⁷⁷ But in regulating that profession, the Court noted, Congress must account for the realities of that profession’s demands and context.

[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress.¹⁷⁸

Therefore, with regard to the Due Process right to counsel,

We thus need only decide whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance [between individual rights and the demands of military discipline and duty] struck by Congress.¹⁷⁹

The Court then looked at the circumstances of the *summary* court-martial, its purpose behind its structural design, and the effect of a counsel requirement on that purpose:

Presence of counsel will turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried. Such a lengthy proceeding is a particular burden to the Armed Forces because virtually all of the participants, include the defendant and his counsel, are

¹⁷⁵ 425 U.S. 25 (1976).

¹⁷⁶ *Id.* at 32-34, 37.

¹⁷⁷ *Id.* at 43.

¹⁷⁸ *Id.* (quoting *Burns*, *supra* note 13. at 140).

¹⁷⁹ *Id.* at 44.

members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.¹⁸⁰

The deferential standard of review that underwrote this analysis was further deployed in *Weiss v. United States*.¹⁸¹ The question in *Weiss* involved whether the selection of military trial and appellate judges and their non-fixed terms of office violated the Appointments Clause and the Fifth Amendment’s Due Process Clause. The Court first fixated on describing the structure of the military justice system, including the roles that judges play in courts-martial and how they are selected for those duties and for detail to specific courts-martial; but it also took a moment to describe the military’s version of the jury: “court-martial panel members may be officer or enlisted personnel, depending on the military status of the accused; the members’ responsibilities are analogous to, but somewhat greater than, those of civilian juries.”¹⁸² This was not exactly a non sequitur, as the special qualifications of panel members (described in Article 25 of the UCMJ) required for “detail” to a court-martial were not unlike having special qualifications for military judges – and the Court noted that such special qualifications did not, as a constitutional matter, imply that they needed a second “appointment” to that office above and beyond what they already received by virtue of their original commission as military officers.¹⁸³

In its final point about the Appointments clause applicability, the Court reiterated what it stated in *Parker v. Levy*: that – despite the military’s justice code evolving over time to “more closely resemble the civilian system,” the military was in fact, and necessarily so, a “specialized society separate from civilian society.”¹⁸⁴ Next, in addressing whether the non-fixed terms of judicial office for military judges violated the Constitution, the Court first acknowledged that the Due Process requirement must be heeded by Congress when legislating on military justice. But this was not a full-throated defense. The clause “provides *some* measure of protection to defendants in military proceedings” (emphasis added), and that its precise formulation must “give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces;” this means that the “test for due process” may depart from civilian standards, but not break the connection altogether.¹⁸⁵

This variability then depends on a rule-by-rule application of what could be called a *military necessity test*: whether the needs of the unit and its mission outweigh the need to recognize and enforce a particular Constitutional right of the accused, in light of possible risks to military efficiency that application of this right could engender. This was the test first described for the right to counsel in summary courts-martial in *Middendorf*: whether “factors militating in favor of [insert the due process norm under debate here] are so extraordinarily weighty as to overcome the balance struck by Congress.”¹⁸⁶ That balance was one struck between the needs of the command for disciplined obedience to accomplish missions and the accused’s right to counsel thought fundamental to any criminal justice system’s legitimacy, in light of the procedural character of that form of non-criminal trial and the hypothesized negative effect of

¹⁸⁰ *Id.* at 45-46.

¹⁸¹ 510 U.S. 163 (1994).

¹⁸² *Id.* at 167.

¹⁸³ *Id.* at 170-72.

¹⁸⁴ *Id.* at 174.

¹⁸⁵ *Id.* at 167-77.

¹⁸⁶ *Id.* at 177-78.

introducing defense counsel into that forum. Below, this military necessity test is juxtaposed against a Supreme Court view of the civilianizing character and de-militarized purpose of military justice.

IV. THE CHANGING CHARACTER OF COURTS-MARTIAL: PLACING THE EMPHASIS ON
“JUSTICE” IN MILITARY JUSTICE

A. *Ortiz and the “Judicial Character” of Courts-Martial*

In 2018, the Supreme Court explained the nature of military justice and the purpose of the UCMJ in a manner arguably contradictory to the vast bulk of previous judicial opinion, but consistent with the gradual civilianization of military law’s forms and functions since the UCMJ was enacted.¹⁸⁷ One scholar has gone so far as to refer to changes to the “nature and structure of American military justice” as “seismic.”¹⁸⁸ *Ortiz v. United States*¹⁸⁹ was never meant to be landmark opinion, and the justices – it would seem – did not appreciate the extent to which their description departed from precedent. Indeed, when the opinion was published, most attention was not given to what the justices said or did not say about underlying principles justifying the UCMJ’s due process idiosyncrasies.¹⁹⁰ Rather, focus was on the fact that the Court officially affirmed the “judicial character and constitutional pedigree” of the Court of Appeals for the Armed Forces (CAAF), the Article I tribunal that acts as the typical court of last resort for appeals arising from courts-martial proceedings.¹⁹¹ This was indeed important, but it was expected (Congress authorized Supreme Court non-collateral review of by certiorari in 1983¹⁹²) and only part of the story of why *Ortiz* is implicitly relevant to the question of court-martial panels’ unanimous guilty findings. The rest of the story involves the *reasons* why the Court affirmed its Article III jurisdiction over an Article I tribunal.

The case arose after an Airman was convicted at court-martial for possessing and distributing child pornography and the conviction was affirmed at the intermediate Air Force Court of Appeals. The CAAF granted *Ortiz*’s petition for review to determine whether the dual appointment of one of those Air Force appellate judges to two courts (he was also assigned to the

¹⁸⁷ See generally Sherman and Vladeck, *supra* note 67. For a full discussion of this case and its relationship to cases like *Parker* and in the context of civilianization, see Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 677-97 (2021).

¹⁸⁸ Vladeck, *supra* note 58, at 936.

¹⁸⁹ 138 S. Ct. 2165 (2018).

