Dividing the Will of God: The Unconstitutionality of Nonunanimous Verdicts in Courts-Martial

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ABSTRACT

The U.S. Constitution requires the jury in criminal trials, whether federal or state, to be unanimous in its verdict. And yet, in courts-martial, the jury (or "panel," in military justice parlance) may continue to convict—and impose a sentence of up to life in prison without the possibility of release—by the mere agreement of six out of eight jurors. This Note challenges the constitutionality of this noticeable relic in criminal procedure and, in light of judicial hesitation, recommends several measures that can be taken by the political branches of both the federal and state governments.

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I dedicate this Note to my mother on the occasion of her birthday.

> This has to be a twelve-to-nothing vote either way. That's the law. OK, are we ready? All those voting "guilty" raise your hands. . . . Nine—ten—eleven. That's eleven for "guilty." OK. "Not guilty"?
>
> *The 8th Juror slowly raises his hand.*
>
> One. Right. OK, eleven to one—"guilty." Now we know where we are.
>
> –The Foreman, *Twelve Angry Men*[1]

Introduction

On the eve of his twenty-eighth birthday, Bryant Craig began celebrating with his friend of some ten years, James Alexander.[2] The two men had plans to drive from New Orleans to Biloxi the next day to mark the occasion.[3] The next morning, Craig called his mother, and they agreed that Craig would come by her house later that day—before his Biloxi trip and before her bingo game at two o'clock—so that he could pick up his birthday present.[4]

At around ten o'clock, Craig began driving, with Alexander in the passenger seat.[5] The journey was short, lasting a mere two miles.[6] But as Craig made the turn onto his mother's street, a man stepped into the road, and Craig had to swerve to avoid hitting him.[7] Craig parked the car, exited, and began walking toward the pedestrian.[8] When Alexander turned to face the pair, he saw the pedestrian fire eight bullets into his best friend.[9] As the shooter walked away, Alexander and Craig's mother—who had heard the gunshots—ran to Craig.[10] At 10:25 on July 31, 2005, Craig placed his head on his mother's chest, closed his eyes, and drew his last breath.[11]

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[1] Reginald Rose, Twelve Angry Men 11 (Penguin Books 2006) (1955).

[2] State v. Stewart, No. 2010-KA-0298, 2011 WL 9160383, at *1 (La. Ct. App. June 29, 2011); Original Brief of the State of Louisiana, Appellee at *2-3, *Stewart*, 2011 WL 9160383 (No. 2010-KA-0298), 2011 WL 1036240, at *2-3 [hereinafter State's Brief].

[3] State's Brief, *supra* note 2, at *3.

[4] *Id.* at *2-3; *Stewart*, 2011 WL 9160383, at *1.

[5] *Stewart*, 2011 WL 9160383, at *1; State's Brief, *supra* note 2, at *3.

[6] *Stewart*, 2011 WL 9160383, at *1.

[7] *Id.*

[8] *Id.*

[9] *Id.* at *1-2.

[10] *Id.*

[11] State's Brief, *supra* note 2, at *2-3.

Within hours, law enforcement identified seventeen-year-old Kia Stewart as the primary suspect based on an anonymous tip.[12] By the end of the day, Alexander had selected Stewart as the perpetrator in a photographic lineup.[13] Accordingly, Stewart was arrested, indicted, and brought to trial before a jury after pleading not guilty.[14] At trial, Alexander was the sole witness for the state.[15] Stewart's legal team had difficulty locating witnesses in post-Katrina New Orleans and called no one to testify on behalf of the defense.[16] On the basis of Alexander's testimony, the jury convicted Stewart of second-degree murder, and he was sentenced to life in prison without the possibility of parole.[17]

Astonishingly, two of the twelve jurors at Stewart's trial had voted *not* to convict him. According to one juror, initially, four or five jurors favored a not-guilty verdict.[18] But they were swayed by the guilty-minded jurors, and, by the end of deliberations, only two remained in the not-guilty camp.[19] At the time, it was constitutional for a state to require less than unanimous agreement to render a guilty verdict in a criminal trial, and Louisiana was one of two states that allowed such nonunanimous verdicts.[20] The decision of ten jurors, even in the face of two dissenting votes, was thus sufficient to condemn Stewart to spend his entire adult life in prison.

Several years after the trial, the Innocence Project launched an investigation and discovered *eighteen* witnesses that contradicted the prosecution's single witness.[21] On the basis of this evidence, an Orleans Parish judge vacated Stewart's conviction, and, on April 13, 2015, the district attorney

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[12] *Kia Stewart*, Innocence Project New Orleans, https://ip-no.org/what-we-do/free-innocent-prisoners/client-profiles/kia-stewart [https://perma.cc/F7WG-NXK4] (last visited Feb. 23, 2025).

[13] *Id.*

[14] *Stewart*, 2011 WL 9160383, at *1.

[15] *See* Matt Sledge, *Judge Orders $180,000 Payout for Wrongfully Convicted N.O. Man*, NOLA.com (Oct. 3, 2017), https://www.nola.com/judge-orders-180-000-payout-for-wrongfully-convicted-n-o-man/article_25b27866-ba64-5cc2-b1c3-2ec8fa96660a.html [https://perma.cc/GW8F-NV5N]; D'Shean Kennedy, *I Sent an Innocent Man to Prison*, Marshall Project (Feb. 22, 2018), https://www.themarshallproject.org/2018/02/22/i-sent-an-innocent-man-to-prison [https://perma.cc/W9SQ-CYC4].

[16] Maurice Possley, *Kia Stewart*, Nat'l Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4675 [https://perma.cc/T3VS-7LAK] (last updated Oct. 5, 2022); *Kia Stewart*, *supra* note 12.

[17] *Stewart*, 2011 WL 9160383, at *1.

[18] Emily Bazelon, *Shadow of a Doubt*, N.Y. Times Mag. (Jan. 15, 2020), https://www.nytimes.com/interactive/2020/01/15/magazine/split-jurors.html [https://perma.cc/W7ZF-XDTX].

[19] *Id.*

[20] Ramos v. Louisiana, 590 U.S. 83, 87 (2020).

[21] *Kia Stewart*, *supra* note 12.

dismissed the charges against Stewart.[22] After nine years, eight months, and six days in prison, Stewart was ordered released.[23]

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Stewart may have been convicted even if a unanimous verdict were required—it is, of course, possible that the ten jurors voting to convict would eventually have persuaded their two dissenting colleagues. A unanimity requirement certainly does not eliminate the possibility of wrongful conviction. But with such a prerequisite, either the jury would have had to continue deliberating (thereby, at least in theory, providing the acquittal-minded jurors with a chance to convince the others), or the judge would have had to find that the jury was deadlocked. That is, if a jury were split ten-to-two today after reasonable deliberation, the judge would declare a mistrial.[24]

The Supreme Court has long held that the Sixth Amendment requires unanimous verdicts in federal prosecutions.[25] Then, a few years ago, it ruled in *Ramos v. Louisiana* that the nonunanimous jury wields no power to convict a defendant in any of the fifty states, fully incorporating the right to a unanimous verdict.[26] The sole exception now is within military courts, where a guilty vote by three-fourths of the jury (the "panel,"[27] as it is referred to in courts-martial) is sufficient to convict and levy a sentence of up to life in confinement.[28] Indeed, if Stewart happened to be a servicemember being tried in military courts, he could have been convicted by even fewer votes than he actually was. Today, even after *Ramos*, his harrowing journey continues to be a distinct possibility for millions of Americans serving in the military.

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[22] Possley, *supra* note 16.

[23] *Kia Stewart*, *supra* note 12.

[24] *See* Arizona v. Washington, 434 U.S. 497, 509 (1978) ("[M]istrial premised upon the trial judge's belief that the jury is unable to reach a verdict [has] long [been] considered the classic basis for a proper mistrial.").

[25] *See infra* notes 56-57 and accompanying text.

[26] *Ramos*, 590 U.S. at 93 (holding that, because the "Sixth Amendment right to a jury trial is 'fundamental to the American scheme of justice,'" the requirement that verdicts are the result of a unanimous consensus within the jury "applies to state and federal criminal trials equally").

[27] For ease, this Note refers to panels, members, juries, and jurors interchangeably. Although different in form, panels and juries are identical in purpose. *See* Dan Maurer, *Why Are Non-Unanimous (Court-Martial) Guilty Verdicts Still Alive After* Ramos*?*, 60 Am. Crim. L. Rev. 127, 171-73 (2023).

[28] *See* 10 U.S.C. § 852(a)(3) (2018) ("No person may be convicted of an offense in a general or special court-martial, other than . . . by the concurrence of at least three-fourths of the members . . . ."); *id.* § 852(b)(2) ("A sentence of death requires (A) a unanimous finding of guilty . . . and (B) a unanimous determination by the members that the sentence for that offense shall include death. All other sentences imposed by members shall be determined by the concurrence of at least three-fourths of the members . . . ."); *see also* Maurer, *supra* note 27, at 143 (tracing the history of the number of votes necessary to convict and sentence in courts-martial and noting that Congress imposed the current standard of three-fourths in 2016).

Following the ruling in *Ramos*, "numerous servicemembers . . . brought timely claims arguing that they could be convicted only if the panel reached a unanimous verdict."[29] In resolving one such claim, the Court of Appeals for the Armed Forces ("CAAF") unanimously held in *United States v. Anderson* that there exists no "right to a unanimous verdict at [a] court-martial under the Sixth Amendment, Fifth Amendment due process, or Fifth Amendment equal protection."[30] The Supreme Court has denied certiorari in the two cases that would have addressed the applicability of *Ramos* to military contexts[31] and, in so doing, has let stand the rule in *Anderson*.

This rule may seem narrow in application—after all, only servicemembers are affected—but that characterization belies the staggering number of individuals that are subject to the jurisdiction of the Uniform Code of Military Justice ("UCMJ"). First, active-duty servicemembers number over 1.3 million individuals,[32] all of whom are subject to the UCMJ as "[m]embers of a regular component of the armed forces."[33] Second, almost another million individuals[34] are "members of a reserve component" under UCMJ jurisdiction.[35] Third, an additional two million individuals can be court-martialed as retirees receiving pay.[36] These figures do not include the *ten* remaining statutory categories of individuals subject to the authority of the UCMJ, including service academy cadets and midshipmen,[37] members of the noncombatant uniformed services (e.g., the Public Health Service) "when assigned to and serving with the armed forces,"[38] and, perhaps most strikingly, *civilians* accompanying the armed forces during a military operation.[39] Altogether, then, notwithstanding the categorical constitutional

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[29] Petition for Writ of Certiorari at 8, Martinez v. United States, 144 S. Ct. 1000 (2024) (No. 23-242).

[30] United States v. Anderson, 83 M.J. 291, 302 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

[31] Anderson v. United States, 144 S. Ct. 1003 (2024); *Martinez*, 144 S. Ct. at 1000.

[32] Off. of the Deputy Assistant Sec'y of Def. for Mil. Cmty. & Fam. Pol'y, U.S. Dep't of Def., 2022 Demographics: Profile of the Military Community iii (2023) [hereinafter 2022 Demographics], https://download.militaryonesource.mil/12038/MOS/Reports/2022-demographics-report.pdf [https://perma.cc/JP6T-JEFJ].

[33] *See* 10 U.S.C. § 802(a)(1) (2018).

[34] 2022 Demographics, *supra* note 32, at iii.

[35] *See* 10 U.S.C. § 802(a)(3) (2018).

[36] Andreas Kuersten, Cong. Rsch. Serv., LSB10945, Military Jurisdiction over Retired Servicemembers 3 (2023).

[37] *See* 10 U.S.C. § 802(a)(2) (2018).

[38] *See id.* § 802(a)(8).

[39] *See id.* § 802(a)(10); *see, e.g.*, United States v. Ali, 71 M.J. 256, 262-65 (C.A.A.F. 2012) (holding that a civilian employee of a private company contracted to provide interpretive services for the U.S. military was subject to prosecution under the UCMJ because the accused committed an offense while "mov[ing] with a military operation" in the vicinity of a combat zone), *cert. denied*, 569 U.S. 972 (2013). Note, however, that civilian dependents merely accompanying servicemembers as, for instance, spouses, cannot be tried by court-martial. *See* Reid v. Covert, 354 U.S. 1, 39-41 (1957).

rule that "[a] jury must reach a unanimous verdict in order to convict,"[40] at least 4.3 million Americans may be called to answer for crimes on something less than the full agreement of the jury.

This Note proceeds in four Parts. Part I explores the history, law, and justifications behind the unanimity requirement in the civilian justice system. Against this general background, Part II delves into the exception: the court-martial and its unique lack of a unanimous jury requirement. Part II also explains the potential reasons for allowing nonunanimous verdicts and outlines recent efforts in military courts to recognize the unanimity requirement. Part III then forms the heart of this Note by setting forth its main argument—that unanimous jury verdicts must be constitutionally required in courts-martial as a matter of existing law. Part III first argues that the Sixth Amendment guarantee of a right to an impartial jury, and by extension, the right to a unanimous verdict, applies to courts-martial. It then interrogates the oft-repeated "separate society" rationale to advance the position that the military accused are similarly situated to civilian defendants under equal protection standards. It also posits that the right to a unanimous verdict is a fundamental right and thus analyzes the military's acceptance of nonunanimous verdicts under strict scrutiny to find that it is unconstitutional. Finally, Part IV, in light of inaction by the courts, provides policy proposals for Congress, the executive branch, and state legislatures, including those regarding potential incremental reforms toward unanimous verdicts.

I. The Unanimous Jury in Civilian Criminal Trials

Today, a civilian defendant cannot constitutionally be convicted and deprived of his liberty anywhere in the United States without the unanimous consensus of a jury.[41] This right to a unanimous verdict boasts an impressive historical pedigree and is grounded in reasoning that reaches beyond the civilian context. Accordingly, this Part first traces the history of the civilian rights to jury trials and unanimous verdicts. It then examines the prudential justifications for both rights with a view to informing a more robust discussion of them in the military justice context.

A. History of the Unanimous Jury Requirement

On one account, the unanimous verdict traces its significance to religious origins. Before the advent of the jury system, when the accused were tried by ordeal or combat, the outcomes were understood to be just because

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[40] Ramos v. Louisiana, 590 U.S. 83, 90 (2020).

[41] *See id.* at 93.

they were ordained by God.[42] And when juries replaced hot irons and boiling water as the determiner of guilt, their "verdict[s] inherited the inscrutability of the judgments of God."[43] That is why, perhaps, the jury verdict needed to be unanimous: it still represented "the infallible judgment of God, and God cannot be divided."[44]

Whatever the provenance, by the late 1300s, it was settled in England that a criminal jury verdict must be the result of unanimous agreement.[45] And by the time of the Founding, Blackstone was singing the praises of "a trial by jury"—that impervious barrier "between the liberties of the people, and the prerogative of the crown."[46] He declared "that no man should be called to answer to the king for a" felony unless "the truth of every accusation . . . be confirmed by the *unanimous* suffrage of twelve of his equals."[47] Even in civil matters, "unanimity was one of the peculiar and essential features of trial by jury at the common law," and "[w]hatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right."[48] Capturing this historical understanding, at the Founding, ten states—six explicitly and four by implication—included references to the unanimous verdict right in their constitutions.[49]

Admittedly, the Framers did not explicitly enshrine the right to a *unanimous* jury verdict in the text of the federal Constitution. All that the text requires, in relevant parts, is that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury," and that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."[50] Nevertheless, the Constitution incorporated "all the essential elements" of a trial by jury at the common law, including "that the verdict should be

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[42] *See* Jack Pope, *The Jury*, 39 Tex. L. Rev. 426, 436-37 (1961). For a brief explanation of how medieval trials relied on the idea of God as the infallible adjudicator, see H.L. Ho, *The Legitimacy of Medieval Proof*, 19 J. L. & Religion 259, 260-90 (2004).

[43] 1 William Holdsworth, A History of English Law 317 (7th ed. 1956).

