No. 12-___

IN THE

Supreme Court of the United States

MICHAEL C. BEHENNA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a servicemember in a combat zone categorically forfeits the right to self-defense as a matter of law by pointing a firearm without authorization at a suspected enemy.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael C. Behenna respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-43a) is reported at 71 M.J. 228. The opinion of the United States Army Court of Criminal Appeals (Pet. App. 45a-75a) is reported at 70 M.J. 521.

JURISDICTION

The United States Court of Appeals for the Armed Forces (CAAF) entered the judgment on July 5, 2012. The CAAF denied a petition for reconsideration on August 6, 2012. Pet. App. 44a. On October 23, 2012, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 3, 2013. The jurisdiction of this Court rests on 28 U.S.C. § 1259(3). *See also* 10 U.S.C. § 867a.

REGULATIONS INVOLVED

A. Rules 916(e)(1) and (e)(4) of the Rules for Courts-Martial, Manual for Courts-Martial, United States (2008 edition), state:

> **Rule 916. Defenses**
>
> * * *
>
> (e) *Self-defense.*
>
> (1) *Homicide or assault cases involving deadly force*. It is a defense to a homicide, assault involving deadly force, or battery involving deadly force that the accused:

(A) Apprehended, on reasonable grounds, that death or grievous bodily harm was about to be inflicted wrongfully on the accused; and

(B) Believed that the force the accused used was necessary for protection against death or grievous bodily harm.

* * *

(4) *Loss of right to self-defense.* The right to self-defense is lost and the defenses described in subsections (e)(1), (2), and (3) of this rule shall not apply if the accused was an aggressor, engaged in mutual combat, or provoked the attack which gave rise to the apprehension, unless the accused had withdrawn in good faith after the aggression, combat, or provocation and before the offense alleged occurred.

B. Rule 920(e)(3) of the Rules for Courts-Martial, Manual for Courts-Martial, United States (2008 edition), states:

Rule 920. Instructions on findings

* * *

(e) *Required instructions.* Instructions on findings shall include: . . .

(3) A description of any special defense under R.C.M. 916 in issue . . .

INTRODUCTION

Petitioner, Army First Lieutenant Michael Behenna, was serving as a platoon leader in Iraq in 2008 when an insurgent attack with an improvised explosive device ripped through his patrol, killing two soldiers and three Iraqi civilians. Lieutenant Behenna interrogated a suspected insurgent linked to the deadly attack by intelligence reports identifying him as a member of the local "Al-Qa'ida in Iraq IED Cell." Because Lieutenant Behenna conducted the interrogation "without authority" and trained his handgun on the suspected terrorist during the encounter, a bare majority of the Court of Appeals for the Armed Forces (CAAF) ruled that Lieutenant Behenna "lost the right to act in self-defense as a matter of law." Pet. App. 13a. Although the majority recognized that a so-called "initial aggressor" may regain the right to self-defense if the opponent escalates the level of force, the majority held that no escalation could have occurred in this case when the suspected insurgent threw a piece of concrete at Lieutenant Behenna and "lunge[d] for the pistol," because Lieutenant Behenna's pointing of that firearm *per se* constituted deadly force. Pet. App. 15a, 16a. As a result, Lieutenant Behenna legally could not defend himself in any manner against even a lethal attack by the enemy suspect.

The 3-2 CAAF ruling is wrong. It conflicts with "basic criminal law concepts" that the CAAF deemed solely applicable outside "an active battlefield situation." Pet. App. 13a-14a. Even assuming that a servicemember becomes an initial aggressor by pointing a firearm at a suspected enemy without authorization, the common law of self-defense does not categorically equate gun pointing with "deadly force" that wholly forfeits the defender's right to repel a lethal attack. *See* Wayne R. LaFave, 2 Substantive Criminal Law § 10.4(a); *accord* Model Penal

Code § 3.11(2). Moreover, as Section 1983 cases involving Fourth Amendment claims make clear, civilian law enforcement officers do not automatically turn into defenseless targets the moment they aim a firearm without authorization at a potential threat.

For this reason, the divided CAAF decision is not only wrong, but dangerous. It puts servicemembers in combat zones in a more vulnerable position than their civilian law enforcement counterparts. Though Lieutenant Behenna's interrogation of the suspected terrorist did not occur in a conventional "active battlefield situation," neither did it involve some brawl in a stateside barroom. It arose from a counter-insurgency operation in "the combat theater of operations." Pet. App. 36a (Effron, J., dissenting). There, countless servicemembers point their weapons on a daily basis—as they are trained to do—to maintain a tactical advantage, control a dangerous situation, or restrain potential enemies. Because the CAAF's categorical ruling would apply regardless of whether a servicemember is an inch or a mile beyond authorization, it will put an ever growing number of servicemembers in physical and legal jeopardy as our armed forces confront increasingly unconventional scenarios involving undefined battle lines and deadly threats from disguised enemies.

The CAAF's ruling is likely to be determinative of servicemembers' right to self-defense in combat zones unless this Court intervenes. The CAAF adhered in this case to an earlier decision in which another bare majority equated the pointing of a firearm to the use of deadly force. And although other federal courts can address the federal common law of self-defense, other federal courts ordinarily do not review claims of self-defense by servicemembers in combat zones. Just as the Federal Circuit has the final say over patents unless this Court steps in, the CAAF essentially has the last word on the

right of servicemembers to defend themselves in combat zones unless this Court intervenes. The decision below should be reviewed, and reversed, now.

