No. 21-___

IN THE

Supreme Court of the United States

STEVEN A. BEGANI,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION APPENDIX

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UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

UNITED STATES,
Appellee / Cross-Appellant

v.

STEVEN A. BEGANI, **Chief Petty Officer**
United States Navy (Retired),
Appellant / Cross-Appellee

Nos. 20-0217 & 20-0327
Crim. App. No. 201800082

Argued March 9, 2021—June 24, 2021

Military Judge: Stephen C. Reyes

Chief Judge STUCKY delivered the opinion of the Court.

We originally granted review to consider whether subjecting members of the Navy's Fleet Reserve, but not members of the Retired Reserve, to Uniform Code of Military Justice (UCMJ) jurisdiction violates the equal protection component of the Fifth Amendment. U.S. Const. amend. V. The Judge Advocate General of the Navy timely certified an additional issue for review: whether Appellant/Cross-Appellee (Appellant) waived this claim. After the United States District Court for the District of Columbia held that the exercise of court-martial jurisdiction over members of the Fleet Reserve was unconstitutional, *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020), we granted review of an additional issue: whether members of the Fleet Reserve have sufficient current connection to the military for Congress to subject them to continuous UCMJ jurisdiction. We hold: (1) that Appellant did not waive appeal of his

assigned issue; (2) as a member of the land and naval forces, Appellant was subject to court-martial jurisdiction; and (3) that the exercise of jurisdiction over Appellant did not violate equal protection.

I. Background

The United States Navy-Marine Corps Court of Criminal Appeals (CCA) summarized the relevant background as follows:

> After 24 years of active-duty service, and numerous voluntary reenlistments, Appellant elected to transfer to the Fleet Reserve. He was honorably discharged from active duty and started a new phase of his association with the "land and naval Forces" of our Nation. In short, for all intents and purposes, he retired. In addition to receiving "retainer pay," base access, and other privileges accorded to his status as a member of the Fleet Reserve, he remained subject to the UCMJ under Article 2(a)(6).
>
> After Appellant retired, he remained near his final duty station, Marine Corps Air Station (MCAS) Iwakuni, Japan, and worked as a government contractor. Within a month, he exchanged sexually-charged messages over the internet with someone he believed to be a 15-year-old girl named "Mandy," but who was actually an undercover Naval Criminal Investigative Service (NCIS) special agent. When he arrived at a residence onboard MCAS Iwakuni, instead of meeting with "Mandy" for sexual activities, NCIS special agents apprehended him.
>
> The Commander, U.S. Naval Forces Japan, sought approval from the Secretary of the Navy to prosecute Appellant at a court-martial, as

> opposed to seeking prosecution in U.S. District Court under the Military Extraterritorial Jurisdiction Act (MEJA). Because Appellant was still subject to the UCMJ, and therefore ineligible for prosecution under MEJA, the Secretary authorized the Commander to prosecute him at court-martial.
>
> After Appellant unconditionally waived his right to a preliminary hearing under Article 32, UCMJ, he entered into a pretrial agreement (PTA). In his PTA, he waived his right to trial by members and agreed to plead guilty and be sentenced by a military judge. He also waived all waivable motions except for one. He argued he could not lawfully receive a punitive discharge because he was a member of the Fleet Reserve. The trial court denied that motion.

United States v. Begani, 79 M.J. 767, 770 (N.M. Ct. Crim. App. 2020) (footnotes omitted).

The CCA affirmed the findings and sentence, holding that Appellant "[was] a member of the land and naval Forces"; "Congress [had] the authority to make him subject to the UCMJ under its constitutional power to regulate those Forces"; and subjecting members of the Fleet Reserve to trial by court-martial, but not retired reservists, did not violate equal protection. *Id.* at 775, 781, 783.

II. Waiver

Recognizing that subject matter jurisdiction cannot be waived, the Government argues that Appellant's equal protection claim only "incidentally" relates to jurisdiction, and therefore can be, and was, waived by Appellant's guilty plea. Whether Appellant waived the issue is a question of law that we review

de novo. *United States v. Davis*, 79 M.J. 329, 331 (C.A.A.F. 2020).

Appellant entered into a pretrial agreement to plead guilty, in which he waived all waivable motions, with the exception of his claim that a punitive discharge is not an authorized punishment for a retiree. Rule for Courts-Martial (R.C.M.) 705(c)(1)(B) prohibits a term of a pretrial agreement that deprives an accused of "the right to challenge the jurisdiction of the court-martial." The court-martial had jurisdiction over Appellant through Article 2(a)(6), 10 U.S.C. § 802(a)(6) (2018)—which Appellant now alleges violates equal protection. If Appellant prevails, and Article 2(a)(6) is unconstitutional, the court-martial has no jurisdiction to try *him*. He would therefore have successfully "challenge[d] the jurisdiction of the court-martial," which cannot be waived. R.C.M 705(c)(1)(B). Therefore, this Court finds that Appellant's argument that Article 2(a)(6) violates the equal protection component of the Fifth Amendment has not been waived.

III. Court-Martial Jurisdiction over the Fleet Reserve

In Appellant's second assigned issue, which we examine first, he argues that court-martial jurisdiction over members of the Fleet Reserve, and retired members of the armed forces more generally, is unconstitutional. Though the Constitution gives Congress the power to set rules for the "land and naval Forces," U.S. Const. art. I, § 8, cl. 14, Appellant argues that members of the Fleet Reserve are not currently part of the "land and naval Forces" and so cannot be subject to the UCMJ.

A. Standard of Review

The question of jurisdiction is a question of law that we review de novo. *United States v. Hennis*, 79 M.J. 370, 374–75 (C.A.A.F. 2020).

B. Law

Congress has plenary authority to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. art. I, § 8, cls. 12–13. Congress also has plenary authority to "make Rules for the Government and Regulation of the land and naval Forces." *Id.* at cl. 14. This power is vast, permitting even compulsory service. *See Selective Draft Law Cases*, 245 U.S. 366 (1918). The "'land and naval Forces'" consist of those "persons who are members of the armed services." *Reid v. Covert*, 354 U.S. 1, 19–20 (1957).

Pursuant to this governing authority over the land and naval forces, "Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J." *Solorio v. United States*, 483 U.S. 435, 438–39 (1987). An offense need not be military in nature to be tried by court-martial. *Id.* The only question is the "military status of the accused. ... 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.'" *Id.* at 439 (internal quotation marks omitted) (citations omitted).

As part of maintaining a Navy, Congress created multiple categories into which naval personnel fall, one being the Fleet Reserve. 10 U.S.C. § 6330(a) (2012). The Fleet Reserve is composed of "enlisted member[s] of the Regular Navy ... who ha[ve] completed 20 or more years of active service in the armed forces." 10 U.S.C. § 6330(b) (2012). Transfer to

the Fleet Reserve is optional, and members of the Fleet Reserve are entitled to retainer pay, remain subject to recall at any time, and are subject to the UCMJ. *See* Article 2(a)(6), UCMJ; 10 U.S.C. § 688(a). Upon completion of thirty years total service, active and inactive, a member of the Fleet Reserve is retired, and is thereafter entitled to retired pay. 10 U.S.C. § 6331(c).

For well over a hundred years, Congress, the military, and the Supreme Court have all understood that retired members of all branches of service of the armed forces who continue to receive pay are still a part "of the land and naval Forces" and subject to the UCMJ or its predecessors. *See, e.g.*, *United States v. Tyler*, 105 U.S. 244, 246 (1882) ("It is impossible to hold that [retirees] who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, ... are still not in the military service."); *McCarty v. McCarty*, 453 U.S. 210, 221–22 (1981) (acknowledging that "[t]he retired officer ... continues to be subject to the [UCMJ]"). Though retirees are still part of the armed forces, persons who have completely separated from the military are not. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14–15 (1955) (holding that "civilian ex-soldiers who had severed all relationship with the military and its institutions" could not properly be subject to court-martial for crimes committed while in the Army). Neither are civilian dependents of servicemembers, *see Reid*, 354 U.S. at 19–20, or civilian employees. *See McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (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.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240–41 (1960) (emphasis added).[1]

C. Discussion

Appellant agrees that under our current case law, members of the Fleet Reserve are in the land and naval forces and subject to the UCMJ. He argues that those cases were either wrong, or their reasoning has been vitiated by subsequent Supreme Court case law and the paucity of examples of involuntary retired recall. Appellant therefore urges this Court to supplement the "military status" test with a "significant connection" test.

This would not be the first time courts have tried to analyze sufficient "connections" to the military to determine UCMJ jurisdiction. In *O'Callahan v. Parker*, the Supreme Court sharply departed from earlier precedent and held that a servicemember could only be court-martialed for crimes that had a sufficient connection to the military. 395 U.S. 258, 274 (1969). After nearly two decades of attempting to parse what level of "service connection" was sufficient—resulting in a myriad of categorical exceptions and twelve different factors to analyze—the Supreme Court reversed *O'Callahan* in *Solorio* and held that the only appropriate test is the "military status of the accused." 483 U.S. at 436, 439.

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1. *But see* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, § 552, 120 Stat. 2083 (2006); *United States v. Ali*, 71 M.J. 256, 259 (C.A.A.F. 2012) (holding that Article (2)(a)(10), subjecting to court-martial nonmilitary persons accompanying armed forces in the field, does not violate the Constitution).

Acknowledging that precedent and practice are not on his side, Appellant nevertheless urges this Court to hold that the Supreme Court narrowly construes military jurisdiction, requiring it to be justified by "certain overriding demands of discipline and duty," *id*. at 440 (internal quotation marks omitted) (citation omitted), and be "the least possible power adequate to the end proposed." *Toth*, 350 U.S. at 23 (internal quotation marks omitted) (citation omitted).

We think this is misplaced. First, *Solorio*'s discussion of the "'demands of discipline and duty'" "concern[ed] the scope of court-martial jurisdiction over *offenses committed by servicemen*" and not who is subject to the UCMJ. 483 U.S. at 440 (emphasis added) (citation omitted). *Solorio*'s test for jurisdiction was the military status of the accused. *Id*. at 451. Second, *Toth* limited the expanse of UCMJ jurisdiction over *civilians*, and was not concerned with whether an individual was a member of the armed forces. 350 U.S. at 22 (declining to infer that the Necessary and Proper Clause included the power to circumvent the Bill of Rights and subject ex-servicemen to court-martial "when they are actually civilians"). Neither of these cases addresses the question here, whether a member of the Fleet Reserve is part of the "land and naval Forces." Other cases, both from our predecessor Court and the Supreme Court, discuss this explicitly.

In prior cases upholding the military status of members of the Fleet Reserve, our predecessor Court identified multiple indicators that members of the Fleet Reserve retain military status. Appellant, as a current member of the Fleet Reserve, is not in the same situation as the appellant in *Toth*, as he has not "severed all relationship" with the military. Fleet Reservists are still paid, subject to recall, and required

to maintain military readiness. Appellant argues that these ongoing connections are insufficient to place Appellant in the "land and naval Forces" because each, in isolation, is insufficient to confer military status.

Pay. Once an enlisted member of the Navy has served for twenty years, he can elect to transfer to the Fleet Reserve, and receive ongoing retainer pay, or he can simply leave the service and become a civilian. Appellant points out that merely receiving pay from the Department of Defense cannot, standing alone, confer UCMJ jurisdiction. *See, e.g.*, *Kinsella*, 361 U.S. at 249. But of course, members of the Fleet Reserve are not civilians, like the defendants in *Kinsella* and *Toth* were. Appellant argues that pay cannot place someone in the armed forces—which is of course true. But that is not what happened here. Being paid didn't confer military status—Appellant is paid *because* of his status. Members of the Fleet Reserve receive retainer pay because they are *currently* in the Fleet Reserve, which is a component of the United States Navy. They have not "severed all relationship" with the military; rather, they are *current* members of the armed forces, though not on active duty, and they are *currently* paid for maintaining that status.

