No. 24-___

IN THE

Supreme Court of the United States

THOMAS L. WHEELER, *ET AL.*,

Petitioners,

v.

UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

With the exception of "summary" courts-martial, which are non-adversarial, non-criminal proceedings, *see Middendorf* v. *Henry*, 425 U.S. 25, 42 (1976), servicemembers facing court-martial had an absolute right, from the Founding through 2018, to be tried by a panel of fellow servicemembers. Indeed, until the post-World War II advent of military judges, the panel was not just *part* of the court-martial; it *was* the court-martial.

Starting in 1968, a servicemember facing a special or general court-martial could request to be tried by a "judge alone." But since 2019, Congress and the President have also authorized some special courts-martial to proceed before a "judge alone" even when the accused objects. *See* 10 U.S.C. §§ 816(c)(2)(A), 819(b). These bench trials are not just for petty offenses. As petitioners' cases demonstrate, they can also include serious misdemeanors and felonies—and civilian crimes as well as military ones. The Court of Appeals for the Armed Forces (CAAF) conceded below that "historical tradition weighs in favor of finding a due process right to a panel" in these cases, Pet. 16a, but nevertheless held that no such right exists.

The question presented is:

Whether Congress violated the Fifth Amendment's Due Process Clause when it deprived servicemembers facing criminal prosecutions of the right to be tried by a panel of fellow servicemembers.

PARTIES TO THE PROCEEDING

This Rule 12.4 petition consolidates direct appeals from three servicemembers convicted by courts-martial. Petitioners are Thomas L. Wheeler, David M. Diaz, and Thomas H. Martin. Respondent in each of petitioners' cases is the United States.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeals that form the basis for this petition, there are no related proceedings for purposes of Rule 14.1(b)(iii).

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INTRODUCTION

Since before the Civil War, this Court has blessed the use of courts-martial, rather than Article III civilian courts, to try criminal offenses committed by members of the armed forces. *See Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 78–79 (1858). Despite recognizing that courts-martial long dispensed a "rough form of justice," *Reid* v. *Covert*, 354 U.S. 1, 35 (1957) (plurality opinion), this Court has repeatedly upheld them. It has done so by reference to the history and tradition of having a soldier's guilt or innocence decided by a panel of fellow servicemembers rather than a jury of distant and disinterested civilians.

Historically, the panel was not just *part* of the court-martial; it *was* the court-martial. From the 1775 Articles of War onward, it was a panel of fellow servicemembers that defined the general (and, later, special) court-martial, not the other way around. The panel was the court-martial's irreducible minimum. More than that, it was the principal procedural protection *for the accused*—a striking feature at a time when military personnel had almost no other rights under the Constitution, federal statutes, or military regulations. Even when Congress created the position of "military judge" in 1968, it left servicemembers with the right to insist on a panel for *any* court-martial—no matter the offense. *See* Military Justice Act of 1968, Pub. L. No. 90-632, § 2(3), 82 Stat. 1335, 1335.

But in the Military Justice Act of 2016, Pub. L. No. 114-328, div. E, 130 Stat. 2000, 2894–2968,[1] Congress upended that long-settled historical practice. For the first time, Congress provided for military bench trials

1. The provisions at issue here went into effect on January 1, 2019. Military Justice Act of 2016, § 5542(a), 130 Stat. at 2967.

over the accused's objection. *See id.* §§ 5161–63, 130 Stat. at 2897–99. CAAF calls such a proceeding an "unrefusable military judge-alone special court-martial." Pet. 9a. The more evocative term is the "short-martial." LISA M. SCHENCK, MODERN MILITARY JUSTICE: CASES AND MATERIALS 264 (4th ed. 2023).

The short-martial was not a reaction to any specific imperative. The only rationale Congress provided for such a radical break from the history and tradition of military jurisdiction was "efficiency." *See* Pet. 5a. The 2016 Act thereby sacrificed the full panoply of protections attendant to a general court-martial, or even the lesser protections provided by a conventional special court-martial *with* a panel, in favor of a quicker—and less procedurally involved—forum for adjudicating servicemembers' guilt or innocence for a host of criminal offenses triable under the Uniform Code of Military Justice (UCMJ).

Tacitly recognizing the grave implications of such a move, Congress prescribed three limits: A short-martial may not impose as punishment a bad-conduct discharge, forfeiture of more than six months' pay, or confinement for more than six months. *See* 10 U.S.C. § 819(b). But those limits do not bar a short-martial from trying felonies or serious misdemeanors, as it did in two of petitioners' cases—or civilian offenses, as it did in the third. And serious offenses or not, short-martial convictions, unlike convictions by summary courts-martial, carry the typical assortment of severe and stigmatizing collateral consequences—including under the Federal Sentencing Guidelines. *See* U.S.S.G. § 4A1.2(g) (convictions by special courts-martial count as prior criminal history). Thus, the Military Justice Act of 2016 eliminated the *sine qua non* of courts-martial in many cases. And the way it

did so exposes servicemembers to the same consequences they would face if convicted of similar offenses in civilian courts—but without comparable procedural safeguards.

CAAF nevertheless upheld the short-martial. It held that the due process considerations this Court articulated in *Middendorf*, 425 U.S. 25, and reiterated in *Weiss* v. *United States*, 510 U.S. 163 (1994), did not militate in favor of a right to be tried by a panel. Pet. 6a–17a. But CAAF's analysis turns *Middendorf* and *Weiss* on their heads. The question in both cases was whether servicemembers were entitled to *greater* procedural protections than those reflected in the history and tradition of military justice in the United States—such as a right to counsel at a summary court-martial in *Middendorf*, or a right to judges with fixed terms of office in *Weiss*. By contrast, the question petitioners present is whether Congress can *deprive* servicemembers of procedural rights that have been central to the history and tradition of courts-martial for no reason other than efficiency. If "the fact of a differing military tradition" should have been "utterly conclusive" of what the Due Process Clause requires in those cases, *see Weiss*, 510 U.S. at 199 (Scalia, J., concurring in part and concurring in the judgment), it should be just as conclusive here.

Properly resolving the constitutionality of the short-martial is of critical importance not only to the military justice system, but to the scope of the court-martial exception to Article III. This Court has previously sustained military jurisdiction *because* Congress has hewed closely to the model of Founding-era courts-martial. *See, e.g.*, *Ortiz* v. *United States*, 585 U.S. 427, 439 (2018) ("Congress has maintained courts-martial *in all their essentials* to resolve

criminal charges against service members." (emphasis added)). The more Congress *departs* from even the minimum procedural requirements (and the central structural feature) of Founding-era courts-martial—the panel—the more it undermines not only the due process rights of servicemembers, but the reason why the Constitution allows members of the armed forces to be prosecuted in military courts in the first place.

DECISIONS BELOW

In Petitioner Wheeler's case, the decision of the en banc Navy-Marine Corps Court of Criminal Appeals (NMCCA) is reported at 83 M.J. 581 (N-M. Ct. Crim. App. 2023) (en banc), and is reprinted at Pet. 23a. CAAF's decision is not yet reported. It is available at 2024 WL 3932500 (C.A.A.F. Aug. 22, 2024), and is reprinted at Pet. 1a.

In Petitioner Diaz's case, the decision of the NMCCA is not reported. It is available at 2023 WL 2124773 (N-M. Ct. Crim. App. Feb. 21, 2023), and is reprinted at Pet. 53a. CAAF's decision is not yet reported. It is available at 2024 WL 4491886 (C.A.A.F. Sept. 17, 2024), and is reprinted at Pet. 21a.

In Petitioner Martin's case, the decision of the NMCCA is not reported. It is available at 2023 WL 2125135 (N-M. Ct. Crim. App. Feb. 21, 2023), and is reprinted at Pet. 56a. CAAF's decision is not yet reported. It is available at 2024 WL 4491794 (C.A.A.F. Sept. 17, 2024), and is reprinted at Pet. 22a.

JURISDICTION

In each of petitioners' cases, CAAF granted discretionary review of the question presented here. In Petitioner Wheeler's case, CAAF issued an opinion and judgment on August 22, 2024. In Petitioner Diaz's

and Petitioner Martin's cases, it issued judgments on September 17, 2024. On October 24, 2024, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including December 20, 2024. This Court's jurisdiction rests on 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

Article 16(c)(2), UCMJ, authorizes special courts-martial before a "military judge alone" either if the accused consents, 10 U.S.C. § 816(c)(2)(B), or "if the case is so referred, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation." *Id.* § 816(c)(2)(A).

Article 19(b), UCMJ, provides that "[n]either a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A))." *Id.* § 819(b).

STATEMENT OF THE CASE

The question presented is whether Congress violated the Due Process Clause when it deprived servicemembers of the right to be tried by a panel of fellow servicemembers for certain categories of criminal offenses—a right that is deeply rooted in the history and tradition of American military justice. Proper understanding of that history and tradition is thus essential to this Court's consideration of the petition and is recounted here.

A. The Court-Martial Panel

At the time the Constitution was drafted, the 1775 Articles of War governing the Continental Army were modeled directly on their British counterpart. Both required a "general court-martial to consist of at least thirteen officers and a regimental court-martial, to consist of not less than five officers, except when that number cannot be conveniently assembled, when three shall be sufficient." David A. Schlueter, *The Court-Martial: A Historical Survey*, 87 MIL. L. REV. 129, 146 (1980); *see also* 1775 Articles of War, arts. XXXIII, XXXVII.[2] The regimental court-martial was limited to "small offences," with all serious charges required to be tried by the panel of officers comprising a general court-martial. *See id.*; *see also* 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 953–60 (2d ed. 1920) (reprinting the 1775 Articles of War).

At various points, Congress authorized (and has continued to authorize) the military to impose non-criminal punishments without a panel. But the Founding-era practice of having all *criminal offenses* tried by a multi-member panel of servicemembers remained unbroken until 1968—and even then, could be bypassed only at the affirmative request of the accused. As CAAF explained below:

> For nearly 200 years, courts-martial in the United States military consisted solely of panels of members of varying numbers and types. This was true for general courts-martial as well as "lesser" courts-martial (the

2. The first Articles for the Government of the Navy adopted under the Constitution provided for a maximum panel of 13 officers for naval courts-martial—and a minimum panel of five. *See* Act of Mar. 2, 1799, ch. 24, § 1, 1 Stat. 709, 713 (Article 47).

> predecessor of our current special courts-martial). This requirement continued with the creation of the UCMJ in 1951. In 1968, Congress created military judges and, for the first time, authorized courts-martial without panel members—but only when an accused requested it.

Pet. 9a; *see also* Military Justice Act of 1968, § 2(3), 82 Stat. at 1335.[3] Indeed, Congress's purpose in creating the position of military judge was to *better* protect the rights of servicemembers—not to dilute them. *See, e.g.*, Sen. Sam J. Ervin, Jr., *The Military Justice Act of 1968*, 45 MIL. L. REV. 77, 77 (1969) (summarizing the 1968 Act's primary goal as making "significant improvements in the brand of justice afforded by military criminal courts").

Thus, before 2019, there was no means by which the military could secure a criminal conviction of a servicemember without either a panel or the servicemember's affirmative request to be tried by a "judge alone."

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3. CAAF's overview excluded "summary" courts-martial—with good reason. Some form of summary military adjudication can be traced back to eighteenth-century "garrison" and "regimental" courts-martial (and Civil War "field officer courts"). *See* Schlueter, *supra*, at 148–49. But those proceedings, like non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, did not (and do not) result in criminal penalties or collateral consequences such as counting as "criminal history" under the Federal Sentencing Guidelines. *See Middendorf*, 425 U.S. at 33–42; 10 U.S.C. § 820(b) ("A finding of guilty at a summary court-martial does not constitute a criminal conviction."); *see also* U.S.S.G. § 4A1.2(g) (2024) ("Sentences imposed by a summary court-martial or Article 15 proceeding are not counted."). *See generally* 1 WINTHROP, *supra*, at 490 (describing these historical examples as providing only "summary disposition[s]").

B. The Military Justice Act of 2016

The proposal to create the short-martial originated in the 2015 Report of the Military Justice Review Group—an effort directed by the Secretary of Defense to produce "a holistic review of the UCMJ in order to ensure that it effectively and efficiently achieves justice consistent with due process and good order and discipline." MIL. JUST. REV. GRP., REPORT OF THE MILITARY JUSTICE REVIEW GROUP 5 (2015).[4]

Among its many suggested reforms to the UCMJ, the MJRG Report proposed the creation of the short-martial—entirely to provide convening authorities with greater flexibility:

> The judge-alone special court-martial would offer military commanders a new disposition option for low-level criminal misconduct—one that would be *more efficient and less burdensome* on the command than a special court-martial, but *without the option for the member to refuse* as in summary courts-martial and nonjudicial punishment.

Id. at 222 (emphases added); *see* S. REP. 114-255, at 595 (2016) (explaining that the purpose of the reform was to give the armed forces the "option" to pursue a judge-alone trial without the accused's consent). In the Military Justice Act of 2016, enacted as Division E of the National Defense Authorization Act for Fiscal Year 2017, Congress adopted most of the Review Group's recommendations—including the short-martial. *See* Pub. L. No. 114-328, div. E, §§ 5001–5542, 130 Stat. at 2894–2968.

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4. The report is available at https://jsc.defense.gov/Portals/99/MJRG%20Part%201.pdf.

To that end, the Military Justice Act of 2016 amended Article 19 of the UCMJ to authorize mandatory bench trials over the accused's objection. The punishment adjudged by a short-martial cannot include "a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months." 10 U.S.C. § 819(b). But nothing in the Act or the Rules for Courts-Martial implementing it prevent a short-martial from trying offenses that are felonies—where the maximum *possible* confinement under the UCMJ exceeds one year. *See, e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) ("[T]he term 'felony' is commonly defined to mean a crime punishable by imprisonment for more than one year"). Article 19 limits only the sentence that a short-martial may *actually* impose.[5]

And felonies or not, *all* convictions by special courts-martial, including those by a short-martial, count as prior criminal history under the Federal Sentencing Guidelines. *See* U.S.S.G. § 4A1.2(g) (2024) ("Sentences resulting from military offenses are counted if imposed by a general or special court-martial."). Thus, for the first time, Congress in the Military Justice Act of 2016 provided for court-martial convictions for criminal offenses without either a panel or the accused's consent to a bench trial.

