IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES,	)	SUPPLEMENTAL REPLY
Appellee / Cross-Appellant,	)	BRIEF OF APPELLANT /
	)	CROSS-APPELLEE
v.	)	
	)	
STEPHEN A. BEGANI,	)	
Chief Petty Officer (E-7),	)	Crim. App. No. 201800082
United States Navy (Retired),	)	USCA Docket Nos. 20-0217/NA
Appellant / Cross-Appellee.	)	and 20-0327/NA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (CONTINUED)

STATUTES AND CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

SUMMARY OF ARGUMENT

The granted issues ask different versions of the same question: Does the government have a constitutionally sufficient justification for constantly subjecting most retired servicemembers to the Uniform Code of Military Justice (UCMJ) for offenses committed *while* they are retired? The original granted issue presents that question as an equal protection claim—challenging the UCMJ's arbitrary distinction between active-duty retirees like Mr. Begani[1] (nearly all of whom remain subject to the UCMJ in perpetuity under 10 U.S.C. § 802(a)(4) and (6)) and reservist retirees (who are virtually never subject to the UCMJ under 10 U.S.C. § 802(a)(5)). The supplemental granted issue presents it under Article I and the Fifth Amendment—challenging whether *any* retiree may constitutionally be subjected to a court-martial for offenses committed while retired (and, if so, for *which* offenses).

Against that backdrop, the most important feature of the government's supplemental brief is what it *doesn't* say: Across 30 pages, the government never offers a single affirmative argument for why

1. We again refer to the Appellant/Cross-Appellee as the military judge did at trial—as "Mr. Begani." J.A. 308; *see also* Supp. Br. 1 n.2.

court-martial jurisdiction over retirees is in any way necessary to "preserve good order and discipline"—or to achieve any other military objective. The brief does not argue that retirees must be subject to the UCMJ insofar as they are regularly subject to involuntary recall (because they aren't). It doesn't argue that retirees must be subject to the UCMJ insofar as they actually owe ongoing duties to the military while retired (because they don't). And it doesn't explain why retirees should constantly be subject to the UCMJ when reservists are not. *See Larrabee* v. *Braithwaite*, No. 19-654, 2020 WL 6822706, at *6 (D.D.C. Nov. 20, 2020) ("Because military retirees are much less likely to be recalled to active-duty service than Reservists are, the distinction in whether these two similar groups are subject to court-martial jurisdiction seems arbitrary at best."), *appeal docketed*, No. 21-5012 (D.C. Cir. Jan. 22, 2021).

Simply put, at no point does the government explain why it *needs* to be able to court-martial retirees like Mr. Begani for post-retirement offenses. Given the Supreme Court's longstanding admonition that courts-martial may exercise only "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in *active*

service," *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) (emphasis added), that omission is more than a little telling.

Perhaps because it has no argument grounded in military function, the government's brief reduces the question whether more than one million retired American servicemembers can be subjected to court-martial for post-retirement offenses to a tautological formalism: So long as Congress simply *declares* a group to be "part of" the "land and naval forces," it may then constitutionally subject all members of that group to military law in perpetuity under its authority "[t]o make rules for the government and regulation of the land and naval forces," U.S. CONST. art. I, § 8, cl 14—whether or not those individuals have any *actual* military responsibilities. *E.g.*, Gov't Supp. Br. 14–15 ("[Mr. Begani's] status is dispositive of the constitutionality of Congress's decision to subject [him] to military jurisdiction under Article 2(a)(6) . . . ."). To the government, Mr. Begani's status is "undisputed," *id*. at 12, 25, for the simple reason that Congress has said so.

On this view, the Supreme Court's decision in *Reid* v. *Covert*, 354 U.S. 1 (1957), hinged entirely on the fact that, although Clarice Covert and Dorothy Smith *were* subject to the UCMJ, they were not technically

part of an entity that Congress had listed as an "armed force" in the U.S. Code. Gov't Supp. Br. 5 (citing 10 U.S.C. § 101(a)(4)). So construed, *Covert* would have come out differently if Congress had simply denominated civilian dependents accompanying the armed forces abroad as "part of" the armed forces—*e.g.*, a Title 10 "Spouse Force"—even if they had no active or ongoing military responsibilities.

