No. 12-210

In the Supreme Court of the United States

RICHARD L. EASTON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Article 44(c) of the Uniform Code of Military Justice provides that, for purposes of double-jeopardy protections, jeopardy attaches in a court-martial proceeding at the beginning of "the introduction of evidence." 10 U.S.C. 844(c). The question presented is whether Article 44(c) violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution when it is applied to a court-martial proceeding that is conducted by both a military judge and members and is dismissed after the court-martial members have been sworn but before opening statements or the introduction of any evidence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-31a) is reported at 71 M.J. 168. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 32a-50a) is reported at 70 M.J. 507.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2012. The petition for a writ of certiorari was filed on August 9, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a First Lieutenant in the United States Army, was convicted by a military judge sitting as a general court-martial of two specifications of missing movement by design, in violation of Article 87 of the

Uniform Code of Military Justice (UCMJ), 10 U.S.C. 887. He was sentenced to dismissal and 18 months of confinement. Pet. App. 2a. The convening authority reduced the term of confinement to ten months and waived the automatic forfeiture of all pay and allowances for six months but otherwise approved the sentence. *Ibid.* The United States Army Court of Criminal Appeals affirmed. *Id.* at 32a-50a. The United States Court of Appeals for the Armed Forces affirmed. *Id.* at 1a-31a.

1. Under the UCMJ, a court-martial may consist of a military judge and several court-martial members, or of members sitting without a judge, or of a military judge alone. Art. 16(1) and (2), UCMJ, 10 U.S.C. 816(1) and (2); see *Weiss* v. *United States*, 510 U.S. 163, 167 (1994). "Former jeopardy" in the context of courts-martial is addressed by Article 44, UCMJ, 10 U.S.C. 844. Article 44(a) provides that "[n]o person may, without his consent, be tried a second time for the same offense." 10 U.S.C. 844(a). Article 44(c) further provides that "[a] proceeding which, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this article." 10 U.S.C. 844(c). Article 44 thus effectively provides that jeopardy attaches when the introduction of evidence begins, regardless of whether the court-martial consists of a judge and members, or only a judge, or only members.

2. In early 2007, petitioner was a First Lieutenant in the United States Army who was assigned as a physician's assistant in the Third Infantry Division based at Fort Stewart, Georgia. When petitioner's unit deployed to Iraq, petitioner intentionally missed the flight. He

was ordered to leave on another flight the next day and also missed that flight by design. Pet. App. 4a-5a.

In April 2007, petitioner was charged with two specifications of missing movement in violation of Article 87, UCMJ (10 U.S.C. 887). Pet. App. 35a. The case was referred to a general court-martial, and petitioner was arraigned. *Ibid.* Before trial, the military judge ruled that two government witnesses were unavailable due to their deployment to Iraq and ordered that they be deposed by videotape. *Id.* at 5a. At a pretrial hearing on July 16, 2007, the military judge noted that the parties had concluded that the videotaped depositions were useless because there was no video image and the audio was incomprehensible. *Ibid.* The government nevertheless stated that it desired to proceed with trial (which was scheduled to begin in three days). *Ibid.* Voir dire was conducted that day, and a panel of court-martial members was sworn and assembled before the court recessed. *Id.* at 6a. Two days later, before the court-martial was scheduled to resume, the convening authority withdrew and dismissed the charges against petitioner. *Ibid.*

In May 2008, petitioner was charged again with the same two specifications of missing movement (and other unrelated charges). Pet. App. 6a, 35a. Petitioner requested trial before a military judge alone and moved to dismiss the missing-movement charges on the ground, *inter alia*, that a trial would violate his constitutional protection against double jeopardy. *Id.* at 6a, 36a. The military judge denied the motion. *Ibid.*

The military judge determined that jeopardy had not attached at the first court-martial because Article 44(c) provides that jeopardy attaches with the introduction of evidence and does not distinguish between a court-

martial held by a judge alone and one involving members. *Id.* at 38a. The judge found that, at the time the charges before the first court-martial were dismissed, no evidence had been presented and no opening statements had been made. *Id.* at 51a.

