No. 17-479

In the Supreme Court of the United States

REECE N. TSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether a convening authority's decision to select the members of a court-martial based on the selection criteria in Article 25(d)(2) of the Uniform Code of Military Justice, 10 U.S.C. 825(d)(2), after having considered all eligible members regardless of rank, violates Article 25 if the convening authority previously selected the same panel members after receiving recommendations developed in a process that systematically excluded eligible members based on rank.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 11
Conclusion 19

TABLE OF AUTHORITIES

Cases:

Middendorf v. *Henry*, 425 U.S. 25 (1976) 16
United States v. *Bartee*:
75 M.J. 342 (C.A.A.F. 2016) 8
76 M.J. 141 (C.A.A.F. 2017), petition for cert. pending, No. 17-175 (filed July 28, 2017) 8, 11
United States v. *Bartlett*, 66 M.J. 426 (C.A.A.F. 2008) 12
United States v. *Carman*, 19 M.J. 932 (A.C.M.R. 1985) 13
United States v. *Crawford*, 35 C.M.R. 3 (C.M.A. 1964) 14
United States v. *Dowty*, 60 M.J. 163 (C.A.A.F. 2004), cert. denied, 543 U.S. 1188 (2005) 4, 9, 12, 15
United States v. *Roland*, 50 M.J. 66 (C.A.A.F. 1999) 14
United States v. *Sullivan*, 74 M.J. 448 (C.A.A.F. 2015), cert. denied, 137 S. Ct. 31 (2016) 16
United States v. *Ward*, 74 M.J. 225 (C.A.A.F. 2015) 16, 17
United States v. *White*, 48 M.J. 251 (C.A.A.F. 1998) 13, 14
United States v. *Williams*, 504 U.S. 36 (1992) 18
United States v. *Yager*, 7 M.J. 171 (C.M.A. 1979) 13
Whelchel v. *McDonald*, 340 U.S. 122 (1950) 12

Constitution, statutes, regulation, and rule: Page

U.S. Const.
Art. I, § 8 12
Amend. V (Due Process Clause) 17
Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, §§ 5001-5542, 130 Stat. 2894-2968 3
§ 5182, 130 Stat. 2899-2900 3
§ 5203(e)(2), 130 Stat. 2906 3
§ 5542(a), 130 Stat. 2967 3
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.* 2
Art. 16(1), 10 U.S.C. 816(1) 3
Art. 22(a), 10 U.S.C. 822(a) 2, 3
Art. 22(b), 10 U.S.C. 822(b) 2, 3
Art, 25, 10 U.S.C. 825 .... *passim*
Art. 25(a), 10 U.S.C. 825(a) 3
Art. 25(a)-(c), 10 U.S.C. 825(a)-(c) 3, 12, 14
Art. 25(b), 10 U.S.C. 825(b) 3
Art. 25(c), 10 U.S.C. 825(c) 3
Art. 25(c)(1), 10 U.S.C. 825(c)(1) 3
Art. 25(d)(1), 10 U.S.C. 825(d)(1) 4, 5, 14
Art. 25(d)(2), 10 U.S.C. 825(d)(2) 3, 4, 9, 12, 13, 14
Art. 36(a), 10 U.S.C. 836(a) 12
Art. 59(a), 10 U.S.C. 859(a) 16
Art. 120, 10 U.S.C. 920 2
Art. 125, 10 U.S.C. 925 2
Art. 128, 10 U.S.C. 928 2
Exec. Order No. 12,473, 3 C.F.R. 201 (1984 Comp.) 12
Rule for Courts-Martial:
Rule 501(a)(1)(A) 3
Rule 502 14
Rule 502(a)(1) 4

Miscellaneous: Page

2 U.S. Marine Corps, *Marine Corps Promotion Manual, Enlisted Promotions* (2012), http://www.marines.mil/News/Publications/MCPEL/Electronic-Library-Display/Article/899517/mco-p140032d-wch-1-2/ 13

In the Supreme Court of the United States

No. 17-479

REECE N. TSO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Armed Forces (Pet. App. 3a) is reported at 76 M.J. 350. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 30a-58a) is not reported but is available at 2016 WL 768532.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 2017. On July 6, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 29, 2017. The petition for a writ of certiorari was filed on September 28, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by court-martial consisting of officer and enlisted members, petitioner, a private (E-1) in the

Marine Corps, was convicted of one specification of wrongful sexual contact, one specification of forcible sodomy, and one specification of assault and battery, in violation of Articles 120, 125, and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 928. Petitioner was sentenced to three years of confinement, total forfeitures, and a dishonorable discharge. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) dismissed the wrongful sexual contact charge but otherwise affirmed. Pet. App. 30a-58a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review, 75 M.J. 433; 76 M.J. 58, and affirmed in a summary order without an opinion. Pet. App. 3a.