But *Covert* and numerous other Supreme Court decisions specifically belie such empty formalism—and make clear that the constitutional inquiry is a functional one. *See, e.g.*, *Covert*, 354 U.S. at 22 (plurality opinion) ("[T]he authority conferred by Clause 14 does not encompass persons who cannot *fairly* be said to be 'in' the military service." (emphasis added)); *see also Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960) ("The test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" (second emphasis added)); *Toth*, 350 U.S. at 15 ("[T]he power granted Congress . . . would seem to restrict court-martial jurisdiction to persons who are *actually* members or part of the armed forces." (emphasis added)).

And although the Supreme Court has never had the opportunity "to precisely define the boundary between 'civilians' and members of the 'land and naval Forces,'" *Covert*, 354 U.S. at 22 (plurality opinion), it has repeatedly underscored that such constitutional line-drawing is up to the courts, not Congress. *See, e.g.*, *id.* at 23 ("[T]here might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military."); *see also McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281, 285 (1960) (incorporating this discussion of *Covert*).

The government implies that these line-drawing cases arise only with respect to those whom Congress has not decreed to be part of the military, and that the constitutional question is otherwise settled by Congress's *ipse dixit*. But this Court has correctly read them to stand for a different proposition—as reflecting "repeated caution against the application of military jurisdiction over anyone *other* than forces serving in active duty." *United States* v. *Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012) (emphasis added). Obviously, that includes retirees such as Mr. Begani.

The government's overly formalistic misreading of these cases is exacerbated by its misunderstanding of them (and others) as somehow

specifically establishing the validity of court-martial jurisdiction over retirees. *See, e.g.*, Gov't Supp. Br. 18–19; *see also id.* at 26 ("The Supreme Court *held* that Retirees are subject to trial by court-martial." (emphasis added)). That's just not accurate. Not only has the Supreme Court *never* directly addressed whether (or when) court-martial jurisdiction over retirees is constitutional, but its more recent jurisprudence has called into question the logic by which *this* Court's predecessor had previously sustained it. *See, e.g.*, *United States* v. *Dinger*, 76 M.J. 552, 555–56 (N-M. Ct. Crim. App. 2017).

Like the NMCCA attempted in *Dinger*, this Court is thus tasked with resolving the constitutional question as a matter of "first principles." *Id.* at 556. And yet, the only "first principle" the government has to offer here is, repeatedly, "because Congress said so." Indeed, the government now dismisses as "irrelevant" the functional arguments on which it had previously relied in *Dinger* and *Larrabee*—that retirees are part of the land and naval forces because they receive pay and remain subject to involuntary recall to active duty. *See* Gov't Supp. Br. 24. *But see Larrabee*, 2020 WL 6822706, at *5 (describing the grounds on which the government previously defended military jurisdiction over retirees).

An accurate reading of the Supreme Court's jurisprudence makes clear that the Constitution requires more than just Congress's say-so to sustain military jurisdiction; it requires that the accused have some ongoing relationship with the military that brings with it *actual* duties and responsibilities. It would be one thing if retirees like Mr. Begani *did* still incur meaningful military obligations while retired. *See, e.g.*, *Murphy* v. *Garrett*, 29 M.J. 469, 472 (C.M.A. 1990) (Sullivan, C.J., concurring) ("In view of petitioner's extensive continuing contacts with the Marine Corps [as a reservist], we are convinced that subjecting him to military jurisdiction is constitutional."). But they don't, and the government's supplemental answer nowhere argues otherwise.

If the Supreme Court's consistent jurisprudence—from *Toth* to *Covert* to *Guagliardo*—means anything, that should be the end of the matter. And although this Court's predecessor long ago held to the contrary, *see United States* v. *Overton*, 24 M.J. 309 (C.M.A. 1987); *United States* v. *Hooper*, 26 C.M.R. 417 (C.M.A. 1958), considerations of *stare decisis* (most of which the government's supplemental answer fails to even address), militate only in favor of overruling those decisions here—and dismissing Mr. Begani's convictions.

ARGUMENT[2]

I. MR. BEGANI IS NOT PART OF THE "LAND AND NAVAL FORCES"

A. Contra the Government's Brief, the Supreme Court Has *Not* Left the Determination of Whether an Individual is "in" the "Land and Naval Forces" Entirely to Congress

The government's central argument in its supplemental answer is that the Supreme Court's skepticism about expansive court-martial jurisdiction has been limited to cases in which the accused was *clearly* a "civilian." In those cases, the government contends, even though Congress had subjected the accused to the UCMJ, it had not purported to define their status as one that placed them *in* the "land and naval forces" for purposes of the Make Rules Clause, U.S. CONST. art. I, § 8, cl. 14. In other words, *once* Congress declares that an individual is part of the "land and naval forces," the government's position is not only that this is all that the Constitution requires; it's that the Supreme Court has already held as much. *See, e.g.*, Gov't Supp. Br. 14–15. Thus, the government argues, Mr. Begani's status as a member of the "land and naval forces" is "undisputed." *Id.* at 12, 25.