5. A short-martial is separately precluded by the Rules for Courts-Martial only if "the maximum *authorized* confinement for the offense it alleges would be greater than *two* years if the offense were tried by a general court-martial," or if "the specification alleges an offense for which sex offender notification would be required under regulations issued by the Secretary of Defense." R.C.M. 201(f)(2)(E) (2024) (emphases added); *see* Dep't of Def. Instruction 1325.07, ¶ 5.7(d)(1), at 39 (Nov. 21, 2024) (identifying offenses that require sex offender notification).

C. Petitioners' Cases

Petitioner Thomas L. Wheeler is a Master-at-Arms Third Class (E-4) in the Navy. Wheeler was tried and convicted of one specification of sleeping on post in violation of Article 95, UCMJ, 10 U.S.C. § 895—a serious misdemeanor for which the maximum peacetime punishment is a dishonorable discharge and confinement and forfeiture of all pay for up to one year. *See* Pet. 25a. Wheeler's case was referred, over his timely objection, to a judge-alone special court-martial—which ultimately sentenced him to 15 days' confinement.

In reviewing Wheeler's short-martial conviction, the Judge Advocate General of the Navy certified Wheeler's constitutional objections to the NMCCA. Sitting en banc, that court affirmed Wheeler's conviction—holding that a judge-alone special court-martial without the accused's consent violates neither the Due Process Clause of the Fifth Amendment nor the Jury Trial Clause of the Sixth Amendment. *See* Pet. 31a–44a. CAAF granted Wheeler's petition for discretionary review and affirmed the NMCCA's due process holding.[6] Writing for the court, Judge Johnson concluded that Congress's elimination of the consent requirement for judge-alone special courts-martial did not violate the Due Process Clause under the approach this Court articulated in *Middendorf* and followed in *Weiss*. *See* Pet. 6a–17a.

Petitioner David M. Diaz is an Electronics Technician, Submarines, Communication Third Class (E-4) in the Navy. While serving as an armed sentry at the Puget Sound Naval Shipyard, Diaz drew a

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6. Wheeler did not pursue his Sixth Amendment claim before CAAF, *see* Pet. 6a n.2, and is not pursuing it before this Court.

loaded firearm (with the safety catch disengaged) and pointed it toward another sailor. *See* Pet. 54a. He was tried and convicted of one specification of willful dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892, and one specification of simple assault, in violation of Article 128, UCMJ, 10 U.S.C. § 928.[7] For willful dereliction of duty, the maximum punishment included a bad-conduct discharge, forfeiture of all pay and allowances for six months, and confinement for the same. *Manual for Courts-Martial* (MCM), pt. IV, ¶ 18(d)(3)(C), at IV-29 (2024 ed.). For simple assault, the maximum punishment included forfeiture of two-thirds pay and allowances for up to three months, and three months' confinement. *Id.* ¶ 77(d)(1)(a), at IV-123.

Like Wheeler, Diaz timely objected to his short-martial. The trial judge overruled his objection, and ultimately sentenced him to thirty days' confinement and a reduction in rank (to E-3). As in *Wheeler*, the Judge Advocate General referred the case to the NMCCA—which summarily affirmed in light of its ruling in *Wheeler*. Pet. 54a–55a. CAAF granted Diaz's petition for discretionary review and, after its ruling in *Wheeler*, summarily affirmed. Pet. 21a.

Petitioner Thomas H. Martin is an Aviation Ordnanceman Second Class (E-5) in the U.S. Navy who was accused of sexually harassing four female subordinate sailors by creating a hostile work environment. He was charged and convicted of one specification of violating a lawful general order, in violation of Article 92, UCMJ, 10 U.S.C. § 892. *See*

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7. Diaz was acquitted of one specification of reckless endangerment, in violation of Article 114, UCMJ, 10 U.S.C. § 924. *See* Pet. 53a.

Pet. 57a. Martin's conviction meets the common definition of a felony: The maximum authorized punishment includes a dishonorable discharge and confinement (and forfeiture of all pay and allowances) for two years. *See* MCM, *supra*, ¶ 18(d)(1), at IV-28; *see also United States* v. *Tucker*, 77 M.J. 696, 702 n.4 (A. Ct. Crim. App. 2018). After rejecting Martin's timely objection to trial without a panel, the military judge sentenced him to a reprimand, reduction in rank (to E-3), and sixty days' restriction. *See* Pet. 56a.

The Judge Advocate General likewise referred Martin's appeal to the NMCCA, which summarily affirmed in light of its ruling in *Wheeler*. Pet. 57a–58a. CAAF granted Martin's petition for discretionary review and also summarily affirmed in light of its ruling in *Wheeler*. Pet. 22a.

The three petitioners thus present this Court with a full range of preserved due process objections to the short-martial. Martin was convicted of a felony; Wheeler was convicted of a serious misdemeanor; and Diaz was convicted of a misdemeanor that could also have been prosecuted in state or federal civilian court.

REASONS FOR GRANTING THE PETITION

This Court has never before been asked to decide whether Congress can eliminate features of Founding-era courts-martial without offending the Constitution. There are compelling reasons to answer that question here. As one NMCCA judge explained, "[p]anel members represent a safeguard in the military justice system that has no civilian equivalent and represent not only a procedural hurdle for a convening authority but also an equity shield for servicemembers." Pet. 46a (Kirkby, J., concurring in the judgment). Whether Congress has the constitutional authority to remove

that shield is a question of exceptional importance—not just to the millions of individuals who are subject to the UCMJ, but to the broader understanding of why (and when) the Constitution permits military adjudication.

I. THE SHORT-MARTIAL RAISES SUBSTANTIAL AND FUNDAMENTAL DUE PROCESS QUESTIONS

In upholding the constitutionality of the short-martial in *Wheeler*, CAAF focused on the due process analysis that this Court articulated in *Middendorf* and further refined in *Weiss*. Thus, quoting one of its own decisions applying *Middendorf* and *Weiss*, CAAF framed the issue as whether "the factors militating in favor of [court-martial panels] are so extraordinarily weighty as to overcome the balance struck by Congress." Pet. 8a (quoting *United States* v. *Anderson*, 83 M.J. 291, 298 (C.A.A.F. 2023)).

There are two problems with CAAF's analysis, both of which independently support this Court's intervention. First, by resorting to a rote application of *Middendorf* and *Weiss*, CAAF failed to appreciate that petitioners present a fundamentally distinct due process issue from what this Court addressed in those cases. There, the question was whether due process required Congress to provide *more* procedural protection than what had historically been available in courts-martial. Here, the question is whether due process allows for Congress to provide *less* than the historical minimum.

In *Weiss*, Justice Scalia explained that it was enough, for due process purposes, if Congress "gave members of the military at least as much procedural protection . . . as they enjoyed when the Fifth Amendment was adopted and have enjoyed ever

since." 510 U.S. at 197 (Scalia, J., concurring in part and concurring in the judgment). If Founding-era courts-martial are the due process baseline, Congress going *below* that floor necessarily raises grave constitutional questions that were neither presented in, nor answered by, *Middendorf* or *Weiss*.

Second, even if the same due process considerations govern cases in which Congress has taken pre-existing procedural protections away, the manner in which CAAF applied *Middendorf* and *Weiss* in *Wheeler* would foreclose virtually all procedural due process claims in courts-martial. CAAF impermissibly undervalued the weight that history and tradition should bear, and it radically overstated both the costs to the military of providing a right to a panel and the procedural safeguards that would make up for its absence. Certiorari should therefore be granted—because *Middendorf* and *Weiss* do not fully account for the due process concerns in petitioners' cases, or because they do, but CAAF badly misapplied them.

A. The Short-Martial Raises a Categorically Different Due Process Concern Than What *Middendorf* and *Weiss* Rejected

The due process framework for courts-martial that this Court applied in *Middendorf* and refined in *Weiss* starts from the baseline of protections that Congress has historically provided—and then asks whether the Constitution requires more. *See, e.g.*, *Weiss*, 510 U.S. at 179; *see also Middendorf*, 425 U.S. at 50 (Powell, J., concurring) ("One must ignore history, tradition, and practice for two centuries to read into the Constitution, at this late date, a requirement for counsel in the discipline of minor violations of military law.").

A recent case helps to illustrate this approach. In *Ramos* v. *Louisiana*, 590 U.S. 83 (2020), this Court incorporated the Sixth Amendment right to a unanimous conviction against the states. *See id.* at 89–93. When servicemembers argued that they were likewise entitled to unanimous convictions as a matter of due process, CAAF relied on *Middendorf* and *Weiss* in holding otherwise.[8] *See Anderson*, 83 M.J. 291. As CAAF explained, *Middendorf* and *Weiss* impose on a servicemember who requests a new procedural right the burden to "demonstrate that the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress." *Id.* at 298 (internal quotation marks omitted; alteration in original); *see also*, *e.g.*, *Sanford* v. *United States*, 586 F.3d 28, 29 (D.C. Cir. 2009) (*Middendorf* and *Weiss* place the burden on the party seeking "a new due process right").

In its decision in Petitioner Wheeler's case, CAAF extended *Anderson*'s burden framework to apply to a very different due process claim. *See* Pet. 8a–17a. In the process, CAAF never considered that the due process objection to the short-martial arises in the *opposite* context—*i.e.*, where Congress has *deprived* servicemembers of protections that have been a central part of special and general courts-martial since before the Founding. CAAF's analysis was thus built upon a flawed foundation. In *Middendorf* and *Weiss*, contrary historical practice provided powerful evidence that the requested procedural right was not

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8. Under current law, a special or general court-martial conviction depends upon the concurrence of three-fourths of the panel members—except where the accused faces the death penalty, when both the verdict and sentence must be unanimous. *See* 10 U.S.C. § 852(a)(3), (b)(2).

necessary to ensure the fairness of the proceeding. *See, e.g.*, *Weiss*, 510 U.S. at 199 (Scalia, J., concurring in part and concurring in the judgment). Petitioners' cases, in contrast, ask whether contrary historical practice ought to provide a comparable weight against Congress taking existing rights *away*.

Indeed, under the logic of *Middendorf* and *Weiss*, when Congress departs downward from historical practice, the weight of tradition should exert force in the opposite direction. In such cases, the burden should fall on the government, and not the accused, to provide some explanation for why such a departure is necessary. That hasn't happened here. *See* Pet. 48a–49a (Kirkby, J., concurring in the judgment) ("While there has been a long standing, and appropriate, recognition that those who serve relinquish certain rights in order to meet the military mission, there is simply no military necessity accomplished by the 'shortcut' contained in R.C.M. 201(f)(2)(E).").

Thus, certiorari is warranted to decide whether (and when) Congress may *deprive* servicemembers of procedural rights that court-martial accused have enjoyed consistently since the Founding.

B. CAAF's Unwarranted Extension of *Middendorf* and *Weiss* Is Flawed on Its Face and Would Effectively Foreclose Military Due Process Claims

Even if *Middendorf* and *Weiss* can fairly be read to require servicemembers to bear the burden of establishing their due process right to historically available procedural protections that Congress has taken away, certiorari would still be warranted. Not only did CAAF apply those cases incorrectly, but its analysis would make it all but impossible for

servicemembers to ever meet CAAF's due process burden. As one judge put it below, "the Government's arguments and the [lower courts'] reasoning in this case provide no reason that Congress could not amend the UCMJ and do away with members completely." Pet. 52a (Kirkby, J., concurring in the judgment). If anything, Judge Kirkby understated the implications.

In CAAF's view, under *Middendorf* and *Weiss*, "the Court must consider (1) historical practice with respect to the procedure at issue, (2) the effect of the asserted right on the military, and (3) the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment." Pet. 8a–9a (citations omitted). Even assuming that the burden of carrying each factor falls on the servicemember, each consideration supports a right to a panel, rather than cutting against it.

Taking "historical practice" first, CAAF correctly conceded that "this factor weighs in favor of a due process right to a panel," since historical tradition consistently and unambiguously supported a right to a panel until Congress took it away beginning in 2019. *See* Pet. 10a; *see also id.* ("[W]e agree with the lower court that 'the possibility of a criminal conviction at an unrefusable proceeding without members is remarkable.'" (quoting Pet. 34a)). Yet CAAF gave that factor insufficient weight. In *Weiss*, for instance, Justices Scalia and Thomas thought the historical practice factor was conclusive where it weighed *against* a new due process right to military judges with fixed terms. *See* 510 U.S. at 199 (Scalia, J., concurring in part and concurring in the judgment). And if historical practice was conclusive *against* a new procedural right in *Weiss*, it ought to be conclusive in *favor* of an old one here.

Turning to the "effect of the asserted right on the military," CAAF focused on the fact that a right to a panel "would result in a longer proceeding." Pet. 12a. That, in turn, would "requir[e] more servicemembers to be pulled away from their regular duties in order to serve as prospective and selected panelists in a case involving offenses the command deemed minor." *Id.* But CAAF's analysis failed to account for the fact that, for more than 200 years, these effects have *already existed*. That whole time, military law required trials by a panel if the accused so requested. *Middendorf* and *Weiss* both stressed the *unpredictable* costs of the process that a new due process right would require. But any costs in this case would not be unpredictable precisely because the asserted right is nothing new. Indeed, the military has accounted for the economic and non-economic costs of panels for as long as it has conducted courts-martial—without ever identifying deleterious operational effects.[9]

Finally, CAAF claimed that there are "adequate procedural safeguards to ensure a servicemember receives a fair trial before a military judge-alone special court-martial." Pet. 13a. Specifically, CAAF pointed to an accused's right to be represented by counsel in a special court-martial; the military judge's (limited) independence; the limits on the offenses a short-martial can try and the punishments it can impose; and the availability of appellate review. *See* Pet. 13a–15a.

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9. One of the country's leading experts on the military justice system has documented an across-the-board *decline* in court-martial prosecutions over the past decade. *See* Dwight H. Sullivan, *The Military Justice Decrescendo*, 68 VILL. L. REV. 849 (2023). Thus, the short-martial was adopted at a time when the number of panels—and their costs—were already *decreasing*.

