UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN M. LARRABEE	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 1:19-cv-654 (RJL)
	)	
RICHARD V. SPENCER, *et al.*	)	
	)	
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

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INTRODUCTION

Petitioner is one of nearly two million military retirees.[1] He receives a military pension but has no military duties or authority. Compl. ¶ 15. He was nevertheless tried and convicted by a court-martial for offenses committed after he left active duty, on private property and against a person who was not part of the armed forces. *Id.* ¶¶ 19, 21. His military trial was unconstitutional.

"[G]iven its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 14 (1955) (quoting U.S. CONST. art. I, § 8, cl. 14). *Toth* thus held that the Constitution forbids the court-martial of a servicemember after his discharge—even for crimes committed while on active duty in a foreign combat theater. But the Supreme Court has never clarified whether *Toth* applies to *retired* servicemembers—and, if so, how.

For a time, lower courts had distinguished *Toth* in retiree cases on the ground that retirees, unlike former soldiers who had simply been discharged, continue to receive pay. *See, e.g.*, *United States* v. *Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958) ("Certainly, one . . . who receives a salary to assure his availability . . . is a part of the land or naval forces."). But in two separate lines of cases, the Supreme Court vitiated that reasoning.

1. As of September 30, 2017, there were 1,996,375 such retirees. Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2017*, at 17 (2018).

First, in *Reid* v. *Covert*, 354 U.S. 1 (1957), and *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960), the Court rejected the government's argument that civilian dependents of servicemembers were "part of" the "land and naval forces," and thus constitutionally subject to trial by court-martial, simply because they were "accompanying a serviceman abroad at Government expense and receiving other benefits from the Government." *Covert*, 354 U.S. at 23 (plurality opinion); *see Singleton*, 361 U.S. at 246–49 (adopting *Covert*). And the Court's companion rulings in *McElroy ex rel. United States* v. *Guagliardo*, 361 U.S. 281 (1960), and *Grisham* v. *Hagen*, 361 U.S. 278 (1960), likewise rejected Congress's extension of military jurisdiction to civilian employees of the military, even though they were receiving a regular salary for their services. *Guagliardo*, 361 U.S. at 286.

Second, in *Barker* v. *Kansas*, 503 U.S. 594 (1992), the Supreme Court held that military retired pay is not in fact current income, but is instead "deferred pay for past services." *Id.* at 605. Even if a salary, on its own, could be sufficient to subject the recipient to court-martial, *Barker* confirms that military retirees are *pensioners*, not part-time, salaried employees. As the military courts recognized in the ruling at issue here,[2] this conclusion eliminated the central analytical justification for holding that retirees remain members of the "land and naval forces" under the Make Rules Clause—and, in the process, the constitutional rationale for trying them by court-

2. For convenience, copies of the NMCCA's ruling in *Dinger* and the NMCCA's and CAAF's rulings in Plaintiff's case are included in appendices to this filing.

martial. *See United States* v. *Dinger*, 76 M.J. 552, 555 (N-M. Ct. Crim. App. 2017), *aff'd on other grounds*, 77 M.J. 447 (C.A.A.F.), *cert. denied*, 139 S. Ct. 492 (2018).

Lacking any precedential foundation, the military courts instead resorted to "first principles," *id.* at 556, but nevertheless sustained military jurisdiction here, holding that retirees are still part of the "land and naval forces"—and subject to trial by court-martial—not because they receive pay, but *solely* because they can be involuntarily recalled to active duty. *See id.* at 556–57. Military jurisdiction over retirees is justified, the argument goes, in order to promote "good order and discipline" among those who *may*, at some indefinite point in the future, be needed for additional active-duty service. *See id.*; *see also United States* v. *Larrabee*, No. 201700075, 2017 WL 5712245, at *1 n.1 (N-M. Ct. Crim. App. Nov. 28, 2017) (applying *Dinger* to Plaintiff's case), *aff'd on other grounds*, 78 M.J. 107 (C.A.A.F. 2018) (mem.), *cert. denied*, 139 S. Ct. 1164 (2019).

This holding is stunning in its breadth. Not only would it mean that all military retirees could be subject to court-martial for any crime committed until their dying day, but it would also mean that Congress meant to subject *retirees* to far more sweeping military jurisdiction than *reservists*, who may only be tried by court-martial for offenses committed on active duty or during inactive-duty training and not for every crime they might commit in civilian life. *See, e.g.*, *United States* v. *Morita*, 74 M.J. 116, 122–23 (C.A.A.F. 2015); *see also* 10 U.S.C. § 802(d) (outlining when reservists can be tried by court-martial).

Tying military jurisdiction over retirees to future recall is also anachronistic. Under current law, few retirees are realistically subject to involuntary recall. Instead, since Vietnam, a robust reserve component—rather than the retired lists—has been the military's go-to source for augmenting the active-duty force. *See* Library of Congress, *Historical Attempts to Reorganize the Reserve Components*, at 15–17 (2007).

But even if, by dint of hypothetical future service, retirees were viewed as part of the "land and naval forces," their amenability to court-martial should be limited, as it is for reservists, to crimes bearing some nexus to their military responsibilities. Courts-martial may exercise only "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. If, contrary to our submission, retirees who have not been lawfully recalled are subject to courts-martial at all, this Court should at the very least hold that such jurisdiction is constitutionally limited to crimes substantially related to their residual military status. No matter how broadly that standard is construed, Plaintiff's case does not meet it.

Because venue is appropriate in this District, and Plaintiff is entitled to relief on the merits, the Court should deny Defendants'[3] motion to dismiss and grant Plaintiff's motion for judgment on the pleadings.

3. The motion to dismiss identifies Secretary Spencer as the sole defendant—and fails to reflect that Plaintiff's suit also names (and seeks relief against) the United States as a defendant. Compl. 1, 9. Plaintiff assumes that the government did not thereby mean to waive all defenses the United States may have against Plaintiff's claims, and thus refers to the "Defendants" throughout this memorandum.

FACTUAL BACKGROUND

None of the underlying facts in this case are in dispute. The following factual background is taken from the NMCCA's ruling in Plaintiff's case and the briefing respecting Plaintiff's petition for a writ of certiorari to the U.S. Supreme Court—matters that are properly subject to judicial notice, and that are therefore properly before the Court as part of Plaintiff's motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). *See, e.g.*, *Tapp* v. *Wash. Metro. Area Transit Auth.*, 306 F. Supp. 3d 383, 392 (D.D.C. 2016). *See generally Murphy* v. *Dep't of the Air Force*, 326 F.R.D. 47, 48–49 (D.D.C. 2018) (summarizing the standard for a Rule 12(c) motion).

On August 1, 2015, after 20 years of service in the U.S. Marine Corps, Plaintiff retired from active duty as a Staff Sergeant, and was transferred to the Fleet Marine Corps Reserve.[4] After his retirement, he continued to reside in Iwakuni, Japan (his final duty station) and began managing two local bars. On November 15, 2015, after a night of drinking, Petitioner sexually assaulted a bartender at one of the bars and used his cell phone to record the incident. The victim was not a member of the armed forces, although her spouse was.

Plaintiff was subsequently convicted by a court-martial, pursuant to his pleas, on one count of sexual assault and one count of indecent recording in violation of

4. Members of the Fleet Marine Corps Reserve receive "retainer pay," not "retired pay." For all practical purposes, this is a distinction without a difference. *See United States* v. *Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001). Congress has defined "retired pay" to include "retainer pay." 10 U.S.C. § 1408(a)(7). And despite its name, the "Fleet Marine Corps Reserve" is not one of the reserve components of the armed forces. *See* 10 U.S.C. § 10101 (listing the seven reserve components).

Articles 120 and 120c of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920 and 920c.[5] The military judge sentenced him to eight years' confinement, a reprimand, and a dishonorable discharge. As part of a pre-trial agreement, however, the Convening Authority disapproved the reprimand, suspended confinement in excess of 10 months, and, except for that part of the sentence extending to the dishonorable discharge, ordered the sentence executed. Plaintiff has completed his sentence and is no longer in custody.

Plaintiff raised four claims in his appeal as of right to the Navy-Marine Corps Court of Criminal Appeals (NMCCA). As relevant here,[6] he argued that, because he was retired, the court-martial's exercise of jurisdiction over him was unconstitutional. Even if it was not, he argued, 10 U.S.C. § 6332 deprived the court-martial of the power to sentence him to a punitive discharge because he was in the Fleet Marine Corps Reserve.[7]

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5. Article 2(a)(6) of the UCMJ authorizes the court-martial of "Members of the . . . Fleet Marine Corps Reserve." 10 U.S.C. § 802(a)(6). Article 2(a)(4) authorizes courts-martial of "Retired members of a regular component of the armed forces who are entitled to pay." *Id.* § 802(a)(4).

6. Before the NMCCA, Plaintiff also raised two claims relating to whether the proceedings in his case were subject to unlawful command influence. Those claims are not at issue here.

7. That provision specifies that "when a member of the naval service is transferred . . . to the Fleet Marine Corps Reserve," "the transfer is conclusive for all purposes," including grade and rate of pay based on years of service to that point. 10 U.S.C. § 6332. Earlier decisions by CAAF's predecessor had interpreted this language to prohibit punitive discharges of retirees. *See United States* v. *Sloan*, 35 M.J. 4 (C.M.A. 1992); *United States* v. *Allen*, 33 M.J. 209 (C.M.A. 1991). CAAF overruled those decisions in *Dinger*, 77 M.J. at 452–53.

While Plaintiff's appeal to the NMCCA was pending, that court resolved both of these arguments in the government's favor in *Dinger*. 76 M.J. 552. As to the constitutional objection, the NMCCA agreed that *Barker* and the line of cases beginning with *Covert* together called into question prior decisions upholding the exercise of military jurisdiction over retired servicemembers. But conceding that the case required resort to "first principles," the court nevertheless held that retirees remain members of the "land and naval forces" for purposes of Congress's Article I authority:

> Unlike the wholly discharged veteran in *Toth* whose connection with the military had been severed, a "retired member of the . . . Regular Marine Corps" and a "member of the . . . Fleet Marine Corps Reserve" may be "ordered to active duty by the Secretary of the military department concerned at any time."

Id. at 556–57 (quoting 10 U.S.C. § 688). Thus, "[n]otwithstanding *Barker* and its implications regarding the tax status of retired pay, we are firmly convinced that those in a retired status remain 'members' of the land and Naval forces who may face court-martial." *Id*. at 557.

Based on *Dinger*, the NMCCA rejected Plaintiff's claims and affirmed. *Larrabee*, 2017 WL 5712245, at *1 n.1. Plaintiff then filed a petition for review in the U.S. Court of Appeals for the Armed Forces (CAAF), seeking discretionary review of three issues: Whether (1) the unlawful command influence in his case was harmless beyond a reasonable doubt; (2) the assertion of jurisdiction was constitutional; and (3) a retiree can lawfully be sentenced to a punitive discharge.

