IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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| UNITED STATES,<br>Appellee | ) | BRIEF ON BEHALF OF APPELLEE |
| v. | ) | Crim.App. Dkt. No. 201400021 |
| Darron WARD, Jr.,<br>Culinary Specialist<br>Seaman Apprentice (E-2)<br>U.S. Navy<br>Appellant | ) | USCA Dkt. No. 15-0059/NA |

TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES:


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## Issue Presented

**THE CONVENING AUTHORITY ISSUED AN INSTRUCTION THAT LIMITED COURT-MARTIAL MEMBER NOMINATIONS TO PERSONNEL ONLY IN THE PAY-GRADES BETWEEN E-7 AND O-5. THE LOWER COURT FOUND THIS SYSTEMATIC EXCLUSION OF PERSONNEL TO BE ERROR, BUT HARMLESS. THIS COURT SHOULD APPLY THE RATIONALE OF *UNITED STATES V. KIRKLAND* AND REVERSE DUE TO THE UNRESOLVED APPEARANCE OF UNFAIRNESS CAUSED BY THE EXCLUSION OF POTENTIALLY QUALIFIED MEMBERS.**

## Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66(b)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866(b)(1) (2012), because Appellant's approved sentence included a dishonorable discharge. This Court has jurisdiction in this case based on Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2012).

## Statement of the Case

A panel of members with enlisted representation sitting as a general court-martial convicted Appellant, contrary to his pleas, of one specification of fleeing apprehension, one specification of rape, and one specification of communicating a threat, in violation of Articles 95, 120, and 134, UCMJ, 10 U.S.C. §§ 895, 920, and 934 (2012). The Members acquitted Appellant of one specification of assault upon a commissioned officer, in violation of Article 128, UCMJ, 10 U.S.C. § 928 (2012).

The Members sentenced Appellant to 933 days confinement and a dishonorable discharge. The Convening Authority approved the sentence as adjudged and, except for the punitive discharge, ordered it executed.

On July 31, 2014, the lower court affirmed the findings and sentence. *United States v. Ward*, No. 201400021, 2014 CCA LEXIS 535 (N-M. Ct. Crim. App. Jul. 31, 2014). Appellant filed a Petition for Review, which this Court granted on December 8, 2014.

## Statement of Facts

### A. The Convening Authority referred charges to general court-martial and detailed Members in accordance with Article 25, UCMJ.

On May 17, 2013, Rear Admiral T.N. Branch, the Commander, Naval Air Force Atlantic, referred charges against Appellant for forcibly penetrating a female civilian's vulva with his finger, threatening that civilian, fleeing from an Air Force lieutenant colonel, and assaulting the lieutenant colonel while fleeing. (J.A. 9-12.) The Commander referred the charges to general court-martial convened by his General Court-Martial Convening Order 1-13 dated February 4, 2013. (J.A. 11-12.)

Appellant elected to be tried by members with enlisted representation. (J.A. 60-62.) On August 27 and September 5, 2013, Rear Admiral T.M. Shoemaker, Rear Admiral Branch's successor-in-command, modified the detailed Members in

Appellant's case in General Court-Martial Orders 1C-13 and 1D-13, respectively.[1] (J.A. 152-53.) The Convening Authority ultimately detailed two O-5s, three O-4s, one E-8, and six E-7s as members for Appellant's court-martial. (J.A. 66-67, 153.) The Convening Authority considered the factors listed in Article 25, UCMJ, in detailing the Members. (J.A. 184-85.)

B. Appellant received the Members questionnaires during trial which cited the Instruction used by subordinate commands to nominate Members. Appellant conducted *voir dire* and made three challenges. Appellant did not object to the Panel composition at trial.