¹⁹⁰ However, there were two exception: see Major Lauren A. Shure & Colonel (retired) Jeremy S. Weber, *Ortiz v. United States: The Savior or Death Sentence of the Military Justice System?*, 81 A.F. L. REV. 187 (2020), and Dan Maurer, *Are Military Courts Really Just Like Civilian Courts?*, LAWFARE, July 13, 2018, <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts> (noting that the Court’s focus on similarities between civilian and military criminal justice, while accurate, ignored the relevant dissimilarities including the primacy of the accused soldier’s commander in making quasi-investigative, quasi-prosecutorial, and quasi-judicial decisions).

¹⁹¹ Kevin Lessmiller, *High Court Says Judges Can Sit on Two Military Panels*, COURTHOUSE NEWS SERVICE, June 22 2018, <https://www.courthousenews.com/high-court-says-judges-can-sit-on-two-military-panels/>; *Leading Case*, *Ortiz v. United States*, 132 HARV. L. REV. 317 (2018) (quoting *Ortiz*, 138 S. Ct. at 2170); Harry Graver, *Summary: the Supreme Court Rules in Ortiz v. United States*, LAWFARE, June 23, 2018, <https://www.lawfareblog.com/summary-supreme-court-rules-ortiz-v-united-states>.

¹⁹² Pub. L. 98-209, § 10(a)(1) (1983), 97 Stat. 1405 (as amended); codified at 28 U.S.C. § 1259.

Court of Military Commissions Review) simultaneously violated the Appointments Clause of the Constitution¹⁹³ or violated 10 U.S.C. § 973(b), a statute intended to “ensure civilian preeminence in government” by prohibiting military officers from serving in certain federal civil offices while still on active duty.¹⁹⁴

The CAAF rejected Ortiz’s claims, and the Supreme Court granted certiorari. Before it could address the statutory or constitutional questions, the Court determined to answer jurisdictional questions raised by a law professor as *amicus curiae*, an argument it described as “new to this Court” but “serious” and “deserving of sustained consideration.”¹⁹⁵ The argument was, essentially, that a court-martial trial was not – and has never been – a “case” within the meaning of Article III. Rather, it was akin to an administrative decision hearing within the Executive Branch and, as a consequence, the Court has neither original nor appellate jurisdiction over controversies culminating in an “appellate” decision by the CAAF.¹⁹⁶ The Court disagreed with the *amicus* argument, but took some time to explain why it could, in fact, exercise appellate jurisdiction over the CAAF and – therefore – over the military justice system.

In concluding that the military justice system’s “essential character” is “judicial,”¹⁹⁷ the Court offered several pieces of evidence or “attributes:”¹⁹⁸

1. From court-martial to the appellate tribunals, each level decides “criminal ‘cases’ as that term is generally understood”¹⁹⁹ and decisions are subject to an “appellate process . . . that replicates the judicial apparatus found in most states”²⁰⁰
2. “procedural protections” for accused servicemembers are “virtually the same” as those in civilian criminal courts²⁰¹
3. Decisions and judgments by these courts have *res judicata* effect²⁰² and trigger Double Jeopardy protections²⁰³
4. Their subject-matter jurisdiction, though it has “waxed and waned over time,” “likewise resemble[s] those of other courts whose decisions we review” because it includes “garden-variety crimes unrelated to military service”²⁰⁴

¹⁹³ U.S. CONST. art 2, § 2, cl. 2.

¹⁹⁴ *Ortiz*, 138 S. Ct. at 2172.

¹⁹⁵ *Id.* at 2173.

¹⁹⁶ Brief of Professor Aditya Bamzai as Amicus Curiae Supporting Neither Party, *Dalmazzi v. United States*, *Cox v. United States*, *Ortiz v. United States*, 138 S. Ct. 2165 (2018), 2017 WL 5495453.

¹⁹⁷ *Ortiz*, 138 S. Ct. at 2174.

¹⁹⁸ *Id.* at 2175.

¹⁹⁹ *Id.* at 2174.

²⁰⁰ *Id.* at 2175.

²⁰¹ *Id.* at 2174 (quoting 1 DAVID SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 50 (2015)).

²⁰² *Id.* (citing *Schlesinger v. Councilman*, 420 U.S. 738 (1975)).

²⁰³ *Id.* (citing *Grafton v. United States*, 206 U.S. 333 (1907)).

²⁰⁴ *Id.* (citing *Solorio*, 483 U.S. at 438-441).

5. The constitutionality of having a separate system for the “trial and punishment” applicable to the armed services alone is beyond dispute²⁰⁵
6. Their punishment schemes are similar to civilian courts: “on top of peculiarly military discipline, terms of imprisonment and capital punishment”²⁰⁶
7. Scholars have long considered this system to be “judicial” in character and exercising “judicial power”²⁰⁷ and this Court has opined as much as far back as 1887²⁰⁸

This list is accurate, and consistent with the description of the events occurring in our hypothetical court-martial in Part I, *supra*. But the Court did not acknowledge the two *other* “attributes” of military law where its argument might run into trouble and what the *amicus* brief failed to exploit: the role of certain commanding officers in making many of the initial investigative and prosecutorial decisions before getting to the courtroom door, including the selection of panel members to sit in judgment, and the fact that most of the crimes made punishable by the UCMJ are *not* “garden-variety crimes unrelated to military service” – they are prohibitions that only apply under purely military circumstances: malingering; absence without leave; desertion; disrespect toward a superior commissioned officer; willfully disobeying a superior commissioned officer; failure to obey an order; misbehavior before the enemy; wearing unauthorized insignias, badges, or medals; conduct unbecoming an officer; and fraternization; to name a few.²⁰⁹ Nor did the Court discuss the areas of due process that are *not* virtually the same as civilian courts, like the Sixth Amendment right to a trial by jury (and its unanimous fact-finding), the ad hoc convening of a court-martial, the non-tenured position of military judge, or why those deviations should continue without change. Nevertheless, the Court opined – perhaps in dicta, but certainly notably – that the disciplinary function of military justice is *incidental* to the primary purpose of the UCMJ and courts-martial:

by adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial.²¹⁰

Therefore, the Court had little trouble asserting that courts-martial “have operated as instruments of military justice, not (as the dissent would have it) mere ‘military command.’”²¹¹ In this way, the military justice system, despite being an Article I creation, “stands on much the same footing

²⁰⁵ *Id.* at 2175 (citing and quoting *Dynes v. Hoover*, 20 How. 65, 79 (1857) (“the constitutional foundation for courts-martial—as judicial bodies responsible for ‘the trial and punishment’ of servicemembers—is not in the least insecure”).

