No. 24-678

In the Supreme Court of the United States

THOMAS L. WHEELER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether Article 16(c)(2)(A) of the Uniform Code of Military Justice, 10 U.S.C 816(c)(2)(A), which authorizes the referral of certain charges to a special court-martial consisting of a military judge empowered to impose only limited punishment, see 10 U.S.C. 819(b)—violates the Fifth Amendment's Due Process Clause.

ADDITIONAL RELATED PROCEEDINGS

Special Court-Martial (Naval Base Kitsap, WA):

United States v. *Martin* (Apr. 13, 2020) (no docket number assigned)

Special Court-Martial (Naval Station Everett, WA):

United States v. *Wheeler* (Aug. 13, 2020) (no docket number assigned)

Special Court-Martial (Puget Sound Naval Shipyard, WA):

United States v. *Diaz* (Aug. 5, 2020) (no docket number assigned)

United States Navy-Marine Corps Court of Criminal Appeals:

United States v. *Diaz*, No. 202100090 (Feb. 21, 2023)

United States v. *Martin*, No. 202100089 (Feb. 21, 2023)

United States v. *Wheeler*, No. 202100091 (Feb. 17, 2023)

United States Court of Appeals for the Armed Forces:

United States v. *Diaz*, No. 23-147 (Sept. 17, 2024)

United States v. *Martin* No. 23-139 (Sept. 17, 2024)

United States v. *Wheeler*, No. 23-140 (Aug. 22, 2024)

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OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces in Wheeler's case (Pet. App. 1a-20a) is reported at 85 M.J. 70. The summary orders of that court with respect to the two other petitioners (Pet. App. 21a, 22a) are reported at 85 M.J. 143 and 85 M.J. 143. The opinion of the Navy-Marine Corps Court of Criminal Appeals in Wheeler's case (Pet. App. 23a-52a) is reported at 83 M.J. 581. Opinions of that court in the other petitioners' cases (Pet. App. 53a-55a, 56a-58a) are not reported but are available at 2023 WL 2124773 and 2023 WL 2125135.

JURISDICTION

The judgments of the Court of Appeals for the Armed Forces were entered on August 22 (Wheeler) and September 17, 2024 (other petitioners). On October 18, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

December 20, 2024, and the petition was filed on December 19, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following trials by special courts-martial with limited punishment authority, petitioners—enlisted sailors in the United States Navy—were each convicted on one or two specifications under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 801 *et seq.* Wheeler was sentenced to 15 days of confinement, eight days of which were suspended, Pet. App. 3a & n.1; Martin was sentenced to a reprimand, reduction in rate, and 60 days of restriction to his warship, *id.* at 56a; and Diaz was sentenced to 30 days of confinement and a reduction in rate, *id.* at 53a. The Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. *Id.* at 23a-52a, 53a-55a, 56a-58a. The Court of Appeals for the Armed Forces (CAAF) affirmed in Wheeler's case, *id.* at 1a-20a, and then summarily affirmed in the other two cases, *id.* at 21a, 22a.

1. A court-martial is a tribunal in the military system that is "convened to determine guilt or innocence and levy appropriate punishment" against members of our Nation's armed forces. *Ortiz* v. *United States*, 585 U.S. 427, 431-432 (2018). There are three types of courts-martial: general, special, and summary. 10 U.S.C. 816(a). A general court-martial "has jurisdiction over all [criminal] offenses under the UCMJ and may impose any lawful sentence, including death." *Weiss* v. *United States*, 510 U.S. 163, 167 (1994) (citing 10 U.S.C. 818). A special court-martial "has jurisdiction over most offenses under the UCMJ, but may "impose [only lesser] punishment," *ibid.* (citing 10 U.S.C. 819), see 10 U.S.C. 818(c), including "confinement for [no] more than one

year," 10 U.S.C. 819(a). And a "summary court-martial is a non-criminal forum" before a single commissioned officer, 10 U.S.C. 816(d), 820(b), that may "be conducted only with the[] consent" of the accused; may "adjudicate[] only minor offenses," *Weiss*, 510 U.S. at 167 (citing 10 U.S.C. 820); and may impose only noncriminal sanctions, including "confinement for [no] more than one month." 10 U.S.C. 820(a) and (b).

