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United States Navy–Marine Corps
Court of Criminal Appeals

Before
THE COURT EN BANC

UNITED STATES
Appellee

v.

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

No. 202100091

Argued: 1 December 2022—Decided: 17 February 2023

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

Military Judge:
Kimberly J. Kelly

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

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

United States v. Wheeler, NMCCA No. 202100091
Opinion of the Court

For Appellant:

Captain Jasper W. Casey, USMC

For Appellee:

Lieutenant Gregg Rustico, JAGC, USN (argued)

Lieutenant John L. Flynn, JAGC, USN (on brief)

Maj Kerry E. Friedewald, USMC (on brief)

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

PUBLISHED OPINION OF THE COURT

HOLIFIELD, Chief Judge:

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

Did the convening authority violate the Fifth and Sixth Amendments of the Constitution by referring charges for which

² 10 U.S.C. § 895.

³ 10 U.S.C. § 865(d).

⁴ 10 U.S.C. § 869.

the President authorized a penalty of over six months of confinement, forfeiture of all pay, and a punitive discharge to a judge-alone special court-martial under Article 16(c)(2)(A), UCMJ[?]⁵

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

I. BACKGROUND

A. Facts

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

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

B. The Judge-Alone Special Courts-Martial

In 2016, Congress amended Articles 16 and 19, UCMJ, creating a new type of special court-martial consisting of a military judge alone at which "neither

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

⁶ 10 U.S.C. §§ 816, 819.

⁷ App. Ex. II.

⁸ App. Ex. XI.

a bad-conduct discharge, nor confinement for more than six months, nor forfeiture of pay for more than six months may be adjudged.”⁹ Congress also delegated to the President the authority to prescribe further regulatory limitations to the new judge-alone special court-martial’s jurisdiction.¹⁰ Although special courts-martial have jurisdiction to try any non-capital offense other than rape or sexual assault (or attempts thereof),¹¹ Rule for Courts-Martial [R.C.M.] 201(f)(2)(E) gives an accused the right to object to a judge-alone special court-martial when the maximum authorized punishment for the charged offense, if tried by a general court-martial, is greater than two years’ confinement—with the exception of offenses under Art. 112a(b) (wrongful use or possession of controlled substances) or attempts thereof under Article 80—or if the offense requires sex offender registration under regulations issued by the Secretary of Defense. None of these exceptions are applicable here.

⁹ Art. 16(c)(2)(A), UCMJ.

¹⁰ The relevant language of the statutes is as follows:

§816. Article 16. Courts-martial classified

...

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

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

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

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

...

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

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

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

¹¹ Articles 18(c) and 19(a), UCMJ.

II. DISCUSSION

A. Law and Standard of Review

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

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

B. The Sixth Amendment Right to a Jury

At oral argument, Appellant's counsel—despite having urged this Court in his initial and reply briefs to find a Sixth Amendment violation—conceded that his challenge was based solely on Appellant's Fifth Amendment due process rights. While we appreciate the candor, we find it necessary still to address the Sixth Amendment challenge in order to fully answer the Judge Advocate General's question. Also, much of Appellant's remaining argument involves viewing Sixth Amendment Jury Clause-related issues through a Fifth Amendment Due Process Clause lens.

The Sixth Amendment of the Constitution guarantees, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."¹³ But, in *Blanton v. N. Las Vegas*, the United States Supreme Court held this right to trial by jury inapplicable to civilian prosecu-

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

¹³ U.S. Const. amend. VI.

tions of petty offenses, with a presumption that any offense carrying a maximum punishment of six months or less is petty.¹⁴ In drawing this presumptive line between petty and serious offenses, the Supreme Court sought to ground the distinction in “objective indications of seriousness with which society regards an offense.”¹⁵ Of those indications, the Court held “most relevant . . . the maximum authorized penalty.”¹⁶ Against this was balanced “the benefits that result from speedy and inexpensive nonjury adjudications.”¹⁷

But the *Blanton* presumption is not dispositive here. Although the above considerations may be relevant in assessing Appellant’s Fifth Amendment due process rights, the Supreme Court and the Court of Appeals for the Armed Forces [C.A.A.F.] have held that the Sixth Amendment Jury Clause does not apply to courts-martial.¹⁸ If there is a constitutional right to a panel of members at a special court-martial, it does not reside in the Sixth Amendment.