After trial before the military judge sitting alone, petitioner was found guilty of the two missing-movement specifications. Pet. App. 6a, 36a. The judge sentenced him to dismissal and 18 months of confinement, but the convening authority reduced the term of confinement to ten months. *Id.* at 2a.

3. On appeal, petitioner contended that his trial before the second court-martial violated the Double Jeopardy Clause of the Fifth Amendment because jeopardy attached at the first court-martial when the members of the court-martial were sworn. Pet. App. 33a, 41a. In particular, he argued that "Article 44(c), UCMJ, is unconstitutional as applied to him" because it provides for attachment of jeopardy when evidence is introduced, while *Crist* v. *Bretz*, 437 U.S. 28 (1978), provides that jeopardy attaches at a jury trial at an earlier time: when the jury is empaneled and sworn. Pet. App. 41a.

The United States Army Court of Criminal Appeals affirmed. Pet. App. 32a-50a. The court concluded that, under the plain terms of Article 44(c), jeopardy did not attach during petitioner's first court-martial, but it declined to reach the constitutionality of that provision, because it held that the first court-martial had been terminated for manifest necessity, which prevented jeopardy from terminating "[e]ven if jeopardy attached in [petitioner's] first court-martial." *Id.* at 43a.

4. The Court of Appeals for the Armed Forces (CAAF) affirmed by a divided vote, holding that petitioner's second court-martial did not violate his constitu-

tional protections against double jeopardy. Pet. App. 1a-31a. The CAAF first concluded that the government did not show that the withdrawal of charges from the first court-martial was the result of manifest necessity. *Id.* at 11a-16a. The CAAF thus turned to the question of whether jeopardy had attached during the first court-martial. *Id.* at 16a.

a. The majority of the CAAF concluded that jeopardy did not attach at the first court-martial because the convening authority had terminated that proceeding before the introduction of evidence and because Article 44(c) is constitutional as applied to courts-martial that include members. Pet. App. 16a-22a.

The CAAF recognized that "the protection against double jeopardy applies in courts-martial," but it held that this Court's decision in *Crist* does not "address double jeopardy in a military context." Pet. App. 17a-18a. The CAAF explained that *Crist*'s "reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury." *Id.* at 18a (quoting *Crist*, 437 U.S. at 35). The interest in retaining a chosen jury, however, is inapplicable in the military context, the CAAF reasoned, in part because "[t]he Sixth Amendment right to a jury trial does not apply to courts-martial." *Ibid.*

The CAAF also considered "[t]he structure and purpose of the UCMJ" and found that "the application of the *Crist* rule to courts-martial would negate portions of the UCMJ." Pet. App. 18a. For instance, the CAAF explained that, under Article 29, UCMJ, 10 U.S.C. 829, military judges and convening authorities have broad power to remove previously selected court members for "good cause" and that convening authorities can detail

new members to a court-martial when it is reduced below a specified number of members. Pet. App. 18a-19a. As a result, the CAAF concluded that a servicemember "does not have the same right to have a trial completed by a particular court panel" that a civilian would have in a jury trial. *Id.* at 19a.

The CAAF explained that the *Crist* rule would also be inconsistent with Article 16, UCMJ, 10 U.S.C. 816, which provides for a special court-martial consisting of not less than three members without a military judge, who would be unable to function properly "if jeopardy attached when members were sworn since they would not be able to perform any duties [including even arraignment] without jeopardy attaching." Pet. App. 19a-20a. The CAAF also identified "other articles that specify how a special court-martial without a military judge operates" and Rule 604 of the Rules for Courts-Martial as provisions that would be inconsistent with a mechanical application of *Crist*'s holding to the military context. *Id.* at 20a-21a.