During trial and after motions, Appellant received the Members questionnaires. (J.A. 142, 169-70.) Each of them indicated at the top of each page the Instruction used for Members nominations from subordinate commands, Commander, Naval Air Force Atlantic Instruction (COMNAVAIRLANTINST) 5813.1H.[2] (J.A. 88-140, 146.) Appellant made no objection at trial to the nomination or detailing of Members. (J.A. 142.) Appellant challenged three Members, two of which the Military Judge granted. (J.A. 71-83.) Appellant then made two peremptory challenges per the Military Judge's ruling on the Defense's

[1] Rear Admiral Shoemaker had previously made two modifications to the February 4, 2013, Convening Order for a different court-martial. (J.A. 64, 150-51.) The Military Judge attached those convening orders, 1A and 1B-13, to the Record as Appellate Exhibit LXX for explanatory purposes. (J.A. 64-65.)

[2] Several of the questionnaires cited the previous Instruction 5813.1G. (J.A. 94, 98, 102-109, 113, 116.)

unlawful command influence Motion. (J.A. 63, 83-84.) After *voir dire* of 203 pages, Appellant again had no objection. (J.A. 68-70, 85.)

C. The Instruction cited on the Members questionnaires tasked subordinate commands to nominate personnel best qualified by reason of age, education, training, experience, length of service, and judicial temperament for potential court-martial duty to supplement questionnaires completed by Naval Air Force Atlantic staff.

In 2008, the Commander, Naval Air Force Atlantic, issued COMNAVAIRLANTINST 5813.1H, that published procedures for the submission of nominations from its subordinate commands for prospective court-martial members. (J.A. 146-48.) Paragraph 5 of the Instruction required subordinate commands to submit quarterly nominations in the number and grade indicated. (J.A. 146.) Specifically, paragraph 5.a required nominations for servicemembers in the grades of commander (O-5), lieutenant commander (O-4), lieutenant (O-3) and below, and enlisted (E-7, E-8, and E-9). (J.A. 147.)

Paragraph 5.a of the Instruction is prefaced with a statement that the tasking to subordinate commands for additional nominees is for the purpose of supplementing the Convening Authority's pool of prospective members:

> *In addition to* COMNAVAIRLANT Staff members who regularly sit on courts-martial, the commands listed below are required to submit quarterly nominations for prospective members in the number and grade indicated,

> to serve as court-martial members for a period of three months. . .

(J.A. 146 (emphasis added).)

The subordinate commands were required to submit quarterly nominations by written memorandum with the completed court-martial questionnaire for each nominee attached. (J.A. 88-90, 147.) A blank questionnaire was attached to the Instruction as enclosure (1). (J.A. 88-90, 146-47.)

Further, paragraph 5.d of the Instruction required the subordinate commands to submit additional nominations if an accused elected enlisted representation——"one or more of the assigned AIRLANT units will be required to provide additional enlisted personnel to serve as members of such court-martial." (J.A. 147.)

D. <u>During post-trial clemency, Appellant challenged the panel selection for the first time</u>.

In a Supplemental Request for Clemency, Appellant claimed that the Members had been improperly detailed, selected, and empanelled. (J.A. 141.) Appellant asserted that COMNAVAIRLANTINST 5813.1H systematically excluded prospective members based on grade. (J.A. 141.) Appellant claimed the Instruction prevented the Commander from nominating officers in paygrades O-6 and above and enlisted in paygrades E-6 and below. (J.A. 141.)

Further, he claimed it was apparent that the Convening Authority used the Instruction to detail Members to his court-martial, because the Convening Authority detailed no officers above paygrade O-5 or enlisted members below paygrade E-7. (J.A. 141.) Appellant stated in the Supplemental Request that he was unaware of the Instruction before trial. (J.A. 163.)

The Force Judge Advocate, Captain Welsh, considered the Request. (J.A. 171-72.) He advised the Convening Authority that the issue lacked merit and that Appellant waived the issue by failing to raise it at trial. (J.A. 171-72.) The Convening Authority approved and executed the sentence as adjudged. (J.A. 174-75.)

E. Post-trial affidavits confirm that the Convening Authority used Article 25 criteria in selecting Appellant's members and that he did not, nor did he intend to, systematically exclude members based on grade.

