IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

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

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

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Issues Presented

I.

DID THE LOWER COURT ERR IN HOLDING THAT THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT DOES NOT PROTECT A SERVICEMEMBER'S FUNDAMENTAL RIGHT TO A PANEL OF MEMBERS AT COURT-MARTIAL?

II.

DID THE LOWER COURT ERR BY DEFERRING TO A CONVENING AUTHORITY'S CASE-BY-CASE REFERRAL DECISION RATHER THAN AN OBJECTIVE STANDARD TO DETERMINE WHETHER AN OFFENSE IS SERIOUS?

Statement of Statutory Jurisdiction

The Judge Advocate General of the United States Navy forwarded this issue to the Navy-Marine Corps Court of Criminal Appeals pursuant to Article 69(d)(1), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 869(d)(1) (2016). The lower court had jurisdiction under Article 69(d)(1)(A), UCMJ, 10 U.S.C. § 869(d)(1)(A). This Court has jurisdiction under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2020).

Statement of the Case

A military judge sitting as a special court-martial under Article 16(c)(2)(A), UCMJ, convicted Appellant, contrary to his pleas, of sleeping on post in violation of Article 95, UCMJ, 10 U.S.C. § 895 (2016). The Military Judge sentenced

Appellant to fifteen days of confinement. The Convening Authority suspended confinement in excess of seven days, the Military Judge entered the judgment into the Record, and the sentence was executed.

On review, the lower court affirmed the findings and sentence. *United States v. Wheeler*, 83 M.J. 581, 583 (N-M. Ct. Crim. App. 2023).

Upon Appellant's Petition, this Court granted review. (Appellant's Pet., Apr. 18, 2023; Appellant's Suppl. Pet., Aug. 4, 2023); *United States v. Wheeler*, No. 23-0140/NA, 2023 CAAF LEXIS 427 (C.A.A.F. June 23, 2023).

Statement of Facts

A. Congress amended Articles 16 and 19, UCMJ, to provide convening authorities with a "more efficient and less burdensome" option for disposing of "low-level criminal misconduct."

1. Articles 16 and 19 allow convening authorities to refer cases to a judge-alone special court-martial that is limited in the punishments it may adjudge.

In 2016, Congress amended Article 16, UCMJ, 10 U.S.C. § 816 (2016), to allow convening authorities to refer cases to a special court-martial "consisting of a military judge alone," subject to the restrictions found in Article 19, UCMJ, 10 U.S.C. § 819 (2016), and "such limitations as the President may prescribe by regulation." Art. 16(c)(2); (J.A. 33, 62–63).

Article 19, as amended, states, "Neither a bad-conduct discharge, nor confinement for more than six months may be adjudged if charges and

specifications are referred to a special court-martial consisting of a military judge alone[.]" Art. 19(b); (J.A. 33).

2. Congress created the judge-alone special court-martial to assist commanders in efficiently disposing of "low-level" offenses in a manner consistent with state and federal civilian practices.

Congress amended Articles 16 and 19 "to improv[e] the efficiency of the military justice system." (J.A. 168.) In particular, the amendments would "provide the military justice system with an option for judge-alone trial by special court-martial, with confinement limited to 6 months or less." (J.A. 170.) This followed proposals by the Military Justice Review Group to provide the military justice system with discretionary authority similar to civilian non-jury trials. (J.A. 171.)

According to the Military Justice Review Group, the judge-alone special court-martial would "offer military commanders a new disposition option for low-level criminal misconduct—one that would be more efficient and less burdensome on the command than a special court-martial, but without the option for the member to refuse as in summary courts-martial and non-judicial punishment." (J.A. 176.) The new forum "may prove particularly useful when addressing cases involving a request for court-martial arising out of a non-judicial punishment or summary court-martial refusal, and in deployed environments where operational

demands may make it difficult to assemble a panel to address cases involving minor misconduct." (J.A. 176.)

The recommendations drew "upon the successful experience of the military justice system with judge-alone trials since 1968" and "upon the experience in the federal civilian system, as well as in state courts, in which an accused defendant does not have the right to trial by jury when the confinement does not exceed six months." (J.A. 175.) The Military Justice Review Group noted that "the Sixth Amendment right to a jury does not apply to trials of petty offenses (i.e., those punishable by not more than six months confinement)." (J.A. 181.)

3. With explicit authorization from Congress, the President restricted the category of cases that could be referred to a judge-alone special court-martial.

The President promulgated Rule for Courts-Martial 201(f)(2)(E), which states that no specification may be tried at a judge-alone special court-martial, over the accused's objection, if "the maximum authorized confinement for the offense it alleges would be greater than two years if the offense were tried by a general court-martial[.]" (J.A. 39.) Notwithstanding that restriction, specifications that allege wrongful use or possession of a controlled substance, or an attempt to do so, may be tried at a judge-alone special court-martial over the objection of the accused. (J.A. 39.) No specification that alleges an offense for which sex offender notification would be required may be referred to that forum. (J.A. 39.)

B. The United States charged Appellant with sleeping on post.

The United States charged Appellant with one Specification of sleeping on post. (J.A. 130.)

C. The Convening Authority referred the case to a judge-alone special court-martial.

The Convening Authority referred Appellant's case "[t]o be tried by Special Court-Martial consisting of a military judge alone pursuant to Article 16(c)(2)(A) of the UCMJ." (J.A. 131.)

D. Appellant moved to dismiss the Charge for lack of jurisdiction.

Appellant moved to dismiss the Charge because the court "lack[ed] jurisdiction over this serious offense absent [Appellant]'s knowing and voluntary election of a military judge-alone forum." (J.A. 132.) Appellant asserted that the Fifth and Sixth Amendments to the U.S. Constitution meant the Convening Authority had "no power to direct a bench-trial" because sleeping on post is a "serious offense." (J.A. 132–35.)

E. The United States opposed Appellant's Motion to Dismiss.

Noting that judicial deference is "at its apogee" where congressional decision-making over the military is concerned, the United States argued that the judge-alone special court-martial satisfied Fifth Amendment due process requirements. (J.A. 138.) The United States also said the Sixth Amendment right

to a jury is inapplicable to courts-martial, but that the forum would satisfy the Sixth Amendment even if it did apply. (J.A. 138–140.)

F. The Military Judge denied Appellant's Motion to Dismiss.

In a written Ruling, the Military Judge denied the Motion to Dismiss and found that the judge-alone special court-martial survived constitutional challenges "whether on its face or as applied in this case." (J.A. 145.)

The Military Judge found that even if the Sixth Amendment applies, the judge-alone special court-martial forum satisfies its requirements. (J.A. 144.) The Ruling stated that Congress, by adopting the punishment limitations in Article 19, "effectively delegated the determination of petty offenses to the Commander in Chief and convening authorities, individuals in a better position to assess the seriousness of any given offense in the unique military context." (J.A. 144.)

Applying Fifth Amendment precedents, the Military Judge found no "extraordinarily weighty countervailing interests" that would "overcome the balance struck by Congress" in creating the judge-alone special court-martial forum. (J.A. 144.)