²⁰⁶ *Id.* at 2175.

²⁰⁷ *Id.*

²⁰⁸ *Id.* (citing and quoting *Runkle v. United States*, 122 U.S. 543, 558 (1887)).

²⁰⁹ *See, e.g.*, UCMJ Articles 83, 85, 86, 89, 90, 92, 99, 106a, 133, and 134.

²¹⁰ *Ortiz*, 138 S. Ct. at 2176 n.5.

²¹¹ *Id.* at 2175.

as territorial and D.C. courts” – other tribunals not created under Article III but over which the Supreme Court has long-recognized and exercised its judicial review authority.²¹²

It is worth acknowledging what *Ortiz* did not stand for. It did not address, consider, or constitutionally evaluate any particular due process protection afforded by or missing from the UCMJ. It did not spring forth into existence a theory that the Sixth Amendment’s demands, including the right to a jury trial, are now equally applicable to a military justice scheme. However, the Court’s logic – that which ultimately supported its continued exercise of jurisdiction and the holding about dual-hatted military judges – sends an important descriptive and normative message about military justice. That message says military justice is far more about *justice* than *military*, for the martial component provides only the setting of the venue and the personal jurisdictional hook. While it may provide commanders a means by which to regain “good order and discipline” within the ranks, especially for military-related offenses,²¹³ that military effect is not the primary purpose or benchmark for gauging the system’s validity or determining its due process requirements. *Ortiz* says that in all other relevant features and intentions, the court-martial system (and the UCMJ that creates it) has mirrored state criminal adjudication practice and procedure as well as in following constitutional requirements – in some cases, like self-incrimination, even anticipating the Supreme Court. Thus, it is not an exaggeration to say that the Court has (perhaps unintentionally) recharacterized the nature of military law in a fundamental way; and it did so by doing precisely what the earlier *Parker* Court said not to do: by comparing it to civilian codes.

It is in this light of *Ortiz*, therefore, that the Court’s recent decision in *Ramos* and its applicability to courts-martial panels must be viewed. Whether the Sixth Amendment right to a jury trial drawn from common law applies, through the Due Process Clause in the Fourteenth Amendment, in courts-martial in general is not exactly the right question;²¹⁴ the question is whether *Ramos* and *Ortiz* together provide the justification for Congress to establish within the UCMJ a specific unanimity requirement, just as it recently ended the variability, and convening authority discretion, in the number of panel members. *Ortiz*, admittedly by implication, removes from the table the argument for the sustaining the status quo: that because the Sixth Amendment right to a jury trial has been held, by lower federal courts, to not translate to courts-martial, no component requirement – like unanimity – translates either.

B. Does Ortiz Imply Article III and Sixth Amendment Arguments are no longer valid?

The Sixth Amendment says the jury requirement applies in “all criminal prosecutions;” Article III says the “trial of all crimes, except in cases of impeachment; shall be by jury,” and the only exception arguably applicable to courts-martial (a case “arising in the land or naval forces”)

²¹² *Id.* at 2178.

²¹³ There is some nuance to determining what, in some cases, constitute a “military-related offense.” Dan Maurer, Larrabee at the District Court: Misunderstanding Military Criminal Law by the Article III Judiciary is Far From Retired, 2021 U. ILL. L. REV. ONLINE 23 (2021), and Lieutenant Colonel Daniel Maurer, *Cross-Examining Convention: A Hypothetical Test of Pro-Convening Authority Discretion*, ARMY LAW. 67, 69 (Winter 2021).

²¹⁴ Nor is the question of whether the Fifth Amendment’s equal protection principle controls here and applies the unanimity requirement to courts-martial. This interesting argument was the basis for the court-martial trial judge’s decision to instruct the panel that unanimity was required for a conviction, but – as the judge recognized – there is no precedent in either military or civilian appellate courts that clearly support this conclusion of law. See *United States v. Dial*, *supra* note 12.

is the Fifth Amendment’s right to grand jury indictment. As discussed in Part III.B. and C., *supra*, the Court in *Milligan* assumed that the lack of an analogous exception for “cases arising in the land and naval forces” in the Sixth Amendment was no evidence that the Framers intended for courts-martial to have juries as conventionally understood and practiced. The Court inferred instead that it was a mistake and read into the Sixth Amendment this exception, then justified the exception by nearly complete deference to the determination by Congress that panels would simply operate differently than constitutional juries.

It is beyond the scope of this article to discuss what the Framers thought about jury-like entities in courts-martial²¹⁵ and whether the Court’s assumption about their intent made in *Milligan* is actually defensible, or the long history of military tribunals extending back to Swedish King Gustavus Adolphus in the Seventeenth Century.²¹⁶ It is simply sufficient to note that nothing in those constitutional provisions proscribes a *Congressional* determination that unanimity is required for courts-martial panels – indeed, no precedent proscribes a Supreme Court bench from affirmatively applying both the Sixth Amendment and Article III’s jury requirement *in toto*: instead of *carving out* courts-martial, these provisions *necessarily include* them. By reinforcing the judicial character of courts-martial and the Supreme Court’s ultimate jurisdictional authority over the “integrated court-martial system” managed by Article I and Article II authorities, *Ortiz* makes a strong case for doing just that. But we need not go that far for the limited purposes of this article’s main claim: that unanimity among the factfinders should be required to determine a person – soldier or otherwise – guilty of a serious offense, regardless of whether it is an Article I, Article III, or state criminal courtroom, and that Congress has the authority and rule-making responsibility to do so.