Following Appellant's trial, the same legal issue was litigated in a post-trial motion in a different court-martial, *United States v. Lesley*, No. 201400271, convened by the same Convening Authority as in this case. The Convening Authority and his Force Judge Advocate submitted affidavits explaining how the members were nominated and detailed in that case as well as more generally within the command. (J.A. 180-85.)

Before the lower court and with consent of Appellant, the United States moved to attach these affidavits along with an affidavit from CAPT Mitchell, the Force Judge Advocate at the time of referral in this case. (J.A. 176-79.) The United States argued the affidavits demonstrated lack of impropriety, but asked the lower court to order further factfinding if necessary to resolve the issue. (J.A. 32.)

1. The Convening Authority explained in his affidavit that he had no intent to systematically exclude any grade.

The Convening Authority assumed command of Naval Air Force Atlantic in June 2013. (J.A. 184.) This was his sixth command tour. (J.A. 184.) He stated in his affidavit in *Lesley* that he had never issued any directions regarding a desired outcome in any case or any instructions to detail members based on grade. (J.A. 185.) However, he had discussed with his staff that he must select the best qualified by reason of age, education, training, experience, length of service, and judicial temperament in accordance with Article 25, UCMJ. (J.A. 184-85.) He emphasized that he never intended to systematically exclude anyone on the basis of grade. (J.A. 185.)

2. The Force Judge Advocate responsible for gathering ten[3] of fifteen Members questionnaires in this case submitted an affidavit stating that he had no intent to systematically exclude any grade.

Captain Mitchell served as the Force Judge Advocate of Naval Air Force Atlantic from August 2011 until August 2013. (J.A. 179.) Ten or eleven of the fifteen Members questionnaires in this case were gathered from subordinate commands while Captain Mitchell served as Force Judge Advocate. (J.A. 88-140.)

Captain Mitchell's affidavit explained that everyone who checked into the Naval Air Force Atlantic staff was required to complete a court member questionnaire. (J.A. 178.) He also stated that subordinate commands submit nominations, "and the only requirement is that they be senior to the accused." (J.A. 178.) Captain Mitchell also affirmed that, "there was no intent by the Commander or [him] to systematically exclude E-6 and below personnel from serving as court-martial members." (J.A. 178.) Rather, Captain Mitchell "advised the Commander that he could choose from the questionnaires presented to him or that he could select anyone within his claimancy he deemed to be best qualified." (J.A. 179.)

[3] CAPT Mitchell may have gathered eleven of the questionnaires. One of them is not dated and may be attributable to CAPT Welsh. (J.A. 119.)

3. The Force Judge Advocate responsible for gathering the remaining four or five Members questionnaires, preparing the convening orders, and advising the Convening Authority on Appellant's clemency request submitted an affidavit stating that he had no intent to systematically exclude any grade.

Captain Welsh assumed duties as the Force Judge Advocate on August 5, 2013. (J.A. 180.) The Convening Authority signed the modified convening orders in this case on August 27, and September 5, 2013. (J.A. 152-53.)

In his affidavit submitted in *Lesley*, Captain Welsh stated that the Convening Authority had constructive knowledge of the Instruction, but that he did not review it prior to selecting members in any case. (J.A. 181.) Captain Welsh reiterated that all Naval Air Force Atlantic staff complete a questionnaire upon reporting to the command and that the subordinate commands also nominate members. (J.A. 180.) He also indicated that the subordinate commands in the area have only one or two O6s who are in billets such as commanders of operational aircraft carriers. (J.A. 180.)

Captain Welsh unequivocally stated in his affidavit that neither he nor the Convening Authority had ever sought to select a panel to achieve a desired result. (J.A. 182.)

## Summary of Argument

Appellant failed to meet his burden to establish that COMNAVAIRLANTINST 5813.1H systemically excluded members based on grade from his trial. While the Convening Authority directed nominations from specific grades in the Instruction, the class of grade-limited nominations did not constitute the entire pool of potential members. The Instruction did not restrict nominations from Naval Air Force Atlantic staff or from additional members solicited in response to an accused's request for enlisted members.