[44] Pope, *supra* note 42, at 436-37.

[45] *See* 1 Holdsworth, *supra* note 43, at 318.

[46] 4 William Blackstone, Commentaries *343.

[47] *Id.* (emphasis added).

[48] Am. Publ'g Co. v. Fisher, 166 U.S. 464, 468 (1897); *cf.* SEC v. Jarkesy, 603 U.S. 109, 121 (2024) ("The right to trial by jury is 'of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right' has always been and 'should be scrutinized with the utmost care.' Commentators recognized the right as 'the glory of the English law,' and it was prized by the American colonists. When the English began evading American juries by siphoning adjudications to juryless admiralty, vice admiralty, and chancery courts, Americans condemned Parliament for 'subvert[ing] the rights and liberties of the colonists.'" (alteration in original) (citations omitted)).

[49] *Ramos*, 590 U.S. at 90-91; *see also id.* at 134-35 (Thomas, J., concurring) ("In the founding era, six states explicitly mentioned unanimity in their constitutions. Four more states clearly referred to the common-law jury right, which included unanimity.").

[50] U.S. Const. Art. III, § 2, cl. 3; *id.* amend. VI.

unanimous."[51] On that basis, in the late nineteenth century, the Supreme Court established, and for well over half a century thereafter consistently reaffirmed, that the Sixth Amendment requires unanimous jury verdicts.[52]

That principle stood firm until the Court's exceptional set of fractured opinions in the twin cases of *Apodaca v. Oregon*[53] and *Johnson v. Louisiana*.[54] In those cases, four Justices broke from precedent and declared that the Sixth Amendment permits "conviction of crime by a less-than-unanimous jury . . . ."[55] Four Justices maintained the opposing view, "that a unanimous verdict is an essential element of a Sixth Amendment jury trial."[56] Curiously, the remaining Justice—Justice Powell—agreed that the Sixth Amendment guarantees a unanimous jury verdict, but not in state courts.[57] In doing so, he broke from precedent in an entirely distinct manner, wreaking havoc on what had, until then, been "the Sixth Amendment's otherwise simple story . . . ."[58]

Justice Powell readily acknowledged "that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial,"[59] but also declared that not "all of the elements of jury trial within the meaning of the Sixth Amendment are necessarily embodied in . . . the Due Process Clause of the Fourteenth Amendment" and therefore are applicable to state

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[51] Patton v. United States, 281 U.S. 276, 288 (1930); *see also* Pope, *supra* note 42, at 437 ("By the common law received in this nation, the verdict required unanimity . . . .").

[52] *See, e.g.*, Thompson v. Utah, 170 U.S. 343, 355 (1898) ("[T]he constitution of the United States gave the accused . . . the right to be tried by a jury . . . and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury."), *overruled on other grounds by* Williams v. Florida, 399 U.S. 78 (1970), *and* Collins v. Youngblood, 497 U.S. 37 (1990); *Patton*, 281 U.S. at 288 (holding that the jury trial right guaranteed by Article III and the Sixth Amendment encompasses the requirement "that the verdict should be unanimous"); Andres v. United States, 333 U.S. 740, 748 (1948) ("Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply.").

[53] 406 U.S. 404 (1972), *abrogated by* Ramos v. Louisiana, 590 U.S. 83 (2020).

[54] 406 U.S. 356 (1972), *abrogated by* Ramos v. Louisiana, 590 U.S. 83 (2020).

[55] *Apodaca*, 406 U.S. at 406.

[56] *Id.* at 414-15 (Stewart, J., dissenting); *see also Johnson*, 406 U.S. at 382 (Douglas, J., dissenting) ("[Until today,] there was no dispute that the Federal Constitution required a unanimous jury in all criminal cases."); *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting) ("[A] majority of the Court agrees that the Sixth Amendment requires a unanimous verdict in federal criminal jury trials, and a majority also agrees that the right to jury trial guaranteed by the Sixth Amendment is to be enforced against the States according to the same standards that protect that right against federal encroachment."); *Johnson*, 406 U.S. at 400 (Marshall, J., dissenting) ("We are asked to decide what is the nature of the 'jury' that is guaranteed by the Sixth Amendment. . . . [H]istory compels the decision that unanimity is an essential feature of that jury.").

[57] *See Johnson*, 406 U.S. at 371 (Powell, J., concurring) ("It therefore seems to me, in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial. But [under] the Fourteenth Amendment . . . due process does not require that the States apply the federal jury-trial right with all its gloss.").

[58] *Ramos*, 590 U.S. at 93.

[59] *Johnson*, 406 U.S. at 371 (Powell, J., concurring).

courts.[60] He believed that the unanimous verdict was one of these elements that so resided beyond the ambit of the Due Process Clause.[61] Accordingly, on the basis of his idiosyncratic dual-track incorporation theory—a view the Court had long ago (even at that time) rejected[62]—Justice Powell provided the crucial fifth vote allowing states to use nonunanimous juries to convict.[63]

Perhaps weathering even this storm, the Court continued to uphold the notion that the Sixth Amendment guarantees a unanimous verdict in at least federal trials.[64] It cabined the strange effect of *Apodaca* and *Johnson* by holding that those cases form the single exception to the rule that, once incorporated, the Bill of Rights secures liberties against encroachment by the states in precisely the same way it does against encroachment by the federal government.[65] And when states attempted to further extend the logic of *Apodaca* and *Johnson* by permitting six-member juries to convict on the agreement of five jurors, Justice Rehnquist, writing for the court, declared the practice unconstitutional.[66]

Ultimately, in *Ramos*, the Court came to terms with the fact that "*Apodaca* sits uneasily with 120 years of preceding case law" and held "that the Sixth Amendment *does* require" unanimous verdicts.[67] Noting that "[n]ot a single Member of this Court is prepared to say Louisiana secured [the defendant's] conviction constitutionally," the Court overruled *Apodaca* and *Johnson* in *Ramos*.[68] By that decision, a unanimous verdict in criminal jury trials became constitutionally guaranteed everywhere in the United States—except, apparently, in courts-martial.[69]

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[60] *Id.* at 369.

[61] *See id.* at 374, 380.

[62] *See* Malloy v. Hogan, 378 U.S. 1, 10-11 (1964) (noting that the Fourteenth Amendment does not apply "to the States only a 'watered-down, subjective version of the individual guarantees of the Bill of Rights'").

[63] *See Johnson*, 406 U.S. at 380 (Powell, J., concurring).

[64] *See, e.g.*, Richardson v. United States, 526 U.S. 813, 817 (1999) ("[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element."); S. Union Co. v. United States, 567 U.S. 343, 356 (2012) ("First, 'the "truth of every accusation" against a defendant "should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours."'" (quoting Blakely v. Washington, 542 U.S. 296, 301 (2004))).

[65] *See* McDonald v. City of Chicago, 561 U.S. 742, 765-66, 766 n.14 (2010); *see also* Timbs v. Indiana, 586 U.S. 146, 150 & n.1 (noting that "[t]he sole exception" to the principle that "there is no daylight between the federal and state conduct [an incorporated Bill of Rights protection] prohibits or requires" is the "holding that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings").

[66] *See* Burch v. Louisiana, 441 U.S. 130, 138-39 (1979).

[67] Ramos v. Louisiana, 590 U.S. 83, 96, 106 (2020).

[68] *Id.* at 111.

[69] *See* Maurer, *supra* note 27, at 136 ("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. Under *Ramos*, and in every state and federal courthouse across the country, two 'no' votes would release you from government custody th[r]ough a hung jury and declaration of a mistrial.").

B. Why Require Unanimity?

The importance of the unanimity requirement is inextricably linked to the intended function of the jury itself. The Framers constitutionalized the American jury right in light of their "solemn objections to the King's [acts of] making 'judges dependent on his will alone,'" and depriving criminal defendants "of the benefits of Trial by Jury."[70] Indeed, the jury right is meant to interpose the impartiality of the layman between the sovereign and the subject—its purpose "is to prevent oppression by the Government."[71] A jury provides the criminal defendant "an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge."[72] In *Apodaca*, the Court found that this purpose would be served no less when ten jurors agree.[73] In *Ramos*, the Court repudiated that understanding and held that, by adopting the common law conception of the jury, the Framers constitutionalized the judgment that unanimity is needed to balance against the state's potential for corruption and undue zeal.[74]

In other words, the Framers conceived of the jury as the last line of defense against iniquitous prosecutions sanctioned by the awesome power of the state.[75] In the courtroom, the judge reigns supreme. Parties, their lawyers, spectators, and jurors must rise when she enters, she sits on a dais literally above all others, and she has the power to fine and confine those who defy her in her domain. One participating in trial and deliberations

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[70] Duncan v. Louisiana, 391 U.S. 145, 152 (1968) (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)). Even prior to independence, the Stamp Act Congress resolved that "the inherent and invaluable right of" trial by jury is among "the most essential rights and liberties." *Id.*

[71] Williams v. Florida, 399 U.S. 78, 100 (1970).

[72] *Duncan*, 391 U.S. at 156. This right to a jury trial was of such paramount importance that it was explicitly enshrined in the original text of the Constitution, before the adoption of the Bill of Rights. *See* U.S. CONST. art. III, § 2, cl. 3. Proponents of Ratification argued that a Bill of Rights was not only unnecessary but would, in fact, be dangerous because "if there was any defect in the attempt to enumerate the privileges of the people," the government could argue the absence of such a right. 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 412 (John P. Kaminski & Gaspare J. Saladino eds., 1976). Inevitably, a bill of rights would also include exceptions to state authority not granted which could, in turn, provide a claim to that very authority by implication. *See, e.g.*, THE FEDERALIST NO. 84, at 535 (Alexander Hamilton) ("[B]ills of rights . . . are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted.").

And yet, in the original text of the Constitution, there were still reserved those rights the Framers found sufficiently consequential to protect explicitly, including that "[n]o Bill of Attainder or ex post facto Law shall be passed," U.S. Const. art. I, § 9, cl. 3, that "no Attainder of Treason shall work Corruption of Blood," U.S. Const. art. III, § 3, cl. 2, and, of course, that "[t]he Trial of all Crimes . . . shall be by Jury," U.S. Const. art. III, § 2, cl. 3.

[73] Apodaca v. Oregon, 406 U.S. 410-11 (1972), *abrogated by* Ramos v. Louisiana, 590 U.S. 83 (2020).

[74] *Ramos*, 590 U.S. at 98-100.

[75] *See* Pope, *supra* note 42, at 437 ("History has provided one of the strongest arguments in that the unanimous verdict more fully protects citizens, during periods of stress, from oppressive governments and powers and from mob psychology.").

for the first time would be forgiven for believing that a judge has unlimited power in her courtroom.[76] And if a judge impermissibly tries to influence the jury, its daring dissenters become the only bulwark against the might of government.[77]

The Constitution vested the antidote to this state power in jurors, whose collective decision—if it is to acquit—has long been talismanic in preventing review or a second prosecution.[78] In this most important moment for

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[76] One history professor who served on a jury recalled feeling "anxious" even before he was selected from the pool of potential jurors in front of a particularly vicious judge who "humiliated one of the panelists" for mumbling her answers during voir dire. D. Graham Burnett, A Trial by Jury 28 (2001). Later, when the judge embarrassed him "in front of the whole court," he asked a lawyer what might happen if he "gave the judge a piece of [his] mind." *Id.* at 152. The lawyer apparently responded that the professor would "be held in contempt and tossed in jail for quite some time; the judge . . . had almost unlimited power over his courtroom." *Id.*

Indeed, examples of judicial abuses of the contempt power are aplenty. Judges have sentenced people to imprisonment for failing to rise, even when they have religious objections against doing so. Luis Kutner, *Contempt Power: The Black Robe—A Proposal for Due Process*, 39 Tenn. L. Rev. 1, 2 (1971). And, famously, Judge Julius Hoffman doled out many dozens of contempt charges amounting to nearly two decades in confinement for ten individuals (including attorneys) in connection with the "Chicago Seven" trial, during which one defendant called him "a racist and a fascist and a pig," Jason Epstein, *A Special Supplement: The Trial of Bobby Seale*, N.Y. Rev. Books (Dec. 4, 1969), https://www.nybooks.com/articles/1969/12/04/a-special-supplement-the-trial-of-bobby-seale.

One recent article collecting stories of egregious contempt rulings noted:

> The pettiest of grievances have been used to justify contempt. Expressing frustration with the judge is *verboten*. Saying "how come" or "but" after a judge tells you to stop speaking can result in two days in jail apiece. Raising your hand in an attempt to speak is a jailable offense. Going to the bathroom without permission can be in contempt of court. Repeatedly emailing to the court complaining about your case can be contemptible. Even if you do not say something untoward, merely having a "combative tone" can get you incarcerated. How about sighing loudly? Jail. Grimacing? Jail. Rolling your eyes? Jail. Whispering inaudibly to your wife? Jail. Taking a "long, deep breath?" Jail. Asking questions out of turn? Jail. Having your phone on? Jail. Using your phone away from the judge? Jail. Slamming a door on the way out? Jail. Wearing a hat? Jail. Standing up? Jail. Sitting down? Jail.

Nino C. Monea, *Is the Contempt Power Obsolete?*, 127 Dick. L. Rev. 411, 432-34 (2023) (footnotes omitted) (collecting cases).

[77] To be sure, the defendant in such a case is not without total remedy. Most obviously, a judge with a wrongful interest in the outcome is one who is unable to guarantee the due process of law, and a conviction before such a judge will be overturned. *See, e.g.*, Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (holding that a situation that "offer[s] a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused" violates due process of law (quoting Tumey v. Ohio, 273 U.S. 510, 532 (1927))). But a defendant's rights are not affected only at the moment of final affirmance of a conviction. The very nature of criminal proceedings imputes an inerasable mark onto a defendant. It is on this principle that the Constitution, for instance, protects the right to a speedy trial. *See* Klopfer v. North Carolina, 386 U.S. 213, 221-22 (1967) (holding that the state must finally resolve an indictment within a reasonable time because the very "pendency of the indictment may subject [a defendant] to public scorn and deprive him of employment, and almost certainly will force curtailment of his speech, associations and participation in unpopular causes").

[78] *See* United States v. Ball, 163 U.S. 662, 671 (1896) ("As to the defendant who had been acquitted by the verdict . . . the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without . . . violating the constitution. . . [because] in this country a verdict of acquittal . . . is a bar to a

the jury, permitting a nonunanimous verdict would defeat its very raison d'être.[79]

Social science literature has long documented other practical benefits of unanimous verdicts. Juries deliberate more thoroughly, and jurors participate more evenly when a unanimous verdict is required.[80] Unanimity fixes "personal responsibility upon each juror and compel[s] full discussion of individual reasons and even of minority views."[81] In contrast, members of minority "factions are less likely to speak during deliberations under majority rules."[82] The result of these deliberative deficiencies is an increase in erroneous verdicts. In Louisiana, for instance, fifty-six percent of cases "in which the defendant was later proven innocent after decades in prison were wrongful convictions based on non-unanimous jury verdicts."[83] Relatedly, "in more than ninety percent of the death row exonerations in States that permitted judges to impose death sentences based on a jury's non-unanimous" recommendation, the recommendation, was, in fact, not unanimous.[84]

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subsequent prosecution for the same offense."); Fong Foo v. United States, 369 U.S. 141, 143 (1962) (holding that although there was evidence that a jury "acquittal was based upon an egregiously erroneous foundation," it cannot be reviewed without doing violence to the constitutional guarantee against double jeopardy); McElrath v. Georgia, 601 U.S. 87, 94 (2024) ("Once rendered, a jury's verdict of acquittal is inviolate. . . . This bright-line rule exists to preserve the jury's 'overriding responsibility . . . to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction.'" (second alteration in original) (quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 572 (1977))).

[79] The unanimous jury matters regardless of whether a defendant may factually be innocent because the continued acceptance of the criminal justice system depends on perceptions that it is legitimate:

> Specifically, perceptions of procedural fairness—resulting in perceptions of the system's "legitimacy," as the term is used—may promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes. . . . By contrast, a criminal justice system perceived to be procedurally unfair or substantively unjust may provoke resistance and subversion, and may lose its capacity to harness powerful social and normative influence.

Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 Wake Forest L. Rev. 211, 211-12 (2012).

[80] *See* Reid Hastie, Steven Penrod & Nancy Pennington, Inside the Jury 173 (1983) (empirical study finding that "unanimous rule juries contrast[] with . . . majority rule juries" in part by taking more time to render verdicts, increasing participation by small factions, decreasing the rate of absorption of smaller factions by larger factions, and driving united discussions based on the strength of evidence as opposed to driving adversarial discussions based on the desire for a certain verdict).

[81] Pope, *supra* note 42, at 437.

[82] Nisha Waller & Naima Sakande, *Majority Jury Verdicts in England and Wales: A Vestige of White Supremacy?*, 65 Race & Class, Apr.-June 2024, at 27, 30.

[83] *In Louisiana, You Can Be Convicted of a Serious Crime by a 10–2 Jury Verdict*, Innocence Project New Orleans, https://ip-no.org/in-louisiana-you-can-be-convicted-of-a-serious-crime-by-a-10-2-jury-verdict [https://perma.cc/H79N-N5WP] (last visited Mar. 2, 2025).

[84] Robert Brett Dunham, *DPIC Analysis: Exoneration Data Suggest Non-Unanimous Death-Sentencing Statutes Heighten Risk of Wrongful Convictions*, Death Penalty Info. Ctr., https://deathpenaltyinfo.org/news/dpic-analysis-exoneration-data-suggests-non-unanimous-de

Even if there were no benefits to *unanimous* verdicts, the racially malicious intent and effect underlying *nonunanimous* verdicts provide sufficient reason to eliminate the latter. When it first decided to permit nonunanimous verdicts, Louisiana, "aware that [the] Court would strike down any policy of overt discrimination . . . sought to undermine African-American participation on juries in another way."[85] Using racial demographics, Louisiana lawmakers "sculpted a facially race-neutral rule permitting ten-to-two verdicts in order to ensure that African-American juror service would be meaningless."[86]

The dissent in *Ramos* took issue with this argument, claiming that "whatever the reasons why Louisiana and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years."[87] But this readoption, far from rendering the Jim Crow origins of nonunanimity harmless, had no practical effect on the marginalization of Black jurors: "[T]he nonunanimous-decision rule operates today just as it was intended to 120 years ago—to dilute the influence of black jurors."[88] Indeed, Black jurors are overrepresented among those casting not-guilty ballots.[89] Furthermore, because most nonunanimous verdicts were to convict rather than to acquit,[90] "majority verdicts can diminish effective decision-making by circumventing the voices of" Black or other minority-group jurors.[91]

In light of these historical and practical reasons, the unanimous jury has become indispensable to a fair and impartial verdict in civilian criminal trials. Military courts, however, have not required unanimous verdicts in courts-martial. In the next Part, this Note explores why that might be.

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ath-sentencing-statutes-heighten-risk-of-wrongful-convictions [https://perma.cc/U5QX-9CJ2] (last updated Sept. 25, 2024).

[85] Ramos v. Louisiana, 590 U.S. 83, 88 (2020).

[86] *Id.* (internal quotation marks omitted).

[87] *Id.* at 142 (Alito, J., dissenting).

[88] Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1636 (2018).

[89] *See* Waller & Sakande, *supra* note 82, at 30.

[90] *See id.*

[91] *Id.* at 30-31; *see also* Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1295 (2000) ("To the extent that people of color serve on a jury, they may need the power to bring attention to the evidence that they alone have recalled and to push their fellow jurors to consider information that challenges their stereotypic assumptions. And without full participation by jurors of color, the criminal justice system structurally reinforces and perpetuates the racial dominance of white decisionmakers."); Frampton, *supra* note 88, at 1599 (providing empirical analysis demonstrating "that nonunanimous-decision rules quietly threaten 'to deprive individuals with diverse views who actually serve on juries from exercising any real voting power'" and that "[t]he absence of a unanimity requirement continues to systematically weaken the voice of nonwhite jurors in contemporary criminal adjudication, just as it was originally intended" (quoting Taylor-Thompson, *supra*, at 1263)).

II. The Nonunanimous Panel in Courts-Martial

The importance of the unanimity requirement in civilian criminal trials does not mean *a fortiori* that such a requirement is necessary—or even beneficial—in the military justice context. Military justice is replete with its own history and policy justifications that merit consideration on their own terms.[92] This Part explores that history and those justifications before elaborating on recent efforts to apply the *Ramos* principle to courts-martial.

A. The Potentially Unique Nature of the Military Panel

In the United States, a unanimous verdict has never been required in the context of courts-martial, except in death penalty cases. From the start of the Revolution to the end of the First World War, a simple majority of the panel was sufficient to convict (even in capital cases).[93] Then, for nearly a century, most military panels could convict and sentence on the agreement of a two-thirds majority in most cases.[94] The only exceptions were sentencing decisions that involved confinement for ten years or longer, which required a three-fourths majority, and both convictions and sentencing decisions in capital cases, which required unanimity.[95] This rule remained in place until 2019, when the 2016 amendments to the UCMJ[96]—requiring three-fourths concurrence in all courts-martial (except capital cases, which still require unanimous verdicts and sentencing determinations)—became effective.[97] A military panel is never hung, for if fewer than three-fourths of panel members vote to convict, the accused is acquitted.[98]

Early American military-law treatises do not explain why unanimity requirements were never adopted for the court-martial panel.[99] However, three justifications have often been proffered: nonunanimous verdicts are necessary (1) "to guard against unlawful command influence"; (2) to promote

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[92] Yet, courts-martial have come to resemble civilian criminal trials. For a concise but comprehensive overview of court-martial proceedings, see Maurer, *supra* note 27, at 132-36.

[93] *See id.* at 143 & n.91.

[94] *See id.* Although historically the UCMJ directed the panel to determine the sentence upon a guilty finding, the National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, 135 Stat. 1541, implemented a new system in which military judges make all sentencing decisions except where the death penalty is concerned. *See* Michael Lewis, *Major Changes in the Uniform Code of Military Justice*, Am. Bar. Ass'n (Oct. 7, 2022), https://www.americanbar.org/groups/judicial/publications/judicial_division_record_home/2022/vol26-1/major-changes-in-uniform-code-of-military-justice [https://perma.cc/TPC2-HXL6].

[95] *See* Maurer, *supra* note 27, at 143.

[96] National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, 130 Stat. 2000.

[97] *See* Maurer, *supra* note 27, at 143.

[98] *See* Rules for Courts-Martial 921(c)(3) (2024).

[99] *See* Maurer, *supra* note 27, at 143 & n.91 ("Winthrop, in his own oft-cited treatise, spends no time discussing the reason why a simple majority vote on guilt was acceptable . . . .").

efficiency in the military justice system";[100] and (3) to preserve "good order and discipline in the armed forces."[101]

The first rationale seeks to justify nonunanimous verdicts on the basis that it "helps reduce the possibility of impermissible influences on panel members both inside and outside the deliberation room."[102] This idea of unlawful command influence ("UCI") is central in military justice. Given "the preeminent role of the commander in the military justice system,"[103] and hierarchy in the military in general, UCI is said to be "the 'mortal enemy of military justice'—the single most dangerous assault on the fairness, and appearance of fairness, of the system."[104]

Inside the deliberation room, the reasoning is that a nonunanimous verdict requires no discussion. Voting for the verdict requires only one anonymized ballot, which in turn guards against UCI. In other words, the fear is that the "undue influence of rank is more likely to surface in the lengthy and heated deliberations often necessary to reach unanimity."[105] Where the panel must speak with one voice, any disagreement means that

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[100] United States v. Anderson, 83 M.J. 291, 302 (C.A.A.F. 2023), *cert. denied,* 144 S. Ct. 1003 (2024); *see also* United States v. Pritchard, 82 M.J. 686, 693 (A. Ct. Crim. App. 2022) (considering "the merits of two proffered bases for Congress's decision to require only majority verdicts in courts-martial," which are "that a requirement for unanimous verdicts would impair military justice by heightening the prospect of unlawful command influence during deliberations" and "that unanimous verdicts would unduly impede the efficiency of military operations"), *appeal denied sub nom.* Dial v. United States, 82 M.J. 446 (C.A.A.F. 2022).

[101] Final Brief on Behalf of the United States at 49, United States v. Anderson, 83 M.J. 291 (2023) (No. 22-193).

[102] United States v. Mayo, No. ARMY 20140901, 2017 WL 1323400, at *9 (A. Ct. Crim. App. Apr. 7, 2017).

[103] Patricia A. Ham, *Still Waters Run Deep? The Year in Unlawful Command Influence*, Army Law., June 2006, at 53, 54. The role of the commander manifests itself most prominently in the position of the convening authority. Because American courts-martial are not standing courts, they are created ad hoc, as necessity demands, by certain commanders—the convening authorities. *See* Eugene R. Fidell, *Rube Goldberg and Military Justice*, Just Security (Apr. 6, 2020) [hereinafter Fidell, *Rube Goldberg and Military Justice*], https://www.justsecurity.org/68935/rube-goldberg-and-military-justice [https://perma.cc/NSV5-ASP6]; Michael Paradis, *Is a Major Change to Military Justice in the Works?*, Lawfare (May 4, 2020, 11:30 AM), https://www.lawfaremedia.org/article/major-change-military-justice-works [https://perma.cc/FB3E-5ALL]. Convening authorities are often not lawyers, but are cloaked with enormous judicial and legal authority "and determine such critical matters as who shall be prosecuted on what charges and at what potential level of severity, what resources the defense will have to prepare for trial, whether there will be a pretrial agreement or grants of immunity, [and] who will serve on the jury." Eugene R. Fidell, Military Justice: A Very Short Introduction 10 (2016) [hereinafter Fidell, Military Justice]. The power of the convening authority has gradually decreased with civilianization of military justice, but they still persist in a central role in courts-martial. *See* Fidell, *Rube Goldberg and Military Justice*, *supra*; Paradis, *supra*. Some countries, like the United Kingdom, have eliminated the position after recognizing that the convening authority exercises authority in contravention to "the independence and impartiality of the tribunal." Findlay v. United Kingdom, App. No. 22107/93, ¶ 80 (Feb. 25, 1997), https://hudoc.echr.coe.int/eng?i=001-58016 [https://perma.cc/93NX-NNQQ]; *see also* Armed Forces Act 1996, c. 46 (UK).

[104] Ham, *supra* note 103, at 54 (footnote omitted) (quoting United States v. Thomas, 22 M.J. 388, 393 (C.M.A. 1986)).

[105] *Pritchard*, 82 M.J. at 693.

one panel member must yield to another, and where one member outranks another, there are "special concerns" because "[i]t is unlikely that the lessons learned during a lifetime of service in a rigid hierarchical system can always be briefly suspended during deliberations."[106] But without the requirement of unanimity, there is no need for discussion, so panel members decide the case by casting one vote by secret ballot.[107] Outside the deliberation room, the lack of a unanimity requirement, in conjunction with secrecy rules,[108] provides a panel member safety in casting "an unpopular vote."[109]

The second rationale seeks to justify nonunanimous verdicts on the basis that they allow for prompt resolution of, and finality in, military trials. This reasoning assumes that "deliberations towards unanimous verdicts are likely to take longer to achieve, thereby keeping participants from their military duties for greater periods of time."[110] If a panel deadlocks, command must choose between the "intolerable burden" of engineering a retrial at great cost and potential impact to mission,[111] and "returning a service member with unresolved charges to its ranks."[112] When only a three-fourths majority is required, however, verdicts "can presumably be reached more quickly on average and provide greater finality for both the command and the accused."[113]

The third and final rationale is closely related to the second and seeks to justify nonunanimous verdicts by balancing the needs of the military against the rights of the individual. The argument here is that the military is an organization driven by a purpose—to be an effective fighting force—and military justice is merely one part of the infrastructure that supports that purpose.[114] Therefore, the goal of military courts is not to insist on justice, but to impose good order and discipline.[115] The Supreme Court has historically endorsed this view, that "the military is, by necessity, a specialized society

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[106] *Mayo*, 2017 WL 1323400, at *8.

[107] *Id.*; *see also* Rules for Courts-Martial 921(c)(1) (2024) ("Voting on the findings for each charge and specification shall be by secret written ballot.").

[108] *See* Rules for Courts-Martial 922(e) (2024) ("[M]embers may not be questioned about their deliberations and voting.").

[109] *Mayo*, 2017 WL 1323400, at *8.

[110] *Pritchard*, 82 M.J. at 694.

[111] Murl A. Larkin, *Should the "Military Less-Than-Unanimous Verdict of Guilt Be Retained?*," 22 Hastings L.J. 237, 251 (1971).

[112] *Pritchard*, 82 M.J. at 694.

[113] *Id.*

[114] *See* Larkin, *supra* note 111, at 251 ("[I]n a military society, the maintenance of discipline is essential to the effectiveness of any fighting force.").

[115] *See* Reid v. Covert, 354 U.S. 1, 38 (1957) ("[M]ilitary law . . . is substantially different from the law which governs civilian society. Military law is, in many respects, harsh law which . . . emphasizes the iron hand of discipline more than it does the even scales of justice."); Nino C. Monea, *Reforming Military Juries in the Wake of* Ramos v. Louisiana, 66 Naval L. Rev. 67, 70 (2020) ("The military justice system must also be concerned with not encumbering commanders or preventing them from enforcing discipline in their units."); United States v. Grimley, 137 U.S. 147, 153 (1890) ("[An army's] law is that of obedience.").

separate from civilian society," in an effort to deny accused servicemembers constitutional rights guaranteed to civilian defendants.[116] Accordingly, the argument goes, a unanimous verdict is not required because the military's need for swift and conclusive discipline overrides the soldier-citizen's right to constitutional protections.[117] And who could not "profess confidence in a breezy cost-benefit analysis like that?"[118]

*B. Efforts at Unanimity in Courts-Martial Post-*Ramos

Following *Ramos*, numerous servicemembers challenged their convictions, arguing that court-martial panels must render unanimous verdicts as a constitutional matter. The CAAF's most extensive response came in *Anderson*, and it summarily affirmed a number of other convictions in explicit reliance on that decision.[119]

Anderson's Sixth Amendment claim proceeded by way of syllogism: the accused in a court-martial has the right to trial by an impartial jury.[120] The right to trial by an impartial jury, per *Ramos*, includes the right to a unanimous verdict.[121] Therefore, the accused in a court-martial has the right to a unanimous verdict.[122] The CAAF, however, rejected this logic, claiming that "[t]he Supreme Court did not explicitly equate impartiality with unanimity," and that the Sixth Amendment right to trial by jury does not otherwise apply to the accused in courts-martial.[123]

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[116] Parker v. Levy, 417 U.S. 733, 743 (1974); *see also* Brief for the United States in Opposition at 20, Martinez v. United States, 144 S. Ct. 1000 (2024) (No. 23-165) ("[The] Court has recognized that the military is a distinct society that could not 'function without strict discipline and regulation that would be unacceptable in a civilian setting,' and that 'the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty.'" (citations omitted) (first quoting Chappell v. Wallace, 462 U.S. 296, 300 (1983); and then quoting *Parker*, 417 U.S. at 744)).

[117] *Pritchard*, 82 M.J. at 694 ("Verdicts with a three-fourths majority, on the other hand, can presumably be reached more quickly on average and provide greater finality for both the command and the accused.").

[118] Ramos v. Louisiana, 590 U.S. 83, 90 (2020).

[119] *See infra* note 137 and accompanying text.

[120] *See* Brief on Behalf of Appellant at 14, United States v. Anderson, 83 M.J. 291 (C.A.A.F. 2023) (No. 22-193) ("[T]he Sixth Amendment requirement that the jury be *impartial* applies to court-martial members . . . ." (quoting United States v. Lambert, 55 M.J. 293, 295 (C.A.A.F. 2001))); *see also* United States v. Hilow, 32 M.J. 439, 442 (C.M.A. 1991) ("The right to trial by fair and impartial members . . . is the cornerstone of the military justice system.").