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

C. The Fifth Amendment Due Process Clause

The Fifth Amendment provides, in part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”¹⁹ While “constitutional rights may apply differently to members of the armed forces than they

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

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

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

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

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

¹⁹ U.S. Const. amend. V.

do to civilians,”²⁰ “the Due Process Clause of the Fifth Amendment applies to servicemembers at courts-martial.”²¹

“[T]he Supreme Court has repeatedly emphasized the broad deference that should be afforded Congress in providing for a servicemember’s rights, . . . [but it] has not considered such deference absolute.”²² “Congress remains subject to the limitations of the Due Process Clause, . . . but the tests and limitations to be applied may differ because of the military context.”²³ When determining the limits of Due Process Clause protection, we ask whether the challenged process “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”²⁴

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

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

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

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

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

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

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

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

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

current special courts-martial).²⁷ This requirement continued with the creation of the UCMJ in 1951.²⁸ In 1968, Congress created military judges and, for the first time, authorized courts-martial without panel members—but only when an accused requested it.²⁹

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

D. Facial Challenge

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

Appellant cites to various cases in which our superior Court has held a “fair and impartial panel” to be a fundamental right as support for his position that he has a fundamental right to a panel of members.³¹ But the central issues of the cited cases deal with the members selection process—either at the convening authority’s selection stage or during voir dire—with a focus on the panel members’ *impartiality*, not the right to a panel itself.³²

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

²⁸ Article 16(2), UCMJ (1951 ed.).

²⁹ Article 16(2)(c), UCMJ (1969 ed.).

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

³¹ App. Br. at 7, 8.

³² See *United States v. Wiesen*, 56 M.J. 172 (C.A.A.F. 2001) (military judge abused his discretion in failing to grant accused’s challenge for cause based on implied bias); *United States v. Modesto*, 43 M.J. 315 (C.A.A.F. 1995) (trial counsel’s failure to disclose

1. *Historical Practice*

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

First, Appellant sidesteps the role of military judges. Prior to the Military Justice Act of 1968, judge-alone courts-martial were unknown—because military judges did not exist.³⁴ Back then, a special court-martial's president was tasked with making evidentiary and other legal rulings, often without the benefit of legal training.³⁵ Starting in 1969, however, convening authorities could detail military judges to preside over special courts-martial.³⁶ The creation of military judges also tripled the types of special courts-martial available. By default, a special court-martial would consist of a military judge and a panel of members. If requested by the accused and approved by the military judge, an accused could be tried and sentenced by a military judge alone. Or, although we find no record of such courts-martial having occurred, a special court-martial could consist solely of members if no military judge was detailed.³⁷ This last option was not removed from the UCMJ until 2019.³⁸

that member had cross-dressed at Halloween party did not warrant reversal of conviction).

³³ Appellant's Brief at 8.

³⁴ Pub. L. No. 90-632 (Oct 24, 1968).

³⁵ While the UCMJ had previously required the appointment of law officers (trained, certified lawyers) to general courts-martial, there was no such requirement applicable to special courts-martial. Art. 26(a), UCMJ (1951 ed.).

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

³⁷ *Id.*

³⁸ National Defense Authorization Act for FY 2017, Pub. L. No. 114-328, Div. E, Title LIV, §5161 (Dec. 23, 2016). Interestingly, the maximum punishment a no-judge

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

Third, since our Navy's birth the number of panel members required for a special court-martial has also changed, most recently in 2019, when the minimum number changed from three to four.⁴¹

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

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

2. Congressional and Presidential Authority

Appellant concedes that Congress had authority to amend Articles 16 and 19 as it did, but challenges the President's authority to promulgate R.C.M. 201(f)(2)(E). We question this distinction.

special court-martial could impose was identical to the maximum punishment now authorized at a judge-alone special court-martial.

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

⁴⁰ Art. 19, UCMJ (1951 ed.).

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

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

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

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

Congress’ authority to make changes to the UCMJ is firmly rooted in Article I, Section 8 of the Constitution: “The Congress shall have the power . . . [t]o make Rules for the Government and Regulation of the land and naval Forces.”⁴⁴ “This power is no less plenary than other Article I powers.”⁴⁵ Furthermore, Congress may make “measured and appropriate delegations of this power.”⁴⁶ Examples of such delegations exist throughout the UCMJ.⁴⁷

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

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

⁴⁵ *Id.* (citation omitted).

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

⁴⁷ See, e.g., Article 6a (“The President shall prescribe procedures for the investigation and disposition of charges”); Article 15 (the President may prescribe limitations “on the powers granted by this article”); Article 18 (a general court-martial may adjudge any sentence “under such limitations as the President may prescribe”); Article 36 (entitled “President may prescribe rules,” gives the President authority to prescribe,

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

The general rule is that “[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.”⁴⁹ And “[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.”⁵⁰ Such was the case when the President signed the Executive Order creating R.C.M. 201(f)(2)(E).⁵¹

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

inter alia, rules of procedure and evidence applicable at courts-martial); and, Article 56 (“punishment . . . for an offense may not exceed such limits as the President may prescribe for that offense”).