Moreover, even if the Instruction systematically excluded potential members based on grade, under *Bartlett*, Appellant suffered no prejudice. There is no evidence of improper motive and the Convening Authority used Article 25, UCMJ, criteria in selecting the Members. The Record as a whole demonstrates a lack of harm.

## Argument

NO ERROR OCCURRED BECAUSE THE ADMINISTRATIVE INSTRUCTION EXPANDED THE POOL OF NOMINEES AVAILABLE FOR DETAILING TO COURTS-MARTIAL, AND DID NOT SYSTEMATICALLY EXCLUDE ANYONE FROM SERVING AS COURT-MARTIAL MEMBERS.

A. Standard of Review.

"Whether a court-martial panel was selected free from systematic exclusion" is a question of law reviewed *de novo*. *United States v. Kirkland,* 53 M.J. 22, 24 (C.A.A.F. 2000) (citing *United States v. McClain,* 22 M.J. 124 (C.M.A. 1986)).

B. The lower court erred in concluding that the "record is clear that service members were impermissibly excluded from the member selection process by virtue of their rank."

1. Nothing in the Instruction places any grade restrictions on nominations from the Naval Air Force Atlantic staff.

The deliberate exclusion of a class of otherwise qualified personnel from service on courts-martial is improper. *McClain*, 22 M.J. at 133 (Cox, J., concurring). A convening authority may not "systematically exclude" members from serving on a court-martial solely on the basis of their grade. *United States v. Roland,* 50 M.J. 66, 68 (C.A.A.F. 1999)).

Both Force Judge Advocates stated that everyone who checked into Naval Air Force Atlantic as staff was required to complete a questionnaire for prospective court-martial assignment. (J.A. 178-180.) Therefore, the command had questionnaires from all

personnel assigned to the command, and the Instruction did not place any grade restrictions on the nominations from the Naval Air Force Atlantic staff. (J.A. 146.) Paragraph 5.a of the Instruction, that directs nominations from subordinate commands in specific grades, is prefaced with a clear tasking statement that the subordinate command nominations are "in addition to COMNAVAIRLANT Staff members." (J.A. 146-47.)

Further, Appellant did not litigate this issue at trial or develop facts to support this, and does not now allege that the Instruction systematically excluded anyone from the Naval Air Force Atlantic staff. The Record does not support that the Instruction excluded members based on grade from the Naval Air Force Atlantic staff.

2. Similarly, in cases of enlisted personnel, the Instruction requests additional enlisted nominations, places no rank restriction on these nominations, and requires that they be Article 25, UCMJ, compliant.

On its face, the Instruction does not exclude E-6s and below assigned to subordinate commands. (J.A. 146-47.) Pursuant to Paragraph 5.d of the Instruction, if an accused elects members with enlisted representation, the Instruction requires one or more subordinate commands "to provide additional enlisted personnel to serve as members of such court-martial." (J.A. 147.)

The Instruction does not identify the number or grade required for these additional case-specific enlisted nominations. (J.A. 147.) And as indicated by the first Force Judge Advocate, the only requirement was that the member be senior to the accused. (J.A. 178.) Therefore, although the Instruction did not require quarterly nominations from E-6s and below, it placed no grade restrictions on, and did not systematically exclude these nominations.

3. The Commander's own Instruction, to supplement unrestricted staff nominations, directs subordinate commands to nominate E-7s and above.

The nomination process is a reasonable means of assisting the convening authority in member selection. *Roland*, 50 M.J. at 69. Appellant has the burden of establishing that qualified personnel were improperly excluded from the selection process. *Kirkland*, 53 M.J. at 24 (citing *Roland,* 50 M.J. at 69).

a. The Convening Authority properly issued an order calling for a quarterly class of grade-limited nominations from subordinate commands.

Article 25, UCMJ, establishes the criteria to screen potential court-martial members. *United States v. Gooch*, 69 M.J. 353, 357 (C.A.A.F. 2011). However, Article 25, UCMJ, criteria are not exclusive, as the operation of Article 25, UCMJ, has been further defined by case law. *Id.* at 358.