G. The Military Judge convicted Appellant.

Appellant pled not guilty to the sole Charge and Specification. (J.A. 154.) At the conclusion of Appellant's contested court-martial, the Military Judge convicted him of sleeping on post. (J.A. 155.)

H. During the pre-sentencing phase, Appellant noted that he refused an offer of nonjudicial punishment because he "wanted a fair hearing."

Before being sentenced, Appellant gave an unsworn statement explaining he "refused mast because [he] wanted a fair hearing." (J.A. 159.) In his sentencing argument, Trial Defense Counsel said Appellant refused nonjudicial punishment because he did not trust his chain of command and "was willing to accept a federal criminal conviction just to have the fair and impartial hearing that . . . he deserves." (J.A. 161, 163.)

I. The Military Judge sentenced Appellant.

The Military Judge sentenced Appellant to fifteen days of confinement. (J.A. 164.) All but seven days of confinement were later suspended by the Convening Authority. (J.A. 166.)

J. Appellant applied for relief under Article 69, UCMJ, and the Judge Advocate General forwarded the issue.

Appellant applied for relief under Article 69, UCMJ, and the Judge Advocate General issued a Certificate of Review for the Navy-Marine Corps Court of Criminal Appeals to consider the assigned error. (J.A. 67–68.)

K. Appellant's Brief at the lower court asserted Fifth and Sixth Amendment violations. At oral argument, Appellant conceded the Sixth Amendment did not apply and that no Sixth Amendment violation occurred.

Appellant's Brief at the service court argued that the Convening Authority violated both the Fifth and Sixth Amendments by referring a "serious offense" to a judge-alone special court-martial. (J.A. 73.)

At oral argument, however, Appellant conceded that the Sixth Amendment right to a jury trial did not apply, that no Sixth Amendment error occurred, and that Appellant's argument exclusively relied on the Fifth Amendment Due Process Clause. (J.A. 3.)

L. The lower court affirmed the findings and sentence.

The Navy-Marine Corps Court of Criminal Appeals held that the Convening Authority did not violate the Fifth or Sixth Amendments by referring the case to a judge-alone special court-martial. (J.A. 1.) The lower court found Articles 16 and 19 were constitutionally valid on their face and as applied. (J.A. 2–3.)

The lower court noted that both this Court and the Supreme Court "have held that the Sixth Amendment Jury Clause does not apply to courts-martial." (J.A. 3.) As a result, the "presumptive line between petty and serious offenses" found in the Supreme Court's Sixth Amendment jurisprudence "is not dispositive here." (J.A. 3.)

Applying the Fifth Amendment analysis from *Middendorf v. Henry*, 425 U.S. 25 (1976), and *Weiss v. United States*, 510 U.S. 163 (1994), the lower court held that "we cannot conclude that the benefit of a panel of members in such cases is 'so extraordinarily weighty' as to overcome the balance struck by Congress and the President." (J.A. 9.)

Argument

I.

THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL DOES NOT APPLY TO COURTS-MARTIAL. APPELLANT CANNOT SHOW A FIFTH AMENDMENT RIGHT TO A MULTI-MEMBER PANEL BECAUSE HIS INTEREST IS NOT "SO EXTRAORDINARILY WEIGHTY" AS TO OVERCOME THE BALANCE STRUCK BY CONGRESS IN CREATING JUDGE-ALONE SPECIAL COURTS-MARTIAL TO ADJUDICATE LOW-LEVEL MISCONDUCT.

A. The standard of review is de novo.

The constitutionality of a statute or rule is a question of law reviewed de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

B. Appellant bears a "heavy burden" of demonstrating that congressional action under the Make Rules Clause is unconstitutional.

Because Congress is expressly authorized by the Constitution to make rules for the "land and naval Forces," Appellant bears the "heavy burden" of showing that a particular facet of the military justice system is constitutionally invalid. U.S.

Const. art I, § 8, cl. 14; *United States v. Vazquez*, 72 M.J. 13, 19 (C.A.A.F. 2013) (citing *Weiss* v. *United States*, 510 U.S. 163, 181 (1994); and quoting *United States v. Mitchell*, 39 M.J. 131, 137 (C.A.A.F. 1994)).

C. Congress is responsible for balancing the rights of servicemembers against the needs of the military, which is a "specialized society" not constitutionally required to match civilian due process standards.

1. The purpose of the military is to fight wars. The military justice system "probably never can be constituted in such a way" as to match civilian due process requirements.

The Supreme Court has long recognized that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). This makes the military "a specialized society separate from civilian society." *Parker v. Levy*, 417 U.S. 733, 743 (1974).

"[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty." *Id*. (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)). When military personnel responsible for fighting wars "are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served." *Quarles*, 350 U.S. at 17.

For that reason, "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Id.*

"The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 758.

2. The responsibility for balancing the rights of servicemembers against the needs of the military lies with Congress. Judicial deference "is at its apogee" when congressional governance of the military is challenged.

The Constitution expressly grants Congress the authority "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14. Congress has "plenary control" over matters pertaining to military discipline. *Weiss*, 510 U.S. at 177 (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)).

The Supreme Court has repeatedly reaffirmed that "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military." *Id.* (quoting *Solorio v. United States*, 483 U.S. 435, 447–48 (1987)). The courts "are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers especially entrusted that task to Congress." *Middendorf v. Henry*, 425 U.S. 25, 43 (1976) (quoting *Burns*, 346 U.S. at 140).

Judicial deference "is at its apogee" when courts review congressional decisions regarding "regulations, procedures, and remedies related to military discipline." *Weiss*, 510 U.S. at 177 (citing *Rostker v. Goldberg*, 453 U.S. 57, 70

(1981)). When deciding a constitutional question pertaining to regulation of the military, courts "must be particularly careful not to substitute [their] judgment of what is desirable for that of Congress, or [their] own evaluation of evidence for a reasonable evaluation by the Legislative Branch." *Rostker*, 453 U.S. at 68.

D. There is no need for a Sixth Amendment analysis. Both the Supreme Court and this Court have held that the Sixth Amendment Jury Clause does not apply to courts-martial.

The Supreme Court has repeatedly recognized that courts-martial "are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth." *Ex parte Quirin*, 317 U.S. 1, 40 (1942) (citing *Ex parte Milligan*, 71 U.S. 2, 123, 138–39 (1866) ("[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."). "The constitution of courts-martial, like other matters relating to their organization and administration," rather than being dictated by the Sixth Amendment, "is a matter appropriate for congressional action." *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950).

This Court has held the same. Courts-martial "have never been considered subject to the jury-trial demands of the Constitution." *United States v. McClain*, 22 M.J. 124, 128 (C.M.A. 1986); *United States v. Riesbeck*, 77 M.J. 154, 162 (C.A.A.F. 2018) ("Courts-martial are not subject to the jury trial requirements of

the Sixth Amendment . . . ."); *United States v. Easton*, 71 M.J. 168, 175 (C.A.A.F. 2012) ("[T]here is no Sixth Amendment right to trial by jury in courts-martial.").