[121] *See* Brief on Behalf of Appellant, *supra* note 120, at 14 ("[T]he Supreme Court found that the term 'trial by an impartial jury' meant that '[a] jury must reach a unanimous verdict [sic] to convict.'" (second alteration in original) (quoting *Ramos*, 590 U.S. at 90)).

[122] *See id.* ("Because the Supreme Court explicitly equated the term impartial with unanimity, and in light of . . . *Lambert*, it is apparent that, following *Ramos*, a non-unanimous guilty verdict at a court-martial cannot be impartial. As such, servicemembers have a constitutional right to be convicted by a unanimous verdict under the Sixth Amendment . . . .").

[123] *Anderson*, 83 M.J. at 295-97.

Anderson brought his Fifth Amendment claims under theories of both due process and equal protection. As to due process, he made three sub-arguments: (1) because the *Ramos* Court incorporated the unanimity requirement as a matter of due process, it is a due process right and thus must be applied to courts-martial under military justice precedents;[124] (2) because the unanimous verdict right "is fundamental to the American scheme of justice," it must be a due process right applicable in military justice contexts;[125] and (3) due process requires conviction only upon proof beyond a reasonable doubt—a guarantee that applies to courts-martial—and a nonunanimous guilty verdict sanctions conviction in the presence of reasonable doubt.[126] The CAAF rejected the first claim on the basis that a right is not converted into one of due process simply by virtue of incorporation.[127] It rejected the second on the ground that the right to a unanimous verdict was not sufficiently supported by history and that a number of other safeguards ensure fair and impartial proceedings such that a due process challenge cannot "overcome the balance struck by Congress" in implementing nonunanimous verdicts.[128] And it rejected the third because "the reasonable doubt standard refers to reasonable doubt in the mind of the individual juror," not in the jury as a whole.[129]

As to equal protection, Anderson contended that because the right to a unanimous verdict is fundamental and a military accused and a civilian defendant are similarly situated, the Equal Protection Clause—by reverse incorporation[130]—mandates that congressional authorization of nonunanimous verdicts withstand strict scrutiny.[131] Applying strict scrutiny, he argued that "[t]here is no compelling interest in denying the fundamental right of a fair and impartial panel to servicemembers merely based on their service to the United States,"[132] or that, in the alternative, even if the unanimity right were not fundamental, the disparate treatment could not surmount rational basis because "[n]o benign purpose exists here."[133] The CAAF disagreed, invoking the principle that the military is a "separate society" driven by a

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[124] Brief on Behalf of Appellant, *supra* note 120, at 32-33.

[125] *Id.* (quoting *Ramos*, 590 U.S. at 93).

[126] *Id.* at 33-35.

[127] *Anderson*, 83 M.J. at 299.

[128] *Id.* at 298-99.

[129] *Id.* at 300.

[130] *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the Fifth Amendment Due Process Clause reverse incorporates the Fourteenth Amendment Equal Protection Clause against the federal government because "it would be unthinkable that the same Constitution would impose a lesser duty" on the United States than its subparts); United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021) ("The federal government is prohibited from violating a person's due process rights by denying him the equal protection of the laws."), *cert. denied*, 142 S. Ct. 711 (2021).

[131] Brief on Behalf of Appellant, *supra* note 120, at 46-47.

[132] *Id.* at 57.

[133] *Id.* at 63.

mission that has no counterpart in the civilian justice system and that there is no fundamental right to a unanimous jury verdict.[134] Therefore, it claimed, rational basis is sufficient to support UCMJ Article 52 (the statutory provision that requires conviction upon agreement of three-fourths of the panel),[135] and rational basis exists because "[t]he Government asserts that nonunanimous verdicts in the military are necessary to promote efficiency . . . and to guard against unlawful command influence."[136]

On the basis of its decision in *Anderson*, the CAAF summarily rejected claims from numerous other servicemembers arguing for reversal on essentially identical grounds.[137] Sixteen servicemembers consolidated their appeals and filed to request certiorari review.[138] Anderson also filed his own petition for certiorari review.[139] On February 20, 2024, however, the Supreme Court denied review in both appeals, leaving the CAAF's holding in *Anderson* in place.[140] Thus, today, the court-martial panel remains the only criminal jury in the United States that can render a valid verdict without unanimous agreement.

III. The "Simple Story" that Should Be: Incorporating the Unanimity Requirement to Military Justice

As a matter of straightforward doctrine, the CAAF erred in *Anderson* by ruling that servicemembers are not constitutionally entitled to unanimous verdicts under the Sixth Amendment. Furthermore, the CAAF's refusal to recognize that *Ramos* explicitly equated the *impartial* jury—a right that military accused are constitutionally guaranteed—with the *unanimous* jury was incorrect. In addition, notwithstanding the supposed "separate society" rationale, the military accused is indistinguishable from the civilian defendant in all aspects relevant under an equal protection analysis. The Fifth Amendment thus provides an independent basis for applying the unanimity requirement to court-martial panels.

A. The Sixth Amendment and Equating Unanimity with Impartiality

The *Anderson* Court began by acknowledging that the Sixth Amendment includes the right to a unanimous verdict.[141] But, it contended,

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[134] *Anderson*, 83 M.J. at 301.

[135] *See* 10 U.S.C. § 852(a)(3) (2018) ("No person may be convicted of an offense in a . . . court-martial, other than . . . by the concurrence of at least three-fourths of the members . . . .").

[136] *Anderson*, 83 M.J. at 302.

[137] *E.g.*, United States v. Martinez, 83 M.J. 439 (C.A.A.F. 2023); United States v. Aikanoff, 83 M.J. 440 (C.A.A.F. 2023).

[138] Petition for Writ of Certiorari, *supra* note 29, at ii.

[139] Petition for Writ of Certiorari, Anderson v. United States, 144 S. Ct. 1003 (2024) (No. 23-437).

[140] *Anderson*, 144 S. Ct. at 1003; Martinez v. United States, 144 S. Ct. 1000, 1000 (2024).

[141] *Anderson*, 83 M.J. at 294.

the "trouble . . . is that the Supreme Court has repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial."[142] In support, the CAAF cited *Ex parte Milligan* for the proposition that the jury trial right is guaranteed to all accused of a crime except those "attached to the army, or navy, or militia in actual service."[143] The court also cited *Ex parte Quirin*, and *Whelchel v. McDonald* as cases reaffirming that principle.[144]

Ex parte Milligan found it "doubtless" that the Framers "meant to limit the right of trial by [petit] jury in the sixth amendment" because the Fifth Amendment textually excepts "cases arising in the land or naval forces . . . when in actual service, in time of war or public danger" from the grand jury requirement.[145] But every step in that logical chain is deeply flawed. First, as Professor Dan Maurer explains, the *Milligan* Court misquoted the Fifth Amendment—there is no comma in the Fifth Amendment immediately after "actual service."[146] The text of the Constitution, then, does *not* indicate that the grand jury exception applies when the armed forces or the militia are (1) in actual service, (2) in wartime, or (3) in a time of public danger; it instead indicates that the exception applies when the armed forces or the militia are (1) in actual service in wartime, or (2) in actual service during a time of public danger. In other words, the Fifth Amendment exception applies to wartime military commissions, not courts-martial generally.[147]

Second, even if the Court were correct in its broader interpretation of the Fifth Amendment exception, it did not explain why it was "doubtless" that the Sixth Amendment required an analogous exception to the petit jury

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[142] *Id.*

[143] *Id.* (quoting *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866)).

[144] *Id.* at 294-95 (quoting *Ex parte* Quirin, 317 U.S. 1, 40 (1942)) (citing Whelchel v. McDonald, 340 U.S. 122, 127 (1950)).

[145] *Milligan*, 71 U.S. at 123.

[146] Maurer, *supra* note 27, at 154.

[147] *See id.* (explaining that "without the trespassing comma" of *Milligan*, "the plain reading of the text is that . . . the exception to the grand jury indictment [applies] only to a certain subset of courts-martial," namely military commissions, not courts-martial more broadly). Admittedly, however, this interpretation also requires a novel understanding of the Fifth Amendment in another way: the modifier "when in actual service" must be understood to apply not only to "the Militia" but also to "the land or naval forces." U.S. CONST. amend. V. The Supreme Court has held that although "[t]hat construction is grammatically possible . . . it is opposed to the evident meaning of the provision . . . ." Johnson v. Sayre, 158 U.S. 109, 114 (1895). However, it is possible that the Framers intended for the phrase "when in actual service" to modify "the land and naval forces" as well in order to ensure that military law applied only to those members of the armed forces who were "employed in whole pay" (rather than also to those who were half-pay retirees). *See* Marc J. Emond, *Can Grandpa Really Be Court-Martialed? The Constitutionality of Imposing Military Law upon Retired Personnel*, 231 MIL. L. REV. 165, 183, 190 (2024).

right.[148] Indeed, given that the Framers clearly knew how to explicitly except servicemembers from constitutional guarantees (as they did in the Grand Jury Clause),[149] by negative implication, they ought *not* be excepted when the text of the Constitution makes no provision doing so.[150] And the Sixth Amendment, of course, is subject to no such textual exceptions.[151]

In addition, *Milligan* has been the subject of numerous complaints in the context of the unanimity debate. For one, the Court there "struck down a military commission trial of a *civilian* for a *civilian offense* in *civilian, unoccupied territory* where *civil[ian]* courts were open and accessible."[152] Therefore, the erroneous interpretation of the Fifth Amendment and the "assumption" regarding the analogous Sixth Amendment exception were "unnecessary to make."[153] In accordance with this understanding, the Supreme Court relegated *Milligan*'s "doubtless" Sixth Amendment exception as "[d]icta" and declined to "finally resolve" the question of whether the right to jury trials applies to courts-martial.[154] The wilting dicta of *Milligan*, and even its younger progeny, are particularly suspect "in the area of criminal procedures, where the revolutions in rights—including the jury right—did not fully develop until long after *Milligan*."[155]

Furthermore, *Quirin* and *Whelchel* do nothing to move the relevant statements in *Milligan* from dicta to holding. "*Quirin* is, if anything, a worse choice as a precedent than *Milligan*."[156] In *Quirin*, at issue was whether German infiltrators in plainclothes seeking to cause "sabotage" could be

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[148] *See* Stephen I. Vladeck, *Military Courts and Article III*, 103 GEO. L.J. 933, 953 (2015) ("[I]n *Ex parte Milligan*, the Court articulated . . . that the petit jury trial provisions of Article III and the Sixth Amendment necessarily include an atextual exception that is *in pari materia* with the textual exception embedded within the Fifth amendment's Grand Jury Indictment Clause. . . . Unfortunately, *Milligan* . . . never elaborated upon [the atextual exception's] source.").

[149] *See* U.S. CONST. amend. V ("No person shall be held to answer for a . . . crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . .").

[150] *See* John M. Bickers, *The Cartoon Physics of the Court-Martial*, 126 W. VA. L. REV. 487, 505 (2024) ("The ordinary rule of *expressio unius est exclusio alterius* would seem to reverse the [*Milligan*] Court's logic. The specific exclusion of the military from the protection of the grand jury right might signal that in the following amendment the lack of such an exclusion meant to include the military within the protection of the petit jury." (footnote omitted)); 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 625 (Thomas M. Cooley ed., Boston, Little, Brown & Co. 1873) ("It would seem but fair reasoning, upon the plainest principles of interpretation, that when the Constitution established certain qualifications . . . it meant to exclude all others . . . .").

[151] *See* U.S. CONST amend. VI ("In *all* criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." (emphasis added)).

[152] Maurer, *supra* note 27, at 146.

[153] *Id.* at 147.

[154] Middendorf v. Henry, 425 U.S. 25, 33-34 (1976).

[155] Bickers, *supra* note 150, at 515.

[156] *Id.*

tried by military commission.[157] It is in that particular context of ruling that military prosecution was permissible in cases of "alleged war crimes by enemy combatants" during an armed conflict—a situation entirely foreign to the unanimity requirement in courts-martial—that the Court made "several points relevant to the jury trial."[158] Thus, again, those points, contained in an opinion Justice Scalia once noted "was not [the] Court's finest hour," remain dicta.[159]

Whelchel, likewise, was a case dealing with inapposite facts regarding whether military courts gave the petitioner an opportunity to tender an insanity defense.[160] It mentioned that the Sixth Amendment jury trial right was not applicable to courts-martial with no further analysis and used bare citations to *Kahn v. Anderson* (which in turn contained only a bare citation to *Milligan*) and *Quirin*.[161]

The *Anderson* Court responded to some of these arguments—it claimed that even if "all the Supreme Court cases stating that there is no Sixth Amendment right to a jury trial in the military justice system can be dismissed as dicta . . . the lack of such a right has been a central component of a series of landmark Supreme Court military justice cases."[162] But the CAAF attempted to ground its position by reference to just three decisions, all of which regarded the proper limit to court-martial jurisdiction (and were issued more than half a century prior to *Ramos*) and one of which was overturned.[163] The idea in *Anderson* was that in these cases, the Supreme Court set certain limits on court-martial jurisdiction (e.g., over civilian dependents accompanying servicemembers deployed overseas) because it was afraid that extending the military's jurisdiction would mean denying more individuals the right to a jury trial.[164] However, that the Court may have been cognizant of the Sixth Amendment implications of subjecting more individuals to court-martial jurisdiction does not change the fact that it had no occasion to pass on whether to apply the jury trial right in military contexts. In fact, these decisions would seem to indicate that the

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[157] *Ex parte* Quirin, 317 U.S. 1, 6-9 (1942).

[158] *See* Maurer, *supra* note 27, at 145-46.

[159] Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

[160] Whelchel v. McDonald, 340 U.S. 122, 123-24 (1950).

[161] *Id.* at 127 (first citing Kahn v. Anderson, 255 U.S. 1, 8 (1921); and then citing *Quirin,* 317 U.S. at 40-41); *see also* Bickers, *supra* note 150, at 520 n.250 ("*Whelchel* made the obligatory reference to *Quirin*, as well as to *Kahn*, which contained a tip of the hat to *Milligan*." (citation omitted)).

[162] United States v. Anderson, 83 M.J. 291, 295 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

[163] *Id.* at 295-96 (first citing U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 17-18, 23 (1955); then citing Reid v. Covert, 354 U.S. 1, 5, 21, 37 (1957); and then citing O'Callahan v. Parker, 395 U.S. 258, 261-62, 272 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987)).

[164] *See Anderson*, 83 M.J. at 295-96.

Court has long had misgivings about the lack of a constitutional jury trial in the military.

But assuming that the Sixth Amendment right to a jury trial as a whole does not apply to military courts, the CAAF explained in *United States v. Lambert* that "the Sixth Amendment requirement that the jury be *impartial* [does] appl[y] to court[s]-martial" and unequivocally extends to the deliberation room.[165] The lower court in *Anderson* had noted that if "the Sixth Amendment right to a jury trial does not apply to trial by courts-martial . . . by extension, neither does the unanimity requirement," but that court ignored the fact that the military courts have long held that constitutional rights can be applied piecemeal to courts-martial.[166] In *Lambert*, for instance, the court claimed that the "military accused has no Sixth Amendment right to a trial by jury" before holding that an accused does enjoy the Sixth Amendment impartiality requirement.[167] In fact, virtually every other Sixth Amendment right (e.g., the right to effective assistance of counsel, the right to public trial, the right to speedy trial) has been so fractionally incorporated to the military.[168] Indeed, as the *Anderson* Court itself acknowledged, "[i]mpartial court-members are a *sine qua non* for a fair court-martial."[169]

But the CAAF then claimed that "[t]he Supreme Court did not explicitly equate impartiality with unanimity . . . ."[170] This characterization of *Ramos*

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[165] 55 M.J. 293, 295 (C.A.A.F. 2001) (emphasis added).

