No. 20-111

In the Supreme Court of the United States

WALTER N. STRAND, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Secretary of the Navy's denial of a request under 10 U.S.C. 1552 to adjust petitioner's military service record must be set aside because he did not adopt the recommendation of a records correction board, even though the Secretary's denial is not arbitrary or capricious, is supported by substantial evidence, and is not otherwise contrary to law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 951 F.3d 1347. The opinion of the United States Court of Federal Claims (Pet. App. 30a-54a) is reported at 138 Fed. Cl. 633. A related opinion of the court of appeals (Pet. App. 68a-78a) is reported at 706 Fed. Appx. 996. A related opinion of the United States Court of Federal Claims (Pet. App. 81a-96a) is reported at 127 Fed. Cl. 44.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2020. The petition for a writ of certiorari was filed on July 29, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Statutory And Regulatory Background

The Legislative Reorganization Act of 1946, 10 U.S.C. 1552, authorizes military service secretaries to correct the records of service members in certain circumstances. Section 1552(a)(1) provides that "[t]he 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." 10 U.S.C. 1552(a)(1). The Act states that, with exceptions not relevant here, any such corrections "shall be made by the Secretary acting through boards of civilians of the executive part of that military department," *ibid.*, and "shall be made under procedures established by the Secretary concerned," 10 U.S.C. 1552(a)(3)(A). The Board for Correction of Naval Records (BCNR or Board) has been established to assist the Secretary of the Navy with this task. 32 C.F.R. 723.2.

Navy regulations provide that applications for correction are submitted, in the first instance, to the Board. 32 C.F.R. 723.3(a). If accepted for consideration, "all pertinent evidence of record" is reviewed by a three member panel. 32 C.F.R. 723.3(e)(1). Where the Board concludes a hearing is warranted, the regulations provide for the appearance of counsel, the presentation of witnesses, and the submission of documentary evidence. 32 C.F.R. 723.4-723.5. Following such a hearing, or if the Board determines that no hearing is warranted, the Board issues "written findings, conclusions and recommendations." 32 C.F.R. 723.6(a)(3); see 32 C.F.R 723.3(e)(4). If the Board recommends the denial of relief, it is required to include a "brief statement of the

grounds for denial." 32 C.F.R. 723.3(e)(4); see 32 C.F.R. 723.6(a)(3).

"With respect to all petitions for relief properly before it," the Board is generally authorized to take "final corrective action on behalf of the Secretary." 32 C.F.R. 723.6(e)(1). A limited number of categories of petitions, however, are "reserved for decision by the Secretary." 32 C.F.R. 723.6(e)(1)-(2). Among them are petitions that, "in the determination of [the] Office of the Secretary or the Executive Director [of the Board], warrant Secretarial review." 32 C.F.R. 723.6(e)(2)(iii). In those instances, the record of proceedings before the Board "will be forwarded to the Secretary who will direct such action as he or she determines to be appropriate." 32 C.F.R. 723.7(a). If the Secretary determines to deny relief, "such decision shall be in writing and, unless he or she expressly adopts in whole or in part the findings, conclusions and recommendations of the Board, or a minority report [of the Board], shall include a brief statement of the grounds for denial." *Ibid.*

B. The Present Controversy

1. Petitioner enlisted in the Navy in 1988. Pet. App. 100a. In 2008, while still on active duty, he fired a gun at a car carrying his estranged wife and her boyfriend. *Id.* at 33a, 100a. Based on that conduct, petitioner was charged with and convicted in a Virginia state court on three felony counts of attempted malicious wounding, attempted unlawful wounding, and the use of a firearm in the commission of a felony. *Id.* at 33a, 100a-101a. And he was sentenced to six years of imprisonment, three of which were eventually suspended for good behavior. *Ibid.*

Following his conviction, the Navy discharged petitioner under "other than honorable conditions," based

on "misconduct due to [the] commission of a serious offense," his "longstanding history of Family Advocacy Program (FAP) involvement and domestic violence issues," and a determination that "his behavior did not align with the Navy's core values." Pet. App. 101a. Petitioner had served for 19 years and six months before his discharge. *Id.* at 34a. Because he was separated before accruing 20 years of service, he was ineligible to request that the Navy transfer him to the Fleet Reserve, a form of retirement available to enlistees. C.A. App. 355-362; 10 U.S.C. 6330(b).