CAAF granted discretionary review, but only with respect to the sentencing issue. *United States* v. *Larrabee*, 77 M.J. 328 (C.A.A.F. 2018) (mem.). After it affirmed the NMCCA's resolution of that question in a published opinion in *Dinger*, 77 M.J. 447, CAAF affirmed the NMCCA's decision in this case "in light of . . . *Dinger*." *Larrabee*, 78 M.J. at 107. Plaintiff timely filed a petition for a writ of certiorari, raising the constitutionality of the military's assertion of jurisdiction over retired servicemembers in general, and over post-retirement offenses in particular. In response, the government argued that the Supreme Court lacked statutory appellate jurisdiction because CAAF had not specifically decided *those* issues. *See* Brief for the United States in Opposition at 10–16, *Larrabee*, 139 S. Ct. 1164 (No. 18-306), 2019 WL 157946. In the alternative, the government defended the NMCCA's decision on the merits. *See id.* at 16–24. The Supreme Court denied certiorari. 139 S. Ct. 1164. This collateral challenge followed.

ARGUMENT

Defendants argue that (1) this Court is not a proper venue for Plaintiff's claims; and (2) Plaintiff fails to state a claim upon which relief can be granted. Both arguments lack merit. Because the Complaint states a valid constitutional claim and no material facts are in dispute, Plaintiff is entitled to judgment on the pleadings.

I. VENUE IS PROPER IN THIS DISTRICT

Typically, a collateral attack on a court-martial must be brought in the district in which the prisoner is confined, because it must be brought as a habeas petition under 28 U.S.C. § 2241(a). *See, e.g.*, *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004). If the

plaintiff is no longer in custody, of course, habeas is unavailable. The Court of Appeals has instead repeatedly underscored the jurisdiction of courts within *this* circuit to entertain "*non*-custodial collateral attacks on court-martial proceedings." *Sanford* v. *United States*, 586 F.3d 28, 31 (D.C. Cir. 2009) (emphasis added); *see also United States ex rel. New* v. *Rumsfeld*, 448 F.3d 403, 406 (D.C. Cir. 2006). These cases reflect the commonsense proposition that non-custodial collateral attacks on courts-martial should be brought in the same locale where the military justice system itself is located—the District of Columbia. There are no standing courts-martial, so the usual requirement that federal criminal defendants seek collateral relief in the trial court, 28 U.S.C. § 2255(a), cannot be followed. But the NMCCA is located at the Washington Navy Yard, and CAAF sits at 450 E Street, N.W.

Under 28 U.S.C. § 1391(e)(1),

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States, may, except as otherwise provided by law, be brought in any judicial district in which (A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (C) the plaintiff resides if no real property is involved in the action.

The government's lead argument for dismissal is that venue in this district is improper. Its position is that neither § 1391(e)(1)(A) nor (B) applies, and that venue is only permissible under § 1391(e)(1)(C)—*i.e.*, where the Plaintiff resides. In fact, venue is entirely proper in this district under *both* § 1391(e)(1)(A) *and* (B).

A. Venue is Proper Under § 1391(e)(1)(A)

As Judge Urbina has explained,

> Courts have consistently allowed the Secretary of the Navy to be sued in the District of Columbia because he performs a significant amount of his official duties in this jurisdiction. The Secretary of the Navy is the head of the Department of the Navy and the President's principal advisor regarding Naval affairs. The Secretary maintains offices in the District of Columbia and is actively involved in dealings with Congressional committees and District of Columbia agencies.

Smith v. *Dalton*, 927 F. Supp. 1, 6 (D.D.C. 1996) (footnotes omitted); *see also id*. at 6 n.43 (citing examples). None of the cases defendants cite to the contrary involve the Secretary of the Navy, and for good reason. *See, e.g.*, *Munoz* v. *England*, No. 05-2472, 2006 WL 3361509, at *7 (D.D.C. Nov. 20, 2006) (Kollar-Kotelly, J.); *Jyachosky* v. *Winter*, No. 04-1733, 2006 WL 1805607, at *4 (D.D.C. June 29, 2006) (Kennedy, J.). Although the government has at times insisted that, for purposes of § 1391(e)(1)(A), the Secretary of the Navy "resides" *only* in the Eastern District of Virginia, judges of this Court have repeatedly rejected that argument—holding that the Secretary *also* resides in the District of Columbia for purposes of § 1391(e)(1)(A) because of the specific nature of his office. *See, e.g.*, *Vince* v. *Mabus*, 956 F. Supp. 2d 83, 88 (D.D.C. 2013) (Lamberth, J.).

Defendants offer no explanation for why these precedents are inapposite. The core argument of the motion to dismiss is that Plaintiff should not be allowed to "manufacture" venue over his claim simply by naming a high-level government official. But even if that were relevant to venue under § 1391(e)(1)(A) (as opposed to § 1391(e)(1)(B)), it is beside the point. Plaintiff is

not challenging the propriety of specific conduct taken by a low-level government official in some distant forum; he is challenging whether the federal government, acting through the Department of the Navy, had the constitutional authority to try him by court-martial. This Court should therefore follow the consistent conclusions of other judges in this district and hold that the Secretary "resides in" the District of Columbia for purposes of § 1391(e)(1)(A).

B. Venue is Proper Under § 1391(e)(1)(B)

Venue is also proper under § 1391(e)(1)(B), because "a substantial part of the events or omissions giving rise to the claim occurred" in the District of Columbia. In contesting the constitutionality of the court-martial that tried him, Plaintiff is necessarily contesting the constitutionality of decisions made under the authority of the Secretary of the Navy with regard to "the powers prescribed for the Judge Advocate General" under the UCMJ. 10 U.S.C. § 5148(d)(2). The offices of the Judge Advocate General of the Navy and his staff are also located at the Navy Yard.

Unlike *E.V.* v. *Robinson*, 200 F. Supp. 3d 108 (D.D.C. 2016) (Bates, J.,), where the plaintiff challenged a specific interlocutory order by a military judge conducting a court-martial in Japan (and did not name the Secretary of the Navy as a defendant), here, Plaintiff is challenging the underlying decisions to court-martial him in the first place and to approve his conviction and sentence—decisions that were necessarily made in the District of Columbia. Thus, insofar as responsibility for Plaintiff's court-martial—and the

affirmance of his conviction and sentence—rests by law with the Judge Advocate General, "a substantial part of the events or omissions giving rise to the claim occurred" in the District of Columbia. Venue is therefore also proper under § 1391(e)(1)(B).[8]

II. THE CONSTITUTION FORBIDS COURTS-MARTIAL OF RETIRED SERVICEMEMBERS FOR POST-RETIREMENT OFFENSES[9]

As the Supreme Court observed in *Toth*, "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed." 350 U.S. at 23 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821)). This is so, Justice Black argued three years later, because "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Covert*, 354 U.S. at 21 (plurality opinion); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866) ("[I]f ideas can be expressed in words,

8. If the Court concludes that venue is improper in the District of Columbia, Plaintiff respectfully requests that, contrary to defendants' suggestion that the case be transferred to the Northern District of Alabama under 28 U.S.C. § 1404(a), it be transferred to the judicial district in which the government has previously represented that the Secretary of the Navy "resides," *i.e.*, the Eastern District of Virginia.

9. As the D.C. Circuit has noted, there is some dispute as to the appropriate standard of review for non-custodial collateral attacks on courts-martial. *Sanford*, 586 F.3d at 31–33. Here, however, because Plaintiff is challenging whether the court-martial could constitutionally exercise jurisdiction in the first place, and because he has preserved that challenge at every level, the standard of review is *de novo*. *See Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of [a] crime who is not attached to the army, or navy, or militia in actual service.").

Thus, although the Supreme Court has repeatedly shown deference to the military in general and to the system of military justice Congress created in the UCMJ in particular, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 753 (1975), the one topic on which it has (properly) shown no deference is the scope of what has been described as the military's "personal jurisdiction"—*i.e.*, the classes of offenders who may constitutionally be subjected to trial before a military tribunal. *See, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 585 n.16 (2006).[10] The unifying theme of these decisions has been the centrality of the accused's military status for purposes of the Make Rules Clause:

> military jurisdiction has always been based on the "status" of the accused, rather than on the nature of the offense. To say that military jurisdiction "defies definition in terms of military 'status'" is to defy unambiguous language of Art. I, § 8, cl. 14, as well as the historical background thereof and the precedents with reference thereto.

Singleton, 361 U.S. at 243; *see also Solorio* v. *United States*, 483 U.S. 435, 439–40 (1987) (quoting this language).

The central question the Supreme Court has asked is "whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" *Singleton*, 361 U.S. at 240–41 (emphasis added). That

10. "Personal jurisdiction" may be a misnomer here because the constitutional objection "is a structural question of subject matter jurisdiction." *Al Bahlul*, 840 F.3d at 760 n.1 (Kavanaugh, J., concurring).

Congress has subjected a specific class of offenders to the UCMJ has been a necessary condition, but not a sufficient one. *See Covert*, 354 U.S. at 22–23 & n.41; *Toth*, 350 U.S. at 14–15. Instead, the Supreme Court has looked to whether "certain overriding demands of discipline and duty" justify the assertion of military—rather than civilian—jurisdiction. *Solorio*, 483 U.S. at 440 (quoting *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)); *see also Parker* v. *Levy*, 417 U.S. 733, 759 (1974).

Retired servicemembers "are certainly not obvious members of the armed forces, as are soldiers on active duty; on the other hand they are not 'full-fledged' civilians." Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 318 (1964). But no similar "demands of discipline and duty" have justified courts-martial of civilians accompanying the armed forces abroad, *see, e.g.*, *Singleton*, 361 U.S. at 238–49; or of discharged ex-soldiers—even for crimes committed while on active duty in a foreign combat theater. *See Toth*, 350 U.S. at 14–17.

Defendants assert that members of the Fleet Marine Corps Reserve, like Plaintiff, are still "part of the nation's 'land and naval Forces'" because they (1) are subject to recall and (2) continue to receive compensation. Neither argument is persuasive. For example, retirees not recalled to duty are statutorily ineligible to serve as court-martial members (jurors). *See* 10 U.S.C. § 825. But even if plaintiff was still part of "the land and naval forces" at the time of his offenses and trial, the Constitution forbids trying him by court-martial for offenses that had no connection to the military. Defendants never explain how the "demands of discipline and duty"

are advanced by subjecting military retirees to trial by court-martial, especially for post-retirement offenses.

Thus, the Complaint states a claim on which relief can be granted and plaintiff is entitled to judgment on the pleadings.

A. The Receipt of Pay is Not a Sufficient Basis for Treating Retirees as Part of the "Land and Naval Forces"

The status of a "retired" servicemember dates to 1861, when Congress first authorized a "retired list" for Army and Marine Corps officers who were either physically disabled or who had served for at least 40 consecutive years. *See* Act of Aug. 3, 1861, ch. 42, §§ 15–18, 12 Stat. 287, 289–90. Unlike soldiers who had been "discharged" from the service, those on the retired list were generally entitled to receive annual pay at a reduced rate. *See* Frank O. House, *The Retired Officer: Status, Duties, and Responsibilities*, 26 A.F. L. REV. 111, 113 (1987).