1. Petitioner's abuse of his wife, SB, began in early 2010 before their marriage and before petitioner enlisted in the Marine Corps. Pet. App. 34a. On the day that petitioner proposed to SB via Skype while they were still in a long-distance dating relationship, petitioner discovered emails indicating that SB had simultaneously dated another man. *Ibid.* That discovery "triggered [a] pattern" of psychological, physical, and sexual abuse that continued after petitioner's March 2010 entry into active duty as a Marine private and after their March 2012 marriage. *Ibid.* In April 2012, SB fled their on-base family housing after a fight and called 911. *Ibid.* The resulting investigation revealed petitioner's abusive conduct and resulted in his court-martial. *Ibid.*

2. a. The UCMJ, 10 U.S.C. 801 *et seq.*, governs courts-martial of servicemembers. The President, Secretary of Defense, and certain commanding officers are authorized to convene general courts-martial. 10 U.S.C. 822(a) and (b). The accused has a statutory right to a general court-martial composed of a panel of members

of the Armed Forces with a military judge. See 10 U.S.C. 816(1); see Rule for Courts-Martial (RCM) 501(a)(1)(A). Where, as here, a court-martial is convened to try an enlisted servicemember, the accused may himself request that the panel include enlisted members. 10 U.S.C. 825(c)(1). If such a request is made, at least one-third of the panel's total membership must normally be enlisted personnel. *Ibid.* (providing exceptions based on physical conditions and military exigencies).

Article 25 of the UCMJ, 10 U.S.C. 825, identifies the individuals who are "eligible to serve" on general courts-martial. 10 U.S.C. 825(a)-(c) and (d)(2).[1] All active-duty commissioned officers are generally "eligible to serve" as court members. 10 U.S.C. 825(a). All active-duty warrant officers are also generally "eligible to serve" as court members, if the accused is not a commissioned officer. 10 U.S.C. 825(b). In addition, if the accused is an enlisted servicemember who has requested that court membership include enlisted personnel, all active-duty enlisted servicemembers who are not members of the same unit as the accused are generally "eligible to serve" as court members. 10 U.S.C. 825(c). No individual who is "the accuser or a witness for the prosecution or has acted as investigating officer or as counsel in the same case," however, "is eligible to serve as a member." 10 U.S.C. 825(d)(2).

[1] In December 2016, Congress amended provisions in the UCMJ, including Article 25, but delayed the effective date of those amendments. Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, §§ 5001-5542, 130 Stat. 2894-2968; *id.* §§ 5182, 5203(e)(2), 130 Stat. 2899-2900, 2906 (amending, *inter alia*, Article 25(c) and (d)); *id.* § 5542(a), 130 Stat. 2967 (effective date). This brief cites the pre-amendment version of UCMJ in the 2012 edition of the United States Code, which currently remains in force and was in force during the period relevant to this case.

Article 25(d)(2) provides that "the convening authority shall detail as members" of the court-martial those servicemembers who, "in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. 825(d)(2); see RCM 502(a)(1). "When it can be avoided," however, the court-martial's membership should not include "any member [who] is junior to [the accused] in rank or grade." 10 U.S.C. 825(d)(1).

The CAAF has recognized that, under Article 25, the convening authority will often "rely on his staff or subordinate commanders" to "nominate court members." *United States* v. *Dowty*, 60 M.J. 163, 170 (2004) (citations omitted), cert. denied, 543 U.S. 1188 (2005). The CAAF has accordingly "addressed the role of subordinates, often the staff judge advocate, in performing a preliminary screening of members" for the convening authority. *Ibid.* In that context, the CAAF has stated that the "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper" when "screening * * * servicemembers for eventual consideration by the [convening authority] for court-martial service." *Id.* at 171.

b. In this case, the Commanding General of the 3d Marine Aircraft Wing at Air Station Miramar, San Diego, California (Major General S.W. Busby) served as the convening authority for petitioner's court-martial. See Convening Order 1b-13 (May 28, 2014). Petitioner elected to be tried by court members with enlisted representation.