2. In 2014, petitioner applied to the BCNR seeking various "corrections" to his service record, including a six-month service credit to gain eligibility for retirement and other benefits. Pet. App. 3a; see *id.* at 71a-72a. The Board recommended to the Secretary that the Navy modify petitioner's records "to show [that] he was honorably retired with 20 years of service," *i.e.*, to grant him six months of retirement credit and an upgrade to his discharge conditions, and to strike from his records that the Navy had discharged him due to his civil convictions. *Id.* at 104a; see *id.* at 99a-105a. The Board "note[d] the seriousness of [p]etitioner's disciplinary infractions and d[id] not condone his misconduct." *Id.* at 103a. But it concluded that "[p]etitioner ha[d] suffered long enough for his indiscretion and should be granted relief in the form of credited term served." *Ibid.*

On the same day, the Executive Director of the Board—a retired Navy judge advocate serving as a civilian—referred the Board's recommendation to the Secretary for decision. See Pet. App. 87a; Pet. 18 n.14. In a handwritten note, he explained that, "based on the seriousness of the offense and the significant grant of

relief, [the Secretary] should review this case for decision." C.A. App. 35; see 32 C.F.R. 723.6(e)(2)(iii). After review, the Secretary disapproved the BCNR's recommendation. Pet. App. 97a-98a. The Secretary concluded that the recommendation of the BCNR was "wholly inconsistent" with both (i) the Navy's core values and (ii) the Navy's "practice in similar cases involving discharge for criminal conduct and criminal conviction." *Ibid.* In reaching these conclusions, the Secretary relied in part on the fact that petitioner had a history of FAP involvement and "domestic violence issues." *Id.* at 98a (citation omitted).

3. The Court of Federal Claims determined that the Secretary's decision was not supported by substantial evidence, Pet. App. 81a-96a, and the Federal Circuit affirmed, *id.* at 68a-78a. The Federal Circuit reasoned that the Secretary's statement describing petitioner's "history of FAP involvement and domestic violence issues" lacked sufficient support in the record. *Id.* at 74a. And "because the Secretary relied on a combination of intertwined reasons," one of which the court found not to be supported by substantial evidence, the court concluded that the Secretary's decision had to be vacated. *Id.* at 75a. Nevertheless, although the trial court had ordered the Navy "to retire [petitioner] with all appropriate backpay, benefits, and allowances," *id.* at 96a, the Federal Circuit held that "further administrative proceedings could remedy the defects in the Secretary's decision," and thus it remanded to the Secretary for further proceedings, *id.* at 69a.

On remand, the Secretary again rejected the recommendation of the BCNR. Pet. App. 55a-67a. The Secretary observed that "[s]ince []the early days of the Naval service, there have been three bedrock principles or

core values that guide our military members: honor, courage and commitment." *Id.* at 60a. The Secretary reasoned that petitioner's misconduct that led to his state-law felony convictions was inconsistent with each of those values. See *id.* at 62a-63a ("Petitioner * * * did not demonstrate honorable behavior towards * * * his former spouse, the victim of his crime."); *id.* at 63a ("Instead of engaging in a crime of passion, [p]etitioner could have demonstrated the Navy core value of courage by walking away."); *id.* at 64a ("Commitment requires a service member * * * to make decisions that are in the best interest of the Navy and the Nation * * * [but] [w]hen [p]etitioner elected to take a gun and attempted to harm his former spouse, he * * * had no regard for our Nation's laws or its people.").