Most recently, this Court held there is no constitutional requirement for a unanimous verdict because "the Supreme Court has repeatedly stated that the Sixth Amendment right to a jury trial does not apply to courts-martial." *United States v. Anderson*, No. 22-0193/AF, 2023 CAAF LEXIS 439, at *5 (C.A.A.F. June 29, 2023). After reviewing Supreme Court precedent at length, this Court found it "would be disingenuous . . . to ignore over a century of consistent guidance from the Supreme Court about the applicability of the Sixth Amendment to military trials." *Id*. at *10.

Since the Sixth Amendment does not apply, disposition of the issue presented rests solely on an analysis of the Fifth Amendment Due Process Clause.

E. Congress is limited by the Fifth Amendment Due Process Clause, but only when the importance of an asserted right is "so extraordinarily weighty as to overcome the balance struck by Congress." The Supreme Court has looked at historical practice, the effect of an asserted right on the military, and "the number of safeguards in place to ensure impartiality" as factors in this analysis.

The Fifth Amendment protects against deprivation "of life, liberty, or property, without due process of law." U.S. Const. amend. V. Since courts-martial may result in the loss of liberty or property, Congress is "subject to the requirements of the Due Process Clause when legislating in the area of military affairs, and that Clause provides some measure of protection to defendants in

military proceedings." *Weiss*, 510 U.S. at 176–77. But given the deference afforded to Congress, *see supra* I.C.2, the "tests and limitations [of due process] may differ because of the military context." *Id.* at 177 (citing *Rostker*, 453 U.S. at 67).

When faced with a Fifth Amendment due process challenge to congressional oversight of courts-martial, the question is "whether the factors militating in favor" of an asserted right "are so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44; *Weiss*, 510 U.S. at 177–78.

In *Middendorf*, the Supreme Court considered whether the Fifth Amendment requires the military to provide defense counsel at summary courts-martial. 425 U.S. at 44. The Court examined "the effect of providing counsel," and found it would "turn a brief, informal hearing which may be quickly convened and rapidly concluded into an attenuated proceeding which consumes the resources of the military to a degree which Congress could properly have felt to be beyond what is warranted by the relative insignificance of the offenses being tried." *Id.* at 45.

The Court further noted that an accused could decline summary court-martial if he felt the assistance of counsel was "necessary in order adequately to present the defense or mitigating circumstances." *Id.* at 46–47. The Fifth Amendment therefore provided no avenue "to overturn the congressional determination" that counsel was not required. *Id.* at 48.

Similarly, in *Weiss* the Supreme Court considered two factors before holding that the military's use of non-tenured judges did not offend Fifth Amendment due process. 510 U.S. at 181. After finding "[t]he absence of tenure as a historical matter in the system of military justice" and noting "the number of safeguards in place to ensure impartiality," the *Weiss* Court concluded that the petitioners had "fallen far short" of demonstrating that fixed tenures met the "extraordinarily weighty" test established by *Middendorf*. *Id.*

F. The Fifth Amendment Due Process Clause does not require multi-member panels at courts-martial.

1. There is no "military due process" that would guarantee Appellant a right beyond those granted by the Constitution, the Uniform Code of Military Justice, and the Manual for Courts-Martial.

In *United States v. Vazquez*, 72 M.J. 13 (C.A.A.F. 2013) this Court rejected the existence of "military due process, an amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the MCM. They do not." *Id.* at 19.

At oral argument before the service court, Appellant insisted that servicemembers have the Fifth Amendment right to a multi-member panel, even in cases where the maximum punishment imposable at general court-martial would be no more than six months confinement. (Oral Argument at 20:26, Dec. 1, 2022.)

Appellant further stated, without citing authority, that "the unique nature of the military community" gave servicemembers this right even though civilians facing a class B misdemeanor in federal courts would not have access to a jury. (Oral Argument at 23:18, Dec. 1, 2022.) In other words, Appellant asks this Court to recognize a right not found in the Constitution, the Uniform Code or the Manual for Courts-Martial. This Court rejected just such a possibility in *Vazquez*.

Indeed, Appellant does not claim that referral of his case violated either his statutory or regulatory rights. As shown below, it did not violate his constitutional rights either.

2. No court has found a Fifth Amendment due process right to a multi-member panel at court-martial. The cases relied upon by Appellant to suggest otherwise are inapt.

Appellant suggests that "a constitutional, due process right to a multi-member panel" has already been established. (Appellant's Br. at 8–9.) The cases Appellant cites, however, are inapt.

Appellant relies in part on *Duncan v. Louisiana*, 391 U.S. 145 (1968), which depends on the applicability of the Sixth Amendment. *Id*. at 149 (jury trial required "in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."). Since the Sixth Amendment does not apply to courts-martial, *see supra*, I.D, and Appellant has abandoned his Sixth Amendment claim, *Duncan* is not relevant to our analysis.

Appellant's reliance on *In re Murchison*, 349 U.S. 133 (1955), is similarly misplaced. That case made no judgment about the necessity for multiple jurors, and held only that a judge could not adjudicate an offense if he acted as a "one-man grand jury" in the same case. *Id.* at 137.

Appellant also cites a string of cases[1] for the proposition that due process demands "a fair and impartial panel." (Appellant's Br. at 8, n.28 and n.31.) But as the lower court correctly recognized, "the central issues of the cited cases deal with the members selection process—either at the convening authority's selection stage or during voir dire—with a focus on the panel members' *impartiality*, not the right to a panel itself." *Wheeler*, 83 M.J. at 586 (emphasis in original). It is settled that a panel, once provided, must be impartial. Despite Appellant's conflation of those concepts, it does not follow that a panel must in all cases be provided.

Since there is no such thing as "military due process," and no court has recognized a Fifth Amendment right to a multi-member court-martial, the issue must be resolved by a *Middendorf-Weiss* analysis.

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[1] Appellant cites: *United States v. Wiesen*, 56 M.J. 172, 174 (C.A.A.F. 2001); *United States v. Mack*, 41 M.J. 51, 54 (C.M.A. 1994); *United States v. Crawford*, 35 C.M.R. 3, 6 (C.M.A. 1964); *United States v. Deain*, 17 C.M.R. 44, 49 (C.M.A. 1954); *United States v. Modesto*, 43 M.J. 315, 318 (C.A.A.F. 1995); *Smith v. Phillips*, 455 U.S. 209 (1982); *Remmer v. United States*, 347 U.S. 227 (1954); *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987); and *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985).

3. Applying *Middendorf* and *Weiss*, Congress' adoption of the judge-alone special court-martial does not offend the Due Process Clause of the Fifth Amendment.

a. Historical practice does not support a due process violation: multi-member panels have not been traditionally guaranteed to servicemembers facing deprivation of liberty or property, particularly for minor offenses.

As in *Weiss*, the analysis begins by asking whether the historical practice establishes a due process requirement. 510 U.S. at 178.