General and special courts-martial are often composed of a military judge, who "acts as [the] presiding officer," and a panel of eight or four (or, in capital cases, 12) "members," whose "responsibilities are analogous to * * * civilian jurors" in the sense that they hear the trial evidence and follow instructions from the military judge to "decide guilt or innocence." *Weiss*, 510 U.S. at 167-168 & n.1; see 10 U.S.C. 816(b)(1) and (c)(1), 825a(a). However, unlike civilian jurors, members may request to call or examine witnesses at trial, Military R. Evid. 614(a) and (b); vote by "secret written ballot," 10 U.S.C. 851(a); and (in non-capital cases) need not be unanimous in order to find guilt, 10 U.S.C. 852(a)(3) and (b)(2).

When general and special courts-martial include members, the convening authority selects ones "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament," 10 U.S.C. 825(e)(2); see also 10 U.S.C. 825(e)(1). A military judge, however, may approve the accused's request that a general or special court-martial be composed of a military judge alone (without members). *Weiss*, 510 U.S. at 167; see 10 U.S.C. 816(b)(3) and (c)(2)(B).

In 2015, a report by the Department of Defense's Military Justice Review Group (MJRG) proposed vesting each convening authority with discretion to assign

certain cases for which the maximum punishment is limited to a judge-alone special court-martial, subject to further limits prescribed by the President. MJRG, Dep't of Def., *Report of the Military Justice Review Group* 217 (Dec. 22, 2015) (*MJRG Report*), https://ogc.osd.mil/Portals/99/report_part1.pdf. The proposal was designed to "offer military commanders a new disposition option" that "would be more efficient and less burdensome" for cases involving only "low-level criminal misconduct." *Id.* at 221-222.

The proposal "dr[ew] upon the successful experience of the military justice system with judge-alone trials since 1968" as well as "experience in the federal [and state] civilian system[s]" in which a defendant has no "right to trial by jury when the confinement does not exceed six months." *MJRG Report* 221-222. And as implemented by Congress and the President, it has provided the convening authority with the ability to assign certain cases to a special court-martial before a military judge, where the available punishments are circumscribed. Military Justice Act of 2016, Pub. L. No. 114-328, Div. E, §§ 5161, 5163, 130 Stat. 2897-2899 (amending 10 U.S.C. 816 and 819); Rules for Courts-Martial (R.C.M.) 201(f)(2)(E)(i).

Congress, in Article 16(c)(2)(A) of the UCMJ, has permitted the convening authority to refer a case to a judge-alone special court-martial "subject to * * * such limitations as the President may prescribe by regulation." 10 U.S.C. 816(c)(2)(A). As with any special court-martial, a judge-alone special court-martial may adjudicate offenses other than completed or attempted rape or sexual assault. 10 U.S.C. 818(c), 819(a); see R.C.M. 201(f)(2)(C) and (D). Article 19(b) of the UCMJ, however, restricts the scope of a judge-alone special court-

martial by providing that the maximum punishment for any specification referred under Article 16(c)(2)(A) may not exceed six months of either confinement or forfeiture of pay and cannot include a bad-conduct discharge. 10 U.S.C. 819(b); accord R.C.M. 201(f)(2)(B)(ii).

The President, in turn, has narrowed the scope of cases that may be tried by a military judge under Article 16(c)(2)(A). Specifically, the President has by regulation prohibited adjudication of any specification referred under Article 16(c)(2)(A) if the accused objects on the ground that the specification alleged involves an offense for which either (1) the maximum authorized confinement would be greater than two years "if [it] were tried by a general court-martial" or (2) sex-offender notification would be required under relevant regulations. R.C.M. 201(f)(2)(E)(i); cf. Manual for Courts-Martial (M.C.M.) App. 12 (maximum punishment chart).

2. Petitioners are three Navy servicemembers whose charges were referred to a military-judge special court-martial with limited punishment authority under Article 16(c)(2)(A).

a. In March 2020, Wheeler—a Master-at-Arms First Class (E-6)—was discovered sleeping at his post as a sentinel aboard a patrol boat tasked with maintaining the security of the harbor at Naval Station Everett, Washington. Pet. App. 2a, 25a. He was charged on one specification of sleeping while on post as a sentinel, in violation of Article 95(a) of the UCMJ, 10 U.S.C. 895(a). See CAAF App. 130.