But even CAAF "recognize[d] the potential benefits of having multiple factfinders in a criminal case." *Id.* at 13a (citing *Ballew* v. *Georgia*, 435 U.S. 223, 232–38 (1978)). *Ballew* held that the Sixth Amendment requires a minimum size for criminal juries entirely *because* "progressively smaller juries are less likely to foster effective group deliberation. At some point, this decline leads to inaccurate fact-finding and incorrect application of the common sense of the community to the facts." *Ballew*, 435 U.S. at 232; *see also id.* at 234 ("[T]he risk of convicting an innocent person . . . rises as the size of the jury diminishes.").

Regardless of whether the Sixth Amendment Jury Trial Clause applies to courts-martial, those risks remain present in military prosecutions. Nor are they abated by the presence of an independent judge; that was also the case in *Ballew*. *See, e.g.*, Pet. 47a (Kirkby, J., concurring in the judgment) ("Even in the military environment, . . . there is a vast difference between accepting fewer than six decision-makers and abandoning entirely the practice of a member panel over an accused objection."). The point is not that a court-martial panel must be the *same* size as a civilian jury. *Cf. Sanford*, 586 F.3d 28 (rejecting, on deferential collateral review, a due process claim that special court-martial panels must have at least six members). Rather, it is that, as the total number of factfinders in *any* criminal forum decreases, the risk of an erroneous conviction increases.

None of the alternative safeguards that CAAF identified account for these concerns. If anything, similar protections were present to an even greater extent in *Ballew* and its related cases. Being represented by counsel, for instance, does nothing to diminish the risk that a single fact-finder will err

more than a multi-member panel would. And protections for that fact-finder's *independence* may help to mitigate the risk of *bias*, but they do nothing to mitigate the risk of *error*.

As for appellate review, historically, one of the most important procedural safeguards for factual errors by courts-martial was the obligation of service-branch courts of criminal appeals "to conduct a de novo review of the factual sufficiency of the evidence in every case." *United States* v. *Harvey*, No. 23-0239, 2024 WL 4128457, at *2 (C.A.A.F. Sept. 6, 2024). But since the short-martial was created, Congress has heavily diluted that obligation. As of today, factual sufficiency review is now categorically unavailable in many cases and heavily deferential in the rest—without regard to whether the fact-finder was a panel or a judge alone. *See* 10 U.S.C. § 866(d)(1)(B); *see also Harvey*, 2024 WL 4128457, at *2–4 (summarizing the changes).[10] Thus, appellate review of a short-martial today will be far *less* able to provide a safeguard for factual errors than what was true when Congress enacted the Military Justice Act of 2016.

Finally, CAAF identified as "safeguards" the limits on the offenses that can be tried and the punishments that can be imposed by a short-martial under the Military Justice Act and the Rules for Courts-Martial. Pet. 15a. But those limits aren't "safeguards," for they do nothing to mitigate the risk that arises from having a single fact-finder resolve an accused's guilt or

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10. The changes to the scope of post-conviction review were adopted on January 1, 2021—two years after the short-martial provisions went into effect. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(b), 134 Stat. 3388, 3611–12.

innocence. All they do is recognize (and attempt to reduce) the *consequences* of the greater number of erroneous convictions that are likely to result from having cases involuntarily tried to a single fact-finder. Those are not the same thing.

In any event, those limits don't do the work that CAAF claimed for them. As noted above, a short-martial is empowered to try felonies and serious misdemeanors—as it did in two of petitioners' cases. This Court has never considered whether the distinction between serious and petty offenses that it has read into the Sixth Amendment's Jury Trial Clause, *e.g.*, *Frank* v. *United States*, 395 U.S. 147, 148–49 (1969), can be translated into the court-martial context.[11] But even if it could be, the jurisdiction of a short-martial is not limited to petty offenses. *See Baldwin* v. *New York*, 399 U.S. 66, 69 (1970) ("[N]o offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is *authorized*." (emphasis added)).

If anything, the Rules for Court-Martial adopted by the President to implement the Military Justice Act of 2016 underscore the serious implications of a short-martial conviction. Although R.C.M. 201(f)(2)(E) bars a short-martial from trying any offense that would require the accused to register as a sex offender if convicted, it reinforces that a short-martial conviction *otherwise* produces collateral consequences. *See, e.g.*, U.S.S.G. § 4A1.2(g) (2024) (counting any conviction by

11. Incorporating a distinction this Court has derived from the Sixth Amendment's Jury Trial Clause would be odd when the Jury Trial Clause does not protect court-martial accused in the first place. *See Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950).

a general or special court-martial as criminal history). And while the President has additionally limited a short-martial to trying offenses for which the maximum *authorized* punishment is two years' confinement, *see* R.C.M. 201(f)(2)(E), that limit proves only that a short-martial *can* try serious offenses—including felonies. In addition, unlike the constraints provided by Article 19(b), that limitation can be rescinded at the stroke of the President's pen.

Like the government in the lower courts, CAAF tried to dismiss these concerns by describing the offenses a short-martial can try as "minor." *See, e.g.*, Pet. 16a. Such a vague term necessarily collapses the key *legal* distinctions—between serious and petty offenses and between felonies and misdemeanors. And in any event, "any future employer will not see 'minor' offense anywhere in the record and will potentially see only the maximum punishment decreed for a specific offense." Pet. 48a (Kirkby, J., concurring in the judgment). Nowhere in CAAF's analysis did the court of appeals address these (or other) consequences of a short-martial conviction—or why they don't augur strongly in *favor* of a due process right to a panel.

That silence is in sharp contrast to *Middendorf*. In that case, then-Justice Rehnquist's majority opinion relied heavily on the *choice* a servicemember had: a summary court-martial without counsel or a special court-martial with *both* a right to counsel *and* a risk that a conviction would lead to greater punishment and collateral consequences. *See* 425 U.S. at 47–48. In *Middendorf*, the availability of that choice was central to this Court's rejection of the plaintiffs' due process claim. But the short-martial deprives the accused of that kind of control over their fate.

All of this underscores the self-defeating nature of CAAF's watering down of *Middendorf* and *Weiss* in *Wheeler*. If (1) contrary historical practice is entitled to little or no weight; (2) the "effects" on the military concern only whether the requested procedural protection creates costs; and (3) the existence of safeguards is satisfied by *any* other procedures regardless of whether they're designed (or even able) to vindicate the same fairness concerns, then it is impossible to imagine a circumstance in which the failure to provide for a new (or retain an existing) procedure *could* violate the Due Process Clause.

Ultimately, even if servicemembers bear the burden of establishing a due process right to procedural protections Congress has *removed* from courts-martial, plenary review is still warranted. This Court's general framework for military due process claims should have militated in favor of finding such a right here. CAAF's contrary analysis not only can't be reconciled with *Middendorf* and *Weiss*, but, if it were left intact, it would make it effectively impossible for servicemembers to prevail on any military due process claim going forward.

II. THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

The due process question petitioners present is of exceptional importance—not just to the millions of Americans who are subject to the UCMJ, but also to the relationship between the military justice system and the Constitution.

Take the immediate implications first. In 2019, the first year the short-martial was available, the armed forces conducted 53 such proceedings. That number jumped to 76 in 2020 and to 79 in 2021. Through the

end of 2023, the military had conducted 335 such trials—335 accused servicemembers who were tried for criminal offenses by a special court-martial without the right to have their guilt or innocence adjudicated by a panel of fellow servicemembers.[12] Even if Congress and the President leave untouched the current criteria for such a proceeding, there is every reason to think that this number will continue to steadily increase. In the coming years, thousands of servicemembers will thus be subjected to mandatory bench trials for serious offenses—many of which will result in convictions with collateral consequences.

Beyond the growing number of cases that will be tried before a single judge without the accused's consent, the short-martial will also produce other direct effects. For example, the *existence* of such an option for the government is likely to have an unmeasurable but undeniable effect on whether and when an accused exercises the right to object to a summary court-martial. Prior to 2019, an accused who objected to a summary court-martial was guaranteed the right to be tried instead by a panel of fellow servicemembers. With that option no longer available in many cases, it is likely that the specter of the short-martial will pressure at least some servicemembers to consent to a summary court-martial when they otherwise wouldn't have—putting a thumb on the scale against the very choice that this Court deemed critical in rejecting a right to counsel in summary courts-martial. *See Middendorf*, 425 U.S. at 47–48.

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12. The statistics in this paragraph come from the annual reports that each service branch is required to file. *See* 10 U.S.C. § 946a(b). They are available at https://jsc.defense.gov/Annual-Reports/.

Of course, if the short-martial is constitutional, then Congress is allowed to impose such influence on an accused's choices. *See id.* at 48 n.25. But that only underscores the need for this Court to decide the constitutionality of such a fundamental shift in the structure of military justice, one way or the other. Ultimately, the question presented involves an issue not at the margins of contemporary military justice, but at the heart of it.

Looking past its immediate effects, the constitutionality of the short-martial also has two critical longer-term implications. First, with respect to courts-martial specifically, if Congress can eliminate panels in all cases covered by current Article 19(b), that strongly implies that Congress could eliminate panels for *all* military prosecutions. *See* Pet. 52a (Kirkby, J., concurring in the judgment) ("[T]he Government's arguments and the majority's reasoning in this case provide no reason that Congress could not amend the UCMJ and do away with members completely."). If the Due Process Clause doesn't require a right to a panel even for felonies, it is difficult to imagine how it would for *any* charges—even those that could result in a death sentence.

Second, this Court has countenanced the existence of military criminal courts, separate and apart from Article III, entirely on the ground that our history and tradition support the ability of the armed forces to try their own personnel for offenses committed while "in" the military. *See Solorio* v. *United States*, 483 U.S. 435 (1987). But the more that contemporary military trials do not include even the few procedural requirements of their Founding-era ancestors, the less that history and tradition can bear the weight of such a broad and significant exception to Article III. As this Court put

it six months ago in the context of the "public rights" exception to Article III, "[w]ithout such close attention to the basis for each asserted application of the doctrine, the exception would swallow the rule." *SEC* v. *Jarkesy*, 144 S. Ct. 2117, 2134 (2024); *see also id.* ("The public rights exception is, after all, an *exception*."). So too, here. Indeed, for as often as this Court has addressed the scope of the public rights exception to Article III in recent years, it has not revisited the scope of the military exception since 1987. *See Solorio*, 483 U.S. at 445–51 (upholding the jurisdiction of courts-martial to try offenses with no connection to the accused's military service).

And although petitioners' cases may seem like modest ones in which to worry about the erosion of the values embodied in Article III, that is exactly where such erosion takes root. *See Stern* v. *Marshall*, 564 U.S. 462, 503 (2011) ("We cannot compromise the integrity of the system of separated powers and the role of the Judiciary in that system, even with respect to challenges that may seem innocuous at first blush."); *see also Reid*, 354 U.S. at 39 ("Slight encroachments create new boundaries from which legions of power can seek new territory to capture.").

Thus, the constitutionality of the short-martial poses a question of critical importance. The answer matters not just for the men and women in uniform today, but for the analytical framework under which they can be subjected to criminal prosecution and punishment—up to and including death—by military rather than civilian courts. It is difficult to imagine a question central to the past, present, and future constitutionality of the military justice system more worthy (and more in need) of this Court's plenary review.

III. FURTHER PERCOLATION WILL NOT AID THIS COURT'S REVIEW

The question presented is not only exceptionally important; it is fully and fairly presented here. Each of the petitioners timely objected to their short-martial. The arguments against and in support of such proceedings were fully fleshed out on appeal to the NMCCA and CAAF. Petitioners' cases run the gamut of the types of offenses currently triable by a short-martial (including felonies). And there are no other obstacles to this Court's ability to reach and decide the question presented through these cases, specifically.

Against that backdrop, there is no reason for this Court to await a future case in which to review the question presented. With regard to collateral review, as this Court has long made clear, collateral challenges to military convictions in lower Article III courts are generally unavailable for claims to which the military courts gave "full and fair consideration." *See, e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 144 (1953) (plurality opinion). Claims implicating the jurisdiction of military courts remain subject to de novo collateral review. *See, e.g.*, *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969). But it is not immediately obvious whether the due process violation that petitioners allege would deprive the military of subject-matter jurisdiction in their cases. Thus, this Court would be in no better a position to resolve the question presented (and, almost certainly, in a far worse position) if it awaited an appeal from a collateral attack.

Nor is there any reason to wait for this question to percolate through direct appeals. No other federal court of appeals will be able to reach the question

presented in this case through de novo review. And CAAF, the "Supreme Court of the military justice system," *United States* v. *Armbruster*, 29 C.M.R. 412, 414 (C.M.A. 1960), has resolved the matter in a way that it is unlikely to revisit. *See, e.g.*, Pet. 53a (summarily affirming Petitioner Diaz's conviction in light of *Wheeler*); Pet. 56a (summarily affirming Petitioner Martin's conviction in light of *Wheeler*). Petitioners' cases therefore provide this Court with an ideal vehicle through which to resolve the question presented, and one that is not likely to recur anytime soon.

* * *

Six years ago, this Court trumpeted the fact that "[m]ilitary courts . . . afford virtually the same procedural protections to service members as those given in a civilian criminal proceeding." *Ortiz*, 585 U.S. at 438. With the short-martial, Congress has significantly departed from those protections—abrogating an unbroken historical tradition that pre-dates the Constitution itself. In the process, it has left countless servicemembers to a compulsory criminal bench trial in circumstances in which their predecessors had an absolute right to be tried by a panel, and in which civilians have an absolute right to be tried by a jury.

This Court recently reiterated that the Due Process Clause protects against the deprivation of rights and liberties that are "deeply rooted in this Nation's history and tradition." *Dep't of State* v. *Muñoz*, 602 U.S. 899, 910 (2024) (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 720–21 (1997)). As noted above, and as CAAF conceded, there is no dispute that a servicemember's right to be tried by a multi-member

panel for criminal offenses is deeply rooted in our history and tradition. Against that backdrop, certiorari should be granted so that this Court can decide whether Congress can eliminate a right so deeply rooted in that history and tradition for no reason other than "efficiency."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 20, 2024

Appendix

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,
Appellee

v.

Thomas L. WHEELER,
Master-at-Arms Third Class
United States Navy,
Appellant

No. 23-0140
Crim. App. No. 202100091

Argued December 19, 2023—
Decided August 22, 2024

Military Judge: Kimberly J. Kelly

For Appellant: *Lieutenant Commander Megan P. Marinos*, JAGC, USN (argued); *Major Jasper Casey*, USMC.