Against that background, the Supreme Court held in *United States* v. *Tyler*, 105 U.S. 244 (1882), that a military retiree receiving pay was still "serving" in the military for purposes of a statute that provided for raises for every five years of a military officer's service. For retirees such as Tyler, "the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only." *Id.* at 245. And although *Tyler* only raised the scope of a specific federal benefit, it suggested in dicta that retirees "may be tried, not by a jury, as other citizens are, but by a military court-martial." *Id. Tyler* thus "first tacitly recognized the power of Congress to authorize court-martial jurisdiction" over retirees. *Dinger*, 76 M.J. at 555; *see also* Bishop, *supra*, at 332 ("[T]he amenability of retired regulars

to court-martial, though unknown to the founding fathers, is as old as the retired list itself, which was also unknown to them.").

Notwithstanding *Tyler*'s implicit endorsement, until recently, "reported courts-martial of military retirees [were] relatively rare." J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 11 (2003). But in the handful of reported cases in which a retiree has challenged his amenability to military jurisdiction, the reviewing court generally rested its analysis on *Tyler*—and the facts that the accused (1) was still receiving military pay and (2) remained theoretically subject to recall to active duty.

For example, in *United States ex rel. Pasela* v. *Fenno*, 167 F.2d 593 (2d Cir. 1948), the Second Circuit rejected a constitutional challenge to the court-martial of a member of the Fleet Reserve for an offense committed after he had left active duty. As the court explained, "The Fleet Reserve is so constituted that it falls reasonably and readily within the phrase 'naval forces' in the Fifth Amendment. Its membership is composed of trained personnel who are paid on the basis of their length of service and remain subject to call to active duty." *Id*. at 595.

Shortly after *Toth*, the Court of Military Appeals (today's CAAF) reaffirmed this reasoning in *United States* v. *Hooper*:

> Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies.

26 C.M.R. at 425; *see also Hooper* v. *United States*, 326 F.2d 982, 987 (Ct. Cl. 1964) (adopting this analysis despite "certain doubts" as to its validity). For over a century, then, *Tyler*'s understanding of retiree pay was central to lower courts' consistent conclusions that military retirees could constitutionally be subject to courts-martial—even though the Supreme Court's decisions after and in light of *Toth* should have eroded the compensation rationale as a sufficient predicate for military jurisdiction. *See, e.g.*, *United States* v. *Overton*, 24 M.J. 309, 311 (C.M.A. 1987).

Whether or not these cases were rightly decided at the time, they have been overtaken by subsequent events, especially the Supreme Court's decision in *Barker*.[11] There, in considering the tax treatment of retiree pay, the Court concluded that "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services." 503 U.S. at 605. Among other things, as Justice White wrote for the unanimous Court, "[t]he amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement." *Id*. at 599 (citation and internal quotation marks omitted); *cf. United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993) ("[A] retired officer has no duties . . . ."), *vacated on other grounds*, 515 U.S. 1138 (1995) (mem.).

11. The Court had previously reserved the question decided in *Barker* in *McCarty* v. *McCarty*, 453 U.S. 210, 222–23 & nn.15–16 (1981).

Although *Barker* observed in dicta that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall," 503 U.S. at 599, it did so while eviscerating the part of *Tyler* that had previously carried those jurisdictional implications. As *Barker* explained, *Tyler*'s framing of retiree pay as "current compensation" had been unnecessary to the result; had failed to appreciate the disparities that "current pay for current services" would create among those who held the same preretirement rank; and had generally created confusion among courts considering how to treat retiree pay for purposes of an array of probate and tax considerations. *See id*. at 599–600. Instead, *Barker* held that, at least for purposes of the relevant federal statute, "military retirement benefits are to be considered deferred pay for past services." *Id*. at 604.[12]

"From these developments it is clear that the receipt of retired pay is neither wholly necessary, nor solely sufficient, to justify court-martial jurisdiction [over retirees]." *Dinger*, 76 M.J. at 555–56. If, as *Barker* held, Congress treats retiree pay as tantamount to a pension,[13] then that remuneration is a benefit paid to a *former* servicemember, rather than a continuing financial tether to a *current* one. Those who

12. The Solicitor General, participating as an *amicus*, had argued for exactly this understanding of retiree pay. *See* Brief for the United States as *Amicus Curiae* in Support of Petitioners at 19–21, *Barker*, 503 U.S. 594, 1991 WL 11009204 (No. 91-611).

13. To similar effect, the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982), generally provides "that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws." Ives & Davidson, *supra*, at 52. That statutory proviso would hardly make sense if it were continuing compensation as opposed to a vested interest in deferred salary.

only receive benefits from the military can hardly be said to be "in" the "land and naval forces" for that reason. *See Covert*, 354 U.S. at 23 & n.16 (plurality opinion). Instead, *Barker* compels the conclusion, as the NMCCA held in *Dinger*, that military jurisdiction over retired servicemembers can no longer rest on the fact that they continue to receive pay—and perhaps never should have.

B. The Alternative Ground Identified in Dinger Would Lead to a Stunning Expansion in Military Jurisdiction

In *Dinger*, the NMCCA properly recognized *Barker*'s jurisdictional implications, and agreed that it had to return to "first principles" to resolve whether retirees could be tried by court-martial. 76 M.J. at 556. It erred, however, in nevertheless upholding the military's jurisdiction on the notion that retirees remain subject to recall. *See id*. at 556–57. In Plaintiff's view, unless and until the Marine Corps recalled him to duty, he was not constitutionally subject to the UCMJ. The Court need go no further than this conclusion in addressing and rejecting the government's effort to defend his court-martial.

The NMCCA's cursory analysis suffers from three separate flaws:

First, the NMCCA justified this "subject to recall" rationale based upon the deference Congress is owed when it legislates under the Make Rules Clause. But it failed to recognize that this deference was derived from cases involving *active-duty* servicemembers—to which there was no question that that clause applied. As Chief Justice Rehnquist wrote for the Court in *Solorio*, "we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights *of servicemen* were implicated." 483 U.S. at 448 (emphasis added); *see also id*. (citing

seven examples, all of which involved active-duty personnel). The NMCCA's conclusion that Congress is entitled to similar deference in extending military jurisdiction to individuals who are *not* active-duty servicemembers does not follow from these cases. At a more basic level, it is also belied by the decisions in which the Supreme Court has recognized the special need for searching review of claims that the military lacked jurisdiction based upon the status of the offender. *E.g.*, *Noyd*, 395 U.S. at 696 n.8.

Second, the understanding that retirees face a reasonable likelihood of recall to active duty, "like Cincinnatus from the plow," Bishop, *supra*, at 357, is generally anachronistic—and has been for decades. Since Vietnam, if not earlier, the reserve components, rather than the services' retired lists, have been the mechanism for augmenting the active-duty force. *See, e.g.*, Library of Congress, *supra*, at 15–17. Thus, the future-activation argument for military jurisdiction "seems rather more plausible when applied to reservists, who are in reality [more] likely to be called to service in emergencies." Bishop, *supra*, at 357.[14]

This policy shift is reflected not only in the legal framework governing activation of the reserve components, but also in two different constraints on when and how retirees can be recalled. For example, 10 U.S.C. § 690(b) imposes a rigid cap

14. As noted above, inactive reservists, unlike retirees, are *not* subject to trial by court-martial for any offense committed at any time. Instead, Congress has strictly limited jurisdiction in such cases to offenses committed while the reservist was "on active duty" or "on inactive-duty training." 10 U.S.C. § 802(d)(2). There is no plausible explanation for why jurisdiction over reservists—who are far more likely to be called to active duty—should be so limited when jurisdiction over retirees is not.

(15 flag officers and 25 other officers from each service branch) on the number of retired officers who can be recalled to active duty under 10 U.S.C. § 688 at the same time—outside of a time of war or national emergency.

Moreover, current Defense Department regulations all but preclude the involuntary recall to active military duty *any* former servicemember who retired due to disability or who has reached the age of 60. *See* DoD Instruction 1352.01, ¶ 3.2(g)(2) (2016) (noting limits on recall of "Category III" retirees).[15] "Theoretically," under current law, "only death cuts off the military's ability to recall its retired members to active duty and/or to subject them to court-martial jurisdiction." Ives & Davidson, *supra*, at 8. In reality, however, the overwhelming majority of military retirees face no prospect whatsoever of involuntary recall to active duty.

To be sure, as the NMCCA pointed out in *Dinger*, the Supreme Court has held that it is constitutional for Congress to subject a pre-induction draftee to military jurisdiction. *See* 76 M.J. at 556 (citing *Billings* v. *Truesdell*, 321 U.S. 542, 544 (1944)). But all *Billings* recognizes is the straightforward point that Congress can treat as part of the "land and naval forces" those who have in fact been lawfully called to active duty, whether or not the call was answered. It hardly follows that anyone who might one day be recalled to service is therefore subject to military jurisdiction so long as that remains solely a theoretical possibility.

15. Of the nearly two million living retirees reported by the Department of Defense as of September 30, 2017, 1,300,702 were 60 or older. *Statistical Report*, *supra*, at 50–51. An additional 77,433 retirees under 60 were disabled. *Id*. at 58. Thus, at least 69% of all retirees fall into Category III.

In rejecting military jurisdiction over civilians who are merely former servicemembers, *Toth* emphasized "the enormous scope of a holding that Congress could subject every ex-serviceman and woman in the land to trial by court-martial for any alleged offense committed while he or she had been a member of the armed forces." 350 U.S. at 19. Those figures only pale in comparison with what *Dinger* would allow.

C. At Most, Retirees Are Subject to Court-Martial Only For Offenses Related to Their Military Status

Finally, even if the NMCCA in *Dinger* was correct that the Make Rules Clause empowers Congress to subject to military jurisdiction anyone who is currently subject to future activation, that conclusion would provoke a related constitutional question—whether, by limiting such cases to those "*arising in* the land or naval forces," the Grand Jury Indictment Clause of the Fifth Amendment requires that the offense have some relationship to the retiree's military status.

In *Solorio*, the Supreme Court rejected the argument that the Constitution requires offenses by *active-duty* servicemembers to be connected to their military service in order to be subject to military jurisdiction. 483 U.S. at 450–51 ("The requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged."). But the Court's analysis was predicated entirely on the view that, where active-duty servicemembers were at issue, their status necessarily brought them within the regulatory scope of the Make Rules Clause and therefore settled their amenability to court-martial jurisdiction. *See, e.g.*, *id*. at 439–40. Where

other classes of individuals who are outside any active chain of command are subjected to military jurisdiction, however, not only does *Solorio* not govern, but its reasoning militates in favor of the opposite conclusion.