i. To assist in the process of selecting panel members for petitioner's court-martial and the separate court-martial scheduled to commence one week later for

a Marine sergeant (E-5) in the same command (Sergeant Miramontes), the staff judge advocate (Lieutenant Colonel K.C. Harris) emailed subordinate commanders asking them to recommend panel members for the two courts-martial. Pet. App. 37a; Appellate Ex. XLIV, at 3-4; see Tr. 88. Lieutenant Colonel Harris stated in his email that he was seeking recommendations for enlisted personnel at grades E-5 (sergeant) and higher and for commissioned officers at grades O-3 (captain) through O-5 (lieutenant colonel), and that he would separately request O-6 (colonel) nominees. Pet. App. 37a; Appellate Ex. XLIV, at 3-4. Consistent with the requirement in Sergeant Miramontes's court-martial that panel members should not be "junior to [the accused] in rank or grade," 10 U.S.C. 825(d)(1), Lieutenant Colonel Harris's solicitation for both cases informed the subordinate commanders that "[a]ny Sgt [Sergeant] nominated must have a [date of rank] senior to the accused," *i.e.*, "1 January 2009." Appellate Ex. XLIV, at 4.

After that solicitation was made, Lieutenant Colonel Harris retired and a new staff judge advocate (Colonel T.G. Scully) arrived on duty. Tr. 87. Colonel Scully was not familiar with the specifics of the earlier nomination process. *Ibid.* When he subsequently received the recommendations, he submitted them, with questionnaires from each nominee, to General Busby. *Ibid.*; see Appellate Ex. XLII. General Busby then selected for petitioner's court-martial panel six officers from the ranks of captain (O-3) through colonel (O-6) and six enlisted members from the ranks of staff sergeant (E-6) to sergeant major (E-9). Convening Order 1b-13 (May 28, 2014).

Petitioner objected to the panel on Article 25 grounds, Tr. 63-65, 86-91, and the military judge sustained the objection, Tr. 90-91. The judge stated that "the problem" in petitioner's case was that the solicitation of nominations "exclu[ded]" lower ranking enlisted personnel as well as all warrant officers and first (O-2) and second (O-1) lieutenants. *Ibid.* Tr. 90. The judge found it "clear" from the evidence that the issue resulted in part "from the fact that [the personnel involved] were picking for two cases, one of which involved a sergeant," and were "understand[ably]" "concerned about the date of rank [for] sergeants for that case." *Ibid.* The judge stated that now that this "flaw in the nomination process" had been identified, she expected that the problem could be corrected. *Ibid.* In response to a question from government counsel, the judge clarified that the convening authority was not prohibited from choosing the same panel members but that "the issue is who is provided as potential nominees" and the selection process "needs to happen again" without "systemic exclusion" of lower ranking personnel. Tr. 91.

ii. General Busby subsequently issued a new order selecting all but one of the 12 panel members that he had previously selected. Convening Order 1c-13 (June 2, 2014); cf. Tr. 65-66 (one member had been excused for bereavement leave). In a letter to the military judge, the General stated that he understood that he "could have selected any member of [his] command senior to the accused who [he] felt possessed the qualifications in [Article 25]" and that the submission of questionnaires, lists, and nominations to him did not impose any "limit[] on [his] ability to choose any member of [his] command." Appellate Ex. XLV; see Pet. App. 38a. The

General also explained that he "considered individuals of all ranks" and that, in addition to the questionnaires that he previously reviewed, he also reviewed questionnaires from enlisted personnel at the ranks of lance corporal (E-3) and above and reviewed the entire roster of officers attached to Marine Wing Headquarters Squadron-3. Appellate Ex. XLV. The General stated that, after that review, he "made [his] determinations based on the criteria in [Article 25]." *Ibid.*; see Pet. App 38a.