In 1775, the Continental Congress allowed naval commanders, at their sole discretion, to inflict up to "twelve lashes upon [a seaman's] bare back with a cat of nine-tails" without any due process. Rules for the Regulation of the Navy of the United Colonies of North America of Nov. 28, 1775, art. 4. It was only "if the fault shall deserve of a greater punishment" that the commander was to request a court-martial composed of multiple members. *Id.* This disciplinary regime survived ratification of the Constitution, and flogging remained a common naval punishment until it was abolished by Congress in 1850. Leo F.S. Horan, *Flogging in the United States Navy*, 76 U.S. Naval Inst. Proc. 969 (1950).

A multi-member panel was not always provided even when offenses proceeded to courts-martial. In 1862, with the Civil War raging, the field-officer's court was created by an act of Congress. George B. Davis, A Treatise on the Military Law of the United States 25 (2d ed. 1899).

This reflected the Army's desire to "replace the older inferior courts by tribunals having a more summary jurisdiction and a somewhat less elaborate procedure; thus enabling the minor infractions of discipline, in camp or garrison, to be more expeditiously disposed of." *Id.* at 24–25. The field-officer's court "was composed of a single officer and was given exclusive jurisdiction over the cases formerly tried by the regimental and garrison courts"—in other words, it replaced multi-member courts-martial with a single factfinder. *Id.* at 25. Just like its successor the summary court-martial, field-officer's courts could impose up to one month of imprisonment or hard labor, and could inflict a fine of up to one month's pay. William Winthrop, Military Law and Precedents 486, 490, 493 (2d ed. 1920). The field-officer's court was restricted to "time of war" in 1874, and was eventually replaced. Davis, *supra*, at 25.

The summary court-martial, established by Congress in 1890, was initially used as the peacetime counterpart to the field-officer's court. *Id.* If an accused objected to his case being heard at summary court-martial, then a garrison or regimental court would "be granted as a matter of right." *Id.* At the outbreak of war with Spain in 1898, however, Congress eliminated the field-officer's court and made the summary court-martial the sole forum to quickly try enlisted men for minor offenses during peace and war. *Id.* at 25–25a. While non-commissioned officers could object, ordinary enlisted soldiers could not. *Id.* at 25a.

This system endured when the Articles of War were revised in 1920: as before, an enlisted soldier could not object to a summary court-martial. Articles of War of June 4, 1920, arts. 7, 14. Even after the enactment of the UCMJ, an enlisted servicemember could only object to summary court-martial if he had not already refused nonjudicial punishment under Article 15. *Middendorf*, 425 U.S. at 44, n.21. It was not until 1968 that all servicemembers gained the option of refusing summary court-martial under any circumstances. *Id.*

Appellant's claim to the contrary rests on an irrelevant distinction. He asserts, "Not for one moment between 1775 and 2019 was a military accused denied his right to a multi-member panel at a criminal trial." (Appellant's Br. at 11). This seemingly relies on a definition of "criminal trial" that excludes summary courts-martial. *Middendorf*, however, held only that summary court-martial "is not a criminal prosecution *for purposes of the Sixth Amendment*." 425 U.S. at 42 (emphasis added). Since Appellant now makes no Sixth Amendment claim, his assertion—even if it were true—is meaningless. Summary courts-martial do implicate Fifth Amendment due process; indeed, *Middendorf* specifically found that they did. *Id.* at 43.

In summary, between 1775 and 1968 the military justice system routinely deprived servicemembers of liberty and property without a multi-member panel. It is the period from 1968 to 2019—when a servicemember could demand a multi-

member court-martial for even trivial misconduct—that stands out as historically unusual. As in *Weiss*, the historical practice undercuts Appellant's claim to a Fifth Amendment due process right.

b. Historical practice does not limit Congress' authority to regulate the military.

Even if history matched Appellant's assertions, it would not limit Congress' authority. Remarking on the 17th-century British conflict surrounding courts-martial jurisdiction, the *Solorio* Court found that "such disapproval in England at the time of William and Mary hardly proves that the Framers of the Constitution, contrary to the plenary language in which they conferred the power on Congress, meant to freeze court-martial usage at a particular time in such a way that Congress might not change it." 483 U.S. at 446; *see also Loving*, 517 U.S. at 766.

As noted above, the history of military justice is one of frequent rebalancing by Congress. *See supra,* I.F.3.a. Congress initially required all courts-martial to have multiple members, but changed that in 1862 with the advent of field-officer's courts. *Id.* It initially gave enlisted men the right to refuse summary court-martial, then withdrew that right, then granted it again in part before restoring it in full. *Id.* These changes often occurred as the nation grappled with threats to its security—which is exactly why the Framers granted such broad authority to Congress. *Loving*, 517 U.S. at 767 ("The circumstances that endanger the safety of nations

are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.") (internal citations omitted).

In 2016, Congress once again rebalanced "the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. The fact that it created a new forum to do so is not unprecedented, and it would not be constitutionally impermissible even if it were.

c. Appellant's trial featured safeguards sufficient to ensure a fair trial.

As in *Weiss*, the next step is to consider "the number of safeguards in place to ensure impartiality" in the absence of the asserted right. 510 U.S. at 181.

i. Appellant's trial had the safeguard of a qualified and independent military judge.

The safeguards provided to Appellant began with a qualified and independent military judge. Military judges are required to be commissioned officers, members of the bar, and certified by the Judge Advocate General "to be qualified, by reason of education, training, experience and judicial temperament[.]" Art. 26(b). Military judges also fall "under the authority of the appropriate Judge Advocate General," a factor that "helps protect [their] independence . . . [because the] Judge Advocates General . . . have no interest in the outcome of a particular court-martial." *Weiss*, 510 U.S. at 180.

Further, Article 26 precludes "a convening authority or any commanding officer from preparing or reviewing" a military judge's fitness reports, and Article 37 makes it a criminal offense for anyone to unlawfully influence a military judge in the performance of her duties. Art. 26(c)(2); Art. 37(a); Art. 131f; *Weiss*, 510 U.S. at 180.

ii. Military appeals courts provide further safeguards for Appellant's trial.

Furthermore, the entire military justice system is overseen by this Court, which the Supreme Court found had "demonstrated its vigilance in checking any attempts to exert improper influence over military judges." *Weiss*, 510 U.S. at 180. This safeguard, along with those listed above, was sufficient to satisfy Fifth Amendment due process concerns in *Weiss*. *Id.* at 181. Each of those safeguards was also provided to Appellant here.

iii. Appellant had qualified military defense counsel available to him.

Lastly, Appellant received fair-trial safeguards exceeding those provided to many civilians in federal courts. He received the assistance of a qualified military defense counsel, at both the trial and appellate levels, without cost to him and without the need to prove indigence. *Compare* Art. 27(c)(1); Art. 38(b)(1) (requiring the detailing of military counsel in all cases) *with* 18 U.S.C. § 3006A (counsel guaranteed only for those "financially unable to obtain counsel"). He also

had the option of requesting individual military counsel of his own choosing—a right unheard of in the civilian world. Art. 38(b)(3)(B).

