

No.17-175

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IN THE  
**Supreme Court of the United States**

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EMMANUEL Q. BARTEE,  
LANCE CORPORAL,  
UNITED STATES MARINE CORPS,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On Petition for a Writ of Certiorari to the  
United States Court of Appeals for the Armed Forces

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**REPLY TO BRIEF IN OPPOSITION**

R. Andrew Austria  
LT, JAGC, U.S. Navy  
*Counsel of Record*  
U.S. Navy-Marine Corps  
Appellate Defense Division  
1254 Charles Morris St, SE  
Bldg. 58, Suite 100  
Washington Navy Yard,  
D.C. 20374  
202-685-7054  
rey.austria@navy.mil

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Petitioner, Lance Corporal Emmanuel Q. Bartee, United States Marine Corps, through counsel, hereby replies to the government's Brief in Opposition filed with this Court on December 6, 2017.

## INTRODUCTION

Discrimination in the selection of court[-martial] members on the basis of improper criteria threatens the integrity of the military justice system and violates the Uniform Code.... When rank is used as a device for deliberate and systematic exclusion of qualified persons, it becomes an irrelevant and impermissible basis for selection.<sup>1</sup>

The government does not dispute servicemembers across the globe will be affected by the answer to the question presented. Nor does it dispute the systematic exclusion of servicemembers based on rank frequently recurs during the member-selection process. Nor does it dispute that fewer women and racial minorities will serve on court-martial panels if this Court allows discrimination on the basis of rank to continue. Instead, it erroneously defends the U.S. Court of Appeals for the Armed Forces' (CAAF) holding that re-impairing the same defective court-martial panel does not violate Article 25, Uniform Code of Military Justice, or the Fifth Amendment's Due Process Clause. The government also asserts that Lance Corporal Bartee's case is an

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<sup>1</sup> *United States v. Daigle*, 1 M.J. 139, 140 (C.M.A. 1975).

unsuitable vehicle to address the question presented and offers misleading procedural arguments for why this Court should deny review. As discussed below, the flaws in each of the government's tenuous positions highlight exactly why this Court must intervene. Lance Corporal Bartee's petition should be granted.

**I. The government errs in defending the CAAF's finding that no violation of Article 25 occurred.**

The government first suggests that the lower court's decision should stand because the improperly-selected members may have satisfied Article 25's eligibility requirements and this "alone would have been sufficient to dispose of this case in the absence of supplementary judicial doctrines developed by the CAAF."<sup>2</sup> But the eligibility of those who were chosen for court-martial service in this case is not at issue: it is the manner in which they were selected.

Take for example an all-white jury that was selected using procedures that excluded racial minorities in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). There is a chance that the selected jury members could still be fair and impartial, but how they were selected still calls into question the very fundamental fairness of the proceedings and the "public[s] confidence in the fairness of our system of justice[.]"<sup>3</sup> So too here.

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<sup>2</sup> Br. in Opp'n 15.

<sup>3</sup> *Batson*, 476 U.S. at 87.

Next, the government offers the convening authority (CA) cured any taint from the initial selection by merely considering a broader category of potential court-members the second time around.<sup>4</sup> The military judge and the courts below each determined that the CA's initial selection violated Article 25. But each erred when it determined that the CA's cursory consideration of the command's alpha roster<sup>5</sup> of 8,000 personnel and his failure to read any additional questionnaires<sup>6</sup> was sufficient to cure the taint from the first selection.

Although the lower court's decision found "no credible evidence" suggesting any improper motive to pack the member pool, the courts below, the military judge, and the government in its Brief in Opposition, each ignored the prosecutor's cavalier statements regarding member selection and "commitment" to Article 25:

And we'll just note for whatever it's worth that in prior situations where this [issue] came up, we ended up with the same exact panel that was originally selected after going through the reconfirming. [Then paraphrasing what the convening authority says] I —

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<sup>4</sup> Br. in Opp'n 16.

<sup>5</sup> The alpha roster is a list of personnel assigned to the command and contains no other biographical data other than name and rank.

<sup>6</sup> A court-martial questionnaire is several pages long and asks the respondent for detailed information regarding their age, family, career history, education, experience with the criminal justice system, as well as their beliefs.

Yes, I understand I can pick whoever I want to, this is still the panel that I want to go forward with.<sup>7</sup>

This statement, along with the affidavit of the CA's Staff Judge Advocate (his attorney who admits that he first looks only at senior personnel), reveal a well-established system to circumvent the protections of Article 25.<sup>8</sup> Thus, the circumstances surrounding Lance Corporal Bartee's court-martial demonstrate the CA's motive to simply rubber stamp his earlier selections and keep the improperly-selected panel.