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2. Mr. Begani's supplemental brief stated that the supplemental granted issue is reviewed *de novo*. Supp. Br. 15 n.9. The government apparently agrees; its supplemental brief does not address the issue.

Not only does Mr. Begani quite overtly dispute his status, *see, e.g.*, Supp. Br. 7 ("[H]e was no longer part of the 'land and naval forces' at the time of his offenses."), but the very Supreme Court cases from which the government purports to draw this argument specifically disclaim it. In *Toth*, for instance, the Court did not suggest that court-martial jurisdiction was appropriate for anyone Congress *deemed* to be in the land or naval forces; rather, it specifically explained that "the power granted Congress . . . would seem to restrict court-martial jurisdiction to persons who are *actually* members or part of the armed forces." 350 U.S. at 15 (emphasis added).

And *Covert* is even clearer on this point: Justice Black's plurality opinion found it unnecessary in *that* case "to precisely define the boundary between 'civilians' and members of the 'land and naval Forces,'" 354 U.S. at 22 (plurality opinion), but clearly viewed such line-drawing as a judicial function. After all, just one page later, Justice Black wrote that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had *not* formally been inducted into the military." *Id.* at 23 (emphasis added); *see also Guagliardo*, 361 U.S. at 285 (adopting this discussion in a

majority opinion). As Justice Clark explained for the Court on the same day as *Guagliardo*, "[t]he test for jurisdiction, it follows, is one of *status*, namely, 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 (second emphasis added), not just a person who Congress decreed to be within that constitutional definition.

That Congress formally treated the accused as being "in" the military was thus neither necessary *nor* sufficient to the Supreme Court; what mattered was what was true in *practice*, not on paper. *See Larrabee*, 2020 WL 6822706, at *4 ("[T]he Supreme Court has *never* implied, much less held, that courts have *no* role in determining whether the individuals whom Congress has subjected to court-martial jurisdiction actually fall within the ordinary meaning of the 'land and naval forces' in the Constitution.").

Notwithstanding this consistent language, the government reads *Toth* (and *Solorio* v. *United States*, 483 U.S. 435 (1987)) as eschewing a functional analysis of court-martial jurisdiction over anyone who has not fully separated from the military. *See* Gov't Supp. Br. 7–11, 18–20. But *Toth* says nothing of the kind, and *Solorio*'s analysis was

necessarily limited to active-duty personnel. *See, e.g.*, 483 U.S. at 444, 448; *see also Larrabee*, 2020 WL 6822706, at *4 (so reading *Solorio*). That neither decision endorsed a formalist "status" analysis for non-active-duty personnel is driven home by the Court of Military Appeals' decision—three years *after Solorio*—in *Murphy*, 29 M.J. 469.

At issue in *Murphy* was whether an inactive reservist could be recalled to active duty to participate in an Article 32 investigation related to his alleged misconduct while on active duty. After holding that the UCMJ authorized such an assertion of jurisdiction, the Court of Military Appeals held that it need not decide whether, as so construed, the UCMJ raised a constitutional question—not because Murphy formally remained a reservist, but *only* "[b]ecause of his continuing active contacts with the United States Marine Corps through regular periods of inactive-duty training and the nature of the charges against him." *Id.* at 471.[3]

3. Among other things, Murphy had "participated in military drills at least a dozen or more times since he resigned his regular commission as a Marine officer and accepted a reserve commission. Apparently he received military retirement points by reason of this participation; and he may have received military pay as well." *Murphy*, 29 M.J. at 472 (Everett, C.J., concurring).

As Judge Cox wrote for the Court, "we do not decide the constitutional question whether a member of the inactive reserve who has *no contacts* with an armed force could be ordered to active duty." *Id*. (citing *Toth*, 350 U.S. 11); *see also id*. at 472 (Everett, C.J., concurring) ("Insofar as constitutional considerations are concerned, this is not the case of . . . a person who, after leaving active duty, has remained in the inactive reserve but has not participated in military drills or training.").