After all, even if the accused is a member of the "land and naval forces" for purposes of the Make Rules Clause, the dispute must still "arise[] in the land or naval forces" for purposes of the Grand Jury Indictment Clause. And whichever offenses that text encompasses in the specific context of retired servicemembers, it should not extend to the crimes at issue here. Plaintiff was convicted for conduct that took place after he retired from active duty. His offenses were not unique to the military. They were not committed on a military base. They were not committed against a victim who was herself part of the armed forces. Thus, unless the Constitution allows for the exercise of military jurisdiction over all retirees in all cases, Plaintiff's offenses did not "arise in the land or naval forces," and the Fifth Amendment forbade his trial by court-martial separate and apart from the limits intrinsic to the Make Rules Clause of Article I.[16]

16. Defendants also suggest that the exercise of military jurisdiction over Plaintiff was constitutional because he *chose* to be transferred to the Fleet Marine Corps Reserve rather than be discharged and forego his pension. Mot. 10. Even if a party to a civil case can consent to an otherwise unconstitutional exercise of jurisdiction by a non-Article III federal court, *see Wellness Int'l Network, Ltd.* v. *Sharif*, 135 S. Ct. 1932 (2015), the same is not true of criminal defendants before military tribunals. *See Al Bahlul*, 840 F.3d at 760 n.1 (Kavanaugh, J., concurring).

D. Defendants' Waiver Argument Reflects a Misreading of the Complaint

Finally, defendants argue that plaintiff waived his claims that "(1) the trial and appellate military judges lacked any term of office, much less life tenure; (2) the civilian judges of CAAF lack life tenure; (3) the trial and appellate military judges and the CAAF judges had no protection against diminution in compensation; and (4) Plaintiff was not indicted by grand jury." Mot. 11. This argument reflects an obvious misreading of ¶ 46 of the Complaint. Plaintiff did not assert any of these points as freestanding claims for relief. Rather, they illustrate the myriad important differences between military and civilian criminal prosecutions—and the real-world impact of Plaintiff's *actual* claim, *i.e.*, that his trial by court-martial was unconstitutional. He not only preserved that claim all the way through the military justice system, but it was the *government* that argued in the Supreme Court that it could be addressed through collateral relief. *See* Brief for the United States in Opposition at 15, *Larrabee*, 139 S. Ct. 1164 (No. 18-306), 2019 WL 157946.

Because Plaintiff was not subject to military jurisdiction for the charged offenses as a matter of law, he not only states a claim on which relief can be granted, but he is entitled to judgment on the pleadings.

CONCLUSION

For the foregoing reasons, and because there are no genuine issues of material fact, Defendants' Motion to Dismiss should be denied and Plaintiff's Motion for Judgment on the Pleadings should be granted. A proposed Order is submitted with this memorandum.

Respectfully submitted,

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May 20, 2019

APPENDIX A

UNITED STATES of America, Appellee

v.

Derek L. DINGER, Gunnery Sergeant (E-7), U.S. Marine Corps (Retired), Appellant

No. 201600108

U.S. Navy–Marine Corps Court of Criminal Appeals.

Decided 28 March 2017

Background: Pursuant to his pleas and while he remained in retired status, accused was convicted by general court-martial, Lieutenant Colonel Christopher M. Greer, USMC, J., of committing indecent acts, attempting to produce child pornography, wrongfully making an indecent visual recording, and receiving, viewing, and possessing child pornography, and was dishonorably discharged. Accused appealed.

Holdings: The United States Navy-Marine Corps Court of Criminal Appeals, Rugh, J., held that:

(1) accused was subject to court-martial, rather than civil trial by jury, and

(2) statute governing transfers of members of the naval service to retired status does not preclude removal from the Fleet Marine Reserve or the retired list of a member who received a punitive discharge or dismissal from court-martial, when approved by the convening authority and affirmed by the Court of Criminal Appeals.

Affirmed.

1. Military Justice ⚿515, 519

Former members of the active duty military who, rather than separating, remain in the Active Reserves or the Individual Ready Reserve in a nonduty, nonpay status must be recalled to active duty for court-martial proceedings, while those in a retired status, by contrast, need not be recalled to active duty as a prerequisite to prosecution at court-martial.

2. Military Justice ⚿514.1

The Constitution requires a close relationship between those subject to court-martial and the military establishment, because the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law; every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections. U.S. Const. Amend. 6.

3. Military Justice ⚿870

In a trial by court-martial there is no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen, all of which are guarantees in civilian trials by jury. U.S. Const. Amend. 6.

4. Military Justice ⚿515

It is impossible to hold that retirees who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, are still not in the military service.

5. Military Justice ⚿515

Accused, who was in retired status from the Marine Corps during offenses and proceedings, was subject to court-martial, rather than civil trial by jury, for prosecution for committing indecent acts, attempting to produce child pornography, wrongfully making an indecent visual recording, and receiving, viewing, and possessing child pornography. UCMJ, Arts. 80, 120, 120c, 134, 10 U.S.C.A. §§ 880, 920 (2006), 920c, 934 (2012).

6. Military Justice ⚿501

Court of Criminal Appeals defines terms in a statute based on their ordinary meaning and the broader statutory context.

7. Military Justice ⚿501

Court of Criminal Appeals is guided by the following rules of statutory construction: (1) a statute will not be dissected and its various phrases considered in vacuo, (2) it

will be presumed Congress had a definite purpose in every enactment, (3) the construction that produces the greatest harmony and least inconsistency will prevail, and (4) statutes in pari materia will be construed together.

8. **Military Justice** ⚿**1322.1**

Statute governing transfers of members of the naval service to retired status does not preclude removal from the Fleet Marine Reserve or the retired list of a member who received a punitive discharge or dismissal from court-martial, when approved by the convening authority and affirmed by Court of Criminal Appeals; neither Congress nor the President of the United States has directly limited the authority of a court-martial to adjudge a discharge for a member in a retired status, and Congress expressly exempted other classes of personnel from dismissal or dishonorable discharge, but not retirees. 10 U.S.C.A. § 6332.

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judge: Lieutenant Colonel Christopher M. Greer, USMC.

Convening Authority: Commander, Marine Corps Installations National Capital Region, Marine Corps Base, Quantico, VA.

Staff Judge Advocate's Recommendation: Major Michael J. Eby, USMC.

For Appellant: Captain Bree A. Ermentrout, JAGC, USN.

For Appellee: Major Tracey L. Holtshirley, USMC; Lieutenant Taurean Brown, JAGC, USN; Lieutenant Robert J. Miller, JAGC, USN.

Before Glaser-Allen, Rugh, and Hutchison, Appellate Military Judges

PUBLISHED OPINION OF THE COURT

RUGH, Judge:

A military judge sitting as a general court-martial convicted the appellant pursuant to his pleas of two specifications of committing indecent acts, one specification of attempting to produce child pornography, two specifications of wrongfully making an indecent visual recording, and one specification of receiving, viewing, and possessing child pornography, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2006), and Articles 80, 120c, and 134, UCMJ, 10 U.S.C. §§ 880, 920c, and 934 (2012). The military judge sentenced the appellant to nine years' confinement and a dishonorable discharge. The convening authority (CA) approved the sentence as adjudged, but suspended all confinement over 96 months pursuant to a pretrial agreement.

The appellant now asserts two assignments of error (AOE): (1) that his court-martial lacked personal jurisdiction over him in light of the U.S. Supreme Court's holding in *Barker v. Kansas*, 503 U.S. 594, 605, 112 S.Ct. 1619, 118 L.Ed.2d 243 (1992), that for tax purposes, military retirement benefits are not current compensation for reduced services; and (2) that Congress' statement in 10 U.S.C. § 6332 that the transfer of a member of the naval service to a retired status "is conclusive for all purposes" precludes the issuance of a punitive discharge to a retiree.[1]

Having carefully considered the record of trial, the pleadings, and oral argument, heard on 15 February 2017 at the George Washington University School of Law, we disagree and affirm the findings and sentence as approved by the CA.

I. Background

From 1 November 2003 to 1 August 2013, following his service on active duty in the Marine Corps, the appellant was a member of the Fleet Marine Corps Reserve List ("Fleet Marine Reserve").[2] He was then

1. This court restyled the AOEs from the appellant's brief. Oral Argument Order of 5 Dec 2016.

2. An enlisted member of the Marine Corps may, after 20 years of active duty, elect transfer to Fleet Marine Reserve. 10 U.S.C. § 6330(b). In this status the member receives "retainer pay" based primarily on years of active duty service. *Id.* § (c)(1). After 30 total years, the member is transferred "to the retired list of the . . . regular Marine Corps" and receives "retired pay" at "the same rate as the retainer pay[.]" 10 U.S.C. § 6331(a), (c).

transferred to the active duty retired list ("retired list").[3] He received retirement benefits after transferring to the Fleet Marine Reserve.

Of the offenses to which the appellant pleaded guilty, two were committed solely while he was a member of the Fleet Marine Reserve [4] and one was committed solely after his transfer to the retired list.[5] The remaining offenses were committed on divers occasions,[6] overlapping the dates he was a member of the Fleet Marine Reserve and on the retired list.[7] The appellant committed each of the offenses in Okinawa, Japan, where he and his family lived.

Based on a Naval Criminal Investigative Service investigation, the Secretary of the Navy, per Department of the Navy policy,[8] specifically authorized the CA "to apprehend, confine, and exercise general court-martial convening authority" over the appellant while he remained in a retired status.[9] At the appellant's court-martial, the military judge held, over trial defense counsel's objection, "that a punitive discharge is an authorized punishment" for the appellant.[10]

II. Discussion

A. Court-martial jurisdiction over those in a retired status

Jurisdiction is a legal question we review *de novo*. *United States v. Tamez*, 63 M.J. 201, 202 (C.A.A.F. 2006).

By act of Congress, the appellant was subject to the UCMJ when he committed the offenses. Art. 2(a), UCMJ ("The following persons are subject to this chapter.... Retired members of a regular component of the armed forces who are entitled to pay.... [and] Members of the Fleet Reserve and Fleet Marine Corps Reserve."). Congress has continually subjected some Naval retirees to court-martial jurisdiction since long before enactment of the UCMJ.[11]

3. We will refer generally to Fleet Marine Reserve and retired list membership as ''retired status,'' as military courts have treated the two statuses interchangeably for purposes of court-martial jurisdiction. *See, e.g. Pearson v. Bloss*, 28 M.J. 376, 379-80 (C.M.A. 1989) (treating a member of the Air Force ''Retired Reserve'' as a retiree because ''[w]hile there still may be some difference between the obligations of these service groups ... their common pay entitlement, access to military bases and services, and general duty obligations strongly support'' treating both as ''part of the armed forces for purposes of court-martial jurisdiction'') (citations and internal quotation marks omitted). Since personnel in either status are subject to similar obligations, we too find no grounds to distinguish between the two categories with respect to the jurisdiction of a court-martial.

4. Charge I, Specifications 1 and 2, alleging separate instances of indecent conduct committed by the appellant against his daughter and stepdaughter between on or about January 2011 and on or about January 2012.

5. Additional Charge II, Specification 2, alleging that the appellant made indecent recordings of his wife without her consent between on or about 1 June 2014 and on or about 31 June 2014.