*C. Ramos and a Unanimous Panel “Superior to All Suspicion”*²¹⁷

Unlike courts-martial and the efficiency-based justifications for the size and procedures of a panel, non-unanimous juries were both ahistorical and fueled by racial animus: they contradicted common law practice dating to the Fourteenth Century and the norm at the time the Constitution was ratified; they were overtly inspired by a desire to disenfranchise the power of racial minorities selected for jury duty as part of larger schemes of racist Jim Crow-era state laws. Such was the case in Louisiana and Oregon, whose laws (the last two state laws of their kind in the country) were under scrutiny by the Court in *Ramos*.²¹⁸

In its decision, the Court held that the Sixth Amendment’s right to trial by jury means conviction (for “serious offenses”) only upon unanimous voting and that it is incorporated against the States by the Fourteenth Amendment. Justice Gorsuch began his opinion by acknowledging that the text of the Sixth Amendment does not expressly require unanimity, but

²¹⁵ Cf. WINTHROP, *supra* note 13.

²¹⁶ See generally David A. Schlueter, *Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129 (1980); CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016); Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981); WINTHROP, *supra* note 13; Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 Vand. L. Rev. 169 (1953); and Dan Maurer, *Martial Misconduct and Weak Defenses: A History Repeating Itself (Except When it Doesn’t)*, 54 UIC L. REV. 867, 873-91 (2021).

²¹⁷ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769).

²¹⁸ 140 S. Ct. 1390, 1394-97 (2020).

nevertheless “carried with it *some* meaning about the content and requirements of a jury trial.”²¹⁹ By looking, not even closely, at state practice in the late Eighteenth Century, English common law, and legal treatises of the time, it is abundantly clear that the Framers meant for unanimity – an unwritten but widely acknowledged “essential feature” of the jury trial.²²⁰ “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,” Gorsuch wrote for the Court.²²¹

This requirement was also nothing new for the Court’s docket: beginning as early as 1898, the Court recognized unanimity’s constitutional origin, and this recognition has never altered.²²² “There can be no question either that the Sixth Amendment’s unanimity requirement applies to state and federal trials equally,” for the jury trial itself it is “fundamental to the American scheme of justice.”²²³ The Court described and criticized the reasoning in an earlier pair of cases, *Apodeca v. Oregon*²²⁴ and *Johnson v. Louisiana*,²²⁵ that ostensibly permitted Oregon and Louisiana’s ahistorical and marginalized jury voting rules despite clear and long-standing Supreme Court precedent. The “badly fractured set of opinions”²²⁶ in these cases was function of having only four justices believe that the Court’s precedent, Framers’ intentions, and common law meant the Sixth Amendment’s unanimity requirement applied to states, not just the federal government. Four other justices “reframed”²²⁷ the question as whether unanimity served an “important function” any longer and answered in the negative.²²⁸ They performed what the *Ramos* Court later denigrated as a too “skimpy”²²⁹ and “breezy cost-benefit analysis”²³⁰ in which the possibility of lowering the rate of hung juries was given a weighty, and determinative, credit.²³¹ Gorsuch rightly criticizes that analysis for ignoring the possibility that a hung jury reflects not a paralytic symptom of the weakness of juries, but rather a paradigmatic indicator that the jury was doing exactly what it was intended to do: be a full “interposition . . . of the commonsense judgment of a group of laymen between the defendant and the possibility of an overzealous prosecutor.”²³²

When the American people chose to enshrine [the Sixth Amendment] right in the Constitution, they weren’t suggesting fruitful topics for future cost-benefit

²¹⁹ *Id.* at 1395.

²²⁰ *Id.* at 1396.

²²¹ *Id.* at 1397.

²²² *Id.* at 3196-97 (quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898) and *Patton v. United States*, 281 U.S. 276, 288 (1930)).

²²³ *Id.* at 1397 (quoting *Duncan v. Louisiana*, 391 U.S. 145, 148-50 (1968)).

²²⁴ 406 U.S. 404 (1972) (plurality opinion).

²²⁵ 406 U.S. 356 (1972).

²²⁶ 140 S. Ct. at 1397.

²²⁷ *Id.* at 1398.

²²⁸ *Apodeca v. Oregon*, 406 U.S. 404, 410 (1972) (“our inquiry must focus upon the function served by the jury in contemporary society”).

²²⁹ 140 S. Ct. at 1401.

²³⁰ *Id.*

²³¹ *Apodeca*, 406 U.S. at 410-11.

²³² *Ramos*, 140 S. Ct. at 1401 (quoting *Apodeca*, 406 U.S. at 410, which quoted *Williams v. Florida*, 399 U.S. 78, 100 (1970), and *Duncan*, 391 U.S. at 156) (internal quotation marks omitted).

analyses . . . [a]s judges, it is not our role to reassess whether the right to a unanimous jury is “important enough” to retain.²³³

The ninth vote in *Apodeca*, Justice Powell, considered it instead to be a battle of the Amendments: he agreed with the first group that precedent and history determined that unanimity is required by the Sixth Amendment, but that the Fourteenth Amendment did not require incorporating this right against the states.²³⁴ That view of a “watered-down” Fourteenth Amendment, even Powell acknowledged, was explicitly contrary to even recent Court precedent (rejecting this “dual-track” approach to the Fourteenth Amendment), but it buoyed his rationale for supporting the “not-an-important-function” quartet of justices, and led to affirming Mr. Apodeca’s conviction under Oregon’s law.²³⁵

The *Ramos* Court chose to further marginalize *Apodeca* and *Johnson* as “unusual” aberrations. The reasoning in those cases was difficult to justify in light of overwhelming precedent and whose holdings were uncertain in their future applicability. Moreover, even after those fractured opinions, the Court continued to emphasize the “historical need for unanimity.”²³⁶

Though *Ramos* deals with two particular state laws, and incorporation of the Sixth Amendment (and its unanimity requirement) via the Fourteenth Amendment, it is not this aspect of the decision that drives the argument in this article. Rather, as is the case with *Ortiz* described above, it is the Court’s *ratio decidendi*, which Gorsuch emphasized as an “old truth” that recognizes the reasoning of past cases binding on future cases.²³⁷ By affirming the normative qualities of juries (by emphasizing the precedential value of the cases that first and repeatedly recognized those qualities), *Ramos* emphasized the *purpose* of the jury in the criminal courtroom, rather than a “functionalist” *value* of a jury calculated by a cost-benefit analysis (that included nothing more than claims about the likelihood and uneconomical effect of hung juries when unanimous voting is required²³⁸). Quoting Blackstone, the Court reiterated that the jury’s purpose is “to determine the truth of every accusation.”²³⁹ This “truth-determiner” purpose and expectation is fully in accord with historical and contemporary understanding of the jury’s role in criminal trials.²⁴⁰ Moreover, Justice Gorsuch notes that even *Apodeca*’s four justice

²³³ *Id.* at 1402.