Appellant asks us to find that the Supreme Court implicitly overruled its prior cases on this subject when it held that, under a federal tax statute, a state could not treat retired military pay differently from retired pay for state officials. *Barker v. Kansas*, 503 U.S. 594, 605 (1992) (holding that "[f]or purposes of 4 U.S.C. § 111, military retirement benefits are to be considered deferred pay for past services"). Of course, in that same case, the Court also said, "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall." *Id.* at 599.

Appellant dismisses this as dicta, but though UCMJ jurisdiction was not in question in *Barker*, it would be strange indeed to find that the Supreme Court implicitly held what it explicitly disclaimed. The state income tax consequences for retainer pay have no bearing on a retired person's continuing status as a member of the federal armed forces.

Military Readiness and Recall. Members of the Fleet Reserve are not only paid for their current status; their status also requires that they maintain readiness for future recall. See Naval Military Personnel Manual (MILPERSMAN), Article 1830-040, CH-38, at 12 (Dec. 19, 2011). They are subject to recall by the Secretary of the Navy "at any time." 10 U.S.C. § 688(a). They are also required to "[m]aintain readiness for active service in the event of war or national emergency," to keep Navy leadership apprised of their home address and "any changes in health that might prevent service in time of war," and remain "subject at all times to laws, regulations, and orders governing [the] Armed Forces." MILPERSMAN Article 1830-040, CH-38, at 12; 10 U.S.C. § 8333. Members of the Fleet Reserve are required to inform their branch of travel or residency outside the United States for any period longer than thirty days, and can be required to perform two months of active service every four years. MILPERSMAN Article 1830-040, CH-38, at 12. If a member of the Fleet Reserve becomes unfit for any duty, he will be transferred to the Retired lists of either the Regular Navy or the Retired Reserve. 10 U.S.C. § 6331(a); MILPERSMAN, Article 1830-030, CH-13, at 3 (Dec. 7, 2005).

Appellant argues that recall is rare, he has no "ongoing military responsibilities," and there is no "good order and discipline" benefit to being subject to

the UCMJ while not on active duty. That Congress could require *more* is not an argument that it has not required enough. Congress has the responsibility "for the delicate task of balancing the rights of servicemen against the needs of the military." *Solorio*, 483 U.S. at 447. Congress has determined that, in order to run an all-volunteer military and maintain an adequate supply of qualified retirees to supplement that force, it needs members of the Fleet Reserve to be subject to the UCMJ but not to take other steps it requires of regular members of active-duty components. And as a factual matter, although the recall of retirees may not be a frequent event, it is not the rare occurrence that Appellant suggests. As the lower court noted when previously considering this very issue, "in both of our wars with Iraq, retired personnel of all services were actually recalled." *United States v. Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (alteration in original removed) (internal quotation marks omitted) (quoting Francis A. Gilligan & Fredric I. Lederer, *Court-Martial Procedure* § 2-20.00, 24 (4th ed. 2015)), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018).

Congress has explicit and extremely broad powers over the military under Article I of the Constitution and there is no constitutional requirement that all members of the armed forces be on continuous active duty. Congress elected to create two components of the armed forces in the Department of the Navy comprised of recent retirees, whom it continues to pay, in exchange for the potential to be recalled as our national security demands. These members of the Fleet Reserve and Fleet Marine Reserve can constitutionally be considered part of the land and naval forces, and Congress has determined that they need to be subject to the UCMJ. To this determination we defer. *See Solorio*, 483 U.S. at 447 ("[J]udicial

deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." (alteration in original) (internal quotation marks omitted) (citation omitted)).

Appellant asks us to adopt a narrow construction of Congress's express authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, by excluding retirees from that power, but to do so would run counter to the Supreme Court's broad deference towards Congress in enacting federal criminal statutes pursuant to Congress's regulatory powers. Despite there being no express federal civilian police power in the Constitution, the Supreme Court has held that "Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty or the spread of any evil or harm to the people of other states from the state of origin." *Brooks v. United States*, 267 U.S. 432, 436 (1925). The Supreme Court has repeatedly endorsed Congress's decision to subject Americans to new federal crimes over objections that Congress has no such authority. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (upholding Congress's decision to criminalize the production and use of homegrown marijuana even if state law allowed for its growth and use); *Perez v. United States*, 402 U.S. 146, 156–57 (1971) (upholding Congress's decision to criminalize purely intrastate loan sharking). The "make Rules" clause has long been interpreted as providing Congress with the power to regulate the trial and punishment of members of the land and naval forces. *Dynes v. Hoover*, 61 U.S. 65, 71 (1857). Given

Congress's broad authority to subject civilians to a federal criminal code based solely on its regulatory authority, we see no reason to narrowly construe Congress's express power to "make Rules" for the armed forces.

IV. Equal Protection Challenge to Jurisdiction

Having established that Congress can subject retirees to jurisdiction under the UCMJ, we now consider Appellant's other assigned issue—whether it violates the equal protection component of the Fifth Amendment to subject members of the Fleet Reserve, but not retired reservists, to military jurisdiction.

A. Standard of Review

"The constitutionality of a statute is a question of law; therefore, the standard of review is de novo." *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000).

B. Law

The federal government is prohibited from violating a person's due process rights by denying him the equal protection of the laws. *Bolling v. Sharpe*, 347 U.S. 497 (1954). The "core concern" of equal protection is to act "as a shield against arbitrary classifications." *Engquist v. Oregon Department of Agriculture*, 553 U.S. 591, 598 (2008). That is, the Government must treat "similar persons in a similar manner." *United States v. Gray*, 51 M.J. 1, 22 (C.A.A.F. 1999) (internal quotation marks omitted) (citation omitted).

The initial question then, is whether the groups are similarly situated, that is, are they "in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). As discussed below, Fleet Reservists and Retired Reservists are, in key aspects, not similarly situated. They serve a different purpose in our

national defense scheme and have different benefits and obligations. They are, therefore, not similarly situated.[2]

C. Discussion

"[I]t is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. The responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, and with the President." *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (internal quotation marks omitted) (citing and quoting *Toth*, 350 U.S. at 17). To that end, Congress created the Fleet Reserve to provide a ready supply of highly trained naval manpower. Members of the Fleet Reserve have served as active-duty enlisted members of the Navy for between twenty and thirty years. 10 U.S.C. § 6330(b) (2012). As members of the Fleet Reserve, they receive retainer pay, based on that experience. 10 U.S.C. §§ 6330(c)(1), 6332. They are required to "[m]aintain readiness for active service in event of war or national emergency," MILPERSMAN Article 1830-040, CH-38, at 12, and may be recalled for training "[i]n time of peace." 10 U.S.C. § 8385(b). In fact, they are subject to recall at any time. 10 U.S.C. § 688(a).

Retired reservists, by contrast, usually served only a few years on continuous active duty and then served

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2. Even if they were similarly situated, we would employ rational basis review of their distinct treatment, and our analysis would be the same. We reject Appellant's contention that the Sixth Amendment right to a jury trial is implicated and so we should apply strict scrutiny. As we explained in Section III, members of the Fleet Reserve and regular retirees are both "part 'of the land and naval Forces'" and so neither have a Sixth Amendment right to a jury trial. Therefore, no fundamental right is implicated by their disparate treatment.

part-time, for a total of at least twenty years. Once retired, they need not remain in the military, (although most do), and receive no pay until they reach statutory eligibility at age sixty. *See, e.g.*, Dep't of Defense, Reg. 7000-14R, Financial Management vol. 7B, ch. 6, para. 060401 (2020) ("Retired pay benefits authorized for non-regular members of the uniformed services in 10 U.S.C., Chapter 1223 are viewed as a pension and entitlement to retired pay under 10 U.S.C. § 12731 is not dependent on the continuation of military status."). They are not required to maintain any level of readiness and can be recalled only in the event of a declaration of war or national emergency by Congress. 10 U.S.C. § 12301(a) (2018). Even then, they only may be recalled once other tiers of available manpower have been exhausted. *Id.*

Appellant glosses over these distinctions, characterizing the pay differences as receiving "retired pay at some point in their retired years." (internal quotation marks omitted) (citation omitted). This, of course, ignores the critical distinctions: *when* they are paid, *why* they are paid, and *how much* they are paid.

Appellant also minimizes the recall distinctions by claiming the two groups are "similarly subject to involuntary recall." But of course, there are important distinctions as to both when they can be recalled and why they can be recalled. Members of the Fleet Reserve can be recalled during a war or national emergency declared by Congress; a national emergency declared by the President; or for training during peacetime. 10 U.S.C. § 8385(a)–(b). Retired reservists on the other hand, may only be recalled for the duration of a war or national emergency declared by Congress (or six months thereafter), and only after

a determination that there are not enough qualified active reserves or national guardsmen to fill the need. 10 U.S.C. § 12301(a).

Appellant notes that the Government has not provided recent examples of *involuntary* recall of retirees. This may in part be due to sufficient numbers of retirees who have volunteered for recall, and because recent threats have not required that level of manpower. For that we may be grateful. But Congress has the duty to ensure the military is ready for *future* threats and needs. That the use of the authority has not been necessary in the recent past hardly means that it is *unconstitutional* to be prepared in the event it is necessary in the future. Appellant was not required to enter the Fleet Reserve and accept retainer pay. But once he did, he made himself available to be recalled, and continued to be subject to the UCMJ.

In order to maintain our national security, Congress has created multiple mechanisms through which interested individuals may volunteer to serve in the armed forces. These mechanisms have varying rights and obligations. Congress has determined that having a class of retired reservists is beneficial, and their utility does not require a concomitant need for them to remain subject to the UCMJ while retired. True, all who have retired from the armed forces in any capacity remain subject to some level of recall—and this only makes sense. All else being equal, those who have trained and extensively served are more valuable in times of war than those who have not served or have served far less time. But members of the Fleet Reserve, being within ten years of full-time, active-duty service, are arguably much more useful in an emergency. They are more familiar with the current systems and can be brought up to speed much

more quickly. To facilitate this, Congress pays them to, among other things, maintain readiness, which includes being subject to the UCMJ.

Congress does not violate equal protection by having different benefits and obligations for these two groups. Fleet Reservists volunteered to enter the Fleet Reserve and accepted current pay in exchange for maintaining readiness, being subject to recall, and being subject to the UCMJ. Retired reservists will only receive a reserve pension once they reach age sixty and can only be recalled once other sources of manpower have been exhausted. These two groups are not similarly situated, and so it does not violate equal protection to subject one and not the other to the UCMJ.

Court-martial jurisdiction over members of the Fleet Reserve does not violate the Constitution, nor does subjecting members of the Fleet Reserve and not retired reservists to UCMJ jurisdiction violate equal protection. Therefore, Appellant, a member of the "land and naval Forces," was properly subject to jurisdiction under Article 2(a)(6), UCMJ.

V. Judgment

The judgment of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

Judge MAGGS, with whom Judge Hardy and Senior Judge Crawford join, concurring.

The specified issue on which the parties have submitted supplemental briefs is "whether fleet reservists have a sufficient current connection to the military for Congress to subject them to constant [Uniform Code of Military Justice (UCMJ)] jurisdiction." This issue is not new. Appellant/Cross-Appellee (Appellant) acknowledges that our decision

in *United States v. Overton*, 24 M.J. 309, 311 (C.M.A. 1987), has already answered the question in the affirmative, holding that Congress constitutionally may subject members of the Fleet Reserve and Fleet Marine Corps Reserve to trial by court-martial. The *Overton* decision is consistent with the longstanding view that retirees are in the armed forces. *See, e.g.*, *United States v. Tyler*, 105 U.S. 244, 246 (1882) ("We are of the opinion that retired officers are in the military service of the government ...."); *United States v. Hooper*, 9 C.M.A. 637, 643, 26 C.M.R. 417, 422 (1958) ("[R]etired personnel are a part of the land or naval forces."); William Winthrop, *Military Law and Precedents* 87 n.27 (2d ed., Government Printing Office 1920) (1895) ("That retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitted of question.").

