No. 17-175

In the Supreme Court of the United States

EMMANUEL Q. BARTEE, 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

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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 a different convening authority previously selected most of the same panel members after receiving recommendations developed in a process that systematically excluded eligible members based on rank.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 3a-28a) is reported at 76 M.J. 141. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App 29a-41a) is not reported but is available at 2016 WL 154628.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 2017. On May 19, 2017, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trial by court-martial consisting of a military judge alone, petitioner, a lance corporal (E-3) in the Marine Corps, was convicted on one specification of

conspiracy to commit larceny, one specification of making a false official statement, and six specifications of larceny, in violation of Articles 81, 107, and 121 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 881, 907, 921. Petitioner was sentenced to 20 months of confinement and a dishonorable discharge. The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. Pet. App. 29a-41a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review, 75 M.J. 342, and affirmed. Pet. App. 3a-28a.

1. Over several months in 2013, petitioner and two civilians used fraudulent credit cards to steal gift cards and electronics from Navy and Marine Corps exchanges in and around San Diego, California. Pet. App. 30a. The government's case against petitioner included business and bank records concerning the fraudulent transactions as well as security-camera videos showing petitioner and his compatriots conducting the transactions. *Id.* at 30a-31a.

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).

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

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[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.

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.

A court-martial with members is but one of the two types of general courts-martial. See 10 U.S.C. 816(1). If the accused timely requests to be tried by a military judge alone, the military judge may exercise his discretion to grant that request. 10 U.S.C. 816(1)(B); see RCM 903(a)(2) and (c)(2)(B).

b. In this case, the acting Commander of the 1st Marine Logistics Group at Camp Pendleton, California (Colonel J.M. Schultz) initially served as the convening authority while the Commanding General (Major General V.A. Coglianese) was away on military business. Pet. App. 5a n.1; C.A. App. 19, 67. Petitioner elected to be tried by court members with enlisted representation. C.A. App. 12.

i. To assist in the process of selecting panel members for petitioner's court-martial and the separate court-martial for another servicemember, the staff

judge advocate subsequently emailed subordinate commanders asking them to direct all of their officers at grade O-4 and above and all of their enlisted personnel at grade E-8 and above to complete and submit court-member questionnaires. Pet. App. 5a; C.A. App. 22, 24-25. Based on the responses, the staff judge advocate recommended 16 individuals that he concluded met the criteria of Article 25 and submitted the questionnaires for the convening authority's review. Pet. App. 5a; C.A. App. 14-16, 22, 65-66. Based on that recommendation, Colonel Schultz appointed a 12-member court-martial panel composed of officers at grade O-4 and above and enlisted members at grade E-8 and above from the recommended list of 16 individuals. Pet. App. 5a; C.A. App. 14-17, 22; cf. *id.* at 37, 67.

A continuance subsequently rendered two of the 12 detailed members unavailable to sit on the panel. Pet. App. 5a n.2. General Coglianese, who reassumed his role as the convening authority upon his return, replaced those members with two individuals—a Navy captain (O-6) and a Marine Corps sergeant major (E-9)—neither of whom had been included on the list of 16 individuals previously recommended by the staff judge advocate. *Ibid.*; C.A. App. 8, 21, 67.

The military judge sustained petitioner's subsequent objection to the panel. Pet. App. 5a; C.A. App. 37, 52. The judge explained that he found no "improper motive to pack the members pool," C.A. App. 46, 48, and recognized that the staff judge advocate intended to apply the Article 25 factors in making his recommendation to the convening authority, *id.* at 49. The judge, however, concluded that the staff judge advocate's process for obtaining nominees from subordinate commanders effectively resulted in "a systematic exclusion of otherwise

qualified personnel based on * * * rank" because his solicitation sought only the submission of questionnaires from all "O-4s and above" and all "E-8s and above" without discussing "the Article 25 criteria." *Id.* at 47, 52.

