No. _____

In the
Supreme Court of the United States

WILLIAM G. BOLTON,
Petitioner,
v.

DEPARTMENT OF THE NAVY BOARD FOR CORRECTION OF NAVAL RECORDS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The scope of the authority of the United States Navy's Board for Correction of Naval Records ("Naval Board") to remove an unjust summary court-martial sentence from a service member's record, by expungement or by clemency, is in need of clarification by this Court. 10 U.S.C. § 1552(a)(1) was previously interpreted by lower courts to allow the Naval Board to expunge or remove invalid or unjust courts-martial sentences. *See, eg.*, *Baxter v. Claytor*, 652 F. 2d 181, 185 (D.C. Cir. 1981); *Owings v. Secretary of the United States Air Force*, 447 F.2d 1245, 1249-50 (D.C. Cir. 1971). In 1983, however, Congress amended 10 U.S.C. § 1552 to streamline and modernize the military justice review system. In doing so, to prevent redundancy, Congress limited the Naval Board's powers with respect to courts-martial that are "tried or reviewed." 10 U.S.C. § 1552(f). It is unclear, however, from the relevant legislative history and the text of the amendment, whether any changes were intended to be made to the Naval Board's powers over non-adversarial summary courts-martial sentences.

A summary court-martial is a special disciplinary procedure and, despite the similarities in name, a summary court-martial is a very different process than general courts-martial or special courts-martial. Most significantly, a summary court-martial is a non-adversarial process, unlike general courts-martial or special courts-martial. Further, summary courts-martial are not considered criminal convictions and are often utilized because they require lesser due process. This Court, in *Mittendorf v. Henry*, 425 U.S. 25, 31-33

(1976), recognized that summary courts-martial are not criminal proceedings, as general and special courts-martial are, and thus are not entitled to the same due process protections. The question now presented to this Court is whether or not the 1983 congressional amendment to 10 U.S.C. § 1552 revoked the power of the Naval Board to remove unjust summary court-martial sentences from a service member's record as a matter of basic fairness.

2. As a second question, it is unclear what due process must be afforded to an applicant to the Naval Board for correction of a military record. The decision of the Sixth Circuit below in this matter leaves in substantial doubt whether there are any procedural protections to ensure that an applicant's full service record is reviewed or whether or not the decision-making process is entirely within the prerogative of the executive. The decision creates a circuit split with the D.C. Circuit, *Morrison v. Sec'y of Def.*, 760 F. Supp. 2d 15 (D.D.C. 2011), as to whether the Naval Board must consider evidence of exemplary service in the military record before issuing a decision on an application for correction of a military record. This very minimalistic protection should be mandated for veterans applying for relief from the Naval Board.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner, who was a Plaintiff-Appellant in the court below, is William G. Bolton.

Respondents, who were Defendants in the court below, are the United States' Navy's Board for Correction of Naval Records and the United States of America.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITIES

OPINIONS BELOW

The Sixth Circuit order affirming the district court is reproduced in the appendix (Pet.App.1) as is the district court's order dismissing Petitioner's complaint (Pet.App.27), and the administrative level decision of the Naval Board (Pet.App. 38).

JURISDICTION

The Sixth Circuit entered judgment on January 18, 2019. (Pet.App.1.) This Court has jurisdiction under 28 U.S.C. § 1254(1), and 10 U.S.C. § 1558(f).

STATUTES INVOLVED

Section 1552(a)(1) of 10 U.S.C. 1552 states as follows:

> The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice. Except as provided in paragraph (2), such corrections shall be made by the Secretary acting through boards of civilians of the executive part of that military department. The Secretary of Homeland Security may in the same manner correct any military record of the Coast Guard.

Section 1552(f) of 10 U.S.C. 1552 states as follows:

> With respect to records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under chapter 47 of this title (or under the Uniform

> Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to—
> (1) correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)); or
> (2) action on the sentence of a court-martial for purposes of clemency.

Section 1558(f)(3)(A) of 10 U.S.C. 1558 states as follows:

> Judicial review.
> **(1)** A person seeking to challenge an action or recommendation of a selection board, or an action taken by the Secretary of the military department concerned on the report of a selection board, is not entitled to relief in any judicial proceeding unless the action or recommendation has first been considered by a special board under this section or the Secretary concerned has denied the convening of such a board for such consideration.
> **(2)**
> **(A)** A court of the United States may review a determination by the Secretary of a military department not to convene a special board in the case of any person. In any such case, the court may set aside the Secretary's determination only if the court finds the determination to be--
> **(i)** arbitrary or capricious;
> **(ii)** not based on substantial evidence;

(iii) a result of material error of fact or material administrative error; or

(iv) otherwise contrary to law.