STATEMENT OF THE CASE

1. First Lieutenant Michael Behenna, of Edmond, Oklahoma, deployed to Iraq in 2007, where he led a platoon assigned to an area north of Baghdad. The platoon's mission included counter-insurgency operations. On April 21, 2008, the platoon patrolled a hotbed of insurgency called Salam Village. The platoon captured two suspects and headed toward a third when an improvised explosive device (IED) tore through the patrol, killing five people—two soldiers, a translator, and two Iraqi members of the Concerned Local Citizens group—while seriously wounding other platoon members. Pet. App. 48a; Record of Trial (ROT) 1190-1194.

Intelligence reports linked a local named Ali Mansur to the deadly April 21 attack. Specifically, a report dated April 27 stated that Mansur, who worked as an Iraqi police officer, belonged to the "Al-Qa'ida in Iraq IED Cell" operating in Salam Village; Mansur transported explosives for the group. Defense Exhibit (DX) H.[1] Another report stated that Mansur would stand on top of a police station overlooking Salam Village and tip off other members of the group by cell phone whenever Coalition Forces approached the Village. Pet. App. 3a; ROT 1189.

Lieutenant Behenna's platoon took Mansur into custody on May 5, 2008, after a local leader identified him

[1] This exhibit was admitted for demonstrative purposes and was published to the court-martial panel members during Lieutenant Behenna's testimony (ROT 1209), as relevant to Lieutenant Behenna's state of mind (ROT 1199-1205).

as a terrorist. ROT 751-753, 759, 789-791. Army interrogators questioned Mansur several times, but could not "get answers." ROT 584. One questioner told Lieutenant Behenna that Mansur was "being deceptive and lying." ROT 601, 1213. Due to this lack of progress, Lieutenant Behenna was ordered to deliver Mansur to Albu Toma—the town near Salam Village where Mansur had been taken into custody—and release him there. ROT 584, 1214.

Convinced that the suspected insurgent had information about the April 21 attack, Lieutenant Behenna decided to interrogate Mansur before releasing him. ROT 1214, 1217-1218. Lieutenant Behenna took Mansur to a culvert outside of Albu Toma, removed Mansur's clothes and handcuffs, and made him sit on a large rock inside the culvert's tunnel. ROT 1221-1229, 1258. At a distance of about two to three feet, Lieutenant Behenna pointed a handgun at Mansur while questioning him about who was involved in the deadly IED attack and who led the Salam Village insurgent cell. ROT 1217, 1229, 1233. Lieutenant Behenna was accompanied to the culvert by an Iraqi translator nicknamed "Harry" and another member of the platoon, Staff Sergeant Hal Warner. Harry stood about 30 feet outside the tunnel and translated Mansur's responses, while Sergeant Warner went further away to relieve himself. ROT 391, 414, 806, 872.

2. What happened next inside the tunnel was the subject of conflicting evidence at trial. *See* Pet. App. 31a ("At trial, two different versions emerged as to what next occurred.") (Effron, J., dissenting).

a. At trial, Lieutenant Behenna testified that, after several minutes of unsuccessful questioning, he tried to scare information out of Mansur by telling him that "[t]his is your last chance to tell the information or you will die."

ROT 1232. As Mansur said something in response, Lieutenant Behenna turned away from Mansur to hear Harry translate. While Lieutenant Behenna's head was turned, he heard a chunk of concrete hit the tunnel wall above his left shoulder. Lieutenant Behenna testified that, when he turned back to look at Mansur, Mansur "was reaching up toward my weapon, getting up." ROT 1234. Lieutenant Behenna instinctively stepped left and fired a "controlled pair" of shots that hit Mansur in the chest and head, killing him. Lieutenant Behenna testified that "this happened fast," and he shot Mansur out of fear that the suspected insurgent "was going to take my weapon and use it on me." ROT 1233-1234, 1264.

b. The prosecution's theory was that Lieutenant Behenna took Mansur into the culvert intending to execute him regardless of whether he answered Lieutenant Behenna's questions. *See* Appellate Exhibit (AE) XCI, Finding 4; ROT 1405-1406 (prosecution's closing argument). To support that theory, the prosecution presented testimony from the translator Harry. Harry testified that, at the time of the first shot, Mansur was seated. ROT 773. Harry admitted, however, that he "didn't see exactly" what happened inside the tunnel. ROT 799. In particular, Harry could "not clearly" see Lieutenant Behenna or Mansur, much less the latter's hands and arms, because Harry was at least 30 feet away from the tunnel, he had turned to Lieutenant Behenna to translate, it was dark and dusty, and the critical sequence happened "so fast." ROT 773, 797-799, 806, 1230. Moreover, contrary to Harry's testimony, Sergeant Warner testified as a prosecution witness that, although he missed seeing the first shot, he saw Mansur "falling" from a "semi-sitting" position just before the second shot. ROT 871-874. Even so, the prosecution relied on Harry's testimony to argue that Mansur did not stand up and grab for Lieutenant Behenna's gun. ROT 1407, 1410.

c. The defense presented two experts to establish that Mansur was crouching or standing up when the first shot was fired. One expert was a forensic pathologist, the other an expert on scene reconstruction. ROT 955, 975-78. Each testified that, in his opinion, Mansur was standing up (though not necessarily completely erect) when the first shot was fired, that the first shot struck him in the chest, and that his right arm was out of the way of the bullet's trajectory. ROT 959, 961-962, 980, 982-983, 992. The forensic pathologist further testified that, in his opinion, the second shot was fired almost immediately after the first and struck Mansur in the head, while he was falling down from the first shot. ROT 961-962. The expert on scene reconstruction agreed that this scenario provided the "best explanation" consistent with the physical evidence. ROT 983, 989. In testifying about this sequence of events, the experts relied on the parallel, horizontal trajectory of both shots, which, in the forensic pathologist's words, made the government's version of a sitting victim "offend[] probability and maybe common sense." ROT 972; *see* ROT 961 ("If he had been sitting down . . . then the trajectory of the bullet would be downward, not horizontal"). Both experts also relied on an analysis of blood patterns. ROT 962, 984, 989.