²³⁴ *Id.* at 1398-99 (referring to *Johnson*, 406 U.S. at 369 (Powell, J. concurring)).

²³⁵ *Id.* at 1398.

²³⁶ *Id.* at 1399 (internal citations omitted).

²³⁷ *Id.* at 1404.

²³⁸ *Apodeca*, 406 U.S. at 411, n. 5 (citing H. KALVEN H. ZEISEL, *THE AMERICAN JURY* 461 (1966)).

²³⁹ 140 S. Ct. at 1395 (citing 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *343 (1769)).

²⁴⁰ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 6 (2018); GEORGE FLETCHER, *BASIC CONCEPTS IN CRIMINAL LAW* 9 (1998); see also American Bar Association, *Principles of Juries and Jury Trials* (2016) (specifically, the Preamble and Principle 4.b.), https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_jury_principles.pdf; see also 47 Am. Jur. 2d (“jury”) § 2 (“The purpose of a jury is to guard against the exercise of arbitrary power, to make available the common sense [sic] judgment of the community in preference over the professional or biased response of a judge in a case. In both criminal and civil cases, the purpose of a trial by jury is to assure the fair and equitable resolution of factual issues, and in criminal cases a trial by jury serves the additional purpose of preventing oppression by the government”).

“functionalist approach” (which, really, is more aptly a “consequentialist” approach) couldn’t help but describe the jury as the “essential” “interposition” of the community’s sense of right of wrong, after weighing the facts from an unprivileged, non-professional “lay” point of view, against the potential “overzealous” professional prosecutor.²⁴¹ This is a “reliability-of-fact determiner” purpose and expectation, also in accord with the general expectation of juries forming a unified immune response to the pathology of “oppression by government.”²⁴² But it is, ironically, incompatible with the *Apodeca* Court’s notion that (the possibility of) hung juries necessarily render unanimous verdicts unreasonably detrimental to society.²⁴³

Therefore, two questions follow. First, does a court-martial panel – as currently qualified under Article 25, UCMJ – have the same *purpose* as a jury does? If it does not, the import and implications of *Ortiz* (that is, analogizing the purpose and elements of military justice system as a whole to those of conventional state criminal law systems) may lack sufficient force to persuade a reasonable Congress to amend the UCMJ’s verdict rule. However, if a court-martial panel does have the same purpose as a civilian jury, the value that *Ortiz* plays in further “civilianizing” military justice is heightened. Thus, the second question is whether *military necessity*, in fulfilling that purpose, justifies a nonunanimous verdict. If the answer to the second question is no, then judicial deference to an unexplained and unjustified Congressional determination that non-unanimity is worth keeping around is also unwarranted, according to the standard of deference the Court knows well and which it applied in *Middendorf* and *Weiss*. The next section answers the first question in the affirmative; Part IV.E. answers the second question in the negative.

D. Panel Members v. Jurors

²⁴¹ 140 S. Ct. at 1401.

²⁴² *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (quoting and citing BLACKSTONE, *supra* note 211); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968) (“A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government”) and *Singer v. United States*, 380 U.S. 24, 31 (1965) (“The [jury trial] clause was clearly intended to protect the accused from oppression by the Government. . . .”); 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 248 (§ 777) (1833); AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION 439 (2012) (speaking of the implied right to acquit a defendant in the face of actual guilt – jury nullification, Amar writes: “the very point of the jury trial is to ensure that American penal policy, both in gross and in micro, commands broad support among the citizenry”).

²⁴³ But, according to Professor Amar, the increasing diversity of the American population “may well require modification of the Founding ideal of jury unanimity.” *Id.* at 442. Amar argues that the variety of backgrounds among the jurors prior to entering the courtroom inevitably yields a variety of (plausible) disagreements about the facts heard in the courtroom. In fact, he suggests that a jury’s ability to convict with only a supermajority, rather than unanimity, “would give some criminal defendants more protection than they receive under the current regime.” How so? If a jury is cannot reach a verdict because there is an 11-1 vote to acquit, resulting in a “hung jury,” that defendant – who most jurors thought not guilty – could be tried again, which *could* lead to a later second trial and, speculatively, *could* lead to unanimous guilty verdict. In such cases, the defendant was harmed by the unanimity rule. *Id.* He goes on to offer this “principled” argument: “the increased demographic diversity on juries . . . may well entail further necessary adjustment of the Founders’ jury vision . . . [o]nce all [people] are properly included [in a jury] . . . it may be as unrealistic to expect jury unanimity as it is to expect House unanimity or Senate unanimity—or Supreme Court unanimity, for that matter.” *Id.* at 444. However, this sort of effects-based, or results-based, speculation is the of the same nature as the “functionalist” approach used in *Apodeca* and roundly criticized in *Ramos*. It is also unclear to me how a majority-vote based decision-making body (Congress or the Court), enacting new laws or opining on the meaning of them, is in any way analogous to a randomly-selected group of lay people charged with applying extant law to discoverable facts, case-by-case, where the accused’s right to life, liberty, and property hinges on their decisions.

This section asks two questions. First: what, exactly, makes a military panel member in a court-martial different from a juror in a criminal trial in Montana, New Hampshire, Washington, D.C., or any other civilian jurisdiction? Second: are these differences meaningful justifications for non-unanimous findings of guilt in a court-martial.