Appellant nevertheless requests that we overrule *Overton* and reach a different conclusion. I agree with the reasons that the Court gives for rejecting Appellant's request, and I join the Court's opinion in full. I write separately only to address one aspect of Appellant's argument in more detail. In his briefs, as I describe below, Appellant makes some effort to demonstrate that this Court's decision in *Overton* was incorrect based on the original meaning of U.S. Const. art. I, § 8, cl. 14, and the Grand Jury Clause of the Fifth Amendment of the United States Constitution.

I commend Appellant for briefing this Court on historical sources pertinent to our interpretation of these provisions. A party urging a court to overturn its precedent on a constitutional issue at a minimum should show that the precedent is inconsistent with the original meaning of the Constitution. *Compare Gamble v. United States*, 139 S. Ct. 1960, 1965 (2019) (declining to overrule precedents establishing the

Dual Sovereignty Doctrine after finding these precedents to be consistent with the Double Jeopardy Clause "[a]s originally understood"), *with Alleyne v. United States*, 570 U.S. 99, 103 (2013) (overruling *Harris v. United States*, 536 U.S. 545 (2002), for being "inconsistent with ... the original meaning of the Sixth Amendment"). In this case, however, I ultimately do not find Appellant's originalist arguments persuasive.

I. Appellant's Argument Under U.S. Const. art. I, § 8, cl. 14

U.S. Const. art. I, § 8, cl. 14 empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces." Appellant argues that Congress cannot use this power to enact a law that subjects him to trial by court-martial because he was no longer part of the "'land and naval [F]orces'" at the time of his offenses or his court-martial. Appellant acknowledges that, as a member of the Fleet Reserve, he continues to receive pay, he is subject to recall, and he is still enlisted. But Appellant asserts that these three facts are insufficient to make him part of the land and naval forces. On the contrary, Appellant asserts that he "has no regular military duties or authority" or, phrased another way, he has no "actual duties and responsibilities." And "because [he] has no ongoing military responsibilities," Appellant contends, "he cannot be regarded as part of the 'land and naval [F]orces'" within the meaning of U.S. Const. art. I, § 8, cl.14.

Appellant's argument appears to rest on two syllogisms. The major premise of the first syllogism is that a person is in the "land and naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14, only if the person has ongoing military duties or authority. The minor premise of the first syllogism is that Appellant

does not have ongoing military duties or authority as a member of the Fleet Reserve. The conclusion of the first syllogism is that Appellant therefore is not in the "land or naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14.

The major premise of Appellant's second syllogism is that Congress may not subject to trial by court-martial a person who is not in the "land and naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14. The minor premise of the second syllogism (which would come from the conclusion of the first syllogism) is that Appellant is not in the "land and naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14. The conclusion of the second syllogism is that Congress therefore may not subject Appellant to trial by court-martial.

I agree with part of this reasoning. The major premise of the second syllogism is settled. In *United States ex rel. Toth v. Quarles*, the Supreme Court held that "given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." 350 U.S. 11, 15 (1955) (quoting U.S. Const. art. I, § 8, cl. 14). And if the minor premise of the second syllogism were true, then I would agree that the conclusion of the second syllogism would also be true.

But I am not convinced that the major premise of the first syllogism—that a person is in the "land or naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14, only if the person has ongoing military duties and authority—is true. As Appellant acknowledges, this Court held in *Overton* that retirees in the Fleet Reserve are part of the land and naval

forces, and thus subject to trial by court-martial, based on their receipt of pay and the possibility of their recall to active duty. The Court in *Overton* did not identify ongoing military duties and authority as a requirement for being in the land and naval forces.

Appellant, however, argues that *Overton*'s reasoning is incorrect and should be overruled on two grounds. One ground is that newer understandings of the purpose of retired pay and recent experience showing the unlikelihood of his recall to active service have undermined *Overton*'s reasoning. The other ground is that *Overton*'s interpretation is contrary to the original meaning of U.S. Const. art. I, § 8, cl. 14. The Court amply addresses and correctly rejects Appellant's first argument. But I believe that Appellant's originalist argument merits a closer inspection.

To prove his assertion that U.S. Const. art. I, § 8, cl. 14, empowers Congress to regulate persons who do not have ongoing military duties and authority, Appellant draws on evidence from the records of the Continental Congress from the 1780s. I agree with Appellant that the Continental Congress's practice under the Articles of Confederation is relevant in determining the original meaning of U.S. Const. art. I, § 8, cl. 14. The constitutional clause was copied from the Articles of Confederation, which gave Congress the power of "making rules for the government and regulation of the said land and naval forces, and directing their operations." Articles of Confederation of 1781, art. IX, para. 4; *see also* 2 *The Records of the Federal Convention of 1787*, at 330 (Max Farrand ed., 1911) (James Madison's Notes, Aug. 18, 1787) (recognizing the clause was borrowed "from the existing Articles of the Confederation") [hereinafter *Farrand's Records*]; 3 Joseph L. Story, *Commentaries*

on the Constitution § 1192 (1833) ("It was without question borrowed from a corresponding clause in the articles of confederation.").[1] Accordingly, the Framers of the Constitution probably intended, those who ratified the Constitution probably understood, and the public probably construed "land and naval Forces" to have the same meaning in the Constitution as in the Articles of Confederation. *See Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 231 n.3 (1998) (reasoning that language in the Constitution has the same meaning as almost identical language in the Articles of Confederation); Felix Frankfurter, *Some Reflections on Reading Statutes*, 47 Colum. L. Rev. 527, 537 (1947) ("[I]f a word is obviously transplanted from another legal source ... it brings the old soil with it.").

The question is whether the evidence that Appellant cites is on point and persuasive. Appellant shows that in 1780, the Continental Congress offered "officers who shall continue in the service to the end of the war" half-pay for life after their "reduction." 18 *Journals of the Continental Congress 1774-1789*, at 958–60 (Worthington Chauncey Ford et al. eds., reprints published from 1904–37 by the Government Printing Office) (Oct. 21, 1789) [hereinafter *Journals*]. Appellant further shows that in 1781, the Continental Congress passed a similar law for "hospital department" officers. 19 *Journals* at 68–70 (Jan. 13, 1781). Appellant contends that these examples show

1. The most significant difference between the clauses in the Constitution and the Articles of Confederation is that the Constitution assigns control over the operations of the armed forces to the President as the commander-in-chief, rather than to Congress. *See* U.S. Const. art. II, § 2, cl. 1. That difference is not relevant here.

that the Continental Congress provided "for post-duty compensation without military status."

These examples, in my view, do not establish the truth of the major premise of the first syllogism on which Appellant's argument rests. The examples do not show that a person is in the "land and naval Forces" within the meaning of U.S. Const. art. I, § 8, cl. 14, only if the person has ongoing military duties or authority. Instead, the examples show merely that a person could receive pay for past military service without being in the land or naval forces. That point is not contested in this case and is insufficient to show that *Overton* was wrongly decided.

In my view, however, other acts of the Continental Congress are relevant because they provide an unmistakable counterexample that contradicts, and thus disproves, the major premise of Appellant's first syllogism. The counterexample concerns furloughed soldiers. The Articles of War originally empowered unit commanders to grant furloughs. See Articles of War of 1775 art. LVI, reprinted in 2 *Journals* at 120 (June 30, 1775). Congress, however, later withheld this power to higher authorities, and at the same time standardized the documentation provided to furloughed and discharged soldiers. 20 *Journals* at 656–57 (June 16, 1781). The furlough document specified that the bearer was permitted to be absent from his regiment, while the discharge document said that the bearer was discharged from the regiment. *Id.* These documents taken together make clear that furloughed soldiers were still in the Army because they were not discharged and that they did not have ongoing duties because they were authorized to be absent.

Perhaps the most telling instance of furloughs took place at the end of the Revolutionary War. In May 1783, with the British Army essentially defeated and a permanent peace treaty expected imminently, Congress had to decide what to do with the soldiers remaining in the victorious Continental Army: Should they be discharged, furloughed, or retained? The Journals describe the debate as follows:

> The Report from Mr Hamilton, Mr Gorham and Mr Peters, in favor of discharging the soldiers enlisted for the war, was supported on the ground that it was called for by Economy and justified by the degree of certainty that the war would not be renewed. Those who voted for furloughing the soldiers wished to avoid expence, and at the same time to be not wholly unprepared for the contingent failure of a definitive treaty of peace. The view of the subject taken by those who were opposed both to discharging and furloughing, were explained in a motion by Mr. Mercer seconded by Mr. Izard to assign as reasons, first that Sr Guy Carleton [the commander-in-chief of all British forces in North America] had not given satisfactory reasons for continuing at N. York, second, that he had broken the Articles of the provisional Treaty.

25 *Journals* at 966–67 (May 23, 1783). In the end, Congress decided to furlough a large contingent of soldiers indefinitely. *Id*. at 967. As the passage above shows, these soldiers remained in the Army and were subject to recall at any time, but they had no ongoing duties. These soldiers were not discharged until Congress approved a proclamation after the signing of the Treaty of Paris, terminating their service effective November 3, 1783. *Id*. at 703 (Oct. 18, 1783). "[S]uch

part of the federal armies as ... were furloughed," the proclamation stated, "shall, from and after the third day of November next, be absolutely discharged ... from said service." *Id.*

The May 1783 furlough, and additional furloughs that soon followed, provoked outrage among many of the furloughed soldiers, some of whom were owed considerable unpaid wages. One historian sympathized with their ire, noting that "[t]here was neither provision for a settlement of accounts nor even a word of appreciation for the soldiers." Kenneth R. Bowling, *New Light on the Philadelphia Mutiny of 1783: Federal-State Confrontation at the Close of the War for Independence*, 101 Penn. Mag. of Hist. & Biog. 419, 423 (1977). In June 1783, hundreds of these furloughed soldiers took part in a mutinous demonstration targeting Congress in Philadelphia. *See* Mary A. Y. Gallagher, *Reinterpreting the "Very Trifling Mutiny" at Philadelphia in June 1783*, 119 Penn. Mag. of Hist. & Biog. 3, 3–4 (1995).

Underscoring the view that these furloughed soldiers were still in the Army, despite having no current or ongoing duties, some of the suspected participants were charged with mutiny in "breach of the third article of the second section of the rules and articles of war." 25 *Journals* at 566 (Sept. 13, 1783). Mutiny was an offense only an "officer or soldier" could commit. Articles of War of Sept. 20, 1776, § II, art. 3, *reprinted in* 5 *Journals* at 789 (Sept. 20, 1776). The court-martial found several of the accused guilty, and adjudged serious punishment. *See* 25 *Journals* at 566 (Oct. 13, 1783). "Sentenced to whippings were gunner Lilly, drummer Horn, and privates Thomas Flowers and William Carman. Sentenced to death by hanging were the two sergeants who had led the demonstration, John Morrison and Christian Nagle."

Bowling, 101 Penn. Mag. of Hist. & Biog. at 445. Mercifully, in exercise of its "special grace," Congress later pardoned the offenders, noting that no lives were lost, no property was destroyed, and those convicted "appear not to have been principals in the said mutiny." 25 Journals at 566 (Sept. 13, 1783). In granting the pardons, however, Congress did not suggest that the courts-martial lacked jurisdiction because the furloughed status of the soldiers meant that they were out of the Army.[2]

In conclusion, because Appellant is asking us to overrule *Overton*, he should at a minimum demonstrate that *Overton* was incorrect as an original matter. His originalist argument rests on a claim that the "land and naval Forces" did not include persons who had no ongoing duties. Assuming that the term "land and naval Forces" had the same meaning in the Articles of Confederation as in U.S. Const. art. I, § 8, cl. 14, Appellant has failed to convince me that his

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2. Later evidence provides additional support. In 1787, Congress asked the Secretary of War Henry Knox whether a discharged former soldier, John Sullivan, could be tried by court-martial after his discharge for his participation in the mutiny "while he with the greater part of the Army were furloughed as a preparatory step to their being discharged." 33 *Journals* at 666–67 (Oct. 12, 1787). It was "a questionable point, whether he or any other person could be legally tried by a court martial for crimes committed during the existence of the Army." *Id.* at 667. Knox reported that "were such an attempt to be made at this late period it might be a considered an unusual stretch of power." *Id.* In addition to the potential jurisdictional problem, Knox also noted that procuring evidence would be "utterly impracticable." *Id.* Knox's doubt that a discharged former soldier could be tried by court-martial for acts committed while he was still in the Army is consistent with what the Supreme Court would later hold in *Toth*, and stands in contrast to the evident understanding that a court-martial could try soldiers who had been furloughed but not discharged.

claim is correct because furloughed soldiers provide a clear counterexample. Furloughed soldiers had no ongoing duties, but they were in the Army, and they were subject to court-martial for offenses committed while furloughed.