The military judge also concluded that the convening authority's original selection of court members did not itself satisfy Article 25 because "Colonel Schultz[] picked just the people on the [staff judge advocate's] list." C.A. App. 50. The judge accordingly distinguished this case from *United States* v. *Hernandez*, No. 201300313, 2014 WL 4715866, at *3 (N-M Ct. Crim. App. Sept. 23, 2014) (per curiam), where a recommended roster that "improperly excluded members of lower ranks" did not result in an Article 25 violation. C.A. App. 49-50. In *Hernandez*, the judge explained, the convening authority selected high-ranking members from his command that he would have been expected to know personally and chose several servicemembers not on the recommended roster, thus indicating that he "properly applied the Article 25 factors in their selection." *Id.* at 50. General Coglianese's limited substitution of two members after the initial selection, the judge concluded, was insufficient to fall "within the ambit of *Hernandez*." *Id.* at 50-51.

ii. The staff judge advocate subsequently provided General Coglianese with a panel-selection recommendation that enclosed the complete alphabetical (alpha) roster of the over 8000 potential court members under the General's command. Pet. App. 6a; C.A. App. 26, 66. The staff judge advocate informed the General that, if he desired, he could choose any of those names who fit the selection criteria in Article 25, but the staff judge advocate recommended that the General adopt an amended convening order that consisted of the same

12 members who had been previously detailed to the court-martial. Pet. App. 6a; C.A. App. 26-27.

General Coglianese ordered that all 12 members (ten of whom had been initially recommended by the staff judge advocate) be removed from the court-martial and then separately reinstated. See C.A. App. 7 (order); cf. *id.* at 16 (initial recommendation). In a letter addressed to the military judge, the General explained that he "recognized he could have chosen from among the full roster of 'roughly 8,000 Marines and sailors,'" but that he had "personally selected this panel based on [the] Article 25" criteria because he "'kn[e]w these individuals personally'" and was "'convinced they meet the qualifications for membership.'" Pet. App. 6a; see C.A. App. 28 (letter). The General thus emphasized that he understood that he "could have selected any member of [his] command senior to the accused" and that he ultimately selected the members "only on the basis of their age, education, training, experience, length of service and judicial temperament," "irrespective of rank, group or class." C.A. App. 28.

Petitioner objected to the new convening order, but the military judge overruled his objection. Pet. App. 6a; see C.A. App. 54-70. The judge explained that the Article 25 problem with the earlier selection had been the "systematic[] exclu[sion]" of members "in the solicitation" and in the resulting "nominations from the subordinate commanders." C.A. App. 56. That problem, the judge reasoned, had been corrected by the Commanding General's "personal[] select[ion]" of court members whom he "personally knows" based on the Article 25 factors, where the General had before him the "entire alpha roster" of individuals under his command and knew that he could have "picked anybody he wanted."

Id. at 56, 63, 70; see *id.* at 61. The judge explained that the Article 25 factors—which include "age, experience," and similar considerations—"lend [themselves] to more senior people being [selected for] the panel." *Id.* at 62-63. Thus, the judge concluded, although the initial "nomination process may have had its flaws," "the General correctly applied the Article 25 criteria" in a subsequent process that was not "designed to systematically exclude anybody." *Id.* at 70.

iii. In response, petitioner's counsel stated that, given his belief that the panel was still "defect[ive]," petitioner was "forced to abandon [his] request for trial by members with enlisted representation" and would instead select "trial by military judge alone." C.A. App. 70-71. The judge noted that he had "discretion * * * to grant or deny that request" and stated that he could grant it only if he found that petitioner "knowingly, intelligently, and voluntarily waive[d] his right to a trial by members." *Id.* at 72. The judge stated that he "doubt[ed] very much" that he would find that standard satisfied—"particularly voluntari[ness]"—if petitioner felt that "he [wa]s forced to [choose a judge-alone trial] by the panel that he has here." *Ibid.*

Petitioner's counsel then represented that petitioner's "view of the improper selection process" was not, in fact, the "sole basis" for electing a court-martial by judge alone and that petitioner's "other reasons" could not be disclosed because of attorney-client privilege. C.A. App. 73. In response, the judge reiterated that he could approve petitioner's choice if it was "knowing, intelligent, and voluntar[y]," but that it would be "a much different story" if petitioner "feels that the selection process has forced him * * * to abandon [his] right and go with the military judge alone." *Ibid.* If petitioner

had "any issues" with the earlier Article 25 ruling, the judge explained, petitioner "ha[d] a right to be tried by a court-martial composed of members" and had "preserved" his challenge "for the Appellate Court." *Id.* at 73-74; see *id.* at 72 (similar).

The military judge then explained petitioner's rights and probed the basis for petitioner's decision in a colloquy with petitioner. C.A. App. 74-77. During that colloquy, the judge specifically asked petitioner if he "fe[lt] like the panel selection process forced [him] to be tried by the military judge alone." *Id.* at 76. Petitioner responded, "I don't think it forced me, sir." *Ibid.* The judge approved petitioner's request. *Id.* at 77.