In *form*, panel members and jurors are quite different species. Where jurors are randomly selected members from a fair cross-section of the community,²⁴⁴ panel members are specifically chosen by a high-ranking authority figure from among the soldiers and officers under his or her command – the same officer who had the discretion to convene a court-martial in the first place.²⁴⁵ Where jurors need not possess any specialized attributes, skills, or background, panel members are specifically chosen by this “court-martial convening authority” for *precisely* those reasons.²⁴⁶ So, for example, in any given civilian petit jury, the defendant might be judged by a software engineer, unemployed grandmother, commercial long-haul truck driver, high school English teacher, pharmaceutical sales representative, mason, interior design consultant, college student, children’s book author, sports writer for the local newspaper, car mechanic, and county government administrative clerk. A court-martial panel, on the other hand, is far more uniform. On that panel, our fictionalized accused Sergeant from Part I will see members from the same profession with much of the same training and many of the same practical and educational experiences of the accused; the only differences being in the rank (and thus professional seniority and responsibility) of the panel member relative to the accused, and that the panel member will usually not come from the same tactical-level unit as the accused.²⁴⁷

But in *purpose*, they are identical. To set the benchmark here, it may be enough to simply restate what the Court has said earlier the “essential feature” of a jury is: “the interposition between the accused and his accuser of the common-sense judgment of a group of laymen, and in the community participation and shared responsibility which results from that group’s determination of guilt or innocence.”²⁴⁸ Though characterized as a “feature” here, it is indistinct from a function or purpose. How is that purpose manifested? Where jurors are charged by judges with listening to all the evidence dispassionately and objectively,²⁴⁹ so too are panel members.²⁵⁰ Where jurors should not have any preconceived ideas or predispositions

²⁴⁴ See *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) (holding that the Sixth Amendment guarantees an impartial jury, which demands a jury drawn from a “representative cross-section of the community”).

²⁴⁵ 10 U.S.C. § 825(e) (Art. 25(e), UCMJ). This remains a controversial provision: see, e.g., David A Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L.J. 1, 35-42 (2017); Major Christopher W. Behan, *Don’t Tug on Superman’s Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003); contra James A. Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91 (2000).

²⁴⁶ 10 U.S.C. § 825(e)(2) (Art. 25(e)(2), UCMJ).

²⁴⁷ *United States v. Gray*, 51 M.J. 1 (C.A.A.F. 1999) (holding that selecting panel members only from outside the accused’s unit was not arbitrary or capricious, even though that qualification is not listed in Article 25).

²⁴⁸ *Williams v. Florida*, 399 U.S. 78, 100 (1970) (holding that there is no constitutional requirement for twelve jurors in a criminal felony trial, affirming a Florida statute that permitted a jury of six).

²⁴⁹ *Ramos*, 140 S. Ct. at 1395 (“[w]herever we might look to determine what the term ‘trial by impartial jury’ meant at the time of the Sixth Amendment’s adoption—whether common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable . . . [the] jury must reach a unanimous verdict in order to convict”).

²⁵⁰ *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) (“[a]s a matter of due process, an accused has a constitutional right as well as a regulatory right, to a fair and impartial panel”); *United States v. Deain*, 17 C.M.R.

about the crime, its punishment, or the defendant,²⁵¹ neither should panel members.²⁵² Where jurors must decide for themselves what admitted evidence is relevant to their decision and how material it is,²⁵³ so too must panel members.²⁵⁴ Indeed, since reliability of factfinding is one of the long-acknowledged reasons behind the Framers’ continuation of the common law jury trial requirement,²⁵⁵ Article 25’s panel member qualification criteria arguably work to *enhance* reliability. Congress demanded that the prospective panel members be screened for those demonstrating a quality required for rational, dispassionate, discernment: judicial temperament. It is the same quality required of a military officer, who is already a member of a state or federal bar, before assigned duty as a military judge to oversee courts-martial proceedings.²⁵⁶

But the comparisons continue still. Where jurors must deliberate in secret,²⁵⁷ so must panel members.²⁵⁸ Where jurors must be free from outside influences that might tamper with their independent judgment,²⁵⁹ so too must panel members be free from “unlawful influence.”²⁶⁰

44, 49 (C.M.A. 1954) (“[f]airness and impartiality on the part of the triers of fact constitute a cornerstone of American justice”); *United States v. Lambert*, 55 M.J. 293, 295 (C.A.A.F. 2001) (“the 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 trial proceedings and the subsequent deliberations”); *see also* R.C.M. 502(a), Discussion (“members . . . should avoid any conduct or communication with the military judge, witnesses, or other trial personnel during the trial which might present an appearance of partiality”); R.C.M. 104 (prohibiting convening authorities and commanders from censuring, reprimanding, or admonishing panel members regarding their findings of fact or sentence, and prohibiting all personnel subject to the UCMJ from influencing or attempting to influence the actions of panel members in reaching a finding or sentence); Article 37, UCMJ (prohibiting “unlawful influence” over members of the court); and *see* R.C.M. 807(b) Discussion (requiring that members of the panel swear an oath: “. . . that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court”).

²⁵¹ U.S. Const. amend. VI; *American Bar Association Principles for Juries and Jury Trials*, Principle 11.B.4. (rev. 2016), at 13.

²⁵² M.C.M. (Part II), *supra* note 17, R.C.M. 807(b)(2), Discussion (describing oath to which panel members are sworn after *voir dire*); R.C.M. 912(f)(1)(M) and (N) (listing partiality and preformed opinions as grounds for disqualification as members).

²⁵³ Fed. R. Evid. 104(e); *compare* M.C.M. (Part III), *supra* note 17, M.R.E. 104(e).

²⁵⁴ M.C.M. (Part II), *supra* note 17, R.C.M. 918(c) (discussing the factfinder’s role in weighing direct and circumstantial evidence).

²⁵⁵ *Williams*, 399 US 78 at 99-103.

²⁵⁶ 10 U.S.C. § 826(b).

²⁵⁷ *Johnson v. Duckworth*, 650 F. 2d 122, 124 (7th Cir. 1981) (quoting *Burch v. Louisiana*, 441 U.S. 130, 138 (1979); for public policy rationales supporting secret deliberations, *see McDonald v. Pless*, 238 U.S. 264, 267 (1915) and *Tanner v. United States*, 483 U.S. 107, 120-21 (1987)).

²⁵⁸ M.C.M. (Part II), *supra* note 17, R.C.M. 921(a) (requiring deliberations in a “closed session” with only panel members present); R.C.M. 922(e) (prohibiting polling the members about their deliberations and voting); *see United States v. Dugan*, 58 M.J. 253 (C.A.A.F. 2003) (discussing need for protecting panel from external inquiry into its deliberative process).

²⁵⁹ *Remmer v. United States*, 347 U.S. 227, 229 (1954).