For Appellee: *Colonel Joseph M. Jennings*, USMC (argued); *Captain Tyler W. Blair*, USMC, and *Brian K. Keller*, Esq. (on brief).

Judge JOHNSON delivered the opinion of the Court, in which Chief Judge OHLSON, Judge SPARKS, Judge MAGGS, and Judge HARDY joined.

Judge JOHNSON delivered the opinion of the Court.

This case involves a charge of sleeping on post that was referred to a military judge-alone special court-martial. Had the convening authority referred this case to a general court-martial, Appellant would have been entitled to trial before a panel of members,

Article 16(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 816(b)(1) (2018), and the maximum punishment would have included a dishonorable discharge, forfeiture of all pay and allowances, and one year of confinement. *Manual for Courts-Martial, United States* pt. IV, para. 22.d.(1)(c) (2019 ed.) (MCM). Instead, the convening authority referred the charge to a special court-martial before a military judge alone pursuant to Article 16(c)(2)(A), UCMJ, 10 U.S.C. § 816(c)(2)(A) (2018). As a result, Appellant could not elect trial by a panel of members and the military judge was barred from adjudging a sentence that included a punitive discharge, confinement for more than six months, Article 19(b), UCMJ, 10 U.S.C. § 819(b) (2018), or forfeitures of pay for more than six months. Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(ii) (2019 ed.).

We hold that Appellant had no Fifth Amendment due process right to a court-martial consisting of a panel of members in a forum that statutorily limited the maximum possible sentence to six months of confinement with no punitive discharge authorized. Additionally, we hold that the convening authority's referral of this case to a military judge-alone special court-martial did not violate Fifth Amendment due process. We therefore affirm the decision of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA).

I. Background

Appellant was charged with one specification of sleeping on post in violation of Article 95, UCMJ, 10 U.S.C. § 895 (2018), after he was discovered asleep at his post as sentinel onboard a harbor patrol boat at Naval Station Everett, Washington. The convening authority referred the charge under Article

16(c)(2)(A), UCMJ, to a special court-martial before a military judge alone.

Before trial, Appellant filed a motion to dismiss, arguing that sleeping on post is a "'serious' offense" which implicated his Fifth and Sixth Amendment rights to trial by a panel of members, and therefore, the military judge-alone special court-martial lacked jurisdiction absent Appellant's knowing and voluntary election of a military judge-alone forum. The military judge denied the motion, concluding that the military judge-alone special court-martial "whether on its face or as applied in this case is consistent with due process."

Contrary to his pleas, Appellant was convicted of sleeping on post in violation of Article 95, UCMJ, and sentenced to fifteen days of confinement.[1] In an en banc published opinion, the NMCCA affirmed the findings and sentence. *United States v. Wheeler*, 83 M.J. 581, 592 (N.M. Ct. Crim. App. 2023) (en banc).

We granted review to consider two issues:

> I. Did the lower court err in holding that the Due Process Clause of the Fifth Amendment does not protect a servicemember's

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1. The convening authority suspended confinement in excess of seven days for six months from the entry of judgment, to be remitted at that time without further action unless vacated sooner. A judge advocate reviewed the record pursuant to Article 65(d), UCMJ, 10 U.S.C. § 865(d) (2018), and did not recommend any corrective action. Upon Appellant's application for relief pursuant to Article 69, UCMJ, 10 U.S.C. § 869 (2018), the Judge Advocate General of the Navy forwarded the record to the NMCCA, recommending review of the question whether Appellant's Fifth and Sixth Amendment rights were violated by the convening authority's referral of the charge to a forum offering no right to a panel verdict.

> fundamental right to a panel of members at court-martial?
>
> II. Did the lower court err by deferring to a convening authority's case-by-case referral decision rather than an objective standard to determine whether an offense is serious?

United States v. Wheeler, 83 M.J. 393 (C.A.A.F. 2023) (order granting review). For the reasons set forth below, we answer both questions in the negative and affirm the decision of the NMCCA.

II. Standard of Review

The constitutionality of a statute is a question of law reviewed de novo. *United States v. Begani*, 81 M.J. 273, 280 (C.A.A.F. 2021).

III. Discussion

A. The Military Judge-Alone Special Court-Martial

In 2016, Congress amended Articles 16 and 19, UCMJ, to create a new kind of special court-martial by military judge alone. National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, § 5161, 130 Stat. 2000, 2898 (2016). As amended, Article 16, UCMJ, allows a convening authority to refer a case to a special court-martial consisting of a military judge alone, subject to the restrictions found in Article 19, UCMJ, and "such limitations as the President may prescribe by regulation." Article 16(c)(2)(A), UCMJ. Article 19(b), UCMJ, as amended, states, "Neither a bad-conduct discharge, nor confinement for more than six months ... may be adjudged if charges and specifications are

referred to a special court-martial consisting of a military judge alone." Article 19(b), UCMJ.

Before these changes were enacted, a case referred to a special court-martial could be tried by military judge alone only upon the request of the accused. Article 16(2)(C), UCMJ, 10 U.S.C. § 816(2)(C) (2012). However, in 2015 the Military Justice Review Group (MJRG) recommended giving the convening authority discretionary authority to refer a case to a military judge-alone special court-martial, subject to limitations on the military judge's authority to adjudge confinement, forfeitures, and a punitive discharge, and subject to further limitations to be prescribed by the President. Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group 217 (Dec. 22, 2015) [hereinafter the MJRG Report]. The proposed changes were designed to "offer military commanders a new disposition option for low-level criminal misconduct—one that would be more efficient and less burdensome on the command than a special court-martial, but without the option for the member to refuse as in summary courts-martial and non-judicial punishment." *Id.* at 222. The MJRG's recommendations drew "upon the successful experience of the military justice system with judge-alone trials since 1968" and "upon the experience in the federal civilian system, as well as in state courts, in which an accused defendant does not have the right to trial by jury when the confinement does not exceed six months." *Id.* at 221.

Congress adopted the MJRG's recommendations, amending Articles 16 and 19 "to improv[e] the efficiency of the military justice system." H.R. Rep. No. 114-537, at 600 (2016). The President then promulgated rules to implement these changes.

R.C.M. 201(f)(2)(B)(ii) states, "A bad-conduct discharge, confinement for more than six months, or forfeiture of pay for more than six months, may not be adjudged by a special court-martial when the case is referred as a special court-martial consisting of a military judge alone under Article 16(c)(2)(A)." R.C.M. 201(f)(2)(E) (2019 ed.) bars military judge-alone special court-martial jurisdiction if the accused objects before arraignment and the military judge determines that (I) the maximum authorized confinement would be greater than two years if the case was tried by a general court-martial (with exceptions not applicable here) or (II) sex offender registration would be required.

B. Fifth Amendment Due Process in Courts-Martial

The first granted issue asks whether the lower court erred in holding that there is no Fifth Amendment due process right to a panel of members at courts-martial. Appellant contends that the Sixth Amendment guarantee of an impartial jury for all criminal prosecutions of serious offenses is a "bedrock procedural right" protected by the Due Process Clause of the Fifth Amendment.[2] He argues that he was entitled to trial before a panel of members because he

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2. Although Appellant asserted a Sixth Amendment violation before the lower court, at oral argument he conceded that his appeal was based solely on a Fifth Amendment due process violation. *Wheeler*, 83 M.J. at 584-85. He did not assert a Sixth Amendment violation before this Court. Therefore, we do not address the applicability of the Sixth Amendment jury clause to this case. *But see United States v. Anderson*, 83 M.J. 291, 294-95 (C.A.A.F. 2023) ("[T]he Supreme Court has repeatedly stated that the Sixth Amendment right to a jury does not apply to courts-martial." (citing cases dating to 1866)).

was charged with a serious offense—that is, one with a maximum sentence to confinement of one year.

The NMCCA recognized that servicemembers historically enjoyed a right to a panel of members at special courts-martial, due in part to the fact that military judges did not exist until they were created by Congress in 1968. *Wheeler*, 83 M.J. at 587. But citing Congress's authority to make changes to the UCMJ and to delegate to the President the power to promulgate rules to implement Congress's legislative changes, the court found "no case law holding that historical practice created a fundamental right that precluded" the new military judge-alone special court-martial. *Id.* We conclude that the NMCCA did not err.

The Fifth Amendment to the Constitution provides, in part, that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Because servicemembers who are subject to appear before a court-martial "may be subjected to loss of liberty or property," they "are entitled to the due process of law guaranteed by the Fifth Amendment. Whether this process embodies" a specific right—in this case, a right to be tried by a panel of members—"depends upon an analysis of the interests of the individual and those of the regime to which he is subject." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *see United States v. Graf*, 35 M.J. 450, 461 (C.M.A 1992) (recognizing that the Due Process Clause of the Fifth Amendment applies to servicemembers at special courts-martial). A procedure does not violate the Due Process Clause of the Fifth Amendment unless "'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Graf*, 35 M.J. at 462 (emphasis

removed) (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

"Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military," *Solorio v. United States*, 483 U.S. 435, 447 (1987), subject to the requirements of the Due Process Clause, *Weiss v. United States*, 510 U.S. 163, 176-77 (1994) (noting that "Congress, of course, is subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings"). "[I]n determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces." *Weiss*, 510 U.S. at 176-77 (citation omitted) (internal quotation marks omitted); *see Anderson*, 83 M.J. at 298 ("When Congress acts pursuant to its power to make Rules for the Government and Regulation of the land and naval Forces, judicial deference is at its apogee." (citations omitted) (internal quotation marks omitted)).

"To succeed in a due process challenge to a statutory court-martial procedure, an appellant must demonstrate that the factors militating in favor of [a different procedure] are so extraordinarily weighty as to overcome the balance struck by Congress." *Anderson*, 83 M.J. at 298 (alteration in original) (citation omitted) (internal quotation marks omitted). In weighing the servicemember's interests in a procedural right against the needs of the military, the Court must consider (1) historical practice with respect to the procedure at issue, *Weiss*, 510 U.S. at 179, (2) the effect of the asserted right on the military, *Middendorf*, 425 U.S. at 45, and (3) the existence in

current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment, *Weiss*, 510 U.S. at 181.

Accordingly, we consider each of these factors in turn to decide whether the unrefusable military judge-alone special court-martial created by Congress, as defined in Articles 16 and 19, UCMJ, and implemented by R.C.M. 201(f)(2), offends fundamental principles of justice in violation of Fifth Amendment due process.

1. Historical Practice

The lower court succinctly summarized the long historical tradition of courts-martial by panels of members:

> For nearly 200 years, courts-martial in the United States military consisted solely of panels of members of varying numbers and types. This was true for general courts-martial as well as "lesser" courts-martial (the predecessor of our current special courts-martial). This requirement continued with the creation of the UCMJ in 1951. In 1968, Congress created military judges and, for the first time, authorized courts-martial without panel members—but only when an accused requested it.

Wheeler, 83 M.J. at 586 (footnotes omitted) (citing David A. Schlueter, *The Court-Martial: A Historical Survey*, 87 Mil. L. Rev. 129 (1980)).[3]

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3. We note that alongside the tradition of courts-martial by panel there exists an equally long tradition of disposition of minor offenses—both civilian and military—without a jury or a panel. For example, the Government described military proceedings dating as far back as 1775 in which a solitary officer

Against that backdrop, we agree with the lower court that "the possibility of a criminal conviction at an unrefusable proceeding without members is remarkable." *Id.* at 587-88. Therefore, this factor weighs in favor of a due process right to a panel in this case.

2. Effect on the Military

The unrefusable military judge-alone special court-martial was created to "improv[e] the efficiency of the military justice system." The MJRG recommended this new forum as a "more efficient and less burdensome" way for a command to address low-level misconduct:

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could in his sole discretion administer limited punishments for low-level offenses. *See, e.g.*, *Wilkes v. Dinsman*, 48 U.S. 89, 127 (1849) ("Where a private in the navy, therefore, is guilty of any 'scandalous conduct,' the commander is ... authorized to inflict on him twelve lashes, without the formality of a court-martial." (citing 2 Stat. 45-46 (1800))); George B. Davis, *A Treatise on the Military Law of the United States* 25 (2d ed. 1899) (describing the field officer's court, created by Congress during the Civil War, which was composed of a single officer); William Winthrop, *Military Law and Precedents* 490 (2d ed. 1920) (noting that a field officer's court could impose up to one month of confinement or hard labor and a fine of up to one month of pay). In the civilian context, the Sixth Amendment right to trial by jury applies only to serious offenses; any offense where the accused cannot possibly be sentenced to more than six months of confinement is presumed to be a petty offense not subject to the Sixth Amendment jury clause. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 543 (1989); *see Callan v. Wilson*, 127 U.S. 540, 555 (1888) ("conceding that there is a class of petty or minor offenses ... which, if committed in this District, may, under the authority of congress, be tried by the court and without a jury"); *Schick v. United States*, 195 U.S. 65, 70 (1904) (noting that there is no constitutional right to trial by jury for petty offenses).

> The judge-alone special court-martial will provide the convening authority with a greater range of disposition options, which may prove particularly useful when addressing cases involving a request for court-martial arising out of a non-judicial punishment or summary court-martial refusal, and in deployed environments where operational demands may make it difficult to assemble a panel to address cases involving minor misconduct.

MJRG Report at 222. The MJRG noted that the proposal was "[c]onsistent with the constitutional authority to authorize civilian non-jury trials without obtaining a defendant's consent in cases involving confinement for six months or less." *Id*. at 217.

In *Middendorf*, the Supreme Court found that similar considerations outweighed a servicemember's claim to a Fifth Amendment due process right to counsel in a summary court-martial, "an informal proceeding conducted by a single commissioned officer" with limited authority to adjudge punishments,[4] whose purpose "'is to exercise justice promptly for relatively minor offenses under a simple form of procedure.'" 425 U.S. at 32 (quoting MCM para. 79.a. (1969 ed.)). The Court found that requiring counsel to be provided to servicemembers at summary courts-martial would impose a "particular burden" on the military "because virtually all the participants,

4. A summary court-martial may "adjudge any punishment not forbidden by this chapter except death, dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, hard-labor without confinement for more than 45 days, restriction to specified limits for more than two months, or forfeiture of more than two-thirds of one month's pay." Article 20(a), UCMJ, 10 U.S.C. § 820(a) (2018).

including the defendant and his counsel, are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Id*. at 45-46.