[166] United States v. Anderson, No. ACM 39969, 2022 WL 884314, at *18 (A.F. Ct. Crim. App. Mar. 25, 2022).

[167] 55 M.J. at 295.

[168] *See* United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011) ("The Sixth Amendment guarantees a criminal accused, including military service members, the right to effective assistance of counsel."); United States v. Hershey, 20 M.J. 433, 435 (C.M.A. 1985) ("Without question, the sixth-amendment right to a public trial is applicable to courts-martial." (footnote omitted)); United States v. Harrington, 81 M.J. 184, 189 (C.A.A.F. 2021) ("In military prosecutions, the accused's Sixth Amendment speedy trial protections are generally triggered when charges are preferred."); *see also* Brief on Behalf of Appellant, *supra* note 120, at 30-32 (collecting cases).

The Air Force Court of Criminal Appeals also recognized that "several rights guaranteed by the Sixth Amendment have been applied to courts-martial," but declined to import the impartial jury right because doing so would be "*in direct contradiction to express statutory language*." *Anderson*, 2022 WL 884314, at *18 n.12. It noted that "the CAAF has found Sixth Amendment guarantees applicable where they are also consistent with the statutory regime Congress enacted." *Id*. Although an argument could be made that statutory language enacted pursuant to Congress's power to make rules for the military might give that statute greater force, the basic idea that an enumerated power gives Congress the power to overcome constitutional objections is a dangerous one. And it is a curious proposition indeed to say that a court should be more hesitant in declaring unconstitutional a practice sanctioned by law (and thus actively harming individuals) than in declaring unconstitutional a practice to which no one was adhering.

[169] *Anderson*, 83 M.J. at 296 (quoting United States v. Modesto, 43 M.J. 315, 318 (C.A.A.F. 1995)); *see also id.* ("[A]n accused servicemember's right to be tried by impartial panel members has long been a 'cornerstone of the military justice system.'").

[170] *Id.* at 297.

is baffling, for the Supreme Court stated: "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."[171] It is possible that the CAAF was seeking to distinguish the right to an impartial jury guaranteed to servicemembers under principles of due process and the right to an impartial jury guaranteed to civilians under the Sixth Amendment. The CAAF has made it clear that the right to a fair and impartial panel stems from the Constitution,[172] but its opinions have vacillated on whether the right originates from the Due Process Clause or the Sixth Amendment.[173] In *Anderson*, the CAAF seems to have taken the view that any guarantee of impartiality in courts-martial stems from the Due Process Clause. It stated: "[E]ach time the majority opinion [in *Ramos*] uses the phrase 'trial by an impartial jury,' the phrase is in quotation marks, indicating it is meant to be a quotation from the Sixth Amendment, rather than a deliberate emphasis on the word 'impartial.'"[174] By cabining the Court's discussion of impartial jury to the Sixth Amendment, the CAAF was presumably relying on the argument that the due process impartiality guaranteed to servicemembers is distinct from the Sixth Amendment impartiality guaranteed to civilians.

It bears mentioning that the Supreme "Court has long stressed that 'the language of an opinion is not always to be parsed as though [it] were dealing with [the] language of a statute.'"[175] But to the extent that such a surgical linguistic analysis is to be conducted, *Ramos* is clear that it was interpreting what an *impartial jury* means, not what a Sixth Amendment *jury trial* means: "The text and structure of the Constitution clearly suggest that the term 'trial by an impartial jury' carried with it *some* meaning about the *content and requirements* of a jury trial."[176] This language suggests that impartiality gives partial meaning to the content and requirements of a jury trial. Conceptually, this makes sense. In at least civilian criminal trials, where a jury trial right fully applies, the content and requirements of such a right include an impartial jury,[177] a jury drawn from "the State and district wherein the crime shall have been committed,"[178] a jury drawn from a

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[171] Ramos v. Louisiana, 590 U.S. 83, 91 (2020).

[172] *See* United States v. Bess, 80 M.J. 1, 7 (C.A.A.F. 2020) ("An accused has an absolute right to a fair and impartial panel, guaranteed by the Constitution . . . .").

[173] *Compare* 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 . . . ."), *with* 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.").

[174] *Anderson*, 83 M.J. at 297.

[175] Brown v. Davenport, 596 U.S. 118, 141 (2022) (second alteration in original) (quoting Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979)).

[176] *Ramos*, 590 U.S. at 89 (second emphasis added).

[177] *Id.* at 91.

[178] U.S. Const. amend. VI.

representative cross section of the community,[179] and at least six jurors.[180] All that Anderson urged, and all that is suggested here, is that that first prong of impartiality includes unanimity.[181]

B. The Equal Protection Basis for Unanimous Panel Verdicts

The Fifth Amendment offers another, independent basis for extending the unanimity requirement to courts-martial. The *Anderson* Court considered two separate Fifth Amendment arguments—one regarding due process and the other regarding equal protection. This section focuses on the latter.[182] That is, on an equal protection analysis, Congress's denial of the unanimous verdict right is unconstitutional because it cannot withstand strict scrutiny.[183]

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[179] *See* Taylor v. Louisiana, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."). One military judge stated in dissent prior to *Anderson* that the CAAF's opinions denying the accused the right to a jury trial focus on this right. That is, the CAAF has historically declined to apply the Sixth Amendment jury trial right because the military cannot guarantee a representative cross section in court-martial panels, not necessarily because it cannot guarantee a jury trial more generally. *See* United States v. Westcott, No. ACM 39936, 2022 WL 807944, at *38 (A.F. Ct. Crim. App. Mar. 17, 2022) (Meginley, J., dissenting in part and in the result).

If an impartial jury is to be truly guaranteed in courts-martial, it may very well be that the constituent right to a jury from a representative cross section of the accused's community must also be provided. *See* Holland v. Illinois, 493 U.S. 474, 480 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)."). The argument for that reform, beyond the scope of this Note, has also been the subject of some scholarly attention. *See, e.g.*, Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103, 158-63 (1992) (arguing that "the military can and should implement a procedure that seeks to obtain a representational cross section of the military community on court-martial panels" and recommending prescriptions); Peter L. Colt, Note, *"Military Due Process" and Selection of Court-Martial Panels: An Illogical Gap in Fundamental Protection*, 2 Hastings L.Q. 547, 559 (1975) ("[I]t is known that the military would have little economic or administrative difficulty in implementing representative procedures, either by random selection or by allowing the convening authority to select junior enlisted members personally.").

[180] Ballew v. Georgia, 435 U.S. 223, 239 (1978).

[181] *Cf.* Johnson v. Louisiana, 406 U.S. 356, 398 (1972) (Stewart, J., dissenting) ("[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines. The requirements of *unanimity and impartial selection thus complement each other* in ensuring the fair performance of the vital functions of a criminal court jury." (emphasis added)), *abrogated by Ramos*, 590 U.S. 83.

[182] To clarify, an equal protection violation would, in fact, constitute a due process violation as well because practices that "deny military personnel equal protection of the law . . . also violate due process." Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 Yale L.J.F. 1, 7 (2021) (citing Bolling v. Sharpe, 347 U.S. 497, 499 (1954)).

[183] The CAAF noted that due process challenges in the context of courts-martial are difficult. *See* United States v. Anderson, 83 M.J. 291, 298 (C.A.A.F. 2023) ("To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that the factors militating in favor of a different procedure are so extraordinarily weighty as to overcome the balance struck by Congress." (alterations and internal quotation marks omitted)), *cert.*

The Equal Protection Clause of the Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws."[184] The Fifth Amendment Due Process Clause is understood to "reverse incorporate" the Equal Protection Clause such that it binds the federal government—including the military—to an identical standard.[185] Equal protection is "concerned with governmental classifications that 'affect some groups of citizens differently than others.'"[186] It thus prohibits "governmental decisionmakers from treating differently persons who are in all relevant respects alike."[187] The threshold question, then, is whether civilian defendants and military accused are similarly situated.

1. Separate Society Versus Similarly Situated

This question is one with which the Supreme Court itself has grappled in two cases presenting two contrasting views of the military, one declared in *Parker v. Levy* and the other in *Ortiz v. United States* forty-five years later: is the military "a specialized society separate from civilian society," with "laws and traditions of its own,"[188] or is justice in the armed forces "virtually the same"[189] as justice in the rest of America?

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denied, 144 S. Ct. 1003 (2024). That is, when Congress strikes a balance between the rights of servicemembers and the operational needs of the military—here, between the right to a unanimous jury verdict and the purported efficiency of nonunanimous verdicts—courts are to give "particular deference" to that legislative balance. *See* Weiss v. United States, 510 U.S. 163, 177-78 (1994).

Existing scholarship has argued that this level of deference is inappropriate and that, even using the deferential standard, the denial of unanimous juries violates due process. *See, e.g.*, Karen A. Ruzic, Note, *Military Justice and the Supreme Court's Outdated Standard of Deference:* Weiss v. United States, 70 CHI.-KENT L. REV. 265, 295 (1994) ("[T]he inordinately high standard of judicial deference, so ardently clung to by the Supreme Court in military matters, is no longer appropriate."); Monea, *supra* note 115, at 91 ("Though a high standard, due process demands larger, unanimous juries in the military."). Evaluating the legal strength of an independent due process argument for a unanimous court-martial panel is beyond the scope of this Note, but this Note does contend that Congress should change the balance it struck in light of the countervailing policy justifications. *See infra* Part IV.

[184] U.S. CONST. amend. XIV, § 1.

[185] *See supra* note 130; *see also Anderson*, 83 M.J. at 300 ("The right to equal protection is part of due process under the Fifth Amendment, and so it applies to courts-martial, just as it does to civilian juries." (internal quotation marks omitted) (quoting United States v. Witham, 47 M.J. 297, 301 (C.A.A.F. 1997))); Lamb, *supra* note 179, at 134 ("[T]he Court of Military Appeals [the CAAF's predecessor court] long has recognized the applicability of the due process and equal protection guarantees of the Fifth Amendment.").

[186] Engquist v. Or. Dep't of Agric., 553 U.S. 591, 601 (2008).

[187] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992); *see also* Ross v. Moffitt, 417 U.S. 600, 609 (1974) ("'Equal protection,' on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable."); United States v. Begani, 81 M.J. 273, 280 (C.A.A.F. 2021) ("[T]he Government must treat 'similar persons in a similar manner.'" (quoting United States v. Gray, 51 M.J. 1, 22 (C.A.A.F. 1999))).

[188] Parker v. Levy, 417 U.S. 733, 743 (1974).

[189] Ortiz v. United States, 585 U.S. 427, 438 (2018).

i. Comparing Civilians and Servicemembers Generally

Parker discussed the separate-society rationale in the context of a First Amendment challenge to a court-martial conviction. The case arose from military proceedings against an Army captain, Howard Levy, who made statements to enlisted personnel arguing that the "United States is wrong in being involved in the Viet Nam War," that he "would refuse to go to Viet Nam if ordered to do so," and that "Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children."[190] Levy was then convicted, in part for these statements, on charges of "conduct unbecoming an officer and a gentleman" under UCMJ Article 133 and of "disorder[] and neglect[] to the prejudice of good order and discipline in the armed forces" under UCMJ Article 134.[191] At the Supreme Court, Levy challenged his conviction in part on the ground that Articles 133 and 134 are overbroad in violation of the First Amendment.[192]

The *Parker* Court found that the First Amendment might "require[] a different application" in the military context and ruled against Levy.[193] And true, the mission of the military might, for instance, require that a servicemember abide by orders to stay silent while surreptitiously infiltrating enemy territory, or even prohibit public expression of certain viewpoints regarding a particular armed conflict. It would be difficult to argue that such orders abridge affected servicemembers' rights under the First Amendment given the military's mission. Similar restrictions exist across American society without raising the specter of unconstitutional state action. In public schools, for instance, "teachers routinely impose prior restraints"—the very "essence of censorship"—by forbidding students from speaking unless permitted to do so.[194] And on examinations, instructors compel students "to explain their views about controversial historical and ethical questions."[195] In courtrooms, too, the judge controls what speech is acceptable.[196]

No one, however, believes that it is necessary to categorize public schools or courthouses as societies separate from the rest of American life in order to treat them differently as a constitutional matter. All that is required is a recognition that a particular *mission* at play in schools and other specific contexts provides the government constitutional authority to exercise what Professor Robert Post calls "managerial" authority that permits restraints on speech.[197] It is this concept of differing missions—not separate societies—

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[190] *Parker*, 417 U.S. at 736-37.

[191] *Id.* at 738.

[192] *Id.* at 752.

[193] *Id.* at 758.

[194] Robert Post, *Theorizing Student Expression: A Constitutional Account of Student Free Speech Rights*, 76 STAN. L. REV. 1643, 1647 (2024).

[195] *Id.* at 1648.

[196] *See id.* at 1658.

[197] *See id.* at 1652-61.

that might diminish the application of First Amendment protections in the military.

The *Parker* Court recognized the mission rationale: "While the members of the military are not excluded from the protection granted by the First Amendment . . . the military mission requires a different application of those protections."[198] But it erred by conflating an organization that has a distinct mission with a separate society. It believed that "[t]he differences between the military and civilian communities result from the fact that 'it is the primary business of armies and navies to fight . . . wars,'" and that "the different character of the military community *and* of the military mission requires a different application of" constitutional protections.[199] But if the mere existence of a particular mission were to give rise to a separate society, we might refer to schools and courtrooms as separate societies, too. That cannot be so.

Furthermore, as a practical matter, the military has, over time, become less isolated and more connected with the rest of American society. To be sure, at one point in history, the armed forces "might have been considered a [small,] peculiar, almost monastic profession, with its members living 'according to their own customs in near-isolation from the civilian world.'"[200] Justice Stewart's dissent in *Parker* acknowledged this fact as well: "Throughout much of this country's early history, the standing army and navy numbered in the hundreds. The cadre was small, professional, and voluntary. The military was a unique society, isolated from the mainstream of civilian life . . . ."[201] But even in 1974, "the days of a geographically distant, frontier military, one without a presence or relevance in the lives of civilian citizens, [were] almost a century in the past."[202] *Parker* relied "on a perspective of military life that [was] . . . obsolete for generations" by "resurrect[ing] a pre–World War I (and in two instances, pre–Civil War) line of authority . . . in support of the novel idea that the military is somehow separate from civilian society in a way that is constitutionally significant."[203] Indeed, writing thirteen years prior to the decision in *Parker*, Professor Joseph Bishop, Jr. stated that there should be "as little distinction as possible between military and civil tribunals and between soldiers and other citizens [because], if there ever was a time when the Army could rationally be described as a 'separate community' with a separate system of government, that time is long past."[204]

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[198] *Parker*, 417 U.S. at 758.

[199] *Id.* at 743, 758 (emphasis added).

[200] Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 744 (2002).

[201] *Parker,* 417 U.S. at 781 (Stewart, J., dissenting).

[202] Mazur, *supra* note 200, at 744.

[203] *Id.* at 743-44.

[204] Joseph W. Bishop, Jr., *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 70 (1961).

One might argue that even if the military at issue in *Parker* was different from its historical counterpart, it was because a large portion of it was composed of "conscripts or draft-induced volunteers, with no prior military experience and little expectation of remaining beyond their initial period of obligation."[205] It is true that in the all-volunteer military of recent decades, the average length of service has been slightly longer than in the 1970s, and the share of citizens serving in uniform has declined.[206] But today's military is integrated with civilian life in myriad other ways.

First, the physical location of servicemembers and technological developments have allowed them to integrate more fully into civilian life. In 2019, some 700,000 servicemembers—well over half of the active-duty military population—lived in off-base housing.[207] For those living within military installations, the rise in individual vehicle ownership, public transit options, and ridesharing apps might mean that servicemembers are no longer as physically limited to the base and its immediate surroundings.[208] Even when on base, the development of cell phones, emails, and social media enables instantaneous communication with civilians.[209]

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[205] *Parker*, 417 U.S. at 782 (Stewart, J., dissenting).