The CAAF concluded that Congress had been "purposeful in selecting the point at which jeopardy attaches" and that it had "appropriately exercised its Article I power * * * '[t]o make Rules for the Government and Regulation of the land and naval Forces' * * * when it enacted Article 44(c)." Pet. App. 21a (quoting U.S. Const. Art. I, § 8, Cl. 14).

b. Judge Erdmann concurred in part and dissented in part. Pet. App. 23a-31a. Although he agreed with the majority that the termination of the first court-martial was not justified by manifest necessity, he concluded that the jeopardy-attachment rule in Article 44(c) is unconstitutional in light of *Crist*. *Id.* at 23a-24a. In his view, the UCMJ's provisions for the removal and substi-

tution of court-martial members are not substantially different from those applicable in civilian practice, *id.* at 24a-26a, and "Article 44(c) was adopted not because of any overriding demand for discipline or duty in the military, but rather to protect servicemembers from retrial where the prosecution initiated a trial only to have the convening authority withdraw the charges so the government could gather additional evidence," *id.* at 29a.

ARGUMENT

Petitioner contends (Pet. 8-24) that the CAAF erred in finding that jeopardy attaches in a court-martial proceeding with a military judge and members when evidence is introduced, as provided by Article 44(c), UCMJ, 10 U.S.C. 844(c). He asserts that the CAAF should have applied the rule announced in *Crist* v. *Bretz*, 437 U.S. 28, 35 (1978), which held that jeopardy attaches in a civilian jury trial when the jury is empaneled and sworn. The decision of the CAAF is correct and does not conflict with the decision of any other court of appeals. Further review is unwarranted.

1. The question in this case is not whether the accused in a court-martial proceeding is entitled to protection against being "twice put in jeopardy of life or limb" for the same offense, as the Double Jeopardy Clause requires. U.S. Const. Amend. V. The question instead is whether Congress has permissibly decided in Article 44(c) that, in the context of a court-martial, a proceeding becomes a "trial" (*i.e.*, jeopardy attaches) when evidence is first introduced. That approach is analogous to the rule that this Court has held to be applicable in the context of a bench trial in the civilian context. See *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) ("In a nonjury trial, jeopardy attaches when the court begins

to hear evidence."). The CAAF correctly concluded that Article 44(c) is constitutional.

a. The Constitution vests Congress with authority "[t]o make Rules for the Government and Regulation of the land and naval Forces." Art. I, § 8, Cl. 14. As a result, judicial deference "is at its apogee" when the Court "review[s] congressional decisionmaking" involving "regulations, procedures, and remedies related to military discipline," and that deference "extends to rules relating to the [constitutional] rights of servicemembers" in the military-justice system. *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (internal quotation marks omitted); see *Solorio* v. *United States*, 483 U.S. 435, 448 (1987) ("[W]e have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated."); *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981).

The Court has repeatedly recognized that court-martial procedures need not correspond precisely to those that are constitutionally required in the civilian context, even though "Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system." *Weiss*, 510 U.S. at 174; see also *Middendorf* v. *Henry*, 425 U.S. 25, 46 (1976) ("[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 fair trials of civilians in federal courts.") (quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955)); *id.* at 49-50 (Powell, J., concurring) ("The procedures in [courts-martial] were never deemed analogous to, or required to conform with, procedures in civilian courts."). Thus, in *Middendorf*, the Court refused to countenance "a mechanical application"

of its civilian-criminal-procedure holdings to the context of a court-martial. *Id.* at 37. It held that servicemembers appearing before summary courts-martial were not entitled to appointed counsel even though those proceedings could result in "the military equivalent of imprisonment." *Id.* at 35, 48. And in *Weiss*, the Court held that military judges need not have fixed terms of office to ensure their independence. 510 U.S. at 181. In both cases, the Court asked whether the factors favoring the asserted constitutional right were "so extraordinarily weighty as to overcome the balance struck by Congress" between the rights of servicemembers and the needs of the military. *Id.* at 177-178 (quoting *Middendorf*, 425 U.S. at 44). Similar deference is appropriate here.[1]

b. Petitioner's attack on the constitutionality of Article 44(c) is predicated on his contention that, under this Court's decision in *Crist*, "no legislature has the discretion to move the point at which jeopardy attaches *in a jury trial*." Pet. 23 (emphasis added). But petitioner errs in assuming that a court-martial with a judge and members is directly equivalent to "a jury trial." In fact, as the drafters of the *Manual for Courts-Martial* have explained, "[t]here is no jury in courts-martial," and