6. *See* Record at 101; Appellate Exhibit XI (the consolidated Charge II, Specification 1, alleging that between on or about 11 October 2012 and on or about 4 September 2014, the appellant received, possessed, and viewed child pornography images and videos); Record at 59, 73-80 (Additional Charge I and its sole specification, alleging that the appellant between on or about 11 October 2012 and on or about 4 September 2014, attempted to produce child pornography; and Additional Charge II, Specification 1, alleging that between on or about 11 October 2012 and on or about 4 September 2014, the appellant made indecent recordings of his stepdaughter). The latter specifications were merged for sentencing. *Id.* at 86, 101-02.

7. We note that the consolidated specification of Charge II, the specification of Additional Charge I, and Specifications 1 and 2 of Additional Charge II erroneously describe the appellant as having exclusively been ''on the active duty retired list'' through his commission of the offenses. Per our discussion *supra* at note 3, the appellant was equally amenable to court-martial jurisdiction whether as a Fleet Marine Reserve member or on the retired list. As a result, we find no prejudice from this error, and we correct the specifications in our decretal paragraph.

8. Manual of the Judge Advocate General, Judge Advocate General Instruction 5800.7F § 0123a.(1) (26 Jun 2012).

9. Appellate Exhibit III.

10. Record at 31.

11. *See, e.g.* Act of Aug. 3, 1861, Ch. 42, 12 Stat 287 (1861) (enacting that ''retired officers shall be entitled to wear the uniform of their respective grades, shall continue to be borne upon the navy register, shall be subject to the rules and

The Supreme Court first tacitly recognized the power of Congress to authorize court-martial jurisdiction in *United States v. Tyler*, when it held that Tyler, who was retired, should benefit from a Congressionally-authorized military pay increase because, among other reasons, Congress had subjected Tyler "to the ... [A]rticles of [W]ar" and "a military court-martial[ ] for any breach of those rules[.]" 105 U.S. 244, 244-46, 26 L.Ed. 985 (1882). The Court explained that because Tyler's "retirement from active service" came with "compensation ... continued at a reduced rate, and the connection" between Tyler and the government thus "continue[d]." *Id.* at 245. Later courts have cited *Tyler* for the proposition that receipt of retirement pay is one reason Congress may constitutionally authorize courts-martial of those in a retired status.[12]

[1] However, three developments have undermined this rationale for court-martial jurisdiction. First, the Supreme Court held that this theory did not justify trial by court-martial of military dependents. *Reid v. Covert*, 354 U.S. 1, 19-20, 23, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957) (denying court-martial jurisdiction over "civilian wives, children and other dependents" stationed overseas, even though "*they may be* accompanying a serviceman abroad *at Government expense* and *receiving other benefits from the Government*.") (emphasis added). Second, in 1992 the Supreme Court decided in *Barker* that at least for tax purposes, "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services." 503 U.S. at 605, 112 S.Ct. 1619. Third, recent decisions have allowed courts-martial of former members of the active duty military who, rather than separating, remain in the Active Reserves or the Individual Ready Reserve in a "nonduty, nonpay status"[13] (albeit only for offenses previously committed on active duty).[14]

From these developments it is clear that the receipt of retired pay is neither wholly

articles governing the Navy, and to trial by general court-martial.'') In contrast, Congress has disclaimed broad court-martial jurisdiction over retired members of the Naval Reserve. *Compare* Naval Reserve Act of 1938, ch. 690, 52 Stat. 1175, 1176 (''[M]embers of the Fleet Reserve and officers and enlisted men ... transferred to the retired list of the Naval Reserve Force or the Naval Reserve or the honorary retired list with pay ... shall *at all times* be subject to the laws, regulations, and orders for the government of the Navy and shall not be discharged ... without their consent, except by *sentence of a court martial*[.]'') (emphasis added), *with* Act of May 5, 1950, Ch. 169, 64 Stat. 107, 109 (subjecting ''[r]etired personnel of a reserve component'' to the UCMJ only if ''receiving hospitalization from an armed force''), *and* S. REP. No. 81-486, at 7 (1949) (describing the UCMJ as ''a lessening of jurisdiction over retired personnel of a Reserve component'' since ''existing law'' gave ''jurisdiction over retired Reserve personnel'').

12. *See, e.g. United States v. Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958) (allowing the court-martial of a retired admiral for offenses he committed while in a retired status in part because ''[o]fficers on the retired list'' continue to ''receive[ ] a salary''); *Hooper v. United States*, 326 F.2d 982, 987 (Ct. Cl. 1964) (holding in a review of a suit brought by the accused in *United States v. Hooper*, *supra*, that ''jurisdiction by military tribunal'' over the appellant was ''constitutionally valid,'' because ''the salary he received was not solely recompense for past services'').

13. *United States v. Nettles*, 74 M.J. 289, 290, 292-93 (C.A.A.F. 2015) (noting that the convening authority had ordered the appellant from the ''Individual Ready Reserve'' to ''active duty for [court-martial] proceedings,'' and then ''allowed him to return to a nonduty, nonpay status''); *see also Lawrence v. Maksym*, 58 M.J. 808, 814 (N-M. Ct. Crim. App. 2003) (denying application for extraordinary writ by ''the inactive reserve petitioner'' because he ''is subject to court-martial jurisdiction under Articles 2 and 3[, UCMJ] for offenses alleged to have been committed while on reserve active duty''). *Cf. United States ex rel. Toth v. Quarles*, 350 U.S. 11, 21-22, 76 S.Ct. 1, 100 L.Ed. 8 (1955) (denying court-martial jurisdiction over crimes allegedly committed while Toth was on active duty, because he was prosecuted while an ''ex-servicem[a]n'' already ''wholly separated from the service'').

14. These members must be recalled to active duty for court-martial proceedings, while those in a retired status like the appellant, by contrast, need not be recalled to active duty as a prerequisite to prosecution at court-martial. *See United States v. Morris*, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001) (''If a member of the Fleet Marine Corps Reserve needed to be ordered to active duty to be subject to the jurisdiction of a court-martial, there would be no need to separately list members of the Fleet Marine Corps Reserve as being persons subject to the UCMJ.'').

necessary, nor solely sufficient, to justify court-martial jurisdiction. As a result, we must call upon first principles to assess the jurisdiction of courts-martial over those in a retired status.

[2, 3] The Constitution allows "Congress to authorize military trial of *members* of the armed services[.]" [15] *Reid*, 354 U.S. at 19, 77 S.Ct. 1222 (emphasis added). The Constitution requires a close relationship between those subject to court-martial and the military establishment,[16] because:

> [T]he jurisdiction of military tribunals is a very limited and extraordinary jurisdiction . . . and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

Id. Those subject to trial by court-martial lose some procedural rights guaranteed ordinary citizens.[17] They are also subject to prosecution for acts or speech otherwise protected from civilian prosecution by the Constitution.[18]

That said, "judicial deference" is "at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged," [19] and the Court has correspondingly acknowledged that Congress could define "a person [as] 'in' the armed services" and subject to court-martial jurisdiction "even [if] he [or she] . . . did not wear a uniform"—indeed, even if he or she had only been sent a notice of induction and "not [yet] formally been inducted into the military[.]" *Reid*, 354 U.S. at 22-23, 77 S.Ct. 1222; *Billings v. Truesdell*, 321 U.S. 542, 544, 556, 64 S.Ct. 737, 88 L.Ed. 917 (1944) (finding "no doubt of the power of Congress to enlist the [citizens] of the nation" into the military, and "to subject to military jurisdiction those who are unwilling" to take the oath of induction into the military, if Congress desired to do so).

The appellant had a closer relationship with the military than the pre-induction draftee, whom the Supreme Court has repeatedly suggested is subject to court-martial jurisdiction. Unlike the wholly discharged veteran in *Toth* whose connection with the military had been severed, a "retired member of the . . . Regular Marine Corps" and a "member of the . . . Fleet Marine Corps Reserve" may be "ordered to active duty by the Secretary of

15. There are other theories of jurisdiction which are not generally applicable to those in a retired status, and thus outside the scope of this opinion. *E.g.* Art. 2(a)(10), UCMJ (claim over those ''serving with or accompanying an armed force in the field'').

16. *See Reid*, 354 U.S. at 30, 77 S.Ct. 1222 (''The Constitution does not say that Congress can regulate . . . 'all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.' '').

17. For instance, there is ''no right to have a court-martial be a jury of peers, a representative cross-section of the community, or randomly chosen,'' all of which are guarantees in civilian trials by jury. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004).

18. *E.g.* Art. 88, UCMJ (prohibiting ''contemptuous words'' against some public officials). For an historical example of a retiree court-martialed for such conduct, *see Closson v. United States*, 7 App.D.C. 460, 470-71 (D.C. Cir. 1896) (considering petition of a retired Army officer charged at court-martial for an ''intemperate and improper letter written . . . to the general commanding the army''). And note, that even the potential for such prosecutions can have a chilling effect on the behavior of those in a retired status. *See UCMJ: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. On Armed* Services, 81st Cong. 706-07 (1949) (statement of Col. Melvin J. Maas, President, Marine Corps Reserve Association) (recounting how after a military retiree had published an article critical of the War Department, an official warned the retiree against ''mak[ing] any public statement[,] under penalty of being court-martialed and losing his retired pay''); *UCMJ: Hearings on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. On Armed Services*, 81st Cong. 99 (1949) (statement of Col. Maas) (''You certainly ought not to put the retired military personnel under this control. . . . [T]hey get their retirement because they earned it. . . . [To] prevent dictatorship, you must unmuzzle them. . . . '').

19. *Solorio v. United States*, 483 U.S. 435, 447, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987) (citations and internal quotation marks omitted).

the military department concerned at any time." [20] "[I]n both of our wars with Iraq, retired personnel of all services were actually recalled," [21] demonstrating Congress' continued interest in enforcing good order and discipline amongst those in a retired status.

[4] As the Court stated in *Tyler*:

> It is impossible to hold that [retirees] who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, ... are still not in the military service.

105 U.S. at 246.[22]

[5] Notwithstanding *Barker* and its implications regarding the tax status of retired pay, we are firmly convinced that those in a retired status remain "members" of the land and Naval forces who may face court-martial. As the appellant was in a retired status during the offenses and the proceedings, he was validly subject to court-martial.

B. Punitive discharge of those in a retired status

The second AOE presents a question of statutory construction, an issue of law reviewed *de novo*. *United States v. McPherson*, 73 M.J. 393, 395 (C.A.A.F. 2014). Title 10 U.S.C. § 6332 provides that "[w]hen a member of the naval service is transferred by the Secretary of the Navy" from active duty to a retired status or transferred from one retired status to another:

> [T]he transfer is conclusive for all purposes. Each member so transferred is entitled, when not on active duty, to retainer pay or retired pay from the date of transfer in accordance with his grade and number of years of creditable service as determined by the Secretary. The Secretary may correct any error or omission in his determination as to a member's grade and years of creditable service. When such a correction is made, the member is entitled, when not on active duty, to retainer pay or retired pay in accordance with his grade and number of years of creditable service, as corrected, from the date of transfer.