Appellant received due process protections that were inconceivable for much of U.S. military history,[2] and which even today would be the envy of many Americans facing criminal charges. His due process challenge must fail.

d. Congress found that a judge-alone special court-martial would improve the efficiency of the military justice system. This Court must show deference to that judgment.

In *Middendorf*, the Supreme Court found providing defense counsel would turn summary courts-martial into an "attenuated proceeding" that would be a "particular burden to . . . members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." 425 U.S. at 45–46.

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[2] Multi-member panels were not always as protective of the accused's rights as they might be today. It was not until 1951 that command influence was outlawed; before that it was common, even expected, for court-martial members "to acquaint themselves with the views of the commanding officer" and to impose the maximum sentence "so that the general, who had no power to increase a sentence, might fix it to suit his own ideas." Rep. of U.S. War Dep't Advisory Comm. at 7 (Dec. 13, 1946). "Not infrequently the general reprimanded the members of a court for an acquittal or an insufficient sentence." *Id.* Also, before military judges were created in 1968, it was often the convening authority's staff judge advocate who provided member instructions during courts-martial. *See, e.g., United States v. Champagne,* 32 C.M.R. 479, 481 (A.B.R. 1962).

So too here. Congress passed the amendments to Articles 16 and 19 for the purpose of "improving the efficiency of the military justice system." (J.A. 168.) It did so based on recommendations from the Military Justice Review Group that a judge-alone special court-martial would "be more efficient and less burdensome on the command," especially in deployed environments or cases involving refusal of nonjudicial punishment. (J.A. 176.) In other words, Congress' reasons for adopting judge-alone special courts-martial mirror exactly the rationale approved of in *Middendorf*.

e. Appellant's arguments that the judge-alone forum has not "materially increased efficiency" are inapposite.

Appellant suggests the new forum is unnecessary for the functioning of military justice, and states there is "no evidence that this new forum has materially increased efficiency over the past four-and-a-half years." (Appellant's Br. at 16.) This argument can be dismissed for three reasons.

First, it is based on an inaccurate understanding of history. Appellant asserts, "We have fought every war in our nation's history with [multi-member panels] and no one ever mentioned it until 2017." (Appellant's Br. at 16.) This is not true. Commanders could order soldiers to courts-martial with a single factfinder during the Civil War, Spanish-American War, World War I, and World War II. *See supra*, I.F.3.a. During the Korean War and part of the Vietnam War, they could do likewise if a servicemember had already refused nonjudicial

punishment. *Id*. Contrary to Appellant's claim, there have been many periods throughout history in which such a forum was deemed necessary for military efficiency.

Second, the United States is not required to prove that judge-alone special courts-martial are either necessary or more efficient. Instead, Appellant bears the burden of showing the congressional scheme is unconstitutional. *Vazquez*, 72 M.J. at 19.

Third, it ignores the clear deference owed to Congress to make such determinations. In *Rostker*, the Supreme Court found, "[W]e must be particularly careful not to substitute our judgment of what is desirable for that of Congress, or our own evaluation of evidence for a reasonable evaluation by the Legislative Branch." 453 U.S. at 68. It is not for this Court to decide whether judge-alone special courts-martial are either necessary or effective: "The Framers especially entrusted that task to Congress." *Middendorf*, 425 U.S. at 43.

Application of the *Middendorf-Weiss* analysis shows a long history of courts-martial with a single factfinder, an abundance of other safeguards to ensure fair trials, and a valid congressional determination that a judge-alone forum will improve the efficiency of military justice. The due process requirements of the Fifth Amendment are fully satisfied.

II.

THE CIVILIAN DISTINCTION BETWEEN "SERIOUS" AND "PETTY" OFFENSES IS BASED ON THE SIXTH AMENDMENT JURY CLAUSE; IT DOES NOT AND CANNOT APPLY TO COURTS-MARTIAL. EVEN IF IT DID APPLY, THE SIX-MONTH LIMIT ON CONFINEMENT PROVIDED TO APPELLANT IS SUFFICIENT TO SATISFY BOTH THE FIFTH AND SIXTH AMENDMENTS.

A. The standard of review is de novo. Appellant bears the burden of demonstrating that the action taken by Congress is constitutionally invalid.

See supra, I.A, I.B.

B. *Baldwin* and its progeny, which establish an authorized penalty of six months confinement as the presumptive line between serious and petty offenses, rely on the Sixth Amendment right to jury trial and do not apply to the military. Appellant has no right to a members panel.

1. Applying a Sixth Amendment analysis to civilian courts, the Supreme Court determined that an authorized penalty of six months confinement is the presumptive line between petty and serious offenses.

In *Duncan*, the Supreme Court held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." 391 U.S. at 149. *Duncan* also affirmed the common practice of "prosecuting petty crimes without extending a right to jury trial." *Id.* at 158.

In subsequent cases, the Court "sought objective criteria reflecting the seriousness with which society regards the offense" to help determine whether a

crime was petty. *Baldwin v. New York*, 399 U.S. 66, 68 (1970). "[T]he most relevant such criteria is the severity of the maximum authorized penalty." *Id.* The *Baldwin* Court concluded that "no offense can be deemed petty for purposes of the right to trial by jury where imprisonment for more than six months is authorized." *Id*. at 69. The Supreme Court later clarified that "the seriousness of other punishment" could be enough to require a jury trial, but reiterated that "[p]rimary emphasis . . . must be placed on the maximum authorized period of incarceration." *Blanton v. N. Las Vegas*, 489 U.S. 538, 542 (1989).

More recently, the Supreme Court considered an appellant convicted of driving drunk in a national park, a federal class B misdemeanor punishable by up to six months confinement. *United States v. Nachtigal*, 517 U.S. 1, 2 (1993). The Court of Appeals erroneously "refused to apply the *Blanton* presumption, reasoning that the Secretary of the Interior, and not Congress, ultimately determined the maximum prison term." *Id*. at 3. The Court rejected this reasoning, and found that "there *is* a controlling legislative determination present within the regulatory scheme" because "Congress set six months as the maximum penalty the Secretary could impose for a violation of any of his regulations." *Id.* at 4 (emphasis in original).

2. The *Baldwin* standard arises from the Sixth Amendment right to a jury, which does not apply to the military.

Baldwin and its progeny are explicitly based on the Sixth Amendment right to jury trial. *Baldwin*, 399 U.S. at 68; *Blanton*, 489 U.S. at 545; *Nachtigal*, 507 U.S. at 3. As shown above, and as Appellant concedes, the Sixth Amendment right to jury trial does not apply here. *See supra*, I.D; (Appellant's Br. at 17.)

Appellant nevertheless urges this Court to import the *Baldwin* standard verbatim into the military. (Appellant's Br. at 17–18.) As discussed below, there are compelling reasons not to do so. *See infra* II.C.