d. The government retained Dr. Herbert MacDonell as an expert in scene reconstruction and potential rebuttal witness. Pet. App. 19a, 37a-38a. On the evening after the defense experts testified, Dr. MacDonell used a government paralegal to reenact the shooting privately for the government attorneys. Pet. App. 19a; ROT 1464. Dr. MacDonell advised the government attorneys that the scenario that the defense experts had presented, though improbable, was "the only logical" explanation "consistent with all of the facts." Pet. App. 19a; ROT 1463-64. He was referring to "something . . . credited to Sherlock Holmes, which said that once you have removed all the things that

are impossible whatever remains, regardless of how improbable, must be the truth." ROT 1463. The next day, after Lieutenant Behenna testified to the same scenario that the defense experts had testified about and that Dr. MacDonell had reenacted for the prosecution, Dr. MacDonell told the government's expert pathologist, "[T]hat's exactly what I told you yesterday." ROT 1462.

The government did not have Dr. MacDonell testify. As Dr. MacDonell was leaving the courtroom to fly home, he told the lead defense attorney, "I would have made a great witness for you." ROT 1480. When the defense attorney asked Dr. MacDonell what he meant, Dr. MacDonell refused to elaborate, not believing it proper. ROT 1462; AE XCIII, Attachment (Affidavit of Dr. MacDonell), at 3.

The next morning, which was the last day of trial, defense counsel told the government attorneys what Dr. MacDonell had said and reminded them that they had to turn over all exculpatory information. The government attorneys said they did not have any. ROT 1445; AE XCI, at 3 (Findings of Fact 21 & 22).

3. After the close of evidence, the military judge instructed the panel members that "[t]he evidence has raised the issue of self-defense." ROT 1315. The judge gave the panel a general instruction on self-defense that closely tracked the pattern jury instructions. *Compare* Pet App. 10a n.3 *with* Department of Army, Pamphlet 27-9, Military Judges' Benchbook, Instructions 5-2-1 & 5-2-6 Note 3, at 859-860, 869 (January 1, 2010) [hereafter cited as "Benchbook"]. In addition, the military judge gave an instruction on the limitations to self-defense. Pet. App. 10a-11a. This instruction modified the pattern instructions significantly. *Compare id*. *with* Benchbook, *supra*, Instruction 5-2-6 Notes 5, 6 & 8, at 870-871. Defense counsel unsuccessfully objected to "the

modification . . . as far as the limitations on self-defense." ROT 1307. Specifically, defense counsel argued that the instructions could be interpreted erroneously to mean that "[t]he act of pointing a weapon toward any combatant in a war zone" creates an inference of assault. ROT 1307-1308.

The court-martial panel found Lieutenant Behenna guilty of unpremeditated murder. ROT 1437-1438.[2] In doing so, as the CAAF later noted, the panel "clearly rejected the government's theory of the case—a premeditated, execution-style killing." Pet. App. 22a. Lieutenant Behenna was sentenced to dismissal, twenty years of confinement (as reduced from twenty-five years by the convening authority), and forfeiture of pay and allowances. Pet. App. 2a.

4. On the evening of the verdict, a government attorney forwarded to defense counsel an email that Dr. MacDonell had sent the government attorney in the interim. In that email, Dr. MacDonell expressed "concern[]" that he did not "have a chance to inform the court of the only logical explanation for this shooting." Appellate Exh. (AE) LXXVI, at 2. Dr. MacDonell added, "[W]hen I heard Lt. Michael Behenna testify as to the circumstances of how the two shots were fired I could not believe how close it was to the scenario I had described to you." *Id.* at 3. Dr. MacDonell continued:

> I am sure that had I testified I would have wanted to give my reenactment so the jury could have had the option of considering how well the

[2] The panel also found Lieutenant Behenna guilty of assaulting Mansur, based on testimony that Lieutenant Behenna hit him on the back with a helmet while taking him into custody on May 5. Pet. App. 2a; ROT 1438. This conviction is not at issue.

> defendant's story fit the physical facts. This, of course, would not have been helpful to the prosecution case. However, I feel that it is quite important as possible exculpatory evidence . . .

AE LXXVI, at 3.

Based on the government's failure timely to disclose favorable evidence, defense counsel moved for a mistrial. The defense motion relied on *Brady v. Maryland*, 373 U.S. 83 (1963), and Rule of Court Martial 701. After the military judge denied the motion, AE XCI, the defense moved for a new trial, in support of which an affidavit from Dr. MacDonell recounted the exculpatory information above, AE XCIII. The military judge also denied that motion. AE XCV.

5. In the United States Army Court of Criminal Appeals (ACCA), Lieutenant Behenna challenged, among other things, (1) the military judge's instruction on the limits of self-defense and (2) the government's failure to timely disclose Dr. MacDonell's view that the defense's version of events was "the only logical" explanation. Pet. App. 19a. The ACCA affirmed the findings and sentence. Pet. App. 75a. Like the military judge, the ACCA did not question that self-defense was "in issue," but upheld the self-defense instructions as correct. Pet. App. 66a-71a. The ACCA also upheld the military judge's denial of the *Brady* claim. Pet. App. 58a-66a.