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[1] The CAAF sustained the constitutionality of Article 44(c) even while placing the burden on the government to prove that "military conditions require a different rule than that prevailing in the civilian community." Pet. App. 17a (quoting *Courtney* v. *Williams*, 1 M.J. 267, 270 (C.M.A. 1976)). The decision in *Courtney* predated this Court's decisions in *Middendorf* and *Weiss* and is arguably superseded by them. But to the extent that the CAAF erred in placing the burden of justifying a departure from civilian practice on the government, that approach favored petitioner. Because the CAAF reached the correct result, any error in its allocation of burdens would not warrant further review.

even though "[t]he role of members has become somewhat more analogous to that of a jury" than it had historically been, "significant differences remain." *Manual for Courts-Martial (MCM)*, App. 21, at A21-58 (2012 ed.). Among other things, "courts-martial are"—unlike civilian juries—"not empaneled to represent a fair cross-section of the community," *Sanford* v. *United States*, 586 F.3d 28, 36 (D.C. Cir. 2009), but are instead chosen by the commanding officer who convenes a court-martial (*i.e.*, the "convening authority") on the basis of "his opinion" about who is "best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." Art. 25(d)(2), UCMJ, 10 U.S.C. 825(d)(2). And court-martial members' responsibilities, while "analogous to," are also "somewhat greater than, those of civilian jurors." *Weiss*, 510 U.S. at 167 n.1.

When Article 44(c) was first enacted, members were even less like jurors, in part because Congress did not provide for the position of a military judge at courts-martial until 1968. See *Weiss*, 510 U.S. at 167. But, as the CAAF noted (Pet. App. 21a), Congress has not amended Article 44(c) in the decades since that development and this Court's decision in *Crist*, even though the UCMJ was redrafted in 1983. Furthermore, the drafters of the Rules for Courts-Martial (R.C.M.)—who exercise authority delegated by Congress and the President to prescribe rules that "shall be uniform insofar as practicable," Art. 36(a) and (b), UCMJ, 10 U.S.C. 836(a) and (b)—have concluded that those developments did not require a modification in the time that jeopardy attaches in the context of court-martial proceedings. Thus, Rule 907(b)(2)(C)(i) tracks Article 44(c) and continues to provide, for purposes of evaluating a motion to

dismiss on former-jeopardy grounds, that a "court-martial proceeding" is not a trial "unless presentation of evidence on the general issue of guilt has begun." R.C.M. 907(b)(2)(C)(i).[2] The accompanying analysis explains that the drafters affirmatively "considered" *Crist* and found that it was inapplicable and "would have adverse practical effect if applied in the military." *MCM*, App. 21, at A21-58.

c. As the CAAF explained (Pet. App. 18a), *Crist*'s own rationale does not squarely apply in the court-martial context. In *Crist*, the Court's determination that jeopardy attaches in a jury trial when the jury is empaneled and sworn was expressly predicated on "the interest of an accused in retaining a chosen jury"—an interest that the Court explained had "roots deep in the historic development of trial by jury." 437 U.S. at 35-36. But, as petitioner concedes (Pet. 18), the constitutional right to a jury trial (see U.S. Const. Amend. VI) does not even apply in the court-martial context. See *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942). And the UCMJ has long provided fewer protections for the accused's chosen court-martial panel than a civilian receives for his chosen jury.

Petitioner contends (Pet. 15) that "military practice" with respect to "dismissing or replacing jury members" is "substantially similar to what occurs in the civilian court system." But there are significant differences that permit more changes to the panel in the court-martial context than in the civilian context. In a civilian federal criminal trial, a juror may be excused for "good cause," but the judge cannot reduce the usual number of 12

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[2] Petitioner thus errs in suggesting (Pet. 16-17) that R.C.M. 604(b) is "[t]he only explicit reference" outside of Article 44(c) to the time at which evidence is introduced.