I should add that Appellant has not cited evidence from other sources that courts typically consult to discern the original meaning of the Constitution. In my review of several of these other sources, I have uncovered nothing that suggests that having ongoing duties and authority was a requirement of membership in the armed forces. Dictionaries from the founding era do not define the compounds "land forces" and "naval forces," and the definitions of similar words like "Army" and "Navy" provide no guidance on whether their members necessarily had ongoing military duties.[3] The records of the Constitutional Convention of 1787 show that the Framers principally discussed the provision that became U.S. Const. art. I, § 8, cl. 14, on August 18, 1787. *See* 2 *Farrand's Records* at 330–31. Their discussion of the topic focused mostly on whether to limit the size of the land and naval forces during peacetime and did not address the specific issue in this case. *Id.*

In *The Federalist Papers*, attention to the land and naval forces mostly addressed the President's role as the commander-in-chief, the funding of the military,

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3. I consulted nine English language dictionaries and four legal dictionaries from the founding era that the Supreme Court often considers in attempting to discern the original meaning of the Constitution. *See* Gregory E. Maggs, *A Concise Guide to Using Dictionaries from the Founding Era to Determine the Original Meaning of the Constitution*, 82 Geo. Wash. L. Rev. 358, 382–92 (2014) (listing these dictionaries and providing links for finding them online).

and the need for some permanent forces despite valid concerns about standing armies. *See, e.g.*, *The Federalist* No. 41, at 119 (James Madison) (in *The Federalist Papers*, Roy P. Fairfield ed., Anchor Books 2d ed. 1966) (1788) (noting that the Constitution gives Congress an "INDEFINITE POWER of raising TROOPS, as well as providing fleets; and of maintaining both in PEACE, as well as in war"); *The Federalist* No. 23, at 59 (Alexander Hamilton) (in *The Federalist Papers*, Roy P. Fairfield ed., Anchor Books 2d ed. 1966) (1787) (noting that there is no "limitation of that authority which is to provide for the defence and protection of the community in any matter essential to its efficacy—that is, in any matter essential to the formation, direction, or support of the NATIONAL FORCES"). And while early state constitutions and the state ratification debates have some relevance to Appellant's second argument as discussed below, I found nothing that specifically addressed the issue of whether the "land and naval Forces" include only persons with ongoing duties.[4] These other sources, in short, do not contradict the evidence and the conclusion obtained from the records of the Continental Congress concerning the status of furloughed soldiers.

4. To the extent English practice might be relevant, Blackstone said that the "military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people, for the safeguard and defence of the realm," a definition that does not contain an active-duty requirement. 1 William Blackstone, *Commentaries on the Laws of England* 395 (1st ed. 1765).

II. Appellant's Argument under the Grand Jury Clause of the Fifth Amendment

Appellant also presents arguments addressing the Grand Jury Clause of the Fifth Amendment. This clause provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." U.S. Const. amend. V. Appellant contends that this clause bars his trial by court-martial. He asserts: "[E]ven if [he] remains a member of the 'land and naval forces' for purposes of the Make Rules Clause, the dispute must still 'arise[] in the land or naval forces' for purposes of the Fifth Amendment's Grand Jury Indictment Clause ... for the military to exercise jurisdiction." (Third alteration in original.) Appellant asserts that his case did not arise in the land or naval forces because the conduct for which he was found guilty took place after he retired from active duty, did not constitute a "military-specific" crime, and bore no connection to either his prior active-duty service or his future amenability to recall.

As the Court correctly explains, the Supreme Court already has rejected the view that court-martial jurisdiction depends on whether the charged offense has a "service connection." *United States v. Begani*, – — M.J. —— (6) (C.A.A.F. 2021). I therefore see no need to address further Appellant's contentions that the alleged offense is not "military-specific" and is not related to Appellant's prior active service or possible future active service. Instead, I will discuss only his argument that he has a right to a grand jury because he did not commit his offenses while on active duty.

The text of the Grand Jury Clause makes Appellant's argument implausible. The drafters of the Fifth Amendment distinguished between armed forces that are in actual or active service and armed forces that are not. They created a *general* exception to the requirement of a grand jury indictment for members of the "land and naval forces" but a *limited* exception for members of the "Militia" that applies only when members of the "Militia" are "in actual service." U.S. Const. amend. V. This distinction leads to an inference that the exception for the "land and naval forces" applies without regard to whether a member of the land and naval forces was in actual service at the time of the offense. As the Supreme Court has put it: "All persons in the military or naval service of the United States are subject to the military law, — the members of the regular army and navy, at all times; the militia, so long as they are in such [actual] service." *Johnson v. Sayre*, 158 U.S. 109, 114 (1895) (emphasis added). The term "actual service" meant that persons have some ongoing duties. See Story, *supra*, at § 1208. ("To bring the militia within the meaning of being in actual service, there must be an obedience to the call, and some acts of organization, mustering, rendezvous, or marching, done in obedience to the call, in the public service."). Accordingly, the text of the Grand Jury Clause indicates that members of the "land and naval forces" can be tried without a grand jury indictment despite having no ongoing duties, even though members of the "Militia" cannot.

History supports this interpretation. At the time of the framing of the Constitution, the question of who was subject to trial by court-martial was important. Three state constitutions expressly limited the exercise of court-martial jurisdiction over militiamen

to those in actual service without requiring the same for members of regular forces. The Massachusetts Constitution provided: "No person can in any case be subject to law-martial, or to any penalties or pains, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature." Mass. Const. of June 15, 1780, pt. 1, art. XXVIII, *reprinted in* 3 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* 1888, 1893 (Francis Newtown Thorpe ed., 1909) [hereinafter *Federal and State Constitutions*]. The New Hampshire and Maryland Constitutions had similar provisions.[5]

When the ratifying conventions in Massachusetts and New Hampshire voted to approve the federal Constitution, they each requested that a similar provision be included in a federal Bill of Rights. Both states proposed the same language: "That no person

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5. The New Hampshire Constitution provided: "No person can in any case be subjected to law martial, or to any pains, or penalties, by virtue of that law, except those employed in the army or navy, and except the militia in actual service, but by authority of the legislature." N.H. Const. of June 2, 1784, art. XXXIV, *reprinted in* 4 *Federal and State Constitutions*, at 2453, 2457. It also provided: "Nor shall the legislature make any law that shall subject any person to a capital punishment, excepting for the government of the army and navy, and the militia in actual service, without trial by jury." N.H. Const. of June 2, 1784, art. XVI, *reprinted in* 4 *Federal and State Constitutions*, at 2455. The Maryland Declaration of Rights similarly provided: "That no person, except regular soldiers, mariners, and marines in the service of this State, or militia when in actual service, ought in any case to be subject to or punishable by martial law." Md. Declaration of Rights of Nov. 11, 1776, art. XXIX, *reprinted in* 3 *Federal and State Constitutions*, at 1686, 1689.

shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces." 1 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787* at 323 (J. Elliot ed., 1827–1830) (Massachusetts); *id.* at 326 (New Hampshire).

The Fifth Amendment incorporates many of these same words. In drafting the Fifth Amendment, Congress pointedly and similarly decided not to qualify the exception for land and naval forces with an "actual service" limitation. Instead, Congress placed that restriction only on the government and regulation of the "Militia." Given the importance of the issue, this distinction must have been intentional and would have been seen as such. Against this background, and consistent with the syntax of the Fifth Amendment, I conclude that those who framed the Fifth Amendment must have intended, those who voted to ratify must have understood, and members of the public would have construed the "actual service" limitation to apply only to members of the "Militia" and not to members of federal land and naval forces.

III. Conclusion

As explained above, our decision in *Overton* has already answered the specified question. We should not overturn Overton in this case because Appellant has not shown that it conflicts with the original

meaning of the Constitution.[6] I concur with the Court's opinion.

6. The United States District Court for the District of Columbia recently reached a different conclusion in *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322, 324 (D.D.C. 2020). The thoughtful opinion of the learned district court, in my view, also does not demonstrate that our decision in *Overton* was incorrect as an original matter.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee / Cross-Appellant

v.

Stephen A. Begani,
Appellant / Cross-Appellee

Nos. 20-0217 & 20-0327
Crim. App. No. 201800082

ORDER

On consideration of the motion to file an out-of-time petition for reconsideration and the petition for reconsideration, it is, by this Court, this 8th day of December, 2020,

ORDERED:

That said motion to file an out-of-time petition for reconsideration is granted, and

The petition for reconsideration is granted on the following issue:

> WHETHER FLEET RESERVISTS HAVE A SUFFICIENT CURRENT CONNECTION TO THE MILITARY FOR CONGRESS TO SUBJECT THEM TO CONSTANT UCMJ JURISDICTION.

Briefs will be filed under Rule 25.

For the Court,*

/s/ Joseph R. Perlak
Clerk of the Court

* Judge Sparks is recused and did not participate.

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee / Cross-Appellant

v.

Stephen A. Begani,
Appellant / Cross-Appellee

No. 20-0327/NA
Crim. App. No. 201800082

DOCKETING NOTICE AND ORDER

Notice is given that a certificate for review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals was filed under Rule 22 on this 23rd day of July, 2020, on the following issue:

> WHETHER APPELLANT WAIVED OR FORFEITED THE RIGHT TO ASSERT THAT HIS COURT-MARTIAL VIOLATED HIS RIGHT TO EQUAL PROTECTION.

It is ordered that this case is hereby consolidated with *United States v. Begani*, Docket No. 20-0217/NA.

Appellant/Cross-Appellee shall file a combined brief on the granted and certified issues on or before August 24, 2020. The briefing schedule under Rule 19(b)(3) shall apply.

Briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES
WASHINGTON, D.C.

United States,
Appellee

v.

Stephen A. Begani,
Appellant

No. 20-0217/NA
Crim. App. No. 201800082

ORDER GRANTING REVIEW

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is, by this Court, this 25th day of June, 2020,

ORDERED:

That said petition is hereby granted on the following issue:

WHETHER ARTICLE 2, UCMJ, VIOLATES APPELLANT'S RIGHT TO EQUAL PROTECTION WHERE IT SUBJECTS THE CONDUCT OF ALL FLEET RESERVISTS TO CONSTANT UCMJ JURISDICTION, BUT DOES NOT SUBJECT RETIRED RESERVISTS TO SUCH JURISDICTION.

Briefs will be filed under Rule 25.

For the Court,

/s/ Joseph R. Perlak
Clerk of the Court

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

Before THE COURT EN BANC

UNITED STATES,
Appellee

v.

Stephen A. BEGANI
Chief Petty Officer (E-7)
U.S. Navy (Retired),
Appellant

No. 201800082

Argued (Panel): 29 March 2019[1]
Reargued (En Banc): 20 November 2019
Decided: 24 January 2020

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Captain Stephen C. Reyes, JAGC, USN. Sentence adjudged 1 December 2017 by a general court-martial convened at Fleet Activities Yokosuka, Japan, consisting of a military judge sitting alone. Sentence approved by the convening authority: confinement for 18 months and a bad-conduct discharge.