6. The United States Court of Appeals for the Armed Forces granted review to determine whether the self-defense instruction or the government's failure to disclose favorable evidence deprived Lieutenant Behenna of his constitutional right to a fair trial. Pet. App. 2a. Every member of the CAAF found the military judge's limiting instruction on self-defense to be erroneous. As the majority explained, the instruction "provided no guidance on how to evaluate an offer-type assault." Pet. App. 11a;

see also Manual for Courts-Martial, Pt. IV, ¶ 54.c(1)(a) (defining "assault" as "an attempt *or offer* with unlawful force or violence to do bodily harm to another") (emphasis added); *id*. ¶ 54.c(1)(b) ("Difference between 'attempt' and 'offer' type assaults"). Worse yet, the instruction "linked the lawful use of force with the issue of escalation with the conjunction 'and.'" Pet. App. 12a. The CAAF explained this linkage was erroneous "because Appellant would have had the right to self-defense if his original use of force had been lawful . . . *or* if Mr. Mansur had escalated the level of force." Pet. App. 12a (emphasis supplied by CAAF).[3]

a. However, parting ways from both courts below and the dissenters, a bare 3-2 majority held that the self-defense instruction was "superfluous." Pet. App. 13a. Because the encounter did not occur in the midst of "an active battlefield situation" that "implicate[s] the unique aspects of military service," the majority purported to apply "basic criminal law concepts." Pet. App. 13a-14a. The majority found that Lieutenant Behenna "lost the right to act in self-defense as a matter of law" by using "unauthorized and excessive" force "in the culvert before the shooting." Pet. App. 13a, 15a. The majority reasoned that any use of force by Lieutenant Behenna was "unauthorized" because he "deviated from his assigned duty to return Mansur to his home, without authority." Pet. App. 14a. This unauthorized use of force made Lieutenant Behenna "the initial aggressor," in the majority's view. Pet. App. 14a. The majority recognized that an initial aggressor "regains the right to act in self-

[3] The escalation principle is not expressly addressed in the Rules for Courts-Martial, but the CAAF has held that it is a common-law principle that coexists with the Rules. *See United States v. Lewis*, 65 M.J. 85, 88 (C.A.A.F. 2007).

defense if the other party escalates the degree of force." Pet. App. 9a. But the majority believed that "Mansur could not have escalated the level of force in this situation, as [Lieutenant Behenna] had already introduced deadly force." Pet. App. 15a-16a. The majority deemed Lieutenant Behenna's use of force—pointing a handgun at a suspected insurgent in a combat zone—"excessive" under the view that "a loaded pistol" *per se* counts as "deadly force." Pet. App. 16a. As a result, according to the majority's reasoning, Lieutenant Behenna forfeited all right to defend himself with any force against a deadly attack because Lieutenant Behenna was the initial aggressor with deadly force. Pet. App. 16a, 17a.

The majority's determination that Lieutenant Behenna was not entitled to argue self-defense at trial also compelled it to reject his *Brady* claim. The majority assumed that the evidence at issue—Dr. MacDonell's professed opinion that the defense's account of the shooting in the culvert provided "the only logical" explanation "consistent with all of the facts" (Pet. App. 19a; ROT 1463-64)—was "favorable and not properly disclosed." Pet. App. 22a. However, the majority held that, even if Dr. MacDonell's opinion was favorable to the defense, it was not material because by the time the shooting occurred, Lieutenant Behenna "had lost the right to act in self-defense as a matter of law." Pet. App. 22a.

b. The dissent sharply rejected the majority's view that Lieutenant Behenna forfeited the right to self-defense as a matter of law "by virtue of conducting an unauthorized interrogation that used improper techniques." Pet. App. 36a. In the dissent's view, "a display of a loaded weapon . . . does not per se constitute use of deadly force," particularly considering the context of an interrogation "in the combat theater of operations" of "a person suspected of aiding enemy forces." Pet. App. 30a,

36a. Instead, given that "two different versions" of what happened in the culvert emerged at trial, the dissent argued that "a properly instructed court-martial panel" should determine in a new trial "whether the interrogation techniques amounted to" an assault with deadly force under the circumstances, and whether Lieutenant Behenna ultimately "acted in self-defense." Pet. App. 31a, 35a-36a. The dissent accused the majority of invading the province of the factfinder. Pet. App. 36a.

The dissent added that, if the government believes a servicemember has conducted "an improper and abusive interrogation, the [Uniform Code of Military Justice] provides ample authority to hold that person accountable in a court-martial." Pet. App. 36a-37a. But such accountability, the dissent remarked, "does not require the servicemember to sacrifice the right of self-defense; nor does it deprive the servicemember of the right to have the panel decide whether, as a matter of fact, the circumstances justified the use of force to save the servicemember's life from an attack by a person suspected of supporting the enemy." Pet. App. 37a.

Because the dissent disagreed with the majority's self-defense analysis, the dissent also disagreed with the majority's reliance on its self-defense ruling to reject the *Brady* claim. The dissent found that Dr. MacDonell's testimony was material because it would have "supplement[ed] the information that had been provided by the two defense experts, from the perspective of a Government-employed consultant of considerable reputation." Pet. App. 42a (citing precedent describing Dr. MacDonell as the "preeminent practitioner in the field").

c. The CAAF later denied Lieutenant Behenna's petition for reconsideration. Pet. App. 44a.

REASONS FOR GRANTING THE WRIT

A bare majority of the CAAF ruled that a servicemember in a combat zone categorically forfeits the right to self-defense by pointing a firearm without authorization at a suspected enemy outside the traditional "active battlefield situation." Pet. App. 13a. The CAAF's ruling has central and growing significance as our servicemembers confront enemies in increasingly unconventional combat settings. Both wrong and dangerous, the decision below warrants review and reversal by this Court.