It's not just that all three judges in *Murphy* thereby understood *Toth* to leave open whether a court-martial could constitutionally try an inactive reservist with no ongoing military contacts; it's that they also understood that this question was not settled simply because Congress had declared inactive reservists to be part of the armed forces. *Cf. United States* v. *Cole*, 24 M.J. 18, 22–23 (C.M.A. 1987) (conducting a detailed functional analysis of whether a reservist who obtained a fraudulent separation from active duty could constitutionally be tried by court-martial). And if *Toth* and its progeny compel courts to apply a functional analysis of the constitutional question even where *reservists* are concerned, as in *Murphy*, then there is no good argument for applying a formalistic analysis to retirees.

B. Because Mr. Begani Has No Ongoing Military Responsibilities, He "Can[not] Be Regarded" as Part of the "Land and Naval Forces"

The Supreme Court's "caution," and its functional approach to ascertaining an accused's military "status," both go to why Mr. Begani has repeatedly highlighted his *actual* duties and responsibilities as a member of the Fleet Reserve—or, more accurately, the complete lack thereof. *See United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993) ("[A] retired officer has no duties . . . ."). As previously noted, Mr. Begani receives pay in the form of his military pension, but unless and until he is recalled to active duty, he holds no active rank; he has no commanding officer or subordinates; he lacks the authority to issue binding orders; he has no obligation to follow orders; he performs no duties; he participates in no regular military activities; he has no obligation to undergo any training;[4] and he is restricted in when and how he can even wear his uniform. *See, e.g.*, *United States* v. *Begani*, 79 M.J. 767, 789–90 (N-M. Ct. Crim. App. 2020) (en banc) (Crisfield, C.J., dissenting), J.A. 23; *see also* Opening Br. 23–24 & n.10.

4. Even a statute that imposes an unenforced training requirement on otherwise inactive personnel does not create a military duty. *See United States* v. *Nettles*, 74 M.J. 289, 292 & n.5 (C.A.A.F. 2015).

The government has never disputed any of these representations about Mr. Begani's ongoing military obligations—either in the NMCCA or in its original or supplemental answer before this Court. The only obligation the government has identified is Mr. Begani's duty to oblige if he is ever involuntarily recalled to active duty. But that duty hardly justifies constant UCMJ jurisdiction over retirees while they are retired, since retirees would still be subject to the UCMJ from the moment that they are recalled—including if they fail to answer. *Cf.* *United States* v. *Lwin*, 42 M.J. 279, 282 (C.A.A.F. 1995) (so holding with respect to reservists).

That is why, at least until now, the litigation over this issue has focused on the only tangible distinctions between civilians and retirees *qua* retirees—the latter's continuing receipt of pay and theoretical amenability to involuntary recall to active duty. *See, e.g.*, *Larrabee*, 2020 WL 6822706, at *5; *Dinger*, 76 M.J. at 552–55; *see also Begani*, 79 M.J. at 775 (applying *Dinger*), J.A. 12. The government's supplemental answer strangely dismisses these considerations as "irrelevant to the issue presented here." Gov't Supp. Br. 24. But they're not irrelevant; they're just *insufficient* to support the assertion of court-martial

jurisdiction for post-retirement offenses—as Mr. Begani has already explained in detail. *See* Supp. Br. 19–35.

The continuing receipt of pay is insufficient because, as the Supreme Court has made clear, that pay is *not* compensation for *current* services, but rather deferred compensation for *past* services. *See Barker* v. *Kansas*, 503 U.S. 594 (1992); *Larrabee*, 2020 WL 6822706, at *5–6; *see also* Supp. Br. 19–27. And the specter of future involuntary recall is insufficient because, even if it were more than theoretical (and it isn't),[5] that does not explain why retirees should be subject to the UCMJ *while* retired, especially when far more likely sources of potential future manpower, such as reservists and Selective Service registrants, are *not* subject to the UCMJ until and unless they are performing a military function. Supp. Br. at 28–35; *see Larrabee*, 2020 WL 6822706, at *6.

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5. The government's supplemental brief tries to move the goalposts, asserting that "recent history contradicts Appellant's personal belief that the possibility of recall for non-active duty servicemembers is 'anachronistic.'" Gov't Supp. Br. 23. But the "recent history" to which the government refers appears to involve only *voluntary* recalls to active duty—as Mr. Begani already explained in his (initial) Reply Brief. *See* Reply Br. 8–9 & nn.4–5. Despite having initially been ordered by the NMCCA to produce evidence of *involuntary* recalls to active duty, the government did not do so below, and has not done so here. All that the government has offered as evidence of such recalls is a cursory citation by the NMCCA in *Dinger* to a cursory claim in a legal treatise.

