

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

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ABSTRACT

The Supreme Court's 2020 landmark decision in Ramos v. Louisiana 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 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.

This Article suggests that Congress can and should amend the Uniform Code of Military Justice ("UCMJ") to conform how its jury-like "panels" determine

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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. 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	129
I. A "TOTALLY DIFFERENT SYSTEM OF JURISPRUDENCE"?	132
II. RISING CONTRADICTIONS	137
III. JUDICIAL DEFERENCE TO MILITARY DISTINCTIVENESS: PLACING THE EMPHASIS ON "MILITARY" IN MILITARY JUSTICE	142
A. <i>A Short History of the Military's Panel Member Deliberation Rule</i>	142
B. <i>Ex Parte Quirin and Ex Parte Milligan Military Commission Dicta Became Doctrine</i>	145
C. <i>The Loose Logic of Ex Parte Milligan</i>	153
D. <i>Parker v. Levy and the Court's Validation of the Military Necessity Rationale</i>	157
E. <i>Middendorf's Due Process Balancing Test and Weiss's Standard of Deference</i>	159
IV. THE CHANGING CHARACTER OF COURTS-MARTIAL: PLACING THE EMPHASIS ON "JUSTICE" IN MILITARY JUSTICE	162
A. <i>Ortiz and the "Judicial Character" of Courts-Martial</i>	162
B. <i>Does Ortiz Imply Article III and Sixth Amendment Arguments are No Longer Valid?</i>	166
C. <i>Ramos and a Unanimous Panel "Superior to All Suspicion"</i>	167
D. <i>Panel Members v. Jurors</i>	171
E. <i>Article 36, UCMJ, and the "so far as is practicable" Standard for Courts-Martial Rules</i>	173
CONCLUSION	177

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.¹ Criticizing the way in which the military had, to that point, eluded evolving social and judicial conceptions of fundamental fairness, the scholar wrote: “[T]he stakes in the matter are far too important to be won or lost by arguments or concepts that have become outmoded.”² His argument never persuaded Congress, or the United States 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 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.³ 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*⁴ and the Court’s recent description of the “purpose” of military law and its function as analogous to state criminal codes in *Ortiz v. United States*,⁵ 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,⁶ 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.

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

2. *Id.* at 258.

3. See *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“This Court has long recognized that the military is, by necessity, a specialized society.”); *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.”); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955) (“[M]ilitary tribunals have not been and probably can never be constituted in such way that they have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.”). 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). *Carter* addressed the president’s power to review and, at his discretion, approve the court-martial findings and sentence of dismissal of an officer; and affirmed the lower court’s discharge of the petitioner’s writ of habeas corpus, challenging the validity of his sentence. 183 U.S. at 386–390, 401.

4. 140 S. Ct. 1390 (2020).

5. 138 S. Ct. 2165 (2018).

6. Larkin, *supra* note 1, at 258.

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 have nothing to do with the rights of service members at courts-martial. Rather, those cases deal with trials of civilians and unlawful enemy combatants 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 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 service members must be found guilty only by a unanimous panel.¹² All this should lead us

7. E.g., Nino C. Monea, *Reforming Military Juries in the Wake of Ramos v. Louisiana*, LXVI NAV. L. REV. 67, 70–71 (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 Guilty Still An Issue?*, 1986 ARMY LAW. 57 (1986); cf. Robert F. Holland, *Improving Criminal Jury Verdicts: Learning From the Court-Martial*, 97 J. CRIM. L. & CRIMINOLOGY 101 (2006) (arguing that civilian systems adopt the non-unanimous rule from courts-martial).

9. See *United States v. McClain*, 22 M.J. 124, 128 (C.A.A.F. 1986) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 18 (1866), for the proposition that “courts-martial have never been considered subject to the jury-trial demands of the Constitution”); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) (citing *Ex parte Quirin*, 317 U.S. 1, 39 (1942), for the proposition that “there is no Sixth Amendment right to trial by jury” for military cases). As discussed *infra* Part III.B., there is room to debate whether *Ex parte Quirin* can be interpreted so broadly.

10. See *Ortiz v. United States*, 138 S. Ct. 2165, 2179–80 (2018) (explaining “not every military tribunal is alike” and distinguishing a commission from “the court-martial system” (citing *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863))).

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 163–94 (Eugene R. Fidell & Dwight Sullivan eds., 2002); Eugene R. Fidell, *Military Justice Since 1950: A Pyrrhic Victory?*, J. NAT’L. SEC. L. & POL’Y (Apr. 29, 2021), <https://jnsrlp.com/2021/04/29/military-justice-since-1950-a-pyrrhic-victory/>.

12. *United States v. Dial*, No. APO AE 09752, at 1 (Army Trial Judiciary, 5th Jud. Cir. Jan. 3, 2022), http://www.caaflg.org/uploads/1/3/2/3/132385649/us_v_dial_-_ruling_-_unanimous_verdict.pdf; see also John Vandiver, *Sexual assault trial postponed over Army judge’s unanimous verdict order*, STARS & STRIPES (Jan. 6, 2022), <https://www.stripes.com/branches/army/2022-01-06/army-judge-pritchard-kaiserslautern-unanimous-verdict-4200701.html>. This decision was reversed. See *United States v. Pritchard*, 82 M.J. 686, 694 (A. Ct. Crim. App. 2022). On June 10, 2022, the Army Court of Criminal Appeals (ACCA) granted the government’s petition for a writ of prohibition, ordered the case back to the trial court, and precluded the trial judge from advising the panel that a guilty verdict required unanimity per *Ramos*. *Id.* The ACCA held that the three-fourths voting requirement was no equal protection violation because (1) military and civilian defendants are not “similarly situated” to begin with; (2) even if similarly situated, Congress has a “rational basis” for its determination that non-unanimous verdicts should be permitted: (a) the ever-present risk of “unlawful command influence” is increased

to conclude that the question is 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 granting commanders significant prosecutorial and judicial-like authority);¹³ 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 a persuasive reason for Congress not to amend this anachronistic piece of the UCMJ.¹⁵

This Article deliberately avoids litigating whether the Sixth Amendment directly, or the Fifth Amendment's due process or equal protection principles indirectly, mean courts-martial non-unanimous guilty verdicts are unconstitutional. Instead, this article beats a new path by analyzing whether Congress—using its

the longer the panel sits in deliberation and (b) military efficiency. *Id.* at 691–694 (“[D]eliberations towards unanimous verdicts are likely to take longer to achieve, thereby keeping participants from their military duties for greater periods of time.”).

13. See *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (“[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.”); see also *In re Grimley*, 137 U.S. 147, 153 (1890) (“[The Army’s] law is that of obedience.”); accord GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 13 (3d ed. 1913); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS (2d 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. See generally Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (current version codified at 10 U.S.C. §§ 801–946a).

“make rules for the government and regulation of the land and naval forces” power¹⁶—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”?¹⁷

Imagine that you are a thirty-year-old Army staff sergeant, presently serving as a squad leader in a field artillery battery, part of a combat division stationed at Fort Hood in Texas. Imagine you were 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.¹⁸ Thus, you were charged with violating Article 118 of the UCMJ, and your case was referred to general court-martial, tried in the courthouse on Fort Hood.¹⁹ Now that the court-martial’s prosecutor²⁰ and your defense attorney have rested their cases, and the judge has instructed the panel members on the applicable law²¹ and their responsibilities, you and your family anxiously await 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 those of civilian criminal courts.²² No longer can officers summarily punish soldiers—physically or

16. U.S. CONST. art. I, § 8, cl. 14.

17. *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL’S CORPS* 87 (1975) (quoting William Tecumseh Sherman’s testimony before a Congressional committee in 1879).

18. *See* Uniform Code of Military Justice art. 2, 10 U.S.C. § 802(a) (identifying the “persons . . . subject to” the Uniform Code of Military Justice); DEP’T OF DEF., *MANUAL FOR COURTS-MARTIAL UNITED STATES* pt. II, R.C.M. 201(a)(2) (2019) [hereinafter M.C.M.] (“The UCMJ applies in all places.”); *Solorio v. United States*, 483 U.S. 435, 449–51 (1987).

19. Any offense listed in Articles 77–134 of the UCMJ is triable by courts-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.

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

21. Murder is prohibited by Article 118 of the Uniform Code of Military Justice. 10 U.S.C. § 918; *see also* M.C.M., *supra* note 18, pt. IV, art. 118(b) (describing the elements of the offense and explaining its terms and maximum punishment).

22. The Manual for Courts-Martial contains the Rules for Courts-Martial (“R.C.M.”) in Part II, the Military Rules of Evidence (“M.R.E.”) in Part III, the Punitive Articles in Part IV, and the Nonjudicial Punishment

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 trial, or approve and order executed a death sentence within days of a capital conviction before any semblance of an appellate review.²³

Your “civilianized”²⁴ 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);²⁵ 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);²⁶ and a protection from the chain-of-command’s unlawful pre-trial punishment,²⁷ including protection from unjustified pre-trial confinement.²⁸ The prosecution was bound by a speedy-trial clock as well, required to bring you to trial within 120 days of being charged.²⁹ Further restraining the prosecution were rules creating a statute of limitations,³⁰ a prohibition of double

Procedures in Part V. M.C.M., *supra* note 18, pt. I; see 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, 9–20 (1987) (discussing the development of the American military justice system).

23. See Fred L. Borch III, “*The Largest Murder Trial in the History of the United States*”: *The Houston Riots Courts-Martial of 1917*, 2011 ARMY LAW. 1, 2–3 (2011); Dan Maurer, *Martial Misconduct and Weak Defenses: A History Repeating Itself (Except When it Doesn’t)*, 54 UIC L. REV. 867, 894–99 (2021) [hereinafter Maurer, *Martial Misconduct*].