Judge STEPHENS announced the judgment of the Court and delivered an opinion in which Senior Judge TANG joined. Judge GASTON filed a separate opinion, concurring in part and concurring in the

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1. We heard the panel oral argument in this case at Pennsylvania State University Law School, State College, Pennsylvania.

result, in which Senior Judge KING joined. Chief Judge CRISFIELD filed a separate dissenting opinion, in which Senior Judge HITESMAN and Judge LAWRENCE joined.

PUBLISHED OPINION OF THE COURT

STEPHENS, Judge:

Appellant was convicted, pursuant to his pleas, of one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child, in violation of Article 80, Uniform Code of Military Justice (UCMJ).[2] The convening authority approved the adjudged period of confinement and, pursuant to a pretrial agreement, commuted the adjudged dishonorable discharge to a bad-conduct discharge.

At the time he committed the offenses in Japan, Appellant was no longer serving in the Regular component of the United States Navy, but had transferred to inactive status in the Fleet Reserve. He asserts five assignments of error (AOEs), which we renumber as follows: (1) as a member of the Fleet Reserve, he is no longer a member of the Armed Forces and therefore cannot constitutionally be subjected to trial by court-martial under the UCMJ; (2) that Appellant's Fifth Amendment Due Process right to equal protection of the laws was violated because Article 2, UCMJ, subjects members of the Fleet Reserve and retirees from Regular components to court-martial jurisdiction, but not retirees of Reserve components; (3) he did not receive adequate notice

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2. 10 U.S.C. § 880 (2012).

under Article 137, UCMJ, or other authority, that he was subject to trial by court-martial for misconduct committed in a foreign country; (4) as a member of the Fleet Reserve, he cannot be punitively discharged from the service; and (5) as a member of the Fleet Reserve, he cannot be subjected to court-martial jurisdiction without first being recalled to active duty.[3]

In an opinion published on 31 July 2019, a panel of this Court found merit in Appellant's second AOE, concluded that the court-martial lacked jurisdiction over Appellant due to an equal protection violation, and dismissed the approved findings and sentence. We subsequently granted the Government's request for en banc consideration and withdrew the earlier panel decision. We now find no prejudicial error and affirm.

I. BACKGROUND

After 24 years of active duty service, and numerous voluntary reenlistments, Appellant elected to transfer to the Fleet Reserve.[4] He was honorably discharged from active duty and started a new phase of his association with the "land and naval Forces"[5] of our Nation. In short, for all intents and purposes, he retired. In addition to receiving "retainer pay," base access, and other privileges accorded to his status as

3. The final AOE is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

4. 10 U.S.C. § 6330(b). In 2018, Congress redesignated § 6330 as 10 U.S.C. § 8330, Pub. L. No. 115-232, §§ 807(b)(15), 809(a), 132 Stat. 1836, 1840 (2018). We will hereinafter refer to relevant portions of Title 10, Part II by their redesignated sections.

5. U.S. Const., Article I, § 8, cl 14.

a member of the Fleet Reserve, he remained subject to the UCMJ under Article 2(a)(6).

After Appellant retired, he remained near his final duty station, Marine Corps Air Station (MCAS) Iwakuni, Japan, and worked as a government contractor. Within a month, he exchanged sexually-charged messages over the internet with someone he believed to be a 15-year-old girl named "Mandy," but who was actually an undercover Naval Criminal Investigative Service (NCIS) special agent. When he arrived at a residence onboard MCAS Iwakuni, instead of meeting with "Mandy" for sexual activities, NCIS special agents apprehended him.

The Commander, U.S. Naval Forces Japan, sought approval from the Secretary of the Navy to prosecute Appellant at a court-martial, as opposed to seeking prosecution in U.S. District Court under the Military Extraterritorial Jurisdiction Act (MEJA).[6] Because Appellant was still subject to the UCMJ, and therefore ineligible for prosecution under MEJA,[7] the Secretary authorized the Commander to prosecute him at court-martial.

After Appellant unconditionally waived his right to a preliminary hearing under Article 32, UCMJ, he entered into a pretrial agreement (PTA). In his PTA, he waived his right to trial by members and agreed to plead guilty and be sentenced by a military judge. He also waived all waivable motions except for one. He argued he could not lawfully receive a punitive discharge because he was a member of the Fleet Reserve. The trial court denied that motion.

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6. 18 U.S.C. § 3261.

7. *See* 18 U.S.C. § 3261(d).

II. DISCUSSION

Congress has the sole authority under the Constitution to make regulations for the land and naval Forces. Implicit in this authority is the power to determine who is subject to court-martial jurisdiction, whether by virtue of membership in the land and naval Forces or some other circumstance that enhances the orderly operation of the military. Court-martial jurisdiction, based on the text of the Fifth Amendment, necessarily deprives an individual of the fundamental right to a grand jury. Court-martial jurisdiction also deprives an individual of the fundamental Sixth Amendment right to a civilian jury trial. Congress created three different groups of military retirees, but currently subjects only two of them to continuous court-martial jurisdiction. Congress considers these groups different for purposes of the overall operation of the land and naval Forces and we owe great deference to its statutory scheme in this area in recognizing Appellant is subject to the UCMJ as a member of the Fleet Reserve.

In considering Appellant's equal protection argument, we find that members of the Fleet Reserve are not similarly situated with retirees from the Reserve Components. Even if they were, Congress has the constitutional authority to subject one, but not the other, to court-martial jurisdiction.

A. Court-Martial Jurisdiction over Members of the Fleet Reserve

1. Congressional authority over the land and naval Forces

It is unquestioned that Congress has the authority to "make Rules for the Government and Regulation of

the land and naval Forces."[8] According to Justice Story, this power is "a natural incident"[9] to Congress' constitutional authority to "declare war,"[10] to "raise and support Armies,"[11] to "provide and maintain a Navy,"[12] and to provide for "calling forth"[13] and "organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States."[14] The land and naval Forces clause was unremarkable and taken almost directly from the Articles of Confederation.[15]

It is also unquestioned that Soldiers, Sailors, and other Service Members do not possess the same constitutional rights at court-martial that they would in civilian court. This reflects an understanding of the necessity for military discipline—which Washington once called "the soul of an Army"[16]—to be elevated

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8. U.S. CONST. art. I, § 8, cl. 14.

9. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 418 (Ronald D. Rotunda, John E. Novak, Carolina Academic Press 1987) (1833).

10. U.S. CONST. art. I, § 8, cl. 11.

11. U.S. CONST. art. I, § 8, cl. 12.

12. U.S. CONST. art. I, § 8, cl. 13.

13. U.S. CONST. art. I, § 8, cl. 15.

14. U.S. CONST. art. I, § 8, cl. 16.

15. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 4. "The united states, in congress assembled, shall also have the sole and exclusive right and power of...making rules for the government and regulation of the said land and naval forces, and directing their operations."

16. George Washington, Letter of Instructions to the Captains of the Virginia Regiments (July 29, 1759), *in* ROBERT A. NOWLAN, THE AMERICAN PRESIDENTS, WASHINGTON TO TYLER 69 (2012).

over certain fundamental constitutional rights. And this is explicitly recognized in the Fifth Amendment grand jury right for those answering for "a capital, or otherwise infamous crime ... except in cases arising in the land or naval forces ... [.]"[17] The very nature of military service means an abrogation of certain rights accorded to other persons.

Commensurate with this service concept, the preamble to the Manual for Courts-Martial (MCM) has long stated that "[t]he purpose of military law is to promote justice, to assist in maintaining good order and discipline, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[18] Over time, the modern court-martial system statutorily enacted in 1950 has expanded. For a time, it was focused on expeditiously adjudicating only service-related crimes, leaving to civilian courts the task of adjudicating non-service-related crimes.[19] At present, both service-related crimes and non-service-related crimes may be prosecuted at courts-martial.[20] Today, the military justice system features many of

17. U.S. CONST. amend. V.

18. MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2019 ed.), Part I, ¶ 3. The Preamble first appears in the MCM in the 1984 edition.

19. *See O'Callahan v. Parker*, 395 U.S. 258 (1969) (courts-martial lack jurisdiction to try service members for non-military offenses lacking a service connection).

20. *Solorio* v. *United States*, 483 U.S. 435 (1987) (abandoning the "service-related" test from *O'Callahan*, Court held appellant's active duty status sufficient for court-martial jurisdiction in alleged crimes against civilians).

the same protections found in civilian justice systems.[21]

The question before us now is, which members of the "land and naval Forces" can be subject to the UCMJ?

2. The statutory scheme of Article 2, UCMJ

At first blush, Article 2 has an odd assortment of characters who are subject to the UCMJ. Generally speaking, Article 2 includes anyone actively serving in uniform, Service Academy students, new enlistees, paid volunteers performing military duties, military prisoners, enemy prisoners of war, and certain persons assigned to serve with the military, or accompanying the military in combat or outside the United States or its territories. The list includes some, but not all, military retirees. It also includes retired Reservists who are receiving hospitalization from an armed force. The common thread in Article 2 is to include those classes of persons Congress has determined it needs to maintain control over for the orderly conduct of the land and naval Forces.

Article 2 has an on-again-off-again approach to Reservists.[22] While they are traveling to and from

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21. *Ortiz v. United States*, 138 S. Ct. 2165, 2170 (2018) (describing military justice system of trial and appellate courts as "integrated 'court-martial' system that closely resembles civilian structures of justice").

22. Prior to implementation of the UCMJ, retirees of the Reserve Component of the Navy were on the same retired list as the retirees of the Regular Component. The Navy ceded jurisdiction over its Reserve Component retirees to mirror the Army's practice of not subjecting its Reserve Component retirees to jurisdiction. *See Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. (1949) [hereinafter *UCMJ Hearing*],

inactive-duty training, during those training periods, and in any intervals for consecutive days of training periods, they are subject to the UCMJ. When the travel from the inactive-duty training ends, so does the Article 2 jurisdiction. For typical Reservist careers, this is a regular feature of their lives starting with entry into service and terminating with discharge from Reserve service or retirement from the Reserve component. Reservists who retire typically will not receive any retirement pay until age 60.[23] Absent being hospitalized in a military facility, in neither the "gray zone" between Reservists' retirement and age 60, nor when they actually begin receiving retirement pay, will they ever be subject to the UCMJ.[24]

This was not always the case with Reservists. Before 1950, the Navy, but not the Army, maintained jurisdiction over its Reserve retirees. When Congress enacted the UCMJ, it understood this difference and expressly understood the Navy recommended relinquishing jurisdiction over its Reserve retirees. It also expressly understood it was maintaining jurisdiction over its Regular retirees but not its Reserve retirees (except those receiving treatment in military hospitals). Since then, Congress has amended and reauthorized Article 2 well over a dozen

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reprinted in William K. Suter, *Index and Legislative History: Uniform Code of Military Justice* 868-69, 1261-62 (William S Hein & Co. 2000); *see also* H.R. Rep. No. 81-491, at 10 (1949); S. Rep. No. 81-486, at 7 (1949), *reprinted in* SUTER, supra.1261 (William S Hein & Co. 2000) (1950) at 868, 1261. *See also* H.R. Rep. No. 81-491, at 10 (1949); S. Rep. No. 81-486, at 7 (1949) *reprinted in* Suter.

23. 10 U.S.C. § 12731(e).

24. Article 2(a)(5), UCMJ.

times.[25] It even amended Article 2 in 2016 so that Reservists would be subject to the Code traveling to and from inactive-duty training.[26] Throughout these myriad changes, Congress has left untouched the jurisdictional difference between Reservist retirees and active duty retirees.