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

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

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

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

3. *Balancing Equities*

“The military constitutes a specialized community governed by a separate discipline from that of the civilian,”⁵² and “the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty”⁵³ This interplay of individual rights and military necessity are reflected in the Preamble to the Manual for Courts-Martial:

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

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

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

“The provisions of the UCMJ with respect to court-martial proceedings represent a congressional attempt to accommodate the interests of justice on one hand, with the demand for an efficient and well-disciplined military, on the

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

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

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

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

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

other.”⁵⁷ This also can be said of the Rules for Courts-Martial regarding presidential efforts to do the same. Congress (in creating the judge-alone special court-martial) and the President (in limiting the offenses that could be tried by such a court-martial over an accused’s objection) each struck a balance between competing interests.

By creating the new judge-alone special court-martial, Congress sought to promote discipline in the armed forces by giving commanders “a new disposition option for low-level criminal conduct—one that would be more efficient and less burdensome on the command . . . but without the option for the member to refuse.”⁵⁸ Previously, the lowest unrefusable option available for dealing with minor offenses was a special court-martial consisting of a military judge and four members. While nonjudicial punishment pursuant to Article 15, UCMJ, or a summary court-martial under Article 20, UCMJ, may be more appropriate ways to handle minor offenses, neither proceeding can be conducted over an accused’s objection.⁵⁹ Faced with such an objection, a commander is left with two disciplinary options: special or general court-martial. But the attendant burden on a commander to select potential members and detail them to a special court-martial—that might remove them from their normal duties for several days or weeks—often far outweighs the minor nature of the misconduct in question.

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

The military is in many ways a community distinct from civilian society. Our system of military justice is similarly distinct. For example, the role of the convening authority in members selection and the referral process has no counterpart in the Federal courts. Also, punishment in the Federal courts is dic-

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

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

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

tated by the offenses charged, not the court that tries them. These two differences provide another objective indicator of how the relevant society—here, the military—regards the seriousness of a given offense.

As mentioned above, the Supreme Court has found a legislature’s assigned maximum punishment to be the clearest objective indicator of how serious society considers a given offense. But for the military community, a convening authority’s referral decision is a similar indicator. A convening authority directly responsible for the good order and discipline of his or her command chooses a specific forum based partly on how serious he or she views the charged offenses to be. For example, whether an alleged violation of Article 95 is referred to a judge-alone special court-martial, a special court-martial with members, or a general court-martial says much about the circumstances of the offense charged. Article 95 prohibits a broad range of conduct, from sleeping on post during a time of war to, as here, sleeping while posted on a stand-by harbor patrol craft in a domestic port during peacetime. While many factors inform the forum decision, that choice is an indicator of where the community believes the specified misconduct falls on that seriousness spectrum.

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

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

⁶⁰ Articles 26 and 27, UCMJ.

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

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

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

4. *Judicial Deference*

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

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

As Congress balances the distinctive interests inherent in military service, it considers both the individual’s rights and the government’s need for a well-ordered and disciplined force. Where Congress has been clear in its determination of where this balance should be struck, the Supreme Court tells us deference is owed. The issue here is not where *we* would strike the balance; rather we should limit our present inquiry to “whether factors militating in favor of [a panel of members] are so extraordinarily weighty as to overcome the balance struck by Congress.”⁶⁷

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

⁶⁴ *Rostker*, 453 U.S. at 64-65.

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

⁶⁶ *Weiss*, 510 U.S. at 176-77.

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

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

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

In recognition of this substantial deference, we apply the test provided by the Supreme Court, first in *Middendorf v. Henry* and later in *Weiss v. United States*.⁷¹ Considering “the factors militating in favor” of trial by a panel of members—here, Appellant offers only that “it’s always been thus” as the sole factor—in contrast to the increased efficiency and reduced burden of prosecution, the sentence limitations in Article 19, the offense limitations in R.C.M. 201(f)(2)(E), and the rights to counsel, a military judge, and appeal guaranteed elsewhere in the UCMJ, we cannot conclude that the benefit of a panel of members in such cases is “so extraordinarily weighty” as to overcome the balance struck by Congress and the President.

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

E. As-Applied Challenge

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

⁶⁸ *Youngstown*, 343 U.S. at 635.

⁶⁹ *Rostker*, 453 U.S. at 68.

⁷⁰ *Graf*, 35 M.J. at 464.

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

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

Our superior Court has decried any reliance “on the concept of ‘military due process,’ an amorphous concept . . . that appears to suggest that servicemembers enjoy due process protections above and beyond the panoply of rights provided to them by the plain text of the Constitution, the UCMJ, and the [Manual for Courts-Martial]. They do not.”⁷³

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

III. CONCLUSION

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

The findings and sentence are **AFFIRMED**.