The Secretary concluded that petitioner's failures were "aggravat[ed]" by the fact that he had received non-judicial punishment and counseling earlier in his career for abusing alcohol, providing him "notice of his obligation to comply with both military regulations and civilian laws and that his failure to adhere and measure up to the high standards of performance required of all members of the U.S. Navy could lead to his separation from service." Pet. App. 62a, 63a; see *id.* at 61a-62a. And the Secretary found further support in the fact that most service members convicted in the military justice system for conduct similar to petitioner's crimes "receive punitive discharges in addition to confinement." *Id.* at 65a; see *id.* at 65a-66a.

The Secretary considered the remainder of petitioner's military service and his good post-discharge conduct, including his acceptance of responsibility for his 2008 criminal offenses. Pet. App. 66a; see *id.* at 60a-61a. The Secretary "commend[ed] [p]etitioner's efforts

to engage in rehabilitation following his conviction and incarceration, as well as his efforts to rebuild his life." *Id.* at 66a. But the Secretary "d[id] not find that [p]etitioner's overall periods of enlisted service * * * and post-service conduct * * * [we]re sufficient to overcome the seriousness of the misconduct that resulted in his civilian conviction for felony offenses." *Id.* at 60a.

In sum, the Secretary "d[id] not find that relief [wa]s warranted and that [p]etitioner should be granted credited time served for retirement when, in fact, the basis for his inability to retire was not an error or an injustice, but his own deliberate misconduct despite being on clear notice of the consequences of his actions." Pet. App. 66a.

4. Petitioner again sought review of the Secretary's decision in the Court of Federal Claims. Pet. App. 31a. The court again held that the Secretary's decision was arbitrary and capricious and "direct[ed] the Navy to * * * retire [petitioner] with all appropriate back pay, benefits, and allowances." *Id.* at 54a; see *id.* at 30a-54a. This time, however, the Federal Circuit reversed. *Id.* at 1a-21a.

a. The court of appeals first rejected petitioner's argument that the Secretary may disapprove a Board's recommended correction only if the Board's findings are unsupported by the administrative record. Pet. App. 11a-14a. The court observed that it had long held that "Board recommendations are not binding on the Secretary since 'Congress clearly has delegated the final authority regarding any correction of military records to the Secretary, not the correction board.'" *Id.* at 11a (quoting *Strickland* v. *United States*, 423 F.3d 1335, 1340 (Fed. Cir. 2005)). It also noted that its predecessor court—the Court of Claims—had similarly held that

"Secretaries are free to . . . differ with the recommendations of [correction] boards where the evidence is susceptible to varying interpretations." *Id.* at 13a (quoting *Sanders* v. *United States*, 594 F.2d 804, 812 (Ct. Cl. 1979) (en banc)) (brackets in original). And it explained that, despite some language in other cases from the Court of Claims that "would seem to support" petitioner, those decisions "were rendered in the context of service secretaries being influenced by—or outright adopting—the opinions of military officers in rejecting otherwise substantiated board recommendations." *Id.* at 12a (citing *Proper* v. *United States*, 154 F. Supp. 317, 326 (Ct. Cl. 1957); *Weiss* v. *United States*, 408 F.2d 416, 420-421 (Ct. Cl. 1969)). The court of appeals thus reiterated that "where a military officer has not unduly influenced the secretary's decision, a service secretary may reject the recommendation of a records correction board—even a recommendation supported by the administrative record—so long as the secretary's rejection decision is not arbitrary or capricious, unsupported by substantial evidence, or otherwise contrary to the law." *Id.* at 14a.