More telling is the fact that the government's Brief in Opposition does not even address whether re-panels the same defective court-martial panel creates the appearance of unfairness in court-martial proceedings. Such selection procedures undermine the public's confidence in the military justice system and calls into question whether servicemembers are treated fairly and in accordance with contemporary American standards of justice. "A fair trial in a fair tribunal is a basic requirement of due process...But [for due process] to perform its high function in the best way 'justice must satisfy the appearance of justice.'"<sup>9</sup> Re-panels the same defective court-martial panel does not satisfy the appearance of justice, Article 25, or the Due Process Clause. As such, this Court cannot let *Bartee* stand.

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<sup>7</sup> R. at 246.

<sup>8</sup> Appellate Ex. XXXV at 1.

<sup>9</sup> *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)).



## II. The issue frequently recurs.

The government does not contest the prevalence of Article 25 violations in the military justice system.<sup>10</sup> Instead, it contends that because the military courts can identify violations of Article 25 this Court need not intervene.<sup>11</sup> While the military courts are capable (at times) of identifying violations of Article 25, they fail to adequately address the problem. However, when a servicemember is tried by an improperly-selected panel, the lower court's decisions in *United States v. Ward*, 74 M.J. 225 (C.A.A.F. 2015), *United States v. Sullivan*, 74 M.J. 448 (C.A.A.F. 2015), and now *Bartee*, all but guarantee that accused servicemembers will not receive any relief. These decisions provide further incentive to CAs to violate Article 25.

Moreover, since the filing of Lance Corporal Bartee's Petition, other CAs have continued to systematically exclude personnel on the basis of rank from court-martial service.<sup>12</sup> The frequency in which such violations occur and the military courts' steadfast reluctance to provide relief demonstrate exactly why this Court must intervene.

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<sup>10</sup> Br. in Opp'n 17.

<sup>11</sup> Br. in Opp'n 17-18.

<sup>12</sup> See, e.g., *United States v. Jeter*, appeal docketed, No. 201700248 (N-M Ct. Crim. App. Aug. 22, 2017) (excluding officers below paygrade O-4, striking all black officers from the original convening order, and resulting in an all-white panel for an accused, black officer (paygrade O-2)).

### III. The lower court's decision in *Bartee* allows for the systematic exclusion of personnel on the basis of rank to endure.

The government argues there is no evidence that the lower court's decision will lead to the "stacking" of court-martial panels.<sup>13</sup> On the contrary, the panel-selection procedures utilized in *Bartee* provide a proven and tested roadmap to CAs to circumvent Article 25. This Court needs to look no further than the pending Petition in *Tso v. United States*, No. 17-479, for such an example.<sup>14</sup>

In the military justice system, the systematic exclusion of personnel based on rank from court-martial service is not used to ensure the fairness of the proceedings. Rather, CAs and their staff often believe that more senior court-martial panels are more likely to convict and/or adjudge harsher sentences.<sup>15</sup> This is the only plausible explanation for why such violations of Article 25 are so prevalent. And here it is even more problematic given that the CA personally knew each of the members.<sup>16</sup> This

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<sup>13</sup> Br. in Opp'n 18.

<sup>14</sup> Another recent example is *United States v. Bess*, where the CA appears to have systematically excluded personnel on the basis of race in a case involving a black, accused servicemember. See *United States v. Bess*, No. 201300311 (N-M. Ct. Crim. App. filed Nov. 20, 2017) (selecting an all-white panel to try a black servicemember).

<sup>15</sup> See, e.g., *United States v. McClain*, 22 M.J. 124, 130-131 (C.M.A. 1986) (finding that the CA systematically excluded personnel on the basis of rank in order to obtain harsher sentences).

<sup>16</sup> R. at 270.

Court's failure to intervene and prohibit the discrimination on the basis of rank will only further encourage CAs to violate Article 25.

**IV. The government's due process arguments regarding the disparate impact on women and racial minorities are a red herring.**

“As a matter of due process, an accused has a constitutional right, as well as a regulatory right, to a fair and impartial panel. These rights are upheld through application of selection criteria contained in Article 25....”<sup>17</sup> To be clear, Lance Corporal Bartee is not raising a due process challenge before this Court on behalf of women and minorities who may be disparately impacted by such selection procedures, as in *Powers v. Ohio*, 499 U.S. 400, 415 (1991). Instead, he brings this matter to the Court's attention to underscore the importance of the question presented to the military justice system and to highlight how such selection procedures impacted his right to a fair trial pursuant to Article 25 and the Fifth Amendment's Due Process Clause.

Moreover, the disparate impact of such selection procedures on women and racial minorities only became apparent when the CAAF determined such selection procedures utilized in *Bartee* comport with Article 25. Given that the CAAF's decisions apply to each of the armed services, the genuine and unintended consequences of such selection

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<sup>17</sup> *United States v. Gooch*, 69 M.J. 353, 357 (C.A.A.F. 2011) (internal citations and quotations omitted).

procedures as approved in *Bartee*, are no longer hypothetical, they are real.