3. Appellant fails to meet his burden to show that *Baldwin* applies to the military.

It is Appellant's burden to show the Constitution requires application of *Baldwin* to the military. *Vazquez*, 72 M.J. at 19. To support this notion, he cites only this Court's opinion in *United States v. Commisso*, 76 M.J. 315 (C.A.A.F. 2017), which stated that the Sixth Amendment right to an impartial jury holds "equally true with regard to servicemember rights under the Fifth Amendment[.]" *Id.* at 321.

Commisso, however, was a case hinging on the impartiality of members who had heard the appellant's case discussed at Sexual Assault Review Board meetings. *Id*. at 317–318. Once again, Appellant invites this Court to conflate the right to an *impartial* jury—which implicates the Fifth Amendment—with the right to have a

jury in the first place. *See supra*, I.F.2. This Court should decline that invitation, as it did in *Anderson*. 2023 CAAF LEXIS 439, at *13 (rejecting notion "that the Supreme Court held—sub silentio—that only a unanimous jury can be impartial.").

C. *Baldwin* cannot be imported to the military due to the fundamental differences between civilian and military justice. This Court should recognize those differences, just as the Supreme Court has repeatedly done.

1. Due to fundamental differences between the civilian and military justice systems, the Supreme Court has repeatedly declined to import constitutional standards from the former to the latter.

"The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker*, 417 U.S. at 758. *See also supra*, I.C.1.

In recognition of the need for military discipline and the plenary authority enjoyed by Congress, the Supreme Court has repeatedly declined to import constitutional standards from the civilian world into the military. In *Weiss*, for example, the Court was invited to apply two different civilian precedents to petitioner's Appointment's Clause challenge. 510 U.S. at 177. Noting that "the tests and limitations of due process may differ because of the military context," the Court declined to use either case and instead applied *Middendorf*. *Id.*

Similarly, in *Parker*, the Court refused to apply civilian standards for the First Amendment overbreadth doctrine because "the different character of the military community and of the military mission requires a different application of those protections." 417 U.S. at 758; *see also Brown v. Glines*, 444 U.S. 348, 353 (1980) (allowing prior restraint for petitions distributed aboard base).

Military appellate courts have followed suit. In particular, they have rejected the notion that a court-martial of fewer than six members violates due process, despite the Supreme Court holding that in a civilian context it would. *Compare Ballew v. Georgia*, 435 U.S. 223 (1978) (finding juries with fewer than six members unconstitutional) *with United States v. Wolff*, 5 M.J. 923, 925 (N-M.C.M.R. 1978) (finding *Ballew* inapposite and "no showing that a five-member court-martial does not render the same quality of justice as does a larger court"), *pet. denied*, 6 M.J. 305 (C.M.A. 1979).

Most recently, this Court rejected the proposition that unanimous verdicts are constitutionally required at courts-martial, even though the Supreme Court has applied that rule to all federal and state jury trials. *Compare Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (noting the Court "has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity") *with United States v. Anderson*, No. 22-0193/AF, 2023 CAAF LEXIS 439, at *1 (C.A.A.F.

June 29, 2023) (finding no Fifth or Sixth Amendment right to a unanimous verdict at courts-martial).

As it has before, this Court should decline Appellant's request to import a civilian standard into the military context.

2. *Baldwin* cannot be imported to the military due to the differences between civilian and military justice. While civilian codes only outlaw "a relatively small segment of potential conduct," the military system is more far-reaching. The seriousness of an offense can also vary in the military to a degree unknown in the civilian world.

A closer look at how the civilian and military justice systems differ shows why *Baldwin* cannot be imported from the former to the latter.

"While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." *Middendorf*, 425 U.S. at 38 (quoting *Parker*, 417 U.S. at 749–751). The need for discipline means the military criminalizes conduct—such as sleeping at work—for which civilians would never face sanctions. *Id*. at 39.

Moreover, certain military offenses can either be trifling or deadly serious, depending on the circumstances. *Parker*, 417 U.S. at 745 (noting of courts-martial that "there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them.") (quoting *Martin* v. *Mott*, 12 Wheat. 19,

35–36 (1827)). Sleeping on post is a perfect example. If one fell asleep on a patrol boat moored in a peaceful stateside harbor, then a commander might—as happened here—try to dispose of the matter through nonjudicial punishment. (J.A. 130, 159.) Failing that, he could refer the charge to a judge-alone special court-martial intended to expeditiously dispose of low-level misconduct. (J.A. 131, 176.)

But the severity of the same offense could be far greater. If, for example, a servicemember fell asleep at his post and classified material was thereby compromised, then a commander might refer the same offense to a special court-martial and seek up to a year's confinement. Art. 95(d)(1)(c), UCMJ, 10 U.S.C. §895. If the same servicemember was receiving special pay at the time, then up to ten years' confinement could be sought. Art. 95(d)(1)(b). If the same servicemember fell asleep on a combat outpost, and as a result his platoon was wiped out, then a commander could refer *the same offense* to a general court-martial and seek the death penalty. Art. 95(d)(1)(a).

Importing *Baldwin* into the military would compel Congress to attach a maximum penalty to every one of the "infinite variety of incidents" cited in *Parker*. This Court should instead recognize—as it did in *Anderson*, and as the Supreme Court has done in *Weiss*, *Parker*, and *Glines*—that the Constitution permits application of a different standard in light of the fundamental differences in the military justice system.

D. Even if the *Baldwin* standard were applied to the military, the judge-alone special-court martial would satisfy it. The six-month limit on confinement was set by Congress, which then permissibly delegated authority to the President and convening authorities to determine which cases could be referred to the forum.

1. As in *Nachtigal*, there is a "controlling legislative determination" that sets the maximum penalty at six months.

In *Nachtigal*, the penalty for drunk driving was set not by Congress, but by the Secretary of the Interior. 507 U.S. at 3. Nevertheless, the Supreme Court found "a controlling legislative determination" because "Congress set six months as the maximum penalty the Secretary could impose for a violation of any of his regulations." *Id.* at 4. There was "no persuasive reason why this congressional determination is stripped of its legislative character merely because the Secretary has final authority to decide, within the limits given by Congress, what the maximum prison sentence will be for a violation of a given regulation." *Id.* (internal quotation marks omitted).

The situation is analogous here. Congress created a court-martial forum able to adjudge no more than six months of confinement for any offense. Art. 16(c)(2)(A); Art. 19(b). Like the Secretary in *Nachtigal*, the President and Convening Authority here acted within those statutorily-prescribed limits. Art. 16(c)(2)(A). As in *Nachtigal*, the statutory six-month limit on confinement is not "stripped of its legislative character" because the President prescribed the general court-martial maximum punishment under Article 56, or because the Convening

Authority chose the forum and thus limited the extent of that punishment. 507 U.S. at 4. And like the *Nachtigal* petitioner, Appellant had the protection of a legislative six-month cap on confinement and could therefore be ordered to a judge-alone trial without a due process violation. *Id.* at 5–6.

