IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee v. **Thomas L. WHEELER** Master-at-Arms Petty Officer Third Class (E-4) U.S. Navy, Appellant	**REPLY ON BEHALF OF APPELLANT** Crim. App. Dkt. No. 202100091 USCA Dkt. No. 23-0140/NA

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

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Argument

A. The due process right to a multi-member panel is a longstanding historical protection against unfair criminal conviction, consistent with any sensible read of *Middendorf* and *Weiss*. No amount of deference to Congress or the Executive justifies stripping that right from servicemembers facing trial on offenses that could also be referred to a general court-martial.

Multi-member panels are a fundamental safeguard derived from the Due Process Clause of the Fifth Amendment. To find otherwise, the lower court accepted the Government's distortion of the due process balancing test established in *Middendorf v. Henry*, 425 U.S. 25 (1976) and *Weiss v. United States*, 510 U.S. 163 (1994).

As the Government rightly emphasizes, "the responsibility for balancing the rights of servicemembers against the needs of the military lies with Congress."[1] Thus the branch owed deference is the legislative—not the executive.[2] Contrary to the Government's Answer, this demands no inconsistency. When it comes to the best indicator of society's views when determining what is serious and what is petty, you may look to the executive's punishment limits.[3] But when it comes to testing whether criminal procedures abrogate due process rights, the deference is

[1] Gov. Ans. 11 (citing U.S. Const., art. 1, Sec. 8, cl. 14; *Weiss v. United States*, 510 U.S. 163, 177 (1994)).
[2] No court has said that the deference owed Congress when balancing the rights of servicemembers against the needs of the military is extended to the President.
[3] *United States v. Nachtigal*, 507 U.S. 1, 4 (1993) (looking to Secretary of Interior's punishments where properly delegated by Congress).

owed to Congress.

Here, assuming Congress identified a specific military "need" for commanders to more quickly and easily dispose of cases,[4] Congress failed to properly balance its procedural solution—elimination of member panels—against a servicemember's interest in a fair and reliable criminal conviction. Indeed, Congress' scheme for mandatory judge-alone courts-martial indicates barely any balancing at all. Under the plain language of Articles 16 and 19, UCMJ, a servicemember may be convicted of *any noncapital offense* at this forum.[5] Congress' statutes, read literally, effectively stripped all servicemembers of the right to a trial by members, unless charged with a capital offense.

Rather, Congress permits *the President* to set limitations on commanders' use of the mandatory judge-alone forum.[6] There is no precedent for such a scheme of delegation at courts-martial where panel rights are at stake, and the Government

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[4] J.A. 168 ("The committee is also committed to improving the efficiency of the military justice system. Therefore, provisions are included that would establish a military judge-alone special court-martial, an additional disposition option with confinement limited to 6 months and no punitive discharge.").

[5] 10 U.S.C. § 816 (2018) (a servicemember may be tried by a special court-martial consisting of military judge alone "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"); 10 U.S.C. § 819 (2018) ("[S]pecial courts-martial have jurisdiction to try persons subject to this chapter for any noncapital offense made punishably by this chapter and, under such regulations as the President may prescribe, for capital offenses.").

[6] 10 U.S.C. § 816(c)(2) (2018).

does not cite to one.

1. A servicemember's interest in a fair and reliable criminal conviction far outweighs any need for increased efficiency.

Even if the President were afforded the same deference as Congress, no actual "balance" is struck here. While the lower court and the Government characterize this new forum as one to dispose of "low-level" offenses,[7] the President did not adopt that restriction. Instead, the President set parameters that permit offenses carrying maximum possible confinement as high as five years to be disposed of in a forum that deprives a servicemember of a multi-member factfinder.[8] But neither the Government nor the lower court explains what constitutes a "low-level" offense, deferring instead to the decision of the convening authority.[9]

This practice, too, has no due process precedent, and leaving to a convening authority the decision of which offenses are subject to bench conviction creates a perverse and decidedly un-uniform justice system. That is, one in which two individuals charged with identical offenses under identical circumstances could be afforded different due process. The lower court did not address this imbalance, and the Government's Answer at this Court ignores it altogether.

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[7] *United States v. Wheeler*, 83 M.J. 581, 590 (N-M. Ct. Crim. App. 2023) (citations omitted); Gov. Ans. 9, 33, 46.
[8] *See* R.C.M. 201(f)(2)(E).
[9] Gov. Ans. 37-38, 43, 45-46.