jurors below 11 without the parties' agreement. Fed. R. Crim. P. 23(b)(1)-(3). That contrasts with the court-martial context, in which both the military judge and the convening authority have power to dismiss a member for "good cause," Art. 29(a), UCMJ, 10 U.S.C. 829(a), which includes "military exigency," R.C.M. 505(f). In addition, more than one court-martial member can be removed (without being replaced), as long as the panel retains a quorum. Art. 29(b) and (c), UCMJ, 10 U.S.C. 829(b) and (c). And, even after trial has begun, a court-martial member can be replaced by a new member. *Ibid.* That differs markedly from the practice associated with alternate jurors in the civilian context, see Fed. R. Crim. P. 24(c), because they must all be selected before trial begins, thus ensuring that all members of the "chosen jury" are present at the time jeopardy attaches. See 2 Charles Alan Wright & Peter J. Henning, *Federal Practice and Procedure* § 388, at 650-651 (4th ed. 2009) ("Alternate jurors may not be impaneled after the trial has begun.").

d. Finally, as the CAAF explained (Pet. App. 19a-21a), the UCMJ specifically contemplates that, in certain proceedings, court-martial members may sit without a military judge. Article 44(c)'s uniform rule sensibly avoids incongruous results in that setting. See *id.* at 20a (noting the impossibility of such a special court-martial's functioning without jeopardy attaching, since being sworn is a prerequisite even to arraignment). Petitioner has not shown that the factors favoring *Crist*'s rule for civilian jury trials even apply, let alone that they are so "extraordinarily weighty" (see p. 9, *supra*) as to overcome Congress's decision to adopt a jeopardy-attachment rule that applies uniformly across

all forms of courts-martial, none of which is entirely analogous to a civilian jury trial.

2. Petitioner separately contends (Pet. 22) that Congress's purported intention in enacting Article 44(c) was "to expand, rather than erode, an accused's protection against double jeopardy." That proposition, which is based on legislative history (Pet. 21 & n.7), is unavailing for multiple reasons.

First, legislative history cannot overcome the plain language that Congress used in Article 44(c), which treats the introduction of evidence as the moment when jeopardy attaches in a court-martial, regardless of how the court-martial is constituted. See, *e.g.*, *Whitfield* v. *United States*, 543 U.S. 209, 215 (2005) ("we need not accept petitioners' invitation to consider the legislative history" when "the meaning of [the statutory] text is plain and unambiguous"); *Lamie* v. *United States Tr.*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent.").

Second, petitioner describes (Pet. 21) Congress's supposed expectation that Article 44(c) would "bring military practice in line with the accepted federal practice." But Congress heard conflicting testimony on what such an alignment would require, with some witnesses referring to when "the court is sworn," others to when "evidence is taken after arraignment," some to both of those times, and at least one to the point when there is a conviction or acquittal.[3] Accordingly, Congress's deci-

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[3] *Uniform Code of Military Justice: Hearings Before a Subcomm. of the Senate Comm. on Armed Servs.*, 81st Cong., 1st Sess. 150 (1949) (*Senate Hearing*) (statement of Col. John P. Oliver: "[Article 44] should be corrected to provide that jeopardy attaches when the court is sworn"); *id.* at 322 (statement of Felix Larkin: "[J]eopardy

sion to pick one of those times does not indicate an intention to incorporate future changes that this Court might deem necessary in the civilian context.

Third, Article 44(c) would have expanded double-jeopardy protections regardless of whether it focused on when members are sworn or when evidence is introduced, because it provided for the first time in the military context that jeopardy would attach before a verdict had been reached. See William Winthrop, *Military Law and Precedents* 260 (2d ed. 1920) (explaining that, under the Articles of War, "unless the case has proceeded at least to an acquittal or a conviction, there has been no trial and therefore no jeopardy"). As a result, taking Congress at its word would be entirely consistent with

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obtains or applies or starts, if you will, in many civil jurisdictions, either when the jury is sworn or the first witness is heard"); *Uniform Code of Military Justice: Hearings Before a Subcomm. of the House Comm. on Armed Servs.*, 81st Cong., 1st Sess. 756 (1949) (statement of Col. John P. Oliver: "[Article 44] should be corrected to provide that jeopardy attaches when the court is sworn"); *id.* at 821 (testimony of Robert D. L'Heureux: "Congress should make [Article 44] somewhat similar to the Federal rules. It should provide that any proceeding in which evidence is taken after arraignment but interrupted prior to findings shall constitute a former trial[.]"); *id.* at 802 (statement of Col. Frederick Bernams Wiener: contending it would be more consistent with the original meaning of the Fifth Amendment to treat jeopardy as attaching only when there is a conviction or acquittal).