Petitioner objected to the new convening order. Tr. 94-95. Petitioner argued that he did not "question[] the veracity of [the General's] letter" but that the prior defect had not been cured because selecting the same panel gave the "appearance of impropriety." *Ibid.* The military judge overruled that objection and found no appearance of impropriety. Pet. App. 38a; Tr. 95. The judge found that, although the panel was the same, the panel was "not an overly senior panel" and was "certainly not stacked." Tr. 95.

iii. After panel members were excused in light of the parties' member-specific challenges, the court-martial panel was reduced to seven members: a lieutenant colonel (O-5), a major (O-4), a captain (O-3), a sergeant major (E-9), a gunnery sergeant (E-7), and two staff sergeants (E-6), including a woman. Pet. App. 40a; Tr. 222. The panel acquitted petitioner on seven specifications of wrongful sexual contact, seven additional specifications of forcible sodomy, and one specification of communicating a threat. Pet. App. 31a. The panel found petitioner guilty and sentenced him on the three specifications previously mentioned. *Ibid.*

3. The NMCCA dismissed the wrongful sexual contact charge but otherwise affirmed. Pet. App. 30a-58a.

As relevant here, the court held that petitioner failed to "demonstrate any impermissible exclusion of members among the nominees for [the second convening order]." *Id*. at 38a. In the alternative, the court concluded that any error in this case was harmless. *Id*. at 38a-40a.

4. a. In May 2016, the CAAF granted discretionary review on a question similar to the one presented in this case. *United States* v. *Bartee*, 75 M.J. 342 (2016). In August 2016, shortly after the merits briefing in *Bartee* had completed, the CAAF granted discretionary review in petitioner's case on essentially the same question but ordered that its review would proceed without merits briefing. 75 M.J. 433. The CAAF subsequently granted review in this case on a second question not relevant here and again ordered that "[n]o [merits] briefs [would] be filed." 76 M.J. 58.

b. In March 2017, the CAAF issued its decision in *United States* v. *Bartee*, 76 M.J. 141, petition for cert. pending, No. 17-175 (filed July 28, 2017). See Pet. App. 4a-29a (reproducing decision in *Bartee*).

In *Bartee*, as in this case, the initial court-martial panel was set aside after a finding of systemic exclusion of lower-ranking servicemembers when the staff judge advocate had solicited nominations from the convening authority's subordinate commanders. Pet. App. 6a. As in this case, the convening authority subsequently chose the same panel members who had been previously selected based on his determination, after considering all eligible members regardless of rank and applying the Article 25 criteria, that they were best qualified for the duty. *Id*. at 6a-7a. The CAAF in *Bartee* held that "no systemic exclusion of members based on rank" had af-

fected the second convening order and that "the convening authority did not violate Article 25." *Id.* at 5a; see *id.* at 8a-12a.

The CAAF explained in *Bartee* that "Congress and the President [have] crafted few prohibitions on court-martial service" in order "to ensure maximum discretion to the convening authority in the selection process, while maintaining the basic fairness of the military justice system." Pet. App. 9a (citation omitted). The court stated that, under Article 25, the convening authority must select court members who, "'in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.'" *Id.* at 8a (quoting Article 25(d)(2), 10 U.S.C. 825(d)(2)). The court observed, however, that Bartee had not argued that the members ultimately selected by the convening authority "did not qualify on the basis of [those Article 25 factors]." *Id.* at 9a. Instead, Bartee had challenged only the "the process" by which nominations were submitted to the convening authority, by invoking the CAAF's prior decisions indicating that the "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper." *Ibid.* (citing *Dowty*, 60 M.J. at 171).

The CAAF in *Bartee* explained that its decisions have "identified three factors" useful "in evaluating any process for screening potential members," only one of which was relevant there: the "[s]ystemic exclusion" of otherwise qualified members based on rank. Pet. App. 9a-10a (finding "no credible evidence" of "bad faith" or "improper motive" by either the convening authority or staff judge advocate). The court therefore focused on whether the "redrawn panel" was ultimately "tainted by an impermissible exclusion" based on rank. *Id.* at 10a.

The court determined that its prior decisions involved circumstances different from those in *Bartee*, *id.* at 10a-12a, and concluded that "any systemic exclusion of members by rank" in the initial solicitation and recommendation process there had been "cure[d]" by "the additional steps taken by the convening authority" in his "assembly of the second panel," *id.* at 12a. The convening authority's own selection under Article 25, the court determined, was "not tainted" by earlier actions excluding members by rank because the convening authority understood that he could have drawn members from the entire roster of Marines and sailors under this command and "personally selected the panel only on the basis of [the Article 25] criteria." *Ibid.*

Judge Ryan concurred in the result on grounds not relevant to the petition in this case, Pet. App. 13a-15a, and Judge Erdmann dissented, *id.* at 16a-29a. Judge Erdmann recognized that that a panel of members need "not * * * be composed of a cross-section of the military community" and that "it is permissible to appoint senior, qualified [court] members" under Article 25 so long as lower grades are not "systematically excluded." *Id.* at 16a (citations omitted). But he concluded that, because the "military judge's initial ruling that the panel was improperly convened" remained the law of the case, Bartee was entitled to relief because the subsequent actions in that case were insufficient to "cure the taint of the initial improper solicitation and selection," *id.* at 23a. See *id.* at 23a-29a.