When tried before a court-martial that includes members, an Article 95(a) offense like Wheeler's would carry a maximum punishment of one year of confinement, forfeiture of all pay and allowances, and a dishonorable discharge. 10 U.S.C. 856(a); M.C.M. Pt. IV, ¶ 22.d(1)(c);

see Pet. App. 25a. In Wheeler's case, however, the convening authority referred the case for trial by special court-martial under Article 16(c)(2)(A), reducing the potential punishment by, *inter alia*, limiting the maximum statutory period of confinement to six months. See 10 U.S.C. 819(b); CAAF App. 129.

Before trial, Wheeler moved to dismiss the case on the theory that his court-martial under Article 16(c)(2)(A) violated the Fifth and Sixth Amendments. CAAF App. 132-135. The military judge denied that motion. *Id.* at 141-145. The military judge found Wheeler guilty after trial and sentenced him to 15 days of confinement. Pet. App. 3a. The convening authority suspended confinement beyond seven days for six months, to be remitted at that time with no further action unless vacated sooner. *Id.* at 3a n.1; see 10 U.S.C. 860b(a)(1)(E). The military judge entered judgment accordingly. CAAF App. 165-166; see 10 U.S.C. 860c(a)(1).

b. From May to July 2019, Martin—an aviation ordinanceman second class (E-5)—sexually harassed four sailors while on active duty onboard the aircraft carrier U.S.S. *Nimitz* (CVN-68), in violation of the Navy Policy on Sexual Harassment. Pet. App. 57a; Entry of Judgment 1 (Apr. 13, 2020). Martin was charged on one specification of violating a lawful general order, in violation of Article 92(1) of the UCMJ, 10 U.S.C. 892(1). See Charge Sheet (Nov. 5, 2019).

When tried before a court-martial that includes members, that offense may be punished by up to two years confinement, forfeiture of all pay and allowances, and a dishonorable discharge. 10 U.S.C. 856(a); M.C.M. Pt. IV, ¶ 18.d(1). However, the commanding officer of the U.S.S. *Nimitz*, as the convening authority, referred Martin's case to a special court-martial by military

judge alone under Article 16(c)(2)(A). Convening Order No. 3-19 (Oct. 28, 2019). As a result, the maximum punishment was six months of confinement and/or forfeiture of pay without a punitive discharge. 10 U.S.C. 819(b).

Martin moved to dismiss the charge on the theory that the Sixth Amendment requires a court-martial trial by members. Gov't NMCCA Br. 3. The military judge denied that motion. *Id.* at 3-4. After trial, the military judge found Martin guilty; sentenced him to a reprimand, reduction in rate to E-3, and restriction to the limits of the U.S.S. *Nimitz* for 60 days; and entered judgment. Entry of Judgment 1-2.

c. In December 2019, petitioner Diaz—a submarine communications electronics technician third class (E-4)—pointed a loaded pistol at another sailor while on active duty at the Puget Sound Naval Shipyard. Entry of Judgment 1 (Aug. 5, 2020). Diaz was charged on three specifications, including one specification of willful dereliction of duty by willfully failing to follow firearm safety protocols, in violation of Article 92(3) of the UCMJ, 10 U.S.C. 892(3), and one specification of assault, in violation of Article 128(a) of the UCMJ, 10 U.S.C. 928(a). See Pet. App. 54a; Charge Sheet (Apr. 1, 2020).

When tried before a court-martial that includes members, willful dereliction of duty may be punished with up to six months of confinement, forfeiture of all pay and allowances, and a bad-conduct discharge, M.C.M. Pt. IV, ¶ 18.d(3)(c), and simple assault was punishable by up to three months of confinement and three months of forfeiture of two-thirds pay, M.C.M. Pt. IV, ¶ 77.d(1)(a) (2019); see Pet. 11. But the commanding officer of the nuclear-powered attack submarine U.S.S.

Olympia (SSN-717), as the convening authority, referred Diaz's case to a judge-alone special court-martial under Article 16(c)(2)(A), see Convening Order No. 1-20 (Apr. 2, 2020), which foreclosed the possibility of a bad-conduct discharge. 10 U.S.C. 819(b).