The concurrence below identified the problem with the Government's and lower court's reasoning: "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)*."[10] If this Court agrees with the Government's and lower court's reasoning, then no limiting principle would stop the President from amending R.C.M. 201, for "expediency reasons," to permit arson, aggravated assault, or even noncapital murder referrals to this new forum.[11]

Whether deference is given (historically and properly) to the Legislature or (for the first time and improperly) to the Executive, *Middendorf* and *Weiss* reflect the Supreme Court's singular outcome when one side of the balancing-test scale is empty. No matter how useful it might be to the Government to be able to secure criminal convictions by a single-member factfinder, due process demands more.

2. None of the "safeguards" the Government identified secures a military defendant's interest in a multi-member panel.

The Government argues that the interests a servicemember has in a multi-member panel are sufficiently preserved by (1) "a qualified and independent

[10] *United States v. Wheeler*, 83 M.J. 581, 594 (N-M. Ct. Crim. App. 2023) (Kirkby, J., concurring) (emphasis added).
[11] As the concurrence also noted, "[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." *Wheeler*, 83 M.J. at 595 (Kirkby, J., concurring).

military judge,"[12] (2) appellate review,[13] and (3) "a qualified military defense counsel."[14] But these "safeguards" do not account for the interests that a multi-member panel protects—the fairness and reliability of criminal convictions.[15]

The Government misapplies *Weiss* to argue that trial judges' qualifications and a civilian appellate court fill the void left by a multi-member panel.[16] In *Weiss*, however, the interest at stake was judicial impartiality. The Supreme Court found that interest was sufficiently preserved by various statutes and regulations designed to protect against unlawful command influence,[17] and the existence of the appellate court composed of civilian judges who serve for fixed terms.[18] The Government shoehorns this *Weiss* rational into its argument here,[19] but judicial impartiality is not the interest at stake. Consistently fair and reliable criminal convictions—with attendant lasting punitive consequences—are the interests ensured by a multi-member panel that perceives and analyzes evidence in a manner that is

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[12] Gov. Ans. 22-23 (citing 10 U.S.C. §§ 826, 837, 931f (2019); *Weiss*, 510 U.S. at 180).
[13] Gov. Ans. 23 (citing *Weiss*, 510 U.S. at 180).
[14] Gov. Ans. 23-24.
[15] *See United States v. Booker*, 543 U.S. 220, 244 (2005) (citing *Blakely v. Washington*, 542 U.S. 296, 313 (2004)) ("[T]he interest in fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly.").
[16] Gov. Ans. 22-23 (citing *Weiss*, 510 U.S. at 180-81).
[17] *Weiss*, 510 U.S. at 180 (citing 10 U.S.C. §§ 826, 837).
[18] *Weiss*, 510 U.S. at 181.
[19] Gov. Ans. 22-23 (citing *Weiss*, 510 U.S. at 180-81).

fundamentally different from a judge acting alone.[20] No system of trials before just a single person, even impartial ones whose verdicts may be appealed, addresses the deficit created by eliminating the option of a multi-member panel.

Equally baseless is the Government's claim that the grant of free military defense counsel and the ability to request a particular counsel safeguard the servicemember's threatened interests. No defense counsel can alter the fairness and reliability of the factfinding function. This amounts to an argument that, because a military accused is given some rights that are not given to a civilian counterpart, we can ignore the deprivation of an *unrelated* right. It does not. A servicemember's access to free representation, even representation of choice, does not ensure the fairness or reliability of a conviction afforded by a multi-member panel at a criminal trial.

There is no mechanism in the court-martial system that fills the specific gap created by stripping a servicemember of his right to a multi-member factfinder at a criminal trial, particularly when charged with a serious offense. If the inadequate safeguards the Government proposed were sufficient to fill the void left by a multi-member panel, it is difficult to imagine a procedural right that Congress could not strip from servicemembers.

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[20] *See Booker*, 543 U.S. at 244 (citing *Blakely*, 542 U.S. at 313) ("[T]he interest in fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly.").

3. The Government's reliance on the history of summary courts-martial is irrelevant.

The Supreme Court's blessing of summary courts-martial without certain fundamental protections only reflects its deference to Congress' due-process balance when a proceeding is *not* criminal. Trials under the binding Article 16(c)(2)(A) forum bear all the hallmarks of a criminal trial.

When reviewing the historical precedent of multi-member panels in criminal proceedings, the Government inexplicably looks to the history of the summary court-martial[21]—a proceeding that cannot result in a criminal conviction.[22] The history of this non-criminal proceedings is irrelevant here.