“The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights.”<sup>18</sup> The need for a fair selection process is even more important given that the CA is responsible for selecting members for court-martial service.<sup>19</sup> A fair and impartial court-martial must begin with the fair and impartial selection of members.<sup>20</sup>

Whether re-impaneling a defective panel comports with due process is a question this Court should address. As this Court recognized in *Dietz v. Bouldin*, 136 S. Ct. 1885, 1895 (2016), there are “additional concerns in criminal cases” when a jury is re-impaneled after discharge.<sup>21</sup> Lance Corporal

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<sup>18</sup> *Burns v. Wilson*, 346 U.S. 137, 142 (1953).

<sup>19</sup> See *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (“Actual appointment of fair and impartial members is the duty and responsibility of the CA.”); *United States v. Kemp*, 46 C.M.R. 152, 156 (C.M.A. 1973) (“It was to the convening authority that Congress entrusted the decision as to its implementation.”).

<sup>20</sup> See Department of Defense Joint Service Committee on Military Justice, *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial* 8 (1999) (“The fundamental goal of a military court-martial member selection system, as in civilian society, is to identify and select a panel of court-martial members that is competent, fair, and impartial.”).

<sup>21</sup> “Given additional concerns in criminal cases, such as attachment of the double jeopardy bar, we do not address here whether it would be appropriate to recall a jury after discharge in a criminal case.” *Bouldin*, 136 S. Ct. at 1895 (citing *Smith v. Massachusetts*, 543 U. S. 462, 473-74 (2005)).

Bartee's case poses such concerns, making his case worthy of review.

## **V. The government's "vehicle" arguments fail.**

The government advances two "vehicle" arguments against granting certiorari, neither of which should preclude review.

First, the government asserts that Lance Corporal Bartee's case is a poor vehicle to address the question presented because he "voluntarily" requested to be tried by military judge alone despite objecting twice to the improperly-selected panel.<sup>22</sup> However, Lance Corporal Bartee's request cannot be deemed voluntary because he was forced to abandon his right to trial by members due to their improper selection.

After Lance Corporal Bartee requested the forum-change, the military judge made clear that he would not accept Lance Corporal Bartee's request if he told the judge it rested on the improper member selection.<sup>23</sup> Only in response to the military judge's threat to deny his request and after giving him more time to consult with counsel, did the trial defense counsel provide a vague notion that there was an additional reason that factored into the decision.<sup>24</sup> The trial defense counsel never stated that it was an "unrelated" reason as the government suggests.<sup>25</sup>

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<sup>22</sup> Br. in Opp'n 20-21.

<sup>23</sup> R. at 279.

<sup>24</sup> R. at 279-80.

<sup>25</sup> R. at 280.

This reason may very well have been related to the improper selection process. Here, the record is clear that absent the Article 25 violation, Lance Corporal Bartee would have elected to be tried by members. In light of these circumstances, Lance Corporal Bartee's choice to be tried by military judge alone cannot be deemed voluntary.

Moreover, the government conveniently ignores the CAAF's decision in *United States v. Greene*, 20 C.M.A. 232 (C.M.A. 1970). Under *Greene*, a military defendant cannot waive his right to appeal the composition of his court-martial panel if his decision to seek trial by military judge alone is compelled by an unfair panel-selection process.<sup>26</sup> Like the accused in *Greene*, Lance Corporal Bartee's decision to be tried by a military judge was compelled by the CA's flawed selection process.

Second, the government argues that because the lower court did not conduct a harmless error analysis, Lance Corporal Bartee's case is an unsuitable vehicle to address a harmless-error issue.<sup>27</sup> However, this Court is more than capable of performing a harmless-error review should it grant certiorari and correctly decide that re-panels the same defective court-martial panel violates Article 25 and the Fifth Amendment's Due Process Clause.

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<sup>26</sup> 20 C.M.A. at 239.

<sup>27</sup> Br. in Opp'n 18.

## CONCLUSION

Servicemembers sacrifice many of their constitutional rights in order to defend our Nation. The Uniform Code of Military Justice stands as a testament to Congress' desire to protect servicemembers' statutory and constitutional rights to a fair a trial. But the lower court's decision effectively strips servicemembers of due process, as well as the important protections Congress conferred on military personnel when it enacted Article 25. Therefore, Lance Corporal Bartee respectfully requests that this Court grant certiorari, reverse the decision of the lower court, and hold that re-panels the same court-martial panel that was originally dismissed due to the systematic exclusion of rank violates Article 25, Uniform Code of Military Justice, and the Fifth Amendment's Due Process Clause.

Respectfully submitted,

R. Andrew Austria  
LT, JAGC, U.S. Navy  
*Counsel of Record*  
U.S. Navy-Marine Corps  
Appellate Defense Division  
1254 Charles Morris St, SE  
Bldg. 58, Suite 100  
Washington Navy Yard, D.C.  
20374  
202-685-7054  
rey.austria@navy.mil