²⁶⁰ 10 U.S.C. § 837(a) (Art. 37(a), UCMJ); *see United States v. Bess*, 80 M.J. 1 (2020) (explaining relationship between Article 37, Article 25, and the Fifth Amendment).

Where jurors must presume the defendant is innocent until proven guilty beyond a reasonable doubt,²⁶¹ so too must panel members.²⁶²

If the fundamental purposes of the court-martial panel and the civilian petit jury are the same, we might ask whether differences in the *selection* of members and their *qualifications* for their selection are grounds for departing from the uniform civilian consensus that unanimity in finding guilt is both normatively better due process and required for a fair trial. In other words, A jury is not “impartial” *only* because of how its members are selected – rather, as the Court has said, it is a function of their decision-making processes and standards. It follows that if unanimity is part of what makes a jury “impartial,” then it would stand to reason that it does so in a panel as well. Any argument otherwise must be justified on some valid ground – for example, by the “military necessity” in a “separate community” argument articulated in cases like *Parker*, *Middendorf*, and *Weiss*.

So, the question is not “does the *Constitution* demand that court-martial panel findings of guilt be unanimous, like juries?” Rather, if Congress wishes to pin reform to a Supreme Court-established standard, it is simply the test discussed in *Middendorf*: does the beneficent protection afforded by unanimity outweigh the “demands of discipline and duty” that drove Congress to make the kinds of balancing choices it did when enacting the UCMJ and in authorizing the President to dictate much of the procedural rules for courts-martial? This is another way of asking: *does “military necessity” provide Congress sufficient justification for permitting non-unanimous verdicts of guilt?*

E. Article 36, UCMJ, and the “so far as is practicable” Standard for Courts-Martial Rules

As noted earlier in Part III.E., “military necessity” in the context of military justice has come to mean a case-by-case assessment of whether “factors militating in favor of [insert the due process norm under debate] are so extraordinarily weighty as to overcome the balance struck by Congress.” The dilemma, of course, is determining by what standard of measurement we are to do the weighing. One way to approximate what the military (and Congress) means by military necessity, in actual military justice practice, is to adopt the “so far as is practicable” standard imposed on the President’s rule-making authority by Congress in the UCMJ. This standard says:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, *so far as he considers practicable*, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, except as provided in chapter 47A of this title, be contrary to or inconsistent with this chapter.²⁶³

²⁶¹ *Coffin v. United States*, 156 U.S. 432 (1895); *In re Winship*, 397 U.S. 358 (1970).

²⁶² 10 U.S.C. § 51(c); M.C.M. (Part II), *supra* note 17, R.C.M. 918(c); R.C.M. 920(e)(5)(A); *see United States v. Philips*, 70 M.J. 161 (C.A.A.F. 2011).

²⁶³ 10 U.S.C. § 836(a) (Art. 36(a), UCMJ) (emphasis added).

The presidentially-sanctioned rule regarding panel voting,²⁶⁴ it should be remembered, is only derived from Congress’s explicit instruction that a finding of guilty requires at least three-fourths of the panel.²⁶⁵ Nevertheless, current judicial interpretation of the Article 36 standard is potentially instructive for what – legally – is or could be considered a “military necessity,” and therefore helpful for Congress when considering whether to jettison the non-unanimity rule before the Supreme Court (likely) finds the current abnormal practice unconstitutional under *Ramos*.

This standard is chiefly explained as “the presence of a unique military concern” that could induce a president to depart from the norm of federal practice because that norm is “impracticable.” In *United States v. Kohlbeke*,²⁶⁶ the Court of Appeals for the Armed Forces confronted a defense claim that the military trial judge misapplied Military Rule of Evidence 707, a presidentially-promulgated rule under his authority from Article 36, UCMJ. That rule of evidence says:

the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.²⁶⁷

The judge construed this Rule to mean that any reference to the circumstances of the polygraph offered to explain the motivation and reasons for a later confession was inadmissible.²⁶⁸ The Court disagreed, holding that the normal rules of “statutory construction” do not demand the trial judge’s restrictive interpretation, and that no such interpretation was applied in federal courts. The Court also noted that an earlier case at the Supreme Court held that M.R.E. 707’s per se ban on introducing the results of a polygraph, despite not having a parallel rule in the Federal Rules of Evidence or Federal Rules of Criminal Procedure, was not an impermissible Sixth Amendment violation. In that case, *United States v. Scheffer*,²⁶⁹ the Court determined that the presidentially-promulgated rule was neither “an arbitrary nor a disproportionate restriction” on the defendant’s rights.²⁷⁰ Therefore, the insurance against making such a negative restriction, according to *Kohlbeke*’s reading of *Scheffer*, was being able to articulate the “presence of a unique military concern [that] could make following the federal practice . . . impracticable and justify a divergent rule.”²⁷¹ So, this suggests two prongs of a standard, both of which are required:

- (1) a generalizable military-related problem that is distinct from concerns commonly afflicting civilian modes of justice, that
- (2) makes the specific application of the Constitutional protection impractical in all potential courts-martial.

²⁶⁴ M.C.M. (Part II), *supra* note 17, R.C.M. 921(c)(2)-(3).

²⁶⁵ 10 U.S.C. § 852(a)(3) (Art. 52(a)(3), UCMJ).

²⁶⁶ 78 M.J. 326 (C.A.A.F. 2019).

²⁶⁷ M.C.M. (Part III), *supra* note 17, M.R.E. 707.

²⁶⁸ *Kohlbeke*, 78 M.J. at 329.

²⁶⁹ 523 U.S. 303 (1998).

²⁷⁰ *Scheffer*, 523 U.S. at 312.

²⁷¹ *Kohlbeke*, 78 M.J. at 333.