(B) If a court sets aside a determination by the Secretary of a military department not to convene a special board, it shall remand the case to the Secretary concerned, who shall provide for consideration by a special board.

(3) A court of the United States may review a recommendation of a special board or an action of the Secretary of the military department concerned on the report of a special board. In any such case, a court may set aside the action only if the court finds that the recommendation or action was--

(A) arbitrary or capricious;

(B) not based on substantial evidence;

(C) a result of material error of fact or material administrative error; or

(4)(D) otherwise contrary to law.

(A) If, six months after receiving a complete application for consideration by a special board in any case, the Secretary concerned has not convened a special board and has not denied consideration by a special board in that case, the Secretary shall be deemed for the purposes of this subsection to have denied consideration of the case by a special board.

(B) If, six months after the convening of a special board in any case, the Secretary concerned has not taken final action on the report of the special board, the Secretary shall be deemed for the purposes of this subsection to have denied relief in such case.

> **(C)** Under regulations prescribed under subsection (e), the Secretary of a military department may waive the applicability of subparagraph (A) or (B) in a case if the Secretary determines that a longer period for consideration of the case is warranted. Such a waiver may be for an additional period of not more than six months. The Secretary concerned may not delegate authority to make a determination under this subparagraph.

STATEMENT OF THE CASE

This case involves a wrongfully-denied application by an honorably discharged Marine Corps veteran, William G. Bolton ("Bolton"), to have the United States Navy's Board for Correction of Naval Records ("Naval Board") remove a summary court-martial sentence from his record by expungement or clemency. The basis for Bolton's application is that the summary court-martial sentence was unjust, as he was unfairly doubly punished and inadequately advised of the effects of his plea. (Pet.App. 38.)

Summary courts-martial are an expedited disciplinary process for minor offenses with less procedural due process afforded because they are not considered "criminal proceedings" like general and special courts-martial. 10 U.S.C. § 820. Summary courts-martial are also non-adversarial in nature and, thus, are not "tried" in the traditional sense of the term. *Mittendorf v. Henry*, 425 U.S. 25, 31-33 (1976). While summary courts-martial are viewed as a valuable tool for military enforcement because the reduced formalities, the minimized due process

protections inflate the risk of unjust sentences. *See* ARTICLE: SUMMARY COURTS- MARTIAL: REDISCOVERING THE SPUMONI OF MILITARY JUSTICE, 39 A.F. L. Rev. 119, 120. Accordingly, where the due process protections are minimized for summary courts-martial sentences, it is even more crucial that this Court find that those sentences are reviewable by the Naval Board for subsequent correction, as this is an important outstanding safeguard to prevent against unjust or unfair consequences.

1. Bolton seeks clemency and/or expungement for a mistake made eight years ago and after four years of active duty service.

On August 22, 2006, Bolton enlisted in the Marine Corps and he proceeded to actively serve this country well for more than four years. He then went on to serve as part of the individual ready reserve, which he was honorably discharged from on or about March 14, 2014. (Pet.App. 28). On August 6, 2016, near the end of Bolton's active duty tenure with the Marine Corps, after serving multiple overseas tours, including one in Iraq, Bolton made the regrettable mistake of driving while under the influence of alcohol. He pleaded guilty via a summary court-martial for violations of Uniform Code of Military Justice ("UCMJ"), Arts 89, 92 and 111. (Pet.App. 28). As a result, the Convening Authority (i.e., the person authorized to convene a court-martial or impose non-judicial punishment) took the action of reducing Bolton's rank to E-1, which is the lowest enlisted rank. (Pet.App. 6). Bolton was additionally

assessed a forfeiture of $964.00 in pay, and served 14 days restriction. (Pet.App. 6).

Now, because of Bolton's length of service, the reduction in rank effectively renders him unable to reenlist in any branch of the military service. (Pet.App. 19-20). At the time that Bolton pleaded guilty, Bolton did not realize this ramification of the rank reduction. In fact, he was never counseled that the rank reduction would have this effect. (Pet.App. 19- 20). Bolton has tried to reenlist but has been told that the reduction in rank, combined with his time in service, is a *de facto* bar to reenlistment.