Appellant asserts that the sentence limitations in Article 16 "are immaterial" because the Supreme Court "has never tested legislative determination of an offense's seriousness based on the forum of a criminal trial." (Appellant's Br. at 20.) *Nachtigal* strongly suggests this is a distinction without a difference.

2. The President's action in limiting the jurisdiction of judge-alone special courts-martial was permissible because it was taken with express congressional authorization.

The Supreme Court "established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself." *Loving*, 517 U.S. at 758 (citation omitted). In *Loving*, the Supreme Court held that the President had authority to prescribe the aggravating factors that permit imposition of the death penalty. *Id.* at 751. Given Congress' plenary authority over the armed forces, the *Loving* Court found "no reasons why Congress should have less capacity to make measured and appropriate delegations of this power than of any other." *Id*. at 767.

In addition, *Loving* noted that the "power of the executive to establish rules and regulations for the government of the army, is undoubted." *Id.* "[I]t would be

contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority." *Id.* at 768. The *Loving* Court further found that Articles 18, 36 and 56 "together give clear authority to the President" to promulgate aggravating factors. *Id.* at 770.

So too here, where Articles 16, 36, and 56 show the same delegation of congressional authority. While Congress defines the offenses and establishes the authorities of courts-martial, it then delegates decisions—about the limits to set on judge-alone special courts-martial, procedures for referring cases to court-martial, and decisions about the maximum punishments for the punitive articles—to the "wide discretion and authority" enjoyed by the President. Arts. 16, 36, 56, UCMJ; *Loving*, 517 U.S. at 768.

Just as in *Loving*, any notion that due process is offended by such presidential action should be rejected by this Court.

3. The Constitution permits convening authorities to exercise "substantial discretion" over military justice decisions.

The Supreme Court has also recognized that wide latitude may be granted to individual convening authorities. "Because the right to command and the duty to obey ordinarily must go unquestioned, this Court long ago recognized that the military must possess substantial discretion over its internal discipline." *Glines*, 444 U.S. at 357. The "special character of the military requires civilian authorities

to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale." *Id.* at 360.

In *Curry v. Secretary of Army*, 595 F.2d 873 (D.C. Cir. 1979), the appellant collaterally attacked his conviction on grounds that Fifth Amendment due process prohibited the "multiple roles" played by the convening authority "in the initiation, prosecution, and review of courts-martial[.]" *Id.* at 875. The *Curry* court held that giving wide discretion to individual convening authorities is "sufficiently responsive to the unique needs of the military to withstand constitutional challenge." *Id*. at 878. "The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who. . . can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere." *Id.*

Appellant here makes the same argument rejected in *Curry*, asserting that it is impermissible to let "a convening authority—the individual who chose to bring the accused to court-martial—dictate whether the offense is serious" and therefore "which rights will be afforded an accused[.]" (Appellant's Br. at 21.) But it has ever been thus. Before 1968, a commander could choose to refer an offense to summary court-martial, at which the accused would have neither multiple factfinders nor the assistance of counsel. *See supra*, I.F.3.a. Even after that, a convening authority had sole discretion to decide to which forum to refer an

offense, and thus how many members would be provided to dispose of it. R.C.M. 401(c). The only change is that convening authorities now have an additional choice, one that mirrors the rights provided to civilians charged with petty offenses.

Appellant also suggests that giving a convening authority power to make such decisions "is on par with a civilian system that leaves the decision of whether a crime is a felony or misdemeanor up to the prosecutor who brought the charges." (Appellant's Br. at 21.) Appellant overlooks the fact that federal prosecutors possess just this kind of discretion over how to charge a particular offense. *See* Dept. of Justice, *Principles of Federal Prosecution*, § 9-27.110 (noting "the prosecutor has wide latitude in determining when, whom, how, and even whether to prosecute for apparent violations of federal criminal law.").

The military justice system has always provided substantial discretion to convening authorities. As in *Curry*, this Court should reject the notion that the exercise of such discretion offends due process.

4. Appellant argues that the President is owed no deference, but also that the President's previous decision to make sleeping on post punishable by up to a year of confinement cannot be modified. These arguments fail.

Appellant contends with the weight of precedent by making two additional arguments, each of which collapses upon closer examination.

First, he asserts—without citing authority—that while Congress is granted "particular deference" in its regulation of military discipline, "no similar deference is owed to the President." (Appellant's Br. at 9.) This argument can be disposed of quickly, as the Supreme Court has repeatedly declared the opposite is true. *Loving*, 517 U.S. at 767–68 (power of the President to establish military regulations "is undoubted"); *Rostker*, 453 U.S. at 66 (noting "healthy deference to legislative *and executive* judgments in the area of military affairs") (emphasis added); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (President's authority is "at its maximum" when he acts pursuant to congressional authorization) (Jackson, J. concurring).

Here, with express authority from Congress, the President prescribed regulations limiting the offenses that may be referred to a judge-alone special court-martial over the objection of an accused. R.C.M. 201(f)(2)(E), Art. 16(c)(3)(A), Art. 19(a). Given Congress' explicit delegation, the President's regulations deserve the same deference as if Congress had enacted them. *Loving*, 517 U.S. at 768.

Second, Appellant argues that the President's maximum punishments—not the hard-and-fast Article 19(b) judge-alone forum sentence limitation—"should be used to determine which offenses are serious under the UCMJ." (Appellant's Br. at 20–21.) Appellant's position is therefore paradoxical. On one hand, he argues

the President *can*, given clear congressional authorization by Article 56(a), set a maximum punishment of one year's confinement for sleeping on post. On the other hand, he asserts the President *cannot*, despite equally clear congressional authorization in Article 16(c)(2)(A), determine that there are circumstances under which the same offense is worth no more than six months confinement. This quandary, in which one presidential action is binding while another is invalid, illustrates the futility of applying *Baldwin* to a military context.

5. The other punishments available at Appellant's trial are not severe enough to trigger a Sixth Amendment jury requirement.

In *Nachtigal*, the petitioner's drunk-driving offense carried not only a potential six-month sentence but also the possibility of five years of probation, a $5,000 fine, referral to a drug and alcohol dependency program, or electronic monitoring. 507 U.S. at 5. Since these additional penalties "cannot approximate in severity the loss of liberty that a prison term entails," they did not overcome the presumption that the offense was petty. *Id.*

Here, in addition to six months of confinement, Appellant was exposed to reduction in rank to E-1 and forfeiture of up to two-thirds pay for up to six months. Art. 19(b). As in *Nachtigal,* these potential penalties, while perhaps onerous, "cannot approximate in severity" a term of six months confinement. 507 U.S. at 5.

Although Appellant was never exposed to a punitive discharge, he argues it should be considered among the potential punishments for purposes of a

seriousness analysis. (Appellant's Br. at 21.) In *Blanton*, however, the Supreme Court gave scant weight to penalties that *might* have been imposed had the circumstances been different. 489 U.S. at 545 (ascribing "little significance" to potential increased penalties the petitioners did not face).

