[ORAL ARGUMENT NOT YET SCHEDULED]

No. 21-5012

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVEN M. LARRABEE,

Plaintiff-Appellee,

v.

THOMAS W. HARKER,
in his Official Capacity as
Acting Secretary of the Navy, *et al.*,

Defendants-Appellants.

On Appeal from the U.S. District Court
for the District of Columbia
(No. 19-cv-654 (RJL))

BRIEF FOR PLAINTIFF-APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici Curiae*

All parties, intervenors, and *amici* appearing before the district court and in this Court thus far are listed in the Brief for Appellants.

B. Rulings Under Review

The rulings at issue in this appeal are Judge Leon's final order and memorandum opinion issued on November 20, 2020, granting Plaintiff-Appellee's Motion for Judgment on the Pleadings. The opinion is not yet reported, but is available at 2020 WL 6822706, and is reprinted at JA 10.

C. Related Cases

This case is a non-custodial collateral attack on a conviction by a court-martial conducted by the U.S. Navy-Marine Corps Trial Judiciary. It has not previously been before this Court. Plaintiff-Appellee Steven Larrabee's direct appeal of his conviction was docketed as No. 201700075 in the U.S. Navy-Marine Corps Court of Criminal Appeals; No. 18-0114/MC in the U.S. Court of Appeals for the Armed Forces; and No. 18-306 in the U.S. Supreme Court. There are no other related cases that satisfy D.C. Cir. R. 28(a)(1)(C).

On March 9, 2021, the U.S. Court of Appeals for the Armed Forces heard argument in a pair of consolidated appeals by a different defendant that raise issues similar to those raised here. *See United States* v. *Begani*, Nos. 20-0217/NA and 20-0327/NA (C.A.A.F.); *see also post* at 10–11 (discussing *Begani*'s procedural history).

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INTRODUCTION

Throughout American history, military jurisdiction has been the exception, not the norm. "[H]aving experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals." *Loving* v. *United States*, 517 U.S. 748, 760 (1996); *see Lee* v. *Madigan*, 358 U.S. 228, 232 (1958) ("The attitude of a free society toward the jurisdiction of military tribunals . . . has a long history.").

In part, that distrust reflected concerns that the military dispensed "a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." *United States* v. *Denedo*, 556 U.S. 904, 918 (2009) (Roberts, C.J., concurring in part and dissenting in part) (internal quotation marks omitted); *see United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955) ("There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III . . . .").

But this skepticism of military jurisdiction has persisted even as courts-martial have evolved to better protect the rights of active-duty personnel. *See Ortiz* v. *United States*, 138 S. Ct. 2165, 2174 (2018). First,

concerns remain that courts-martial—which still utilize procedures and try offenses that would never pass muster in civilian courts, *see post* at 49–51—do not adequately protect the rights of those *not* in active service. *See United States* v. *Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012) (reiterating the Supreme Court's "repeated caution against the application of military jurisdiction over anyone other than forces serving in active duty").

Second, because "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts," *al Bahlul* v. *United States*, 840 F.3d 757, 797 (D.C. Cir. 2016) (en banc) (Wilkins, J., concurring) (internal quotation marks omitted), this skepticism also reflects the broader and more fundamental separation of powers concerns that arise *whenever* the political branches divert adjudicatory authority away from Article III courts—regardless of the quality of the non-Article III forum. *See, e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 503 (2011).

Courts-martial are a longstanding exception to Article III, but one that the Supreme Court has strictly circumscribed, stressing that "the scope of the constitutional power of Congress to authorize trial by court-martial . . . call[s] for limitation to 'the least possible power adequate to the end proposed,'" *i.e.*, "the narrowest jurisdiction deemed absolutely

essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22–23 (citation omitted). As the district court put it, the government bears the burden of demonstrating "why subjecting [the personnel at issue] to court-martial jurisdiction is *necessary* to maintain good order and discipline" among active-duty troops. JA 21.

For troops currently *in* active service, that question answers itself. *See Solorio* v. *United States*, 483 U.S. 435 (1987). But *inactive* personnel are another matter. Reservists are subject to the UCMJ only while on active duty or inactive-duty training. 10 U.S.C. § 802(a)(3)(A)(i); *Murphy* v. *Garrett*, 29 M.J. 469 (C.M.A. 1990) (court-martial of inactive reservist would raise constitutional question). National Guard troops are subject to the UCMJ only while in federal service. 10 U.S.C. § 802(a)(3)(A)(ii). And ex-servicemembers may *never* be tried by court-martial, even for offenses committed on active duty. *See Toth*, 350 U.S. at 21–23.

The linchpin across these categories—the constitutional condition that compels compliance with the UCMJ and makes violators liable to court-martial—is the power to give (and duty to obey) orders. *Parker* v. *Levy*, 417 U.S. 733, 758 (1974) ("The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render

permissible within the military that which would be constitutionally impermissible outside it."). For those who lack the capacity to lawfully give or receive orders, it necessarily follows that no such need exists.

Here, Plaintiff-Appellee Steven Larrabee, a member of the Fleet Marine Corps Reserve, was court-martialed for offenses committed after he left active service. But like any other retired servicemember, Mr. Larrabee has no authority to give or receive binding orders. He "has no duties." *United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993). And he may not even wear his uniform except in specifically approved circumstances; he appeared at his court-martial in civilian clothes. His only obligation is to present himself in the highly unlikely event that he is ever called to active duty—just like any of the other two million military retirees or any of the 16 million Selective Service registrants.

The central question in this appeal is whether the Constitution nevertheless allows Congress to require Mr. Larrabee to comply with the UCMJ while he is retired—and to face a court-martial if he doesn't. Given that, like other military retirees, Mr. Larrabee wields no military authority and bears no military obligations, the district court correctly held that the answer is "no." The decision below should be affirmed.

STATEMENT OF THE ISSUES PRESENTED

The government frames the issue presented as: "Did Congress exceed its power under Article I of the U.S. Constitution by authorizing court-martial jurisdiction over Fleet Marine Corps Reserve members in Article 2(a)(6) of the Uniform Code of Military Justice, 10 U.S.C. § 802(a)(6)?" Gov't Br. 3. Both on direct appeal and in the district court, Mr. Larrabee argued in the alternative that, even if the answer to that question is "no," his offenses did not "aris[e] in . . . the land or naval forces"—such that his court-martial in any event violated the Grand Jury Indictment Clause, U.S. CONST. amend. V. Because this Court "may affirm on any ground properly raised," *EEOC* v. *Aramark Corp.*, 208 F.3d 266, 268 (D.C. Cir. 2000), this appeal also raises the following issue:

Does the Fifth Amendment's Grand Jury Indictment Clause bar the court-martial of members of the Fleet Marine Corps Reserve for non-military offenses committed against a civilian on private property?

PERTINENT STATUTES AND REGULATIONS

Except for those set forth in the Addendum to this brief, the applicable statutes and regulations are contained in the Brief for the Appellants.

STATEMENT OF THE CASE

In addition to the factual and procedural background to this appeal ably summarized in the government's brief, Gov't Br. 3–11. it may be helpful to situate this case within the broader context of recent litigation on the constitutionality of subjecting military retirees to the UCMJ.

As the district court noted, "[t]he lack of any Supreme Court case addressing the question is likely due in part to the fact that in the 70-year period since the UCMJ explicitly authorized such jurisdiction, the military has so rarely chosen to exercise it." JA 23 n.8; *see also* 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) ("[R]eported courts-martial of military retirees are relatively rare."). Indeed, it has been 57 years since this question was last resolved by an Article III appellate court. *See Hooper* v. *United States*, 326 F.2d 982 (Ct. Cl. 1964). And at least when this brief was filed, the last time that the (Article I) U.S. Court of Appeals for the Armed Forces had considered the question was 32 years ago—when it was still known as the U.S. Court of Military Appeals. *See Pearson* v. *Bloss*, 28 M.J. 376, 377 (C.M.A. 1989).

In both *Hooper* and *Pearson*, the courts based their analyses almost entirely on the fact that, unlike the ex-servicemember in *Toth*, retirees continue to receive pay from the military—which those courts treated as a salary. *E.g.*, *Hooper*, 326 F.3d at 987 ("[W]e believe that this plaintiff was part of the land or naval forces. . . . *because* the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies." (emphasis added)). In *Barker* v. *Kansas*, 503 U.S. 594 (1992), however, the Supreme Court "reversed course . . . when it determined that for purposes of tax treatment, military retirement benefits actually represent *deferred* pay for past services." JA 22; *see also Barker*, 503 U.S. at 605 (holding that, instead of qualifying as "current compensation for reduced current services," "military retirement benefits are to be considered deferred pay for past services" for tax purposes).