Although the summary court-martial discussed in *Middendorf* is not a criminal forum and does not result in a criminal conviction, *see* Article 20(a), UCMJ, the *Middendorf* analysis of the burdens that would accompany the proposed process is equally applicable to the special court-martial at issue in this case. Allowing a servicemember to refuse a military judge-alone special court-martial in favor of a proceeding before a panel of members would require the detailing and voir dire of a prospective panel. This would result in a longer proceeding requiring more servicemembers to be pulled away from their regular duties in order to serve as prospective and selected panelists in a case involving offenses the command deemed minor. *See Toth v. Quarles*, 350 U.S. 11, 17 (1955) ("[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. ... To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."). As a result, allowing a servicemember to refuse a military judge-alone special court-martial would burden the military by transforming a proceeding "which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried." *Middendorf*, 425 U.S. at 45. We therefore conclude that this factor weighs against finding a due process right to a panel in this case.

3. Legal Safeguards

Finally, we must determine whether there are adequate procedural safeguards to ensure a servicemember receives a fair trial before a military judge-alone special court-martial. Appellant contends that a multi-member panel is essential to prevent a "miscarriage of justice that is risked by trial before a sole fact-finder whose latent biases or limits on interpreting evidence will never be mitigated by the perspectives of fellow fact-finding members." We understand Appellant's concerns and recognize the potential benefits of having multiple factfinders in a criminal case. *See Ballew v. Georgia*, 435 U.S. 223, 232-38 (1978) (discussing these potential benefits). However, we are not persuaded that these potential benefits would increase the fairness of a special court-martial so much that multiple factfinders are constitutionally required. We reach this conclusion in part because, even without multiple factfinders, several features of the military justice system ensure the impartiality of the military judge and the fairness of the trial.

First, a qualified, independent military judge presides over each military judge-alone special court-martial. Article 26(a), (b), UCMJ, 10 U.S.C. § 826(a), (b) (2018). In *Graf*, we concluded that the UCMJ provides substantial safeguards of a military judge's independence. 35 M.J. at 463. There, the appellant argued that the absence of a fixed term of office for the military judges and appellate military judges who presided over his case precluded their judicial independence, in violation of the Due Process Clause of the Fifth Amendment. *Id.* at 454. While we recognized that the Fifth Amendment Due Process Clause applies to a servicemember at court-martial,

id., we held that "other guarantees of independence provided for military trial judges" in the UCMJ ensure "that court-martial judges can independently and fairly perform their duties without protection of a fixed term of office." *Id.* at 463. Specifically, we noted that the UCMJ:

- "provides for an administrative method of complaint against interfering superiors within the uniformed service itself, which ultimately requires the attention of the civilian secretary of that service," *id.* (citing Article 138, UCMJ, 10 U.S.C. § 938);
- "provides for the preferral of charges and possible court-martial of any servicemember, whatever his grade or rank, who influences or attempts to influence a judge's findings or sentencing decisions at courts-martial," *id.* (citing Article 37, UCMJ, 10 U.S.C. § 837); and
- "in extraordinary cases where the above remedies are not adequate, resort to this Court under the All Writs Act, 28 U.S.C. § 1651(a), is possible." *Id.* (citing cases).

Those same provisions ensure the impartiality of the military judge in this case.[5]

Second, an accused facing a military judge-alone special court-martial is entitled, at no cost to the accused, to detailed military defense counsel, Article 27(a), UCMJ, 10 U.S.C. § 827(a) (2018), or, to the extent reasonably available, to military defense

5. We note that while the defense advocated for dismissal for lack of jurisdiction, the defense did not challenge the military judge's impartiality in this case.

counsel of the accused's choosing, Article 38(b)(3)(B), UCMJ, 10 U.S.C. § 838(b)(3)(B) (2018).

Third, R.C.M. 201(f)(2)(E) limits the offenses that can be referred to a military judge-alone special court-martial while Article 19(b), UCMJ, and R.C.M. 201(f)(2)(B)(ii) limit the punishments that can be adjudged, regardless of the specific offenses or number of offenses tried. As a result, Appellant's potential legal exposure to confinement was statutorily constrained to preclude more than six months of confinement or a punitive discharge. *See Middendorf*, 425 U.S. at 40 n.17 (noting that a servicemember forced to face a summary court-martial that could only impose one month of imprisonment for an offense that carried a ten-year maximum "would no doubt be delighted at his good fortune").

Fourth, despite the fact that Appellant did not have a right of direct appeal to the NMCCA, Appellant's conviction was subject to post-trial review by a qualified judge advocate, Article 65(d)(2), UCMJ, the Judge Advocate General, Article 69(a), UCMJ, and the NMCCA, Article 66(b), UCMJ, to the same extent as any other general or special court-martial resulting in the same sentence.[6] The existence of all of these procedural safeguards weighs against a due process right to a panel in this case.

4. Weighing the Interests

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6. Congress has now given an accused the right to appeal all convictions by special or general courts-martial, regardless of their punishments, to the Courts of Criminal Appeals. *See* Article 66(b)(1), UCMJ, 10 U.S.C. § 866(b)(1) (Supp. V 2023) (granting jurisdiction over "a timely appeal from the judgment of a court-martial, entered into the record ... , that includes a finding of guilty").

After weighing Appellant's interests in a court-martial before a panel against the needs of the military, and taking into account historical practice with respect to courts-martial before panels, the effect of such a right on the military, and the existence in current practice of other procedural safeguards that satisfy the Due Process Clause of the Fifth Amendment, we agree with the lower court's conclusion that the benefits of a multi-member panel are not so weighty as to overcome the balance struck by Congress and the President. *See Wheeler*, 83 M.J. at 591-92. Although we conclude that historical tradition weighs in favor of finding a due process right to a panel, historical tradition is not dispositive of the question whether a proceeding violates Fifth Amendment due process. *Anderson*, 83 M.J. at 299. As the Supreme Court noted in *Solorio*, there is nothing in the Constitution that suggests that "court-martial usage at a particular time [must be frozen] in such a way that Congress might not change it." 483 U.S. at 446. In determining whether the historical tradition of courts-martial before member panels gives rise to a right to a panel in this case, "we must give particular deference" to Congress's determination that an unrefusable military judge-alone special court-martial promotes discipline in the armed forces and enhances a commander's ability to fairly and efficiently deal with minor offenses. *Middendorf*, 425 U.S. at 43.

Appellant "has the burden to demonstrate that Congress' determination should not be followed." *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (first citing *Weiss*, 510 U.S. at 181; and then citing *United States v. Mitchell*, 39 M.J. 131, 137 (C.M.A. 1994) (the appellant bears a "'heavy burden to show the Constitutional invalidity of this facet of the military justice system'")). Affording due deference to

Congress's determination that the military judge-alone special court-martial promotes fairness and efficiency, we conclude that Appellant has not met his burden. We therefore hold that the unrefusable military judge-alone special court-martial where neither a punitive discharge nor confinement of more than six months may be adjudged does not run afoul of the Fifth Amendment Due Process Clause.

C. The Convening Authority's Referral Decision

The second granted issue asks about the convening authority's referral of this case to an unrefusable military judge-alone special court-martial. According to Appellant, sleeping on post is an objectively serious offense because it is punishable by up to one year of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970) (holding "that no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized"). He argues that the convening authority's referral decision violated his fundamental due process right to have a serious offense tried by a panel of members.

We disagree. Congress created the military judge-alone special court-martial pursuant to its constitutionally bestowed authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Then, Congress delegated to the President the authority to promulgate regulations implementing the changes to Articles 16 and 19. Article 16(c)(2)(A), UCMJ. The Supreme Court "established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving v. United States*, 517 U.S. 748, 758 (1996). The

delegation of authority to determine whether a case shall be referred to a forum that limits the maximum sentence that may be adjudged is a proper exercise of Congress's power to delegate "the authority to make policies and rules that implement its statutes." *Id.* at 771.

Pursuant to Congress's delegation of power, the President promulgated rules limiting the cases that a convening authority may refer to a military judge-alone special court-martial and further limiting the punishments that may be adjudged therein. R.C.M. 201(f)(2)(B)(ii); R.C.M. 201(f)(2)(E)(i). In *Loving*, the Supreme Court noted, "'The military constitutes a specialized community governed by a separate discipline from that of the civilian,' and the President can be entrusted to determine what limitations and conditions on punishments are best suited to preserve that special discipline." 517 U.S. at 773 (quoting *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). Therefore, the Court found "no fault" in Congress's delegation of power to the President to prescribe aggravating factors that permit application of the statutory death penalty in military capital cases. *Id.* at 772. Additionally, the Court concluded that the President's promulgation of a Rule for Courts-Martial implementing the statutory death penalty and narrowing the category of death-eligible cases, "was well within the delegated authority." *Id.* at 774. Here, as in *Loving*, the President acted within his delegated authority to prescribe rules narrowing the category of cases that may be referred to a military judge-alone special court-martial and limiting the punishments that can be adjudged in that forum.

The discretion to refer charges to the new forum was appropriately vested in the convening authority, subject to the limitations prescribed by Articles 16 and

19 and R.C.M. 201(f)(2)(B)(ii) and 201(f)(2)(E)(i). *See United States v. Nachtigal*, 507 U.S. 1, 4 (1993) (Congress's delegation of power to the President is not "stripped of its 'legislative' character merely because the [convening authority] has final authority to decide, within the limits given by Congress, what the maximum prison sentence will be for a violation of a given regulation."). "[T]he special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." *Brown v. Glines*, 444 U.S. 348, 360 (1980). As we have observed:

> One of the hallmarks of the military justice system is the broad discretion vested in commanders to choose the appropriate disposition of alleged offenses. The critical responsibility of commanders for the morale, welfare, good order, discipline, and military effectiveness of their units traditionally has been viewed as requiring the exercise of such discretion.
>
> The discretionary disposition authority of commanders includes the power to take no action, dismiss charges, initiate administrative actions under applicable regulations, institute [nonjudicial punishment] proceedings under Article 15, refer the matter to a summary, special, or general court-martial, or forward it to a superior commander.

United States v. Gammons, 51 M.J. 169, 173 (C.A.A.F. 1999).

The convening authority's referral of this case to a military judge-alone special court-martial was a

proper exercise of statutory authority. Article 16(c)(2)(A) provides that a special court-martial may consist of a military judge alone "if the case is so referred by the convening authority, subject to [Article 19, UCMJ,] and such limitations as the President may prescribe by regulation." Article 16(c)(2)(A). Here, the referral was consistent with the limitations imposed by Congress in Article 19, UCMJ (limiting the maximum punishments that may be adjudged), and with the additional limitations imposed by the President in R.C.M. 201(f)(2)(B)(ii) (imposing an additional limitation on the maximum permissible sentence), and R.C.M. 201(f)(2)(E)(i) (barring referral to a military judge-alone special court-martial if the accused objects and the maximum sentence at a general court-martial would exceed two years of confinement, or if sex offender registration would be required).[7]

IV. Conclusion

We hold that Appellant had no Fifth Amendment due process right to a trial before a panel of members where the military judge-alone special court-martial forum limited the maximum confinement that could be adjudged to six months and precluded a punitive discharge. We also hold that the convening authority's forum selection in accordance with Articles 16 and 19, UCMJ, and R.C.M. 201 did not violate due process. Therefore, the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

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7. Although Appellant objected to the military judge-alone special court-martial's jurisdiction, he could not prevail where the maximum confinement exposure he would have faced at a general court-martial was one year of confinement, and a conviction would not subject him to sex offender registration.

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES WASHINGTON, D.C.

United States,
Appellee

v.

David M. Diaz,
Appellant

No. 23-0147/NA
Crim. App. No. 202100090

ORDER

On further consideration of the granted issues, 83 M.J. 431 (C.A.A.F. 2023), and in view of *United States v. Wheeler*, __ M.J. __ (C.A.A.F. Aug. 22, 2024), it is, by the Court, this 17th day of September, 2024,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Marinos)
Appellate Government Counsel (Keller)

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Thomas H. Martin,
Appellant

No. 23-0139/NA
Crim. App. No. 202100089

ORDER

On further consideration of the granted issues, 83 M.J. 434 (C.A.A.F. 2023), and in view of *United States v. Wheeler*, __ M.J. __ (C.A.A.F. Aug. 22, 2024), it is, by the Court, this 17th day of September, 2024,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Malcolm H. Squires, Jr.
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Marinos)
Appellate Government Counsel (Keller)

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before THE COURT EN BANC

UNITED STATES,
Appellee

v.

Thomas L. WHEELER
Master-at-Arms Third Class (E-4),
U.S. Navy
Appellant

No. 202100091

Argued: 1 December 2022
Decided: 17 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Kimberly J. Kelly.

Sentence adjudged 23 June 2020 by a special court-martial convened at Naval Station Everett, Washington, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: confinement for 15 days.[1]

Chief Judge HOLIFIELD delivered the opinion of the Court, in which Senior Judge HOUTZ, Senior Judge DEERWESTER, Senior Judge STEWART, Judge MYERS, Judge HACKEL, and Judge KISOR joined. Judge KIRKBY filed a separate opinion concurring in the judgment.

PUBLISHED OPINION OF THE COURT

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1. The convening authority suspended all confinement in excess of 7 days.

HOLIFIELD, Chief Judge:

Appellant was convicted, contrary to his pleas, of one specification of sleeping on post, in violation of Article 95, Uniform Code of Military Justice [UCMJ], for falling asleep at his post while serving as a sentinel onboard a harbor patrol boat.[2] His conviction and sentence were subsequently reviewed by a judge advocate pursuant to Article 65(d), UCMJ.[3] In response to the reviewing judge advocate's conclusion that, inter alia, the court-martial had jurisdiction over Appellant, the latter sought relief from the Judge Advocate General of the Navy under Article 69, UCMJ.[4] The Judge Advocate General considered Appellant's petition and forwarded the record of trial to this Court, recommending review of the following issue:

> Did the convening authority violate the Fifth and Sixth Amendments of the Constitution by referring charges for which the President authorized a penalty of over six months of confinement, forfeiture of all pay, and a punitive discharge to a judge-alone special court-martial under Article16(c)(2)(A), UCMJ[?][5]

Answering this question in the negative, we find no prejudicial error and affirm.