This Court should instead rely on the holding from *Nachtigal*, and find that the congressional prohibition on punitive discharges at a judge-alone special court-martial is "not stripped of its legislative character" just because it was attached to the forum, rather than to the offense itself. 507 U.S. at 4; *see supra*, II.D.1. Congress ensured that Appellant never faced a punitive discharge; this is enough to satisfy the Sixth Amendment standard as laid out in *Nachtigal*.

Finally, Appellant asserts that the "Navy's own regulations further indicate the offense's severity" because a sailor convicted of sleeping on post could be administratively separated for commission of a serious offense. (Appellant's Br. at 22.) Administrative separation, however, is a collateral consequence rather than part of the sentence. *United States v. Talkington*, 63 M.J. 212, 215 (C.A.A.F. 2014). And the Supreme Court has never, when drawing the line between petty and serious offenses, considered collateral consequences such as the termination of employment. *See, e.g., Blanton*, 489 U.S. at 545 (noting "the *statutory* penalties are not so severe" that DUI must be deemed serious offense) (emphasis added).

This Court should decline Appellant's invitation to consider, as part of the statute, possible punishments that are not part of the statute.

E. Applying *Middendorf*, Appellant has no "extraordinarily weighty" right to have Congress legislate the maximum punishments for a military offense before it can be referred to judge-alone special court-martial.

Since *Baldwin* does not apply to the military, the test for a Fifth Amendment due process challenge comes from *Middendorf* and *Weiss*. As noted above, the analysis hinges on historical practice, the presence of other safeguards to ensure impartiality, and the effect of an asserted right on the military. *See supra*, I.E.

1. No historical tradition exists of Congress setting the maximum punishments for military offenses.

Since 1775, Congress' role has been to define the offenses that might be punished, and establish the composition, authorities, and maximum sentences of different court-martial forums. *Compare* Articles of War of June 30, 1775, Arts. 33, 38, 51 (setting minimum membership for general and regimental courts-martial and establishing maximum penalties for each forum) *with* Arts. 16, 19, 36, 56, UCMJ (establishing kinds of courts-martial, limiting punishment available at judge-alone special courts-martial, and delegating to President ability to set rules and maximum punishments).

In the early days, Congress was content for most offenses to be punished "as a court-martial shall direct." *E.g.*, Rules for Regulation of Navy, 1775. Starting in

1890, Congress mandated that such punishments "shall not, in time of peace, be in excess of a limit which the President may prescribe"—a practice that continues today. *Compare* Winthrop, *supra*, at 24 (noting the 1890 change); *with* Art. 56, UCMJ ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense.").

Deciding the appropriate court-martial forum for a given offense has historically been the province of the convening authority, within limits set by the President and Congress. *Compare* Winthrop, *supra*, at 155, 481 (charges can only properly be referred by certain commanders with convening authority) *with* R.C.M. 401(c) (noting authority of commanders to dispose of charges). By choosing the forum, convening authorities have also thereby determined—at least in many cases— what the maximum punishment for the offense will be and how many fact-finders will be provided.

There have been exceptions, and sometimes new exceptions are added. *See, e.g.*, R.C.M. 201(f)(2)(C)(i) (capital offenses with mandatory punishments beyond the special court-martial maximum may not be referred to special courts-martial); R.C.M. 201(f)(2)(D) (some offenses under Articles 120 and 120b may not be referred to special courts-martial). But none of those exceptions apply here.

Congress has historically declined to set maximum punishments for military offenses, a fact that "suggests the absence of a fundamental fairness problem" in this case. *Weiss*, 510 U.S. at 179.

2. Servicemembers whose offenses are referred to judge-alone special court-martial have the same safeguard—a six-month limit on confinement provided by the legislature—as civilians facing trial before a federal magistrate for a class B misdemeanor. Whether that limitation attaches to the offense or the forum does not affect the Fifth Amendment analysis.

Another factor in the Fifth Amendment *Weiss* analysis is whether other "safeguards" exist to ensure a fair trial. 510 U.S. at 181.

Here, the relevant safeguard is a legislative determination that penalties no more severe than six months of confinement may be adjudged. The petitioner in *Nachtigal* received that safeguard, even though an executive actor established the maximum punishment within the limits set by Congress. 507 U.S. at 4; *see supra*, II.D.1. Appellant received the same safeguard, as there was never any possibility of punishment greater than six months confinement once the case was referred to a judge-alone special court-martial. Art. 19(b), UCMJ.

The only dispute here is whether Appellant was entitled to have that same safeguard provided in a different way, i.e., by a congressional limitation placed on the offense, rather than the forum. This does not seem an especially weighty concern. In *Middendorf*, the Supreme Court held that due process was not offended by forcing a servicemember to choose between a forum that did not

provide defense counsel and one with a much higher maximum penalty. 425 U.S. at 47–48. Likewise, the *Weiss* Court held the Fifth Amendment did not demand a fixed tenure for military judges, even though defendants tried before Article III judges enjoy that protection. 510 U.S. at 181.

If rights as significant as those at stake in *Middendorf* and *Weiss* can be sacrificed without a due process violation, then Appellant cannot show that a theoretical right to have a six-month limitation provided *via a specific mechanism* is "so extraordinarily weighty as to overcome the balance struck by Congress." *Middendorf*, 425 U.S. at 44.

3. This Court owes deference to the President's determination that sleeping on post, under certain circumstances, is an offense appropriate for a judge-alone special court-martial.

As part of its Fifth Amendment analysis, the *Middendorf* Court found that providing counsel at summary courts-martial would result in an "attenuated proceeding" and a "particular burden" to the military. 425 U.S. at 45–46.

Here, Congress applied the same rationale and passed the amendments to Articles 16 and 19 for the purpose of "improving the efficiency of the military justice system." (J.A. 168.) Using its plenary authority, it then allowed the President to "set such limitations" as he deemed appropriate. Art. 16(c)(2)(A), UCMJ. With this express congressional authorization, the President determined (in relevant part) that a convening authority could order a judge-alone special

court-martial for any offense that could not be punished by more than two years of confinement at general court-martial. R.C.M. 201(f)(2)(E). The Convening Authority—using the "flexibility" and "substantial discretion" the Supreme Court has said he must have—then determined Appellant's offense to be appropriate for referral to a judge-alone special court-martial. *Glines*, 444 U.S. at 357.

This is precisely how the Framers intended regulation of the armed forces to work. *Loving*, 517 U.S. at 756. Congress created a new forum so that adjudication of low-level offenses could occur without an "attenuated proceeding." *Middendorf*, 425 U.S. at 45. The President then prescribed limitations for that new forum. In turn, the Convening Authority determined his personnel should not be diverted from their "basic fighting purpose" by "the necessity of trying" a case that, in his mind, merited only seven days of confinement. *Quarles*, 350 U.S. at 17; (J.A. 166.)

As in *Middendorf*, these determinations were constitutionally permissible and are deserving of deference from this Court. 425 U.S. at 48; *Rostker*, 453 U.S. at 66.

Conclusion

The United States respectfully requests that this Court affirm the lower court's decision.

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