I. The CAAF's Categorical Curtailment Of The Right Of Servicemembers To Defend Themselves In Combat Zones Is Of Vital And Growing Importance.

According to the U.S. Department of Defense (DoD), "In the post-September 11 world, irregular warfare has emerged as the dominant form of warfare confronting the United States."[4] DoD defines irregular warfare as conflicts between states and non-state actors, such as the struggle in Iraq and elsewhere between the United States and its allies, on the one hand, and al Qaida and other terrorist networks, on the other hand.[5] The "irregular forces" waging this war often "hide among the population" and use "indirect" methods[6] such as roadside improvised

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[4] U.S. Dep't of Defense, *Quadrennial Defense Review Report*, at 36 (Feb. 6, 2006), available at http://www.defense.gov/pubs/pdfs/QDR20060203.pdf.

[5] *Id*. at 3.

[6] U.S. Dep't of Defense, *Irregular Warfare: Countering Irregular Threats*, Joint Operating Concept Version 2.0, at 9 & n.16 (May 17, 2010).

explosive devices,[7] rather than "direct conventional military confrontation,"[8] as occurs in "traditional warfare."[9] DoD is in a process of "rebalancing" the armed forces so that the "general purpose forces" can "[i]ncrease counterinsurgency, stability operations, and counterterrorism competency and capacity."[10] The goal is for the armed forces as a whole to "develop[] a mastery of irregular warfare comparable to that . . . achieved for conventional warfare."[11]

Given the changing nature of warfare and of DoD's response to it, servicemembers can expect increasingly to encounter the enemy in scenarios outside the conventional "active battlefield situation." In many such encounters, of course, servicemembers will display firearms to carry out their mission and protect themselves and those around them. Yet under the CAAF's ruling, whenever they do so beyond their authorization—whether or not they are aware that they lack authority to act, and whether or not the lack of authorization is apparent at the time—they will surrender their right to self-defense as the initial aggressor with deadly force.

This case vividly illustrates the grave danger inherent in the irregular warfare our troops are waging. Lieutenant Behenna's platoon regularly conducted missions whose "main purpose was counterinsurgency." ROT 1181. During some of those missions, the platoon was

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[7] U.S. Department of Defense, *Quadrennial Defense Review Report*, at 21 (Feb. 2010) [hereafter 2010 QDR].

[8] U.S. Department of Defense, *Quadrennial Roles and Missions Review Report*, at 5 (Jan. 2009) [hereafter QRM].

[9] U.S. Department of Defense, Counterinsurgency Operations, Jt. Publ'n 3-24, at p. I-6 (Oct. 5, 2009).

[10] 2010 QDR, *supra* note 7, at p. viii.

[11] QRM, s*upra* note 8, at 9.

"supposed to conduct operations with … the CLC [Concerned Local Citizens group], the Iraqi Army, the Iraqi Police, and to also gain trust with the leadership there in Albu Toma." ROT 1181. Confirming intelligence reports, a member of the Albu Toma leadership identified Ali Mansur as a terrorist. ROT 751-753, 759, 789-791. Yet Army intelligence also reported Mansur to be a member of the same police force with which the platoon was required to conduct operations. DX H, at 2. Indeed, Mansur reportedly stood atop his police station to keep a watch for Coalition Forces and, when spotted nearby, to tip off the local insurgent cell. DX H, at 1-2; ROT 1189. It is in unconventional scenarios like this one, outside the "active battlefield situation," that the CAAF decision disabling the right of servicemembers to defend themselves will become increasingly determinative.

II. The CAAF's Categorical Curtailment Of The Right Of Servicemembers To Defend Themselves In Combat Zones Conflicts With The Common Law Of Self-Defense And Fourth Amendment Case Law, And Perversely Gives Servicemembers Less Protection To Respond To Deadly Threats Than Civilian Police Officers.

The CAAF decision is dangerously wrong. The majority woodenly treats a confrontation between a servicemember and a suspected terrorist in a combat zone no differently than a barroom brawl between two civilians in the States. For the CAAF, pointing a firearm in both situations categorically equates with deadly force and thereby strips civilians and servicemembers alike of all right to defend against a deadly attack if they are subsequently determined to be the initial aggressor in the encounter. Even worse, though servicemembers in the theater of operations are frequently tasked with more dangerous missions than law enforcement officers back

home, the CAAF ruling leaves servicemembers with *less* leeway to defend against deadly attacks than Section 1983 cases involving Fourth Amendment claims afford their civilian counterparts.

1. Contrary to the CAAF majority's categorical rule, the common law requires consideration of "all the circumstances" to decide a self-defense claim. *Beard v. United States*, 158 U.S. 550, 564 (1895); *accord Starr v. United States*, 153 U.S. 614, 623 (1894). Thus, the common law generally does not treat the act of pointing a firearm at a potential assailant as *per se* deadly force, but requires consideration of the specific nature of the encounter and the particular characteristics of the defender and assailant. Indeed, the weight of authority holds that, for self-defense purposes, "merely to threaten death or serious bodily harm" with a firearm or other deadly weapon, "without any intention to carry out the threat, is not to use deadly force." Wayne R. LaFave, 2 Substantive Criminal Law § 10.4(a).[12]