The Supreme Court in *Middendorf* found nothing more than a successful Congressional balance of due-process interests in the context of a *non-criminal* proceeding. The Court focused its analysis on the limited punishments available, the hearing's non-adversarial character, and, most crucially, the ability of an accused to opt out of the forum and secure the protections afforded at a criminal

[21] Gov. Ans. at 18-21.

[22] 10 U.S.C. § 820(b) (2018) ("A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction."); R.C.M. 1301 ("The function of the summary court-martial is to promptly adjudicate minor offenses under a simple disciplinary proceeding. A finding of guilt by the summary court-martial does not constitute a criminal conviction as it is not a criminal forum.").

trial.[23] The Government's argument here takes that narrow holding and inflates it to mean that the court-martial members panel itself is not a constitutional protection at all.

That is not *Middendorf*'s lesson. Unlike that case, MA3 Wheeler's special court-martial was an adversarial, criminal proceeding. First, his special court-martial threatened punishments that were not nearly as limited as at a summary court. He faced more confinement than that which would have been available at a summary court-martial.[24] He also faced the loss of two-thirds of his pay for six months—six times the financial exposure as at a summary court.[25]

Second, this trial was decidedly adversarial. The Government was represented by a qualified and certified prosecuting trial counsel.[26] And MA3 Wheeler was represented, as Congress authorized, by qualified defense counsel.[27]

Third, and most importantly, unlike the *Middendorf* appellant, MA3 Wheeler could not refuse the mandatory judge-alone forum that the Convening authority ordered.

Taken together, the criminal proceeding of the contested special court-

[23] 425 U.S. at 40-47 (emphasizing that an accused "may simply refuse trial by summary court-martial and proceed to trial by special or general court-martial").
[24] R.C.M. 1301(d)(1).
[25] R.C.M. 1301(d)(1).
[26] 10 U.S.C. § 827(a)(1) (2018).
[27] 10 U.S.C. §§ 827(a)(1), 838 (2018).

martial in *United States v. Wheeler* bore no resemblance in form or function to a summary court-martial where the Constitution's full procedural safeguards did not apply. Thus, this Court should give no weight to the Government's discussion of the history of summary courts-martial when analyzing the historical precedent of multi-member panels at criminal proceedings.

B. If Congress created the judge-alone special court-martial to dispose of "low-level" offenses, then uniformity demands an objective standard for determining those offenses.

The lower court and the Government relied on the Report of the Military Justice Review Group—recommending the addition of the mandatory judge-alone special court-martial—to conclude that this new forum was intended for minor offenses. The lower court explained that "[b]y 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*.'"[28] The Government also references that portion of the Report[29] as well as the portion that explained the Review Group "drew . . . '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.'"[30] This—

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[28] *Wheeler*, 83 M.J. at 590 (citing Office of the General Counsel, Dep't of Defense, Report of the Military Justice Review Group, Part I: UCMJ Recommendations (MJRG Report), 222 (Dec. 22, 2015)) (emphasis added).
[29] Gov. Ans. 3. (citing J.A. 176).
[30] Gov. Ans. 4 (citing J.A. 175).

along with the following additional portions of the report—demonstrates that the judge-alone special court-martial was specifically intended to emulate its civilian counterpart:

> - *Consistent 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, the proposal also would provide the military justice system with similar discretionary authority for referral to a judge-alone special court-martial, in which confinement and forfeitures would be limited to six months or less and no punitive discharge would be authorized (as reflected in the proposed changes to Article 19).[31]
>
> - *Consistent with federal civilian practice*, the confinement that could be adjudged in a case referred to a judge-alone special court-martial would be six months or less; forfeitures would be capped at six months; and a punitive discharge would to be available, in accordance with the proposed changes to Article 19.[32]
>
> - The proposal to create a referred judge-alone special court-martial supports the [General Counsel's] Terms of Reference[33] *by incorporating a practice used in U.S. district courts*—the judge-alone trial with a punishment cap of six months[']confinement (and no punitive discharge in the military context). This proposal supports MJRG Operational Guidance by promoting the first of six 'key principles': discipline in the armed forces. 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

[31] J.A. 171 (emphasis added).
[32] J.A. 175 (emphasis added).
[33] These established five guiding principles for the Review Group to apply during its review, including "Where they differ with existing military justice practice, consider the extent to which the principles of law and the rules of procedure and evidence used in the trial of criminal cases in the United States district courts should be incorporated into the military justice practice." MJRG Report, 14.

refuse as in summary court-martial and non-judicial punishment.[34]

- The amendments also would add the option of referral to a non-jury (judge-alone) special court-martial. *Such a forum is common among civilian criminal jurisdictions. See* 18 U.S.C. § 3559; Fed. R. Crim. P. 58(b)(2); *United States v. Merrick*, 459 F.2d 644 (4th Cir. 1972). Providing commanders with this option would generate greater efficiencies in the military justice system for the adjudication of low-level, misdemeanor-equivalent offenses.[35]

By ignoring these portions of the Review Group's Report, the lower court and the Government fail to recognize that the goal was to make the military-justice system more like the civilian federal justice system. Thus, it logically follows that if Congress's purpose was to create a judge-alone forum for minor offenses that resembled the civilian forum, then the serious-petty distinction that exists in the civilian forum would apply to its military counterpart.