2. Bolton was punished twice by separate authorities for the same incident and received a *de facto* bar on reenlistment in any branch of the military which was not understood or explained.

Bolton was advised by detailed military defense counsel that all charges relating to the August 06, 2010 incident, including those assigned to the federal court, would be disposed of by summary court-martial. (Pet.App. 28). This was untrue, however. On August 13, 2010, a court citation for a DUI was in fact brought against Bolton before the base court at Camp Lejeune. (Pet.App. 28). Bolton was not informed by any means that his citation was to be heard by the base court. (Pet.App. 28). Because of his failure to appear at base court on August 13, 2010, on August 14, 2010, Bolton was convicted of driving under the influence, a violation of NCGS 20-138.1. (Pet.App. 28).

The action of the base court at Camp LeJeune, North Carolina resulted in a conviction for driving under the influence. (Pet.App. 28). That conviction was subsequently sent to the State of North Carolina, which suspended his license and the State of Ohio did the same. (Pet.App. 6). The suspension in North Carolina remained in force for a minimum of six (6) months. (Pet.App. 6). The suspension in Ohio was eventually reversed. (Pet.App. 6).

Thus, in addition to effectively being denied the opportunity to serve his country by way of rank reduction, Bolton was also saddled with license suspensions in two states as a result of unexpected civilian punishment.

3. The record before the Naval Board was incomplete and biased against Bolton.

Because he believes that the summary court-martial sentence was unjust, Bolton sought relief from the Naval Board. Unbeknownst to Bolton, however, the Naval Board did not review his full and complete military record when it evaluated his application for correction. The administrative record upon which the Naval Board issued its decision failed to include all relevant information in favor of Bolton. (Pet.App. 20-21). The Marine Corps was charged with submitting Bolton's service record to the Naval Board; however, it appears to have submitted only those portions of Bolton's record that it felt bolstered its case position on Bolton's discipline. There is, in fact, no evidence that Appellant's full service record was transmitted to the Board. Additionally even the Sixth Circuit was confused as to whether the complete service file was

ever transferred to the Naval Board. (Pet. App. 21). Nevertheless, Bolton had a reasonable expectation of due process. As part of that due process, the Naval Board should have requested and been provided with, Bolton's full and complete service record. To the detriment of Bolton, however, his full and complete service record was not reviewed. Bolton had no way of knowing this at that time though.

The Naval Board's decision was comprised entirely of cherry-picked circumstances rationalizing Bolton's discipline and was bereft of important mitigating factors. More specifically, in its decision denying Bolton's application, the Naval Board notes that Bolton was counseled for underage drinking on August 10, 2007. (Pet.App. 39). While the 2007 incident occurred and is barely documented in Bolton's service record, it was nevertheless given inappropriate credence and consideration. At the same time, the Naval Board wholly omits any acknowledgement of Bolton's service, including his tour in Iraq. The impropriety of this is even more pronounced given that Bolton had served his country honorably including a tour in Iraq that was completely ignored in the Naval Board's decision.

Further, Bolton was recommended for a Navy Commendation Medal for his actions in Haiti by his then Squad Leader. (Pet.App. 21). While the medal was denied at the company level, he nevertheless received a written commendation from his Battalion Commander on April 1, 2010. (Pet.App. 21). This written commendation should have been submitted to the Naval Board for review as part of Bolton's service record, but was not contained in the record considered

by the Naval Board. Like the rest of Bolton's distinguished service record, Bolton's written commendation does not appear to have played any role in the Naval Board's decision.

4. The Naval Board decided that it could not expunge Bolton's summary court-martial and that Bolton was not entitled to clemency.

Ultimately, the Naval Board reviewed Bolton's application for purposes of clemency and found that he was not entitled to clemency. (Pet.App. 39-40). In reaching this decision, the Naval Board summarizes Bolton's military service in one paragraph. This paragraph focuses on Bolton's uncharged underage drinking report and the circumstances that gave rise to the summary court-martial. There is no mention of the fact that he had served honorably, with distinction, for four years of active duty, including a tour in Iraq. (Pet.App. 39-40). While the Naval Board's decision seemingly suggests that it reviewed Bolton's entire record, there is no mention of the written commendation he received for his exemplary service in Haiti. (Pet.App. 39-40).