24. 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, 2 n.4 (2020).

25. See Uniform Code of Military Justice art. 31(a), 10 U.S.C. § 831(a) (“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, 302 (C.A.A.F. 2016) (describing the relationship between Article 31 and the Fifth Amendment).

26. See M.C.M., *supra* note 18, pt. III, M.R.E. 311–17; see also *United States v. Hernandez*, 81 M.J. 432, 437–38 (C.A.A.F. 2021) (describing the relationship between Military Rules of Evidence 311–317 and the Fourth Amendment).

27. See Uniform Code of Military Justice art. 13, 10 U.S.C. § 813.

28. See M.C.M., *supra* note 18, pt. II, R.C.M. 305(d); see also *United States v. Regan*, 62 M.J. 299, 300, 301–02 (C.A.A.F. 2006) (explaining conditions that qualify as pre-trial confinement under Rules for Courts-Martial 305).

29. See M.C.M., *supra* note 18, pt. II, R.C.M. 707(a); see also *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (explaining the relationship between Rules for Courts-Martial 707 and the Sixth Amendment).

30. See Uniform Code of Military Justice art. 43, 10 U.S.C. § 843; see also *United States v. Briggs*, 141 S. Ct. 467, 473–74 (2020) (finding the statute of limitations under the UCMJ to apply to a prosecution for rape under UCMJ Article 43).

jeopardy,³¹ and protections from both multiplicitous charging³² and an “unreasonable multiplication of charges.”³³

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.³⁴ Before trial even commenced, you were given full opportunity to consult with and engage the services of a licensed defense counsel. In fact, 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.³⁵ That attorney was subject to the rules of professional responsibility of the state in which she was licensed,³⁶ the Army Judge Advocate General’s Corps regulation on professional responsibility,³⁷ and constitutional requirements for effective, competent assistance of counsel.³⁸ 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.³⁹

You were provided an opportunity to plead guilty, which you elected not to do;⁴⁰ and you were provided an opportunity to have your case decided by a neutral, fully-qualified judge⁴¹ alone, rather than jury-like panel. You chose the latter.⁴²

31. See Uniform Code of Military Justice art. 44, 10 U.S.C. § 844; see also *United States v. Rice*, 80 M.J. 36, 40, 44 (C.A.A.F. 2020) (finding “Article 44, UCMJ, and the Fifth Amendment’s Double Jeopardy Clause” bars prosecution of a UCMJ offense which “wholly encompass[ed]” a civilian offense).

32. See *United States v. Cardenas*, 80 M.J. 420, 424 (C.A.A.F. 2021).

33. See *United States v. Quiroz*, 55 M.J. 334, 337–38 (C.A.A.F. 2001).

34. See Uniform Code of Military Justice art. 32, 34, 10 U.S.C. §§ 832, 834. 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. 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). See *id.* § 834. 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.

35. See *id.* § 827(b) (describing qualifications of defense counsel); *id.* § 838(a) (describing duties of defense counsel); see also *United States v. Watkins*, 80 M.J. 253, 258 (C.A.A.F. 2020) (describing the relationship between Article 38 and the Sixth Amendment).

36. See Uniform Code of Military Justice art. 27(b), 10 U.S.C. § 827(b).

37. See DEP’T OF THE ARMY, ARMY REG. 27–26: RULES OF PROFESSIONAL CONDUCT FOR LAWYERS 1 (2018).

38. See *United States v. Furth*, 81 M.J. 114, 117 (C.A.A.F. 2021) (applying “ineffective assistance of counsel” framework from *Strickland v. Washington*, 466 U.S. 668 (1984)).

39. See Uniform Code of Military Justice art. 46, 10 U.S.C. § 846; M.C.M., *supra* note 18, pt. II, R.C.M. 701 (discovery processes); *id.* R.C.M. 906(b)(7), (13) (motions for appropriate relief regarding discovery and admissibility); see also *United States v. Hernandez*, 81 M.J. 432, 440–41 (2021) (discussing Military Rules of Evidence 311(a) (citing *United States v. Perkins*, 78 M.J. 381, 386 (C.A.A.F. 2019))).

40. See Uniform Code of Military Justice art. 45, 10 U.S.C. § 845 (“[A] plea of guilty [can be] made by the accused and accepted by the military judge,” except where there is a charge “for which the death penalty is mandatory”).

41. *Id.* § 826 (describing qualifications and duties of military judges).

42. See *id.* § 825 (describing selection and qualifications of panel members); see also *United States v. Moreno*, 63 M.J. 129, 132 (C.A.A.F. 2006) (explaining a service member’s right to a trial by “qualified, properly

Before the prosecution called its first witness, your counsel conducted an effective *voir dire* and several members were excused for cause.⁴³ You were later afforded the right to confront adverse witnesses against you,⁴⁴ to call experts on your behalf,⁴⁵ and to raise alternative defenses—you claimed obedience to orders, justification, and self-defense.⁴⁶ 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,”⁴⁷ and it had to prove that your defenses do not exist by the same high standard.⁴⁸ You also know that, if found guilty, you have the right to argue that the government abridged some statutory or constitutional right during your prosecution or sentencing through an appellate system that ultimately culminates at the U.S. Supreme Court.⁴⁹

You have been accused of a capital offense, but the prosecution has elected not to pursue this matter as a capital crime and, therefore, will not ask for the death penalty if the panel returns a verdict of guilty.⁵⁰ The Court-Martial Convening Authority—the two-star Major General commanding the First Cavalry Division to which you are assigned⁵¹—decided not to refer the case “capital” after consulting

selected, and impartial” members). *But see* United States v. Riesbeck, 77 M.J. 154, 162–63 (C.A.A.F. 2018) (explaining “[a] military defendant has a right both to ‘members who are fair and impartial,’” but not to “a representative cross section of the military community” (quoting United States v. Kirkland, 53 M.J. 22, 24 (C.A.A.F. 2000))); United States v. McClain, 22 M.J. 124, 128–29 (C.M.A. 1986) (distinguishing the Sixth Amendment right to a jury from the Article 25 right to a panel).

43. *See* M.C.M., *supra* note 18, pt. II, R.C.M. 912(d), (f)(1) (providing for examination of members and listing fourteen grounds for removing a member “for cause”).

44. *See* United States v. Baas, 80 M.J. 114, 120–21 (C.A.A.F. 2020) (discussing the admissibility of testimony of a witness absent from trial under the Sixth Amendment to courts-martial.).

45. *See* M.C.M., *supra* note 18, pt. II, R.C.M. 703(a), (d); *see also* United States v. Blazier, 69 M.J. 218, 225 n.6 (C.A.A.F. 2010) (explaining the Sixth Amendment, Article 46, and Rules for Courts-Martial 703 support the right of the defendant to the compulsory process of witnesses who can provide relevant and necessary evidence).

46. *See* M.C.M., *supra* note 18, pt. II, R.C.M. 916(c)–(e).

47. *See id.* R.C.M. 905(c), 920(e)(5); *see also* United States v. Prather, 69 M.J. 338, 342 (C.A.A.F. 2011) (explaining the the Due Process Clause requires proof beyond a reasonable doubt for conviction in courts-martial); United States v. Neal, 68 M.J. 289, 298–99 (C.A.A.F. 2010) (same).

48. *See* M.C.M., *supra* note 18, pt. II, R.C.M. 916(b)(1).

49. *See* Uniform Code of Military Justice art. 66, 10 U.S.C. § 866 (establishing intermediate “Courts of Criminal Appeals”); *id.* § 867(a) (establishing review by the U.S. Court of Appeals for the Armed Forces); *id.* § 867a (establishing limited certiorari review by the U.S. Supreme Court); 28 U.S.C. § 1259 (same). *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 1 (May 31, 2021), https://www.yalelawjournal.org/pdf/FidellFissellCaveFinal_oryo61do.pdf (criticizing the narrow jurisdiction Congress has afforded the Supreme Court over military justice).

50. *See* M.C.M., *supra* note 18, pt. II, R.C.M. 103(3)–(4); *id.* R.C.M. 201(f)(1)(A)(iii); *id.* R.C.M. 1004.

51. *See* Uniform Code of Military Justice art. 22(a), 10 U.S.C. § 822(a)(5) (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

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*.⁵²

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 panel),⁵³ 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 the UCMJ, this is sufficient for a conviction; if just one more member had voted "not guilty," you would have been acquitted.⁵⁴ Under *Ramos*, and in every state and federal courthouse across the country, two "no" votes would release you from government custody though a hung jury and declaration of a mistrial. 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. This has striking implications: one of which is that your civilian (alleged) accomplice—if you had one—would have been tried for murder, the same offense, in Texas. If only three-fourths of that jury believed the facts were proven against your conspirator beyond a reasonable doubt, they would not be facing a sentencing hearing. Even more jarring, perhaps, is that if you had been tried by civilian court in Texas first and released because only three-fourths of the jury would vote to convict, or even if unanimously acquitted (one hundred percent of the jury voted "not guilty"), double jeopardy would not have prevented a *subsequent* court-martial for the same offense in which six of eight "guilty" votes is just good enough.⁵⁵

(Dec. 30, 2021) [hereinafter Maurer, *FY 22 NDAA*], <https://www.lawfareblog.com/what-fy-2022-ndaa-does-and-does-not-do-military-justice>.

52. See M.C.M., *supra* note 18, app. 2.1 & accompanying analysis.

53. See M.C.M., *supra* note 18, pt. II, R.C.M. 502(b).

54. See M.C.M., *supra* note 18, pt. II, R.C.M. 921(c)(3). A court-martial acquittal triggers double jeopardy protection, see Uniform Code of Military Justice art. 44, 10 U.S.C. § 844, and is distinct from "mistrials," disused in Rules for Court-Martials 915, see M.C.M., *supra* note 18, pt. II, R.C.M. 915.