I. BACKGROUND

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2. 10 U.S.C. § 895.

3. 10 U.S.C. § 865(d).

4. 10 U.S.C. § 869.

5. We note that the Judge Advocate General also referred two similarly situated cases to this Court, certifying the same question. This explains the use of "charges" in the question despite Appellant having been charged with a single charge and specification.

A. Facts

On 7 March 2020, Appellant was serving as a crewmember onboard a harbor patrol boat at Naval Station Everett, Washington, tasked with maintaining the security of the harbor. He was discovered asleep at his post before he was properly relieved.

Appellant was charged with a single specification of sleeping on post in violation of Article 95, UCMJ, an offense for which the President has authorized a maximum punishment of confinement for one year, forfeiture of all pay and allowances for one year, and a dishonorable discharge. Appellant's charge was referred to a judge-alone special court-martial in accordance with Articles 16 and 19, UCMJ.[6] Prior to trial, Appellant filed a motion to dismiss the charge against him for a lack of jurisdiction, arguing that the referral of his case to a judge-alone special court-martial violated his rights under the Fifth and Sixth Amendments to the Constitution.[7] The military judge denied the motion and the case proceeded to trial.[8] On 23 June 2020, the military judge found Appellant guilty and sentenced him to 15 days' confinement.

B. The Judge-Alone Special Courts-Martial

In 2016, Congress amended Articles 16 and 19, UCMJ, creating a new type of special court-martial consisting of a military judge alone at which "neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged."[9] Congress also delegated to the President the authority to prescribe

6. 10 U.S.C. §§ 816, 819.

7. App. Ex. II.

8. App. Ex. XI.

9. Art. 16(c)(2)(A), UCMJ.

further regulatory limitations to the new judge-alone special court-martial's jurisdiction.[10] Although special courts-martial have jurisdiction to try any non-capital offense other than rape or sexual assault (or attempts thereof),[11] Rule for Courts-Martial [R.C.M.] 201(f)(2)(E) gives an accused the right to object to a judge-alone special court-martial when the maximum authorized punishment for the charged offense, if tried by a general court-martial, is greater than two years' confinement—with the exception of offenses under Art. 112a(b) (wrongful use or possession of controlled substances) or attempts thereof under Article 80—or if the offense requires sex offender

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10. The relevant language of the statutes is as follows:

§ 816. Article 16. Courts-martial classified

…

(c) SPECIAL COURTS-MARTIAL.—Special courts-martial are of the following two types:

(1) A special court-martial consisting of a military judge and four members ...

(2) A special court-martial consisting of a military judge alone—

(A) if the case is so referred by the convening authority, subject to section 819 of this title (article 19) and such limitations as the President may prescribe by regulation;

...

§ 819. Article 19. Jurisdiction of special courts-martial

(a) IN GENERAL. Subject to section 817 of this chapter (article 17), special courts-martial have jurisdiction to try persons subject to this chapter for any non-capital offense made punishable by this chapter ...

(b) ADDITIONAL LIMITATION.—Neither a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged if charges and specifications are referred to a special court-martial consisting of a military judge alone under section 816(c)(2)(A) of this title (article 16(c)(2)(A)).

11. Articles 18(c) and 19(a), UCMJ.

registration under regulations issued by the Secretary of Defense. None of these exceptions are applicable here.

II. DISCUSSION

A. Law and Standard of Review

As discussed below, although the question before us focuses on the convening authority's referral action, we decline to cabin our analysis to this step in the military justice process. We will examine first whether Articles 16 and 19 and R.C.M. 201(f)(2)(E) facially violate Appellant's Fifth or Sixth Amendment rights. "The constitutionality of an act of Congress is a question of law that we review de novo."[12] If we find these articles and the President's implementing rules to be constitutionally valid (and we do), we next turn to how they were applied in Appellant's case.

During oral argument, Appellant's counsel stated that his was a facial challenge to the articles and rule. But the Judge Advocate General's question, focused on the convening authority's referral decision, implies an as-applied challenge—in effect, asking whether, if Articles 16 and 19 and R.C.M. 201(f)(2)(E) are constitutionally valid, was it constitutionally permissible to refer a charge alleging a violation of Article 95 to a judge-alone special court-martial.

B. The Sixth Amendment Right to a Jury

At oral argument, Appellant's counsel—despite having urged this Court in his initial and reply briefs to find a Sixth Amendment violation—conceded that his challenge was based solely on Appellant's Fifth Amendment due process rights. While we appreciate

12. *United States v. Vasquez*, 72 M.J. 13, 17 (C.A.A.F. 2013) (quoting *United States v. Ali*, 17 M.J. 256, 265 (C.A.A.F. 2012) (additional quotation marks omitted).

the candor, we find it necessary still to address the Sixth Amendment challenge in order to fully answer the Judge Advocate General's question. Also, much of Appellant's remaining argument involves viewing Sixth Amendment Jury Clause-related issues through a Fifth Amendment Due Process Clause lens.

The Sixth Amendment of the Constitution guarantees, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[13] But, in *Blanton v. N. Las Vegas*, the United States Supreme Court held this right to trial by jury inapplicable to civilian prosecutions of petty offenses, with a presumption that any offense carrying a maximum punishment of six months or less is petty.[14] In drawing this presumptive line between petty and serious offenses, the Supreme Court sought to ground the distinction in "objective indications of seriousness with which society regards an offense."[15] Of those indications, the Court held "most relevant ... the maximum authorized penalty."[16] Against this was balanced "the benefits that result from speedy and inexpensive nonjury adjudications."[17]

But the *Blanton* presumption is not dispositive here. Although the above considerations may be relevant in assessing Appellant's Fifth Amendment due process rights, the Supreme Court and the Court of Appeals for the Armed Forces [C.A.A.F.] have held that the Sixth Amendment Jury Clause does not apply

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13. U.S. const. amend. VI.

14. *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989).

15. *Id.* (citing *Frank v. United States*, 395 U.S.147, 148 (1969)).

16. *Id.* (citing *Baldwin v. New York*, 399 U.S. 66, 68 (1970)).

17. *Id.* (citing *Baldwin*, 399 U.S. at 73).

to courts-martial.[18] If there is a constitutional right to a panel of members at a special court-martial, it does not reside in the Sixth Amendment.

Thus, we conclude that the referral of Appellant's charge to a mandatory judge-alone special court-martial did not violate his rights guaranteed by the Sixth Amendment. The remainder of our analysis, then, will focus solely on his rights under the Fifth.

C. The Fifth Amendment Due Process Clause

The Fifth Amendment provides, in part, that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[19] While "constitutional rights may apply differently to members of the armed forces than they do to civilians,"[20] "the Due Process Clause of the Fifth Amendment applies to servicemembers at courts-martial."[21]

"[T]he Supreme Court has repeatedly emphasized the broad deference that should be afforded Congress in providing for a servicemember's rights, ... [but it]

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18. *Ex Parte Quirin*, 317 U.S. 1, 39 (1942) ("Presentment by a grand jury and trial by a jury of the vicinage where the crime was committed were at the time of the adoption of the Constitution familiar parts of the machinery for criminal trials in the civil courts. But they were procedures unknown to military tribunals, which are not courts in the sense of the Judiciary Article. ... As this Court has often recognized, it was not the purpose or effect of § 2 of Article III, read in the light of the common law, to enlarge the then existing right to a jury trial. ... [The] Sixth Amendment[ ] ... did not enlarge the right to jury trial as it had been established by that Article."); *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2017); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012)

19. U.S. Const. amend. V.

20. *Easton*, 71 M.J. at 175 (citation omitted).

21. *United States v. Graf*, 35 M.J. 450, 454 (C.M.A 1992) (citation omitted).

has not considered such deference absolute."[22] "Congress remains subject to the limitations of the Due Process Clause, ... but the tests and limitations to be applied may differ because of the military context."[23] When determining the limits of Due Process Clause protection, we ask whether the challenged process "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[24]

The Supreme Court has stated, in *Weiss v. United States*, that "[i]t is elementary that a fair trial in a fair tribunal is a basic requirement of due process."[25] For our purposes, "tribunal" is synonymous with "court-martial."[26] Furthermore, given the facts of this case and the issue raised to us, our analysis is limited to special courts-martial.

For nearly 200 years, courts-martial in the United States military consisted solely of panels of members of varying numbers and types. This was true for general courts-martial as well as "lesser" courts-

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22. *Id*. at 461 (citing *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)).

23. *Id*. (citing *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981)) (internal citations omitted).

24. *Id*. at 462 (quoting *Patterson v. New York*, 432 U.S. 197, 202 (1977)).

25. *Weiss v. United States*, 510 U.S. 163, 178 (1994) (examining whether military judges needed to have a fixed term of office, as "a necessary component of a fair trial is an impartial judge.") (citations omitted).

26. *See Manual for Courts-Martial, United States* (2019 ed.), pt. I, para. 3 at I-1. The Preamble to the Manual for Courts-Martial lists among the "agencies through which military justice is exercised . . . courts-martial for the trial of offenses against military law." Although "military tribunals," "military commissions," "provost courts," "courts of inquiry," and "nonjudicial punishment proceedings" are also mentioned, they are not relevant to the case before us.

martial (the predecessor of our current special courts-martial).[27] This requirement continued with the creation of the UCMJ in 1951.[28] In 1968, Congress created military judges and, for the first time, authorized courts-martial without panel members—but only when an accused requested it.[29]

Given the clear historical requirement for members, both predating and incorporated in the UCMJ, it is not surprising that there is no case law holding that trial before a panel of members is a right at a special court-martial—there was simply no need for the courts to address it. The creation of the judge-alone special court-martial changed this. Thus, we now examine the novel question of whether the right to a panel of members was a creature solely of statute and regulation, or, as Appellant now argues, the right is also implicit in the Due Process Clause of the Fifth Amendment.

D. Facial Challenge

At oral argument, Appellant's counsel described his client's position as a facial challenge to the constitutionality of the new judge-alone special court-martial. That is, that the referral of offenses punishable by more than six months' confinement to an unrefusable, judge-alone forum is constitutionally invalid in all circumstances.[30]

Appellant cites to various cases in which our superior Court has held a "fair and impartial panel" to

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27. *See* Schlueter, The Court-Martial: A Historical Survey, 87 Mil. L. Rev. 129 (1980).

28. Article 16(2), UCMJ (1951 ed.).

29. Article 16(2)(c), UCMJ (1969 ed.).

30. *See United States v. Castillo*, 74 M.J. 160, 162 (C.A.A.F. 2015) (explaining that "a facial challenge, . . . requires the challenger to establish that no set of circumstances exist under which the [regulation] would be valid") (cleaned up).

be a fundamental right as support for his position that he has a fundamental right to a panel of members.[31] But the central issues of the cited cases deal with the members selection process—either at the convening authority's selection stage or during voir dire—with a focus on the panel members' impartiality, not the right to a panel itself.[32]

1. Historical Practice

Citing the predominant role that historical practice plays in the determination of whether a right is fundamental, Appellant describes at length the role of court-martial members throughout our nation's history.[33] And his description is accurate; while the composition of such panels has varied over the years, until 2019 accused servicemembers enjoyed the right to a panel of members at special courts-martial. But Appellant's description paints an incomplete picture.

First, Appellant sidesteps the role of military judges. Prior to the Military Justice Act of 1968, judge-alone courts-martial were unknown—because military judges did not exist.[34] Back then, a special court-martial's president was tasked with making evidentiary and other legal rulings, often without the benefit of legal training.[35] Starting in 1969, however,

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31. App. Br. at 7, 8.

32. *See United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) (military judge abused his discretion in failing to grant accused's challenge for cause based on implied bias); *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995) (trial counsel's failure to disclose that member had cross-dressed at Halloween party did not warrant reversal of conviction).

33. Appellant’s Brief at 8.

34. Pub. L. No. 90-632 (Oct. 24, 1968).

35. While the UCMJ had previously required the appointment of law officers (trained, certified lawyers) to general

convening authorities could detail military judges to preside over special courts-martial.[36] The creation of military judges also tripled the types of special courts-martial available. By default, a special court-martial would consist of a military judge and a panel of members. If requested by the accused and approved by the military judge, an accused could be tried and sentenced by a military judge alone. Or, although we find no record of such courts-martial having occurred, a special court-martial could consist solely of members if no military judge was detailed.[37] This last option was not removed from the UCMJ until 2019.[38]

Second, in 1999 Congress increased from 6 to 12 months the maximum confinement awardable at a special court-martial.[39] The six-month limitation had been part of the UCMJ since its inception.[40]

Third, since our Navy's birth the number of panel members required for a special court-martial has also

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courts-martial, there was no such requirement applicable to special courts-martial. Art. 26(a), UCMJ (1951 ed.).

36. Art. 26, UCMJ (1969 ed.). The detailing of military judges to preside over special courts-martial remained authorized but not required for the next five decades. *See* Art. 26(a) UCMJ (2019 ed.).

37. *Id.*

38. National Defense Authorization Act for FY 2017, Pub. L. No. 114-328, Div. E, Title LIV, § 5161 (Dec. 23, 2016). Interestingly, the maximum punishment a no-judge special court-martial could impose was identical to the maximum punishment now authorized at a judge-alone special court-martial.

39. National Defense Authorization Act for FY 2000, Pub. L. No. 106-65, Div. A, Title V, Subtitle J, § 577(a) (Oct 5, 1999).

40. Art. 19, UCMJ (1951 ed.).

changed, most recently in 2019, when the minimum number changed from three to four.[41]

Fourth, the Military Justice Act of 2016 also created the option to bifurcate findings and sentencing, giving an accused the choice to be tried by members, yet sentenced by the military judge. When elected by accuseds, this procedure brings courts-martial more in line with criminal trials in the Federal courts.[42]

These are but four of the ways Congress has legislated significant changes to special courts-martial over the last half-century. We find no case law holding that historical practice created a fundamental right that precluded any of their enactments. The recent changes to Articles 16 and 19, UCMJ, are simply the next step in the evolution of special courts-martial. That military justice evolves and departs from historical practice does not in itself violate the Due Process Clause. Granted, the possibility of a criminal conviction at an unrefusable proceeding without members is remarkable given historical practice. And that historical practice is a factor for us to consider. But a deeper analysis of past congressional action in this area softens the factor's talismanic impact that Appellant argues.