It was not until Bolton appealed this decision to the District Court and the record was filed before the District Court, that the omissions in the record became glaringly apparent. It was at this point that Bolton amended his appeal to allege that the failure of the Naval Board to review a full military record is arbitrary and capricious.

5. The District Court incorrectly found that the Naval Board lacked statutory authority to grant the relief Bolton sought and that Bolton, therefore failed to state a claim upon which relief could be granted.

The Naval Board filed a Motion to Dismiss Bolton's appeal of the Naval Board's decision arguing that there was no technical double jeopardy issue created by the treatment of Bolton, and that even if there was, the Naval Board was unable to correct Bolton's record on that issue because the Naval Board's authority does not extend to correcting unjust courts-martial. (Pet.App. 31,33). After the administrative record was filed, Bolton filed an Amended Complaint. The Naval Board then filed another substantially similar Motion to Dismiss Bolton's Amended Complaint with the same legal reasoning.

Bolton opposed the motion arguing that the arguments were overly formalistic and that the Naval Board had the power to remove all record of an unjust punishment, and that, at minimum, the rank reduction should be removed from Bolton's record. (Pet.App. 33).

The District Court agreed with the Naval Board and dismissed Bolton's appeal. (Pet.App. 35.) The District Court made no review of the procedural arguments relating to the failure to review an entire service record and it found the lack of authority of the Naval Board to remove an unjust summary court-martial dispositive. (Pet.App. 34).

6. The Sixth Circuit Court of Appeals held that the Naval Board lacks the authority to remove an unjust summary court-martial, and that clemency decisions do not require review of a complete record.

Bolton timely appealed the District Court's decision and argued for reversal based on the fact that the Naval Board had the authority to grant Bolton's requested relief, that a plausible claim for relief was stated, and that the District Court's decision, even if correct as to the issue of the authority of the Board to expunge a summary court-martial sentence, was too broad in its failure to consider substantive and procedural issues with the Naval Board's clemency decision.

The Sixth Circuit affirmed the District Court's decision finding that the 1983 amendment to 10 U.S.C. § 1552 removed the Board's power to address summary courts-martial in any substantive way even if the sentence is substantively or procedurally unjust and the Board was limited to correcting non-judicial punishment, also known as Article 15 punishment. (Pet.App. 11-15).

The Sixth Circuit also affirmed the District Court's decision with respect to review of the Board's clemency decision. The Sixth Circuit concluded that even though the Board did not review a complete record that appropriately reflected both Bolton's accolades and discipline, the Naval Board's denial of clemency was not arbitrary and capricious. The Sixth Circuit found that Bolton waived his right to challenge the completeness of the record by not including it in his

petition to the Naval Board. (Pet.App. 22). This is problematic, as service members are lead to believe that a full record is reviewed, and, in Bolton's case, it was only after the administrative record was filed in the District Court that Bolton had the opportunity to discover that the Naval Board had made its decision based on an incomplete record.

REASONS FOR GRANTING THE PETITION

This Court should grant this petition as the procedural protections afforded to military service members and veterans are subject to substantial confusion when it comes to summary courts-martial sentences. Further complicating matters, the Department of Defense actively invites veterans who "believe they have experienced an error or injustice to request relief from their service's Board for Correction of Military/Naval Records (BCM/NR) or Discharge Review Board (DRB)."[1] The Sixth Circuit's decision basically renders that invitation to veterans meaningless, as it guts the ability of the Naval Board to correct anything other than scriveners' errors or the most minor of injustices. This Court should grant this petition so it can enunciate the remedies available to veterans and the protections afforded to those veterans seeking such a remedy from the Naval Board with respect to summary courts-martial.

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[1] https://www.defense.gov/News/News-Releases/News-Release-View/Article/1039945/dod-announces-new-outreach-efforts-to-veterans-regarding-discharges-and-militar/source/GovDelivery/ (accessed 03/21/19).

A summary court-martial is a hybrid procedure which is subject to substantially less procedural due process than general and special courts-martial due to the minor nature of the offenses involved. Summary courts-martial cannot be used for officers. 10 U.S.C. § 820, Art. 20. Concomitantly, summary courts-martial carry potentially harsher punishment than non-judicial punishment or Article 15 punishment, which are implemented for the most minor offenses. Art. 15, UCMJ, 10 U.S.C. § 815.