The Government does not point to any controlling authority to support that this distinction between "petty" and "serious" offenses as recognized by the Supreme Court in *Baldwin v. New York*, 399 U.S. 68 (1970), cannot apply at courts-martial. As Chief Judge Crawford reasoned, "The fact that the Sixth Amendment right to trial by jury does not apply to court-martial proceedings . . . does not require us to jettison Supreme Court precedent and good logic in assessing whether [an] appellant was tried by a fair, impartial jury of his

[34] J.A. 176 (emphasis added).
[35] J.A. 179 (emphasis added).

superiors."[36] There is similarly no reason to abandon precedent that serious offenses be tried before members. Nor is there reason to abandon the well-reasoned distinction between serious and petty offenses.

C. The President assigned a maximum punishment of one year of confinement for MA3 Wheeler's offense. The forum's statutory maximum is irrelevant to analyzing whether MA3 Wheeler was convicted of a serious offense at that forum.

The Government argues that MA3 Wheeler was charged with a petty offense because the potential penalties, in addition to confinement, "while perhaps onerous, 'cannot approximate in severity' a term of six months[']' confinement."[37] In making this argument, the Government overlooks that the President's maximum term of imprisonment for MA3 Wheeler's *charged offense*—sleeping on post in violation of Article 95, UCMJ—is one year. The seriousness of an offense is determined based on the maximum possible punishment assigned to the offense itself, not on the statutory maximum punishment that may be afforded at a particular forum.[38] As such, MA3 Wheeler was charged with a *serious* offense.

United States v. Nachtigal does not stand for any contrary principle. There, the defendant was convicted of driving under the influence (DUI)—a class B misdemeanor carrying a maximum penalty of six months' imprisonment and a

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[36] *United States v. Wiesen*, 57 M.J. 48, 53 n.2 (C.A.A.F. 2002) (Crawford, C.J., dissenting).
[37] Gov. Ans. 40 (citing *Nachtigal*, 507 U.S. at 5).
[38] *See Nachtigal*, 507 U.S. at 4-5.

$5,000 fine.[39] The Supreme Court determined that "[b]ecause the maximum term of imprisonment is six months, DUI under 36 C.F.R. § 4.23(a)(1) (1992) is presumptively a petty offense to which no jury trial right attaches."[40] The *Nachtigal* court focused on the (Executive-assigned) punishment for that *offense*. And while the Supreme Court found that, under certain circumstances, a petty offense could be deemed a serious offense,[41] it did not find any circumstances that would justify forcing a serious offense into a judge-alone forum meant for petty offenses.

Nachtigal thus demonstrates only the settled, objective standard for defining serious versus petty offenses. When Congress departs from this standard, servicemembers are afforded inconsistent due process "protections." As a result, sailors like MA3 Wheeler get bench convictions for serious offenses.

Even the Government recognizes that the President has another mechanism to declare—under settled objective tests—that convictions like the one MA3 Wheeler has are indeed "low-level." But the President has declined to reduce the maximum sentence. Instead, the President has allowed convening authorities to

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[39] *Id.* at 2.
[40] *Id.* at 4.
[41] *Blanton v. N. Las Vegas*, 489 U.S. 538, 543 (1989) ("A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one.").

send these otherwise objectively serious offenses to mandatory judge-alone criminal trials.

Conclusion

This Court should find that MA3 Wheeler was denied his fundamental, due process right to a multi-member panel at a criminal trial, reverse the decision of the Navy-Marine Corps Court of Criminal Appeals, and set aside the findings and sentence.

Respectfully submitted,

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Certificate of Compliance

The undersigned counsel hereby certifies that: (1) this reply complies with the type-volume limitation of Rule 24 because it contains fewer than 7,000 words; and (2) this reply complies with the type style requirements of Rule 37.

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Certificate of Filing and Service

I certify that the foregoing was electronically delivered to this Court, and that a copy was electronically delivered to Director, Appellate Government Division, and to Director, Administrative Support Division, Navy-Marine Corps Appellate Review Activity, on September 25, 2023.

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