The government mischaracterizes Mr. Begani's argument as asking this Court "to restrict Congress's ability to define the 'land and naval forces' to active duty servicemembers." Gov't Supp. Br. 19. That is incorrect. No one disputes that reservists are part of the "land and naval forces" *at least* while they are on active duty or inactive-duty training, even if constitutional questions might arise if they were subject to the UCMJ while completely inactive. *See, e.g.*, *Murphy*, 29 M.J. at 471; *see also Wallace* v. *Chafee*, 451 F.2d 1374, 1381 (9th Cir. 1971) ("The principle that court-martial jurisdiction should be narrowly construed on constitutional grounds still stands; our conclusion is that the use of such jurisdiction over on-duty reservists comports with such a construction.").

Article 2(a) also subjects other non-active-duty personnel to the UCMJ, and is constitutional as so applied entirely because those individuals have an ongoing, constant, active, and even *daily* connection to the military. *See, e.g.*, 10 U.S.C. § 802(a)(7) (subjecting to the UCMJ "[p]ersons in custody of the armed forces serving a sentence imposed by a court-martial."); *see also Kahn* v. *Anderson*, 255 U.S. 1, 7–8 (1921) (upholding the military's authority to court-martial military prisoners).

The difference between Mr. Begani's position and the government's is function versus form—where the constitutionality of such jurisdiction turns not just on what Congress has provided by statute; but on the accused's *actual* ongoing connection to the military. Wherever the Constitution draws the line between civilians and members of the "land and naval forces," *see Covert*, 354 U.S. at 22 (plurality opinion), individuals with zero ongoing military duties or responsibilities necessarily fall on the short side of it.

To be clear, such a holding would in no way prevent the government from exercising its recall authorities over retirees, at which point they would obviously become subject to the UCMJ—including for offenses committed prior to their retirement.[6] But until and unless that

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6. Indeed, nothing in Mr. Begani's argument calls into question the government's existing ability to recall to active duty retirees from active-duty components or the reserves for past offenses committed while on active duty under Article 2(a)(1) and Article 3. *See, e.g.*, *Morgan v. Mahoney*, 50 M.J. 633, 633–36 (A.F. Ct. Crim. App. 1999); *see also United States* v. *Hennis*, 79 M.J. 370, 378, 380 (C.A.A.F. 2020), *cert. denied*, No. 20-301, 2021 WL 78103 (U.S. Jan. 11, 2021).

Nor would such a holding provide retired servicemembers with a windfall; they would remain subject to trial in civilian court for civilian criminal offenses—as Mr. Begani was. *See, e.g.*, 18 U.S.C. § 2423(c); *see also id.* § 3261(d) (those who have "cease[d] to be subject" to the UCMJ can be prosecuted under the Military Extraterritorial Jurisdiction Act).

happens, Mr. Begani, as a retired servicemember with no ongoing military responsibilities, "can[not] be regarded as falling within the term 'land and naval forces,'" *Singleton*, 361 U.S. at 241, and so Article 2(a)(6) exceeds Congress's constitutional authority under the Make Rules Clause. *See Larrabee*, 2020 WL 6822706, at *7 ("[I]n the absence of a principled basis promoting good order and discipline, Congress's present exercise of court-martial jurisdiction over all members of the Fleet Marine Corps Reserve is unconstitutional.").

II. EVEN IF ARTICLE I SUPPORTS THE MILITARY'S ASSERTION OF JURISDICTION OVER MR. BEGANI'S POST-RETIREMENT OFFENSES, THE FIFTH AMENDMENT PRECLUDES IT

If this Court nevertheless concludes that Mr. Begani remains part of the "land and naval forces" for purposes of Congress's Article I authority, his offenses must still "aris[e] in the land or naval forces," U.S. CONST. amend. V, to be subject to trial by court-martial. As Mr. Begani explained in his Supplemental Opening Brief, his offenses do *not* fall into that exception from the Grand Jury Indictment Clause because they are insufficiently related to his military status. Supp. Br. 35–37.

In responding to Mr. Begani's Fifth Amendment argument, the government mischaracterizes it in two respects. First, it claims that Mr.

Begani's position is that he was not "in actual service in time of war or public danger." Gov't Supp. Br. 20. Second, it reads Mr. Begani's Supplemental Opening Brief as arguing for a return to the "service-connection" test articulated in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), which the Supreme Court overruled in *Solorio*, 483 U.S. 435—and which the government in any event believes to be satisfied here. Gov't Supp. Br. at 28–30.