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[12] *Accord Douglas v. United States*, 859 A.2d 641, 642 (D.C. App. 2004) ("mere display of a deadly weapon to ward off an attack is not necessarily to be equated to the actual use of deadly force"); *State v. Moore*, 729 A.2d 1021, 1029 (N.J. 1999) ("Like many other jurisdictions, we are also persuaded that a critical difference exists between brandishing a gun and actually discharging it," such that "brandishing a weapon does not constitute deadly force when its purpose is to threaten the use of deadly force if necessary"); *Mattox v. State*, 874 S.W.2d 929, 935-36 (Tex. Ct. App. 1994) (under state law, "threat to cause death or serious bodily injury by the production of a weapon or otherwise, as long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute the use of deadly force" (quotations omitted)); *State v. Rincker*, 423 N.W.2d 434, 441 (Neb. 1988) (same); *Toledo v. State*, 452 So.2d 662, 662 n.3 (Fla. Dist. Ct. App. 1984) ("display of a deadly weapon without more is not deadly force"); *United States v. Black*, 692 F.2d 314, 318 (4th Cir. 1982) ("only threaten[ing] deadly

This authoritative view was espoused both by the dissent in this case, Pet. App. 30a (Effron, J., dissenting) ("A display of a loaded weapon . . . does not per se constitute use of deadly force"), and by the concurring opinion in *United States v. Stanley*, 71 M.J. 60 (C.A.A.F. 2012), *cert. denied*, 133 S.Ct. 210 (2012). In *Stanley*, decided a few months before this case, the CAAF found the pointing of a firearm, in and of itself, to be "the *use* of deadly force." *Id*. at 63 (emphasis supplied by CAAF). That case involved a fight between four soldiers in a stateside farmhouse over a criminal drug enterprise. The CAAF majority opinion determined that a soldier who pointed his pistol at two others while searching for their weapons forfeited his right to self-defense on the spot as an initial aggressor with deadly force. *Id*. In a concurrence, two CAAF judges criticized the majority opinion for "conflat[ing] the concept of the display of a dangerous weapon with the concept of the use of deadly force." *Stanley*, 71 M.J. at 72 (Baker, C.J., joined by Stucky, J., concurring in part and in the result). The concurring judges thus disagreed that the defendant in that case used deadly force by pointing a weapon at the other parties. *Id*. at 64. To the contrary, they maintained that "[t]hreatening death or serious bodily harm, without intention of carrying out the threat, does not constitute the use [of] deadly force." *Id*. at 72.

Tellingly, though the affray in *Stanley* was a far cry from a combat zone encounter with the enemy, the CAAF majority in the present case cited *Stanley* to support its ruling below that Lieutenant Behenna introduced deadly

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force" does not amount to using deadly force); *State v. Williams*, 433 A.2d 765, 769 (Me. 1981) ("loading the pistol or pointing it, in a threatening manner," does not by itself constitute "deadly force").

force to his encounter with Mansur by pointing his firearm at the suspected insurgent. Pet. App. 15a-16a. It is the mechanical application of this erroneous rule on self-defense to servicemembers in combat zones that makes the decision below especially dangerous for our armed forces.

Granted, the CAAF's categorical view here and in *Stanley* that "point[ing] a weapon at an individual who poses no threat" at the moment amounts to "deadly force," Pet. App. 15a n.5, finds some support at common law.[13] But that view has been roundly rejected by the Model Penal Code as "unduly severe," *see* Model Penal Code (MPC) § 3.11 cmt. 2, and replaced by a number of states adopting the MPC's position that "a threat to cause death or serious bodily injury, by the production of a weapon or otherwise, so long as the actor's purpose is limited to creating an apprehension that he will use deadly force if necessary, does not constitute deadly force." MPC § 3.11(2); *see id*. at cmt. 2.

Review is warranted now because the CAAF is unlikely to reconsider the categorical rule applied in this case, given the CAAF's prior application of the same rule in *Stanley*. As a practical matter, moreover, the CAAF has the last say on the right to self-defense of servicemembers in combat zones unless this Court intervenes.[14]

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[13] *See, e.g., Armstrong v. Bertrand*, 336 F.3d 620, 626 (7th Cir. 2003) (interpreting Wisconsin law to hold that robber who threatened victim with gun "had no right of self-defense"); *Commonwealth v. Mayfield*, 585 A.2d 1069, 1077 (Pa. Sup. Ct. 1991) ("mere wielding of a knife amounts to use of deadly force").

[14] Only in the rare prosecution under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261(a)(1), 3267(1), might a lower federal court outside the military court system have occasion to

2. In addition to the common law, decades of Section 1983 case law involving Fourth Amendment claims counsel against treating the act of brandishing a firearm as an automatic trigger for liability. This Court's seminal decision in *Graham v. Connor*, 490 U.S. 386 (1989), rejected "mechanical" liability rules for adjudicating excessive force claims against civilian law enforcement. *Id*. at 396 (quotations omitted). Instead, *Graham* required a "careful balancing" of the individual interests against those of the government, with "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue" and "whether the suspect poses an immediate threat to the safety of the officers or others." *Id*. at 396. Furthermore, this balancing "must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id*. at 396-97.

Accordingly, this Court and federal courts of appeals have held time and again that categorical rules are inappropriate for deciding whether an officer's act of pointing a gun at someone gives rise to liability. In *Los Angeles County v. Retelle*, 550 U.S. 609 (2007) (per curiam), this Court held that police officers searching a home for suspects, one of whom was known to have a handgun, acted reasonably in brandishing their firearms as they entered a bedroom and ordered two innocent adults to get out of bed and stand naked at gunpoint while the search proceeded. While no doubt traumatic for those occupants, this Court concluded that the actions of the

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address a servicemember's right to self-defense in a combat zone overseas. *Cf. United States v. Green*, 654 F.3d 637 (6th Cir. 2011).

officers ultimately were reasonable because a weapon may have been "within reach," and "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." *Id*. at 614-15. Likewise, federal courts of appeals applying *Graham* have generally refused to find the pointing of firearms by police officers—even at unarmed and innocent civilians—to be excessive and unreasonable as a matter of law.[15] As this Court has stated, "this area is one in which the result depends very much on the facts of each case." *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