Because of *Barker*, the constitutional question resurfaced in a trio of court-martial prosecutions brought by the Navy and Marine Corps beginning in 2015. The first involved Derrick Dinger, who was convicted by court-martial for offenses committed both while he was a member of the Fleet Marine Corps Reserve and after he was transferred to the

active-duty retired list. On appeal, the U.S. Navy-Marine Corps Court of Criminal Appeals upheld the constitutionality of his court-martial—but only after holding that, because of *Barker*, "we must call upon first principles." *United States* v. *Dinger*, 76 M.J. 552, 556 (N-M. Ct. Crim. App. 2017). Because *Barker* vitiated the prior justification for subjecting retirees to the UCMJ, the court was forced to analyze the question anew.

Reaching the question as a matter of first impression, the court relied upon the fact that those in the Fleet Marine Corps Reserve and on the retired list remain subject to recall to active duty—and that, for *that* reason, Dinger remained "in" the "land and naval forces" under Article I, and thus constitutionally subject to court-martial, while retired. *See id.* at 556–57. The court also held that courts-martial have the authority to sentence retirees to punitive discharges. *See id.* at 557–59.

Dinger sought discretionary review of both holdings from the U.S. Court of Appeals for the Armed Forces. The court granted review only as to the punitive discharge issue and affirmed. *See United States* v. *Dinger*, 77 M.J. 447 (C.A.A.F. 2018). Dinger then unsuccessfully petitioned the Supreme Court, seeking review solely on the punitive discharge issue. *See Dinger* v. *United States*, 139 S. Ct. 492 (2018) (mem.).

The procedural course of this case largely paralleled *Dinger*. After its decision in *Dinger*, the Navy-Marine Corps Court of Criminal Appeals rejected Mr. Larrabee's appeal—summarily disposing of the issues decided in *Dinger*. *United States* v. *Larrabee*, No. 201700075, 2017 WL 5712245, at *1 n.1 (N-M. Ct. Crim. App. Nov. 28, 2017). Mr. Larrabee then petitioned the Court of Appeals for the Armed Forces for discretionary review of three issues, including the retiree jurisdiction and punitive discharge issues. Contra the district court's recitation, JA 13, that court granted review only as to the punitive discharge question—summarily affirming after (and in light of) *Dinger*. *United States* v. *Larrabee*, 78 M.J. 107, 107 (C.A.A.F. 2018) (mem.). After the Supreme Court denied Mr. Larrabee's petition for certiorari—which presented only the jurisdictional question, *see Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (mem.)—he brought this non-custodial collateral challenge.[2]

2. In opposing certiorari, the government argued that the Supreme Court lacked jurisdiction over the retiree jurisdiction issue—because the court of appeals had not itself agreed to review it. Brief in Opposition at 10–16, *Larrabee*, 139 S. Ct. 1164 (No. 18-306), 2019 WL 157946. Stressing the availability of collateral review and, thus, "the potential for further consideration of the question presented in the [civilian] courts of appeals," the government explained that, "even if the question presented warranted review, no need exists to stretch [the Supreme] Court's direct-review jurisdiction over the CAAF in order to consider it." *Id*. at 15.

Like Mr. Larrabee's case, the third of the three recent cases also involves offenses committed by a retired servicemember in Japan. Stephen Begani was court-martialed for offenses committed while he was a member of the Navy's Fleet Reserve. After pleading guilty, Begani raised two constitutional challenges to the jurisdiction of his court-martial on appeal. In addition to the argument rejected in *Dinger*, Begani also argued that, insofar as retired *reservists* are subject to court-martial only while receiving military hospitalization, 10 U.S.C. § 802(a)(5), the UCMJ violates equal protection principles by treating similarly situated retired servicemembers differently with respect to their amenability to court-martial. After a three-judge panel sustained his equal protection claim, *United States* v. *Begani*, 79 M.J. 620 (N-M. Ct. Crim. App. 2019), the Navy-Marine Corps Court of Criminal Appeals reheard the case en banc, issuing a fractured, 4-3 ruling affirming Begani's conviction. *United States* v. *Begani*, 79 M.J. 767 (N-M. Ct. Crim. App. 2020) (en banc).[3]

3. Two of the four judges in the majority voted to reject Begani's equal protection claim on the merits. 79 M.J. at 772–82 (plurality opinion). The other two would have held that Begani forfeited that jurisdictional claim by failing to preserve it in his plea agreement. *Id*. at 783–87 (Gaston, J., concurring in part and in the result). Three judges dissented from both of those conclusions. *See id*. at 787–97 (Crisfield, C.J., dissenting).

Begani then petitioned the Court of Appeals for the Armed Forces for discretionary review of both the equal protection issue and the broader constitutional challenge rejected in *Dinger*. Initially, review was granted only as to the equal protection claim. *United States* v. *Begani*, 80 M.J. 200 (C.A.A.F. 2020) (mem.). The government subsequently certified an additional issue—whether Begani had forfeited his equal protection claim by not preserving it in his plea agreement. *United States* v. *Begani*, 80 M.J. 289 (C.A.A.F. 2020) (mem.). The Court of Appeals later agreed to take up the *Dinger* question as well, but only after it was asked to do so in light of the district court's decision in this case. *See United States* v. *Begani*, 80 M.J. 463 (C.A.A.F. 2020) (mem.). Oral argument on all three issues took place on March 9, 2021; the court's decision remains pending.

The upshot of this background is not just that the constitutionality of court-martial jurisdiction over military retirees has not been given plenary consideration by federal appellate courts in decades; it's that a practice that had historically been exceedingly "rare" has, for whatever reason, become increasingly common—alongside intervening Supreme Court decisions that have required military courts to resort to "first principles" in order to sustain it.

SUMMARY OF ARGUMENT

The government frames the issue in this case as a question of deference—a theme it returns to at least a dozen times across 45 pages. In its view, the argument that Congress has the constitutional authority to subject retired servicemembers like Mr. Larrabee to court-martial for post-retirement offenses largely reduces to the fact that Congress has decreed them to be "in" the "land and naval forces." *See, e.g.*, Gov't Br. 12 ("It is clear that Fleet Marine Corps Reserve members are in the armed services. Congress has declared by statute that members are part of the armed services. It is entitled to deference for that determination, which it made pursuant to its plenary constitutional authority to create and organize the armed services." (citation omitted)).

This call for deference is unfounded. The government is improperly conflating the considerable deference the political branches enjoy when *regulating* the "land and naval forces" with the antecedent question of who falls *within* the "land and naval forces" in the first place. On this latter question, as the district court correctly noted, *see* JA 19–20, the Supreme Court has emphatically and consistently extended *no* deference to Congress. Rather, an unbroken line of decisions makes clear that the

constitutionality of subjecting non-active-duty personnel to the UCMJ—and to court-martial for any violations thereof—turns on *functional* considerations, not formal ones. And the functional analysis of whether non-active-duty personnel may constitutionally be subject to the UCMJ reduces to whether they are truly in a military "status" when they are tried, *i.e.*, "whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 241 (1960) (quoting U.S. CONST. art. I, § 8, cl. 14 (emphasis added)).

The answer to that question is not a matter of legislative *ipse dixit*. And, contrary to what the government claims in its brief, no decision of this Court or the Supreme Court holds otherwise. Instead, because retirees like Mr. Larrabee meet no potentially relevant functional criteria for military status, they are *not* part of the "land and naval forces" while retired—and Congress therefore lacks the power to subject them to the UCMJ (and to court-martial) so long as they remain in that status.

But even if members of the Fleet Marine Corps Reserve *are* still "in" the "land and naval forces" for purposes of Congress's Article I power while they are retired, that conclusion is only necessary to establish the

government's position; it is not sufficient. After all, the line of Supreme Court decisions beginning in *Toth* demands that the exercise of military jurisdiction be "absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22–23 (citation omitted).

To this precedent, the government offers two responses putatively grounded in necessity—that otherwise, retirees like Mr. Larrabee might escape prosecution; and that subjecting retirees to the UCMJ is necessary to preserve their combat readiness. Gov't Br. 42–45. The first argument is not only inconsistent with *Toth*; it is simply incorrect on the facts of this case. And the second argument is belied by the fact that, in contrast to other inactive personnel (who are more likely to be called upon in an emergency and yet *not* subject to the UCMJ while inactive), the government imposes precisely *zero* training, health, or other readiness-related obligations on military retirees while they are retired.

Finally, for courts-martial to constitutionally exercise jurisdiction, they must not only have jurisdiction over the offender, but the *offense* itself must "aris[e] in . . . the land or naval forces"—so that it is expressly excepted from the Fifth Amendment's requirement of a grand jury indictment, and implicitly excepted from the petit-jury requirements of

Article III and the Sixth Amendment. *See, e.g.*, *Ex parte Quirin*, 317 U.S. 1, 39–40 (1942).