To the government's first misstatement, nowhere in his Supplemental Opening Brief does Mr. Begani argue that the "actual service" language of the Fifth Amendment limits the scope of "cases arising in the land or naval forces." *See* Supp. Br. 15 (quoting *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866)). To whatever extent this interpretation may find support in Founding-era materials, *see, e.g.*, *Solorio*, 483 U.S. at 453 n.2 (Marshall, J., dissenting), it was expressly repudiated by the Supreme Court in *Johnson* v. *Sayre*, 158 U.S. 109, 114 (1895), which held that the "actual service" proviso applies only to cases arising in the militia. Mr. Begani has not disputed that holding.

Nor is Mr. Begani arguing for a return to *O'Callahan*'s much-maligned service-connection test. As his Supplemental Opening Brief

makes clear, the relationship Mr. Begani believes that the Fifth Amendment requires is, at a minimum, that the charged offenses be either "military-specific crimes" or connected "to either his prior active-duty service or his future amenability to recall." Supp. Br. 36–37. In other words, for an accused who has *no* ongoing military duties or responsibilities, an offense can only "aris[e] in the land or naval forces" if it is a uniquely military offense or one directly related to the accused's past or future military service.[7]

Any other conclusion would mean that "the Constitution allows for the exercise of military jurisdiction over all retirees in all cases," *id.* at 37, at which point the Fifth Amendment's limiting language would be performing no work that isn't already accomplished by the text of the Make Rules Clause. *But see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.").

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7. The UCMJ itself already imposes a comparable non-service-connection nexus requirement for reservists—who may be tried only for offenses committed on active duty or during inactive-duty training. 10 U.S.C. § 802(a)(3). Given that mandate, imposing an analogous requirement here would hardly create "uncertainty." Gov't Supp. Br. 30.

Tellingly, the government nowhere argues that the offenses for which Mr. Begani was convicted fall into either of these categories; it simply insists that no nexus of any kind is required; and that, even if one is, Mr. Begani's offenses satisfy *O'Callahan*'s service-connection test for *active-duty* personnel. But even if *O'Callahan* were the correct standard (and it isn't), Mr. Begani's offenses still wouldn't qualify.[8]

Because Mr. Begani's offenses were civilian offenses unrelated to his prior or potential future military service, they did not "aris[e] in the land or naval forces," and so the Fifth Amendment therefore precluded their trial by court-martial. Even if Article 2(a)(6) may be constitutional as applied to *other* offenses by retired servicemembers, then, it is unconstitutional as applied here.

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8. Although the government notes that the Court of Military Appeals in *Solorio* held that it was sufficient that the victim was a military dependent, *see* Gov't Supp. Br. 29–30, the Supreme Court clearly did not agree—or else it would have had no reason to overrule *O'Callahan*. *See Solorio*, 483 U.S. at 465–66 (Marshall, J., dissenting) (explaining why Solorio's offenses were *not* service-connected); *see also Relford* v. *Commandant,* 401 U.S. 355, 365 (1971) (listing numerous factors that would establish a service connection, none of which included whether the victim was a military dependent).

Indeed, only one of the Justices in *Solorio* appeared to believe that the facts of that case satisfied *O'Callahan*. *See* 483 U.S. at 451–52 (Stevens, J., concurring in the judgment).

III. THIS COURT SHOULD OVERRULE *OVERTON* AND *HOOPER*

The above analysis underscores why Mr. Begani's court-martial was unconstitutional—and why his convictions should therefore be dismissed. And although such a holding would require this Court to overrule at least two of its predecessor's decisions, Mr. Begani's Supplemental Opening Brief explained why such a measure is appropriate here. *See* Supp. Br. 38–40.

The government responds in only two respects. First, it appears to suggest that the *Supreme Court* has settled the matter—which, of course, would preclude this Court from reaching a different result. Second, it belatedly attempts to defend the Court of Military Appeals' decision in *Overton*. The first argument is flatly erroneous; the second is both unpersuasive on its own and unresponsive to subsequent developments. If this Court agrees with Mr. Begani that his court-martial was unconstitutional, then it can—and should—overrule those precedents and dismiss his convictions.

A. The Supreme Court Has *Not* "Held that Retirees Are Subject to Trial By Court Martial"

In Section E.2 of its supplemental answer, titled "The Supreme Court held that Retirees are subject to trial by court-martial," Gov't

Supp. Br. 26, the government all-but argues that this Court is bound by a series of prior Supreme Court decisions, *none of which* presented the constitutional questions at issue here. And yet, this heading does not appear to be a typo. *See id.* ("[T]he Supreme Court *affirmed* court-martial jurisdiction over Retirees without analyzing 'service connectedness.'" (emphasis added)). Indeed, the government's position appears to be that the Supreme Court has necessarily resolved this issue, albeit *sub silentio*.