Article 2 recognizes different types of active duty retirees. It is "common knowledge in the military community"[27] that active duty service members may elect to "retire" after 20 years of service. The Navy and Marine Corps have a separate group of enlisted Sailors and Marines who have more than 20, but less than 30, years of service. With the clarity that is the hallmark of defense bureaucracy, these groups of "retirees" are placed into what is known as the Fleet Reserve, to which Appellant belongs, and the Fleet Marine Corps Reserve, though neither has anything to do with the Reserve components.[28] Members of these groups transfer to the Navy and Marine Corps retired list after reaching 30 years of combined active duty service and Fleet Reserve or Fleet Marine Corps Reserve membership. The Army and Air Force have no such comparable "Reserve" pool of active duty enlisted retirees between 20 and 30 years of service. All active duty Navy and Marine officers are placed directly onto their Services' retired lists when they retire, along with their retired enlisted counterparts

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25. Congress amended Article 2 in 1959, 1960, 1962, 1966, 1979, 1980, 1982, 1983, 1986, 1988, 1996, 2006, 2009, 2013, and in 2016. *See* 10 U.S.C. § 802 (2016).

26. *Compare* 10 U.S.C. § 802(a)(3) (2013) *with* 10 U.S.C. § 802(a)(3) (2016).

27. *United States v. Stargell*, 49 M.J. 92, 94 (C.A.A.F. 1998).

28. Article 2(a)(6), UCMJ.

with 30 years of service. All active duty retirees who are "entitled to pay" are subject to the UCMJ.[29]

3. Recalling active duty and Reserve retirees to service

Congress established essentially three different groups of retirees of the land and naval Forces. The Regular component retirees; the members of the Fleet Reserve and Fleet Marine Corps Reserve; and the retirees of the Reserve components. Commensurate with these groups' different treatment under Article 2, Congress developed different mechanisms, which have different attendant effects, for both paying and recalling each of them in a time of war or national emergency.

a. The Fleet Reserve

The Fleet Reserve (and its Marine Corps equivalent, the Fleet Marine Corps Reserve) was established under the Naval Reserve Act of 1938, to serve as a repository to which enlisted members could voluntarily be transferred upon retirement from active duty until they completed 30 years of service.[30] The Fleet Reserve was specifically designed to serve as a trained body of experienced naval Service Members who could be recalled to active duty when needed.[31] Consistent with this underlying purpose, members of the Fleet Reserve are subject to recall to active duty by the Secretary of the Navy "at any

29. Article 2(a)(4), UCMJ.

30. Pub. L. No. 75-732, 52 Stat. 1175 (1938).

31. *Murphy v. United States*, 165 Ct. Cl. 156, 160 (Ct. Cl. Mar. 13, 1964) (citing *United States ex rel. Pasela v. Fenno*, 167 F.2d 593, 595 (2d Cir. 1948)), *cert. denied*, 379 U.S. 922 (1964); *Abad v. United States*, 144 F. Supp. 951 (Ct. Cl. 1956).

time."[32] To that end, they are required to "[m]aintain readiness for active service in event of war or national emergency" and to keep Navy authorities apprised of their location and "any change in health that might prevent service in time of war"; remain "subject at all times to laws, regulations, and orders governing [the] Armed Forces"; and even in peacetime can be required to perform up to two months of active service every four years.[33] In exchange for remaining ready for any rapid recall, they receive a regular salary called "retainer pay,"[34] which at least one State court has viewed aspayment for current, not past, services rendered.[35]

b. Retired members of the Regular (active duty) components

Once members of the Fleet Reserve have reached 30 years of service, they may transfer to the Navy's retired list and join the ranks of retired members of Regular (active duty) components.[36] Like members of the Fleet Reserve, these retirees remain subject to being recalled "at any time" to active duty by the Secretary of the relevant military department.[37] In exchange, they receive a regular salary in the form of retirement pay.[38] While the Supreme Court has

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32. 10 U.S.C. § 688.

33. Naval Military Personnel Manual, Art. 1830-040 (Ch-38, 19 December 2011); 10 U.S.C. § 8333.

34. 10 U.S.C. § 8330(c).

35. *See Sprott v. Sprott*, 576 S.W.2d 653 (Tx. Civ. App. Beaumont 1978).

36. 10 U.S.C. § 8326(a).

37. 10 U.S.C. § 688.

38. 10 U.S.C. § 8333.

viewed, for tax purposes, this salary as deferred pay for past services,[39] the salary such retirees receive has generally been viewed not as a mere pension but as "a means devised by Congress to assure their availability and preparedness for future contingencies."[40]

c. Retired members of Reserve components

Members of Reserve components may retire once they meet the time in service and other eligibility requirements.[41] Even when eligible to retire, however, reservists typically are not entitled to retirement pay until they reach age 60.[42] In the interim, they may request to be transferred to inactive status, during which time they are not required to participate in any training or other program connecting them to their Reserve components.[43] Once in such an inactive or retired status, reservists may not be ordered to active duty unless, "[i]n time of war or of national emergency declared by Congress, or when otherwise authorized by law," the Secretary of the military department, with the approval of the Secretary of Defense, "determines that there are not enough qualified Reserves in an active status ... who are readily

39. *Barker v. Kansas*, 503 U.S. 594, 605 (1992).

40. *United States v. Hooper*, 9 U.S.C.M.A. 637, 645 (C.M.A. 1958); *see also United States v. Tyler*, 105 U.S. 244, 244-46 (1882); *Hooper v. United States*, 326 F.2d 982, 987 (Ct. Cl. 1964) (finding "the salary [the active duty retiree] received was not solely recompense for past services"); *McCarty v. McCarty*, 453 U.S. 210, 221-22 (1981) (finding "military retired pay differs in some significant respects from a typical pension or retirement plan").

41. 10 U.S.C. § 12731.

42. 10 U.S.C. § 12731(e).

43. 10 U.S.C. § 12735.

available."[44] Otherwise, between the time they retire and the time they become eligible to start receiving retirement pay, they receive no pay and have very little ongoing connection with the Armed Forces.

4. Judicial deference to Congress

This collection of statutes and Department of Defense instructions portrays Congress' (and the Executive Branch's) clear view that the three groups of retirees are separate and distinct when considered in the context of national military policy—a determination which the Constitution plainly authorizes Congress to make (and the Executive Branch to implement). It is well-settled that "judicial deference" to Congress is "at its apogee" when Congress legislates under its authority to raise and support armies.[45] Judicial deference is not blind, nor is it unlimited, and cannot be used to vouchsafe actions that exceed the Constitution's limitations imposed on Congress. In the area of military affairs, Congress remains subject to the limitations of the Due Process Clause.

For most of our Nation's history, the Supreme Court took a "hands-off" approach to courts-martial. One early case, *Martin v. Mott*,[46] arose from Jacob Mott's refusal to muster when President James Madison called forth the militia during the War of 1812. Mott disagreed with the President that there was a danger of imminent invasion. He was court-martialed for his refusal. Justice Story, writing for the Court, declined to conduct any substantive review of the President's decision. The Court did not just merely

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44. 10 U.S.C. § 12301(a).

45. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

46. 25 U.S. (12 Wheat.) 19 (1827).

invoke "prompt and unhesitating obedience to orders"[47] between a militiaman and his commander, but considered the consequences of individual, and judicial, second-guessing of the President and Congress when enacting military policy.

Soon after Congress enacted the UCMJ in 1950, the Supreme Court in *United States ex rel. Toth v. Quarles*[48] held that an honorably discharged Airman could not be court-martialed, despite Article 2's assertion of jurisdiction over him, for a murder he committed in Korea about 10 weeks before his discharge. The UCMJ allowed for prosecution at court-martial of anyone who had been discharged, but was subject to the Code when they committed an offense punishable by confinement of five years or more, and who could not be tried in any State or Federal court for that offense. The Court reasoned that the fully discharged (not retired) Toth was no longer "in" the land and naval Forces for purposes of subjecting him to court-martial jurisdiction pursuant to Congress' constitutional powers.

Two years after *Toth*, the Court reached a similar conclusion in *Reid v. Covert*.[49] The Court held that Article 2(a)(11)'s grant of jurisdiction over persons "accompanying the armed forces without the continental limits of the United States" and its territories could not constitutionally be applied to the wife of an Air Force sergeant charged with murdering her husband while stationed in England. As in *Toth*, the Court found the jurisdictional provision constitutionally infirm because "civilian wives,

47. *Id*. at 30.

48. 350 U.S. 11 (1955).

49. 354 U.S. 1 (1957).

children, and other dependents" are not members of the "land and naval Forces" subject to Congress' power to regulate. Appellant now asks us to compare him to the discharged Airman in *Toth* and consider him "wholly separated from the service."[50] We cannot.

As discussed above, Appellant is a member of the Fleet Reserve. This makes him, in Congress' view, a member of the land and naval Forces. He is subject to recall "almost at the scratch of"[51] the Secretary of the Navy's pen. And, however likely or unlikely our current national defense posture makes it, he may still be required to perform duties. There may be valid arguments as to whether or not Mr. Toth or Mrs. Covert could be subjected to the Code due to the potential for their actions to impact good order and discipline.[52] But the salient point in those cases is that they were simply not in any discernable way "in" the armed forces and could not fall under Congressional authority to regulate their behavior as such. We look just as much to Congress' explicit constitutional grant of authority for regulating the land and naval Forces when evaluating who is subject to the Code as to whether the person's actions could impact good order and discipline. It should not be lost in our analysis that there are other classes of people who are not "in" the armed forces, but who nevertheless fall under the ambit of Article 2 jurisdiction because Congress

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50. *Id*. at 85.

51. *United States v. Wheeler*, 10 U.S.C.M.A. 646, 655 (C.M.A. 1959).

52. Both cases had vigorous dissents. *Toth* was decided 6-3 with a lengthy dissent by Justice Reed and a brief one by Justice Minton. *Covert* was decided 6-2 with a dissent by Justice Clark, who joined the Court's opinion in *Toth*.

desires to regulate their behavior for the efficiency of the operation of the land and naval Forces.[53]

We decline Appellant's invitation to overrule our recent decision in *United States v. Dinger*, where we held that members of the Fleet Marine Corps Reserve are subject to the Code.[54] We also note the binding precedent of our superior court's similar holding in *United States v. Overton*, which reinforced decades of case precedent on this very issue.[55] We are satisfied that as a member of the Fleet Reserve, Appellant is a member of the land and naval Forces and that Congress has the authority to make him subject to the UCMJ under its constitutional power to regulate those Forces.

B. Equal Protection

We now turn to whether Congress violated Appellant's right to equal protection when it made him, along with other members of the Fleet Reserve, subject to the Code, but declined to do the same for retirees from the Reserve components. While the Fourteenth Amendment on its face prohibits only the States from "deny[ing] any person within its jurisdiction the equal protection of the laws,"[56] the Supreme Court has held its equal protection component applies to the Federal government via the

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53. Prisoners of war are subject to the Code under Article 2(a)(9) and (13). Under Article 2(a)(7), military prisoners, even after they receive their DD-214s (Certificate of Discharge from active duty), are subject to the Code if they are still in a military brig serving a sentence imposed by a court-martial.

54. 76 M.J. 552 (N.M. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018).

55. 24 M.J. 309 (C.M.A. 1987).

56. U.S. CONST. amend. XIV § 1.

Fifth Amendment Due Process Clause.[57] The Fifth Amendment, in pertinent part, states:

> No person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service, in time of War, or public danger ... nor be deprived of life, liberty, or property, without due process of law ... [.][58]

The text of the Fifth Amendment—the source for Appellant's alleged equal protection violation—reveals several features. First, the amendment treats "cases arising in the land and naval forces" as categorically separate and distinct from those tried in civilian courts concerning the fundamental right to a grand jury. Second, with respect to that right, it differentiates between the standing "land and naval forces" and the temporary "Militia." Finally, it declares that the right to a grand jury is excepted from the Militia only during times of actual service, time of war, or public danger.[59]

Taken together, this language reveals a design whereby the Constitution explicitly allows Congress, as the creator of all Federal tribunals and courts-martial, to withhold certain otherwise fundamental constitutional rights from those in the profession of arms, and for the circumstances of their service to be

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57. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

58. U.S. CONST. amend. V (emphasis added).

59. *Johnson v. Sayre*, 158 U.S. 109, 115 (1895) (holding the three modifying phrases apply only to the word, "Militia").

considered when so doing. As the Supreme Court long ago explained,

> [I]n pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service. Every one connected with these branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.[60]

While there is no question the right to a grand jury and the right to a trial by jury are fundamental constitutional rights, they are only fundamental to the extent (and to the persons to whom) the Constitution grants them in the first place.