Although the Supreme Court has held that all non-capital offenses committed by active-duty servicemembers necessarily arise in the land or naval forces, *see Solorio*, 483 U.S. 435, it has never held—or even suggested—that the same is true for non-military offenses committed by inactive personnel. *Cf. Loving*, 517 U.S. at 774 (Stevens, J., concurring) (explaining that *Solorio* did not resolve even whether *capital* offenses by active-duty troops always fall within the Fifth Amendment's exception).

So long as the Fifth Amendment imposes *any* military nexus requirement for offenses committed by non-active-duty personnel, Mr. Larrabee's case fails to meet it; it is undisputed that he was convicted of civilian offenses committed against a civilian on private property after he retired from active duty. Thus, unless every single offense committed by those who are "in" the "land and naval forces" for purposes of Article I, Section 8 necessarily "aris[es] in . . . the land or naval forces" for purposes of the Grand Jury Indictment Clause's exception, Mr. Larrabee's court-martial was also prohibited by the Fifth Amendment.

ARGUMENT

I. ARTICLE I OF THE CONSTITUTION DOES NOT AUTHORIZE COURTS-MARTIAL OF POST-RETIREMENT OFFENSES BY MEMBERS OF THE FLEET MARINE CORPS RESERVE

A. Congress Does Not Receive Deference in Defining the Scope of the "Land and Naval Forces"

In a series of decisions in the 1950s and 1960s, the Supreme Court repeatedly rejected court-martial jurisdiction over non-active-duty personnel that Congress had expressly authorized in the UCMJ. In *Toth*, for instance, the Court held that the Constitution bars the court-martial of ex-servicemembers—even for offenses committed while on active duty. *See* 350 U.S. at 21–23. In *Reid* v. *Covert*, 354 U.S. 1 (1957), the Court likewise read the Constitution to prohibit the court-martial of civilian dependents of servicemembers for capital offenses committed during peacetime.[4] Three years later, *Singleton* extended that holding to non-capital offenses. 361 U.S. at 248–49. And in *Grisham* v. *Hagen*, 361 U.S. 278 (1960), and *McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281

4. Justice Black's plurality opinion in *Covert* would have gone further, but the narrower opinions of Justices Frankfurter and Harlan, whose votes were necessary to the result, were limited to capital offenses. *See Covert*, 354 U.S. at 44–45 (Frankfurter, J., concurring in the result); *id.* at 65 (Harlan, J., concurring in the result).

(1960), the Court likewise held that the Constitution forecloses peacetime courts-martial of civilian employees of the armed forces for capital and non-capital offenses, respectively.

In each of these rulings (from which the Supreme Court has never retreated, *see Ali*, 71 M.J. at 269), Congress had explicitly subjected persons not on active duty to the UCMJ (and, thus, to court-martial for violations thereof), but the Supreme Court accorded no deference to Congress's determinations, nor to the application thereof by courts-martial. Instead, the Justices considered the constitutional question first and on a clean slate—because the accused "raised substantial arguments denying the right of the military to try them at all." *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969); *see also Schlesinger* v. *Councilman*, 420 U.S. 735, 759 (1975) ("The constitutional question presented turned on the status of the persons as to whom the military asserted its power.").

In contrast, in every case in which the Supreme Court *has* accorded Congress deference in regulating the military (including every case cited by the government), the dispute involved active-duty personnel—where there was no question as to the "military status of the accused." *See, e.g.*, *Solorio*, 483 U.S. at 440 ("Implicit in the military status test was the

principle that determinations concerning the scope of court-martial jurisdiction over offenses committed *by servicemen* was a matter reserved for Congress." (emphasis added)); *see also id.* at 440 n.3 (distinguishing *Toth*'s skepticism of military jurisdiction on precisely this ground). Whatever the merits of such deference to Congress's determinations in that context, it simply has no bearing here—where the constitutional question goes to whether the individuals at issue are properly understood to be "in" the "land and naval forces" in the first place.[5]

B. Whether Individuals are "in" the "Land and Naval Forces" Turns on Functional Considerations of Their Status, Not Formal Assertions by Congress

The importance of the government's invocation of deference is that its argument for *why* Mr. Larrabee is "in" the "land and naval forces" for purposes of Article I—and, thus, subject to court-martial even for post-retirement offenses—largely reduces to the fact that Congress has said

5. Thus, three years after *Solorio*, the Court of Military Appeals went out of its way to flag the difficult constitutional question that would arise from an attempt to court-martial an inactive reservist who had "*no contacts* with an armed force." *Murphy*, 29 M.J. at 471. Not only did the *Murphy* court conduct its own analysis of whether the accused had sufficient contacts to moot the constitutional issue, *see also id.* at 472 (Everett, J., concurring), but it did even mention *Solorio* (or, more generally, the idea that it should simply defer to Congress) in its analysis.

so. *See, e.g.*, Gov't Br. 12, 18, 40. But the same line of cases in which the Supreme Court declined to defer to Congress's assertion of court-martial jurisdiction over non-active-duty personnel cannot be reconciled with the idea that the constitutional test for military status reduces to such question-begging formalism. As the district court put it, "the 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." JA 20. Instead, the standard that emerges from the Supreme Court's decisions is one grounded in function, *i.e.*, whether the personnel in question are *presently* wielding—or otherwise subject to—military authority.

In *Toth*, for instance, the Court rejected the government's argument that it was enough that the accused's offense had taken place while he was on active duty. Instead, "the power granted Congress . . . would seem to restrict court-martial jurisdiction to persons who are *actually* members or part of the armed forces" when they are tried, and not just at the time of their offense. 350 U.S. at 15 (emphasis added). Justice Black's plurality opinion in *Covert* was to the same effect, concluding that "the authority

conferred by Clause 14 does not encompass persons who cannot *fairly* be said to be 'in' the military service," 354 U.S. at 22 (plurality opinion) (emphasis added), without regard to what Congress had provided. So too, *Singleton*, where the majority stressed that "[t]he 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.'" 361 U.S. at 240–41 (second emphasis added).

In those cases, unlike in this one, Congress had not also deemed the accused to be "in" the "land and naval forces"; it had merely subjected them to the UCMJ. But rather than seize on that formalistic defect, the Supreme Court in each case focused on the functional question—whether the accused could *actually* "be regarded as falling within the term 'land and naval forces.'"[6] *See United States* v. *Cole*, 24 M.J. 18, 22 (C.M.A. 1987) ("The Supreme Court has not chosen to delineate a bright-line rule but instead has proceeded on a case-by-case basis to identify those who are civilians and not within the scope of Article I, section 8, clause 14.").

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6. Indeed, in *Guagliardo*, the Court suggested that if Congress truly wanted to subject civilian employees of the military to court-martial, it could conscript them into active service, *see* 361 U.S. at 286—rather than simply declaring them to be "in" the armed forces going forward.

And in each of those cases, the reason why the accused did not meet the Supreme Court's test for military status was the fact that they had no actual military role. They were civilians not only in form, but also in function—as borne out by their lack of military duties, powers, or responsibilities. *E.g.*, *Covert*, 354 U.S. at 19 n.38 (plurality opinion) (noting that the accused "'render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity'" (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 106 (2d ed. 1920))).

In that respect, the Supreme Court's analysis dovetails with the consistent distinction courts have adopted between civilian and military *offices*—which likewise turns not on a formal label, but rather on the office's functional duties. *E.g.*, *People* v. *Duane*, 121 N.Y. 367, 373 (1890) ("It is difficult to conceive of . . . a military office without the power of command, the right of promotion or the obligation to perform some duty."); *see Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 91 (2007) ("[Military offices] are primarily characterized by the authority to command in the Armed Forces—commanding both people and the force of the government.").

Thus, although the Supreme Court has never precisely defined the boundary between those who are "in" the "land and naval forces" and those who are not, its decisions have consistently reflected the view that the boundary is heavily informed by the accused's military *function*—by whether the accused has any authority or obligation to act in a military capacity. Military prisoners, for example, may lack the capacity to *give* lawful orders, but they remain obligated to follow them. *See Kahn* v. *Anderson*, 255 U.S. 1 (1921) (upholding the jurisdiction of courts-martial to try military prisoners for offenses committed while imprisoned).[7]

This understanding of military status still leaves the ultimate decision of who may constitutionally be subjected to military jurisdiction to the political branches—just not in the manner that the government's brief claims. As the *Toth* line of cases makes clear, it is not enough to

7. The UCMJ also purports to authorize the court-martial, "[i]n time of declared war or a contingency operation, [of] persons serving with or accompanying an armed force in the field." 10 U.S.C. § 802(a)(10). But the only decision upholding this provision rested on the narrow, case-specific ground that the accused was a non-U.S. citizen outside the United States who, as such, lacked constitutional protections. *See Ali*, 71 M.J. at 266–69; *see also United States* v. *Averette*, 41 C.M.R. 363 (C.M.A. 1970) (interpreting an earlier version of § 802(a)(10), which applied only "in time of war," to require a *declaration* of war, in order to avoid the constitutional questions that would otherwise have arisen from applying it to a U.S. citizen during the war in Vietnam).

satisfy Article I's definition that Congress has simply *asserted* that particular personnel are in the "land and naval forces." But insofar as the status test is functional, it follows that Congress *does* determine who is in the "land and naval forces" when it decides who to invest with the functional authority to wield military power—and when. *See, e.g.*, *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) ("[T]he rights of men *in* the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress." (emphasis added)). Thus, the question becomes whether Congress so empowered members of the Fleet Marine Corps Reserve.