Summary courts-martial are a unique vehicle resulting in confusion. This Court, in *Mittendorf v. Henry*, 425 U.S. 25, 31- 33 (1976), acknowledged the misfit quality of the fit as somewhere between the courtroom procedure of general and special courts-martial and the Article 15 punishment, informally known as non-judicial punishment, stating:

> The summary court-martial occupies a position between informal nonjudicial disposition under Art. 15 and the courtroom-type procedure of the general and special courts-martial. Its purpose, "is to exercise justice promptly for relatively minor offenses under a simple form of procedure." Manual for Courts-Martial 79a (1969) (MCM). It is an informal proceeding conducted by a single commissioned officer with jurisdiction only over noncommissioned officers and other enlisted personnel. Art. 20, UCMJ, 10 U.S.C. § 820. The presiding officer acts as judge, factfinder, prosecutor, and defense counsel. The presiding officer must inform the accused of the charges and the name of the accuser and call all

> witnesses whom he or the accused desires to call. MCM 79d (1). The accused must consent to trial by summary court-martial; if he does not do so, trial may be ordered by special or general court-martial.

Id. at 32-33. The Court further clarified that summary courts-martial are very different from criminal-type proceedings in that "a summary court-martial is procedurally quite different from a criminal trial. In the first place, it is not an adversary proceeding." *Id.* at 40.

It is precisely this awkward, non-adversarial middle position of summary courts-martial that makes Bolton's rights so difficult to ascertain. Therefore these rights are in dire need of clarification by this Court.

The Naval Board should be involved in providing the relief justice requires with respect to summary courts- martial sentences, while recognizing that the process is not for legal reversals of proceedings. The Naval Board is well-suited to protect against injustices. Notably, this is wholly unrelated to the validity of the court-martial process which is not at issue. The Court's analysis of summary courts-martial in *Mittendorf* suggests that a summary court-martial is more akin to non-judicial proceedings for the purposes of whether it was a "criminal prosecution" with the attendant rights that could have come with that designation. This is important to whether the Naval Board has any right to expunge or otherwise remove a summary court-martial sentence from a petitioner's military record. Without the due process protections afforded to the other types of court-martial proceedings, the Naval Board's ability

to review summary courts-martial for unjust actions is of even greater importance. The Naval Board is unequivocally vested with the authority to do this for Article 15 discipline and it should likewise have the authority to do this for the closely-related discipline summary courts-martial. Indeed one commentator has referred to the summary court-martial as a "supercharged Article 15." ARTICLE: SUMMARY COURTS-MARTIAL: REDISCOVERING THE SPUMONI OF MILITARY JUSTICE, 39 A.F. L. Rev. 119, 120.

Historically, lower courts held that the Naval Board had the power to remove unjust courts-martial sentences while lacking the power to overrule as a matter of law courts-martial. However, when Congress amended 10 U.S.C. § 1552 in 1983, lower courts began finding that the Naval Board lost this power with respect to courts-martial. However, this Court has never considered whether it was the legislature's intent to revoke the Naval Board's power to remove unjust summary courts-martial sentences.

As a practice it is clear that the military treats summary courts-martial and non-judicial punishment very similarly. The incredibly close relation between summary court-martial proceedings and non-judicial punishment is also demonstrated through the Memorandum of Pretrial Agreement signed by Bolton. The form language within the Memorandum is designed for either summary court-martial or non-judicial punishment. The only aspect of discipline that rendered Bolton's sentence more onerous than non-judicial punishment seems to have been his reduction

in rank by more than one pay grade (*i.e.*, Bolton was reduced in rank by three pay grades). Otherwise, the monetary penalty and restriction period were both within the limits for non-judicial punishment. Art. 15, UCMJ, 10 U.S.C. § 815. The Convening Authority had the discretion to impose non-judicial punishment or summary court- martial for the offenses involved. Bolton's actions with respect to the matter would have been the same either way.

It makes little sense to allow the plea arrangement to go outside of the ambit of the Naval Board simply because the Convening Authority chose to render the punishment through summary court- martial rather than non-judicial punishment. If anything, the higher, albeit slightly, penalties associated with a summary court-martial make it more, not less, appropriate for review by the Naval Board.

A second issue that merits this Court's review is a determination of the proper standards, if any, for Article III judicial review of the Naval Board's decisions. Currently, there is a circuit split as to whether the Naval Board must review a full service record.