5. After issuing its decision in *Bartee*, the CAAF affirmed the NMCCA's decision in this case in a summary order entered by the court clerk without an opinion. Pet. App. 3a. As relevant here, the order states that "[o]n further consideration of the granted issues, and in

light of * * * United States v. Bartee, 76 M.J. 141," it is ordered "[t]hat the decision of the [NMCCA] is hereby affirmed." *Ibid.*

ARGUMENT

Petitioner presents (Pet. i) the question whether a convening authority's selection of a panel of court-martial members "violates Article 25" of the UCMJ if that panel includes the same members of a prior panel that had been found defective because of a nomination process that systemically excluded members based on rank. Petitioner states (Pet. 1, 21) that his "claims rise and fall with *Bartee*," 76 M.J. 141 (C.A.A.F. 2017), petition for cert. pending, No. 17-175 (filed July 28, 2017), and suggests that his petition "should be held pending the disposition of the petition in *Bartee*" or granted if this Court deems this case to be "a better vehicle." No further review is warranted. The CAAF's summary order of affirmance based on *Bartee's* Article 25 decision is correct, and its decision is limited to the court-martial system and thus does not conflict with the decision of any other court of appeals.

1. The CAAF's one-sentence summary order of affirmance (Pet. App. 3a) indicates that the court rejected petitioner's Article 25 contentions based on *Bartee*'s conclusion that "the convening authority [in that case] did not violate Article 25" when he reconstituted a court-martial panel without any "systemic exclusion of members based on rank," *id.* at 5a. That disposition is correct. The text of Article 25 confirms that no violation occurred in this case, and petitioner identifies no relevant provision in any statute or rule to support his position.

a. "The right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-

martial." *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950). A servicemember therefore has "no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen." *United States* v. *Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004), cert. denied, 543 U.S. 1188 (2005). Instead, "[t]he constitution of courts-martial, like other matters relating to their organization and administration, is a matter" that is left to "congressional action." *Whelchel*, 340 U.S. at 127 (internal citations omitted); see U.S. Const. Art. I, § 8. Congress has directly regulated courts-martial in the UCMJ and has also recognized the President's authority as Commander-in-Chief to establish regulations to govern courts-martial. See 10 U.S.C. 836(a). Pursuant to that authority, the President has adopted the Manual for Courts-Martial, including the Rules for Courts-Martial, to govern such proceedings. See Exec. Order No. 12,473, 3 C.F.R. 201 (1984 Comp.).

"Congress and the President [have] crafted few prohibitions on court-martial service," in order "to ensure maximum discretion to the convening authority in the selection process." *United States* v. *Bartlett*, 66 M.J. 426, 429 (C.A.A.F. 2008). Article 25's text broadly defines the categories of commissioned officers, warrant officers, and enlisted personnel who are "eligible to serve" as court members, without requiring the convening authority to consider or select any particular types of members within each category. See 10 U.S.C. 825(a)-(c); see also 10 U.S.C. 825(d)(2) (identifying servicemembers who are not "eligible" to serve due to their connection with the particular case). The convening authority's obligation under Article 25 is instead to exercise his own discretion in choosing eligible members who are best qualified to serve based on certain traits,

i.e., to select the members who, "*in his opinion*, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. 825(d)(2) (emphasis added); accord RCM 502(a)(1) (same).

Most of those traits—age, education, training, experience, length of service—are generally more prevalent in senior servicemembers who have been promoted and have served longer in the Armed Forces. See *United States* v. *Carman*, 19 M.J. 932, 936 (A.C.M.R. 1985) ("[S]enior commissioned and noncommissioned officers, as a class, are older, better educated, more experienced, and more thoroughly trained than their subordinates."); see also *United States* v. *Yager*, 7 M.J. 171, 172-173 (C.M.A. 1979) (approving the categorical exclusion of E-1 and E-2 enlisted servicemembers based on Article 25(d)(2)'s criteria).[2] An individual's "selection for promotion" and "selection for command" (after exiting the lower ranks) reflect the outcome of competitive processes based on characteristics "'totally compatible'" with Article 25's "requirements for selection as a court member." *United States* v. *White*, 48 M.J. 251, 255 (C.A.A.F. 1998) (quoting *Carman*, 19 M.J. at 936). The CAAF has thus stated that a convening authority is