C. Members of the Fleet Marine Corps Reserve, Like Mr. Larrabee, Have No Regular Military Authority or Responsibilities

Applying that distinction to members of the Fleet Marine Corps Reserve like Mr. Larrabee is relatively straightforward. As Judge Leon explained below, despite its name, the Fleet Marine Corps Reserve is *not* a reserve component of the U.S. armed forces. *See* JA 11; *see also* 10 U.S.C. § 10101 (identifying the seven reserve components). Nor are its

members in active service. Instead, the Fleet Marine Corps Reserve is the retirement status for enlisted Marines who have completed at least 20 years of active service. *See* 10 U.S.C. § 8330.

Indeed, the Marine Corps *itself* identifies transfer to the Fleet Marine Corps Reserve as "retirement." *See* Marine Corps Order 1900.16, *Marine Corps Separation and Retirement Manual* ¶ 7001.1 (Feb. 15, 2019) ("MCO 1900.16") ("This Chapter outlines policies and procedures governing retirement and transfer of active duty enlisted Marines to the Fleet Marine Corps Reserve."), *available at* https://perma.cc/7P5R-MHJH; *see also id.* ¶ 1012.1 ("An appropriate retirement ceremony is to be held within the capabilities of the command for Marines retiring (includ[ing] transfer to the [Fleet Marine Corps Reserve] . . .)."). Thus, when someone like Mr. Larrabee "transfers" to the Fleet Marine Corps Reserve, as the Navy-Marine Corps Court of Criminal Appeals has explained, "for all intents and purposes, he retired." *Begani*, 79 M.J. at 770; *see also Dinger*, 76 M.J. at 554 n.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.").

The reason *why* members of the Fleet Marine Corps reserve are "for all intents and purposes . . . retired" is because they wield no actual military authority while in that status. Among other things, they:

- Are not assigned to a specific command, and so have no immediate commanding officer. *See* Marine Corps Order 1001R.1L, *Marine Corps Reserve Administrative Management Manual* ch. 1 ¶ 5 (Mar. 25, 2018) (exempting members of the Fleet Marine Corps Reserve from the Marine Corps' command structure because "[t]he FMCR is not part of total Reserve manpower as currently defined by statute"), *available at* https://perma.cc/PBN5-H4KH.

- Lack authority to issue binding orders. *Cf.* 10 U.S.C. § 750 ("A retired officer has no right to command except when on active duty.").

- May refer to their retired rank only if it does not "give[] the appearance of sponsorship, sanction, endorsement, or approval" by the Department of Defense. Dep't of Def. Directive 5500.7-R, *Joint Ethics Regulation* § 2-304 (Aug. 30, 1993), *available at* https://perma.cc/N62H-WZDH.

- Are ineligible for promotion. *See* MCO 1900.16 ¶ 7013.

- Have no obligation to maintain any level of physical fitness. *See* Marine Corps Order 6100.13A, *Marine Corps Physical Fitness and Combat Fitness Tests* ch. 2 ¶ 2 (Feb. 23, 2021) (omitting members of the Fleet Marine Corps Reserve from the categories of personnel required to regularly pass a physical fitness test), *available at* https://perma.cc/D2K7-LFKY.[8]

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8. Members of the Fleet Marine Corps Reserve are also not subject to the Marine Corps' random drug testing program, even though reservists and brig prisoners are. *See* Marine Corps Order 5300.17A, *Marine Corps Substance Abuse Program* app. B ¶ 1(c) (June 25, 2018), *available at* https://perma.cc/J7LC-S5JH.

- Are not required to participate in any military activities. *See* MCO 1900.16 ¶ 1405.1 (noting that members of the Fleet Marine Corps Reserve are obligated only to keep the relevant officials informed of their current payment and physical mailing addresses).[9]

- Cannot refer charges to a court-martial. 10 U.S.C. §§ 822–24.

- Cannot serve as a court-martial panel member (*i.e.*, a juror). *Id.* § 825.

- Are limited in when and how they can wear their uniform. *See* MCO 1900.16 ¶ 1101.5(b)(4)(B).

These criteria are not meant to be either conclusive or exhaustive. Rather, they are offered here to illustrate the extent to which, through both the UCMJ and administrative regulations, Congress and the Department of Defense have declined to invest members of the Fleet Marine Corps Reserve with *any* of the substantive authorities or responsibilities that could possibly be relevant to the preservation of "good order and discipline" among troops in active service.[10] So long as

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9. Members of the Fleet Marine Corps Reserve can only be required to undergo training *after* they have been recalled to active duty. *See* 10 U.S.C. § 8385(b). Leaving aside that such training only *follows* recall, the government has also offered no evidence that any member has ever been recalled under this provision. *Cf. United States* v. *Nettles*, 74 M.J. 289, 292 & n.5 (C.A.A.F. 2015) (a statute that imposes an unenforced training obligation on inactive reservists does not create a military duty).

10. Indeed, active-duty Marines who face "administrative separation processing" for suspected military or civilian offenses may transfer *to* the Fleet Marine Corps Reserve or retired list in a "restricted status"

the Supreme Court continues to require more than Congress's say-so in determining whether individuals are "in" the "land and naval forces," any functional test for military status simply cannot include members of the Fleet Marine Corps Reserve while they are retired.[11]

D. Mr. Larrabee's Receipt of "Retainer Pay" and His Theoretical Amenability to Future Involuntary Recall Do Not Support a Different Result

Tellingly, the government's brief does not dispute that members of the Fleet Marine Corps Reserve lack each of the authorities and duties identified above. Its argument that Mr. Larrabee satisfies the test for military "status" instead focuses on what it describes as the two "indicia of military service" that "confirm" the military status of members of the Fleet Marine Corps Reserve while they are retired: their eligibility to receive "retainer pay" and their amenability to involuntary recall to active duty. Gov't Br. 32. In the government's view, these examples

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(depending upon their time in active service), at least in part to preserve some of their accrued benefits. *See* MCO 1900.16 ¶ 6106.4(a).

11. Even the government's own Board of Correction for Naval Records interprets the statutory phrase "civilians" in its enabling legislation to *include* members of the Fleet Marine Corps Reserve. *See Nicely* v. *United States*, 147 Fed. Cl. 727, 739–42 (2020).

satisfy whatever functional test the Constitution imposes.[12] But as the district court held, "[n]either factor . . . suffices to demonstrate why military retirees *plainly* fall within the 'land and naval forces' or why subjecting them to court-martial jurisdiction is *necessary* to maintain good order and discipline." JA 21. That's because, just like the other indicia the government invokes in its brief, neither supports the relevant point, *i.e.*, whether members of the Fleet Marine Corps Reserve continue to exercise military functions *while* they are retired.

Taking the government's pay argument first, the Supreme Court has already effectively held that pay, standing alone, is an insufficient constitutional basis on which to subject those receiving it to the UCMJ.

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12. At least, that is the position that the government takes in *this* case. In *Begani*, the government argued to the Court of Appeals for the Armed Forces that "[m]ilitary compensation is neither a prerequisite to, nor a basis for, court-martial jurisdiction" over members of the Fleet Marine Corps Reserve. Supplemental Answer at 22–23 & n.3, *Begani*, No. 20-0217/NA, *available at* https://perma.cc/ZC4G-YC4V. Likewise, the government argued that "a servicemember's amenability to recall does not determine whether Congress may constitutionally subject a Fleet Reservist to military jurisdiction." *Id.* at 23. In *Begani*, at least, these considerations were supposedly "irrelevant to the issue" of "whether Fleet Reservists have a sufficient current connection to the military for Congress to subject them to constant UCMJ jurisdiction." *Id.* at 1, 24. *But see* Gov't Br. at 31–32 (describing the district court's rejection of these justifications in this case as "error").