For example, Article 25(d)(1) requires screening of members junior in rank and grade to an accused. *Id.* "Further, although not enumerated as an express criterion in Article 25, UCMJ, availability in the military context is an appropriate screening factor." *Id.* Such screening is imperative to maintain good order and discipline in an operational context. *Id.*

So too, in *United States v. Yager,* 7 M.J. 171 (C.M.A. 1979), the Court of Military Appeals found no violation of Article 25 in the convening authority's order to allow commands to exclude E-1 and E-2 grades from nominations. *Id.* at 173. The *Yager* court reasoned that "there was a demonstrable reason for the exclusion of these grades reasonably related to the criteria for qualification under Article 25(d)(2), because the application of these criteria would exclude most, if not all, of the grades involved." *Id.*

The Convening Authority published the Instruction in order to have qualified officers and senior enlisted from each of his subordinate commands on stand-by to serve as court-martial members "in today's high-tempo military, [where] finding officers who will be available some time in the future is often a difficult task." *Gooch*, 69 M.J. at 364 (Stucky, J., dissenting). Further, the Instruction was an appropriate screening tool to broaden the pool of qualified members outside of the Naval Air Force Atlantic staff. It was the Commander's

prerogative to have a standing pool of senior personnel available to serve as court-martial members. Given the unique nature of the military "to fight and be ready to fight the nation's wars," military realities should be "read into" the Convening Authority's own directions to his subordinate commands, and it should be presumed that the Convening Authority implemented the Instruction for a proper, military purpose, unless the Defense proves otherwise. *See United States v. Forney*, 67 M.J. 271, 275 (C.A.A.F. 2009)(quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

b. No precedent supports that the Convening Authority's own Instruction impermissibly violates Article 25.

No case law prohibits a Convening Authority, as in this case and in *Yager*, from implementing an Instruction such as this that solicits nominations from his subordinate commands. This Court's precedent only establishes that others cannot limit the nomination pool presented to the convening authority. For example, the *Roland* court upheld the quarterly nomination process initiated by the staff judge advocate, because the defense failed to meet their burden to show unlawful command influence. 50 M.J. at 69. Conversely, the *Bartlett* court found error in the Secretary of the Army's exclusion of certain classes of officers from consideration, but held the error to be harmless. *United States v. Bartlett*, 66 M.J. 426, 431 (C.A.A.F.

2008); *see also United States v. Dowty*, 60 M.J. 163, 172, 176 (C.A.A.F. 2004)(staff judge advocate's use of volunteers did not prejudice appellant's substantial rights).

In both *Bartlett* and *Dowty*, it was an outside party who prevented the convening authority from personally considering all members of the command. In this case, as Appellant concedes, the Convening Authority considered all staff members. And the Convening Authority himself chose to solicit additional quarterly nominations restricted to E-7 above. No outside party in this case, however, restricted the Convening Authority from considering every member of the command, or of subordinate commands.

Because no precedent since *Yager* squarely addresses a situation like this, where the convening authority himself or herself asks for a limited group of nominations from subordinate commands and in the absence of evidence suggesting improper motive, the defense should bear the burden of demonstrating a violation of Article 25.

c. Appellant's reliance on *Kirkland* is misplaced. A subordinate commander in that case impermissibly limited the pool.

The *Kirkland* court reversed a quarterly nomination process initiated by the special court-martial convening authority. 53 M.J. at 24-25. In *Kirkland*, the base legal office sent a quarterly letter to subordinate commanders signed by the special

court-martial convening authority to solicit nominations for potential court-martial assignment. 53 M.J. at 23. Attached to the letter was a chart that specified the "number and rank of the personnel that each commander was asked to nominate." *Id*. The chart had a column for E-7, E-8, and E-9, but no place to list a nominee in a lower grade. To nominate an E-6 or below, the nominating official would have had to modify the form. *Id*.