---

[2] In the Marine Corps, for instance, a private (E-1) is automatically promoted to private first class (E-2) after six months of active service so long as his service is "satisfactory." 2 U.S. Marine Corps, *Marine Corps Promotion Manual, Enlisted Promotions* ¶ 2101.1 (2012) (Marine Corps Order P1400.32D), http://www.marines.mil/News/Publications/MCPEL/Electronic-Library-Display/Article/899517/mco-p140032d-wch-1-2/. The Marine will then be promoted to lance corporal (E-3) after eight additional months if his commander determines he is otherwise qualified for promotion. *Id.* ¶ 2101.2.

"permi[tted] to look first at the senior grades for qualified court members" and may select senior qualified members so long as the selection is ultimately based on the Article 25(d) factors and not made "solely on the basis of military grade" in a manner that "systematically exclude[s]" the "lower eligible grades." *Id.* at 254; accord *United States* v. *Roland*, 50 M.J. 66, 68 (C.A.A.F. 1999). Congress's direction not to select court members "junior to [the accused] in rank or grade," "[w]hen it can be avoided," 10 U.S.C. 825(d)(1), also itself reflects a preference for military personnel senior to the accused.

Significantly, petitioner has never argued that the panel members that General Busby selected in this case did not qualify under Article 25 on the basis of "age, education, training, experience, length of service, and judicial temperament," 10 U.S.C. 825(d)(2). Petitioner's only apparent Article 25 argument is that Congress intended that "all ranks and grades [be] eligible for appointment." Pet. 18 & n.65 (quoting *United States* v. *Crawford*, 35 C.M.R. 3, 8 (C.M.A. 1964)). But although Congress made "all" active-duty commissioned officers, warrant officers, and enlisted personnel generally "eligible" to serve as court members in appropriate cases, 10 U.S.C. 825(a)-(c), the fact that such individuals are statutorily "eligible" to serve does not itself speak to the process whereby the convening authority selects a panel from such "eligible" servicemembers. Article 25(d)(2) governs that selection process, and petitioner does not dispute that the panel here satisfied the criteria therein. That alone would have been sufficient to dispose of this case in the absence of supplementary judicial doctrines developed by the CAAF.

b. In the absence of text in Article 25 and Rule 502 regulating the issue, the CAAF has developed a judge-

made doctrine to "address[] the role of subordinates [of a convening authority] * * * in performing a preliminary screening of members" and making panel-member recommendations to the convening authority. *Dowty*, 60 M.J. at 170. The CAAF has determined in that context that the "systemic exclusion of otherwise qualified potential members based on an impermissible variable such as rank is improper." *Id.* at 171. That doctrine was the basis for the military judge's conclusion that the initial panel in this case was defective. See p. 6, *supra*.

By invoking its decision in *Bartee*, however, the CAAF appears to have declined to extend that judge-made doctrine to encompass the circumstances of this case. Like the convening authority in *Bartee*, General Busby's decision process following the identification of the initial error complied with Article 25 and evinced no "systemic exclusion of members based on rank," Pet. App. 5a, because the General considered all individuals under his command, understood that he could have chosen any eligible members, and "personally selected the panel only on the basis of [Article 25] criteria," *id.* at 12a. The CAAF's decision in this case is thus fully consistent with the limited constraints imposed by Article 25 on the convening authority's broad discretion to select the panel. Moreover, the CAAF's decision reflects the reasonable conclusion that, even if a subordinate's recommendation may have been based on the subordinate's consideration of only more senior ranks, the convening authority's decision governed by Article 25 will not be sufficiently tainted by such a recommendation if the evidence shows that the convening authority considered a broader category of potential court members and ultimately based his decision on the Article 25 factors.

Petitioner does not articulate a sound reason for disturbing the CAAF's determination that judicial rules developed in its prior decisions did not apply here.[3]

2. Petitioner contends that review is warranted on the Article 25 question he presents for multiple reasons, none of which have merit.