The court of appeals next concluded that the Secretary's decision satisfied this standard. Pet. App. 14a-21a. The court observed that, after "a broad review of [petitioner's] record," the Secretary reasonably placed "heavy weight" on petitioner's "'cho[ice] to take a gun and attempt[] to cause his former wife and another individual substantial harm.'" *Id.* at 15a (citation omitted; second and third sets of brackets in original). And the court determined that petitioner's criminal conduct "fully support[ed] denying him credit for six months of service he did not perform." *Ibid.*

The court of appeals rejected petitioner's various objections to the Secretary's additional reasoning. The court explained, for example, that, while it was true that the Navy "had not adopted its core values of Honor, Courage, and Commitment" when petitioner was first counseled for alcohol abuse in 1992, there was "nothing arbitrary about analyzing his overall history of performance and conduct under the values existing at the time of the [Secretary's] decision," and that petitioner's counseling in 1992 "still could—and did—warn him of the consequences of future misconduct." Pet. App. 18a. Moreover, although petitioner faulted the Secretary for giving "insufficient consideration" to his positive service record and post-service conduct, the court explained that the Secretary had in fact acknowledged several positive aspects of petitioner's record, and there was no requirement that the Secretary's "'brief statement'" lists "every aspect of a petitioner's record." *Id.* at 19a-20a & n.11 (quoting 32 C.F.R. 723.3(e)(4)).

Finally, the court of appeals concluded that the fact "[t]hat the Secretary weighed certain aspects of the record differently than did the Board does not mean that the Secretary's conclusions were arbitrary or unsubstantiated." Pet. App. 20a. Even if the "Board's contrary conclusion may also be supported by substantial evidence," the court wrote, "that conclusion is not under review here." *Ibid.* "[W]hereas the Secretary in correcting a military record is to act through a board of civilians, as required by [10 U.S.C. 1552], he has . . . retained the authority to take such final action on board recommendations as he determines to be appropriate." *Id.* at 20a-21a (citation omitted; first set of brackets in original). Because the Secretary properly exercised that discretion, the court of appeals reversed the trial

court and reinstated the Secretary's decision. *Id.* at 21a.

b. Judge Reyna dissented. Pet. App. 22a-28a. Judge Reyna did not disagree with the panel's holding that the Secretary was free to disagree with the Board's recommendation, as long as the Secretary's decision was not arbitrary and capricious and is supported by substantial evidence. But he would have vacated the Secretary's decision under that standard based on his conclusion that the record did not support one aspect of the Secretary's decision—namely, the Secretary's suggestion that petitioner had been counseled early in his career for two different acts of misconduct (one in 1992 and one in 1993), rather than being counseled twice for the same misconduct. *Id.* at 22a-23a. Judge Reyna disagreed with the panel majority that any such error in the Secretary's decision was harmless. Compare *id.* at 27a-28a, with *id.* at 5a n.8 (majority opinion) (concluding that, while it was "unclear from the record whether the 1992 and 1993 entries addressed the same underlying act(s) of misconduct," any error was harmless).

c. Petitioner did not seek rehearing en banc.

ARGUMENT

Petitioner contends (Pet. 10-30) that the Secretary's decision not to adjust petitioner's service record must be set aside unless the Board's recommendation to make such an adjustment was not supported by substantial evidence. The court of appeals correctly rejected that contention. And its decision does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

1. The court of appeals correctly determined that, at least where a military officer has not unduly influenced a service secretary's decision, the secretary may reject

a recommendation of a correction board that is supported by substantial evidence—as long as the secretary's rejection decision does not violate the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Section 1552(a)(1) provides that "[t]he Secretary of [each] 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." 10 U.S.C. 1552(a)(1). In so doing, the statute vests in the Secretary the authority and discretion to make the final determination whether any record correction is warranted. And in keeping with that directive, it is the Secretary's determination, *not* the correction board's recommendation, that constitutes the "final agency action" subject to judicial review, 5 U.S.C. 704, and that must be "set aside" if the reviewing court determines that it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. 706(2)(A).

Contrary to petitioner's contention (Pet. 21-22), the statute's further command that, subject to certain exceptions, "corrections shall be made by the Secretary acting through boards of civilians," 10 U.S.C. 1552(a)(1), does not require a different conclusion. Particularly read in light of the first sentence of Section 1552(a)(1), which authorizes the Secretary to make decisions based on what the Secretary "considers * * * necessary," this provision merely requires the Secretary to submit applications for corrections to a "board[] of civilians" in the first instance, rather than immediately acting upon them himself or delegating them to active-duty military officers. *Ibid.* It does not further require him to defer to those subordinate civilian officers' recommendations.