Diaz moved to dismiss the prosecution on the theory that he was entitled to a court-martial trial by members under the Fifth Amendment's Due Process Clause. Gov't NMCCA Br. 3. The military judge found no due-process violation and denied the motion. *Ibid.* After trial, the military judge found Diaz guilty on the two specifications noted above; sentenced him to 30 days of confinement and reduction in grade to E-3; and entered judgment. Entry of Judgment 1-2.

3. The en banc NMCCA affirmed in Wheeler's case. Pet. App. 23a-52a. In doing so, the court explained that Article 16(c)(2)(A) does not violate the Fifth Amendment's Due Process Clause. *Id.* at 29a-45a. One judge concurred in the judgment, "to express [his] concern with the methodology used by Congress in creating a military judge-alone special court-martial." *Id.* at 45a-52a. He agreed, however, that Article 16(c)(2)(A) comports with due process. *Id.* at 45a-46a. And the NMCCA subsequently affirmed in Martin's and Diaz's cases based on its decision in Wheeler's case. Pet. App. 53a-55a, 56a-58a.

4. The CAAF then granted review in Wheeler's case to consider, *inter alia*, the due-process challenge to Article 16(c)(2)(A) and affirmed. Pet. App. 1a-20a. Like the en banc NMCCA, the CAAF recognized that the Fifth Amendment's Due Process Clause does not grant the right to a court-martial composed of a panel of members where, as here, the maximum possible sentence for the alleged specification is limited by statute to six

months of confinement without a punitive discharge. *Id.* at 2a; see *id.* at 6a-17a.

Quoting this Court, the CAAF observed that "[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." Pet. App. 8a (quoting *Weiss*, 510 U.S. at 177); see *id.* at 17a (noting that Article 16(c)(2)(A) was enacted pursuant to Congress's military-regulation authority). The court explained that such deference reflects the Constitution's vesting of "Congress [with] primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.* at 8a (quoting *Solorio* v. *United States*, 483 U.S. 435, 447 (1987)).

Again drawing from this Court's decisions, the CAAF focused on three factors relevant to the "interests of the [servicemember] and those of the [military] regime to which he is subject." Pet. App. 7a (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). Specifically, it looked to (1) the "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." *Id.* at 8a-9a.

With respect to historical practice, the CAAF acknowledged that while a "long historical tradition of courts-martial by panels of members" exists, so does "an equally long tradition of disposition of minor offenses" in the military without such panels. Pet. App. 9a & n.3; see *id.* at 9a-10a. The court noted that, for example, by 1775, "a solitary officer could in his sole discretion administer limited punishments for low-level offenses." *Id.* at 9a-10a n.3.

The CAAF also noted that the practice of utilizing "a panel of members at special courts-martial" was "due in part to the fact that military judges did not exist until they were created by Congress in 1968." Pet. App. 7a; see *id.* at 9a. And it recognized that in the civilian context with civilian judges, the court emphasized, "there is no constitutional right to trial by jury for petty offenses," a category that presumptively includes offenses punishable by no more than "six months of confinement." *Id.* at 10a n.3. The court nevertheless concluded that because military judges since 1968 had tried cases without members only with the accused's assent, prior tradition "weighs in favor of a due process right to a panel in this case." *Id.* at 10a.

The CAAF recognized, however, that "nothing in the Constitution * * * suggests that 'court-martial usage at a particular time must be frozen in such a way that Congress might not change it'" and, as such, "historical tradition is not dispositive of the question whether a proceeding violates Fifth Amendment due process." Pet. App. 16a (quoting *Solorio*, 483 U.S. at 446) (brackets omitted). And in light of its examination of the other two factors, the court found it appropriate to "defer[] to Congress's determination" that Article 16(c)(2)(A) "promotes discipline in the armed forces and enhances a commander's ability to fairly and efficiently deal with minor offenses." *Id.* at 16a-17a.