55. I am indebted to Lieutenant Colonel W. Jeremy Stephens, Judge Advocate, U.S. Army, for drawing my attention to these additional implications. For "former jeopardy" implications for courts-martial under the "dual sovereign doctrine," see *United States v. Schneider*, 38 M.J. 387, 390–92 (C.M.A. 1993) (upholding conviction of a soldier who was acquitted for conduct in Missouri but subsequently found guilty for the same conduct by general court-martial); and see also *Gamble v. United States*, 139 S. Ct. 1960, 1980 (2019) (explaining and upholding the dual sovereignty doctrine); and Kelsi B. White, *Gamble v. United States: Military Justice in Absence of Double Jeopardy*, 47 MITCHELL HAMLINE L. REV. 162, 165 (2020) (arguing for pragmatic solutions to limit the prevalence of successive prosecutions in the dual sovereignty regime).

II. RISING CONTRADICTIONS

Under the UCMJ and the criminal law it creates and applies to a discrete population based on their employment status,⁵⁶ Congress and presidents have long felt that a unanimous panel was not necessary or warranted, just as an “impartial jury” itself was not required for such courts-martial, apparently excepted from the guarantee in the Sixth Amendment.⁵⁷ 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.⁵⁸ This is so despite the fact that the Supreme Court’s recent decision that the Constitution demands unanimous guilty verdicts in criminal trials;⁵⁹ despite the fact that other federal criminal jurisdictions already require it;⁶⁰ despite the fact that, in form and function, the court-martial system has “increasingly come to resemble ordinary civilian courts”;⁶¹ 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.”⁶²

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.⁶³ But this “military necessity” is as vague and mutable as it seems. Over time, several theories (briefly recounted below) of “separateness” have given the Court sufficient grounds to validate either the basic distinction between military and civilian justice or to comment approvingly on specific attributes unique to the former and repugnant to the latter.⁶⁴

56. Uniform Code of Military Justice art. 2, 10 U.S.C. § 802; see *Solorio v. United States*, 483 U.S. 435, 449–51 (1987) (ending a “service connect[ed]” test for court-martial jurisdiction and holding jurisdiction to exist based solely on a person’s status within the military, rather than the nature of the misconduct).

57. See sources cited *supra* note 42.

58. Uniform Code of Military Justice art. 52(a)(3), (b)(2), 10 U.S.C. § 852(a)(3), (b)(2); M.C.M., *supra* note 18, pt. II, 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. *Id.*

59. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1397 (2020).

60. Fed. R. Crim. P. 31(a).

61. Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 941 (2015) [hereinafter Vladeck, *Military Courts*].

62. Uniform Code of Military Justice art. 36(a), 10 U.S.C. § 836(a); see discussion *infra* Part IV.E.

63. See *infra* Part III.D.; see also 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, 7 (1962).

64. See *Ex parte Reed*, 100 U.S. 13, 23 (1879) (explaining that the court-martial “is the organism provided by law and clothed with the duty of administering justice in this class of cases . . . [i]ts 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

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.⁶⁵ 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,⁶⁶ this theory has dimmed in relevance.

The second theory holds that there are innate experiential and philosophical differences between civilians and those charged with maintaining standards of discipline in the military, and so civilians—whether jurors or judges—should keep their distance or, to use a military aphorism, stay in their lane.⁶⁷ But even this argument has been inconsistent at the Court. Not long after Congress enacted the first version of the UCMJ, the Court opined:

[O]ther 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

between civilian and military jurisdiction has always been maintained.”); *Runkle v. United States*, 122 U.S. 543, 555–56 (1887) (“A court-martial organized under the laws of the United States . . . is called into existence for a special purpose and to perform a particular duty.”); *Swaim v. United States*, 166 U.S. 553, 555 (1897) (“[T]he rules and articles of war” have been “confided by the laws of the United States” to courts-martials “from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrate or civil courts.” (citing *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82 (1858))); *Burns v. Wilson*, 346 U.S. 137, 140–42 (1953) (“Military law . . . exists separate and apart from the law which governs our federal judicial establishment.”).

65. See *In re Grimley*, 137 U.S. 147, 153 (1890); *Carter v. McLaughry*, 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); JOINT SERV. COMM. ON MIL. JUST., REPORT OF THE JOINT SERVICE SUBCOMMITTEE: PROSECUTORIAL AUTHORITY STUDY 18–19, 92 (2020).

66. See *Vladeck, Military Courts*, *supra* note 61, at 948–49.

67. 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. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interfere in judicial matters.”); *Burns*, 346 U.S. at 144; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) (explaining “military personnel . . . may be especially competent to try soldiers for infractions of military rules”); *Reid v. Covert*, 354 U.S. 1, 39 (1957). The Court stated:

Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice In part, this is attributable to the inherent differences in values and attitudes that separate the military establishment from civilian society.

Reid, 354 U.S. at 38–39 (footnote omitted); see also *Solorio v. United States*, 483 U.S. 435, 448 (1987) (recognizing “[t]he notion that civil courts are ‘ill equipped’ to establish policies regarding matters of military concern” (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983))); Arthur W. Lane, *The Attainment of Military Discipline*, 55 J. MIL. SERV. INST. U.S. 1, 15 (1914). Lane stated:

[E]very 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. Punishment has three objects: retribution, deterrence and reform [but] [d]eterrence is the primary object.

Id.

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.⁶⁸

And as described in *infra* Part IV.A., 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”—the idea that legal standards, norms, and duties for the military community must depart from those of civilian communities.⁶⁹ But, as described in *supra* Part I, and as various studies of the “civilianization” of military law over time argue,⁷⁰ such departures are increasingly marginalized, have stopped altogether, or are based on flat misunderstanding of the facts and rules.⁷¹ The grand jury indictment and trial by petit jury of a fair

68. *Noyd v. Bond*, 395 U.S. 683, 694 (1969).

69. *See, e.g., Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (“The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts . . .”); *Creary*, 259 U.S. at 343 (“[T]he 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*, 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.”); *Id.* at 149 (Frankfurter, J., writing separately to request reargument) (“The content of due process in civil trials does not control what is due process in military trials.”); *Quarles*, 350 U.S. 11, 15–17 (1955) (explaining that “maintain[ing] discipline is merely incidental to an army’s primary fighting function”); *Parker v. Levy*, 417 U.S. 733, 743 (1974) (“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*, 462 U.S. at 302 (“Congress has . . . established a comprehensive internal system of justice to regulate military life, taking into account the special patterns that define military structure.”); *United States v. Kazmierczak*, 16 C.M.R. 594, 599 (C.M.A. 1967). The *Kazmierczak* court stated:

We start with the fundamental principle that persons 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.

Kazmierczak, 16 C.M.R. at 599.

70. *See generally* 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* 287–309 (John T. Parry & L. Song Richardson eds., 2013) [hereinafter *Vladeck, Civilianization of Military Jurisdiction*].

71. *See* Rachel VanLandingham, *Professional Criminal Prosecution Versus The Siren Song of Command: The Road to Improve Military Justice*, JUST SEC. (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 arguments for retaining court-martial convening authority over major felonies like sexual assault 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).

cross-section of the community, however, remain the significant exceptions to the general trend.⁷²

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”⁷³ 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.⁷⁴ All of them are inherently arguments about what is, in essence, a “military necessity.”

As far back as *Martin v. Mott*⁷⁵ 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 jeopard [sic] the public interests.⁷⁶

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 enforce good order and discipline.⁷⁷ It is not a

72. See Vladeck, *Military Courts*, *supra* note 61, at 950; *United States v. Riesbeck*, 77 M.J. 154, 162–63 (C.A.A.F. 2018) (explaining “[a] military defendant has a right both to ‘members who are fair and impartial,’” but not to “a representative cross section of the military community” (quoting *United States v. Kirkland*, 53 M.J. 22, 24 (C.A.A.F. 2000))).

73. See *Reid v. Covert*, 354 U.S. 1, 39 (1957).

74. See Dan Maurer, *A Logic of Military Justice?*, 53 TEX. TECH L. REV. 669, 707–23 (2021) [hereinafter, Maurer, *Logic of Military Justice*].

75. 25 U.S. 19 (1827).

76. *Id.* at 30.

77. See M.C.M., *supra* note 18, pt. I (identifying three “purposes” of military law, including “efficiency and effectiveness in the military establishment”); *Curry v. Sec’y of the Army*, 595 F.2d 873, 878 (D.C. Cir. 1979). In *Curry*, the court stated:

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

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 . . . [i]ts judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to other legal tribunals.”⁷⁸ Therefore, its “legal cognizance” is over the “exercise of judicial functions.”⁷⁹ In an opinion 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 to pass 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 things, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*.⁸⁰

Yet, the Supreme Court has long subscribed to a theory that the Fifth and Sixth Amendments, read in concert with the 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.⁸¹ 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.⁸² But the reasoning in those cases is, at best, suspect because

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.

Curry, 595 F.2d at 878.

78. *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).

79. *See Smith v. Whitney*, 116 U.S. 167, 176 (1886); *see also Runkle v. United States*, 122 U.S. 543, 556–57 (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”).

80. *Runkle*, 122 U.S. at 558–59.

81. *See infra* Part III.