Thus, in both *Grisham* and *Guagliardo*, the Court held that civilian employees of the military could not constitutionally be subjected to the UCMJ in peacetime—even though they drew a regular salary from the Department of Defense for their ongoing services to the military. *See Guagliardo*, 361 U.S. at 282–84; *Grisham*, 361 U.S. at 279–80. Even if retainer pay is properly understood as a form of compensation for ongoing services, then, it is still insufficient to meet the military status test.

If, notwithstanding *Grisham* and *Guagliardo*, a salary *could* still provide a sufficient constitutional basis for subjecting those receiving it to the UCMJ, that still wouldn't help the government here—because "retainer pay" is not a salary at all; it is a pension. As the government's brief correctly explains, it is calculated based solely upon the retiree's *previous* active-duty service, including the nature and duration of their service and their pay grade at retirement. Gov't Br. 5 (citing 10 U.S.C. §§ 8330(c)(1), 8333(a)). No feature of retainer pay relates in any way to what a member of the Fleet Marine Corps Reserve does *while* retired.

Because of how it is calculated, the Supreme Court held in *Barker* that, at least for purposes of a specific federal tax statute, such pay is "deferred pay for past services," rather than "current compensation for

reduced current services." *Id.* at 605. At issue in *Barker* was whether retired pay[13] could be taxed by Kansas under 4 U.S.C. § 111, through which the United States has consented to state taxation of "pay or compensation for personal service as an officer or employee of the United States" only if "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111(a). Discriminatory taxes would otherwise be barred by the doctrine of intergovernmental tax immunity. *See Davis* v. *Mich. Dep't of the Treasury*, 489 U.S. 803 (1989). Because Kansas taxed retired pay but *not* state and local government retirement benefits, the question turned on whether retired pay was better understood as current salary (in which case, Kansas was not discriminating) or a pension (in which case, it was).

In holding that retired pay was a pension, the Supreme Court focused its analysis on how such pay is computed. As Justice White wrote,

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13. In contrast to "retainer pay," which is what members of the Fleet Reserve and Fleet Marine Corps Reserve are eligible to receive, "retired pay" is what members on the retired list are eligible to receive. But this distinction is purely terminological; as the district court noted, "[t]here is not any material difference between 'retainer pay' for members of the Fleet Marine Corps Reserve and 'retired pay' for individuals in retired status." JA 11 n.1; *see United States* v. *Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001) ("[The UCMJ] makes no distinction between retired pay and retainer pay."). The government has not argued otherwise.

> The 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. By taking into account years of service, the formula used to calculate retirement benefits leaves open the possibility of creating disparities among members of the same preretirement rank. Such disparities cannot be explained on the basis of "current pay for current services," since presumably retirees subject to these benefit differentials would be performing the same "services."

Id. at 599–600 (internal quotation marks omitted).

Barker decided the issue only in the context of 4 U.S.C. § 111. But its characterization of retired pay had nothing to do with *that* statute; it was based instead on the statutes governing the calculation of retired pay—which apply in all relevant circumstances. *See id.* at 599 (citing Brief for the United States as *Amicus Curiae* at 11 n.16, *Barker*, 503 U.S. 594 (No. 91-611), 1992 WL 12012042). *Barker*'s analysis thus underscores that, by its nature, retainer pay is properly understood as deferred compensation—and that it is therefore insufficient to provide the indicia of *current* military service on which the government's brief relies. *See, e.g.*, *Dinger*, 76 M.J. at 555–56 ("[I]t is clear that the receipt of retired pay is neither wholly 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."); *see also* JA 21 ("The Government's position rests on the longstanding, but largely inaccurate, assumption that this retainer pay represents reduced compensation for current part-time services.").[14] Thus, although *Barker* did not address the nature of retired pay in the context of subjecting recipients of such pay to the UCMJ (it had no reason to do so), its analysis indicates that, even if a current salary *could* be sufficient to satisfy the military status test, retainer pay, like retired pay, isn't.

As for the fact that members of the Fleet Marine Corps Reserve remain subject to the specter of involuntary *future* recall to active service, that's true enough—at least on paper.[15] But that theoretical possibility

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14. Congress has also adopted this understanding of retainer and retired pay in the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982). That statute treats retired pay as property that is divisible upon divorce according to state martial property laws, rather than as income that is not.

15. As has been true throughout this litigation, the government keeps offering evidence of voluntary recalls as proof that retirees face a meaningful specter of *involuntary* recall. *See* Gov't Br. 33 ("They were *asked* to return to active duty . . . ." (emphasis added)). In *Begani*, the en banc Navy-Marine Corps Court of Criminal Appeals went so far as to *order* the government to produce data on involuntary recalls. When the government explained that it was unable to do so, the court withdrew its demand. *See* Supplemental Opening Brief at 4 & n.5, *Begani*, No. 20-0217/NA, *available at* https://perma.cc/KXT6-P8BD.

does nothing to change the status, duties, or authority of members of the Fleet Marine Corps Reserve *while* they are retired. After all, no one would ever think that the 16 million men registered with the Selective Service System could constitutionally be subjected to court-martial simply because they *might* one day be called to active duty in a time of war or national emergency. So too, here.

Nor, as Part II demonstrates, has Congress ever deemed it necessary to subject other bodies of reserve manpower to court-martial while off active duty and not in training—including the Selected Reserve, the Individual Ready Reserve, and inactive National Guard troops. And courts have repeatedly suggested that serious constitutional questions would arise if Congress tried to do so. *See, e.g.*, *Murphy*, 29 M.J. at 471; *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(3) purports to extend only to on-duty periods, and we therefore think it is valid."). Likewise, although the military may court-martial those currently subject to the UCMJ for offenses committed during prior

periods of active-duty service, it has no authority to court-martial the same individuals for offenses committed *in between* their distinct enlistments. *See* 10 U.S.C. § 803(a).[16]

Ultimately, neither of the "objective indicia" the government invokes as evidence that members of the Fleet Marine Corps Reserve remain "in" the "land and naval forces" while retired has anything to do with the military function that they serve in that status—or, more precisely, the lack thereof. Unless the Constitution can be satisfied merely by an empty statutory label, members of the Fleet Marine Corps Reserve are not "in" the "land and naval forces" while retired.

E. Neither the Supreme Court nor This Court Has Ever Held Otherwise

The government's brief contends that both the Supreme Court and this Court have "uniformly upheld" statutes subjecting retired servicemembers to court-martial, Gov't Br. at 13, and have "concluded that military retirees, who have similar indicia of military service, are in

16. The military may also court-martial those who wrongfully refuse to appear when lawfully called to active duty. *See, e.g.*, *Billings* v. *Truesdell*, 321 U.S. 542 (1944); *United States* v. *Lwin*, 42 M.J. 279 (C.A.A.F. 1995). Those individuals were not court-martialed while inactive, however; they were court-martialed for refusing to acknowledge their lawful activation.

the armed services." *Id.* at 14. In fact, neither court has ever squarely confronted the constitutional question presented in this case.

Taking the Supreme Court first, *United States* v. *Tyler*, 105 U.S. 244 (1882), did not even involve a court-martial. In that case, the Supreme Court considered only whether a military retiree receiving pay was still "serving" in the military for purposes of a statute that tied servicemembers' pay raises to five-year periods of "service." The Court's purely descriptive reference to court-martial jurisdiction over retirees (which correctly summarized the statutes then on the books) was necessarily dicta given that Tyler himself had never been tried—and that the substantive issue did not turn in any way on the military's jurisdiction. *See* 105 U.S. at 246.[17]

United States v. *Fletcher*, 184 U.S. 84 (1893), is equally unavailing for the government. 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 dispute was over whether

17. The government portrays the Supreme Court's decision in *Barker* as consciously reiterating this dictum from *Tyler*. Gov't Br. 30. But *Barker* quoted this passage from *Tyler* only as one part of a block quote that was offered to support an unrelated point. *See* 503 U.S. at 600 & n.4; *see also* JA 22–23 (rejecting this reading of *Barker*).

(and when) his sentence had been approved by the President—resolution of which affected his entitlement to back pay. *See Fletcher* v. *United States*, 26 Ct. Cl. 541 (1891), *rev'd*, 148 U.S. 84. Neither the Court of Claims nor the Supreme Court ever so much as hinted at the jurisdictional question. *See also Runkle* v. *United States*, 122 U.S. 543 (1887) (invalidating the dismissal of a retired Army officer because it was not properly approved by President Grant, without discussing whether the court-martial itself presented constitutional questions).

The same can be said of this Court's predecessor's decision in *Closson* v. *United States ex rel. Armes*, 7 App. D.C. 460 (1896). The only issue in that case was *where* a retired Army officer could be confined pending court-martial—whether he had a right to be confined to quarters or could instead be detained in "quarters not his own." *Id*. at 468; *see also* Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 352 (1964) ("The court, deciding the only issue before it, held the arrest and confinement proper."). Given that *Toth* and its progeny were still six decades away, the lack of attention to whether the exercise of jurisdiction was *itself* constitutional is not exactly surprising.