This intentional design, found on the face of the Constitution, is of vital importance in this case for two reasons. First, it impacts how we view whether Appellant is indeed "similarly situated" with a retired Reservist. The law of equal protection leaves to the legislature the initial discretion to determine what is "different" and what is "the same," and also broad latitude to establish classifications depending on the nature of the issue, the competing public and private concerns it involves, and the practical limitations of addressing it.[61] Generally, these discretionary

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60. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

61. *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (under Fourteenth Amendment's Equal Protection clause, children living in Texas, but not legally admitted to the United States, could not be denied enrollment in public schools solely on the basis of their citizenship).

legislative decisions are valid and enforceable as long as the classification is drawn in a manner rationally related to a legitimate governmental objective.[62] As we shall see, the broad deference owed to Congress in the area of military affairs makes this an area we do not lightly second-guess.

Second, this constitutional design evidenced by the Fifth Amendment impacts how we view the fundamental nature of the rights involved, which is important because the equal protection component's general rule of deference only gives way when laws involve suspect classifications (which is not at issue here) or impinge on fundamental personal rights protected by the Constitution.[63] Laws burdening fundamental rights are subjected to strict scrutiny and will be sustained only if they are "necessary to promote a compelling governmental interest."[64] As the Supreme Court has found, however, the only fundamental right Appellant now claims he is being deprived of—the Sixth Amendment right of trial by jury—has the same constitutional breadth as the grand jury right.[65] Hence, it only applies under

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62. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (statute governing subsistence funds to qualifying individuals in certain hospitals, nursing homes, and other care facilities does not unfairly discriminate based on mental health but on whether institution receives Medicaid funds).

63. *See, e.g.*, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942).

64. *Dunn v. Blumstein*, 405 U.S. 330, 342 (1972) (emphasis in original) (citations and internal quotation marks omitted) (Tennessee durational residence laws for voting infringed on fundamental right) (citations omitted).

65. *Ex parte Milligan*, 71 U.S. at 123. ("[T]he framers of the Constitution, doubt-less, meant to limit the right of trial by jury,

circumstances in which the grand jury right would apply.

1. Similarly situated

We first take up whether members of the Fleet Reserve are similarly situated with retired members of Reserve components. In doing so, we take all relevant factors into consideration asking the basic question as to whether the subject classes are "materially identical."[66] While not a perfect scientific test, whether two groups are similarly situated has been described by various Federal Courts of Appeal as "identical or directly comparable in all material respects" or "prima facie identical" or even a more "colloquial" phrasing of "apples to apples."[67] We conclude that under any of these tests the two groups are not similarly situated.

While both are generally subject to recall, members of the Fleet Reserve are more so and with less process involved. It appears plain that Congress intended for Fleet Reservists to be among the first "retired" Service Members to be drawn from. No declaration of war or national emergency is required by Congress. No other legal precursors are required. The Secretary of the Navy can return Appellant, and any other members of the Fleet Reserve, to active duty with a mere signature.

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in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.").

66. *Kolbe v. Hogan*, 813 F.3d 160, 185 (4th Cir. 2016).

67. The Fourth Circuit in *Kolbe* cites, respectively, *LaBella Winnetka, Inc. v. Village of Winnetka*, 628 F.3d 937, 942 (7th Cir. 2010); *Grider v. City of Auburn, Ala.*, 618 F.3d 1240, 1264 (11th Cir. 2010); and *Barrington Cove Ltd. P'ship v. R.I. House. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001).

The stated purpose of the Fleet Reserve is to "provide an available source of experienced former members of the Regular Navy or Navy Reserve."[68] These members "could be organized without further training to fill billets requiring experienced personnel in the first stages of mobilization during an emergency or in time of war."[69] While this indicates that Navy Reservists could become members of the Fleet Reserve, it does not include retired Reservists as members in the Fleet Reserve.

Finally, we would be remiss if we did not consider the typical career path of each group in historical context. In this regard, we decline to follow Appellant's line of argument that *Toth* prohibits context—past or future—from being taken into consideration when assessing whether groups are similarly situated. While the Court in *Toth* declined to look at *Toth*'s past connections to the service, we think that is the wrong question to ask here. It made sense to do so in *Toth* because the argument that he very recently used to be in the Air Force was central for the government. The natural response from Toth, and adopted by the Court, was that his current, and not past, association was what mattered. And that would be true for someone who no longer had any association with the armed forces. Because Appellant still has a current, though decreased, association with the armed forces, the question of his past association is relevant

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68. DoD Fin Mgmt. Reg. Vol 7B, Ch 2, § 10201. The "or Navy Reserve" language indicates that someone affiliated with the Navy Reserve may somehow have enough qualifying service time to transfer to the Fleet Reserve. This does not mean that retired Navy and Marine Corps Reservists under 10 U.S.C. § 12731 are members of the Fleet Reserve or Fleet Marine Corps Reserve.

69. *Id.*

in a way which Toth's was not. Appellant's current continuing association is a direct result of his voluntary past associations. They are interwoven in a way that Toth's, with his clean break from the Air Force, were not. We are not compelled to blindly follow the reasoning in *Toth* on this particular issue.

Members of the Fleet Reserve, like Appellant, have typically been career active duty enlisted Sailors. That means they have been on continuous, salaried active military service for at least two decades, and subject to the UCMJ throughout that entire time. Their transfer to the Fleet Reserve is but an extension of this continuity, in terms of salary, readiness requirements, recallability, and jurisdiction.

Retired Reservists, by contrast, typically served on active duty only sporadically. Accordingly, they were only sporadically subjected to UCMJ jurisdiction. Their transfer into retirement further highlights this lack of continuity. Most end up in the so-called "gray zone" for several years until they reach age 60. During this time, they are not required to maintain any readiness, they are far less subject to any form of imminent recall, and they receive no pay. Practically the only thing that changes when they reach age 60 is that they start to receive pay, which is essentially an annuity for service they provided years before. And in order to receive that retired pay, the Reservists do not need to maintain any military status whatsoever, including being a member of the Retired Reserve.[70]

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70. *See* Department of Defense Financial Management Regulation 7000.14-R, Vol 7B, Ch 6. para. 0604, "Foreign Citizenship After Retirement." The dissent enlists the "obligations and benefits" of retired Reservists from the Navy's Military Personnel Manual (MILPERSMAN 1820-0303(7)) as evidence that retired Reservists are "very similar" to Regular

2. Deference to Congress regarding fundamental right to jury trial

Assuming that Appellant and Reserve component retirees are similar enough to require an equal protection analysis, we recognize the practical effect of jurisdiction on Appellant, or anyone within Article 2 jurisdiction for that matter, is a deprivation of certain fundamental rights. As we stated above, that is often the very nature of the profession of arms.

It is far from clear that we are compelled to review Article 2 under any heightened scrutiny. Other courts have merely applied a rational basis test in considering Congress' different treatment of Regular and Reserve retirees.

In 1963, the District Court for Washington, D.C. issued an opinion in *Taussig v. McNamara.*[71] Taussig,

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retirees. The retired Reservists are required to inform the Navy of their physical address, they are cautioned to show discretion in using their name and military rank to not appear to imply official DoD or DON endorsement, they and their families have eligibility for health insurance and health care services, etc. Some of the items in this list resemble the obligations for another group of Service Members—those in the Individual Ready Reserve (IRR). See BUPERSINST 1001.39F and Marine Corps Order 1235.1A. The IRR Service Members, "the primary force of trained individuals for replacement and augmentation in emergencies" are unquestionably not subject to the Code, even though Article 31(b), UCMJ, warnings may apply to them depending on the facts and circumstances of the questioning. *See United States v. Gilbreath*, 74 M.J. 11, 23-24, n. 4 (C.A.A.F. 2014). Congress chose not to make this group subject to the Code, either. Obligations and benefits—or taxation of income, see *Barker v. Kansas*, 503 U.S. 594 (1992)—should not drive analysis of whether Article 2 violates the Constitution's guarantee of equal protection.

71. *Taussig v. McNamara*, 219 F. Supp. 757 (D.D.C. 1963).

a retired Regular component Naval officer, sued the Federal government. He alleged various actions and policies were unconstitutionally interfering with his right to conduct certain business with the Federal government. He specifically alleged a violation of his right to follow his chosen profession as violations of his "liberty" and "property" rights within the Fifth Amendment where retirees of the Reserve components were not similarly prohibited. He also made a facial challenge to his being subject to the UCMJ under Article 2, where the Reserve component retirees were not. The District Court held that it was "plainly in the power of Congress to distinguish between the Regular and the Reserve retired officer"[72] when it came to selling to the service in which he held a retired status. The District Court explained:

> It is plainly for Congress to decide which categories of retired members of the Armed Forces should be subject to the Code. There is clearly a rational distinction between the careerist, who is subject to recall at any time during war or national emergency, see 10 U.S.C. § 6481 (applying to retired officers of the regular Navy and Marine Corps) and the reservist, who is subject to recall only as a second-line of manpower, see 10 U.S.C. § 672(a). In view of the repeated applications [Article 2] to regular retired officers ... this Court is in no position to say that the determination by Congress that retired reserve officers (unless hospitalized...) shall not be subject to the Code is anything but completely proper.[73]

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72. *Id*. at 761–62.

73. *Id*. at 762.

In 1964, Congress passed the Dual Compensation Act that required Regular component retirees to have reduced retired pay if they worked for the Federal government.[74] The Act made no such provision for Reserve component retirees. A group of retired Regular component officers sued the Federal government over the decrease in their retired pay arguing the Act violated the equal protection component of the Fifth Amendment's Due Process clause. The U.S. Court of Claims denied the officers' claim because it found a rational basis for the Act. One of the reasons was the differences between the offices held by the Regular and Reserve component retirees:

> A regular officer who has retired status remains a member of the regular armed services. A retired reserve officer's status is different—he can be ordered to active duty only in time of war or national emergency after all active reservists have been called. A retired regular officer, therefore, continues at all times to hold an office in the military—he is already a federal officeholder.[75]

Of course, both of these cases were based on "pure" equal protection claims and did not directly infringe on fundamental rights. They also involve officers and not the more similar comparison between the enlisted retirees in the Fleet Reserve, such as Appellant, and the enlisted retirees of the Reserve Component. But it still strikes us as odd that in one scenario, Congress would be free to legislate based on the differences between the two dissimilar groups and courts would

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74. 5 U.S.C. § 5532 (1966) (repealed 1999).

75. *Puglisi v. United States*, 215 Ct. Cl. 86, 97, 564 F.2d 403 (Ct. Cl. 1977).

be satisfied with some rational reason for Congressional action, but in the present scenario, we would not only find the groups suddenly similar, but would be compelled to apply strict scrutiny.

We also must keep in mind we are delving into "Congress' authority over national defense and military affairs, and perhaps no other area has the [Supreme] Court accorded Congress greater deference."[76] In *Rostker v. Goldberg*, the Court held that a military draft that excluded women on the basis of sex did not violate equal protection. In doing so, the Court focused significantly on Congress' constitutional authority to make such regulations for the armed forces. The Court eschewed a heightened scrutiny analysis, specifically the usual intermediate scrutiny test for sex-based differences. At that time, women were barred from combat roles. Because the draft was to provide combat troops, the registration of only men was "closely related" to Congress' purpose. The Court held that "the sexes are not similarly situated" for the purposes of the draft and the "Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality."[77]

We look to the Supreme Court for guidance in whether to formally apply strict scrutiny analysis or to generally defer to Congress in military matters. *Rostker*, and other cases concerning the military, arose in more pure equal protection categories, such as sex discrimination, rather than cases more focused on the fundamental rights aspect of the equal protection component of the Due Process clause. But

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76. *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981).

77. *Id.* at 79.

we believe the same sort of deference is due to Congress in military matters for equal protection challenges based on the deprivation of a fundamental right.