The Naval Board has taken the position that its decisions on clemency are a matter of executive discretion and not subject to Article III court review. (Pet.App. 24). The Sixth Circuit's decision does not affirmatively address this issue; however, it did engage in review of the clemency decision using an "extra-deferential standard" of review. (Pet.App. 25-26.) The extraordinarily deferential review, however, was incomplete because the Sixth Circuit did not consider

whether the failure of the Naval Board to review a complete record was arbitrary and capricious. The Sixth Circuit's decision was in contravention with the D.C. Circuit, which has held in *Morrison v. Sec'y of Def.*, 760 F. Supp. 2d 15 (D.D.C. 2011) that the Naval Board must review all pertinent evidence, including evidence of exceptional service. The Sixth Circuit's decision affirmed the Naval Board's decision despite Bolton's contention that the record was incomplete and lacked evidence of Bolton's exceptional service.

This Court sought to strike a difficult balance when reviewing decisions involving the military in *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), however the lower court's application of "extraordinary deference" to Naval Board decisions has gone too far if a full service record is not required to be reviewed at a minimum. There is the threat of resounding confusion as to whether the Naval Board must review a full service record in making decisions on an application to correct a military record. This Court's review is vital, both to clear up this uncertainty, as well as to ensure members of the armed services and veterans are afforded appropriate procedural safeguards applying to the Naval Board.

I. The Naval Board has the ability to remove unjust summary courts-martial sentences.

The Naval Board, pursuant to 10 U.S.C. § 1552, is empowered to make such corrections to military records where such correction is "necessary to correct an error or remove an injustice." Historically this power has included "the power to remove all traces of an invalid court-martial from a serviceman's record

and to change a dishonorable discharge into an honorable one. The Naval Board clearly has jurisdiction to consider whether [the military members'] military records should be corrected if the Board considers it necessary to correct an error or remove an injustice." *Baxter v. Claytor*, 652 F.2d 181, 185 (D.C. Cir. 1981) (internal quotations and citations omitted); *see also Payne v. Brownlee*, 2006 U.S. Dist. LEXIS 17054 (D.D.C., Mar. 24, 2006)(approvingly citing *Baxter* for the proposition that while the Board lacks authority to disturb finality of courts-martial, the Board can remove all trace of one from a servicemen's record to remove an injustice); *Owings v. Secretary of United States Air Force* (SAFOS), 447 F.2d 1245, 1249- 50 (D.C. Cir. 1971)(distinguishable on other grounds, but concerning the consideration of a district court's reversal of a Board of Corrections decision that failed to remove an unjust court-martial).

In 1983 Congress amended the statute and as pertinent to this action, included section (f) to 10 U.S.C. 1552 which provides as follows:

> With respect to records of courts-martial and related administrative records pertaining to court-martial cases **tried or reviewed** under chapter 47 of this title [10 USCS §§ 801 et seq.] (or under the Uniform Code of Military Justice (Public Law 506 of the 81st Congress)), action under subsection (a) may extend only to--
> **(1)** correction of a record to reflect actions taken by reviewing authorities under chapter 47 of this title [10 USCS §§ 801 et seq.] (or under the Uniform Code of Military Justice (Public Law

> 506 of the 81st Congress)); or
> **(2)** action on the sentence of a court-martial for purposes of clemency. (Emphasis added).

This Court has not weighed in on whether this amendment, which would seem to place some restrictions on the Naval Board's authority with respect to courts-martial, applies to summary courts-martial sentencing. The Sixth Circuit's decision below has ruled that it does, but the question is whether a summary court-martial sentence is a record of a court-martial "tried or reviewed" under Chapter 47.

The language "tried or reviewed" would seem to apply to cases actually taken to a trial and/or appeal. This would seem to make sense under the purpose of why the Congress amended the statute to begin with since it was to prevent the redundancy created when a robust but streamlined appellate process for the military justice system was created in the same bill. The intent of the changes to the Naval Board's authority was to prevent them from being a second appellate forum "overturning as a matter of law, findings or sentences of courts-martial." (S.B. 98-53, at 11). The Naval Board was no longer to be the review authority for courts-martial, but neither expungement nor clemency are an "overturning" of anything.

Further, this amendment does not repudiate all ability of the Naval Board to review records to correct injustice. The Naval Board has already been held by lower courts to have retained its authority to correct injustices with respect to Article 15 punishment and the Naval Board still maintains clemency powers with

respect to courts-martial. *E.g. Cooper v. United States*, 285 F. Supp. 3d 210 (D.D.C. January 10, 2018).