As a factual matter, this claim is patently erroneous. Neither *United States* v. *Tyler*, 105 U.S. 244 (1882), nor *United States* v. *Fletcher*, 148 U.S. 84 (1893), involved a constitutional challenge to the assertion of court-martial jurisdiction over a retiree; *Tyler* did not even involve a court-martial *at all*. At issue in *Tyler* was whether a military retiree receiving pay was still "serving" in the military for purposes of a federal statute that tied servicemembers' raises to five-year periods of "service." The Court's purely descriptive reference to court-martial jurisdiction over retirees was necessarily dicta given that Tyler had never been tried and that the substantive issue did not turn at all on the military's jurisdiction. *See* 105 U.S. at 246; *see also* Supp. Br. 20.

Fletcher is no more helpful to the government's argument. Although the plaintiff in that case had been court-martialed while retired, he did not challenge whether the court-martial properly exercised jurisdiction. Instead, the entire dispute was over whether (and when) his sentence had been properly approved by the President—which affected the plaintiff's entitlement to back pay. *See Fletcher* v. *United States*, 26 Ct. Cl. 541 (1891), *rev'd*, 148 U.S. 94. There was no discussion in either the Court of Claims or the Supreme Court of the Army's constitutional authority to try Fletcher in the first place.

If the government's brief means to imply that *Fletcher* thereby implicitly *endorsed* the Army's constitutional authority to exercise court-martial jurisdiction over a retiree, that argument is squarely foreclosed by decades of Supreme Court precedent. *See, e.g.*, *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 511 (2006) ("We have described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." (quoting *Steel Co.* v. *Citizens for a Better Envt.*, 523 U.S. 83, 91 (1998))); *Lewis* v. *Casey*, 518

U.S. 343, 352 n.2 (1996) ("[W]e have repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect.").

Finally, as the government correctly notes, the descriptions of court-martial jurisdiction over retirees in both *Barker* and *McCarty* v. *McCarty*, 453 U.S. 210 (1981), "were not part of the Court's holdings." Gov't Supp. Br. 27. More than that, neither *Barker* nor *McCarty* had reason to *analyze* court-martial jurisdiction over retirees; they merely quoted *Tyler*'s dicta and cited the UCMJ without elaboration. *Barker*, 503 U.S. at 600 n.4; *McCarty*, 453 U.S. at 221–22 & nn.13–14.

Simply put, the Supreme Court has never addressed the constitutional questions presented here, let alone expressed any opinion as to their answers. The government's section heading is inaccurate, and this Court is not bound by any Supreme Court decision to uphold the constitutionality of Mr. Begani's court-martial.

B. *Overton* and *Hooper* Were Wrongly Decided

Unlike the Supreme Court, this Court's predecessor *has* previously considered the constitutionality of Article 2(a)(6), most recently in 1987 in *Overton*. As Mr. Begani noted in his Supplemental Opening Brief, *Overton*'s actual analysis of these questions is quite thin.

See Supp. Br. 38. With citations omitted, this is the Court of Military Appeals' *full* discussion of the constitutional questions presented here:

> Congress, in its wisdom, has decided that court-martial jurisdiction may be exercised over members of the Fleet Marine Corps Reserve. This grant of jurisdiction is neither novel nor arbitrary. Although some civilian and military leaders have expressed doubt with respect to the wisdom of this judgment, we do not. This type of exercise of court-martial jurisdiction has been continually recognized as constitutional. Appellant has not persuaded us today to the contrary.

24 M.J. at 311 (citations omitted). And *Hooper* (the earlier decision on which this passage largely relies), isn't any more convincing—relying all-but summarily on retirees' continuing receipt of pay and amenability to future recall. *See* 26 C.M.R. at 425; *see also* Supp. Br. 8, 10, 14. Even at the time that *Hooper* was decided, the Court of Claims had "doubts" that the Court of Military Appeals' constitutional analysis was correct. *Hooper* v. *United States*, 326 F.2d 982, 987 (Ct. Cl. 1964).