In addition to reading into these decisions far more than their text supports, *see* Gov't Br. 13 ("The Supreme Court and this Court have uniformly *upheld* [statutes subjecting retirees to court-martial]." (emphasis added)), the government's brief also makes much of what it calls the "longstanding historical practice" supporting court-martial jurisdiction over retired servicemembers, which dates in some form to the initial creation of retired lists for the Army and Marine Corps in 1861. *Id.* at 1, 2, 25. Here, though, the government is confusing historical *practice* for the historical existence of mostly untested legal *authorities*.

The reality, as noted above, is that "reported courts-martial of military retirees are relatively rare." Ives & Davidson, *supra*, at 11. Rarer still are judicial decisions upholding such courts-martial against constitutional challenges; as noted below, in the 160 years that such jurisdiction has been on the books, there have been exactly *two* such rulings by Article III appellate courts. Whatever the wisdom of those rulings, they are not binding on this Court—and have in any event been overtaken by subsequent events, especially the Supreme Court's decisions in *Toth* and its progeny and its clarification of the nature of retired pay in *Barker*. Thus, the government's historical examples

bespeak nothing more than "a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court . . . [which] does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding." *NLRB* v. *Noel Canning*, 573 U.S. 513, 573 (2014) (Scalia, J., concurring in the judgment).

As for those two Article III appellate rulings, the first came from the Second Circuit in 1948. In *United States ex rel. Pasela* v. *Fenno*, 167 F.2d 593 (2d Cir.), *cert. dismissed*, 335 U.S. 806 (1948), the court upheld the court-martial of a member of the Navy's "Fleet Reserve"—based entirely on the facts that the accused received retainer pay and remained amenable to future recall. *See id.* at 595. And 18 years later in *Hooper*, the Court of Claims rejected a retired admiral's challenge to his post-retirement court-martial "because the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies." 326 F.2d at 159. Even then, the decision stressed, "we have certain doubts" as to the constitutionality of such jurisdiction. *Id.*

That's why, in its 2017 ruling in *Dinger*, the Navy-Marine Corps Court of Criminal Appeals concluded that whether the Constitution allows retirees to be subjected to the UCMJ for post-retirement offenses was, contra the government, *not* settled by precedent, and instead had to be decided based upon "first principles." 76 M.J. at 556. Properly understood, those "first principles" demonstrate that, notwithstanding their eligibility to receive retainer pay and their amenability to future recall, members of the Fleet Marine Corps Reserve are not "in" the "land and naval forces" for purposes of Congress's constitutional authority to subject them to the UCMJ under the Make Rules Clause. As the district court held below, 10 U.S.C. § 802(a)(6), which subjects members of the Fleet Marine Corps Reserve to the UCMJ, is therefore unconstitutional.

II. MAINTAINING DISCIPLINE AMONG TROOPS IN ACTIVE SERVICE DOES NOT DEPEND UPON THEIR AMENABILITY TO COURT-MARTIAL WHILE INACTIVE

Even if this Court concludes that members of the Fleet Marine Corps Reserve *are* "in" the "land and naval forces" for purposes of Article I, the government still bears the burden of demonstrating that subjecting those individuals to court-martial for offenses committed while retired is

"absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22–23 (citation omitted).

Implicitly acknowledging this additional requirement, the government closes its brief by offering two reasons why court-martial jurisdiction over members of the Fleet Marine Corps Reserve is, in its view, "necessary": (1) to ensure that offenders don't "escape prosecution"; and (2) because "it is imperative that Fleet Marine Corps Reserve members retain their training before being recalled to active duty." Gov't Br. 43–44. Neither of these arguments is remotely persuasive.

Taking the "escape prosecution" argument first, the Supreme Court in *Toth* specifically rejected the suggestion that court-martial jurisdiction could be made necessary by the (potential) unavailability of a civilian forum. As Justice Black explained, "[t]here can be no valid argument . . . that civilian ex-servicemen must be tried by court-martial or not tried at all. If that is so it is only because Congress has not seen fit to subject them to trial in federal district courts." 350 U.S. at 21; *see also Singleton*, 361 U.S. at 246 (suggesting that "the answer to the disciplinary problem" raised by the Court's holding would be for Congress to expand the jurisdiction of the civilian courts, not courts-martial).

In any event, on the facts of *this* case, the only reason why "military authorities determined that [Mr. Larrabee] could not be tried by a civilian court in the United States," Gov't Br. 43, is because the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67, does not apply to those who are subject to prosecution under the UCMJ. *Id.* § 3261(d)(1); *see also* Gov't Br. A15–16 (reflecting this understanding). If Mr. Larrabee is correct that the Constitution forbade his court-martial, he necessarily *would* have been subject to prosecution in a civilian federal court. Indeed, the government does not argue otherwise.[18] Nor does the government dispute that Japan had concurrent jurisdiction over Mr. Larrabee's offenses—and could also have tried them if the Marine Corps did not. *See* Gov't Br. A15. Simply put, it's only *because* the government claimed the authority to try Mr. Larrabee by court-martial that these other criminal remedies were unavailable in this case.

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18. In addition to facing prosecutions in civilian state or federal court for post-retirement offenses, retired servicemembers are also subject to the Hiss Act, 5 U.S.C. § 8311–22, which, among other things, disqualifies them from continuing to receive retainer pay or retired pay if they are convicted of any number of criminal offenses. *See id.* § 8312. The government also represented to the district court that military retirees convicted of civilian offenses could also be stripped of their other remaining military benefits, as well. *See* JA 26.

The government's broader argument—that subjecting members of the Fleet Marine Corps Reserve to the UCMJ is necessary to retain their training pending recall—runs headlong into two insuperable obstacles. First, as noted above, members of the Fleet Marine Corps Reserve don't *have* an obligation to maintain any level of training or physical readiness while they are retired. They are exempt from the Marine Corps' annual physical fitness test and drug screening program. And they are subject to *no* training requirements of any kind unless and until they are recalled to active duty. *See ante* at 26 & n.9. To the contrary, some members joined the Fleet Marine Corps Reserve *because* of their unsuitability for active-duty service. *See id.* at 26 n.10. If it is truly "imperative" to preserve the combat utility of members of the Fleet Marine Corps Reserve and other retirees pending their (highly unlikely) involuntary recall to active duty, one might reasonably expect the government to take at least some steps to … preserve their combat utility.

Second, and more fundamentally, no such imperative has presented itself with respect to other classes of personnel that are far more likely than the Fleet Marine Corps Reserve to be involuntarily called upon to augment active-duty troops during a crisis. Indeed, were the United

States to face an emergency requiring significantly more manpower than the 1.3 million active-duty troops currently in uniform,[19] the first—and primary—source for additional troops would necessarily be the Ready Reserve, including the Selected Reserve, the Individual Ready Reserve, and inactive National Guard units. *See* Dep't of Def. Instruction 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, encl. 5, § 2 (Mar. 11, 2014), *available at* https://perma.cc/B28F-EWXN. This reflects the rise of—and increasing reliance upon—the modern reserve system, the most important shift in the structure of the U.S. armed forces since the end of the Cold War. *See* Library of Congress, *Historical Attempts to Reorganize the Reserve Components*, at 1, 15–17 (2007), *available at* https://perma.cc/SG43-7KMR.

But even though the Selected Reserve "consists of those units and individuals in the Ready Reserve designated by their respective Service . . . as so essential to initial wartime missions that they have *priority over all other Reserves*," Dep't of Def. Instruction 1215.06 § 2(a) (emphasis added), *its* members are not subject to the UCMJ while

19. *See* Dep't of Def., *Defense Manpower Requirements Report for Fiscal Year 2020*, at 2 tbl.1-1 (2019), *available at* https://perma.cc/QP9F-NXGP.

inactive. Neither are members of the Individual Ready Reserve or inactive National Guard troops—many of whom *are* subject to readiness requirements. *See ante* at 25 & n.8 (citing MCO 6100.13A). Apparently, subjecting those personnel to the UCMJ while they are inactive has not been deemed essential to preserving *their* combat readiness—or their availability to be called to active duty if and when they are needed. *See* JA 25 ("Congress's current treatment of inactive members of the Reserve components calls into question whether court-martial jurisdiction over military retirees is actually necessary to such end.").