Each subordinate command submitted a data sheet for each nominee to the legal office. *Id.* The legal office in turn provided names and data sheets of the nominees to the convening authority. *Id.* The staff judge advocate also advised the convening authority that he could select other members if they met the criteria of Article 25, UCMJ. *Id.*

At trial in *Kirkland*, the military judge denied the defense's motion for a new court-martial panel. *Id.* The *Kirkland* Court held that "under these facts. . .the military judge erred in denying the defense request." *Id.* at 24. Reversal was appropriate because of an unresolved appearance that potentially qualified court members below E-7 were excluded. *Id.*

Unlike *Kirkland*, the grade-specific nominations from the subordinate commands in this case were solicited by the Convening Authority and did not comprise the entire pool of potential members for his consideration. Rather, his pool of

nominations included the grade-specific nominations from Paragraph 5.a, enlisted nominations from Paragraph 5.d, and all servicemembers assigned to Naval Air Force Atlantic staff. (J.A. 146-47.) As indicated in *Gooch*, the Convening Authority was not required to consider all eligible members——he just could not exclude an entire class of eligible members based on rank, which he did not do. *Gooch*, 69 M.J. at 360, n. 7.

C. Even assuming Appellant has met his burden to show that COMNAVAIRLANTINST 5813.1H systematically excluded members of certain grades, under *Bartlett*, Appellant suffered no prejudice.

1. *Bartlett* established a workable, case-specific framework for assessing prejudice. It did not overrule *Kirkland*.

If this Court finds nonconstitutional error in the application of Article 25, UCMJ, this Court tests for prejudice pursuant to Article 59(a), UCMJ. *Bartlett*, 66 M.J at 430. This requires a case-specific, rather than a structural-error analysis. *Id.*

Based on precedent, the *Bartlett* court identified three categories of nonconstitutional error and their corresponding burdens. *Gooch*, 69 M.J. at 361. First, if administrative error, the appellant must show prejudice. *Bartlett*, 66 M.J. at 430 (citing *United States v. Upshaw*, 49 M.J. 111, 113 (C.A.A.F. 1998). Second, if the government intentionally excludes a class of eligible members, the government must show lack of harm.

*Bartlett*, 66 M.J. at 430 (citing *Dowty*, 60 M.J. 163). Third, if there is unlawful command influence, the government must prove beyond a reasonable doubt that the error was harmless. *Bartlett*, 66 M.J. at 430 (citing *United States v. Hilow*, 32 M.J. 439, 442 (C.M.A. 1991) and *McClain*, 22 M.J. at 132).

This categorical approach encapsulates the spirit of impartiality contemplated by Congress in enacting Article 25, UCMJ. *See McClain*, 22 M.J. at 132. The Government has a greater burden to demonstrate that the member selection process was fair and impartial in cases such as *McClain* where the convening authority categorically excluded junior officers and junior enlisted for the purpose of seeking a harsher sentence. 22 M.J. 130. On the other hand, the appellant has the burden to demonstrate prejudice in cases such as *Upshaw* where the convening authority excluded qualified servicemembers as a result of mistake or other administrative error. 49 M.J. at 113.

However, as the *Gooch* court noted, "the line between each category can be vague." 69 M.J. at 361. Citing the clear institutional bias in *McClain*, the *Kirkland* court held that the military judge in that case erred in denying the defense's request for a new panel based on an appearance of impropriety caused by a nomination process that required subordinate commands to submit quota submissions on a chart that did not provide any place to nominate members below the grade of E-7.

*Kirkland*, 53 M.J. at 24-25. Under the specific facts of that case, the *Kirkland* Court decided that the nomination process created an "unresolved appearance that potentially qualified court members below the grade of E-7 were excluded." *Kirkland*, 53 M.J. at 25. Essentially, the United States would have been unable to demonstrate lack of harm as it would have been required under *Bartlett*——the appearance of impropriety was too great under the facts of the case. Thus, *Bartlett* does not overrule *Kirkland*.

2. Applying *Bartlett*, Appellant suffered no prejudice. There is no evidence of improper motive here and the Convening Authority used Article 25, UCMJ, criteria in selecting the Members in this case.