[206] Erich J. Prince, *Consider Benefits of Shorter Military Enlistments*, The Hill (Mar. 26, 2023), https://thehill.com/opinion/national-security/3918671-consider-benefits-of-shorter-military-enlistments [https://perma.cc/95E9-DPZB].

[207] Cong. Budget Off., How the Military's Basic Allowance for Housing Compares with Civilian Housing Costs 4 (2024), https://www.cbo.gov/publication/60062 [https://perma.cc/VD8E-ETB3].

[208] *Compare* Mark J. Perry, *Chart of the Day: Rising Household Vehicle Ownership over Time Belies the "Middle Class Stagnation" Narrative*, Am. Enter. Inst. (Sept. 24, 2013), https://www.aei.org/carpe-diem/chart-of-the-day-rising-household-vehicle-ownership-over-time-belies-the-middle-class-stagnation-narrative [https://perma.cc/ADP2-YN34] (indicating that in 1970, about forty-eight percent of American households owned at least one vehicle), *with* Ashlee Valentine, *Car Ownership Statistics 2024*, Forbes, https://www.forbes.com/advisor/car-insurance/car-ownership-statistics [https://perma.cc/53NB-F8B3] (last visited Jan. 3, 2025) (indicating that in 2022, about ninety-two percent of American households owned at least one vehicle).

[209] Although not dispositive, the rise of social media, in particular, allows servicemembers to remain connected to the wider civilian culture. For instance, a search for videos tagged with "army" on popular social media site TikTok returns more than 39 million posts. *See #army*, TikTok, https://www.tiktok.com/tag/army?lang=en [https://perma.cc/D99F-XTJD] (last visited Mar. 2, 2025). Many other posts show individuals in uniform surprising family members, *see, e.g.*, @aelden_evrard, TikTok (Mar. 15, 2022), https://www.tiktok.com/@aelden_evrard/video/7075197075515804954?lang=en [https://perma.cc/FTD9-WQ9Z], being the target of pepper spray, *see, e.g.*, @yah.girl.nd, TikTok (July 30, 2021), https://www.tiktok.com/@yah.girl.nd/video/6990851634775461125?lang=en [https://perma.cc/ARX7-29GX], and partaking in social-media trends, *see, e.g.*, @bigdaddyjuju, TikTok (Oct. 3, 2022), https://www.tiktok.com/@bigdaddyjuju/video/7150408944983346474?lang=en [https://perma.cc/6HKQ-TFFY]. The various branches have their own social media accounts boasting millions of followers and exhibiting their servicemembers. *See, e.g.*, U.S. Coast Guard (@UScoastguard), Facebook, https://www.facebook.com/UScoastguard [https://perma.cc/25B4-MUCA] (last visited Mar. 2, 2025); U.S. Navy (@usnavy), Instagram, https://www.instagram.com/usnavy/?hl=en [https://perma.cc/E88V-9E9F] (last visited Mar. 2, 2025); U.S. Marines (@USMC), Twitter, https://twitter.com/USMC?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [https://perma.cc/5VLZ-92SF] (last visited Mar. 2, 2025).

Second, many servicemembers are inextricably connected to civilian life through their civilian spouses and children. In 1973, only 40% of the active-duty enlisted force were married,[210] but in the last twenty years, married individuals comprised between 45% and 54% of enlisted personnel.[211] Among all married servicemembers, only 10.8% of them are in dual-military marriages, meaning that approximately 90% of married servicemembers are married to civilians.[212] Nearly 35% of servicemembers have minor children, who are, of course, necessarily civilian.[213]

In short, the military has become more integrated with civilian life. That integration is well reflected in service demographics. Indeed, today's military more closely resembles the racial and gender makeup of the American population than did the military of the 1970s. Nearly a third of today's military, for example, is composed of racial minority groups and the officer corps exhibits racial diversity similar to that of the general population.[214] Until the mid-1970s, female servicemembers constituted less than 2% of the military,[215] but today, women make up nearly 18% of the active-duty force.[216] Whatever isolation may have persisted in the military by the time of *Parker*, there remains even less of a divide with civilians today. Therefore, the *Parker* Court's "'separate society' rationale was and is factually and legally unsupportable."[217]

ii. Comparing Civilian Justice and Military Justice

The gradual reflection of civilian life attributes in the military indicates that the two communities, as a whole, might be similarly situated.[218] However, the equal protection analysis might require not only a comparison between civilian and servicemember generally, but one between criminal defendant in the civilian justice system and accused servicemember in the

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[210] *The Military-Civilian Gap: War and Sacrifice in the Post-9/11 Era*, Pew Rsch. Ctr. (Oct. 5, 2011), https://www.pewresearch.org/wp-content/uploads/sites/3/2011/10/veterans-report.pdf [https://perma.cc/6UBJ-VBU4].

[211] 2022 Demographics, *supra* note 32, at 129.

[212] *Id.* at 128.

[213] *Id.* at v.

[214] *Id.* at iii; *Demographics of the U.S. Military*, Council on Foreign Rels. (July 13, 2020, 9:00 AM), https://www.cfr.org/backgrounder/demographics-us-military#chapter-title-0-7 [https://perma.cc/D62D-S9VG].

[215] Daphne Lofquist, *Three-Fourths of Female Veterans Served During Wartime*, U.S. Census Bureau (Mar. 13, 2018), https://www.census.gov/library/stories/2018/03/female-veterans.html [https://perma.cc/MA5W-WMDM].

[216] 2022 Demographics, *supra* note 32, at iii.

[217] Mazur, *supra* note 200, at 744.

[218] This is not to say that civilians and servicemembers are in all respects *identical*. Every community has its own defining attributes, and, to be sure, there are few career choices that require the dedication and sacrifices requested of servicemembers. Simply stated, the extent of the analysis conducted here regards whether civilian defendants and the military accused are sufficiently similarly situated for equal protection purposes.

military justice system. On this comparison, too, the two classes are similarly situated.

As the two communities merged, so did their justice systems. Whatever may have been the case in the past, today, "[t]he military justice system's essential character [is] in a word, judicial" and "[t]he procedural protections afforded to a service member are 'virtually the same' as those given in a civilian criminal proceeding."[219] For example, the Fifth Amendment Double Jeopardy Clause applies to courts-martial just as it does to civilian criminal trials.[220] Military prosecutors must prove beyond a reasonable doubt every element of the charged offense in order to satisfy the Fifth Amendment Due Process Clause,[221] and the same clause prohibits the government from suppressing evidence favorable to an accused if it is requested and material.[222] The accused has the Sixth Amendment right to counsel[223]—including the right to effective assistance of counsel[224]—and, in fact, almost every other right under the Sixth Amendment.[225] Perhaps most importantly, "courts-martial today can try service members for a vast swath of offenses, including garden-variety crimes unrelated to military service," meaning that the jurisdictions of civilian and military courts overlap significantly and comparable sentences can be meted out upon conviction in either tribunal.[226]

The *Anderson* Court nevertheless differentiated the military justice system on the ground that it does not guarantee a constitutional right to (1) a trial by jury, (2) before an Article III judge, or (3) after indictment by a grand jury.[227] But, first, it seems unacceptably circular to argue that a right to a trial by jury cannot be guaranteed because a right to a trial by jury is not guaranteed. In any case, portions of the jury right are already incorporated—panel members essentially function as jurors, and they are required to be impartial.[228] Second, although military judges are not Article III judges, they share important characteristics with their civilian counterparts. CAAF judges, for instance, are civilians, and they serve for long (fifteen-year) terms, protected by for-cause removal provisions.[229] The decisions rendered by military judges likewise enjoy res judicata effect, including in the context

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[219] Ortiz v. United States, 585 U.S. 427, 437-38 (2018).

[220] United States v. Rice, 80 M.J. 36, 40, 45-46 (C.A.A.F. 2020).

[221] United States v. Richard, 82 M.J. 473, 479 (C.A.A.F. 2022).

[222] United States v. Claxton, 76 M.J. 356, 359 (C.A.A.F. 2017).

[223] United States v. Wattenbarger, 21 M.J. 41, 43 (C.M.A. 1985).

[224] United States v. Gooch, 69 M.J. 353, 361 (C.A.A.F. 2011).

[225] United States v. Westcott, No. ACM 39936, 2022 WL 807944, at *40-41 (A.F. Ct. Crim. App. Mar. 17, 2022) (Meginley, J, dissenting in part and in the result).

[226] Ortiz v. United States, 585 U.S. 427, 438 (2018).

[227] United States v. Anderson, 83 M.J. 291, 301 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

[228] *See supra* notes 27, 165 and accompanying text.

[229] *See* 10 U.S.C. § 942(b)(1), (c) (2018).

of the Double Jeopardy Clause.[230] And third, indictment by a grand jury, or lack thereof, is not a sufficient differentiator. If it were, many federal and state defendants would never be similarly situated, for the Grand Jury Clause has not been incorporated.[231] Yet courts have welcomed comparisons between similarly situated federal and state defendants to show differential treatment in support of selective prosecution claims.[232]

It is true that, in order to enforce certain military disciplinary objectives, there are offenses in the military that do not have civilian criminal counterparts. The UCMJ, for instance, prohibits some actions lawful for civilians[233] such as conduct unbecoming an officer,[234] absence without leave,[235] or misbehavior before the enemy.[236] But again, courts-martial today also try "garden-variety crimes" that are unrelated to military service.[237] Indeed, the UCMJ prohibits robbery,[238] kidnapping,[239] arson,[240] assault,[241] and numerous other offenses that have clear civilian counterparts.[242] Quite simply, courts-martial "operate[] as instruments of military *justice*, not . . . mere 'military command,'" and the jurisdiction of military courts

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[230] *Ortiz*, 585 U.S. at 438.

[231] Hurtado v. California, 110 U.S. 516, 538 (1884) (holding that the right to indictment via a grand jury is not required in state criminal prosecutions); *see also* Robert W. Frey, Note, *Incorporation, Fundamental Rights, and the Grand Jury:* Hurtado v. California *Reconsidered*, 108 Va. L. Rev. 1613, 1628 (2022) ("Thanks to *Hurtado*, the Grand Jury Clause is the last criminal procedure right that the Court has not found to be fundamental.").

[232] United States v. Armstrong, 517 U.S. 456, 470 (1996); *see also id.* at 480 (Stevens, J., dissenting) ("Evidence tending to prove that black defendants charged with distribution of crack in the Central District of California are prosecuted in federal court, whereas members of other races charged with similar offenses are prosecuted in state court, warrants close scrutiny . . . ."); United States v. Tuitt, 68 F. Supp. 2d 4, 14 (D. Mass. 1999) (holding that the "Defendant has offered information pertaining to similarly situated individuals who were not prosecuted" in part because he "has compared federal and state prosecutions arising out of the same population and geographic area and has shown that whites represented at least 10% of state prosecutions as compared to 0% in federal court"); United States v. Jones, 36 F. Supp. 2d 304, 311 (E.D. Va. 1999) (noting that a transfer of prosecution from state to federal court "would be vulnerable on selective prosecution grounds if African-American defendants were routinely diverted from state to federal prosecution while prosecutors allowed similarly situated Caucasian defendants to remain in state court"). And to be clear, selective prosecution claims are adjudicated "according to ordinary equal protection standards." Wayte v. United States, 470 U.S. 598, 608 (1985).

[233] Vladeck, *supra* note 148, at 949-50.

[234] 10 U.S.C. § 933 (2018).

[235] *Id.* § 886.

[236] *Id.* § 899.

[237] Ortiz v. United States, 585 U.S. 427, 438 (2018).

[238] 10 U.S.C. § 922 (2018).

[239] *Id.* § 925.

[240] *Id.* § 926.

[241] *Id.* § 928.

[242] *See, e.g.*, 18 U.S.C. § 2112 (2018) (prohibiting robbery); *id.* § 1201 (prohibiting kidnapping); *id.* § 81 (prohibiting arson); *id.* § 111 (prohibiting assault). Anderson himself was convicted of attempted sexual abuse of a child. United States v. Anderson, 83 M.J. 291, 293 (C.A.A.F. 2023), *cert. denied*, 144 S. Ct. 1003 (2024).

"overlaps significantly with the criminal jurisdiction of federal and state courts."[243] In light of these overwhelming similarities, there can be little doubt that a servicemember accused of a crime and a civilian accused of a crime are "in all relevant respects alike."[244]

2. Fundamental Right Versus State Interest

Once it is established that two groups of individuals are similarly situated, the equal protection analysis calls for ascertaining whether the government's disparate treatment disadvantages a "suspect class" or encroaches on the exercise of a "fundamental right."[245] If either a suspect class or a fundamental right is involved, the discrimination is "presumptively invidious" and courts must apply strict scrutiny.[246] Then, on strict scrutiny review, the government must "demonstrate that its classification has been precisely tailored to serve a compelling governmental interest."[247]

The class of accused servicemembers is perhaps not a "suspect" one,[248] but the right to a unanimous jury verdict surely ought to be a fundamental one. A fundamental right is "explicitly or implicitly guaranteed by the Constitution."[249] For example, rights protected by the First Amendment (explicitly guaranteed)[250] and the right to vote (implicitly guaranteed) are fundamental.[251] Similarly, the right to a unanimous verdict is guaranteed by the Constitution—the Sixth Amendment—and is "fundamental to the American scheme of justice," a "vital right," and an "indispensable" facet of

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[243] Ortiz v. United States, 585 U.S. 427, 438-39 (2018) (emphasis added).

[244] Nordlinger v. Hahn, 505 U.S. 1, 10 (1992).

[245] Plyler v. Doe, 457 U.S. 202, 216-17 (1982).

[246] *Id.*

[247] *Id.*

[248] Suspect classes are classes of individuals "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973). Historically, the Supreme Court has recognized as suspect only classifications based on race, *see* McLaughlin v. Florida, 379 U.S. 184, 192 (1964), national origin, *see* Oyama v. California, 332 U.S. 633, 644-46 (1948), alienage, *see* Graham v. Richardson, 403 U.S. 365, 371-72 (1971), and religion, *see* United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938). The First Amendment, however, "has generally prevented courts from entertaining the claim that religious classifications deserve heightened scrutiny." Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485, 495 n.33 (1998). Anderson made no argument that accused servicemembers constitute a suspect class. *See* United States v. Anderson, 83 M.J. 291, 301 (C.A.A.F. 2023) ("[Anderson] does not argue that servicemembers are a protected class."), *cert. denied*, 144 S. Ct. 1003 (2024).

[249] *Rodriguez*, 411 U.S. at 2.

[250] *E.g.*, Williams v. Rhodes, 393 U.S. 23, 38-39 (1968).

[251] *E.g.*, Dunn v. Blumstein, 405 U.S. 330, 336 (1972).

fair adjudication.[252] Accordingly, UCMJ Article 52 must be subject to strict scrutiny.

However, the CAAF rejected Anderson's argument that "a unanimous verdict is a fundamental right" in a single sentence without reasoning.[253] One possible explanation is that in *Edwards v. Vannoy*, the Supreme Court declined to find that the right to a unanimous jury verdict is a "watershed" procedural rule necessitating retroactive application on federal collateral review.[254] Even assuming *Vannoy* was correctly decided, that ruling is inapposite to finding whether a right is fundamental. There has only ever been one watershed procedural rule—the right to counsel—and there will never be any other such watershed rules.[255] But even the Court in *Edwards* acknowledged that many decisions are "momentous and consequential," are "landmark and historic," and "*fundamentally* reshape[] criminal procedure," even if not watershed.[256] And watershed procedural rules dictate only whether the right applies "retroactively on federal collateral review."[257] Watershed rules, therefore, do not map perfectly onto the constellation of fundamental rights.