Indeed, even when courts have found that officers acted impermissibly or unreasonably in creating their need to use deadly (or otherwise substantial) force, the federal courts of appeals hold that the reasonableness of the officers' use of force is a context-dependent question for the factfinder. As the Second Circuit has explained in a typical case, "actions leading up to the shooting are *irrelevant* to the objective reasonableness of [an officer's] conduct at the moment he decided to employ deadly force. The reasonableness inquiry depends *only* upon the

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[15] For example, in *Baird v. Renbarger*, 576 F.3d 340 (7th Cir. 2009), the Seventh Circuit declined to decide "at a high level of generality" the legality of an officer's "pointing of a gun," as gun pointing "encompasses far too great a variety of behaviors and situations." *Id*. at 345. Rather, the court acknowledged the "considerable leeway" that must be accorded on a case-by-case basis "to law enforcement officers' assessments about the appropriate use of force in dangerous situations." *Id*. at 342; *accord Blossom v. Yarbrough*, 429 F.3d 963 (10th Cir. 2005); *Aponte Matos v. Toledo Davila*, 135 F.3d 182 (1st Cir. 1998); *Edwards v. Giles*, 51 F.3d 155 (8th Cir. 1995); *Courson v. McMillian*, 939 F.2d 1479 (11th Cir. 1991); *Collins v. Nagle*, 892 F.2d 498 (6th Cir. 1989); *Hinojosa v. City of Terrell*, 834 F.2d 1223 (5th Cir. 1988).

officer's knowledge of circumstances immediately prior to and at the moment that he made the split-second decision to employ deadly force."[16] A few lower courts in these police cases have held that antecedent officer conduct "may" influence the excessive-force analysis.[17] But none has held—as the CAAF held here—that antecedent conduct *categorically* subjects an officer to liability for subsequent uses of force. And given that civil cases are this forgiving, there should be *no* doubt about the lack of suitability and wisdom of an "on/off switch" for *criminal* liability in the theater of operations for servicemembers who, outside of their zone of authority, are threatened by potentially deadly enemies. *Scott v. Harris*, 550 U.S. 372, 382 (2007).

3. As noted, because servicemembers in combat zones are routinely tasked with moving among and seeking out hidden, disguised, and deadly threats—even beyond the "active battlefield situation"—they openly carry and often brandish their weapons outside of their bases, a practice opposite that of police officers in the States. Yet perversely, the CAAF decision leaves servicemembers with much *less* legal room to defend themselves against lethal assailants. The CAAF decision not only fails to afford servicemembers the basic allowance that *Graham* gives civilian officers for "split-second judgments—in

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[16] *Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) (emphasis added); *accord Bodine v. Warwick*, 72 F.3d 393, 400 (3rd. Cir. 1995) (opinion of then-Judge Alito); *Livermore v. Lubelan*, 476 F.3d 397, 406-07 (6th Cir. 2007); *Schulz v. Long*, 44 F.3d 643, 648-49 (8th Cir. 1995); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992); *Fraire v. Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991).

[17] *Billington v. Smith*, 292 F.3d 1177, 1186-91 (9th Cir. 2002); *see also St. Hilaire v. City of Laconia*, 71 F.3d 20, 26 (1st Cir. 1995) (factoring in antecedent police conduct).

circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Worse still, if the CAAF decision is allowed to stand, servicemembers who overstep their authority instantly become defenseless targets for deadly enemy attacks. If they draw their firearms first, they could lose all right to self-defense "as a matter of law." Pet. App. 13a, 22a. If they wait for the enemy to attack before drawing their weapons, they could lose their lives. Neither "basic concepts of criminal law" (Pet. App. 14a) nor common sense requires servicemembers to make that Hobson's choice.

III. The Question Presented Equals Or Exceeds The Importance Of Lower Court Decisions Imposing Rigid Rules On The Use Of Force By Civilian Police Officers.

This Court has granted certiorari to review lower court decisions that imperil civilian law enforcement officers with rigid rules for *civil* liability that box in police work. This criminal case presents an even more compelling situation for review.

For example, in *Scott v. Harris*, this Court reversed the Eleventh Circuit's denial of summary judgment to a police officer sued for ramming the plaintiff's car to end a high-speed car chase. 550 U.S. 372 (2007). The Eleventh Circuit had read *Tennessee v. Garner*, 471 U.S. 1 (1985), as establishing rigid preconditions for a police officer's use of "deadly force" to be reasonable under the Fourth Amendment. *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005), *rev'd sub nom. Scott v. Harris*, 550 U.S. 372. This Court rejected that reading, explaining that *Garner* simply analyzed "the use of a particular type of force in a particular situation." *Scott*, 550 U.S. at 382. The Court in

Scott observed that *Garner*'s discussion of what circumstances might have justified shooting a fleeing suspect had "scant applicability" to the case before it, which involved a different type of force (a police car ramming the fugitive's car) to prevent a different type of danger (a high-speed car chase). *Id*. at 383. Thus, the Court in *Scott* rejected a rigid framework for analyzing police use of deadly force as unworkable. The Court concluded, "[I]n the end we must still slosh our way through the factbound morass of 'reasonableness.'" *Id.*

Similarly, in *Brosseau v. Haugen*, this Court reversed the Ninth Circuit's denial of summary judgment to an officer sued for shooting the plaintiff in the back during his attempt to flee. 543 U.S. 194 (2004) (per curiam). The Ninth Circuit had held that the officer was not entitled to qualified immunity based partly on that court's view that *Garner* established a "specific constitutional rule" for police use of deadly force. *Haugen v. Brosseau*, 339 F.3d 857, 862 (9th Cir. 2003), *rev'd*, 543 U.S. 194. This Court rejected the Ninth Circuit's view, observing that the decision in *Garner* was "cast at a high level of generality." *Brosseau*, 543 U.S. at 199. The Court approvingly cited other lower court precedent recognizing that *Garner* provides guidance, but seldom clear answers, for the "many different kinds of circumstances" in which police officers use force to combat threats to themselves and to others. *Id*. (quotations omitted). The Court in *Brousseau*, as in *Scott*, thus granted review to reverse a lower court decision that ignored the complexity and fact-sensitivity of dangers confronting police in the field.