It is not difficult to imagine that an efficiency-based argument similar to the one the government made in *Middendorf* can be made to justify nonunanimous panel decisions. In other words, there might be an articulable “unique military concern” regarding verdict unanimity’s practicability that could render non-unanimity a “military necessity” in courts-martial. The panel members were selected for their duty based on a determination that they are “best qualified” (holding the virtues enumerated in the UCMJ²⁷²), which usually means they were drawn from positions of authority and responsibility (they would not have been assigned those positions otherwise).²⁷³ In their normal suite of duties and responsibilities, these servicemember have missions to plan, operations to execute, and organizations to lead. From this point of view, a protracted dispute within the panel over a fundamental question of whether the charge was proven beyond a reasonable doubt of course prevents those panel members from returning to their normal duties as quickly as possible after trial and increases the chances of a deadlocked panel.²⁷⁴

One can imagine that argument would continue: not only would this internal debate risk keeping leaders from their units, non-consensus would risk sending servicemembers who were “probably guilty” back to those units, acquitted of the charges. Surely, this is a principled, non-arbitrary justification – even if it is only speculative (neither Congress nor the President have articulated *any* justification for the rule). But in order to be such a “unique military concern” – a military necessity – that renders the constitutional norm “impracticable,” it must not only be non-arbitrary, but must also not be a “disproportionate restriction” of the individual’s constitutional right. The courts offer no test in this context, other than what was announced in *Middendorf*: “factors militating in favor of [insert the due process norm under debate] are so extraordinarily weighty as to overcome the balance struck by Congress.”²⁷⁵

Viewing unanimous guilty verdicts as impracticable may be perfectly acceptable under two conditions. First, *if* the data reveals that – in actual courts-martial – waiting on unanimous determinations of guilt creates real-world delay in mission accomplishment. Of course, no such data exists. The second condition would be *if* we also still accept all the premises and conclusions tacitly adopted or explicitly stated in *Parker v. Levy*’s categorical partition of military and civilian justice. Indeed, this military necessity test accords well with the general, long-standing “principle that all military action must, as far as practicable, be summary, final and conclusive.”²⁷⁶ Such a maxim would normally be deployed in reference to tactical actions on battlefields where swift obedience to orders by individuals, acting as a singular cohesive team, in

²⁷² 10 U.S.C. §825(e)(2) (“by reason of age, education, training, experience, length of service, and judicial temperament”).

²⁷³ These qualifications are indicia of “competency,” and competency to impartially judge a set of facts in light of legal prohibitions and rules is generally thought, within the military at least, to be analogous to competency in military leadership and affairs generally. UNITED STATES DEP’T OF DEFENSE, JOINT SERVICE COMMITTEE ON MILITARY JUSTICE, REPORT ON THE SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL 46 (1999).

²⁷⁴ See Monea, *supra* note 7, at 70; Nancy Montgomery, *Supreme Court decision on unanimous jury verdicts leaves military out*, STARS AND STRIPES, <https://www.stripes.com/news/supreme-court-decision-on-unanimous-jury-verdicts-leaves-military-out-1.627112> (quoting a former Air Force lawyer, in response to the *Ramos* decision, that “Not requiring all members to agree as to guilt or innocence eliminates the deadlocked juries and mistrials that occur in civilian courts when the jury is not unanimous”).

²⁷⁵ See *supra* Part III.E. (notes 175-86 and accompanying text).

²⁷⁶ WINTHROP, *supra* note 13, at 173.

the face of life-threatening enemy contact is thought by military leaders to make the difference between mission success and failure.²⁷⁷ But Colonel William Winthrop – the “Blackstone of Military Law”²⁷⁸ – believed it applied just as meaningfully to the court-martial panel members who, “in their decision and action must be and appear as a unit.”²⁷⁹ Individual disagreements or dissents are submerged by the will of the majority, representing the “court” as a whole. However, at least some of those conclusions are now at least suspect in view of the Court’s most recent exposition on the nature and character of modern military justice in *Ortiz*.

CONCLUSION

Requiring unanimous findings of guilt by court-martial panels would not only *not* violate core assumptions about “military necessity,” it would dock military law’s procedure more firmly within military law’s purpose (as explained by *Ortiz* and illustrated by the myriad other due process protections mirroring civilian justice described in Part I above) and make the rule on unanimous verdicts, lauded as fundamental or the standard model for judicial factfinders by the Court in *Ramos*, actually unanimous in application.

By failing to address and evolve the findings procedure for courts-martial panels, Congress in a very real sense is shifting a burden away from where it ought to be. It is not a matter of asking: why should the military depart from its historical practice of non-unanimous panels? That places the burden, unfairly, on a hypothetical accused servicemember to defend his desire for a due process protection that – in all other circumstances – is unquestionable. It is instead a matter of asking: *why should the military depart from common law civilian practice of unanimous juries?* The burden of persuasion ought to be on Congress to articulate why it is reasonable, under some “military necessity” argument, for deviating from this due process convention. It is then the Court’s responsibility to ensure that this reason withstands the very minimal scrutiny suggested by *Middendorf* and *Weiss*. Because *Ortiz* can be read as suggesting that military necessity is only collateral to the real aims of military law, and that this law already mirrors most of what is fundamentally important about civilian criminal trials, it is not a sufficient excuse for Congressional inaction to say that the Sixth Amendment does not apply. As the value of unanimity is considered, under *Ramos*, to be extremely weighty, this anachronistic rule of court-martial procedure can and should be voted out, conforming military practice to the rest of the states and federal government.

²⁷⁷ LIEUTENANT COLONEL DAVE GROSSMAN, ON KILLING: THE PSYCHOLOGICAL COST TO LEARNING TO KILL IN WAR AND SOCIETY 5–17 (1995); Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 1995 ARMY L. 27, 30 (1995); C.E. BRAND, ROMAN MILITARY LAW xi-xii (1968) (“[I]ndividual well-being becomes secondary to the group efficiency of the fighting unit . . . The nature of war is essentially such that the military duty of the individual soldier must often require him to act in a way that is highly inconsistent with his fundamental instinct of self-preservation.”); Gen. William C. Westmoreland, *Military Justice—A Commander’s Viewpoint*, 10 AM. CRIM. L. REV. 5, 5 (1970) (“Discipline conditions the soldier to perform his military duty . . . in a way that is highly inconsistent with his basic instinct for self-preservation.”).

²⁷⁸ *Reid*, 354 U.S. at 19, n. 38. For his biography, see JOSHUA E. KASTENBERG, THE BLACKSTONE OF MILITARY LAW (2009).

²⁷⁹ WINTHROP, *supra* note 13, at 173.