The relevant committee reports from both the Senate (S. Rep. No. 98-53) and the House of Representatives (H.R. Rep. No. 98-549) suggest that minimal consideration was given to the scenario created when the non-adversarial summary court-martial process results in a plea agreement. In such a circumstance, there is no trial and no appellate review. Thus, such a proceeding falls outside of the purview of the amendment, and also does not risk the redundancy the amendment was intended to eliminate. Indeed, the Naval Board is the most likely and reasonable forum to address issues with these processes which would be targeted towards a backstop of basic fairness, as opposed to any formal legal basis for reversals.

Under the Sixth Circuit's analysis, the nonsensical, counter-intuitive result is that the Naval Board is free to correct unjust Article 15 punishments, but is powerless to correct unjust summary courts-martial. This is despite these two disciplinary vehicles being treated virtually the same – even using the same form, but with summary courts-martial carrying slightly higher penalties. Surely such a formalistic and illogical result was not intended by Congress.

Bolton's summary court-martial sentence was not "tried or reviewed" through the military justice system. Rather, it was a result of a non-adversarial plea agreement, via summary court-martial. It also is important to understand that Bolton's application to the Naval Board was a request for removal of an unjust summary court-martial sentence, not a request to

reverse a summary court-martial finding as a matter of law. Accordingly, the summary court-martial sentence should be afforded limited review by the Naval Board to correct an injustice.

II. The Naval Board's decision was arbitrary and capricious as it failed to review Bolton's full service record.

Article III Courts are vested with the authority to vacate the Naval Board's improper ruling where the ruling was arbitrary and capricious, failed to rely on substantial evidence, or is otherwise contrary to law. 10 U.S.C. § 1558(f)(3)(A). In pertinent part, 10 U.S.C. § 1558(f)(3)(A) states:

> A court of the United States may review a recommendation of a special board or an action of the Secretary of the military department concerned on the report of a special board. In any such case, a court may set aside the action only if the court finds that the recommendation or action was--
>
> **(A)** arbitrary or capricious;
> **(B)** not based on substantial evidence;
> **(C)** a result of material error of fact or material administrative error; or
> **(D)** otherwise contrary to law.

Additionally, the Naval Board's decisions are reviewable pursuant to the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*. The procedures taken by the Marine Corps unfairly punished Bolton twice for the same infraction, failed to afford him all of his

substantive rights, and induced him to take a plea deal without apprising him of the fact that doing so would bar him from reenlisting in any branch of military service. As such, the sentence of the summary court-martial was substantively and procedurally unfair to Bolton. It resulted in a manifest injustice. When the Naval Board was petitioned by Bolton under 10 U.S.C. § 1552 to review his record and correct the injustice, the Naval Board did not review a complete record. Therefore, its decision denying Bolton relief was arbitrary and capricious.

The failure to review a complete record rendered the Naval Board's decision procedurally flawed. To affirm the Board's decision a court must conclude that the Board "**examined the relevant data and articulated a satisfactory explanation for its action** including a rational connection between the facts found and the choice made." *Coburn v. Murphy*, 827 F.3d 1122, 1126 (D.C. Cir. 2016)(reviewing decision of the Army Board for Correction of Military Records)(emphasis added). Minimally, the reviewing court "must satisfy itself that the Board considered all of the relevant evidence and provided a reasoned opinion that reflects a contemplation of the facts and circumstances pertinent to the case before it." *Barna v. United States*, 127 Fed. Cl. 253, 270-271 (2016). These lower court decisions with respect to the Naval Board are consistent with this Court's jurisprudence with respect to administrative agencies that must likewise consider all relevant factors and establish a record sufficient for a reviewing court. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). The Naval Board's decision fails on both counts as it did not

examine all relevant data and it failed to articulate a satisfactory explanation for its decision.