In *United States v. Allen*, our superior court cited this statute, among other factors,[23] to support its holding that "because appellant was tried as a retired member, he could not be reduced [in rank] ... by the court-martial[.]" 33 M.J. 209, 216 (C.M.A. 1991) (citing Navy policy, a law review article espousing that retiree "forfeiture of pay, and by analogy reduction, was not necessary to satisfy the military interest[,]" [24] and a Comptroller General opinion). The appellant claims the statute also precludes punitive discharge of retirees.[25] We disagree.

20. 10 U.S.C. § 688. This is also similar to the scenario of the inactive Reservist who was subject to court-martial in *Lawrence*, 58 M.J. at 814. *See* 10 U.S.C. § 12304(a) (stating that the President "may authorize the Secretary of Defense ... without the consent of the members concerned, to order... any member in the Individual Ready Reserve ... under regulations prescribed by the Secretary concerned ... to active duty for not more than 365 consecutive days").

21. Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure*, § 2-20.00, 24 (4th ed. Matthew Bender & Co. 2015) ("In recent years, for example, the Army has instituted a policy of issuing recall orders to selected retired personnel with the orders to be effective in case of national emergency.").

22. *See also Barker*, 503 U.S. at 599, 112 S.Ct. 1619 ("Military retirees unquestionably remain in the service and are subject to restrictions and recall...."); *Kahn v. Anderson*, 255 U.S. 1, 6-7, 41 S.Ct. 224, 65 L.Ed. 469 (1921) (allowing those in a retired status to serve as members at courts-martial because "retired ... officers are officers in the military service of the United States").

23. *See United States v. Sloan*, 35 M.J. 4, 11 (C.M.A. 1992) ("*Allen* itself clearly reflects [that] our decision there was not dependent solely upon this statutory provision").

24. Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 356-57 (1964). Of note, Bishop suggested that punitively discharging a retiree was a more appropriate punishment than reduction in rank. *Id.* at 353 ("[T]he appropriate punishment should ... be distinctively military. Practically speaking, in the case of retired personnel, this means dismissal ... or dishonorable discharge....")

25. Critically, in *Sloan*, our superior court recognized the potential for disparate treatment between the branches of service when 10 U.S.C.

[6, 7] We define terms in a statute based on their "ordinary meaning" and the "broader statutory context." *United States v. Pease*, 75 M.J. 180, 186 (C.A.A.F. 2016). "We are also guided by the following rules of statutory construction: (1) a statute will not be dissected and its various phrases considered *in vacuo*; (2) it will be presumed Congress had a definite purpose in every enactment; (3) the construction that produces the greatest harmony and least inconsistency will prevail; and (4) statutes in *pari materia* will be construed together." *United States v. Ferguson*, 40 M.J. 823, 830 (N.M.C.M.R. 1994) (citing *United States v. Johnson*, 3 M.J. 361 (C.M.A. 1977)).

Title 10 U.S.C. § 6332 has its origins in legislation creating the United States Naval Reserve,[26] in which Congress provided that "[m]en transferred to the Fleet Naval Reserve shall be governed by the laws and regulations for the government of the Navy and shall not be discharged from the Naval Reserve Force without their consent, except by sentence of a court-martial." [27] But, Congress replaced those provisions with language similar to the present statute in 1938,[28] which it re-enacted in 1952.[29]

Since then, and with the enacting of the UCMJ in 1950, Congress has subjected retirees to court-martial.[30] It has allowed general courts-martial to, "under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code." [31] Congress has excluded some personnel from prosecution at certain types of courts-martial,[32] and entirely prohibited special and summary courts-martial from adjudging dismissals or dishonorable discharges.[33] Recently, Congress directed that any "person subject to this chapter" guilty of certain offenses must receive a minimum sentence of a dishonorable or bad-conduct discharge, subject only to exceptions not based on personal status.[34]

Likewise, under authority delegated by Congress, the President has consistently declined to allow courts-martial to adjudge "administrative separation[s] from the ser-

§ 6332, a Department of Navy-only statute, was read to limit the reach of the UCMJ. While the court resolved the disparity through other means in *Sloan* (*see* n. 24, *supra*), it remained a concern of Chief Judge Sullivan, who wrote in concurrence, ''I join the principal opinion today in its decision not to overturn that portion of [Allen] concerning the reduction in grade and pay of court-martialed retired members. However, I am not adverse to revisiting this issue in a Navy case. As for appellant [an Army retiree], I think that, as a matter of constitutional law and codal intent, he is entitled to equal treatment.'' 35 M.J. at 12 (Sullivan, C.J., concurring).

26. Naval Appropriations Act of 1916, Ch. 417, 38 Stat. 589, 590 (''[T]he Secretary of the Navy is authorized to transfer to the Fleet Naval Reserve at ... his discretion any enlisted man of the naval service with twenty or more years naval service....'').

27. *Id.* at 591 (emphasis added).

28. Naval Reserve Act of 1938, ch. 690, 52 Stat. 1175, 1178 (''Provided, That all transfers from the Regular Navy to the Fleet Naval Reserve or to the Fleet Reserve, and all transfers of members of the Fleet Naval Reserve or the Fleet Reserve to the retired list of the Regular Navy, heretofore or hereafter made by the Secretary of the Navy, shall be conclusive for all purposes, and all members so transferred shall, from the date of transfer, be entitled to pay and allowances, in accordance with their ranks or ratings and length of service as determined by the Secretary of the Navy....'').

29. Armed Forces Reserve Act of 1952, ch. 608, 66 Stat. 481, 505 (''The unrepealed provisions of the Naval Reserve Act of 1938 ... continue to apply....'').

30. Act of May 5, 1950, Ch. 64 Stat. 107, 109.

31. *Id.* at 114. The current article, Article 18(a), UCMJ, remains substantially the same.

32. *Id.* (''[S]ummary courts-martial shall have jurisdiction to try persons subject to this code except officers, warrant officers, cadets, aviation cadets, and midshipmen....''). The current article, Article 20, UCMJ, remains substantially the same.

33. *Id.* Articles 19 and 20 of the current version of the UCMJ retain the same prohibitions.

34. National Defense Authorization Act (NDAA) for Fiscal Year 2014, Pub. L. No. 113-66, 127 Stat. 672, 959 (2013). As none of the appellant's offenses occurred exclusively after its effective date of 24 June 2014, we cite this provision for interpretative purposes only, and not as substantive law dictating the appellant's sentence. *See* FY 2015 NDAA, Pub. L. No. 113-291, 128 Stat. 3292, 3365 (2014).

vice[s.]" [35] The President has provided that a "dishonorable discharge ... may be adjudged only by a general court-martial ... for those who should be separated under conditions of dishonor, after having been convicted of offenses usually recognized in civilian jurisdictions as felonies, or of offenses of a military nature requiring severe punishment." [36]

Neither Congress—through the UCMJ—nor the President—through the RULES FOR COURTS-MARTIAL—has directly limited the authority of a court-martial to adjudge a discharge for a member in a retired status.

For this reason, we decline to override long-standing, military justice-specific provisions in the MCM subjecting those in a retired status to courts-martial and broadly authorizing those courts-martial to adjudge a punitive discharge. We make this decision particularly in light of the fact that Congress expressly exempted other classes of personnel from dismissal or dishonorable discharge within the UCMJ, *but not retirees*.[37]

[8] We agree that "[t]he only consistent, contextual reading of [the statute] is that a transfer to the retired list is conclusive in all aspects as to the fact that the member was transferred to the retired list on a certain date, in a certain grade, and with creditable service as determined by the Secretary." [38] We thus find that the statute does not preclude removal from the Fleet Marine Reserve or the retired list of a member who received a punitive discharge or dismissal from court-martial, when approved by the CA and affirmed by our court.

Such a reading harmonizes the statute with the other UCMJ provisions discussed *supra*. Unlike the reduction in rank of a retiree prohibited by *Allen* and *Sloan*, there is neither long-standing Navy policy against the punitive discharge of retirees,[39] nor other factors which might support an expansive reading of the statute. Here, the appellant committed felony-level offenses meriting a dishonorable discharge. Collateral effects on issues like retired pay are policy matters within the discretion of Congress.

C. Incorrect court-martial order

Although not raised by the appellant, we note that the court-martial order (CMO) fails to reflect that the military judge consolidated Specifications 1 and 2 of Charge II into one specification after ruling the specifications an unreasonable multiplication of charges as applied to findings.[40]

Likewise, we note that the consolidated specification of Charge II, Specification 1 of Additional Charge I, and Specifications 1 and 2 of Additional Charge II each erroneously describe the appellant as having exclusively been "on the active duty retired list" through his commission of the offenses. Though, per our discussion *supra* at note 3, the appellant was equally amenable to court-martial jurisdiction whether as a Fleet Marine Reserve member or on the retired list.

The appellant now does not assert, and we do not find, any prejudice resulting from these errors. Nevertheless, the appellant is entitled to have the CMO accurately reflect the results of the proceedings. *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998). We thus order corrective action in our decretal paragraph.

III. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

35. MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES, 1968, ¶ 126a. The rule applicable at the appellant's court-martial, RULE FOR COURTS-MARTIAL (R.C.M.) 1003(b)(8), MCM (2012 ed.), was substantially the same.

36. R.C.M. 1003(b)(8)(B).

37. *See United States v. Wilson*, 66 M.J. 39, 45-46 (C.A.A.F. 2008) (" '[Where] Congress includes particular language in one section of a statute but omits it in another section ... it is generally presumed that Congress acts intentionally and purposely in the disparate ... exclusion.' ") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)) (alterations in original) (additional citation omitted).

38. Appellee's Brief of 7 Sep 2016 at 13 (citation omitted).

39. *See, e.g. United States v. Overton*, 24 M.J. 309 (C.M.A. 1987); *Hooper*, 26 C.M.R. at 419.

40. Record at 101; Appellate Exhibit XI.

The supplemental court-martial order shall reflect that in the consolidated specification of Charge II, the specification of Additional Charge I, and Specifications 1 and 2 of Additional Charge II, the appellant was "on the active duty retired list or on the Fleet Marine Corps Reserve List."

The supplemental court-martial order shall also reflect that the military judge consolidated Specifications 1 and 2 of Charge II into a single specification for findings and sentence, to read as follows:

> In that Gunnery Sergeant Derek L. Dinger, U.S. Marine Corps (Retired), on the active duty retired list or on the Fleet Marine Corps Reserve List, did, at or near Okinawa, Japan, between on or about 11 October 2012 and on or about 4 September 2014, knowingly and wrongfully receive, possess and view child pornography, to wit, images and videos of minors engaging in sexually explicit conduct, which conduct was of a nature to bring discredit upon the armed forces.

Chief Judge GLASER-ALLEN and Judge HUTCHISON concur.

APPENDIX B

UNITED STATES NAVY–MARINE CORPS COURT OF CRIMINAL APPEALS

No. 201700075

UNITED STATES OF AMERICA
Appellee

v.