Applying strict scrutiny, then, the nonunanimous court-martial panel cannot be constitutional. The governmental interests at stake are those identified in section II.A above. Namely, nonunanimous verdicts supposedly guard against UCI, promote efficiency, and preserve good order and discipline.[258] But, first, even assuming that shielding against UCI is a compelling state interest, the solution of permitting less-than-unanimous verdicts is not narrowly tailored to that end. It seems odd, at best, to require that one right—a constitutional one at that—be totally eviscerated so as to allow

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[252] Ramos v. Louisiana, 590 U.S. 83, 89-93 (2020); *see also* United States v. Westcott, No. ACM 39936, 2022 WL 807944, at *45 (A.F. Ct. Crim. App. Mar. 17, 2022) (Meginley, J., dissenting in part and in the result) ("Given that our military justice system is 'judicial'—as described in *Ortiz*—I find the right to a unanimous verdict is a fundamental constitutional right, as articulated in *Ramos*.").

[253] *Anderson*, 83 M.J. at 301 ("Even if Appellant were similarly situated to a civilian criminal defendant, he has no fundamental right to a unanimous verdict in the military justice system . . . .").

[254] *See* 593 U.S. 255, 271 (2021) ("[T]he *Ramos* jury-unanimity rule does not apply retroactively on federal collateral review."). Under the framework established by *Teague v. Lane*, 489 U.S. 288, 311 (1989), a new rule of constitutional criminal procedure generally does not apply retroactively to convictions that were already final at the time the new rule was announced. However, there are two exceptions: (1) "courts must give retroactive effect to new substantive rules of constitutional law," such as those prohibiting criminalization of a class of primary conduct or prohibiting a category of punishment; and (2) "courts must give retroactive effect to new watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Montgomery v. Louisiana, 577 U.S. 190, 198 (2016). *Edwards* went beyond finding that the unanimous verdict right is not a watershed procedural rule by entirely eliminating the second exception. *See Edwards*, 593 U.S. at 272 ("New procedural rules do not apply retroactively on federal collateral review. The watershed exception is moribund.").

[255] *Edwards*, 593 U.S. at 272.

[256] *Id.* at 270-71 (emphasis added).

[257] *Id.* at 271.

[258] *See supra* section II.A.

for a safeguard against a potentiality.[259] It also seems disingenuous to say that servicemembers on panels cannot set aside hierarchy for the sake of deliberation. "Countless military cases have held that jurors are presumed to follow complex, ungainly instructions,"[260] and American jurisprudence generally adheres to the understanding "that juries are presumed to follow their instructions."[261] If a lay jury can properly confine its consideration of an incriminating statement to the purpose of assessing credibility and not that of evaluating guilt on the basis of a limiting instruction,[262] a military panel can also obey an instruction (particularly if it is a written rule that commands adherence) to suspend deference to authority for the purposes of deliberation. As one military appellate court acknowledged, "we might presume that panel members could deliberate [a case] fairly without the influence of rank or position in most cases."[263] This type of instruction would be a much narrower and more viable alternative to permitting conviction on a nonunanimous verdict.

Second, the efficiency rationale is not a sufficiently compelling interest. For the past sixty years, the hung-jury rate in nonmilitary cases has stayed consistent at approximately six percent.[264] And, despite the millions of individuals *subject* to courts-martial,[265] there are not overwhelming numbers of courts-martial. In 2021, the Department of Defense branches conducted just 1,361 general and special courts-martial.[266] Courts-martial before a panel are even rarer and occur in only twenty-two percent of cases—all of 299 cases in 2021.[267] Assuming that military panels would hang at the same rates (which is unlikely given that military panels tend to be composed of fewer members than civilian juries), in 2021, eighteen cases would have terminated

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[259] United States v. Westcott, No. ACM 39936, 2022 WL 807944, at *46 (A.F. Ct. Crim. App. Mar. 17, 2022) (Meginley, J., dissenting in part and in the result) ("To say that one protection for an accused servicemember is a reason to diminish another protection is a non-sequitur.").

[260] Monea, *supra* note 115, at 77 (first citing United States v. Nash, 71 M.J. 83, 89 (C.A.A.F. 2012); then citing United States v. Washington, 57 M.J. 394, 403 (C.A.A.F. 2002); and then citing United States v. Holt, 33 M.J. 400, 408 (C.A.A.F. 1991)).

[261] Richardson v. Marsh, 481 U.S. 200, 211 (1987).

[262] Harris v. New York, 401 U.S. 222, 223-25 (1971).

[263] United States v. Mayo, No. ARMY 20140901, 2017 WL 1323400, at *8 (A. Ct. Crim. App. Apr. 7, 2017).

[264] Harry Kalven, Jr. & Hans Zeisel, The American Jury 57 (1966) (showing that the jury deadlocks in 5.5% of cases); Nicole L. Mott, *Caseload Highlights: Examining the Work of State Courts: A Profile of Hung Juries*, Nat'l Ctr. for State Cts. 1 (May 2003), https://www.courtstatistics.org/__data/assets/pdf_file/0022/30559/A-Profile-of-Hung-Juries.pdf [https://perma.cc/23NZ-ZJJP] (last visited Mar. 2, 2025) (showing that the jury deadlocks in six percent of cases).

[265] *See supra* text accompanying notes 32-40.

[266] Don Christensen, *Reflections on Court-Martial Numbers*, CAAFlog (Mar. 8, 2022), https://web.archive.org/web/20240912152230/http://www.caaflog.org/home/new-numbers-are-out.

[267] *Id.*

in a mistrial.[268] On a cost basis, it seems likely that retrying eighteen more cases each year would be feasible in light of the collective budget of the Defense Department service branches—over $600 billion annually.[269] To be sure, panel members and the accused in all 299 cases may be kept from their normal duties for longer periods if unanimous verdicts are required. But it is far from evident that efficiency "always scores as a credit, not a cost."[270]

For instance, "non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The [ten] jurors 'can simply ignore the views of their fellow panel members of a different race or class.'"[271] The military justice system is no stranger to racial disparities of a similar character to those that mar the civilian justice system. Indeed, the military has long recognized "that racial disparities have existed and continue to exist in our military."[272] A government investigation found that Black and Hispanic servicemembers "were more likely than White [service]members to be the subjects of investigations . . . and to be tried in general and special courts-martial in all of the military services" even after "controlling for attributes such as rank and education."[273] A different study found that Black servicemembers are also "more likely than white servicemembers to receive less than honorable administrative discharges (General and Other Than Honorable)" as well as "punitive discharges (Bad Conduct and Dishonorable)."[274]

Unanimous verdicts are required as the last line of defense against such racial disparities in military justice. The numerous benefits of unanimous verdicts—especially ones that allow greater defenses against racial

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[268] Presumably, these eighteen cases, though statistically negligible, would be among the most difficult in terms of factual uncertainties, meaning that these are the very cases that would most benefit from a full deliberation aimed at a unanimous verdict.

[269] Chris Gordon, *Air Force vs. Army vs. Navy: How the '24 Budgets Stack Up*, Air & Space Forces Mag. (Mar. 13, 2023), https://www.airandspaceforces.com/air-force-vs-army-vs-navy-how-the-24-budgets-stack-up [https://perma.cc/95EF-X3KH] (last visited Mar. 2, 2025).

[270] Ramos v. Louisiana, 590 U.S. 83, 99 (2020).

[271] *Id.* at 127 (Kavanugh, J., concurring) (quoting Johnson v. Louisiana, 406 U.S. 356, 397 (1972) (Stewart, J., dissenting)), *abrogated by Ramos*, 590 U.S. 83.

[272] U.S. Dep't of Def., Internal Review Team on Racial Disparities in the Investigative and Military Justice Systems 3 (2022), https://media.defense.gov/2023/Jun/08/2003238260/-1/-1/1/IRT-REPORT.PDF [https://perma.cc/H5VC-48RU]; *see also* Kathleen H. Hicks, *Addressing Racial Disparities in the Military Justice System*, The Hill (Sept. 1, 2021, 7:01 PM ET), https://thehill.com/opinion/national-security/570464-addressing-racial-disparities-in-the-military-justice-system [https://perma.cc/MM4Z-MH7C] ("Racial disparities in the military justice system have been a problem for far too long.").

[273] U.S. Gov't Accountability Off., No. GAO-19-344, Military Justice: DOD and the Coast Guard Need to Improve Their Capabilities to Assess Racial and Gender Disparities (2019), https://www.gao.gov/assets/gao-19-344.pdf [https://perma.cc/CWZ4-66AL].

[274] Alden Pinkham, Millie VandenBroek, Cara Cancelmo & Shannon Carter, *Discretionary Injustice: How Racial Disparities in the Military's Administrative Separation System Harm Black Veterans*, Conn. Veterans Legal Ctr. 22 (2022), https://ctveteranslegal.org/wp-content/uploads/2022/11/Discretionary-Injustice-Report.pdf [https://perma.cc/H4DT-2MUX].

biases—apply with no less force in the military context.[275] To hold that "constitutional protections . . . 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."[276] Particularly "[i]n a noncombat setting with so few cases, the chief concern [of courts-martial] should be accuracy, not haste."[277] Thus, the efficiency rationale fails to provide the necessary compelling interest.

Finally, the good-order-and-discipline rationale cannot serve as a compelling state interest for many of the same reasons. The existing hierarchical and disciplinary structures of the modern military and its justice system make "it unlikely that a marginal increase in acquittals or mistrials would erode discipline."[278] In addition to the availability of more swift administrative measures to address minor misconduct, it is common practice to confine or otherwise separate the accused from his unit.[279] In any case, the *Ortiz* Court highlighted the "false dichotomy" between discipline and justice by recognizing that a military justice system that promotes basic constitutional protections enhances discipline.[280] Accordingly, UCMJ Article 52 cannot withstand strict scrutiny and must be unconstitutional.

IV. The Path Forward for Unanimity

Despite the compelling constitutional grounds for extending the unanimous verdict right to the military accused, the Supreme Court has declined to review the CAAF's judgment in *Anderson*.[281] It is, of course, possible for the CAAF or the Supreme Court to require unanimous panels on the basis of the arguments such as those contained in the preceding Part. Anderson and other individuals could also file for federal collateral review and continue efforts to bring the unanimous jury to courts-martial through the lower federal courts.[282] However, federal habeas corpus relief is exceedingly

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[275] *See Ramos*, 590 U.S. at 100 ("[R]equiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations[.]"); discussion *supra* section I.B.

[276] Reid v. Covert, 354 U.S. 1, 14 (1957).

[277] Monea, *supra* note 115, at 78.

[278] *Id.*

[279] *Id.*

[280] Lauren A. Shure & Jeremy S. Weber, Ortiz v. United States*: The Savior or Death Sentence of the Military Justice System?*, 81 Air Force L. Rev. 187, 231-32, 235 (2020) (emphasis added).

[281] Anderson v. United States, 144 S. Ct. 1003 (2024); Brief for Respondent, Martinez v. United States, 144 S. Ct. 1000 (2024) (No. 23-242).

[282] *See* Burns v. Wilson, 346 U.S. 137, 139 (1953) (holding that federal district courts have jurisdiction to consider habeas corpus applications from individuals confined by order of military courts); Denedo v. United States, 66 M.J. 114, 119 (C.A.A.F. 2008) ("The results of courts-martial are subject to collateral review by courts outside the military justice system.");

difficult to obtain,[283] Article III courts generally apply a highly deferential review when considering constitutional challenges to the UCMJ,[284] and the Supreme Court rarely grants review in cases on appeal from the CAAF.[285]

Accordingly, this Part explores the possibilities of reform through the political branches. At a national level, both Congress and the President can and should move the military justice system towards reform.[286] State legislatures also have a part to play given the half-a-million members of the National Guard who are under the jurisdiction of one of fifty-three separate state (or territorial) codes of military justice. Reform through legislation or executive action may not, at first blush, have the value of improved permanence that constitutionalization might. But given that courts tend to be deferential in cases concerning military legislation,[287] political reform may be just as irreversible in practice.

Bergdahl v. United States, 683 F. Supp. 3d 24, 35 (D.D.C. 2023) (holding that a servicemember may bring a collateral attack on a court-martial conviction in federal district court "regardless of whether the service member is in custody" because "the district court's power to preside over collateral attacks of court-martial convictions [is] not limited to proceedings for writs of habeas corpus" (citing Schlesinger v. Councilman, 420 U.S. 738, 745 (1975))).

[283] Jones v. Hendrix, 599 U.S. 465, 530 (2023) (Jackson, J., dissenting) ("[A series of recent federal habeas rulings in the Supreme Court] have now collectively managed to transform . . . federal postconviction judicial review into an aimless and chaotic exercise in futility. The route to obtaining collateral relief is presently replete with imagined artificial barriers, arbitrary dead ends, and traps for the unwary.").

[284] *See* John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 Ga. L. Rev. 161, 161 (2000) ("[T]he military deference doctrine requires that a court considering certain constitutional challenges to military legislation perform a more lenient constitutional review than would be appropriate if the challenged legislation were in the civilian context."); *see also id.* at 215 ("[I]n a series of decisions issued between 1974 and 1976, the Court fashioned a remarkable new and more flexible military deference doctrine in which the Court granted Congress wide berth in deciding how best to balance the needs of the military society against the civil liberties of the individual servicemember.").

[285] *See* Fidell, Military Justice, *supra* note 103103, at 6. It was not until 1983 that Congress even provided for certiorari jurisdiction over courts-martial. Fidell, Fissell & Cave, *supra* note 182, at 7. And it was not until December 22, 2024 that every servicemember who petitions for review at the CAAF became eligible to seek certiorari review. Eugene R. Fidell & Brenner M. Fissell, *Equal Access to the Supreme Court for Servicemembers: The Missing Pieces*, Just Security (Nov. 15, 2024), https://www.justsecurity.org/104857/supreme-court-servicemembers-1259 [https://perma.cc/NSV5-ASP6]. A grant of the writ of certiorari in cases before CAAF is so exceedingly rare that miniature trophies—called "Golden CAAFs"—are awarded to lawyers who succeed in getting such a petition granted. Steve Vladeck, *The Missing Court-Martial Docket*, One First (Jan. 9, 2023), https://www.stevevladeck.com/p/9-military-justice-andat-the-supreme [https://perma.cc/BB7G-56ZP].

[286] Professor Dan Maurer has made excellent arguments to advance the proposition "that unanimity among the factfinders should be required to determine a person—soldier or otherwise—is guilty of a serious offense . . . and that Congress has the authority and rule-making responsibility to do so." Maurer, *supra* note 27, at 167. This Part adds to Professor Maurer's call for reform by suggesting incremental policy proposals and expanding the call to include potential action by the executive branch and state legislatures.

[287] *See supra* notes 284-85 and accompanying text.

First, Congress has, over the years, steadily civilianized the military justice system, including by raising the number of votes required to convict.[288] It certainly has the authority to amend the UCMJ to require unanimity in all courts-martial.[289] Unanimity, in fact, is already required, at both conviction and sentencing, if prosecutors are seeking the death penalty.[290] This provision represents Congress's recognition that consensus without dissent is possible—and necessary for at least one criminal sanction—notwithstanding general objections that unanimity is logistically infeasible for the military.

The military, however, has not carried out an execution since 1961.[291] The only other U.S. jurisdiction that authorizes the imposition of the death penalty but has not used it for a longer period of time is New Hampshire, where the last execution took place in 1939.[292] In practice, then, the most severe punishment available is "a sentence of confinement for life without eligibility for parole,"[293] which, in many ways, constitutes "simply another type of death penalty."[294] In recent decades, while executions have decreased nationwide, those serving life sentences without parole quadrupled in number.[295] Defendants subject to the death penalty are often entitled to certain enhanced procedural protections, such as the right to counsel with certain minimum qualifications, and jurors tend to be more squeamish about imposing capital punishment.[296] For the accused against whom the prosecution seeks a life sentence without parole, however, no such protections apply and no such reservations are apparent.[297] Unlike in civilian courts, in

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[288] Maurer, *supra* note 27, at 143; *supra* text accompanying notes 93-97.

[289] Dynes v. Hoover, 61 U.S. 65, 79 (1857) ("Congress has the power to provide for the trial and punishment of military and naval offences . . . .").

[290] 10 U.S.C. § 852(b)(2) (2018).