In upholding the member selection process resulting from an Army regulation that systematically excluded certain classes of officers from consideration, the *Bartlett* court considered six factors in concluding the error was harmless: (1) the individual who enacted the regulation did not act with an improper motive; (2) the convening authority who detailed the members did not act with an improper motive; (3) the convening authority was authorized to convene a general court-martial; (4) the appellant "was sentenced by court members personally chosen by the convening authority by a pool of eligible officers; (5) the court members all met the criteria in Article 25, UCMJ;" and (6)

"the panel was well-balanced across gender, racial, staff, command, and branch lines." *Bartlett*, 66 M.J. at 431.

Here, Appellant has not pointed to any specific evidence that the Members were not fair or impartial or that he was prejudiced because of any unfairness or impartiality. In fact, Appellant conceded that "there is no facial evidence of either benign or malignant motive by those involved in the preliminary screening process." (J.A. 26.) There is also "no evidence that the convening authority's motivation in detailing the members he assigned to Appellant's court-martial was anything but benign." *See Bartlett*, 66 M.J. at 431; *see also United States v. Masusock,* 1 C.M.A. 32, 36 (C.M.A. 1951) (noting that there is a long-standing legal presumption of "regularity in the conduct of governmental affairs"); *cf. United States v. Hagen*, 25 M.J. 78, 84 (C.M.A. 1987) (holding that within context of allegation of vindictive prosecution by a convening authority, "[t]here is a strong presumption that the convening authority performs his duties as a public official without bias").

Further, Appellant's case was convened by a Convening Authority who was authorized to convene a general court-martial; Appellant was tried and sentenced by members personally chosen by the Convening Authority; and, "the court members all met the criteria in Article 25, UCMJ." *Id.*; s*ee also Gooch,* 69 M.J. at 361 (finding error but no prejudice because "the Article 25,

UCMJ, criteria were applied to the potential pool of panel members" and the resulting panel that tried appellant was "fair and impartial").

Moreover, the Military Judge conducted "a rigorous and diligent voir dire process" that encompassed 203 pages, after which he granted two of Appellant's three challenges. (J.A. 68-69, 71-83.) *See Gooch*, 69 M.J. at 361. He also granted Appellant an additional peremptory challenge. (J.A. 63.) The Record as a whole demonstrates a lack of harm. *See Bartlett,* 66 M.J. at 430-31. Accordingly, even if error, Appellant suffered no prejudice.

3. *Bartlett* still demands fairness in the nomination process as set forth in *Roland*.

The *Roland* court acknowledged that the nomination process is a reasonable means of assisting the convening authority in member selection. 50 M.J. at 69. However, the process may not systematically exclude servicemembers. *Id.* Nothing in *Bartlett* changes that. Rather, *Bartlett* identified the framework for assessing whether a faulty nomination process prejudiced an appellant's right to a fair and impartial panel. *See Gooch*, 69 M.J. at 361. Errors akin to the institutional bias in *McClain* increase the burden on the United States to demonstrate that the appellant was not prejudiced. This framework adequately addresses competing concerns of judicial economy, finality of

judgments, and an appellant's right to a fair trial. Thus, contrary to that asserted by Appellant, it creates a framework that allows for reversal in appropriate cases——this is just not one of them.

**Conclusion**

WHEREFORE, the United States respectfully requests that this honorable Court affirm the findings adjudged and approved below.

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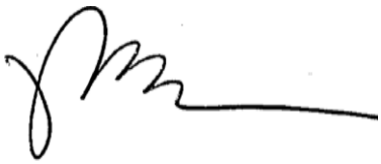

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2. This brief complies with the requirements of Rule 37 because it was prepared in a monospaced typeface using Microsoft Word Version 2010 with 12 point, Courier New font.

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I certify the foregoing was electronically filed with the Court at efiling@armfor.uscourts.gov as well as provided to opposing appellate defense counsel, Lieutenant Jessica Ford, JAGC, USN, at jessica.ford@navy.mil on February 24, 2015.

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