The government nevertheless defends *Overton*, suggesting that "nothing in *Overton* indicates it relied on *Hooper* any more than it relied on the other cited cases, including *McCarthy*, *Tyler*, and *Toth*." Gov't Supp. Br. 25. But there was nothing in those other cases for the Court of Military Appeals to "rely upon" besides dicta. *Overton* is thus

unconvincing at least largely for the same reason as the government's brief here—because it assumed that prior cases had settled questions that they had not considered, neglecting to provide its own substantive analysis in support of those putative conclusions.

C. *Overton* and *Hooper* Have Been Overtaken by Subsequent Events

In any event, as Mr. Begani's Supplemental Opening Brief, the NMCCA in *Dinger*, and Judge Leon in *Larrabee* have all made clear, *Overton* and *Hooper* have been overtaken by subsequent events—including the Supreme Court's clarification in *Barker* that retiree pay is deferred compensation, not continuing compensation. Supp. Br. 38–39.

This Court has identified four factors in considering whether to overrule a prior precedent. They include "whether the prior decision is unworkable or poorly reasoned; any intervening events; the reasonable expectations of servicemembers and the risk of undermining public confidence in the law." *United States* v. *Dinger*, 77 M.J. 447, 452 (C.A.A.F. 2018) (citations and internal quotation marks omitted). All four factors are present here; indeed, the government does not even respond to Mr. Begani's discussion of the latter three in his Supplemental Opening Brief. *See* Supp. Br. 38–40.

If this Court agrees with Mr. Begani that Article 2(a)(6) is unconstitutional, whether because it exceeds Congress's Article I powers or because it violates the Fifth Amendment as applied to Mr. Begani's specific offenses, the government has offered no good reason for nevertheless keeping *Hooper* and *Overton* on the books. The proper disposition, then, would be to overrule those precedents—and to dismiss Mr. Begani's convictions.[9]

* * *

9. Contra the *amicus* brief, there is no doubt that this Court has the power to strike down acts of Congress that transgress the Constitution. "Article III requires only that the ultimate 'judicial power' be reserved in the Article III courts; it does not require that all adjudicative bodies exercising the review 'standards' that Article III courts exercise be constituted as Article III courts." *Kalaris* v. *Donovan*, 697 F.2d 376, 387 (D.C. Cir. 1983). Not only is this Court's decision in this case subject to such Article III oversight, *see* 28 U.S.C. § 1259(2), (3); *see also Ortiz* v. *United States*, 138 S. Ct. 2165 (2018), but the power of non-Article III *state* courts to strike down federal statutes has been a central principle of Federal Courts doctrine dating back to the Founding. *See, e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401–02 (1953).

Nor is 10 U.S.C. § 867(c)(4) to the contrary. That statute limits this Court to acting "only with respect to matters of law," a proviso that simply distinguishes matters of law from matters of *fact*—which Courts of Criminal Appeals *are* empowered to review in at least some cases. *See* 10 U.S.C. § 866(d)(1). There is no indication in the UCMJ's legislative history (or anywhere else, for that matter) that Congress intended the term "matters of law" to confine this Court to purely *statutory* claims.

The government's supplemental brief closes by asserting that, "[l]ike Appellant's primary argument which casts uncertainty onto whether someone is a 'servicemember,' Appellant's alternative argument muddies otherwise well-settled law." Gov't Supp. Br. 30. This is the exact misconception that pervades the rest of the government's supplemental brief—that these questions are somehow "well-settled," whether by this Court or the Supreme Court. *See id*. at 26.

In the process, the government's brief sidesteps the real question that these cases present: What is the functional argument for why retirees with no ongoing military responsibilities, like Mr. Begani, nevertheless remain members of the land and naval forces who can constitutionally be tried by court-martial for post-retirement offenses? *See Toth*, 350 U.S. at 23 ("Determining 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.'" (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821))).

However unintentionally, the government's brief necessarily and conclusively answers that question—by failing to provide one.

CONCLUSION

For the foregoing reasons and those previously stated, Mr. Begani's convictions should be dismissed.

Respectfully submitted,

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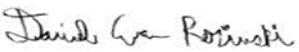

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CERTIFICATE OF FILING AND SERVICE

I certify that on February 8, 2021, a copy of the foregoing brief in the case of *United States* v. *Begani*, USCA Dkt. Nos. 20-0217/NA and 20-0327/NA, was electronically filed with the Court (efiling@armfor.uscourts.gov) and contemporaneously served on the Government Appellate Divisions.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

This brief complies with the type-volume limitation of Rule 24(c) because it contains 6,222 words. This brief complies with the typeface and type-style requirements of Rule 37.

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