Addressing the "[e]ffect on the [m]ilitary," the CAAF explained that, where "low-level misconduct" is involved, Pet. App. 10a-12a, placing military personnel on "detail[]" as court-martial members would take them "away from their regular duties in order to serve as prospective and selected panelists in a case involving offenses the command deemed minor"—a commitment of mili-

tary resources that might be "'better spent than in possibly protracted disputes over the imposition of discipline'" for low-level offenses. *Id.* at 12a (quoting *Middendorf*, 425 U.S. at 46). And reasoning that the option of a judge-alone special court-martial for such offenses punishable by no more than six months of confinement was "[c]onsistent with the constitutional authority to authorize civilian non-jury trials * * * in cases involving confinement for six months or less," *id.* at 11a (citation omitted; brackets in original), the court found that requiring panels of members in similar circumstances would "consume[] 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," *id.* at 12a (quoting *Middendorf*, 425 U.S. at 45).

Finally, the CAAF also found other procedural safeguards sufficient "to ensure a servicemember receives a fair trial before a military judge-alone special court-martial." Pet. App. 13a-15a. The court emphasized that such proceedings are conducted by "a qualified" and "independent" miliary judge with various protections that "ensure the impartiality" of the factfinder, *id.* at 13a-14a; that the accused is entitled by statute to "military defense counsel" at no cost or, if reasonably available, "military defense counsel of the accused's choosing," *id.* at 14a-15a; that post-trial military review is available, *id.* at 15a & n.6; and that, in the end, only certain offenses may be tried by a military judge pursuant to Article 16(c)(2)(A), under which punishment could not exceed "six months of confinement" or involve any "punitive discharge," *id.* at 15a.

Roughly a month later, based its decision in Wheeler's case, the CAAF summarily affirmed the judgments in Martin's and Diaz's cases. Pet. App. 21a, 22a.

ARGUMENT

Petitioners renew their claim (Pet. 12-29) that Article 16(c)(2)(A) of the UCMJ, 10 U.S.C. 816(c)(2)(A), violates the Due Process Clause when it authorizes a convening authority to refer certain low-level offenses for trial by a special court-martial composed of a military judge without members. The military appellate courts correctly rejected that claim. The CAAF's decision does not conflict with any decision of this Court or another court of appeals, nor does it resolve any question otherwise warranting this Court's review. The Court should deny certiorari.

1. The CAAF correctly recognized that the Fifth Amendment's Due Process Clause does not require a court-martial that can result only in six months of confinement and/or forfeiture of pay without a disciplinary discharge to include members in addition to the military judge. The limited authority conferred in Article 16(c)(2)(A) tracks the rule that applies in civilian courts, where the Sixth Amendment's express guarantee of a trial by jury presumptively does not apply if the maximum punishment that may be imposed after a bench trial is six months of imprisonment. Congress reasonably determined—pursuant to its broad Article I authority to govern and regulate the Nation's armed forces—that similar proceedings for the trial of low-level military offenses are appropriate. Nothing in the Due Process Clause suggests otherwise.

All but one of petitioners initially asserted a right to a court-martial by members by invoking the Sixth Amendment, which provides 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 commit-

ted," U.S. Const. Amend. VI. See pp. 6-7, *supra*. As the CAAF recognized (Pet. App. 6a n.2), it is well settled that the Sixth Amendment's "right to trial by jury" does not apply to "trials by courts-martial." *Whelchel* v. *McDonald*, 340 U.S. 122, 127 (1950) (citing *Ex parte Quirin*, 317 U.S. 1, 40-41 (1942), and *Kahn* v. *Anderson*, 255 U.S. 1, 8 (1921)); see *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *id.* at 137-138 (Chase, C.J., concurring in the judgment).

Even in the civilian context, however, the Court has long recognized that the Sixth Amendment's express jury-trial right applies only to trials for "serious crimes." *Lewis* v. *United States*, 518 U.S. 322, 327 (1996). This Court has repeatedly reaffirmed that no jury-trial right exists for a "petty" offense, a category that presumptively includes offenses for which the legislature has limited the maximum sentence that may be imposed after trial to six months or less. *Id.* at 327-328; see, *e.g.*, *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 543-544 (1989).[1]

In this Court, petitioners have abandoned any standalone Sixth Amendment claims, and instead rely solely on the more general language of the Fifth Amendment's Due Process Clause, which prohibits "depriv[ations] of life, liberty, or property, without due process of law," U.S. Const. Amend. V. See Pet. App. 6a n.2. But contrary to their contentions, that general language does not create a right—unique to the military context—for low-level military crimes analogous to civilian petty offenses to be tried before a court-martial that includes members in addition to a military judge.