Throughout this litigation (and the litigation in *Dinger* and *Begani*), the government has never explained why it is at once "necessary" for the very *last* personnel it would involuntarily recall in a crisis to be subject to trial by court-martial while they are inactive,[20] but not necessary to

20. Even in an emergency, the government's own mobilization criteria effectively disqualify over two-thirds of military retirees from being recalled to active duty. *Compare* Dep't of Def. Instruction 1352.01, *Management of Regular and Reserve Retired Military Members*, ¶ 3.2(g)(2) (Dec. 8, 2016) (noting that Category III retirees—those who are disabled and/or more than 60 years old—are not to be utilized for military positions), *available at* https://perma.cc/W52D-4BPF, *with* Dep't of Def., *Statistical Report on the Military Retirement System: Fiscal Year 2019*, at 16, 29–30, 59 (2020) (showing that, of 2,002,695 retirees receiving pay in 2019, 67% were either more than 60 years old or disabled), *available at* https://perma.cc/9BRH-TN8H.

subject to court-martial any of the inactive personnel who are far more likely to augment active-duty troops if and when circumstances demand. Whether or not this distinction between retired servicemembers and other inactive personnel is, as the district court suggested, "arbitrary," *id.*, it is at the very least fatal to the government's claim that subjecting members of the Fleet Marine Corps Reserve to the UCMJ in perpetuity is somehow "absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22–23 (citation omitted).

III. BECAUSE MR. LARRABEE'S OFFENSES DID NOT "ARIS[E] IN . . . THE LAND OR NAVAL FORCES," HIS COURT-MARTIAL WAS ALSO FORECLOSED BY THE GRAND JURY INDICTMENT CLAUSE

The district court held that Congress lacked the power under Article I to subject members of the Fleet Marine Corps Reserve like Mr. Larrabee to court-martial for post-retirement offenses. JA 18. It therefore did not reach Mr. Larrabee's alternative argument, advanced both on direct appeal and in his pleadings below, that the Fifth Amendment's Grand Jury Indictment Clause limits the jurisdiction of courts-martial to cases "arising in . . . the land or naval forces." U.S. CONST. amend. V. It is black-letter law that this Court "may affirm on any ground properly raised." *Aramark Corp.*, 208 F.3d at 268. Because Mr. Larrabee was

convicted of civilian offenses against a civilian victim on private property, his offenses did *not* "aris[e] in . . . the land or naval forces." The district court's ruling can therefore also be affirmed on this alternative basis.

In *Solorio*, the Supreme Court rejected the argument—adopted in *O'Callahan* v. *Parker*, 395 U.S. 258 (1969)—that the Fifth Amendment requires that offenses by *active-duty* personnel be connected to their military service in order to be subject to court-martial. 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 just as *O'Callahan*'s service-connection requirement applied only to offenses by active-duty personnel, so, too, did *Solorio*'s overruling of it. There, Chief Justice Rehnquist's analysis was predicated entirely on the view that, where active-duty servicemembers were concerned, their *status* necessarily brought them within the scope of the Make Rules Clause—and thereby settled their amenability to court-martial. *See* 483 U.S. at 439–40. To underscore *Solorio*'s limited scope, four Justices would later suggest that it did not even resolve that issue for *capital* offenses committed by active-duty personnel, let alone for offenses by non-active-

duty personnel. *See Loving*, 517 U.S. at 774 (Stevens, J., concurring) ("The question whether a 'service connection' requirement should obtain in capital cases is an open one both because *Solorio* was not a capital case, and because *Solorio*'s review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones.").

Whether or not *Solorio* is so limited as to active-duty personnel, *see United States* v. *Hennis*, 79 M.J. 370, 379 (C.A.A.F. 2020) ("We hold that *Solorio* applies to capital cases."), it underscores that the Supreme Court has not settled the scope of the Grand Jury Indictment Clause's exception as applied to non-active-duty personnel. Indeed, as the district court suggested, for offenses committed by individuals outside any active chain of command, *Solorio*'s analysis points in the opposite direction. *See* JA 19–20; *cf.* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-22.30 (5th ed. Matthew Bender & Co. 2020) ("Rather than demonstrating the need for general jurisdiction over retired personnel, *Hooper* suggests a need for a limited jurisdiction contingent upon a strong 'service connection' test similar to that which was required under the Supreme Court's now-abandoned decision in *O'Callahan v. Parker*.").

After all, even if, contrary to the analysis above, Mr. Larrabee remains a member of the "land and naval forces" for purposes of Article I's Make Rules Clause, his offenses must still "aris[e] in . . . the land or naval forces" for his court-martial to be constitutional. And whatever offenses by military retirees might fit that description, Mr. Larrabee's don't: He was convicted for civilian offenses committed after he retired against a civilian victim on private property.

Thus, unless the Constitution allows for the exercise of military jurisdiction over all retirees in all cases (in which case, the exception to the Grand Jury Indictment Clause would serve no purpose independent of the scope of the Make Rules Clause), Mr. Larrabee'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.[21]

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21. Nor is there any argument that Mr. Larrabee consented to his court-martial because he *chose* to be transferred to the Fleet Marine Corps Reserve rather than be discharged and forego his pension. 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*, 575 U.S. 665 (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); *see also* JA 23–24 (rejecting the government's suggestion that Mr. Larrabee "consented" to jurisdiction).

* * *

Despite their advancements in recent years, courts-martial today still employ numerous procedures that would be clearly unconstitutional in civilian courts. Among many other examples, guilty verdicts in non-capital cases require the concurrence of only three-fourths of the panel members. 10 U.S.C. § 852(a)(3). *But see Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020) (holding that the Sixth Amendment creates a fundamental right against non-unanimous verdicts). And the panel members, in turn, are those who, "in [the convening authority's] opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(e)(2). *But see Taylor* v. *Louisiana*, 419 U.S. 522, 528–30 (1975) (holding that the Sixth Amendment protects a fundamental right to the "selection of a petit jury from a representative cross section of the community"). In capital cases, courts-martial have not been required to follow *Ring* v. *Arizona*, 536 U.S. 584 (2002). *See United States* v. *Akbar*, 74 M.J. 364, 404 (C.A.A.F. 2015). And in general, the Supreme Court has instructed reviewing courts to accord more deference to courts-martial than to civilian courts in reviewing *all* procedural due process claims, *see Weiss* v. *United States*,

510 U.S. 163, 177–78 (1994), including challenges to military judges' lack of even *statutory* tenure protections. *See id.*

Alongside these procedural departures, the government continues to employ courts-martial to prosecute substantive conduct that would be constitutionally shielded from civilian prosecution—including anti-war speech otherwise protected by the First Amendment, *see Parker*, 417 U.S. at 735; wearing religious attire, *see Goldman* v. *Weinberger*, 475 U.S. 503 (1986); adultery and fraternization, *see United States* v. *Wales*, 31 M.J. 301 (C.M.A. 1990); and contemptuous speech toward the President or other senior political officials. *See* 10 U.S.C. § 888.[22] In all of these respects, among countless others, military justice remains a system apart. *See Parker*, 417 U.S. at 743 ("[T]he military is, by necessity, a specialized society separate from civilian society.").

On the government's view, Congress can subject individuals to the separate procedural and substantive rules of the military justice system

22. During World War II, for instance, the Army brought charges under Article 88's predecessor against a retired officer associated with the America First Committee for giving a speech in which he impugned President Roosevelt's loyalty—dropping the matter only to avoid drawing more attention to the remarks. John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1733 n.225 (1968).

solely by decreeing them to be "in" the "land and naval forces," no matter how far removed from active duty they may be in both time and function or how unlikely it is that they will ever be called to serve—or serve again.

But "[a]s necessity creates the rule, so it limits its duration." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *see also* JA 16 ("Experience has clearly demonstrated the baseline proposition that court-martial jurisdiction *must* be narrowly limited."). As the district court correctly concluded below, given both the systematic inapplicability of the UCMJ to other inactive personnel and the lack of duties and authorities possessed by members of the Fleet Marine Corps Reserve like Mr. Larrabee, there is simply no good argument for why these military retirees need to be subject to the UCMJ *while* they are retired. And so long as military jurisdiction in this country is to remain the exception, rather than the norm, there are compelling prudential, historical, and constitutional reasons why they should not be.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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May 26, 2021

ADDENDUM

ADDENDUM

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Dep't of Def. Instruction 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components* (Mar. 11, 2014)

Encl. 5 ¶ 2:

READY RESERVE CATEGORIES. The Ready Reserve is comprised of Service members of the Reserve and National Guard, organized in units or as individuals, or both. These Service members are accessible for involuntary order to AD in time of war or national emergency pursuant to sections 12301 and 12302 of Reference (d) and section 712 of Reference (i) in the case of members of the Coast Guard Reserve. The Ready Reserve consists of three subcategories: the Selected Reserve, the Individual Ready Reserve (IRR), and the ING.

a. Selected Reserve. The Selected Reserve consists of those units and individuals in the Ready Reserve designated by their respective Service, and approved by the Chairman of the Joint Chiefs of Staff, as so essential to initial wartime missions that they have priority over all other Reserves. All Selected Reservists are in an active status. They are trained as prescribed in section 10147(a) of Reference (d) or section 502(a) of Reference (f), as appropriate. In addition to the involuntary call-up authorities described in this section, members of the Selected Reserve may also be involuntarily called to AD to augment the active forces for any operational mission pursuant to sections 12304, 12304a, and 12304b of Reference (d). . . .