STEVEN M. LARRABEE
Staff Sergeant (E-6), U.S. Marine Corps (Retired)
Appellant

Appeal from the United States Navy-Marine Corps Trial Judiciary

Military Judges: Lieutenant Colonel Eugene H. Robinson, Jr., USMC.
Convening Authority: Commanding General, Marine Corps Installations Pacific, Okinawa, Japan.
Staff Judge Advocate's Recommendation: Major Christopher W. Pehrson, USMC.
For Appellant: Commander Brian L. Mizer, JAGC, USN.
For Appellee: Lieutenant Commander Justin C. Henderson, JAGC, USN; Lieutenant George R. Lewis, JAGC, USN.

Decided 28 November 2017

Before HUTCHISON, FULTON, and SAYEGH, *Appellate Military Judges*

This opinion does not serve as binding precedent, but may be cited as persuasive authority under NMCCA Rule of Practice and Procedure 18.2.

SAYEGH, Judge:

At a general court-martial, a military judge convicted the appellant, pursuant to his pleas, of one specification of sexual assault and one specification of indecent recording in violation of Articles 120 and 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920 and 920c. The

military judge sentenced the appellant to eight years' confinement, a reprimand, and a dishonorable discharge. The convening authority (CA) disapproved the reprimand, but approved the remainder of the sentence. In accordance with the pretrial agreement (PTA), the CA suspended confinement in excess of 10 months, and, except for that part of the sentence extending to the dishonorable discharge, ordered the sentence executed.

The appellant raises four assignments of error (AOEs): (1) the staff judge advocate (SJA) created unlawful command influence (UCI) by attempting to have the military judge reassigned a year before he was scheduled to leave his judicial assignment in Okinawa, Japan; (2) the CA abused his discretion by not approving the appellant's request for a post-trial Article 39(a) session to investigate the appellant's allegations of UCI; (3) application of jurisdiction under Article 2(a)(6), UCMJ, is unconstitutional in this case where the appellant was transferred to the Fleet Marine Corps Reserve three months prior to committing the offenses to which he pleaded guilty; and (4) a court-martial cannot sentence a service member transferred to retired status to a punitive discharge.[1]

Having carefully considered the record of trial and the parties' submissions, we conclude the findings and sentence are correct in law and fact and find no error materially prejudicial to the appellant's substantial rights. Arts. 59(a) and (66)(c), UCMJ.

I. BACKGROUND

The appellant retired from active duty in the United States Marine Corps on 1 August 2015 and was transferred to the Fleet Marine Corps Reserve. Upon retiring, the appellant remained in Iwakuni, Japan, and began managing two local bars. On 15 November 2015, the appellant video-recorded himself sexually assaulting KAH at one of the bars he managed. On 25 May 2016, the Secretary of the Navy authorized the CA to "apprehend, confine, or, exercise general-court martial convening authority" over the appellant.[2] On 2 June 2016, the CA placed the appellant in pretrial confinement (PTC). On 7 June 2016, an initial review officer (IRO) determined grounds existed to retain the appellant in PTC.

In August 2016, the appellant's trial defense counsel (TDC) filed a motion alleging the IRO abused his discretion and seeking the appellant's immediate

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[1] In accordance with our holding in *United States v. Dinger*, 76 M.J. 552 (N-M. Ct. Crim. App. 2017), *rev. granted*, __ M.J. __, 2017 CAAF LEXIS 995 (C.A.A.F. Oct 16, 2017), we summarily reject AOEs 3 and 4. *United States v. Clifton*, 35 M.J. 79, 81-82 (C.M.A. 1992).

[2] Appellate Exhibit (AE) IV at 2, Secretary of the Navy Memorandum for Commanding General, Marine Corps Installations Pacific of 25 May 2016.

release from PTC. On 14 September 2016, the military judge ruled that the IRO abused his discretion and ordered the appellant released from PTC. Five days later, on 20 September 2016, the appellant was released from PTC and placed on pretrial restriction. On 26 October 2016, the TDC filed a motion, pursuant to Article 13, UCMJ, for illegal pretrial punishment.

During the Article 13, UCMJ, motion session, the defense called the SJA to establish the SJA's improper motives and basis for advising the CA to not immediately abide by the military judge's PTC release order. The SJA testified that he disagreed with some of the military judge's past rulings, to include sentences on previous cases, and that he did not agree with the military judge's decision to order the release of the appellant from PTC in this case, describing it as "erroneous."[3] The SJA testified that he asked the trial counsel (TC) to file a motion for reconsideration of the military judge's PTC release order.[4]

The SJA denied that his disagreements were personal or that they in any way affected his approach to his duties. The SJA described his personal opinion regarding previous rulings by the military judge:

> Let's agree to disagree. To characterize this as a vendetta or motive against this military judge or against any particular accused is just flat wrong. So no, I had no concern whatsoever about any previous decision. There's been hundreds of them prior to this, and there will be hundreds of them after that. And we will continue with our process as required. I can't get fixated on one decision.[5]

In support of the Article 13, UCMJ, motion, the appellant submitted an affidavit from one of his TDCs, Captain N, alleging specific comments by the SJA about the military judge. The comments were made during, and in the context of, pretrial negotiations in the appellant's case. The affidavit states that the SJA indicated he would not support the proposed PTA because, in light of the military judge's decision to order day-for-day PTC credit, it did not provide for enough confinement. The SJA further explained that he was dissatisfied with the military judge's sentences in two previous cases. Captain N quotes the SJA as saying, "Okinawa is dealing with a military judge who just does whatever he wants to do" and "[The military judge] does

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[3] Record at 58.

[4] *Id.* at 69. The motion was ultimately withdrawn based on the government's misunderstanding of an email from the military judge that a motion to reconsider would not be litigated. *See id.* at 81-82; AE XVI at 1.

[5] Record at 69.

whatever he wants to do when I try to do everything right."[6] The SJA testified that he did not recall making the specific statements alleged in Captain N's affidavit, but he did acknowledge that during the previous "Article 6" visit he discussed with the SJA to the Commandant of the Marine Corps (CMC) the need for more judge advocates and another military judge in Okinawa.[7] The SJA denied that he requested the military judge be removed or replaced—he testified that the discussion was intended to facilitate assignment of more judge advocates and a second military judge to Okinawa in order to improve case processing times.[8] The SJA admitted he made similar remarks about judge advocate manning in Japan to the Deputy Commander, Marine Corps Installations Pacific, a week prior to his testimony.[9]

Based on the SJA's testimony, the military judge approved the TDC's request to conduct *voir dire* of the military judge.[10] During this *voir dire*, the military judge indicated that his current tour as a military judge was due to end in the summer 2018 and that he had taken no action to request reassignment sooner.[11] The military judge stated that he had received a phone call in late September or early October 2016 from Headquarters, Marine Corps. The purpose of the phone call was to inform the military judge that he would be reassigned during the upcoming summer of 2017.[12] The military judge was not given a reason for the early reassignment, only that his replacement was a newly promoted Colonel.[13] At the conclusion of the *voir dire*, the military judge indicated he had no reservations about his ability to continue to impartially try the appellant's case, and that he did not believe a third party, who knew all of the facts, would have any reservations with him remaining as the military judge in this case.[14]

During argument on the Article 13, UCMJ, motion, the TDC suggested there was UCI, stating: "Sir, just as a preliminary matter, our questions regarding the – what has been accused of tampering with the military judge and by the SJA to get him relocated, we do believe that we have raised at

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[6] AE XVII at 7.

[7] Record at 62.

[8] *Id.* at 63-64.

[9] *Id.* at 64.

[10] *Id.* at 72.

[11] *Id.*

[12] *Id.* at 73.

[13] *Id.*

[14] *Id.* at 74-75.

least the appearance of UCI enough to shift the burden with regards to that issue onto the government."[15] The TDC made no further references to UCI. During the government's argument in rebuttal, the TC commented:

> I'm, quite frankly, completely confident that this Court is not swayed by the rhetoric that is cited in the motion trying to attack and further, you know, unannounced tries to claim some sort of [UCI] and that somehow Lieutenant Colonel [P] is communicating with Headquarters Marine Corps to try to get this – to try tp get your honor removed from the bench, which is obviously ridiculous.[16]

The military judge issued an immediate bench ruling denying the appellant's request for additional confinement credit for illegal pretrial punishment, but under RULE FOR COURTS-MARTIAL (R.C.M.) 305(k), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.), did award the appellant an additional day-for-day credit for the period of time the appellant spent in PTC because the IRO abused his discretion. The military judge's ruling did not address UCI.

On 3 February 2017, the appellant submitted matters pursuant to R.C.M. 1105,requesting that the CA disqualify himself from taking action on the case, or alternatively, order a post-trial Article 39(a) session, award additional confinement credit, and grant the appellant access to Marine Corps Air Station, Iwakuni for medical care. The CA considered, but did not grant, the appellant's request.

II. DISCUSSION

A. UCI

UCI is "'the mortal enemy of military justice.'" *United States v. Gore,* 60 M.J. 178, 178 (C.A.A.F. 2004) (quoting *United States v. Thomas,* 22 M.J. 388, 393 (C.M.A. 1986)). "Congress and this court are concerned not only with eliminating actual unlawful command influence, but also with 'eliminating even the appearance of [UCI] at courts-martial.'" *United States v. Lewis,* 63 M.J. 405, 415 (C.A.A.F. 2006) (quoting *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979)). Indeed, the "appearance of [UCI] is as devastating to the military justice system as the actual manipulation of any given trial[.]" *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003) (citation and internal quotation marks omitted).

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[15] *Id.* at 76-77.

[16] *Id*. at 79.

In *United States v. Boyce*, 76 M.J. 242 (C.A.A.F. 2017), the court set forth an analytical framework for courts to use in applying this standard. First, an appellant must show some evidence that UCI occurred. *Id.* at 249. This is a low burden, but the showing "must consist of more than 'mere speculation.'" *Id.* (quoting *United States v. Salyer*, 72 M.J. 415, 423 (C.A.A.F. 2013)) (additional citation omitted). Once an appellant presents some evidence of UCI, the burden shifts to the government to prove beyond a reasonable doubt that "either the predicate facts proffered by the appellant do not exist, or the facts as presented do not constitute unlawful command influence." *Id.* (citing *Salyer*, 72 M.J. at 423) (additional citation omitted). If the government meets this burden, no further analysis is necessary. *Id.* We consider the totality of the evidence in determing whether there is the appearance of UCI. *Id.* at 252.

We first turn our attention to whether the appellant properly raised the issue of UCI at trial. The appellant's brief asserts that UCI was raised at trial but "[t]he military judge simply ignored the defense request to address the [UCI] directed at the military judge."[17] We disagree. "The threshold for raising the [UCI] issue at trial is low, but more than mere allegation or speculation." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)). The appellant in this case did not file a written UCI motion or make one orally on the record. In the absence of a written or oral motion, the TDC's references to possible UCI during argument on a distinctly separate issue was not sufficient to properly raise UCI at trial.[18] Therefore, we analyze the appellant's UCI claim as one first raised on appeal.