2. Congressional and Presidential Authority

Appellant concedes that Congress had authority to amend Articles 16 and 19 as it did, but challenges the

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41. National Defense Authorization Act for FY 2017, Pub. L. No. 114-328. Also, four members is now the maximum, where previously there was no upper limit.

42. Congress continues to move in this direction. For offenses committed after December 27, 2023, sentencing by military judge, pursuant to sentencing guidelines, will be required at nearly all special and general courts-martial. National Defense Authorization Act for FY 2022, Pub. L. No. 117-81.

President's authority to promulgate R.C.M. 201(f)(2)(E). We question this distinction.

The President's action neither increased the punishments imposable at, nor enlarged the pool of offenses that could be tried by, a judge-alone special court-martial. As to the latter, the Rule actually has the opposite effect. In the absence of Presidential action, all special courts-martial have jurisdiction to try "any non-capital offense made punishable by [the UCMJ]."[43] The President has, through R.C.M. 201(f)(2)(E), limited the jurisdiction of judge-alone special courts-martial by creating a right to object where the maximum punishment authorized for a charged offense exceeds two years (except for charges of wrongful use or possession of controlled substances) or where the offense would require sex offender registration.

Appellant's position essentially is that the statute creating the judge-alone special court-martial with nearly unlimited jurisdiction is constitutionally sound, but the implementing regulation that limits its jurisdiction is unconstitutional because it doesn't limit it enough. Rejecting this reasoning, we step back and begin with Congress' authority to create the new special court-martial.

Congress' authority to make changes to the UCMJ is firmly rooted in Article I, Section 8 of the Constitution: "The Congress shall have the power ... [t]o make Rules for the Government and Regulation of the land and naval Forces."[44] "This power is no less

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43. Article 19(a), UCMJ. Under this Article, even capital offenses may be tried at special courts-martial "under such regulations as the President may prescribe." See R.C.M. 201(f)(2)(C)(ii).

44. *See, e.g.*, *Loving v. United States*, 517 U.S. 748, 767 (1996).

plenary than other Article I powers."[45] Furthermore, Congress may make "measured and appropriate delegations of this power."[46] Examples of such delegations exist throughout the UCMJ.[47]

Here, Congress amended the UCMJ to create a new form of special court-martial. In doing so, it expressly delegated to the President the authority to limit when charges could be tried by such a court-martial, i.e., "if the case is so referred by the convening authority, subject to section 819 of this title (article 19) *and such limitations as the President may prescribe by regulation*."[48]

The general rule is that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[49] And "[w]hen the President acts pursuant to an express or implied

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45. *Id.* (citation omitted).

46. *Id.* at 768 ("Indeed, it would be contrary to precedent and tradition for us to impose a special limitation on this particular Article I power, for we give Congress the highest deference in ordering military affairs. And it would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority. We decline to import into Clause 14 a restrictive nondelegation principle that the Framers left out.") (citation omitted).

47. *See, e.g.*, Article 6a ("The President shall prescribe procedures for the investigation and disposition of charges"); Article 15 (the President may prescribe limitations "on the powers granted by this article"); Article 18 (a general court-martial may adjudge any sentence "under such limitations as the President may prescribe"); Article 36 (entitled "President may prescribe rules," gives the President authority to prescribe, inter alia, rules of procedure and evidence applicable at courts-martial); and, Article 56 ("punishment ... for an offense may not exceed such limits as the President may prescribe for that offense").

48. Article 16(c)(2)(A), UCMJ (emphasis added).

49. *Loving*, 517 U.S. at 768 (citing *Lichter v. United States*, 334 U.S. 742, 778 (1948)) (cleaned up).

authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."[50] Such was the case when the President signed the Executive Order creating R.C.M. 201(f)(2)(E).[51]

Upon closer review, however, it appears Appellant's claim is not that the President lacked the authority to limit the jurisdiction of judge-alone special courts-martial. Rather, it is that the President had the authority to draw a line, but he simply drew it in the wrong place. Appellant argues that drawing a line that allows an unrefusable judge-alone trial of an offense for which the maximum punishment is two years' confinement equates to a violation of due process. Were we to consider this fact in isolation, we might agree. But we do not view the terms of R.C.M. 201(f)(2)(E) in a vacuum. For example, the Rule limiting what offenses are triable by a judge-alone special court-martial must be read in conjunction with the limitation imposed by Congress in Article 19, namely, the forum's maximum sentencing authority.

3. Balancing Equities

"The military constitutes a specialized community governed by a separate discipline from that of the civilian,"[52] and "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty ...."[53] This interplay of individual rights and military necessity

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50. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

51. 2018 Amendments to the Manual for Courts-Martial, United States, Exec. Order No. 13,825 (March 1, 2018).

52. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)).

53. *Id.* (citing *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

are reflected in the Preamble to the Manual for Courts-Martial:

The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.[54]

"Traditionally, due process has required only that the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused has been left to the legislative branch."[55] The Supreme Court has described how balancing these disparate but important interests can shape military procedure:

> It is the primary purpose of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. ... [M]ilitary tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to the fair trials of civilians in federal courts.[56]

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54. *Manual for Courts-Martial, United States* (2019 ed.), pt. I, para. 3 at I-1.

55. *Medina v. California*, 505 U.S. 437, 453 (1992) (citing *Patterson*, 432 U.S. at 210).

56. *Middendorf v. Henry*, 425 U.S. 25, 46 (1976) (citing *Toth v. Quarles*, 350 U.S. 11, 17 (1955)) (alteration in original).

"The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice on one hand, with the demand for an efficient and well-disciplined military, on the other."[57] This also can be said of the Rules for Courts-Martial regarding presidential efforts to do the same. Congress (in creating the judge-alone special court-martial) and the President (in limiting the offenses that could be tried by such a court-martial over an accused's objection) each struck a balance between competing interests.

By creating the new judge-alone special court-martial, Congress sought to promote discipline in the armed forces by giving commanders "a new disposition option for low-level criminal conduct—one that would be more efficient and less burdensome on the command ... but without the option for the member to refuse."[58] Previously, the lowest unrefusable option available for dealing with minor offenses was a special court-martial consisting of a military judge and four members. While nonjudicial punishment pursuant to Article 15, UCMJ, or a summary court-martial under Article 20, UCMJ, may be more appropriate ways to handle minor offenses, neither proceeding can be conducted over an accused's objection.[59] Faced with such an objection, a commander is left with two disciplinary options: special or general court-martial.

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57. *Curry v. Secretary of the Army*, 595 F.2d 873, 880 (D.C. Cir. 1979).

58. Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group Part I: UCMJ Recommendations, 222 (Dec 22, 2015).

59. Unless attached to or embarked in a vessel, an accused may demand court-martial in lieu of nonjudicial punishment (Article 15(a), UCMJ) and any accused subject to trial by summary court-martial may object thereto (Article 20, UCMJ).

But the attendant burden on a commander to select potential members and detail them to a special court-martial—that might remove them from their normal duties for several days or weeks—often far outweighs the minor nature of the misconduct in question.

In amending Articles 16 and 19, it appears Congress sought to balance the individual's benefit of being tried by a panel of members with a commander's need to efficiently and fairly deal with minor military offenses. In doing so, Congress limited the amount of punishment that could be adjudged at a judge-alone special court-martial. The President, apparently seeking the same balance, further limited the types of offenses that could be tried at such a court-martial. We do not find unreasonable the exchange of these protections for the right to a panel of members.

The military is in many ways a community distinct from civilian society. Our system of military justice is similarly distinct. For example, the role of the convening authority in members selection and the referral process has no counterpart in the Federal courts. Also, punishment in the Federal courts is dictated by the offenses charged, not the court that tries them. These two differences provide another objective indicator of how the relevant society—here, the military—regards the seriousness of a given offense.

As mentioned above, the Supreme Court has found a legislature's assigned maximum punishment to be the clearest objective indicator of how serious society considers a given offense. But for the military community, a convening authority's referral decision is a similar indicator. A convening authority directly responsible for the good order and discipline of his or her command chooses a specific forum based partly on how serious he or she views the charged offenses to be. For example, whether an alleged violation of Article

95 is referred to a judge-alone special court-martial, a special court-martial with members, or a general court-martial says much about the circumstances of the offense charged. Article 95 prohibits a broad range of conduct, from sleeping on post during a time of war to, as here, sleeping while posted on a stand-by harbor patrol craft in a domestic port during peacetime. While many factors inform the forum decision, that choice is an indicator of where the community believes the specified misconduct falls on that seriousness spectrum.

We note, too, that trial by a judge-alone special court-martial, unlike nonjudicial punishment or summary court-martial proceedings, guarantees an accused the right to counsel and that the proceeding will be presided over by a qualified and certified military judge.[60] And a conviction at a judge alone special court-martial carries with it the same post-trial review rights as any special or general court-martial conviction with the same sentence.[61]

Finally, we find that, in a critical way, the balance struck by Congress and the President provides an accused servicemember more protection than is afforded a civilian counterpart charged with petty offenses. The Supreme Court has held that, so long as each offense tried at a civilian proceeding without a jury is a petty offense, the number of offenses and aggregate punitive exposure at a single trial are irrelevant.[62] In contrast, at a judge-alone special

60. Articles 26 and 27, UCMJ.

61. Articles 65, 66, and 69, UCMJ. While the review and appeals processes are relatively limited for court-martial convictions with sentences not involving confinement for two years or more or a punitive discharge, they are the same regardless of forum.

62. *See Lewis v. United States*, 518 U.S. 322 (1996).

court-martial, the maximum confinement awardable is six months regardless of the number of offenses charged.[63]

4. Judicial Deference

Our analysis of these factors and the balance struck by Congress and the President is limited by the significant deference we owe to each branch in such matters.

Our review involves "Congress' authority over national defense and military affairs, and perhaps in no other area has ... Congress [been accorded] greater deference."[64] The Bill of Rights "did not alter the allocation to Congress of the 'primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military.'"[65] Congress "is subject to the requirements of the Due Process Clause when legislating in the area of military affairs .... But, in determining what process is due, courts must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces."[66]

As Congress balances the distinctive interests inherent in military service, it considers both the individual's rights and the government's need for a well-ordered and disciplined force. Where Congress has been clear in its determination of where this balance should be struck, the Supreme Court tells us deference is owed. The issue here is not where we

63. A convening authority could choose to refer known multiple offenses to multiple courts-martial. *But see* R.C.M. 401(c) Discussion ("[O]rdinarily, all known charges should be referred to a single court-martial.")

64. *Rostker*, 453 U.S. at 64-65.

65. *Loving*, 517 U.S. at 767 (citing *Solorio*, 483 U.S. at 447-448).

66. *Weiss*, 510 U.S. at 176-77.

would strike the balance; rather we should limit our present inquiry to "whether factors militating in favor of [a panel of members] are so extraordinarily weighty as to overcome the balance struck by Congress."[67]

We owe similar deference to the Executive. As discussed above, the President's authority was "at its maximum" when he created R.C.M. 201(f)(2)(E) pursuant to Congress' express delegation of authority.[68]

Article 19's limitation on punishment evidences that Congress has weighed the relevant equities, just as R.C.M. 201's limitation on offenses represents a similar evaluation by the President. Both are entitled to substantial deference here; it is not for us to simply substitute our own weighing of the equities. "[W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress"[69] or to "legislate by litigation."[70]

In recognition of this substantial deference, we apply the test provided by the Supreme Court, first in *Middendorf v. Henry* and later in *Weiss v. United States*.[71] Considering "the factors militating in favor" of trial by a panel of members—here, Appellant offers only that "it's always been thus" as the sole factor—in contrast to the increased efficiency and reduced burden of prosecution, the sentence limitations in Article 19, the offense limitations in R.C.M. 201(f)(2)(E), and the rights to counsel, a military

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67. *See Middendorf*, 425 U.S. at 44 (holding servicemembers do not have a right to counsel at summary courts-martial); *see also Weiss*, 510 U.S. at 177-78 (applying the same test in holding that due process does not require that military judges have fixed terms of office).

68. *Youngstown*, 343 U.S. at 635.

69. *Rostker*, 453 U.S. at 68.

70. *Graf*, 35 M.J. at 464.

71. *Middendorf*, 425 U.S. at 44; *Weiss*, 510 U.S. at 177-78.

judge, and appeal guaranteed elsewhere in the UCMJ, we cannot conclude that the benefit of a panel of members in such cases is "so extraordinarily weighty" as to overcome the balance struck by Congress and the President.

We therefore hold that Articles 16 and 19, UCMJ, and R.C.M. 201 are not facially unconstitutional. We now turn to how these provisions were applied in Appellant's case.

E. As-Applied Challenge

No one claims that the convening authority in this case acted contrary to the requirements and limitations of R.C.M. 201(f)(2)(E). Appellant cites no authority to say the existence of a judge-alone special court-martial is itself unconstitutional. He would, apparently, take no issue with referral of a so-called "petty offense" to such a forum. Instead, he objects to the convening authority's referral of an alleged violation of Article 95, UCMJ, to such a court-martial, as that offense as it applies to Appellant carries a maximum penalty of a year's confinement, total forfeitures, and a dishonorable discharge.

As previously discussed, the Sixth Amendment's Jury Clause does not apply at courts-martial. And the Fifth Amendment says nothing regarding a panel of members at courts-martial or what offenses are properly triable without such a panel. Appellant must show, then, that denial of members (or the right to object to trial by a judge-alone special court-martial) in his case undermined his right to a "fair trial in a fair tribunal."[72]

Our superior Court has decried any reliance "on the concept of 'military due process,' an amorphous

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72. *Weiss*, 510 U.S. at 178 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).

concept ... that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]. They do not."[73]

We discussed this "panoply of rights" in the previous section, finding that they are not outweighed by any benefit Appellant may have received from being tried before a panel of members. Appellant has the burden to show that the convening authority's referral decision, taken in full accordance with existing law and regulation, was invalid in light of the balance of equities struck by Congress and the President in Articles 16 and 19 and R.C.M. 201(F)(2)(E). He has not done so.