First, petitioner asserts (Pet. 16-19) that the "systematic exclusion of personnel on the basis of rank" is a widespread and recurring problem, Pet. 16. Petitioner states (Pet. 16-17) that this assertion is "discussed at length in * * * Bartee's [certiorari] [p]etition" and, like Bartee, petitioner supports the assertion by arguing that military courts have "repeatedly held that the systematic exclusion by rank is harmless error." The key decisions on which petitioner (Pet. 16 n.59) and Bartee focus do not support their contention. In *United States* v. *Sullivan*, 74 M.J. 448 (2015), cert. denied, 137 S. Ct. 31 (2016), and *United States* v. *Ward*, 74 M.J. 225 (2015), for instance, each service court of appeals had already found an Article 25 violation, and the CAAF granted discretionary review solely to decide whether those Article 25 violations were "harmless" errors under Article 59(a) of the UCMJ, 10 U.S.C. 859(a). See *Sullivan*, 74 M.J. at 449, 451; *id.* at 450 (noting that government did not dispute that Article 25 violation occurred); *Ward*, 74

---

[3] Although this Court generally defers to the CAAF's decisions on interpretive matters unique to military law, see *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976), if this Court were to grant review in this case, the Court would be presented with the logically antecedent question whether the CAAF's doctrine regulating subordinates' panel-selection recommendations to a convening authority finds sufficient support in the text of Article 25 and the text of the Rules for Court-Martial, which are silent with respect to such recommendations.

M.J. at 226 n.1, 227-229; *id.* at 227 n.3 (noting that government did not seek review on the "findings of error"). Those decisions thus illustrate that the military courts are fully capable of identifying the types of Article 25 errors that concern petitioner, which those courts can then review on a case-specific basis to determine what relief (if any) is warranted.

Petitioner's contention (Pet. 17) that violations of Article 25's "procedures cannot be deemed harmless" suggests that he disagrees with the harmless-error holdings of those cases. Regardless of the merits of that contention, however, this case would not be a suitable vehicle to address any harmless-error issue. The CAAF summarily affirmed in light of *Bartee*, and *Bartee* concluded that "the convening authority did *not* violate Article 25." Pet. App. 5a (emphasis added). The court therefore did not conduct any "harmless error" analysis in this case.

Second, petitioner argues (Pet. 19-20) that this Court should grant review to "prevent the disparate impact [court-martial panel selection] procedures will have on women and racial minorities," Pet. 20. Notwithstanding the unique military context here, certain types of panel-selection processes could arguably implicate the equal-protection component of the Fifth Amendment's Due Process Clause. But petitioner not only failed to make any such due-process argument below, he failed to raise the possibility of any disparate impact on minorities and women and never developed an evidentiary record to support such a contention. See Pet. CAAF Supp. to Pet. for Grant of Review 3, 15-16 (June 20, 2016); Pet. NMCCA Br. 23-29; Pet. NMCCA Reply Br. 1-6; see also Tr. 63-65, 86-91, 94-95 (arguments before the military judge). Thus, notwithstanding petitioner's reference to

the "Due Process Clause" in his Question Presented, Pet. i, such matters are not properly before this Court because petitioner did not previously press, and no court below passed upon, such contentions. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule * * * precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below.'") (citation omitted).

3. Finally, even if petitioner's Article 25-based challenge to the process for selecting court members were otherwise worthy of review, this case would be a poor vehicle to address it. The CAAF summarily affirmed in this case without issuing an opinion. Pet. App. 3a. Although the order's statement that the CAAF affirmed "in light of * * * United States v. Bartee," *ibid.*, suggests that the court applied its decision in *Bartee* to this case, the order does not discuss any of the circumstances in this case or explain the manner in which the CAAF applied *Bartee*'s teachings to those circumstances. Even petitioner appears to recognize the difficulties that would attend plenary review of the CAAF's summary order in this case. Petitioner does not, for instance, argue that the CAAF's summary order provides a good vehicle for review. Indeed, rather than submitting a stand-alone certiorari petition, petitioner argues (Pet. 1) that his "claims rise and fall with *Bartee*"; asks (*ibid.*) that the Court simply "h[o]ld [his petition] pending the disposition of the petition in *Bartee*"; and repeatedly acknowledges (Pet. 16, 19) that his position is discussed at greater "length in * * * Bartee's [certiorari] [p]etition." For the reasons explained in the brief in opposition in *Bartee*, no further review is warranted in that case. The Court should accordingly deny certiorari in this case as well.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
THOMAS E. BOOTH
Attorney

DECEMBER 2017