[291] John Gramlich, *California Is One of 11 States that Have the Death Penalty but Haven't Used It in More than a Decade*, Pew Rsch. Ctr. (Mar. 14, 2019), https://www.pewresearch.org/short-reads/2019/03/14/11-states-that-have-the-death-penalty-havent-used-it-in-more-than-a-decade [https://perma.cc/539H-VBD8].

[292] *Id.*

[293] 10 U.S.C. § 856(c)(4)(A) (2018).

[294] Brandon J. Baker, *Life Without Parole Is American's Hidden Death Penalty*, Prison Journalism Project (Sept. 21, 2022), https://prisonjournalismproject.org/2022/09/21/life-without-parole-is-americas-hidden-death-penalty [https://perma.cc/4VU2-TSBH]; *see also* Cary Aspinwall, *Life Without Parole Is Replacing the Death Penalty — But the Legal Defense System Hasn't Kept Up*, Marshall Project (May 22, 2021, 6:00 AM EDT), https://www.themarshallproject.org/2021/05/22/life-without-parole-is-replacing-the-death-penalty-but-the-legal-defense-system-hasn-t-kept-up [https://perma.cc/3JPX-BXU5] (quoting Lawrence Meyers, a former judge of the Texas Court of Criminal Appeals, as remarking that "[l]ife without parole is just another form of the death penalty, just a slower version of it").

[295] Peter Irons, *A Prison Sentence of Life Without Parole Isn't Called the Death Penalty. But It Should Be.*, NBC News (June 24, 2020, 2:08 PM EDT), https://www.nbcnews.com/think/opinion/prison-sentence-life-without-parole-isn-t-called-death-penalty-ncna1232018 [https://perma.cc/SG4Q-6NNW].

[296] *See* Aspinwall, *supra* note 294; Brandon L. Garrett, *Why Jurors Are Rejecting the Death Penalty*, Slate (July 11, 2017, 2:31 PM), https://slate.com/news-and-politics/2017/07/why-jurors-are-rejecting-the-death-penalty.html [https://perma.cc/56D4-S2MQ].

[297] *See* Aspinwall, *supra* note 294; Garrett, *supra* note 296.

the military, this "slower version"[298] of the death penalty requires neither a unanimous verdict nor a twelve-person panel.[299]

Thus, if Congress were serious about protecting the military accused with the additional safeguard of unanimous juries for the most severe sanctions, it should consider legislating the unanimity requirement at least in cases where possible sentences exceed ten years in confinement. This type of progressive burden is familiar to Congress and the military. For a century preceding the 2016 amendments to the UCMJ, the level of agreement required of the panel was dependent on the sentence to be imposed: capital cases required unanimous concurrence; a sentence of ten years' confinement or longer required three-fourths concurrence; and all other cases required two-thirds concurrence.[300] Such gradation would mark an important incremental step towards a full-fledged unanimity requirement.

Second, even in the absence of congressional action, the President can mitigate the impact of nonunanimous verdicts. Congress, through the UCMJ, has delegated significant power to the President to prescribe regulations for "[p]retrial, trial, and post-trial procedures" in the military.[301] Accordingly, for as long as the UCMJ has been in effect, the President has issued the Manual for Courts-Martial ("MCM").[302] Although the MCM cannot override explicit commands of the UCMJ,[303] "[i]t, in effect, declares much of the military law," and by the third year of its publication, it was well understood to constitute the "'bible of military justice' . . . used as such by all persons having any dealings with military justice."[304] In its current iteration, the MCM contains the Rules for Courts-Martial and is more broadly an 800-page compendium of countless policies that govern the entire length of a court-martial proceeding and the conduct of all individuals involved therein, from "investigating officer" to "the members of the Boards of Review."[305]

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[298] Aspinwall, *supra* note 294.

[299] *See* 10 U.S.C. §§ 816, 852 (2018).

[300] *See supra* notes 93-97 and accompanying text.

[301] 10 U.S.C. § 836(a) (2018).

[302] *See* Exec. Order No. 10,214, 16 Fed. Reg. 1303 (Feb. 8, 1951) ("By virtue of the authority vested in me by the . . . [UCMJ] and as President of the United States, I hereby prescribe the [MCM] . . . .").

[303] *See* 10 U.S.C. § 836(a) (2018) ("Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial . . . may be prescribed by the President by regulations . . . but which may not . . . be contrary to or inconsistent with this chapter."); *see also* United States v. LaGrange, 3 C.M.R. 76, 78 (C.M.A. 1952) ("Article 36 of the [UCMJ] provides that the President may prescribe rules of procedure . . . in cases before courts-martial, provided they are not contrary to or inconsistent with the provisions of the [UCMJ]. This Article brings into the [UCMJ] the oft-expressed rule that the terms of a congressional enactment can not be defeated by terms engrafted thereon by an executive order, and if the two are inconsistent, the statute must stand alone.").

[304] Frank Fedele, *The Manual for Courts-Martial — Its Legal Status and the Effect of Decisions of the United States Court of Military Appeals*, 23 Fordham L. Rev. 323, 324 (1954).

[305] *Id.* at 324-25; *see* U.S. Dep't of Def., Manual for Courts-Martial (rev. ed. 2024) [hereinafter 2024 MCM].

Even though the comprehensive "provisions of the [MCM] are law-making in nature," it is not the product of an enactment of Congress but an order of the President.[306] As a result, amendments to the MCM are frequent and require nothing more than an executive order to implement. For instance, both 2022 and 2023 saw executive orders amending the MCM,[307] which were reflected in the republications of the MCM in 2023 and 2024.[308] Indeed, the Joint Service Committee on Military Justice ("JSC") reviews the MCM every year to ensure harmonization with "judicial and legislative developments in military and civilian" law and practice and accordingly proposes amendments for the President to implement by executive order.[309]

The MCM, through the Rules for Courts-Martial, controls important aspects of the panel's processes, including by requiring that panel members decide by casting a single anonymous vote without deliberation.[310] The purpose behind the nondeliberative secret ballot is to guard against potential UCI in the deliberation room and to protect the panel members if they must cast unpopular votes.[311] But, as suggested in section III.B.2, it is at best incoherent with an otherwise universally accepted practice, and at worst pretextual, to contend that servicemembers cannot abide by jury instructions to refrain from unduly influencing subordinates (or being so unduly influenced simply because a superior votes a certain way).[312] Furthermore, civilian juries—both grand[313] and petit[314]—commonly cast unpopular votes without

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[306] Fedele, *supra* note 304, at 325.

[307] *See* Exec. Order 14,103, 88 Fed. Reg. 50535 (July 28, 2023); Exec. Order 14,062, 87 Fed. Reg. 4763 (Jan. 26, 2022).

[308] *See* 2024 MCM, *supra* note 305; U.S. Dep't of Def., Manual for Courts-Martial (rev. ed. 2023).

[309] Office of the Gen. Couns., U.S. Dep't of Defense, DoD Instruction 5500.17, Role and Responsibilities of the Joint Service Committee on Military Justice 6-8 (2018).

[310] *See supra* notes 105-09 and accompanying text.

[311] *See supra* notes 107-09 and accompanying text.

[312] *See supra* text accompanying notes 260-63.

[313] For example, one poll indicated that only 22% of Americans approved of a New York grand jury's decision declining to indict Daniel Panteleo, the police officer who had placed Eric Garner in the fatal chokehold. *Sharp Racial Divisions in Reactions to Brown, Garner Decisions*, Pew Rsch. Ctr. 1 (Dec. 8, 2014), https://www.pewresearch.org/wp-content/uploads/sites/4/2014/12/12-8-14-Police-Race-release.pdf [https://perma.cc/82FR-7NWY]. In contrast, 57% of Americans, *id.*, and 65% of New Yorkers, PBS News Hour, *Definitions of Justice Diverge over Eric Garner on Staten Island – Part 2*, PBS (Dec. 4, 2014, 7:55 PM EDT), https://www.pbs.org/newshour/show/definitions-justice-diverge-eric-garner-staten-island [https://perma.cc/R5SD-Y8JQ], reported that the grand jury made the wrong decision.

[314] For example, Casey Anthony, a Florida woman accused of killing her two-year-old daughter, was, according to one poll, the most hated person in America. Jill Serjeant, *Casey Anthony Is Most Hated Person in America: Poll*, Reuters (Aug. 10, 2011, 10:15 AM EDT), https://www.reuters.com/article/idUSTRE77934O [https://perma.cc/L75F-CL9Z]. Nearly two-thirds of Americans believed that Anthony had definitely or probably killed her daughter, but the jury had voted to acquit. Camille Mann, *Casey Anthony Guilty Say 2 Out of 3 Three Americans, Says Poll*, CBS News (July 11, 2011, 12:00 PM EDT), https://www.cbsnews.com/news/casey-anthony-guilty-say-2-out-of-3-americans-says-poll [https://perma.cc/TD2T-SZEC]. When the

the security of a secret ballot. Proponents of this practice in courts-martial seem to have offered no justification as to why we must assume that the lay juror would exhibit greater counter-majoritarian fortitude than the military panel member. Accordingly, the JSC should propose amendments terminating the use of secret ballots, and the President should issue a new executive order incorporating such amendments.

An amendment of this sort can take a broad or narrow approach. In a broad approach, panel members would no longer vote by secret written ballots and would be subject to questioning about their deliberations and voting. Such a broad approach is likely to encourage more deliberation simply by virtue of removing a barrier to verbal discussion.[315] But if the JSC or the President believes there is merit to the stated purposes driving secret voting, even a narrow approach would have benefits. In such an approach, the panel would still vote by secret written ballot and be immune from questioning regarding its deliberation, but the rules would require the panel to report an anonymized record of how its members voted.

This change to the rules would provide useful data as to how many courts-martial are decided by nonunanimous verdicts and with what kind of divisions within the panel. Currently, this lack of information constrains both advocates of reform and those preferring the status quo. If records reveal that, for example, nearly every court-martial is being decided by unanimous verdict, one could argue that the marginal cost of mandating unanimity would be even lower than estimated in section III.B.2 (or, conversely, that a unanimity requirement would achieve little in practice).[316] But that debate cannot properly be had until more information is public. Measured against the significant benefit of better data, the costs are likely to be only marginal. In all cases but those with unanimous verdicts, the unchanged requirement of secret ballots and prohibition against questioning would continue to uphold the core purposes purportedly for which ballots are kept secret (i.e., to shield against UCI and to protect unpopular votes). And where the verdict is unanimous, although the ballots would no longer be anonymous, at the time of voting, the ballots were still secret (and thus, presumably, safe from at least UCI, if not popular pressures).

Third, another intermediate solution can be implemented by state legislatures. Fifty-three state and territorial jurisdictions, each of which have National Guard servicemembers, have their own codes

court released the names of the jurors—which was only done three months after the verdict in an unusual move to ensure a "cooling off period" for their safety—they received death threats. Tamara Lush & Kyle Hightower, *Casey Anthony Jurors Lay Low After Names Revealed*, SEATTLE TIMES, https://www.seattletimes.com/nation-world/casey-anthony-jurors-lay-low-after-names-revealed [https://perma.cc/LC5N-8FX2] (last updated Oct. 27, 2011, 6:10 AM).

[315] A robust deliberative process is part of why unanimity is important. *See supra* notes 80-82 and accompanying text.

[316] *See supra* notes 268-69 and accompanying text.

of military justice.[317] These statutes collectively cover court-martial procedures—including the number of votes required for conviction—for the nearly half a million individuals who comprise the National Guard.[318] The state and territorial codes currently vary widely in the level of concurrence required for conviction. In Colorado, for example, "[n]o person may be convicted of an offense except by the unanimous concurrence of the members" of the panel.[319] In the U.S. Virgin Islands, the code of military justice simply incorporates by reference the UCMJ.[320] But many more jurisdictions lag behind the latest UCMJ amendments requiring even a three-fourths majority, and, in those states and territories, conviction may still be reached with a two-thirds majority.[321] Amending these state and territorial laws to at least comport with the standards of the UCMJ, and, ideally, to require unanimity, would be a productive initial step towards reform.

Conclusion

Consider the following hypothetical: Harry is enjoying a warm spring afternoon on the porch of his house in Columbus, Georgia. While taking a sip of his iced tea, he is viciously assaulted by an unknown assailant. Harry succumbs to his injuries. Georgia authorities begin an investigation and, within days, ascertain that Sally, a Master Sergeant at Fort Benning was responsible for the homicidal attack. State prosecutors bring charges and take her to trial in civilian court, but a jury acquits her. Unsatisfied, the Army convenes a court-martial to try Sally for the very same act of murder. She is then convicted—and sentenced to life in prison without the possibility of parole—on the agreement of six of eight panel members. Even setting aside the issue of double jeopardy,[322] one would think that, after *Ramos*,

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[317] *State Codes*, Nat'l Inst. Mil. Just., https://www.nimj.org/state-codes.html [https://perma.cc/WS7H-AN3B] (last visited Mar. 2, 2025).

[318] *See* Anshu Siripurapu & Noah Berman, *What Does the U.S. National Guard Do?*, Council on Foreign Rels., (Apr. 3, 2024, 10:35 AM EST), https://www.cfr.org/backgrounder/what-does-us-national-guard-do [https://perma.cc/54QZ-QLD4].

[319] Colo. Rev. Stat. § 28-3.1-317(1) (2024).

[320] V.I. Code Ann. tit. 23, § 1551 (2024).

[321] *See, e.g.*, Ky. Rev. Stat. Ann. § 35.260(1) (West 2024); P.R. L. Ann. tit. 25, § 2617(a) (2024); 30 R.I. Gen. L. § 30-13-55(a) (2024).

[322] The Double Jeopardy Clause, U.S. Const. amend. V, does not prevent military authorities from prosecuting individuals acquitted in state civilian court because the dual-sovereignty doctrine allows federal and state authorities to separately prosecute the same individual for the same conduct, Gamble v. United States, 587 U.S. 678, 681-82 (2019). As recently as 2020, the CAAF affirmed a death sentence levied by a general court-martial for murder counts of which the accused was acquitted in civilian court. United States v. Hennis, 79 M.J. 370, 374 (C.A.A.F. 2020), *cert. denied*, 141 S. Ct. 1052 (2021); *see also* United States v. Rice, 80 M.J. 36, 43 n.13 (C.A.A.F. 2020) ("[T]he same misconduct can be the basis for prosecution under separate statutory provisions of different sovereigns because the same act, by transgressing the laws of two sovereigns, creates a "duality of harm." (quoting *Gamble*, 587 U.S. at 686)); United States v. Greening, No. 201700040, 2018 WL 1547779, at *1-2 (N-M. Ct. Crim. App. Mar. 30, 2018)

a three-fourths majority is simply not sufficient for this verdict. After all, the right to a unanimous jury is a constitutional one, and "fundamental to the American scheme of justice."[323] But there is no legal bar that prevents actualization of this hypothetical, in which the verdict of an eight-person, nonunanimous jury can lead to a life in prison (even in the face of a contrary decision from a twelve-person unanimous jury).

This Note challenged the permissibility of that possibility from both legal and policy angles. Whether viewed under the Sixth Amendment right to an impartial jury or Fifth Amendment equal protection, the law should be straightforward: servicemembers have a constitutional right to unanimous jury verdicts. But in the absence of the Supreme Court's decision to settle the matter, it is the duty of other branches of government—at both national and state levels—to remedy the issue. At one point in our history, it may very well have been that the military was a society separate from its civilian counterpart. But if ever that was the case, it certainly is not today. Continuing to adhere to this vestigial assumption leads to a peculiar trade for servicemembers. If one volunteers his time, youth, and potentially life or limb to serve, in the event he is accused of a crime, he is to be treated constitutionally worse than if he had not so volunteered. "But where is the justice in that?"[324]

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(affirming a sentence exceeding three years' confinement for an offense to which the accused already had pleaded guilty in a Virginia court), *aff'd*, 79 M.J. 152 (C.A.A.F. 2019).

[323] Ramos v. Louisiana, 590 U.S. 83, 93 (2020).

[324] *Id.* at 111.