III. CONCLUSION

After careful consideration of the record, as well as the briefs and oral argument of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[74]

The findings and sentence are **AFFIRMED**.

KIRKBY, Judge (concurring in the judgment):

I write separately to express my concern with the methodology used by Congress in creating a military judge-alone special court-martial. While I concur with the majority that neither the changes to Articles 16 and 19, UCMJ, nor the creation of Rule for Courts-Martial 201(f)(2)(E)), on their face or as-applied, violate either the Fifth or Sixth Amendments to the Constitution, my position on this would be different if

73. *Vazquez*, 72 M.J. at 19.

74. Articles 59 & 66, UCMJ.

the current limited protections offered to servicemembers by R.C.M. 201(f)(2)(E) were eroded in the future without full congressional oversight.

I. DISCUSSION

A. Importance of Members.

Panel members represent a safeguard in the military justice system that has no civilian equivalent and represent not only a procedural hurdle for a convening authority but also an equity shield for servicemembers. Having some number of fact finders who come from outside the military justice establishment creates a safeguard that the courts, and the President, should not casually discard. In *Ballew v. Georgia*, the Supreme Court articulated the importance of jury sizes and discussed at length the dangers of reducing the size of a group of decision-makers below six. The Court explained that "[b]ecause of the fundamental importance of the jury ... any further reduction [below six members] that promotes inaccurate and possibly biased decision making, that causes untoward differences in verdicts, and that prevents juries from truly representing their communities, attains constitutional significance."[1] Of significance to the case at bar, the Court rejected Georgia's argument that if six member juries are constitutionally acceptable for felony trials, five member juries should be acceptable for misdemeanor trials. The Court responded that:

> [t]he problem with this argument is that the purpose and functions of the jury do not vary significantly with the importance of the crime. In Baldwin[2]... the Court held that the right to a

1. *Ballew v. Georgia*, 435 U.S. 223, 238 (1978).
2. *Baldwin v. New York*, 399 U.S. 66 (1970).

> jury trial attached in both felony and misdemeanor cases. Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to a trial by jury.[3]

In *United States v. Corl*,[4] this Court's predecessor rejected the application of *Ballew* to courts-martial and affirmed the practice of five member panels. While the Supreme Court has not upset that decision, it remains significant that the Supreme Court has articulated the danger of reducing the number of decision-makers. In my view, these concerns must come into play when we, over the objection of the accused, reduce the number of fact finders in a court-martial to one. Even in the military environment, recognized as unique by the *Corl* court and others, there is a vast difference between accepting fewer than six decision-makers and abandoning entirely the practice of a member panel over an accused objection.

B. Procedural Due Process

The Fifth Amendment provides, in part, that "[n]o person shall be ... deprived of life, liberty, or property, without due process of law."[5] While "constitutional rights may apply differently to members of the armed forces than they do to civilians,"[6] "the Due Process Clause of the Fifth Amendment applies to Servicemembers at courts-martial."[7] "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and

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3. *Id*. at 247.
4. *United States v. Corl*, 6 M.J. 914 (N.C.M.R. 1979).
5. U.S. Const. amend. V.
6. *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004).
7. *United States. v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992).

circumstances."[8] "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."[9]

The Supreme Court found that the resolution of the issue of whether certain administrative procedures were constitutionally sufficient required an analysis of the governmental and private interests that are affected.[10] The Court noted that prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[11] While I recognize the applicability of these principles to an administrative arena, I believe servicemembers facing a criminal conviction should be afforded no less protection. The President's decree in R.C.M. 201 that offenses are "minor" tests the limits of such "fairness" when a criminal conviction attaches to their records for the remainder of their career (if any) and into the civilian world. Simply put, any future employer will not see "minor" offense anywhere in the record and will potentially see only the maximum punishment decreed for a specific offense. While there has been a

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8. *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961).

9. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

10. *Arnett v. Kennedy*, 416 U.S. 134 167-68 (1974) (Powell, J., concurring in part); *Goldberg v. Kelly*, 397 U.S. 254, 263-66 (1970); *Cafeteria Workers*, 367 U.S. at 895.

11. *See, e.g.*, *Goldberg*, 397 U.S. at 263-271.

long standing, and appropriate, recognition that those who serve relinquish certain rights in order to meet the military mission, there is simply no military necessity accomplished by the "shortcut" contained in R.C.M. 201(f)(2)(E).

Congress has long sought to make military courts more akin to our civilian federal counterparts, the military judge-alone court-martial could, and I would argue should, have followed that example by creating classes of offenses with defined maximum punishments.[12] As the majority points out, in drawing this presumptive line between petty and serious offenses, the Supreme Court sought to ground the distinction in "objective indications of seriousness with which society regards an offense."[13] Of those indications, the Court held "most relevant ... the maximum authorized penalty."[14] Against this was balanced "the benefits that result from speedy and inexpensive nonjury adjudications."[15] However, the "presumptive line" is a presumption that crimes with a maximum punishment of less than six months are petty, not a presumption that crimes with a maximum punishment greater than six months are serious. The Supreme Court leaves open the possibility that a crime with a maximum punishment of less than six months can still be serious. In the arena of military justice where loss of pay, reduction in grade, and other associated punishments foreign to the civilian world are authorized, I believe our analysis should not forget that while the Supreme Court dictates maximum punishments are "most relevant," they are not the

12. See 18 U.S.C. § 3559(a)(7)-(8).

13. *United States v. Nachtigal*, 507 U.S. 1, 3 (1993) (quoting *Blanton v. North Las Vegas*, 489 U.S. 538, 541 (1989)).

14. *Baldwin*, 399 U.S. at 68.

15. *Id*. at 73.

only relevant considerations. I see no reason why the goals of speed and cost-saving cannot be reached in a manner that is not so facially one-sided. A scheme similar to the federal system would distinguish, for servicemembers, future employers and the civilian public, the relative seriousness of a specific offense. The creation of a separate class of offenses, even simply numbered differently and assigned six-month maximum punishments, is neither time-consuming nor burdensome on the Government and offers a viable alternative to the R.C.M. 201(f)(2)(E) shortcut.

C. Sixth Amendment

While the Sixth Amendment in its entirety may not apply to courts-martial, the history of courts-martial raises the question of whether a panel of members must be considered a procedural due process right, especially considering the relatively modern appearance of military judges. If that is the case, I see no reason to apply a different standard than the serious-petty standard articulated by the Supreme Court in determining the limits of that right. The majority highlights cases concerning impartiality and the member-selection process, rather than the base-level right to a panel, in support of the claim that a "fair and impartial panel" is a fundamental right. I would suggest that the majority's reliance on these cases, in the majority's own sentiment, arises from the fact that never before has the concept of removing the panel entirely been a consideration. As the majority points out in its historical analysis – this case takes us to new ground.

The majority identifies that "[t]he recent changes to Articles 16 and 19, UCMJ, are simply the next step

in the evolution of special courts-martial."[16] While I disagree that this step is in anyway simple or necessarily next, I do not disagree with the proposition that the system develops and evolves. In this case Congress has opted to evolve the system to ease prosecution and expedite criminal conviction. I believe alternatives could have involved changes to Article 15, changes to summary courts-martial proceedings, or the creation of proceedings that do not result in criminal convictions. I do however recognize that where alternatives may have been preferable for servicemembers, the majority has correctly pointed out that the power to delegate rests with Congress and with Congress lies the result. "This power is no less plenary than other Article I powers."[17] Furthermore, Congress may make "measured and appropriate delegations of this power."[18]

The majority suggests "Congress (in creating the judge-alone special court-martial) and the President (in limiting the offenses that could be tried by such a court-martial over an accused's objection) each struck a balance between competing interests."[19] But, I am unclear how the Soldiers, Sailors, Marines, Airmen, Coastguardsmen or our Space Guardians in the field will view the creation of this new forum, one where they have objectively lost their choice of finder of fact, as well as any form of balance. Simply put: a servicemember, charged with an offense that carries a maximum punishment of 5 years in prison (according to Presidential decree) is unlikely to believe that this

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16. *United States v. Wheeler*, __ M.J. __, No. 202100091, slip op. at 10 (N-M. Ct. Crim. App. Feb. 17, 2023).

17. *Loving v. United States*, 517 U.S. 748, 767 (1996) (citing *Solorio v. United States*, 483 U.S. 435, 441 (1987))

18. *Loving*, 517 U.S. at 767.

19. *Wheeler*, __ M.J. __, slip op. at 13-14.

change accommodates justice. While this may not offend the Constitution, we should be wary of the impact on good order and discipline that servicemembers, in a wholly voluntary force, must be able to view as just.

Finally, I will point out that the Government's arguments and the majority's reasoning in this case provide no reason that Congress could not amend the UCMJ and do away with members completely. Perhaps that too would not offend the Constitution, but I am hesitant to conclude that the members of the armed forces who dedicate their lives to upholding the Constitution should be guaranteed so little due process when facing prosecution for crimes as serious as any prosecuted in civilian courts.

II. CONCLUSION

Accordingly, while I do not join the majority analysis in all respects, I concur with the judgment reached by the court.

[SEAL] FOR THE COURT:

/s/
MARK K. JAMISON
Clerk of Court

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

David M. **DIAZ**, Electronics Technician, Submarine, Communications Third Class (E-4),
U.S. Navy,
Appellant

No. 202100090
Decided 21 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary, Pursuant to Article 69, UCMJ

Military Judge: Kimberly J. Kelly

Sentence adjudged 27 May 2020 by a special court-martial convened at Naval Base Kitsap, Bremerton, Washington, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: reduction to E-3, confinement for 30 days.

For Appellant: Captain Jasper W. Casey, USMC (argued)

For Appellee: Lieutenant Michael A. Tuosto, JAGC, USN, Lieutenant Commander Jeffrey S. Marden, JAGC, USN

Before HOLIFIELD, DEERWESTER, and STEWART, Appellate Military Judges

PER CURIAM:

Appellant was convicted, contrary to his pleas, of one specification of willful dereliction of duty and one specification of assault, in violation of Articles 92 and 128, Uniform Code of Military Justice [UCMJ] for willfully failing to follow firearm safety protocols and pointing a loaded pistol at another Sailor.[1] His conviction and sentence were subsequently reviewed by a judge advocate pursuant to Article 65(d), UCMJ.[2] In response to the reviewing judge advocate's conclusion that, inter alia, the court-martial had jurisdiction over Appellant, Appellant sought relief from the Judge Advocate General of the Navy under Article 69, UCMJ.[3] The Judge Advocate General considered Appellant's petition and forwarded the record of trial to this Court, recommending review of the following issue:

> Did the convening authority violate the Fifth and Sixth Amendments of the Constitution by referring charges for which the President authorized a penalty of over six months of confinement, forfeiture of all pay, and a punitive discharge to a judge-alone special court-martial under Article 16(c)(2)(A), UCMJ[?]

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1. 10 U.S.C. § 892, 928.
2. 10 U.S.C. § 865(d).
3. 10 U.S.C. § 869.

Having answered this question in the negative in our recent decision in *United States v. Wheeler*, we find no prejudicial error and affirm.[4]

Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[5]

The findings and sentence are **AFFIRMED**.

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4. *United States v. Wheeler*, —— M.J. ——, 2023 WL 2055914, No. 202100091 (N-M. Ct. Crim. App. Feb. 17, 2023), https://www.jag.navy.mil/courts/documents/archive/2022/WHEELER_202100091_EN-BANC_PUB-Concur.pdf.

5. Article 59 & 66, UCMJ.

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Thomas H. **MARTIN**,
Aviation Ordnanceman Second Class (E-5),
U.S. Navy,
Appellant

No. 202100089
Decided 21 February 2023

Appeal from the United States Navy-Marine Corps Trial Judiciary, Pursuant to Article 69, UCMJ

Military Judge: Kimberly J. Kelly (arraignment), Ann K. Minami (motions), Lawrence C. Lee (trial)

Sentence adjudged 20 February 2020 by a special court-martial convened at Naval Base Kitsap, Bremerton, Washington, consisting of a military judge sitting alone. Sentence in the Entry of Judgment: a reprimand, reduction to E-3, and restriction for 60 days.

For Appellant: Captain Jasper W. Casey, USMC

For Appellee: Lieutenant Megan E. Martino, JAGC, USN, Lieutenant John L. Flynn IV, JAGC, USN

Before HOLIFIELD, DEERWESTER, and STEWART, Appellate Military Judges

PER CURIAM:

Appellant was convicted, contrary to his pleas, of one specification of violating a lawful general order, in violation of Article 92, Uniform Code of Military Justice [UCMJ] for violating the Department of the Navy Policy on Sexual Harassment by creating a hostile work environment for four Sailors.[1] His conviction and sentence were subsequently reviewed by a judge advocate pursuant to Article 65(d), UCMJ.[2] In response to the reviewing judge advocate's conclusion that, inter alia, the court-martial had jurisdiction over Appellant, Appellant sought relief from the Judge Advocate General of the Navy under Article 69, UCMJ.[3] The Judge Advocate General considered Appellant's petition and forwarded the record of trial to this Court, recommending review of the following issue:

> Did the convening authority violate the Fifth and Sixth Amendments of the Constitution by referring charges for which the President authorized a penalty of over six months of confinement, forfeiture of all pay, and a punitive discharge to a judge-alone special court-martial under Article 16(c)(2)(A), UCMJ[?]

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1. 10 U.S.C. § 892.
2. 10 U.S.C. § 865(d).
3. 10 U.S.C. § 869.

Having answered this question in the negative in our recent decision in *United States v. Wheeler*, we find no prejudicial error and affirm.[4]

Conclusion

After careful consideration of the record and briefs of appellate counsel, we have determined that the findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred.[5]

The findings and sentence are **AFFIRMED**.

4. *United States v. Wheeler*, —— M.J. ——, 2023 WL 2055914, No. 202100091 (N-M. Ct. Crim. App. Feb. 17, 2023), https://www.jag.navy.mil/courts/documents/archive/2022/WHEELER_202100091_EN-BANC_PUB-Concur.pdf.

5. Article 59 & 66, UCMJ.