82. *See Vladeck, Military Courts, supra* note 61, 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*, 165 U.S. 553, 558 (1897) (discussing that the “nature” of the office yields inherent authority to convene general courts-martial, separate and apart from any Congressional authorization to do so); *United States v. Scheffer*, 523 U.S. 303, 307 n.2, 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”).

their premises are now ineluctably outdated or unequivocally wrong.⁸³ 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,⁸⁴ Congress ought to reconsider its reluctance to move military law on this matter. Likewise, now that Congress has enacted a dramatic revision of the UCMJ that removes court-martial convening authority for specific types of serious felonies from non-lawyer commanders,⁸⁵ 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 against rational basis scrutiny (by the courts or, more importantly, by Congress) 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 1776, the number of panel members was fixed at thirteen officers.⁸⁶ 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.⁸⁷ Given the nature of the certain criminal allegations, as in, for example, desertion cases, 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. 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.⁸⁸ So, between the late eighteenth century and 2016, a panel at a general court-martial flexibly consisted of between five and thirteen

83. See Vladeck, *Military Courts*, *supra* note 61, at 952–56 (discussing cases like *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78–80 (1858)). But this theory was repeated in later cases, without debate. See *Kurtz v. Moffitt*, 115 U.S. 487, 500 (1885); *Burns v. Wilson*, 346 U.S. 137, 140 (1953).

84. See *infra* Part IV.A.

85. See Maurer, *FY 22 NDAA*, *supra* note 51.

86. ARTICLES OF WAR OF 1776, § XIV, art. 1.

87. See Monea, *supra* note 7, at 89.

88. See *id.*; Dwight H. Sullivan, *Playing the Numbers: Court-Martial Panel Size and the Military Death Penalty*, 158 MIL. L. REV. 1, 5 & n.18 (1998).

members, at the discretion of the court-martial convening authority⁸⁹ who assigned them.⁹⁰

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.⁹¹ 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).⁹² This remained the rule until 2016 when Congress required three-fourths of the panel members to convict in a general or special court-martial.⁹³

There is no explanation in the military treatises of the time, 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.⁹⁴

89. See WINTHROP, *supra* note 12, at 78. According to William 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." *Id.* 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. *Id.*

90. *Id.* Article 25(e)(2) of the UCMJ describes the qualifications those members must possess, Uniform Code of Military Justice art. 25(e)(2), 10 U.S.C. § 825; 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, 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 HASTINGS 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*, 176 MIL. L. REV. 190 (2003); Bradley J. Huestis, *Anatomy of a Random Court-Martial*, ARMY LAW. 22 (2006).

91. ARTICLES OF WAR of 1775, art. XXXVII; see also DAVIS, *supra* note 13, at 142; SEC'Y OF WAR, A MANUAL FOR COURTS-MARTIAL 46 (1946). 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. See WINTHROP, *supra* note 12, at 377.

92. ARTICLES OF WAR of 1920, art. 43.

93. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000 (amending Uniform Code of Military Justice art. 52, 10 U.S.C. § 852). This rule would not become effective until the beginning of 2019. *Id.*

94. See *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. 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.").

Likewise, requiring *all* of those panel members to agree before they can return to their normal duties—most of which involve the direct command and control of tactical units—would risk prolonged deliberations and delay these key leaders’ return to duty. Plausible it may be but not persuasive.⁹⁵

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”),⁹⁶ which also recommended finally fixing the number of panel members at a general court-martial at eight.⁹⁷ It can be inferred that Congress purposely made this change to prevent gaming of the system. 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 *varied*.⁹⁸ 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 up⁹⁹ to a total four

95. See *United States v. Dial*, No. APO AE 09752, at 1 (Army Trial Judiciary, 5th Jud. Cir. Jan. 3, 2022) http://www.caaflog.org/uploads/1/3/2/3/132385649/us_v_dial_-_ruling_-_unanimous_verdict.pdf. In *Dial*, the court discussed two justifications for the non-unanimity rule but could only cite to some tangential support in the legislative history for these. *Id.* at 8. The first justification, in 1912 during the debate over revising the Articles of War, is from the testimony of the Army’s Judge Advocate General Enoch H. Crowder; the second, in 1949 during debate over the soon-to-be-enacted UCMJ, is from testimony by its chief drafter, Professor Edmund Morgan of Harvard. *Id.* at 12–13. According to the court, General Crowder intimated that panel members’ absence from their normal duties because of indeterminately long deliberations would lead to operational risk—an “impair[ment]” in the accomplishment of missions. *Id.* at 12. Crowder subsequently testified in 1916 that the effect of a “delay” could be “embarrassing”—and he only illustrated his concern with a short hypothetical involving a court-martial in wartime. See *Revisions of the Articles of War: Hearing Before a Subcommittee of the Comm. on Mil. Affairs*, 64th Cong. 27 (1916) (testimony of Brigadier Gen. Enoch H. Crowder). Moreover, the court rejected the suggestion that a non-unanimous verdict “prevents a senior ranking member from pressuring a junior member to ‘get on board’ for a unanimous vote.” *Dial*, No. APO AE 09752, at 15. Professor Morgan’s testimony does not prove otherwise. Nothing in the congressional record of his testimony actually refers to voting by the members. While Morgan does strongly suggest that the intent of the new UCMJ court-martial procedures was to mitigate the undue influence of commanders that had always bedeviled observers and animated critics of the Articles of War, the checks on that influence, Morgan highlights, actually minimize the risk of deliberation room intimidation. See *Hearings Before a Subcommittee of the Comm. on Armed Servs. on H.R. 2498*, 81st Cong. 606 (1949) (testimony of Prof. Edmund M. Morgan, Jr.) (“We have tried to prevent courts martial from being an instrumentality and agency to express the will of the commander.”).

96. 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. *Press Release: No. NR-185-14*, DEP’T OF DEF. (Apr. 15, 2014), https://ogc.osd.mil/Portals/99/press_release.pdf.

97. MILITARY JUSTICE REVIEW GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 109–10 (2015).

98. *Id.* at 30; see also Sullivan, *supra* note 88, at 33–34 & n.158 (describing different panel sizes and the varying number of votes needed for acquittal); *United States v. Newson*, 29 M.J. 17, 19 & n.1 (C.M.A. 1989) (describing panel challenges used to reduce the number of members needed to convict as a “numbers game”).

99. M.C.M., *supra* note 18, pt. II, R.C.M. 921(c) (“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.).

members: four out of five is 80%. This rule, when 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—likely 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.¹⁰⁰ 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.”¹⁰¹

100. David A. Schlueter, *Reforming Military Justice: An Analysis of the Military Justice Act of 2016*, 49 ST. MARY’S L.J. 1, 63–64 (2017).

101. See *Ex parte Quirin*, 317 U.S. 1 (1942).

In *Ex parte Quirin*, 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.¹⁰² Their mission was to destroy American war industry and property on behalf of the German Reich.¹⁰³ 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.¹⁰⁴ 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 violated the Articles of War. The motion was denied, and they appealed.¹⁰⁵

By the time the matter arrived before the U.S. Supreme Court, the question presented at first was narrow: in a *per curiam* decision, 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.¹⁰⁶ The Court subsequently published an opinion on the merits of the constitutional issue: "whether the detention of petitioners . . . for trial by Military Commission . . . on charges preferred against them purporting to set out their violations of the law of war and of the Articles of War, is in conformity to the laws and Constitution of the United States."¹⁰⁷

The Court decided against the petitioners. The justices made several points relevant to the jury trial and its meaning 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 case, *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.¹⁰⁸ The earlier *Ex parte Milligan* Court emphasized the distinction between the

102. *Id.* at 21–23, 35.

103. *Id.* at 21.

104. *Id.* at 22–23.

105. *Id.* at 24.

106. *Id.* at 1 n.3, 18 (detailing the *per curiam* decision dated July 31, 1942).

107. *Id.* at 18–19.

108. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127, 130 (1866).

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 of trial than are furnished by the common law courts.”¹⁰⁹

The key and essential differences, those that triggered Mr. Milligan’s constitutional right to a civilian trial by jury but not that of the *Ex parte Quirin* petitioners, were that the latter were unlawful enemy belligerents under the meaning of international law¹¹⁰ and were charged with offenses under the Law of War.¹¹¹ 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”).¹¹²

Its evidence was the lack of mention of such trials in Article III, Section 2 of the Constitution,¹¹³ 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.”¹¹⁴ But *Ex parte 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, *Ex parte Milligan* itself was also not a case involving a court-martial of a service member, and that Court was addressing rights of service members only by way of contrasting them against those guaranteed expressly to civilians. *Ex parte Milligan* assumed 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*.¹¹⁵ 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.¹¹⁶ Yet, the Court of Military Appeals

109. *Id.* at 123.

110. See *Ex parte Quirin*, 317 U.S. at 35–38, 45.

111. *Id.* at 29; see also INGRID DETTER, *THE LAW OF WAR* xv (3d ed. 2013) (distinguishing the “Law of War” from “laws of war” because the former “is intended to indicate there is now a homogeneous body of rules applicable to the modern state of war”).

112. *Ex parte Quirin*, 317 U.S. at 39, 44–45.

113. “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. III, § 2, cl. 3.

114. *Ex parte Quirin*, 317 U.S. at 39–44.

115. *Ex parte Milligan*, 71 U.S. at 123.

116. See *id.*

("C.M.A.") (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."¹¹⁷

Nevertheless, even without the military judiciary's stamp of approval, the dicta in the *Ex parte Quirin* holding and the *Ex parte 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, Section 8's "make rules" clause means that:

Congress has the power to provide for the trial and punishment of military and naval offences in the manner then and now practiced by civilized nations; and that the power to do so is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, that the two powers are entirely independent of each other.¹¹⁸

For the *Ex parte 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 contempts, among others.¹¹⁹ For at least one concerned scholar, this meant that the Court has well-worn reasons to conclude that "less-than-unanimous verdicts by courts-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.¹²⁰

Ex parte 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* courts-martial panel system favorably. In the 1956 case of *Kinsella v. Krueger*,¹²¹ the civilian wife of 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.¹²² 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.¹²³ 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.¹²⁴ In her case, a treaty

117. *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986). The errors in *Ex parte Milligan*, arguably undercutting this conclusion of law, are explained in greater detail *infra* Part III.C.

118. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78–79 (1857).

119. See *Ex parte Quirin*, 317 U.S. at 39–40 (internal citations omitted).

120. Larkin, *supra* note 1, at 241–42.

121. 351 U.S. 470 (1956).

122. *Id.* at 472.

123. *Id.*

124. *Id.* at 473 (quoting then Uniform Code of Military Justice art. 2(11), 50 U.S.C. § 552).

between the U.S. and Japan granted the U.S. exclusive criminal jurisdiction over service members and their dependents stationed there.¹²⁵ 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.”¹²⁶ 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.¹²⁷

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.¹²⁸ Second, the Court concluded that “[i]n all matters of substance,” there was functionally no meaningful difference between those in uniform and their family members co-located with them abroad: the government pays for their housing, provides their medical care, and funds their travel in moving to and from the foreign country.¹²⁹

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 *civilians* attached to their units.¹³⁰ And a service member was more likely to be obedient and trustworthy if his commander had legal leverage over his family members as well.

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.”¹³¹

125. *Id.* at 473–74.

126. *Id.* at 473.

127. *Id.* at 474.

128. *Id.* at 474–76.

129. *See id.* at 477.

130. *Id.*

131. *Id.* at 478–79.

Not only would this be likely the case in many foreign jurisdictions¹³² 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.¹³³ 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.¹³⁴ 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.”¹³⁵

But the Court very soon thereafter, in *Reid v. Covert*,¹³⁶ 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,¹³⁷ 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 accused is living overseas.¹³⁸ 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.¹³⁹

Nevertheless, in holding that Article 2(11) was actually unconstitutional, the only beneficiaries of the Court’s animus toward the military’s expediency and

132. *Id.*

133. Uniform Code of Military Justice art. 31, 10 U.S.C. § 831; *see generally* *Miranda v. Arizona*, 384 U.S. 436 (1966).

134. *Miranda*, 384 U.S. at 489.

135. *Id.* at 479.

136. 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* 3 n.1, 239 (1967) (describing *Reid v. Covert*, in which Wiener was counsel for the victorious civilian petitioners, in relation to subsequent practice in Great Britain).

137. 354 U.S. at 19–20.

138. *See id.* at 9.

139. *Id.* at 14.

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.”¹⁴⁰ *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 [courts-martial] is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. 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.¹⁴¹

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.”¹⁴² 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.”¹⁴³ Thus, while *Reid* criticizes diminishing constitutional protections for military members on grounds of efficiency, it nevertheless continues to permit them.

O’Callahan v. Parker,¹⁴⁴ 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, 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.¹⁴⁵ 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.¹⁴⁶ The district court denied relief, and the Court of Appeals affirmed.¹⁴⁷

140. *Id.* at 23.

141. *Id.* at 21.

142. *Id.* at 36.

143. *Id.* at 37.

144. 395 U.S. 258 (1969).

145. *Id.* at 260–61.

146. *Id.* at 261.

147. *Id.*

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 Art. III trials apply.”¹⁴⁸ In fact, the Court was somewhat pejorative: “[The court-martial is] singularly inept in dealing with the nice subtleties of constitutional law.”¹⁴⁹ 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.¹⁵⁰ 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: “[I]t does not follow that ascertainment of ‘status’ completes the inquiry, regardless of the nature, time, and place of offense.”¹⁵¹ Instead, the Court reasoned that the test for jurisdiction was status *plus* something that made the offense “service connected.”¹⁵²

While the decision in *O’Callahan*, and the narrow jurisdictional test it announced, was later overruled in the late 1980s,¹⁵³ 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 public¹⁵⁴ and by the courts. Even after the dramatic reforms coming with the enactment of the UCMJ in 1950, the *Reid* Court opined that:

[M]ilitary law is, in many respects, harsh law It emphasizes the iron hand of discipline more than it does the scales of justice [T]his is attributable to the inherent difference in values and attitudes that separate the military establishment from civilian society . . . in the military, by necessity, emphasis

148. *Id.*

149. *Id.* at 265.

150. *See id.* at 264–65.

151. *Id.* at 267.

152. *Id.* at 272. 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 connected” 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 “flout[ed],” and whether the crime created a threat to the military post or military property. 401 U.S. at 363, 365–69.

153. *Solorio v. United States*, 483 U.S. 435, 436, 450–51 (1987) (discarding the “service connection” test from *O’Callahan* and establishing that jurisdiction of the UCMJ attaches based solely on the accused’s status—if an individual “was a member of the Armed Services at the time of the offense charged”).

154. *See generally* ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* (1970). *But see* Joseph W. Bishop, *Against the Evidence*, COMMENTARY (June 1971), <https://www.commentary.org/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).

must be placed on the security and order of the group, rather than on value and integrity of the individual.¹⁵⁵

This low regard, therefore, was explained as acceptable, at least in part, by historical relevance: “[T]he 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.”¹⁵⁶ 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 there was a “possibility of influence on the actions of the court-martial by the officer who convene[d] it, select[ed] its members and the counsel on both sides, and who usually ha[d] direct command authority over its members.”¹⁵⁷ 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.¹⁵⁸ 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.”¹⁵⁹ In fact, as described in *infra* Part IV.A., this very sentiment was tacitly rejected by the Court as recently as 2018.

C. *The Loose Logic of Ex Parte 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. Riesbeck*.¹⁶⁰ But *Riesbeck* only cites to *United States v. McClain*¹⁶¹ for this proposition. *McClain*, in turn, cites only *Ex parte Milligan*,¹⁶² the case dealing with military commission jurisdiction over civilians, not courts-martial jurisdiction over service members. According to *Ex parte Milligan*:

155. *Reid v. Covert*, 354 U.S. 1, 38–39 (1957).

156. *O’Callahan*, 395 U.S. at 265.

157. *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 some of the structural issues that the justices complained of in *O’Callahan*).

158. See *supra* notes 22–52 and accompanying text.

159. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955).

160. 77 M.J. 154, 162–63 (C.A.A.F. 2018) (citing *United States v. McClain*, 22 M.J. 124, 128–29 (C.A.M. 1986)).

161. *Id.* (citing *McClain*, 22 M.J. at 128–29).

162. *McClain*, 22 M.J. at 128 (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866)).

[T]his 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.¹⁶³

The problem *Riesbeck* 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 Amendment, specifically: “every one accused of a crime . . . attached to the army, or navy, or militia in actual service.”¹⁶⁴ 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.”¹⁶⁵ Why did the Court fail to mention this important timing caveat? One theory could be that the Court fundamentally *misquoted* the actual Fifth Amendment. The Court wrote:

The [S]ixth [A]mendment 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 [F]ifth, 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 [S]ixth [A]mendment, to those persons who were subject to indictment or presentment in the [F]ifth.¹⁶⁶

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 without 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 *Ex parte 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 *Ex parte Quirin*,¹⁶⁷ which only addressed trying unlawful

163. *Ex parte Milligan*, 71 U.S. at 123 (emphasis added).

164. *Id.*

165. U.S. CONST. amend. V.

166. 71 U.S. at 123.

167. 317 U.S. 1, 39 (1942).

enemy combatants for war crimes by a military commission, not service members for violations of the domestic criminal law, whether under the Articles of War or later the UCMJ. But the *Ex parte Quirin* Court only cited for this conclusion to *Ex parte Vallandigham*¹⁶⁸ (a trial of a civilian by military commission in time of war), *In re Vidal*¹⁶⁹ (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 v. United States*¹⁷⁰ (a case addressing the Supreme Court's jurisdiction over the Court of Claims).¹⁷¹ Then *Ex parte Quirin* goes on to say:

[W]e must conclude that [Section] 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.¹⁷²

First, the text here should distinguish the case's rationale from any involving courts-martial of service members. The facts, the Court's concern, 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 a military commission for offenses against the law of war.

But assuming we can and should conflate courts-martial and commission, the only case *Ex parte Quirin* cites for this categorical "status-based" exclusion is *Ex parte Milligan*.¹⁷³ If the *Ex parte Milligan* Court grounded its reasoning off a fundamental misquoting of the text of the Fifth Amendment, and *Ex parte 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 C.M.A. and CAAF) that the Fifth and Sixth Amendments do not apply to service members (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

168. 68 U.S. (1 Wall.) 243, 244 (1864).

169. 179 U.S. 126, 127 (1900).

170. 289 U.S. 553, 555 (1933).

171. *Id.*

172. 317 U.S. 1, 40 (1942) (citing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123, 138 (1866)).

173. *Id.*

power to select the members)¹⁷⁴ that seem to be reluctantly-accepted gospel. But anyone citing the authority for this conclusion cites to *Ex parte Milligan* or *Ex parte Quirin* (or both), which are both factually-distinguishable from “regular” courts-martial of service members 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 *Ex parte Milligan* as supporting the Court’s conclusion.¹⁷⁵ *Middendorf v. Henry* (described in more detail *infra*) also mentions this as axiomatic, but as dicta in concluding that the right to counsel does not apply to summary courts-martial.¹⁷⁶ That Court interpreted the applicability to be status-connected, whereas the plain reading of the Fifth Amendment 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 service members 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 service members 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 v. United States* 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.¹⁷⁷ This was first steadfastly asserted in 1895 in *Johnson v. Sayre*¹⁷⁸—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 *Ex parte 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.¹⁷⁹ 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

174. Guy P. Glazier, *He Called for his Pipe, and He Called for His Bowl, 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).