A contrary reading that would require the Secretary to adopt the recommendations of subordinate officers who are appointed by, and serve at the pleasure of, the Secretary, see 32 C.F.R. 723.2, would be illogical. Providing for service secretaries to "act[] through" civilian boards, 10 U.S.C. 1552(a)(1), does not imply that these secretaries are bound to follow instructions from these civilian boards, any more than a principal "acting through," *ibid.*, agents must follow the agents' instructions or a court of appeals acting through three-member panels may not revisit en banc any panel's decision. If Congress intended to invert the usual chain of command of the Executive Branch, one would expect much clearer language than is present here.

The court of appeals' interpretation of the statute, moreover, does not render Congress's requirement that the Secretary "act[] through boards" surplusage nor relieve the Secretary of the need to "create the Boards at all." Pet. 23. Rather, it means only that, although Section 1552(a) constrains the *process* by which the Secretary may reach a final correction decision, it imposes no *substantive limitation* on the Secretary's exercise of his discretion beyond that he "consider[] it necessary to correct an error or remove an injustice." 10 U.S.C. 1552(a)(1). See *Miller* v. *Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986) ("Though section 1552(a) directs the Secretary to act through a civilian board, it leaves no doubt that the final decision is to be made by him.").

Nor is that interpretation inconsistent with any other provision of Section 1552. As petitioner observes (Pet. 23-24), in some cases, the Secretary need not act through a correction board at all—namely, if the Secretary has determined to grant a servicemember's request to enlist, re-enlist, or be promoted. 10 U.S.C.

1552(a)(2). In such cases, Section 1552(a) does not even have to seek the Board's recommendation in the first instance. Petitioner errs, however, by reading that narrow exception to Section 1552(a)(1)'s procedural requirement that the Secretary otherwise "act[] through boards of civilians" to also mean that the general substantive authority granted the Secretary by Section 1552(a)(1) applies only in the same narrow circumstances. Nor do provisions referring to the Board making "a determination," 10 U.S.C. 1552(a)(3)(D), mean that the Secretary must accept any such determination. Cf. Pet. 24. And the fact that the Secretary may *initiate* the corrections process before the Board on behalf of a group of servicemembers who were "similarly harmed by the same error or injustice," does not suggest that the Secretary is thereby deprived of his authority to review the Board's recommendation at the *end* of that process. 10 U.S.C. 1552(b).

Finally, the court of appeals' decision is also consistent with the legislative history of the Legislative Reorganization Act of 1946, 10 U.S.C. 1552. Petitioner contends (Pet. 25) that Congress enacted the statute because (1) "Congress was not properly equipped to handle the volume of requests" and (2) "Congress was concerned that military members did not receive the same legal and procedural protections in the military justice system that they would be entitled to in civilian courts." Both concerns could explain why Congress provided for boards of civilians to accept applications, hold hearings where servicemembers could be represented by counsel, hear witnesses, receive evidence, and issue written reasoned decisions. See pp. 2-3, *supra*. But neither demands that service secretaries be required to adopt the recommendations of those correction boards where the

record compiled in those proceedings is susceptible to multiple reasonable interpretations. And despite petitioner's concern for affording "near complete deference" to secretaries' decisions, Pet. 27, the court of appeals' decision establishes nothing more than that a service secretary is permitted to reject a correction board's recommendation if, and only if, the rejection satisfies the ordinary APA standard of review.