Petitioner specifically invokes (Pet. 21 n.7) a statement by Professor Edmund M. Morgan, Jr., to the effect that he was "anxious * * * to have the double jeopardy clause apply, and apply the way it does in civilian courts." *Senate Hearing* 325. That statement, however, pertained to permitting a new trial when the first trial included the introduction of evidence but was terminated as a result of "imperious necessity." *Ibid.* That aspect of Article 44(c) is not the subject of petitioner's challenge, and Morgan's testimony never squarely addressed the time at which he believed jeopardy attached. *Id.* at 321-325.

an intention to "expand, rather than erode" (Pet. 22) protections against double jeopardy.

3. Because *Crist*'s rule for civilian jury trials is not directly applicable to the military context, there is no basis for petitioner's assertion (Pet. 14) that the CAAF "has now created a system that conflicts with every other jurisdiction in the United States." Petitioner identifies no other jurisdiction that has addressed the applicability of double jeopardy to courts-martial as opposed to civilian jury trials. Moreover, even if some other courts had done so, this Court would typically defer to the decision of the military courts. See *Middendorf*, 425 U.S. at 43 ("Dealing with areas of law peculiar to the military branches, the Court of Military Appeals' judgments are normally entitled to great deference.").[4]

That result is particularly appropriate here because the rule that Congress adopted—and that the CAAF sustained—is scarcely a dramatic departure from the civilian context, as it tracks the time when jeopardy attaches in a civilian bench trial. See pp. 7-8, *supra*; see

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[4] Petitioner suggests (Pet. 19) that the CAAF's reliance on the lack of a constitutional right to a jury trial under the Sixth Amendment is "impossible to reconcile" with other decisions from the CAAF. But those other decisions addressed other aspects of the Fifth Amendment (specifically, its equal-protection component and Due Process Clause). See *United States* v. *Weisen*, 56 M.J. 172, 174 (C.A.A.F. 2001); *United States* v. *Tulloch*, 47 M.J. 283, 285 (C.A.A.F. 1997); *United States* v. *Santiago-Davila*, 26 M.J. 380, 390 (C.M.A. 1988). Those rights are independent of the Double Jeopardy Clause and of the right to a jury trial. Cf. 6 Wayne R. LaFave, *Criminal Procedure* § 22.2(c), at 47 (3d ed. 2007) ("Long before the Sixth Amendment right to jury trial was applied to the [S]tates, state jury selection procedures were subjected to constitutional challenge on the ground that they violated the [E]qual [P]rotection [C]lause of the Fourteenth Amendment."). In any event, a conflict within the CAAF's own cases would not warrant certiorari.

also *United States* v. *Wells*, 26 C.M.R. 289, 292 (C.M.A. 1958) (Congress's decision to make jeopardy attach at "the beginning of the presentation of evidence * * * accords with th[e approach] of the Federal courts in the case of a trial by a judge without a jury," which is "not inappropriate," because, "[i]n some respects a court-martial functions as both a judge and a jury").

Furthermore, because the first court-martial proceeding against petitioner was dismissed before opening statements and before the introduction of any evidence (Pet. App. 51a), this case does not present an instance in which the government can be said to have "ma[d]e repeated attempts to convict an individual for an alleged offense," which would implicate a double-jeopardy concern separate from the defendant's interest in retaining a chosen jury. *Green* v. *United States*, 355 U.S. 184, 187 (1957). Instead, petitioner's trial before the second court-martial simply allowed the government to "pursue its not-yet-vindicated interest in one complete opportunity to convict those who have violated its laws." *Sattazahn* v. *Pennsylvania*, 537 U.S. 101, 115 (2003) (citation omitted). Under the circumstances, further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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