After trial, the military judge found petitioner guilty.

3. The NMCCA affirmed. Pet. App. 29a-41a. As relevant here, the court of appeals based its Article 25 decision on two alternative holdings. *Id.* at 35a-41a. First, the court held that General Coglianese's selection of court members complied with Article 25 without "improper exclusion of members based on rank" or "taint" from "the initial improper nomination process," because the General made his decision after considering "the entire command roster" and "clearly stated [his] understanding of the [Article 25] qualification criteria, 'irrespective of rank, group or class.'" *Id.* at 38a-39a (citation omitted). In the alternative, the court held that any Article 25 error did not prejudice petitioner in light of petitioner's subsequent election of "trial by military judge alone," *id.* at 40a. See *id.* at 39a-41a.

4. a. On discretionary review, the CAAF affirmed. Pet. App. 3a-28a. The CAAF held that "no systemic exclusion of members based on rank" had occurred and that "the convening authority did not violate Article 25." *Id.* at 4a; see *id.* at 7a-11a.

The CAAF explained 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. 8a (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 7a-8a (quoting Article 25(d)(2), 10 U.S.C. 825(d)(2)). The court observed, however, that petitioner 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 8a. Instead, the court stated, petitioner 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 explained that its decisions have "identified three factors" useful "in evaluating any process for screening potential members," only one of which was relevant here: the "[s]ystemic exclusion" of otherwise qualified members based on rank. Pet. App. 8a-9a (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 9a. The court determined that its prior decisions involved circumstances different from the present case, *id.* at 9a-11a,

and concluded that "any systemic exclusion of members by rank" in the initial solicitation and recommendation process here had been "cure[d]" by "the additional steps taken by the convening authority" in his "assembly of the second panel," *id.* at 11a. 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 'roughly 8000 Marines and sailors'" under this command and "personally selected the panel only on the basis of [the Article 25] criteria." *Ibid.*

b. Judge Ryan concurred in the result. Pet. App. 12a-14a. Judge Ryan determined that, under the best reading of the record here, no error exists—much less a prejudicial one—because petitioner "knowingly and voluntarily waiv[ed] his right to a trial by members" "for reasons unrelated to the member selection process." *Id.* at 13a-14a & n.1. She explained that the military judge "made clear that he would not accept [petitioner's] request to be tried by military judge alone if the panel selection process forced that decision" and that petitioner's own testimony—as well as his attorney's representation that petitioner had "other reasons" for the request—showed that petitioner's "decision was not [so] forced." *Id.* at 12a-13a.

c. Judge Erdmann dissented. Pet. App. 15a-28a. Judge Erdmann recognized 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 15a (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, petitioner was entitled to relief because the second convening authority's subsequent actions were insufficient to "cure the taint of the initial improper solicitation and selection," *id.* at 22a. See *id.* at 22a-28a.

ARGUMENT

Petitioner seeks (Pet. i) certiorari on 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 most of the members of a prior panel selected by a different convening authority that had been found defective because of a nomination process that systemically excluded members based on rank. The CAAF correctly determined that the reimpaneling of the court-martial panel in this case did not violate Article 25, and its decision is limited to the court-martial system and thus does not conflict with the decision of any other court of appeals. No further review is warranted.

1. The CAAF correctly concluded that "the convening authority [in this case] did not violate Article 25" when he reconstituted petitioner's court-martial panel without any "systemic exclusion of members based on rank." Pet. App. 4a. The text of Article 25 confirms that no violation occurred, 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 service-members 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 "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

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[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.

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 Coglianese selected in this case "did not qualify [under Article 25] on the basis of age, education, training, experience, length of service, and judicial temperament." Pet. App. 8a. Petitioner's only apparent Article 25 argument is that Congress intended that "all ranks and grades [be] eligible for appointment." Pet. 26 & n.97 (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 pp. 5-6, *supra*.

The CAAF, however, declined to extend that judge-made doctrine to encompass the circumstances of this case. It concluded that General Coglianese'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. 4a, because the General had before him a list of 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 11a. 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. 22-25) that the "systematic exclusion of personnel on the basis of rank" is a widespread and recurring problem. Petitioner focuses (Pet. 23-24) on two CAAF opinions, neither of which supports his contention. See Pet. 22-24 & n.79. 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), 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 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

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[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.

those courts can then review on a case-specific basis to determine what relief (if any) is warranted.