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[1] This Court has before it a certiorari petition asking the Court to overrule its line of precedents recognizing that the Sixth Amendment's jury-trial right does not extend to petty offenses. See Pet. at 2, 13, *United States* v. *Lesh*, No. 24-654 (filed Dec. 13, 2024).

"The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953). "The rights of [servicemembers] in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976) (citation and brackets omitted). "The Framers especially entrusted * * * to Congress" the task of "determin[ing] the precise balance to be struck in this adjustment." *Ibid.* (citation omitted). The Constitution thus vests in Congress broad power to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14. "[T]he Framers * * * conferred th[at] power on Congress" in "plenary" and "unqualified language," reflecting that "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, 446-447 (1987).

Pursuant to that Article I authority, Congress may "authorize military trial of members of the armed services without all the safeguards given an accused by Article III and the Bill of Rights" and thus need not follow "the normal method of trial in civilian courts as provided by the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 19 (1957) (plurality opinion); see *id.* at 42 (Frankfurter, J., concurring in the result). And because "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline,'" the "'limitations of due process'" apply differently in court-martial contexts. *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (quoting *Chappell* v. *Wallace*,

462 U.S. 296, 301 (1983), and *Rostker* v. *Goldberg*, 453 U.S. 57, 67 (1981)) (brackets omitted).

Although "the Due Process Clause * * * provides some measure of protection to defendants in military proceedings" and ultimately requires a "'fair trial in a fair tribunal,'" *Weiss*, 510 U.S. at 176, 178 (citation omitted), "[j]udicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking in this area." *Id.* at 177 (quoting *Rostker*, 453 U.S. at 70); see *Solorio*, 483 U.S. at 447. That "deference" applies directly when the "due process rights" of "servicemen [are] implicated." *Solorio*, 483 U.S. at 448. Indeed, this Court has repeatedly emphasized that "courts 'must give particular deference to the determination of Congress'" when "determining what process is due." *Weiss*, 510 U.S. at 177 (quoting *Middendorf*, 425 U.S. at 43). The due-process "standard" in court-martial contexts therefore "ask[s] 'whether the factors militating in favor of [a procedure sought by a servicemember] are so extraordinarily weighty as to overcome the balance struck by Congress.'" *Id.* at 177-178 (quoting *Middendorf*, 425 U.S. at 44); see *id.* at 181.

Here, the CAAF correctly determined that the Due Process Clause does not nullify Congress's exercise of its Article I authority to authorize a judge-alone special court-martial to try low-level offenses for which confinement may not exceed six months of confinement. "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss*, 510 U.S. at 174. Among other things, Congress established the position of "military judge" in 1968 to serve as the "presiding officer at a spe-

cial or general court-martial," "rule[] on all legal questions," and, if the court-martial includes members, to instruct them "regarding the law and procedures to be followed." *Id.* at 167. In 2016, Congress continued its journey on that path, when it expanded the role of military judges to judge-alone trials of offenses in contexts that parallel those in which the civilian system permits judges to try petty offenses without a jury.

After someone subject to the UCMJ (such as a military investigator) has formally alleged that a servicemember has committed an offense under the UCMJ, 10 U.S.C. 830(a) and (b), the servicemember's commanding officer (or since 2023, depending on the allegations, an approved officer who is bar-certified) may convene a court-martial to adjudicate the case. 10 U.S.C. 822(a), 823(a); see 10 U.S.C. 801(17), 824a(b)(1), (c)(2)(A), (4), and (5) (Supp. IV 2022). The officer must make an initial judgment about "what disposition should be made" of the misconduct allegations "in the interest of justice and discipline," 10 U.S.C. 830(c)(2), in light of relevant advice from or consultation with a military lawyer, 10 U.S.C. 834(a)(1) and (b) (2018 & Supp. III 2021).