175. JENNIFER K. ELSEA & JONATHAN M. GAFFNEY, CONG. RSCH. SERV., R46503, MILITARY COURTS-MARTIAL UNDER THE MILITARY JUSTICE ACT OF 2016 3 & n.25 (2020).

176. *Middendorf v. Henry*, 425 U.S. 25, 33 (1976) (citing *Ex parte Milligan* and *Ex parte Quirin* without determining whether the Sixth Amendment applies to courts-martial).

177. 483 U.S. 435, 453–54 (1987) (Marshall, J., dissenting).

178. 158 U.S. 109 (1895).

179. *See id.* at 114.

of the Fifth Amendment's grand jury exception.¹⁸⁰ 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.¹⁸¹ 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."¹⁸² 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."¹⁸³

Given its recurrence in this 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 1974.¹⁸⁴ 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 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.¹⁸⁵ 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.¹⁸⁶ The Court ultimately disagreed with Levy, holding that those UCMJ prohibitions satisfied the Constitution's requirements:

180. *Id.* at 115.

181. *Id.*

182. *Id.* at 115.

183. *Id.* (citations omitted) (citing five cases between 1857 and 1886).

184. 417 U.S. 733 (1974).

185. *Id.* at 738–39.

186. *See id.* at 740–41.

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.¹⁸⁷

The Court asserted with axiomatic confidence that military justice “cannot be equated to a civilian code . . . [because] the [UCMJ] essays more varied regulation of a much larger segment of activities of the more tightly knit military community.”¹⁸⁸ 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;¹⁸⁹ (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;¹⁹⁰ and (3) the government relates to a service member not just as sovereign to citizen but also as employer to employee.¹⁹¹

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 “overriding demands of discipline,”¹⁹² (2) that certain conduct is criminalized in the military that could not be in civilian communities;¹⁹³ 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.¹⁹⁴ Therefore, the Court ultimately concluded, if speech undermines the effectiveness of the 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.¹⁹⁵ By way of this logical train, the Court effectively carved out this sort of exception from the First Amendment, and thus did not employ strict scrutiny here, as would be expected in a criminalization of free speech.¹⁹⁶ Rather, it employed what appears to be, if anything, a rational basis

187. *Id.* at 743.

188. *Id.* at 749.

189. *Id.* at 743 (citing *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

190. *See id.*

191. *Id.* at 751.

192. *Id.* at 744 (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

193. *See id.* at 751 (recognizing “[t]here is simply not the same autonomy as there is in the larger civilian community”).

194. *Id.* at 758–59 (citations omitted).

195. *See id.* at 761.

196. *See, e.g., Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (applying strict scrutiny to the *Florida Code of Judicial Conduct* canon restricting political activity by Florida state judges).

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.¹⁹⁷ 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.¹⁹⁸

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

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*.¹⁹⁹ 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.”²⁰⁰ 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 caps its possible

197. 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 provide and maintain a navy,’ 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.”); *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 offences [sic] committed by persons in the military service, would seem to be plenary.”); *Burns v. Wilson*, 346 U.S. 137, 140–41 (1953); *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. United States ex rel Singleton*, 361 U.S. 234, 246 (1960) (“[T]he 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 [] military necessities” such as “respect for duty and a discipline without counterpart in civilian life,” “against the equally significant interest of ensuring fairness to servicemen charged with military offenses [T]his congressional judgment must be respected.”); *Solorio v. United States*, 483 U.S. 435, 441 (1987) (discussing the plenary power of “Congress to regulate the Armed Forces”).

198. *Chappell v. Wallace*, 462 U.S. 296, 302–05 (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.”).

199. 425 U.S. 25 (1976).

200. *Id.* at 38.

punishment at thirty days of confinement.²⁰¹ Under such limitations, the Court held that this was not even a “criminal prosecution” within the meaning of the Fifth and Sixth Amendments.²⁰² 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.”²⁰³ But in regulating that profession, the Court noted, Congress must account for the realities of that profession’s demands and context.

The 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.²⁰⁴

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.²⁰⁵

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:

[P]resence 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, including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline.²⁰⁶

The deferential standard of review that underwrote this analysis was further deployed in *Weiss v. United States*.²⁰⁷ 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.

201. *Id.* at 32–34.

202. *Id.* at 34.

203. *Id.* at 43 (citing *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); and then citing U.S. CONST. art. 1, § 8).

204. *Id.* (quoting *Burns v. Wilson*, 346 U.S., 140 (1953)).

205. *Id.* at 44.

206. *Id.* at 45–46.

207. 510 U.S. 163 (1994).

The Court first fixated on describing the structure of the military justice system, including the roles that judges play in courts-martial, 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: "[c]ourt-martial [panel] members may be officers or enlisted personnel, depending on the military status of the accused; the members' responsibilities are analogous to, but somewhat greater than, those of civilian jurors."²⁰⁸ 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.²⁰⁹

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.'"²¹⁰ Next, in addressing whether the non-fixed terms of judicial office for military judges violated the Constitution, the Court first acknowledged that due process requirements must be heeded by Congress when legislating on military justice.²¹¹ But this was not a full-throated defense. Due process "provides *some* measure of protection to defendants in military proceedings"²¹² but courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces;"²¹³ this means that the test for due process may depart from civilian standards, but not break the connection altogether.

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."²¹⁴ That balance was struck between the needs of the command for disciplined obedience to accomplish missions and the accused's right to counsel thought to be fundamental to any criminal justice system's legitimacy, in light of the procedural character of that form of non-criminal

208. *Id.* at 167–169, 167 n.1.

209. *See id.* at 170–72.

210. *Id.* at 174 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

211. *Id.* at 176–77.

212. *Id.* at 176 (emphasis added).

213. *Id.* at 177.

214. *Id.* at 177–78 (quoting *Middendorf v. Henry*, 425 U.S. 25, 44 (1976)).

trial and the hypothesized negative effect of 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 opinions but consistent with the gradual civilianization of military law’s forms and functions since the UCMJ was enacted.²¹⁵ One scholar has gone so far as to refer to changes to the “nature and structure of American military justice” as “seismic.”²¹⁶ *Ortiz v. United States*²¹⁷ was never meant to be a 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 did not focus on what the Justices said or did not say about underlying principles justifying the UCMJ’s due process idiosyncrasies.²¹⁸ 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 (“C.A.A.F”), the Article I tribunal that acts as the typical court of last resort for appeals arising from courts-martial proceedings.²¹⁹ This was indeed important, but it was expected (Congress authorized Supreme Court non-collateral review of C.A.A.F. decisions by certiorari in 1983)²²⁰ 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.

215. See generally Sherman, *supra* note 70; Vladeck, *Civilianization of Military Jurisdiction*, *supra* note 70. For a full discussion of this case and its relationship to cases like *Parker* in the context of civilianization, see Maurer, *Logic of Military Justice*, *supra* note 74, at 677–97.

216. Vladeck, *Military Courts*, *supra* note 61, at 936.

217. 138 S. Ct. 2165 (2018).

218. However, there were two exceptions. See Lauren A. Shure & Jeremy S. Weber, *Ortiz v. United States: The Savior or Death Sentence of the Military Justice System?*, 81 A.F. L. REV. 187 (2020); 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).

219. See Kevin Lessmiller, *High Court Says Judges Can Sit on Two Military Panels*, COURTHOUSE NEWS SERV. (June 22 2018), <https://www.courthousenews.com/high-court-says-judges-can-sit-on-two-military-panels/>; *The Supreme Court, 2017 Term—Leading Cases*, 132 HARV. L. REV. 317, 320–21 (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>.

220. 28 U.S.C. § 1259.

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 Court of Military Commissions Review) simultaneously violated the Appointments Clause of the Constitution²²¹ 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.²²²

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."²²³ The argument was, essentially, that a court-martial trial was not, and has never been, a "case" within the meaning of Article III.²²⁴ 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.²²⁵ 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,"²²⁶ the Court offered several pieces of evidence or "attributes:"²²⁷

1. From court-martial to the appellate tribunals, each level decides "criminal 'cases' as that term is generally understood"²²⁸ and decisions are subject to an "appellate process . . . that replicates the judicial apparatus found in most states"²²⁹
2. "[P]rocedural protections" for accused service members are "virtually the same" as those in civilian criminal courts²³⁰
3. Decisions and judgments by these courts have *res judicata* effect²³¹ and trigger double jeopardy protections²³²

221. *Id.*; see also U.S. CONST. art II, § 2, cl. 2.

222. *Ortiz*, 138 S. Ct. at 2172.

223. *Id.* at 2173.

224. Brief of Professor Aditya Bamzai as Amicus Curiae in Support of Neither Party at 11–12, 44, 48, *Ortiz v. United States*, 138 S. Ct. 2165 (2018) (No. 16-1423), 2017 WL 549543.

225. *Id.* at 26, 29.

226. *Ortiz*, 138 S. Ct. at 2174.

227. *Id.* at 2175.

228. *Id.* at 2174.

229. *Id.* at 2175.

230. *Id.* at 2174 (quoting 1 DAVID SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 50 (9th ed. 2015)).

231. *Id.* (citing *Schlesinger v. Councilman*, 420 U.S. 738, 746 (1975)).

232. *Id.* (citing *Grafton v. United States*, 206 U.S. 333, 345 (1907)).