Dep't of Def. Instruction 1352.01, *Management of Regular and Reserve Retired Military Members* (Dec. 8, 2016)

¶ 3.2(g):

Utilization of Retired Military Members.

(1) Categories I and II retired military members who are physically qualified may be identified for potential deployment to positions that must be filled within 30 days after mobilization.

(2) The nature and extent of the mobilization of Category III retirees will be determined by each Military Service, based on the retiree's military skill and, if applicable, the nature and degree of the retiree's disability. Category III retirees generally should be deployed to civilian defense jobs upon mobilization, unless they have critical skills or volunteer for specific military jobs.

(3) Retired military members who live overseas will be considered first by the Military Service concerned to meet mobilization augmentation requirements at overseas, U.S., or allied military installations or activities that are near their places of residence.

Marine Corps Order 1001R.1L, *Marine Corps Reserve Administrative Management Manual* (Mar. 25, 2018)

Ch. 1 ¶ 5:

Retired Reserve. The Retired Reserve consists of Reserve Marines who fall into one of the categories described below.

a. Retired Reserve Awaiting Pay (Gray Area Retirees). This category consists of Reserve Marines who have completed at least 20 qualifying years of service and have requested transfer to the Retired Reserve. When the Marine reaches age 60 (or reduced retirement age eligibility as defined in reference (d) and covered in Chapter 4 of this Order), retired pay commences upon application by the member.

b. Retired Reserve in Receipt of Retired Pay. This category is comprised of Reserve Marines who have completed at least 20 years of qualifying service, are at age 60 (or reduced retirement age eligibility as

defined in reference (d) and covered in Chapter 4 of this Order), and have applied for and are receiving retired pay.

c. Reserve Active Duty Retirees. These Reserve Marines have completed at least 20 years of active-duty service for retirement pay and have been approved for an active-duty retirement.

d. Physical Disability. Reserve Marines retired for physical disability under sections 1201, 1202, 1204, or 1205 of reference (c).

e. Others. Reserve Marines drawing retired pay based on retirement for reasons other than age, service requirements, or physical disability fall into this category. Marines in this category are retired under special conditions.

Note: The Retired Reserve does not include members of the Fleet Marine Corps Reserve (FMCR). The FMCR consists of enlisted personnel who have completed 20 but less than 30-years of active-duty service and are receiving retainer pay. The FMCR is not part of total Reserve manpower as currently defined by statute (reference (c)); however, it is a pool of trained personnel available for mobilization consistent with the Retired Reserve.

Marine Corps Order 1900.16, *Marine Corps Reserve Administrative Management Manual* (Mar. 25, 2018)
¶ 1012.1:

An appropriate retirement ceremony is to be held within the capabilities of the command for Marines retiring (includes transfer to the FMCR, TDRL, and PDRL).

¶ 1101.5(b)(4)(B):

FMCR and Retired Marines. These Marines are entitled to wear the prescribed uniform of the grade held on the retired list when wear of the uniform is appropriate under the provisions of reference (ci) MCO P1020.34

¶ 1405.1:

Retired and FMCR Marines will:

a. Keep the Director, Defense Finance and Accounting Service (DFAS) informed at all times of their current check mailing address and current home mailing address using the address in paragraph 1404.1. All retired/FMCR Marines must be on direct deposit.

b. Keep the CMC (MMSR-6) informed at all times of their current home mailing address. Provide address changes and submit with signature over the EDIPI for identification purposes. Report address changes to:

United States Marine Corps
Manpower and Reserve Affairs (MMSR-6)
3280 Russell Road
Quantico, VA 22134-5103

Telephone: 1-800-715-0968.

¶ 6106.4(a):

FMCR/Retirement-Eligible Marines

a. Marines with 20 or more years of service are subject to administrative separation per this Manual. The DC, M&RA is the separation authority.

(1) A Marine being considered for administrative separation

processing who is eligible for transfer to the FMCR or retired list may request that transfer before the command initiates administrative separation processing. See paragraph 7012 and use Figures 7-3, 7-4 and 7-5.

(2) The CMC (MM) may approve the request for transfer to the FMCR/retired list, or the CMC (MM) may disapprove such a request, and based on adverse information submitted by the Marine's chain of command or adverse material contained in the Marine's official records, direct administrative separation processing to ensure the Marine is afforded the procedural rights of a respondent prior to making a separation, characterization of service, and grade determination.

(3) The CMC (MM) may only direct administrative separation processing if the information submitted by the Marine's chain of command or material contained in the Marine's official records forms one of the specific reasons for involuntary administrative separation per this Chapter.

¶ 7001.1:

This Chapter outlines policies and procedures governing retirement and transfer of active duty enlisted Marines to the Fleet Marine Corps Reserve (FMCR). This Chapter also contains administrative instructions including retirement procedures for Marines while members of the FMCR. Retirement of Reserve enlisted Marines not on active duty and disability retirements are covered in Chapters 3 and 8, respectively.

¶ 7013:

Grade While a Member of the FMCR. A Marine who transfers to the FMCR does so in the grade held on the day released from active duty unless otherwise directed to transfer to the FMCR in the last grade

satisfactorily held by the DC M&RA per paragraph 701. Advancement to any officer grade upon retirement is explained in paragraph 7018.

Marine Corps Order 5300.17A, *Marine Corps Substance Abuse Program* (June 25, 2018)

App. B ¶ 1(c):

The above requirement does not preclude participation in special testing:

(1) Brig staff are tested quarterly.

(2) Prisoners are tested as directed by their commander.

(3) Marines assigned as SACOs, UPCs, and observers are tested monthly, except for Recruiting Command SACOs, who are tested quarterly and as directed by the commander.

(4) Reservists are tested no later than 72 hours after the beginning of scheduled annual training or initial active duty training.

(5) Commanders direct testing of Marines reporting in from Permanent Change of Station (PCS), Unauthorized Absence (UA), and extended leave periods (exceeding seven days) within 72 hours of arrival/return to the unit.

Marine Corps Order 6100.13A, *Marine Corps Physical Fitness and Combat Fitness Tests* (Feb. 23, 2021)

Ch. 2 ¶ 2:

Requirement

a. Active Component. The PFT is a scored, calendar year annual requirement for all active duty Marines, regardless of age, gender, grade, or duty assignment. It is required to be conducted between 1 January and 30 June of each year.

b. Reserve Component. The PFT is a scored, calendar year annual requirement for all Selected Marine Corps Reserve (SMCR) and Individual Mobilization Augmentee (IMA) Marines, regardless of age, gender, grade, or duty assignment. PFT scores will remain valid for two years for promotional purposes should operational constraints prevent annual testing. It is required to be conducted between 1 January and 30 June of each year.

c. Activated Reservists. Activated Reserve Marines, to include Active Reserve (AR), mobilized or those performing Active Duty Operational Support (ADOS) will comply with the active component annual PFT requirement. Exceptions and waivers will be administered in accordance with this Order.

d. End of Active Service/Retirement. Marines are required to complete a PFT during the annual period preceding their End of Active Service (EAS) or retirement date, unless otherwise directed. The terminal leave date will not be utilized to determine PFT requirements. e. End of Active Service (EAS)/Retirement Final Physical Examination. Completion of the required final physical examination, regardless of when completed, does not exempt a Marine from performing a PFT. A Marine, who elects to complete their final physical examination 7-12 months prior to EAS or retirement, is still required to perform the annual PFT for that period. This policy is also applicable to the reserve component annual requirement. For example, a Marine who completes their final physical examination in March, but does not EAS or retire until October, is still required to perform the annual PFT for the January-June timeframe.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B) and 32(g)(1), I hereby certify that this brief contains 11,332 words, as calculated by the word count function in Microsoft Word, and excluding the items that may be excluded under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and D.C. Cir. Local R. 32(e)(1). This brief uses a proportionally spaced typeface, Century Schoolbook, with 14-point typeface, in compliance with Federal Rules of Appellate Procedure 32(a)(5)(A) and 32(a)(6).

Stephen I. Vladeck
Counsel for Plaintiff-Appellee

May 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of May, 2021, a true and correct copy of the foregoing Brief for Appellee was served on all counsel of record in this appeal via the D.C. Circuit's CM/ECF utility.

Stephen I. Vladeck
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May 26, 2021