Petitioner's contention (Pet. 27-29) that "[v]iolations of Article 25 cannot be deemed harmless," Pet. 27, 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 majority below concluded that "the convening authority did *not* violate Article 25." Pet. App. 4a (emphasis added). It therefore did not conduct any "harmless error" analysis in this case.

Second, petitioner's assertion (Pet. 25-26) that the CAAF's decision provides a "roadmap" to "circumvent Article 25's selection requirements" is misplaced on multiple fronts. Petitioner begs the question of what Article 25 requires while providing little argument based on Article 25 to support his position. Petitioner's related assertion (Pet. 26) that convening authorities will "stack" court-martial panels against the accused likewise assumes that panels with more senior members will be more likely to convict. But the evidence in this case contradicts that supposition. C.A. App. 66 (testimony rejecting view that "more senior panels" are more favorable to the prosecution than "panels that have junior members"). Moreover, all three courts below found "no credible evidence" suggesting any "[i]mproper motive to 'pack' the member pool." Pet. App. 9a (citation omitted); see *id.* at 40a; C.A. App. 46, 48, 69.[4]

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[4] Petitioner relies (Pet. 8-9) on an email from a senior enlisted servicemember from a "different command" on the east (not west) coast to suggest an improper selection process, but even petitioner acknowledges that he did not develop a record suggesting its connection to the convening authority or other personnel in this case.

Third, petitioner argues (at 29-33) that this Court should grant review to "prevent the disparate impact [court-martial panel] selection procedures will have on women and racial minorities," Pet. 32-33. 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. C.A. Br. 8-18; Pet. C.A. Reply Br. 2-9; see also C.A. App. 37-70 (transcript of 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).[5]

See C.A. App. 58; see *id.* at 65. The military judge accordingly concluded that the email was not relevant. *Id.* at 59-60. Both courts of appeals accepted that evidentiary determination and found no basis to consider the email, Pet. App. 9a n.3, 36a n.5, and no basis exists for this Court to consider it here.

[5] Petitioner also suggests in passing (Pet. 5, 27, 35) that his case implicates a due-process right to a "fair trial," Pet. 5, apparently on the premise that being forced "to surrender [the statutory] right to be tried by members" as a result of an improper selection process under Article 25 "cannot be deemed harmless," Pet. 27. But as discussed in the text, petitioner was not forced into such a surrender

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 military judge granted petitioner's request to be tried by a military judge alone *without* panel members. See pp. 8-9, *supra*. As a result, the earlier selection of those members had no impact on the ultimate disposition of this case.

Petitioner contends (Pet. 33-34) that his decision to request a trial by judge alone was "compelled by an unfair panel-selection process" and that he relied on the "military judge's assurances that the Article 25 issue was preserved for appeal." That is incorrect.

Petitioner's counsel informed the military judge that petitioner had multiple reasons for requesting a court-martial by judge alone and that petitioner's belief that the panel selection process was flawed was not the "sole basis" for the request. C.A. App. 73. The military judge then made clear that while he could approve petitioner's request to relinquish his right to a trial by members if it was "knowing, intelligent, and voluntar[y]," it would be "a much different story" if petitioner "fe[lt] that the selection process has forced him * * * to abandon [his] right and go with the military judge alone." *Ibid.*; see *id.* at 72 (noting on lack of "voluntari[ness]" if defendant feels "forced" to elect trial by judge). The judge thus granted petitioner's request only after petitioner himself informed the judge that he did not "feel like the panel selection process forced [him] to be tried by the military judge alone." *Id.* at 76-77. That statement clarified any contrary suggestion by petitioner's counsel. The judge's approval of petitioner's request likewise

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here, and any harmless-error issue would be presented only if the Court were to agree with petitioner on the merits.

shows that the judge credited petitioner's testimony and found petitioner's request to relinquish his right to trial by members to be voluntary.

Although the military judge did inform petitioner that he had preserved his challenge to the panel selection process, the judge did so in the context of stating that he wanted to "make sure that [petitioner] understands he has th[e] right" to trial by members and that "if there [are] any issues with the [judge's Article 25] decision" upholding the member-selection process, that issue had been preserved "for the Appellate Court." C.A. App. 73-74; see also *id.* at 72. That colloquy merely shows that the judge emphasized that petitioner was free to exercise his right to trial by members because he had preserved his Article 25 challenge on appeal. Petitioner elected not to do so. As such, this case would be an unsuitable vehicle to address the Article 25 question that petitioner presents.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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