The appellant asserts that the SJA's criticism of the military judge to the TDC during pretrial negotiations, and the apparent actions he took in trying to have the military judge reassigned a year early, amounted to UCI. The appellant also argues that after the military judge learned of the SJA's criticisms, he intentionally ignored the appellant's request to address UCI at trial and allowed himself to be influenced in his decision to deny the appellant's motion for unlawful pretrial punishment.[19]

Although neither a commander nor a CA, actions by an SJA may constitute UCI, because "'a[n SJA] generally acts with the mantle of command authority.'" *United States v. Hamilton*, 41 M.J. 32, 37, (C.M.A.

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[17] Appellant's Brief of 8 May 2017 at 11.

[18] We considered but did not find any abuse of discretion on the part of the military judge for not recusing himself after he granted additional *voir dire* and sought challenges from both parties. Record at 75. *See United States v. Allen*, 31 M.J. 572 (N.M.C.M.R. 1990).

[19] Appellant's Brief at 11, 16.

1994) (quoting *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986)). Likewise, the Court of Appeals for the Armed Forces has found UCI where the government sought to remove a sitting military judge and where government actions compelled a military judge to recuse themself. *See Salyer*, 72 M.J. at 415; *Lewis*, 63 M.J. at 405 .

At the outset, we look for facts which, if true, would constitute actual UCI. The military judge was not removed from the bench before the end of his tour. There is no evidence in the record that the SJA's comments to the SJA to CMC was the catalyst for the phone call to the military judge.[20] Even assuming the comments by the SJA to Capt N were true in all respects, they would not amount to actual UCI. The comments reflect the SJA's frustration with a military judge who makes decisions uninfluenced by command authority. The comments were also made in the context of pretrial negotiations and not in a public forum. Further, following the additional *voir dire* of the military judge, the TDC was satisfied that the military judge could continue to impartially try the appellant's case. There being no evidence the military judge was unlawfully removed from the bench, no evidence the SJA's comments or actions unlawfully influenced the proper disposition of the appellant's case, nor any challenges to the military judge prior to his ruling on the Article 13, UCMJ motion, we conclude that the appellant has failed to establish any facts, which if true, would constitute actual UCI and will focus our analysis on apparent UCI.

The appellant avers there is apparent UCI because "the public would be appalled to know the trial judiciary of the Marine Corps can be openly mocked and manipulated by senior leaders as it was in this case."[21] The appellant bears the burden of producing "some evidence" of UCI before the burden shifts to the government. *Biagase*, 50 M.J. at 150. "[G]eneralized, unsupported claims of 'command control' will not suffice to create a justiciable issue." *Green v. Convening Authority*, 42 C.M.R. 178, 181 (C.M.A. 1970). "The quantum of evidence necessary to raise unlawful command influence" requires the "record [contain] some evidence to which the [trier of fact] may attach credit if it so desires" *United States v. Ayala*, 43 M.J. 296, 300 (C.A.A.F. 1995) (citations and internal quotation marks omitted).

Assuming, without deciding, that the appellant has met the low threshold of "some evidence," the burden of proof shifts to the government to prove

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[20] The court will not engage in speculation regarding the purpose or intent behind how the United States Marine Corps executes the assignments of their judge advocates.

[21] Appellant's Reply Brief of 11 Aug 2017 at 3.

beyond a reasonable doubt that the facts as presented do not constitute apparent UCI. *Boyce*, 76 M.J. at 249.

Unlike the military judges in *Salyer* and *Lewis* who recused themselves, the military judge here indicated he had no reservations about his ability to continue to impartially try the appellant's case, and was not challenged by either party on his ability to do so. The SJA denied on the record making any statements or taking any action intended to have the military judge reassigned.[22] The SJA testified that his attempts to facilitate assignment of additional judge advocates and another military judge to Okinawa were not based on his personal dissatisfaction with the military judge's past rulings, or any rulings in this case. This testimony was unrebutted by the appellant. Although the SJA admitted to discussing the need for additional legal personnel in Okinawa with the SJA to the CMC, there is no evidence that this discussion had any influence on the Headquarters, Marine Corps' phone call to the military judge.

The appellant's speculation regarding the SJA's motives "amounts to no more than a claim of [UCI] in the air." *United States v. Shea*, 76 M.J. 277, 282 (C.A.A.F. 2017). Morever, the military judge's Article 13, UCMJ ruling—awarding the appellant 111 additional days of PTC credit—demonstrated his ability to remain impartial despite the SJA's comments.[23] "We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of [UCI] in the absence of a connection to the result of a particlar trial." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citing *Thomas*, 22 M.J. at 369 (additional citation oitted). We find the government has proven beyond a reasonable doubt that the facts as presented do not constitute apparent UCI.

However, assuming arguendo the government failed to meet its burden, we would nonetheless find that the government proved beyond a reasonable doubt that the UCI did not place an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer, fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce,* 76 M.J. at 248 (quoting *Lewis*, 63 M.J. at 415). Unlike actual UCI, which requires prejudice to the accused, "no such showing is required for a meritorious claim of an appearance of [UCI]. Rather, the prejudice involved . . . is the damage to the public's perception of the fairness of the military justice system as a whole[.]" *Id.*

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[22] Record at 64.

[23] *Id*. at 85.

The facts and circumstances surrounding this case include an SJA who voiced his personal displeasure with the military judge to the TDC during pretrial negotiations. As stated above, these comments were not intended for the public, nor were they substantively UCI. The SJA made a specific request directly to the SJA to CMC for an additional military judge to be assigned to Japan, and there was a subsequent phone call to the military judge from Headquarters, Marine Corps informing him that he was being reassigned a year early. However, the reasons for the phone call are not clearly established on the record, and ultimately the military judge was never reassigned. Morever, following voir dire, where the military judge stated on the record he could impartially try the case, the TDC was apparently satisfied and declined to challenge him for cause. Finally, a different SJA provided the CA the required post-trial advice and recommendations.[24] Under these facts, we find that the government has proven beyond a reasonable doubt that any apparent UCI "did not place 'an intolerable strain' upon the public's perception of the military justice system and that 'an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249 (quoting *Salyer*, 72 M.J. 423).

B. CA's denial of post-trial Article 39(a), UCMJ, hearing

The appellant asserts as error that the CA abused his discretion in "ignoring" the request for a post-trial Article 39(a), UCMJ, session after being presented with "more than enough evidence that the [UCI] in this case is not harmless beyond a reasonable doubt."[25] Although not referenced in the post-trial submission, we reviewed the appellant's request as one pursuant to R.C.M. 1102(b)(2).

R.C.M. 1102(b)(2) and (d) provide authority for a CA to direct a post-trial Article 39(a), UCMJ, session for the purpose of inquiring into, and when appropriate, resolving "any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). "When an appellant requests the [CA] to order a post-trial Article 39(a) session, it is a matter for the [CA's] sound discretion whether to grant the request." *United States v. Ruiz*, 49 M.J. 340, 348 (C.A.A.F. 1998). In as much as a CA may be persuaded by facts, a CA is not compelled to approve a request "based merely on unsworn, unsubstantiated assertions." *Id*. "We review a convening authority's decision not to grant a

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[24] The appellant does not argue and we find no evidence in the record that the removal of the original SJA was some indicia of UCI. There are many reasons SJAs are substituted during the post-trial process.

[25] Appellant's Brief at 19.

post-trial hearing for an abuse of discretion." *United States v. Lofton*, 69 M.J. 386, 391 (C.A.A.F. 2011) (citing *Ruiz*, 49 M.J. at 348). Both *Lofton* and *Ruiz* found that it was an abuse of discretion for a CA to deny a request for a post-trial 39(a) session that was based on substantiated assertions. *Lofton,* 69 M.J. at 392; *Ruiz*, 49 M.J. at 348.

The appellant's request for a post-trial Article 39(a), UCMJ, was to address the appellant's assertions of UCI on the part of the SJA.

> "We request a post-trial hearing to determine (1) whether [UCI] occurred in this case; (2) whether the military judge should have recused himself before awarding a sentence or ruling on motions; and (3) if the answer to (2) is yes, then whether SSgt Larrabee should have been awarded additional credit for illegal pretrial punishment and the [CA's] refusal to obey a judicial order."[26]

The appellant's request alleges apparent UCI through the actions of the SJA and that the military judge was being reassigned early due to "defense friendly rulings."[27] The appellant's request also included new allegations that accused the SJA of fabricating evidence and misrepresenting facts to an administrative discharge board that occurred after the appellant's court-martial and was unrelated to the appellant's case.[28] Finally, the request included an affidavit from a TDC not detailed to this case. In this affidavit the TDC alleges a conversation about a PTC issue in an unrelated case where the SJA said over the phone in a "very derisive tone," saying "'[The Military Judge] is a liberal judge' who 'does not understand the purpose of military justice' and that the area needed a better judge, or words substantially to that effect."[29] The CA's action indicates the the appellant's request was considered before the CA took action and approved the sentence as adjudged.[30]

We find the appellant's request did not substantiate his assertions. The affidavit presented to the CA included comments between the SJA and a TDC made in the context of discussing a PTC issue associated with an unrelated case. The comments were unprofessional, but not intended for the public, nor did they constitue UCI on the part of the SJA. The request alluded to the SJA

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[26] Addendum to SJA's Recommendation (SJAR) dated 8 Feb 2017, Encl. (1) at 3.

[27] *Id*. at 4.

[28] *Id*.

[29] *Id.*, Encl. (1) to Encl. (1).

[30] CA's Action of 15 Feb 17. A different SJA prepared and processed the SJAR and SJAR addendum.

creating apparent UCI through his actions, but provide the CA no additional evidence to substantiate that allegation. The appellant asserts the military judge was being reassigned early because of his previous rulings, but includes nothing to support the claim. Similarly, the appellant's allegation that the SJA intentionally fabricated evidence before an unrelated administrative discharge board hearing that occurred after the appellant's trial is not relevant to the appellant's court-martial. Although the allegations in the appellant's request may raise questions regarding the character and conduct of the SJA, they do not substantiate the allegation that the SJA was able to influence the military judge's rulings in this case, or influence the decision of Headquarters Marine Corps to notify the military judge of a potential early reassignment.

We find the appeallant's request fails to sufficiently establish any matter that would affect the legal sufficiency of the proceedings, and thus conclude that the CA did not abuse his discretion in denying the appellant's request for a post-trial Article 39(a), UCMJ, session.

III. CONCLUSION

The findings and sentence, as approved by the CA, are affirmed.

Senior Judge HUTCHISON and Judge FULTON concur.

For the Court

R.H. TROIDL
Clerk of Court

APPENDIX C

United States Court of Appeals
for the Armed Forces
Washington, D.C.

United States,
Appellee

v.

Steven M. Larrabee,
Appellant

USCA Dkt. No. 18-0114/MC
Crim.App. No. 201700075

O R D E R

On further consideration of the granted issue, 77 M.J. 328 (C.A.A.F. 2018), and in light of *United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018), it is, by the Court, this 22nd day of August 2018,

ORDERED:

That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is hereby affirmed.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

cc: The Judge Advocate General of the Navy
Appellate Defense Counsel (Mizer)
Appellate Government Counsel (Monks)