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”²³³
5. The constitutionality of having a separate system for the “trial and punishment” applicable to the armed services alone is beyond dispute.²³⁴ Their punishment schemes are similar to civilian courts: “on top of peculiarly military discipline, terms of imprisonment and capital punishment”²³⁵
6. Scholars have long considered this system to be “judicial” in character and exercising “judicial power”²³⁶ and the Court has opined as much as far back as 1887²³⁷

This list is accurate, and consistent with the description of the events occurring in our hypothetical court-martial in *supra* Part I. But the Court did not acknowledge the *other* “attributes” of military law where its argument might run into trouble and what the *amicus* brief failed to exploit. First, the Court failed to mention the role that certain commanding officers play 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. Second, the Court failed to note 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).²³⁸ Third, the Court ignored the areas of due process that are *not* virtually the same as civilian courts, like the absence of 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 the 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:

233. *Id.* (citing *Solorio v. United States*, 483 U.S. 435, 438–41 (1987)).

234. *Id.* at 2175 (“[T]he constitutional foundation of courts-martial—as judicial bodies responsible for ‘the trial and punishment’ of service members—is not in the least insecure.” (quoting *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857))).

235. *Id.*

236. *Id.*

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

238. *See, e.g.*, Uniform Code of Military Justice art. 83, 10 U.S.C. § 883; Uniform Code of Military Justice art. 85, 10 U.S.C. § 885; Uniform Code of Military Justice art. 86, 10 U.S.C. § 886; Uniform Code of Military Justice art. 89, 10 U.S.C. § 889; Uniform Code of Military Justice art. 90, 10 U.S.C. § 890; Uniform Code of Military Justice art. 92, 10 U.S.C. § 892; Uniform Code of Military Justice art. 99, 10 U.S.C. § 899; Uniform Code of Military Justice art. 106a, 10 U.S.C. § 906a; Uniform Code of Military Justice art. 133, 10 U.S.C. § 933; Uniform Code of Military Justice art. 134, 10 U.S.C. § 934.

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.²³⁹

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.’”²⁴⁰ In this way, the military justice system, despite being an Article I creation, “stands on much the same footing 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.²⁴¹

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, 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,²⁴² 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 should be viewed. Whether the Sixth Amendment right to a jury trial drawn from common law applies, through the Due

239. *Ortiz*, 138 S. Ct. at 2176 n.5.

240. *Id.* at 2175.

241. *See id.* at 2178.

242. There is some nuance to determining what, in some cases, constitutes a “military-related offense.” See 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, 24, 25–26 (2021) (analyzing Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706 (D.D.C. Nov. 20, 2020), which held “a court-martial’s jurisdiction to try a military retiree for conduct that occurred *after* he retired . . . was unequivocally unconstitutional”); Daniel Maurer, *Cross-Examining Convention: A Hypothetical Test of Pro-Convening Authority Discretion*, 2021 ARMY L. 67, 69–71.

Process Clause in the Fourteenth Amendment, in courts-martial in general is not exactly the right question;²⁴³ 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 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;”²⁴⁴ Article III says the “trial of all crimes, except in cases of impeachment, shall be by jury,”²⁴⁵ and the only exception arguably applicable to courts-martial (a case “arising in the land or naval forces”) is the Fifth Amendment’s right to grand jury indictment.²⁴⁶ As discussed in *supra* Part III.B. and C., the Court in *Ex parte 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-martial and whether the Court’s assumption about their intent made in *Ex parte Milligan* is actually defensible, or in the long history of military tribunals extending back to Swedish King Gustavus Adolphus in the Seventeenth Century.²⁴⁷ It is simply sufficient to note that nothing in those

243. 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 a court-martial trial judge’s decision to instruct a 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 supports this conclusion of law. See *United States v. Dial*, No. APO AE 09752, at 11 (Army Trial Judiciary, 5th Jud. Cir. Jan. 3, 2022), http://www.caaflog.org/uploads/1/3/2/3/132385649/us_v_dial_-_ruling_-_unanimous_verdict.pdf.

244. U.S. CONST. amend VI.

245. *Id.* art. III, § 2, cl. 3.

246. *Id.* amend. V.

247. See generally David A. Schlueter, *The Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129 (1980) (tracing the evolution of courts-martial from ancient Rome to the present); CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND (2016) (examining the role of military justice in American history); Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981) (reviewing the achievements of Swedish King Gustavus II Adolphus and analyzing the Swedish Articles of War of 1621); WINTHROP, *supra* note 12 (providing a scholarly overview of military law in the early Twentieth Century); Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6

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—is 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"*²⁴⁸

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.²⁴⁹ 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*.²⁵⁰

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.²⁵¹ Justice Gorsuch began his opinion by acknowledging that the text of the Sixth Amendment does not expressly require unanimity, but nevertheless "carried with it *some* meaning about the content and requirements of a jury trial."²⁵² 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.²⁵³ "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," Justice Gorsuch wrote for the Court.²⁵⁴

Vand. L. REV. 169 (1953) (discussing the historical pedigree of the UCMJ); Maurer, *Martial Misconduct*, *supra* note 23, at 873–91 (providing a brief history of "Military Crime and Punishment").

248. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769).

249. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1394 (2020).

250. *See id.* at 1394–97.

251. *Id.* at 1397.

252. *Id.* at 1395.

253. *Id.* at 1395–96.

254. *Id.* at 1396.

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.²⁵⁵ "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 is "fundamental to the American scheme of justice."²⁵⁶ The Court described and criticized the reasoning in an earlier pair of cases, *Apodaca v. Oregon*²⁵⁷ and *Johnson v. Louisiana*,²⁵⁸ 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" in these cases was a 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.²⁵⁹ Four other justices "reframed"²⁶⁰ the question as whether unanimity served an "important function" any longer and answered in the negative.²⁶¹ They performed what the *Ramos* Court later denigrated as a too "skimpy"²⁶² and "breezy cost-benefit analysis"²⁶³ in which the possibility of lowering the rate of hung juries was given a weighty, and determinative, credit.²⁶⁴ Gorsuch rightly criticized 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.'"²⁶⁵

When the American people chose to enshrine [the Sixth Amendment] right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses As judges, it is not our role to reassess whether the right to a unanimous jury is "important enough" to retain.²⁶⁶

The ninth vote in *Apodaca*, 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 thought that the Fourteenth Amendment did not require incorporating this right against the

255. See *id.* at 1396–97 (first quoting *Thompson v. Utah*, 170 U.S. 343, 351 (1898); and then quoting *Patton v. United States*, 281 U.S. 276, 288 (1930)).

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

257. 406 U.S. 404 (1972) (plurality opinion).

258. 406 U.S. 356 (1972).

259. See *Ramos*, 140 S. Ct. at 1397–98 (discussing *Apodaca* and *Johnson*).

260. *Id.* at 1398.

261. *Apodaca*, 406 U.S. at 410 ("Our inquiry must focus upon the function served by the jury in contemporary society.").

262. 140 S. Ct. at 1401.

263. *Id.*

264. See *Apodaca*, 406 U.S. at 410–11.

265. *Ramos*, 140 S. Ct. at 1401 (quoting *Apodaca*, 406 U.S. at 410).

266. *Id.* at 1402.

states.²⁶⁷ 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. Apodaca’s conviction under Oregon’s law.²⁶⁸

The *Ramos* Court chose to further marginalize *Apodaca* and *Johnson* as “unusual” aberrations. The reasoning in those cases was difficult to justify in light of overwhelming precedent and holdings that were uncertain in their future applicability. Moreover, even after those fractured opinions, the Court continued to emphasize the “historical need for unanimity.”²⁶⁹

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 *supra*, 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.²⁷⁰ 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 required²⁷¹). Quoting Blackstone, the Court reiterated that the jury’s purpose is to determine “the truth of every accusation.”²⁷² This “truth-determiner” purpose and expectation is fully in accord with historical and contemporary understanding of the jury’s role in criminal trials.²⁷³ Moreover, Justice Gorsuch noted that even *Apodaca*’s four justice “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 or wrong, after weighing the facts from an unprivileged, non-professional “lay” point of view, against the potential “overzealous”

267. *Id.* at 1398–99 (referring to *Johnson v. Louisiana*, 406 U.S. 356, 369 (1972) (Powell, J., concurring)).

268. *Id.* at 1398 (quoting *Johnson*, 406 U.S. at 384 (Douglas, J., dissenting)).

269. *Id.* at 1399 (citations omitted).

270. *Id.* at 1404.

271. *Apodaca v. Oregon*, 406 U.S. 404, 411 & n.5 (1972) (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 461 (1966)).

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

273. See JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 6 (2018); GEORGE FLETCHER, *BASIC CONCEPTS IN CRIMINAL LAW* 9 (1998); see also AM. BAR ASS’N, *PRINCIPLES OF JURIES AND JURY TRIALS* pmb., princ. 4B (2016), https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_jury_principles.pdf; 47 AM. JUR. 2D *Jury* § 2 (2022) (“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.”).

professional prosecutor.²⁷⁴ 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.²⁷⁵ But it is, ironically, incompatible with the *Apodaca* Court’s notion that (the possibility of) hung juries necessarily render unanimous verdicts unreasonably detrimental to society.²⁷⁶

Therefore, two questions follow. First, does a court-martial panel, as currently qualified under Article 25 of the 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 non-unanimous 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

274. 140 S. Ct. at 1401 (citing *Apodaca*, 406 U.S. at 410–11).

275. *United States v. Gaudin*, 515 U.S. 506, 510–11 (1995) (quoting and citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *343 (1769)); *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.”); *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 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 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”).

276. But, according to Professor Amar, the increasing diversity of the American population “may well require modification of the Founding ideal of jury unanimity.” AMAR, *supra* note 275, 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.” *Id.* 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:

[T]he increased demographic diversity on juries . . . may well entail further necessary adjustment of the Founders’ jury vision Once 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 *Apodaca* and roundly criticized in *Ramos*. It is also unclear 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.