The D.C. Circuit has already rejected the argument that the Naval Board does not have to consider all pertinent evidence of record because it is not an "investigative body." *See Morrison v. Sec'y of Def.*, 760 F. Supp. 2d 15 (D.D.C. 2011). Rather the *Morrison* court made clear that even though the Naval Board is not an investigative body, it must consider all pertinent evidence, which includes evidence of exceptional service:

> Although not an investigative body, 32 C.F.R. § 723.2(b), the BCNR is required to review "all pertinent evidence of record" when it examines applications to correct naval records. *Id.* § 723.3(e)(1). Pertinent evidence includes factors mitigating against the decision that led to the record sought to be changed, such as "exceptional service." *See, e.g., Fuller v. Winter*, 538 F. Supp. 2d 179, 184 (noting the BCNR's conclusion that an applicant's "many years of exceptional service mitigated his conduct" and thus militated in favor of changing records concerning the applicant's involuntary separation).

Id. at 20. While the Sixth Circuit attempts to distinguish the *Morrison* case in a footnote, in reality it created a circuit split as to whether the Naval Board must review evidence of exceptional service when rendering a decision on an application to correct a military record.

Notably, the administrative record submitted by the Naval Board lacks any reference to Bolton's written commendation from his Battalion Commander on April 1, 2010. There is also exceedingly little information in the record regarding Bolton's service, which included multiple promotions and tours of duty abroad, including tours in Iraq; a Marine Expeditionary unit to Bahrain, Greece, Turkey, Jordan and Kuwait; assignment to the Republic of Georgia to Georgian forces; and, a rescue mission to Haiti, after the country was struck by a hurricane. Thus, all relevant data was not considered by the Naval Board in coming to its decision.

The Sixth Circuit indicated that it was uncertain as to how Bolton could know that the record was incomplete. (Pet.App. 21). Bolton knows the administrative record submitted by the Board to the District Court was incomplete because it lacks any reference to the written commendation from his Battalion commander. Thus even if the Naval Board had a full service record in front of it, Naval Board's submission of the administrative record to the District Court was incomplete. Either way the omission would constitute a failure of the Naval Board to review all relevant facts and to submit a sufficient record to the reviewing courts.

Further, the minimal explanation given by the Naval Board in its decision is far from satisfactory. The Naval Board's decision includes only one substantive paragraph with a factual analysis. That paragraph is founded almost exclusively on events of 2007 (making Bolton 19 years old at the time). These

events have little to no relevance to the issue of whether relief should be granted to Bolton on the grounds set forth in his application. (Pet.App. 39-40). Further, the record is exceedingly limited as to the circumstances around the 2007 incident. Bolton entered the service out of high school a young man who made some mistakes and who has acknowledged those mistakes. Bolton only seeks what any similarly situated civilian would be able to obtain, a fresh start, free of a record besmirched by the mistakes of his youth. The decision of the Naval Board was arbitrary and capricious and the lower courts' decisions have denied Bolton the appropriate level of judicial review to which he is entitled under 10 U.S.C. § 1558.

The Naval Board's counterargument that it is not an investigative body does not alleviate the Naval Board of the requirement to review all of the pertinent evidence. Importantly, the Naval Board has not asserted in any of its briefings that the administrative record contains the entire "service record" of Bolton. The Naval Board should not be permitted to simply rely on portions of Bolton's service record that the Marine Corps views as supporting its position. The instruction on the application to the Naval Board leads applicants to believe that their full service records will be reviewed. Instruction number six states, in pertinent part, that "all evidence **not already included in your record** must be submitted by you." (Emphasis added).[2] This language suggests to the applicant that a full service record is provided to the

[2] Form DD 149 available at: https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf (accessed April 11, 2019)

Naval Board for review and that the applicant is further permitted to provide additional information if he or she so chooses. In further promulgating the guise that its review is comprehensive, the Naval Board's decision misleadingly implies that Bolton's entire record was reviewed. (Pet.App. 38-40).

The Naval Board failed to consider evidence of Bolton's exceptional service, including having been recommended for a Navy Commendation Medal for exceptional actions in Haiti and a written commendation from his Battalion Commander. This failure resulted in an arbitrary and capricious decision which the lower courts have failed to correct.

The Sixth Circuit's analysis raises an important question about the proper legal standard for reviewing the Naval Board's decisions. While this Court's decision in *Orloff v. Willoughby*, 345 U.S. 83, urged the judiciary to be scrupulous not to interfere with legitimate military matters, the extraordinary deference now used by lower courts is excessive. If the Naval Board is not even minimally required to review an applicant's entire service record, there is no verifiable baseline to ensure a rational connection between the Naval Board's decision and the facts at issue. This Court should hold that the Naval Board must minimally review the entire service record of applicants seeking clemency.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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