Nonbinding guidance issued by the Secretary of Defense, 10 U.S.C. 833, provides that such officers should consider several factors before deciding to pursue charges, including whether the evidence is "probably sufficient" to support a guilty finding; "the nature, seriousness, and circumstances of the alleged offense"; "the accused's culpability"; and whether referral to a particular "type of court-martial" would be appropriate for the "potential sentence or range of punishments" that "the circumstances of the case justify" in light of the "maximum and minimum punishments" that would apply. M.C.M. App. 2.1, §§ 2.1(a) and (c), 2.5(a), (b), (d),

and (e); cf. 10 U.S.C. 856(c)(1)(A) (punishment by court-martial must account for "the nature and circumstances of the offense" and must be "sufficient, but not greater than necessary, to promote justice and to maintain good order and discipline in the armed forces").

If the relevant officer elects to proceed with charges and determines that they warrant criminal court-martial proceedings, the officer, as the convening authority, may direct trial by a court-martial of one of three types, correlated to the seriousness of the charge. First, the officer may refer a charge to a general court-martial with eight members, where a finding of guilty may then result in the full (noncapital) punishment for the charge authorized by statute and military regulation. See 10 U.S.C. 816(b)(1), 818(a). Second, the officer may refer a charge to a special court-martial with only four members, where a finding of guilty on the charge can result in "confinement for [no] more than one year" without a "dishonorable discharge" or "dismissal." See 10 U.S.C. 816(c)(1), 819(a).

Third, the officer in certain circumstances may refer a charge to a judge-alone special court-martial, where a guilty finding on the charge can result in "confinement for [no] more than six months" without a disciplinary discharge. 10 U.S.C. 816(c)(2)(A), 819(b); see R.C.M. 201(f)(2)(E)(i); see pp. 4-5, *supra*. The officer's decision to refer charges to a judge-alone special court-martial reflects a determination that the charges involve sufficiently "low-level criminal misconduct" that a low maximum punishment is warranted. See *MJRG Report* 222. Such circumstances in the military context are analogous to the trial of petty criminal offenses in the civilian system, which can result in a maximum sentence of im-

prisonment after trial of no more than six months and for which the defendant has no right to a trial by jury.

Thus, as the CAAF recognized (Pet. App. 12a), Congress could have permissibly determined—consistent with the MJRG's recommendation—that given "the relative insignificance of the offenses being tried," those disciplinary scenarios do not warrant "the resources of the military" required to detail military personnel as members of a court-martial which would instead be "better spent" achieving military objectives other than the resolution of "possibly protracted disputes over the imposition of discipline." *Middendorf*, 425 U.S. at 45-46. As the CAAF recounted, other procedural safeguards sufficiently "ensure a servicemember receives a fair trial before a military judge-alone special court-martial." See Pet. App. 13a-15a; p. 11, *supra*. The trial of such low-level crimes in the military system does not need—and the Due Process Clause does not inflexibly require—diverting servicemembers to participate in a court-martial for relatively minor infractions analogous to those that are triable in the civilian context by a judge alone.

2. Petitioners largely disregard the critical role of Congress's Article I authority over military discipline and identify no sound basis for displacing Congress's judgment, let alone the "extraordinarily weighty" showing required to do so, *Weiss*, 510 U.S. at 177 (citation omitted). They instead suggest (Pet. 13-23) that the CAAF's analysis has "two problems." Pet. 13. But their contentions cannot withstand scrutiny.

a. First, petitioners contend (Pet. 13-16) that the practice of having panels of members in "Founding-era courts-martial are the due process baseline," which "ought to be conclusive" when defining what process is

due under the Fifth Amendment. Pet. 14, 17. They focus (Pet. 3, 13-14, 17), on Justice Scalia's statement in his separate opinion in *Weiss* v. *United States* that once a procedure is "firmly rooted in the practices of our people," such a process cannot be "so fundamentally unfair as to deny due process of law." *Weiss*, 510 U.S. at 199 (Scalia, J., concurring in part and concurring in the judgment) (citation and internal quotation marks omitted). Petitioners then assert (Pet. 17; see Pet. 3) that the converse must also be true—namely, that because a "historical practice was conclusive *against* a new procedural right in *Weiss*, it ought to be conclusive in *favor* of an old one here."