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

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,²⁷⁷ panel members are specifically chosen by a high-ranking authority figure potentially 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.²⁷⁸ 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.²⁷⁹ 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.²⁸⁰

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 commonsense judgment of a group of laymen, and in the community participation and shared

277. 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”).

278. Uniform Code of Military Justice art. 25(e), 10 U.S.C. § 825(e); Uniform Code of Military Justice art. 22, 10 U.S.C. § 822(a). 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, 35–36 (2017). Compare 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, 196 (2003) (arguing the “[court-member appointment process] meets the due process standards of an Article I court”), with James A. Young, *Revising the Court Member Selection Process*, 163 MIL. L. REV. 91, 93 (2000) (arguing for “abolishing the [court-member appointment] criteria and adopting a random selection scheme”).

279. Uniform Code of Military Justice art. 25(e)(2), 10 U.S.C. § 825(e)(2).

280. See *United States v. Gray*, 51 M.J. 1, 49–50 (C.A.A.F. 1999) (holding that selecting panel members only from outside the accused’s unit was not arbitrary or capricious).

responsibility that results from that group's determination of guilt or innocence."²⁸¹ 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,²⁸² so too are panel members.²⁸³ Where jurors should not have any preconceived ideas or predispositions about the crime, its punishment, or the defendant,²⁸⁴ neither should panel members.²⁸⁵ Where jurors must decide for themselves what admitted evidence is relevant to their decision and how material it is,²⁸⁶ so too must panel members.²⁸⁷ Indeed, since reliability of factfinding is one of the long-acknowledged reasons behind the Framers' continuation of the common law jury trial requirement,²⁸⁸ 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 and 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.²⁸⁹

281. *Williams v. Florida*, 399 U.S. 78, 100 (1970); *see also id.* (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).

282. *See Ramos v. Louisiana*, 140 S. Ct. 1390, 1395 (2020) ("Wherever we might look to determine what the term 'trial by impartial jury' meant at the time of the Sixth Amendment's adoption . . . the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.").

283. *See United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001) ("As 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. 44, 49 (C.M.A. 1954) ("Fairness 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) ("[T]he Sixth Amendment requirement that the jury be impartial applies to court-martial members and covers not only the selection of individual jurors, but also their conduct during trial proceedings and the subsequent deliberations."); *see also M.C.M.*, *supra* note 18, pt.II, R.C.M. 502(2) ("[M]embers . . . 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."); *M.C.M.*, *supra* note 18, pt.II, R.C.M. 104(a) (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); Uniform Code of Military Justice art. 37, 10 U.S.C. § 837 (prohibiting "unlawful influence" over members of the court); *M.C.M.*, *supra* note 18, pt.II, R.C.M. 807(b) (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").

284. *See U.S. CONST.* amend. VI; AM. BAR ASS'N, PRINCIPLES OF JURIES AND JURY TRIALS princ. 11(B)(4) (2016).

285. *See M.C.M.*, *supra* note 18, pt. II, R.C.M. 807(b)(2) (describing oath to which panel members are sworn); *id.* at R.C.M. 912(f)(1)(M)–(N) (listing partiality and preformed opinions as grounds for disqualification as members).

286. *See FED. R. EVID.* 104(e); *M.C.M.*, *supra* note 18, pt.III, M.R.E. 104(e).

287. *See M.C.M.*, *supra* note 18, pt.II, R.C.M. 918(c) (discussing the factfinder's role in weighing direct and circumstantial evidence).

288. *See Williams v. Florida*, 399 U.S. 78, 99–103 (1970).

289. Uniform Code of Military Justice art. 26, 10 U.S.C. § 826(b); Uniform Code of Military Justice art. 25(e) (2), 10 U.S.C. § 825.

But the comparisons continue still. Where jurors must deliberate in secret,²⁹⁰ so must panel members.²⁹¹ Where jurors must be free from outside influences that might tamper with their independent judgment,²⁹² so too must panel members be free from “unlawful influence.”²⁹³ Where jurors must presume the defendant is innocent until proven guilty beyond a reasonable doubt,²⁹⁴ so too must panel members.²⁹⁵

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,” it would be part of what makes a panel “impartial” 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 when 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 *supra* Part III.E., “military necessity” in the context of military justice has come to mean a case-by-case assessment of whether “factors

290. See *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, 267–68 (1915), and *Tanner v. United States*, 483 U.S. 107, 120–21 (1987).

291. See M.C.M., *supra* note 18, pt.II, R.C.M. 921(a) (requiring deliberations in a “closed session” with only panel members present); *id.* at R.C.M. 922(e) (prohibiting polling the members about their deliberations and voting); see also *United States v. Dugan*, 58 M.J. 253, 256 (C.A.A.F. 2003) (discussing need for protecting panel from external inquiry into its deliberative process).

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

293. See Uniform Code of Military Justice art. 37(a), 10 U.S.C. § 837(a)(1); see also *United States v. Bess*, 80 M.J. 1, 6–8 (2020) (explaining relationship between Article 37, Article 25, and the Fifth Amendment).

294. *Coffin v. United States*, 156 U.S. 432, 452–61 (1895); *In re Winship*, 397 U.S. 358, 361–68 (1970).

295. Uniform Code of Military Justice art. 51, 10 U.S.C. § 851(c); M.C.M., *supra* note 18, pt.II, R.C.M. 918(c); *id.* at R.C.M. 920(e)(5)(A); see also *United States v. Phillips*, 70 M.J. 161, 164–66 (C.A.A.F. 2011).

militating in favor of [insert the due process norm under debate] are so extraordinarily weighty as to overcome the balance struck by Congress.”²⁹⁶ 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.²⁹⁷

The presidentially-sanctioned rule regarding panel voting,²⁹⁸ it should be remembered, is only derived from Congress’ explicit instruction that a finding of guilty requires at least three-fourths of the panel.²⁹⁹ 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, drawn from *United States v. Kohlbeek*,³⁰⁰ is chiefly explained as “[t]he presence of a unique military concern” that could induce a president to depart from the norm of federal practice because that norm is “impracticable.”³⁰¹ In *Kohlbeek*, 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 of the UCMJ. That rule of evidence says:

[T]he result of a polygraph examination, the polygraph examiner’s opinion, or any reference to an offer to take, failure to take, or taking of a polygraph examination, is not admissible.³⁰²

The trial 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

296. See *supra* notes 212–14 and accompanying text.

297. Uniform Code of Military Justice art. 36(a), 10 U.S.C. § 836(a) (emphasis added).

298. See M.C.M., *supra* note 18, pt. II, R.C.M. 921(c)(2)–(3).

299. Uniform Code of Military Justice art. 52(a)(3), 10 U.S.C. § 852(a)(3).

300. 78 M.J. 326 (C.A.A.F. 2019).

301. *Id.* at 333.

302. M.C.M., *supra* note 18, pt. III, M.R.E. 707.

confession was inadmissible.³⁰³ The *Kohlbeke* 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.³⁰⁴ 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.³⁰⁵ In that case, *United States v. Scheffer*,³⁰⁶ the Court determined that the presidentially-promulgated rule was neither an arbitrary nor a disproportionate restriction on the defendant’s rights.³⁰⁷ 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.”³⁰⁸ 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.

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 UCMJ³⁰⁹), which usually means they were drawn from positions of authority and responsibility (they would not have been assigned those positions otherwise).³¹⁰ In their normal suite of duties and responsibilities, these service members 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

303. *Kohlbeke*, 78 M.J. at 329.

304. *Id.* at 333.

305. *Id.* (citing *United States v. Scheffer*, 523 U.S. 303, 312 (1998)).

306. 523 U.S. 303 (1998).

307. *Id.* at 312.

308. *Kohlbeke*, 78 M.J. at 333.

309. 10 U.S.C. § 825(e)(2) (“[T]he convening authority shall detail . . . such members of the armed forces as, in his opinion, are best qualified . . . by reason of age, education, training, experience, length of service, and judicial temperament.”).

310. 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. U.S. DEP’T OF DEF., JOINT SERV. COMM. ON MIL. JUST., REPORT ON THE SELECTION OF MEMBERS OF THE ARMED FORCES TO SERVE ON COURTS-MARTIAL 46 (1999).

prevents those panel members from returning to their normal duties as quickly as possible after trial and increases the chances of a deadlocked panel.³¹¹

One can imagine that argument would continue: not only would this internal debate risk keeping leaders from their units, non-consensus would risk sending service members 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.³¹² 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.”³¹³

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.”³¹⁴ 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 the face of life-threatening enemy contact is thought by military leaders to make the difference between mission success and failure.³¹⁵ But

311. See Monea, *supra* note 7, at 70 (“[U]nanimity requirements might slightly raise the incidence of a deadlocked jury.”); Nancy Montgomery, *Supreme Court decision on unanimous jury verdicts leaves military out*, STARS AND STRIPES (Apr. 23, 2020), <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 “[n]ot 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”).

312. See *United States v. Scheffer*, 523 U.S. 303, 308–309 (1998) (“The approach taken by the President in adopting [M.R.E.] 707—excluding polygraph evidence in all military trials—is a rational and proportional means of advancing the legitimate interest of barring unreliable evidence.”).

313. See *supra* notes 212–14 and accompanying text.

314. WINTHROP, *supra* note 12, at 173.

315. See 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; 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.”); 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.”).

Colonel William Winthrop—the “Blackstone of Military Law”³¹⁶—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.”³¹⁷ 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 *supra* Part I) 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 service member 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 courts-martial procedure can and should be voted out, conforming military practice to the rest of the states and federal government.

316. *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957). For his biography, see generally JOSHUA E. KASTENBERG, *THE BLACKSTONE OF MILITARY LAW* (2009).

317. WINTHROP, *supra* note 12, at 173.