This case presents an even more compelling situation for review than *Scott* or *Brosseau*. Rigid rules for the use of force by police officers raise concern because police regularly put themselves in situations "fraught with danger" for officers and the public. *Arizona v. Johnson*, 555

U.S. 323, 330 (2009) (internal quotation marks omitted). But the danger pales in comparison with that faced by servicemembers in places like Salam Village, as the deadly IED attack on Lieutenant Behenna's platoon illustrates. The prudence of having a firearm trained on potentially deadly threats in settings outside the "active battlefield situation" does not dissipate the moment a servicemember oversteps his or her authorization. In this context, it is perverse for the CAAF to make a servicemember's act of gun pointing an automatic trigger for a categorical loss of the right to self-defense.

IV. This Case Is An Ideal Vehicle For Review Of The Question Presented.

This case provides an ideal vehicle for addressing the important question presented here, which is a purely legal question under the federal common law of self-defense. To be sure, detailed rules of engagement and other legal material govern servicemembers' use of force in combat situations. Likewise, detailed laws and military policies govern who may interrogate suspected terrorists and how. Yet none of those laws or policies is at issue here. Lieutenant Behenna does not challenge in this petition the CAAF's determination that he lacked authority to interrogate Mansur or to point a weapon at him during the interrogation. Pet. App. 14a. The sole question of law is whether a servicemember in a combat zone categorically forfeits the right to self-defense by pointing a firearm at an enemy suspect without authorization.

Furthermore, petitioner does not challenge in this petition the CAAF's use of "basic criminal law concepts" to answer that question. Pet. App. 14a. Thus, this case does not concern an "area[] of law peculiar to the military branches," in which deference to the CAAF might be appropriate. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976).

Nor does this case implicate the "principle of deference" to Congress's judgment of the proper balance between the rights of servicemembers and the needs of the military. *Solorio v. United States*, 483 U.S. 435, 447-448 (1987). This case also does not implicate the Article III courts' obligation to show "the utmost deference to Presidential responsibilities . . . in military and national security affairs." *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988). The Rules for Courts-Martial, which the President promulgates by executive order, incorporate "common law self-defense principles." *United States v. Lewis*, 65 M.J. 85 (C.A.A.F. 2007). Thus, this case turns upon federal common law principles of self-defense with which this Court has long experience and over which it has plenary review power. *See*, *e.g.*, *Starr v. United States*, 153 U.S. 614 (1894); *Wiggins v. People, Etc., in Utah*, 93 U.S. 465 (1876).

Nor do any factual disputes overhang the pure question of self-defense law presented here. Indeed, the CAAF's categorical ruling on self-defense obviated the central factual dispute at trial over what happened in the culvert, because under that ruling, Lieutenant Behenna had already lost the right to self-defense as a matter of law by the time the shooting occurred.

Finally, the CAAF majority opined at one point that, "[e]ven assuming for a moment that Mansur could have escalated the level of force, . . . a naked and unarmed individual in the desert does not escalate the level of force when he throws a piece of concrete at an initial aggressor in full battle attire, armed with a loaded pistol, and lunges for the pistol." Pet. App. 16a. But this factual assertion by the CAAF majority cannot be viewed as an alternative legal basis for sustaining Lieutenant Behenna's conviction. If this Court holds, as Lieutenant Behenna urges, that the question whether a servicemember forfeits his right to self-defense by pointing a gun at an enemy suspect is

necessarily context-dependent and requires resolution by the factfinder, then this Court must reverse, and the CAAF majority's statement could not stand in the way of Lieutenant Behenna's receiving a new trial. As the dissent below observed:

> Under the majority's approach, the panel should not have had the opportunity to consider factual issues raised by Appellant's testimony, including whether the interrogation techniques amounted to the use of force likely to produce death or grievous bodily harm, whether Appellant intended to use the interrogation techniques as a pretext for killing Ali Mansur, or whether Appellant reasonably apprehended that Ali Mansur rose up and reached for Appellant's weapon for the purpose of killing Appellant. These issues, however, were matters for resolution by a court-martial panel, not this Court.

Pet. App. 36a (Effron, J., dissenting); *see also Commonwealth v. Cataldo*, 668 N.E.2d 762, 765 (Mass. 1996) ("Where, as here, the evidence is conflicting and the jury would have been warranted in believing evidence that the defendant pointed a gun at another with or without the intent to shoot the latter, the jury must be instructed properly on the definition of deadly force and the use of deadly force in self-defense, and the jury must determine whether the defendant's acts constituted the use of deadly force.").

Of course, on retrial, a court-martial panel would hear for the first time the government's own expert—the "preeminent practitioner in the field" (Pet. App. 42a)—testify that Lieutenant Behenna's account of self-defense against the suspected insurgent was "the only logical" explanation consistent with the physical evidence. Pet. App. 19a. With a panel properly instructed on self-

defense, Lieutenant Behenna would stand a very strong chance of proving his innocence.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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