2. Petitioner contends (Pet. 10-13) that the Federal Circuit's decision widens a conflict among the courts of appeals. But the decision below reflects "the uniform understanding of the Secretary's power since the statute was enacted in 1946." *Strickland* v. *United States*, 423 F.3d 1335, 1341 (Fed. Cir. 2005); see *id.* at 1340-1341 ("This interpretation of § 1552(a) is uniform across the circuits.") (citing, *e.g.*, *Neal* v. *Secretary of the Navy*, 639 F.2d 1029, 1043 (3d Cir. 1981); *Horn* v. *Schlesinger*, 514 F.2d 549, 553 (8th Cir. 1975)). Petitioner fails to identify any decision adopting or applying a different standard.

Most of the decisions on which petitioner relies merely recognize—as the Federal Circuit did below—that, while service secretaries are not bound by the recommendations of a correction board, they also may not disregard them "arbitrarily." See *Neal*, 639 F.2d at 1043 n.13 ("Although the decision of the BCNR is in the form of a recommendation to the Secretary of the Navy who 'will direct such action in each case as he determines to be appropriate,' he may not arbitrarily overrule the recommendations of the Board where its findings are justified by the record.") (citation omitted); *Horn*, 514 F.2d at 553 (noting that although "the Secretary is authorized, in a proper case, to overrule the Board's recommendations, he cannot do so arbitrarily") (citations omitted); *Champagne* v. *Schlesinger*, 506 F.2d 979, 983

(7th Cir. 1974) ("Arbitrary rejection can result in judicial reversal of the Secretary's decision."); *Hodges* v. *Callaway*, 499 F.2d 417, 423 (5th Cir. 1974) ("Moreover, though the Secretary may overrule the Board's recommendations for relief, he cannot do so arbitrarily.") (emphasis omitted); *Nelson* v. *Miller*, 373 F.2d 474, 478 (3d Cir.) (recognizing that while "Secretary of the Navy [may] 'direct such action in each case as he determines to be appropriate[,]' [h]e may not * * * arbitrarily overrule the recommendations of the Board where the findings of the Board are justified by the record") (citation omitted), cert. denied, 387 U.S. 924 (1967).

The other two decisions simply cite the Third Circuit's decision in *Neal*—a decision that, again, is itself consistent with the decision below—"as persuasive authority," Pet. 12, in the course of discussions that do not pertain to the Secretary's authority to overrule the Board's recommendation at all. See *Dibble* v. *Fenimore*, 545 F.3d 208, 215 (2d Cir. 2008) (citing *Neal* for the proposition that, when the Secretary adopts the Board's recommendation, the decision can be reviewed judicially for arbitrariness and capriciousness); *Blassingame* v. *Secretary of the Navy*, 866 F.2d 556, 560 (2d Cir. 1989) (citing *Neal* as an example of a case in which "technical procedural irregularities in an administrative hearing" were "insufficiently prejudicial to justify" the court's vacating of the final decision).

3. Lastly, petitioner errs in suggesting (Pet. 13-19) that a conflict within the Federal Circuit warrants this Court's review. Petitioner contends (Pet. 14-15) that two early cases from the Court of Claims, the predecessor court to the Federal Circuit, constrained service secretaries' discretion to reject substantiated recommendations from civilian correction boards. See *Proper*

v. *United States*, 154 F. Supp. 317, 326 (Ct. Cl. 1957); *Weiss* v. *United States*, 408 F.2d 416, 421 (Ct. Cl. 1969). But as the decision below explained, *Proper* and *Weiss* were rendered in the context of "service secretaries being influenced by—or outright adopting—the opinions of military officers in rejecting otherwise substantiated board recommendations." Pet. App. 12a. In the absence of concern about undue influence by active-duty military officers, the court of appeals correctly determined that "*Proper* and *Weiss* 'have no application.'" *Id.* at 13a (quoting *Strickland*, 423 F.3d at 1342). Indeed, even as Judge Reyna disagreed about the proper resolution of the appeal, he did not disagree with the panel majority on the correct standard of review to apply. Compare *id.* at 14a (majority opinion), with *id.* at 22a-28a (Reyna, J., dissenting). In any event, an intracircuit conflict would not warrant this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam), especially given petitioner's failure to request rehearing en banc.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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