But a proposition does not imply its converse. And petitioners' efforts to make historical practices both a ceiling *and* a floor on a servicemember's constitutional rights—which would eliminate any latitude for adjustment by Congress or the President—is deeply flawed. The "plenary" and "unqualified language" that "the Framers of the Constitution" drafted in Article I to "confer[] * * * on Congress" the power to govern and regulate the land and naval forces itself demonstrates that the Constitution does not "freeze court-martial usage at a particular time in such a way that Congress might not change it." *Solorio*, 483 U.S. at 446. Petitioners' position would set military procedure in stone, tie the hands of Congress, and preclude any number of Congress's subsequent statutory modifications to court-martial procedures.

Indeed, under petitioner's view, it is unclear whether Congress's 1968 innovation of presiding military judges who decide questions of law and provide instructions that bind court-martial members would be consistent with due process. No sound reason exists, however, for

deeming military disciplinary procedure to be forever constitutionally frozen. To the contrary, flexibility to innovate and adapt is especially important in the military context, as the Framers recognized by granting Congress plenary authority to regulate the military, U.S. Const., Art. I, § 8, Cl. 14, and making the President the armed forces' commander-in-chief, see Art. II, § 2, Cl. 1. And the CAAF gave weight, just not dispositive weight, to historical practices in assessing whether the Due Process Clause must intrude into the combined legislative and executive judgment at issue here. See, *e.g.*, Pet. App. 16a.

b. Petitioners also contend (Pet. 16-23) that the CAAF's context-specific analysis should have given more weight to history and less weight to other factors. But petitioners' suggestion (Pet. 18) that the CAAF "failed to account" for the fact that the costs of detailing military personnel as courts-martial members "*already existed*," largely repackages their contention that historical practices should be dispositive. Article I allows Congress to take advantage of fairness-increasing innovations, like the introduction of a military judge, to remediate the longstanding burden of diverting servicemembers to serve on the court-martial of minor crimes. Cf. *Lewis*, 518 U.S. at 338-339 (Kennedy, J., concurring in the judgment) (noting the "enormous burdens" that would be placed on the civilian criminal justice system if jury trials were required to adjudicate petty offenses).

Petitioners incorrectly suggest (Pet. 19) that "the risk of erroneous conviction increases" where the number of factfinders is reduced from a panel of members to a single judge. But even if that is true, our long tradition of judges in the civilian system trying petty offenses without a jury illustrates that any potential risk

of judicial factfinding error is insufficient to require a lay factfinding body where, as here, the maximum potential punishment after a bench trial cannot exceed six months of confinement. See, *e.g.*, *Blanton*, 489 U.S. at 545 (rejecting contention that a trial by jury for a petty offense is required because a subsequent criminal trial might result in "increased penalties for repeat offenses"); cf. *Schriro* v. *Summerlin*, 542 U.S. 348, 355-356 (2004) (discussing potential concerns about fairness of single-judge factfinding).

Petitioners assert (Pet. 21) that judge-alone special courts-martial are "empowered to try felonies and serious misdemeanors" and thus are not "limited to petty offenses." The UCMJ, however, does not categorize military offenses as felonies or misdemeanors. Instead, it permits offenses like petitioners' to be submitted for trial by a special court-martial by a military judge, where a convening authority has determined that they are sufficiently minor that a maximum sentence of no more than six months of confinement is appropriate. 10 U.S.C. 819(b); see pp. 4-5, 16-17, *supra*. They are thus functional analogues of petty offenses in the civilian context. Far from being a "significant[] depart[ure]" from the "'procedural protections * * * given in a civilian criminal proceeding,'" Pet. 28 (citation omitted), Article 16(c)(2)(A) reflects Congress's permissible exercise of its Article I authority to revise the modern military justice system in a manner that more closely parallels its civilian counterpart.

Finally, petitioners suggest (Pet. 25) that the CAAF's decision "strongly implies that Congress could eliminate panels for all military prosecutions," including "those that could result in a death sentence." But petitioners' speculation is ill-founded. The CAAF simply de-

termined that Congress may authorize judge-alone special courts-martial where it has "statutorily limited the maximum possible sentence to six months of confinement with no punitive discharge authorized," which is "'[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.'" Pet. App. 2a, 11a (citation omitted; brackets in original). And it did so through a circumstance-specific analysis. See *id.* at 9a, 16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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