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

⁷³ *Vazquez*, 72 M.J. at 19.

⁷⁴ Articles 59 & 66, UCMJ.

KIRKBY, Judge (concurring in the judgment):

I write separately to express my concern with the methodology used by Congress in creating a military judge-alone special court-martial. While I concur with the majority that neither the changes to Articles 16 and 19, UCMJ, nor the creation of Rule for Courts-Martial 201(f)(2)(E)), on their face or as-applied, violate either the Fifth or Sixth Amendments to the Constitution, my position on this would be different if the current limited protections offered to servicemembers by R.C.M. 201(f)(2)(E) were eroded in the future without full congressional oversight.

I. DISCUSSION

A. Importance of Members.

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

[t]he problem with this argument is that the purpose and functions of the jury do not vary significantly with the importance of the crime. In *Baldwin*²... the Court held that the right to a jury trial attached in both felony and misdemeanor

¹ *Ballew v. Georgia*, 435 U.S. 223, 238 (1978).

² *Baldwin v. New York*, 399 U.S. 66 (1970).

cases. Only in cases concerning truly petty crimes, where the deprivation of liberty was minimal, did the defendant have no constitutional right to a trial by jury.³

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

B. Procedural Due Process

The Fifth Amendment provides, in part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."⁵ While "constitutional rights may apply differently to members of the armed forces than they do to civilians,"⁶ "the Due Process Clause of the Fifth Amendment applies to Servicemembers at courts-martial."⁷ "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."⁸ "[D]ue process is flexible and calls for such procedural protections as the particular situation demands."⁹

The Supreme Court found that the resolution of the issue of whether certain administrative procedures were constitutionally sufficient required an analysis of the governmental and private interests that are affected.¹⁰ The

³ *Id.* at 247.

⁴ *United States v. Corl*, 6 M.J. 914 (N.C.M.R. 1979).

⁵ U.S. Const. amend V.

⁶ *United States v. Marcum*, 60 M.J. 198, 205 (C.A.A.F. 2004).

⁷ *United States v. Graf*, 35 M.J. 450, 454 (C.M.A. 1992).

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

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

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

Court noted that prior decisions indicated that identification of the specific dictates of due process generally requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹ While I recognize the applicability of these principles to an *administrative* arena, I believe servicemembers facing a criminal conviction should be afforded no less protection. The President's decree in R.C.M. 201 that offenses are "minor" tests the limits of such "fairness" when a criminal conviction attaches to their records for the remainder of their career (if any) and into the civilian world. Simply put, any future employer will not see "minor" offense anywhere in the record and will potentially see only the maximum punishment decreed for a specific offense. While there has been a long standing, and appropriate, recognition that those who serve relinquish certain rights in order to meet the military mission, there is simply no military necessity accomplished by the "shortcut" contained in R.C.M. 201(f)(2)(E).

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

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

¹² See 18 U.S.C. § 3559(a)(7)-(8).

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

¹⁴ *Baldwin*, 399 U.S. at 68.

¹⁵ *Id.* at 73.

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

C. Sixth Amendment

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

The majority identifies that “[t]he recent changes to Articles 16 and 19, UCMJ, are simply the next step in the evolution of special courts-martial.”¹⁶ While I disagree that this step is in anyway simple or necessarily next, I do not disagree with the proposition that the system develops and evolves. In this case Congress has opted to evolve the system to ease prosecution and expedite criminal conviction. I believe alternatives could have involved changes to Article 15, changes to summary courts-martial proceedings, or the creation of proceedings that do not result in criminal convictions. I do however recognize that where alternatives may have been preferable for servicemembers, the majority has correctly pointed out that the power to delegate rests with Congress and with Congress lies the result. “This power is no less plenary than other Article

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

I powers.”¹⁷ Furthermore, Congress may make “measured and appropriate delegations of this power.”¹⁸

The majority suggests “Congress (in creating the judge-alone special court-martial) and the President (in limiting the offenses that could be tried by such a court-martial over an accused’s objection) each struck a balance between competing interests.”¹⁹ But, I am unclear how the Soldiers, Sailors, Marines, Airmen, Coastguardsmen or our Space Guardians in the field will view the creation of this new forum, one where they have objectively lost their choice of finder of fact, as well as any form of balance. Simply put: a servicemember, charged with an offense that carries a maximum punishment of 5 years in prison (according to Presidential decree) is unlikely to believe that this change accommodates justice. While this may not offend the Constitution, we should be wary of the impact on good order and discipline that servicemembers, in a wholly voluntary force, must be able to view as just.

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

II. CONCLUSION

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



FOR THE COURT:

Mark K. Jamison
MARK K. JAMISON
Clerk of Court

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

¹⁸ *Loving*, 517 U.S. at 767.

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