In *Frontiero v. Richardson*,[78] the Court invalidated regulations that awarded increased military benefits to married men, but not married women. Because these differences were based on sex, and "solely for the purpose of achieving administrative convenience"[79] the regulations were unable to withstand the Court's heightened scrutiny review. But then, just two years later, in *Schlesinger v. Ballard*,[80] the Court declined to apply any heightened scrutiny to Naval regulations that discriminated based on sex. Congress mandated involuntary separation for male Naval officers who failed to promote to Lieutenant Commander after nine years, but allowed female officers an additional four years. The Court eschewed a heightened scrutiny test not only because the disparate treatment of the men and women was not based on "archaic and overbroad generalizations"[81] but also because it was based on some operational need and concern of the Navy. The Court found the regulations to have "complete rationality."[82] The Court concluded that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. The

78. 411 U.S. 677 (1973).

79. *Id*. at 690 (emphasis in the original).

80. 419 U.S. 498 (1975).

81. *Id*. at 508.

82. *Id*. at 509 (emphasis added). Justice Brennan, the author of *Frontiero*, wrote a lengthy dissent arguing the Court should have applied "close judicial scrutiny." *Id*. at 511 (Brennan J., dissenting).

responsibility for determining how best our Armed Forces shall attend to that business rests with Congress, and with the President."[83]

As outlined above, Congress clearly sees Appellant and other members of the Fleet Reserve (and Fleet Marine Corps Reserve), retirees from the Regular component, and retirees from the Reserve component, as having meaningful differences in the context of the overall land and naval Forces. This expresses itself most clearly in recall procedures in the event of a major war. While we are currently in a post-Cold War era and have seen high operating tempo with the Global War on Terror, it is Congress' duty to be prepared for the kind of catastrophic military necessity that could threaten our Nation's very existence. This certainly qualifies as a significant and compelling governmental interest. It also appears that Congress, in giving effect to its overall national security structure, decided to only subject those to UCMJ jurisdiction, (and only under the necessary circumstances) that it believes are required for the efficient regulation of the land and naval Forces.

Whether subjecting Appellant and all other retirees, Regular or Reserve components, to the Code, has the same *de minimus* impact on good order and discipline is not the sole focus of our analysis. It is also not the sole way, or even the relevant way, Congress views these groups. If we were to find otherwise and conclude that equal protection compels Congress to subject either all retirees to the Code or none of them, we would arrive at absurd results.

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83. *Id*. at 510 (citing and quoting *Toth v. Quarles*, 350 U.S. 11 (1955)) (internal quotations omitted).

If all retirees were subject to the UCMJ, this would mean that Reservists would have spent their whole career only sporadically being subject to the Code during in-active duty training or some other active service, but in all other respects of daily life, being civilians. Then, upon retirement, these same Reservists—even in the "gray zone" before retirement pay commenced at age 60—would suddenly be continually subject to the UCMJ in a way they never were prior to retirement. It would be one thing if Congress could explain this to retired Reservists that it had some considered judgment, held hearings, or studied the issue. It would be quite another to just philosophically invoke "equal protection" as an explanation.

We reach an equally absurd result in not subjecting any retirees to the UCMJ. If Congress desired to recall a significant number of retirees to active duty for a war or other large-scale contingency (without amending Article 2 to make the Fleet Reserve, Fleet Marine Corps Reserve, and Regular Component retirees subject to the UCMJ the moment they received orders to return to service)[84] the

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84. The dissent believes this would be obviated by Article 2(a)(1)'s grant of jurisdiction over "other persons lawfully called or ordered into, or for duty in or for training in, the armed forces . . . ." This reading renders this portion of Article 2 to be surplusage. Congress need not rely on this subsection of Article 2 to recall the retired members of the Regular component and members of the Fleet Reserve and Fleet Marine Corps Reserve because it can rely on Article 2(a)(4) and 2(a)(6), respectively. Taking Article 2 as a whole, this means the Article 2(a)(1) language is not intended for Congress to have jurisdiction over a Regular component retiree who refuses orders to return to active service. The dissent's legislative (re)drafting by judiciary goes well beyond Chief Justice Marshall's famous maxim for the judicial department to merely "say what the law is." *Marbury v.*

government would have to prosecute any who refused to return to service in the Article III courts and not have the option of a more expedient court-martial. This would bring us back to the problems pointed out by Justice Story in *Mott*, where every individual (even those already "in" the armed forces) could challenge whether or not Congress', or the President's, recall was valid—and this would all be done in the civilian court system during a time of war or national emergency. Congress already has a tidy recall system for its different entities. Active Component retirees are already subject to the UCMJ and Reserve Component Retirees are subject to the Code once they get recall orders. Excluding all retirees, in the name of equal protection, would require Congress to amend Article 2 if it wished to preserve its recall scheme.

In closing on this matter, we note that in 1949, prior to enacting the UCMJ, Congress held extensive hearings. In particular, Congress heard testimony strongly advocating for the removal of all retirees from court-martial jurisdiction, not just the retirees of the Reserve components.[85] Some of the strongest

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Madison, 5 U.S. 137, 177 (1803) and, in context, violates a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988) (Scalia, J., plurality opinion).

85. Then-Colonel Melvin Maas, U.S. Marine Corps, (who later retired as a Major General in the Reserve Component and was a member of Congress for 16 years) testified to the House Armed Services Committee as President of the Marine Corps Reserve Association. He urged removal of jurisdiction over retired personnel. "Now I want to urge something on this committee that is perhaps revolutionary. This is the time to consider it, however. That is removing retired personnel from military control completely." When asked about "fleet Reserves and fleet Marine Corps Reserves," Colonel Maas replied, "Exactly the same principle. There is no reason why they should be

advocates came from, or on behalf of, professional officers who themselves could expect to be subject to the UCMJ in retirement. Congress heard, and rejected, their concerns. Since then, Congress has had 34 general elections. It has passed Goldwater-Nichols transforming many important aspects of the land and naval Forces. It has also updated the UCMJ many times, including a recent partial revision of Article 2—specifically concerning Reservists, no less[86]—and has

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restricted [subject to jurisdiction]. It is un-American." *See Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. On Armed Services*, 81st Cong. (1949), *reprinted in* William K. Suter, *Index and Legislative History: Uniform Code of Military Justice* 706-07 (William S. Hein & Co. 2000) (1950). Col Maas expressed the same sentiment to the Senate Armed Services Committee. *See Hearings on S. 857 and H.R. 4080* at 99-101. He was joined by Colonel John P. Oliver, Judge Advocate General Reserve, in arguing against jurisdiction over retirees. *See Hearings on S. 857 and H.R. 4080* at 147. Years later, the Army commissioned a study of the new UCMJ and made recommendations to Congress. "The Powell Report," named for Lieutenant General Herbert B. Powell, USA, Deputy Commanding General, United States Continental Army Command for Reserve Affairs, and head of "The Committee on the Uniform Code of Military Justice Good Order and Discipline in the Army" was apparently provided to Congress. *See* Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation and Future*, 55 MIL. L. REV. 92 n.284 (1972). It strongly argued for removing jurisdiction over retirees. Powell Report at 7, 8, 175, 179. The Legislative History is merely remarked upon to show Congress was aware of the opinion from individual Service Members and the Services that retirees should not be subject to the UCMJ and not to "interpret" Article 2's meaning. *See Conroy v. Aniskoff*, 507 U.S. 511 (1993) (Scalia, J., concurring) ("We are governed by laws, not by the intentions of the legislators.").

86. *Supra*, n. 25.

continued to reject the input it received almost 70 years ago.

Now this Court is faced with a novel interpretation of the interplay of Article 2, UCMJ, and Fifth Amendment equal protection. This court is now asked to "find" in the Constitution the same favored policy of other professional military officers which was rejected by Congress, and continually rejected since. This would be a remarkable act of judicial activism. It is possible not subjecting Regular component retirees or members of the Fleet Reserve and Fleet Marine Corps Reserve, or both, to court-martial jurisdiction is the best policy. That is for Congress to decide.

C. Appellant Waived Any Lack of Notice: He Was Subject to Trial by Court-Martial Under the UCMJ for Misconduct Committed in a Foreign Country

For the first time on appeal, Appellant argues the Government violated his Fifth Amendment Due Process right to fair notice when it failed to inform him under Article 137, UCMJ, or otherwise, that he was still subject to the Code while in the Fleet Reserve for misconduct committed in a foreign country. We hold Appellant waived any review of this issue by not raising it with the court below.

Waiver is the "intentional relinquishment or abandonment of a known right."[87] A plea of guilty generally waives any nonjurisdictional errors that occurred in the earlier stages of the proceedings.[88]

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87. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations omitted).

88. *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014) (citations omitted).

Appellant's claim to lack of notice prior to entering his guilty pleas does not amount to a claim of lack of jurisdiction over the offenses or a challenge to the voluntary and intelligent character of his pleas. We find these voluntary actions waived any due process violation or other issue related to his claimed lack of notice. Because Appellant waived this issue, there is no error for this Court to review on appeal.[89]

D. Punitive Discharge

Appellant asserts that under 10 U.S.C. § 6332, Fleet Reserve members cannot be punitively discharged from the service. This Court considered and rejected such a claim in *United States v. Dinger*, where, after examining the statute in its historical and statutory context, we

> decline[d] to override long-standing, military justice-specific provisions in the [Manual for Courts-Martial] subjecting those in a retired status to courts-martial and broadly authorizing those courts-martial to adjudge a punitive discharge. We ma[de] this decision particularly in light of the fact that Congress expressly exempted other classes of personnel from dismissal or dishonorable discharge within the UCMJ, *but not retirees*.[90]

Nor do we find the application of our holding in *Dinger*, decided prior to Appellant's trial, violates his

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89. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

90. 76 M.J. 552, 559 (N.M. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018) (citations omitted) (emphasis in original); *Dinger*, 76 M.J. at 559 (citations omitted) (emphasis in the original).

rights against ex post facto laws.[91] It is clear from Appellant's motion made during trial that he was on notice that he could receive a punitive discharge. This Court's decision in *Dinger*, recognizing the "long-standing" practice of subjecting retirees subject to the Code to the possibility of a punitive discharge, was issued before Appellant's punitive discharge was adjudged.[92] Even though our superior court's opinion in the same case was issued after Appellant's trial, that opinion affirmed this Court's holding that in 10 U.S.C. § 6332 "Congress did not prohibit a court-martial from sentencing a retiree to a punitive discharge or any other available punishment established by the President."[93]

We find this AOE to be without merit.

E. Recall to Active Duty as a Jurisdictional Prerequisite

Finally, Appellant asserts that Fleet Reserve members must first be recalled to active duty to be subjected to trial by court-martial. But Appellant's argument does not comport with the plain language of Article 2, UCMJ. It would render Article 2(a)(6) meaningless surplusage, and has been squarely rejected by both this Court and our superior court.[94]

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91. *See Bouie v. Columbia*, 378 U.S. 347, 353 (1964) (finding that judicial rulings operating to expand criminal laws may violate the Ex Post Facto Clause).

92. Appellant's punitive discharge was adjudged on 1 December 2017. This Court's opinion in *Dinger* was issued on 28 March 2017.

93. *United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018).

94. *United States v. Morris*, 54 M.J. 898, 900 (N.M. Ct. Crim. App. 2001) ("If a member of the Fleet Marine Corps Reserve needed to be ordered to active duty to be subject to the

We find this AOE to be without merit.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined the approved findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant's substantial rights occurred. Arts. 59 and 66, UCMJ. The findings and sentence as approved by the convening authority are AFFIRMED.

Senior Judge TANG concurs.

GASTON, Judge, with whom KING, Senior Judge, joins (concurring in part and in the result):

I agree with the principal opinion's treatment of Appellant's first, third, fourth, and fifth Assignments of Error (AOEs).

With respect to Appellant's equal protection claim, I believe he waived this claim when, after stipulating to his status as a member of the Fleet Reserve at the time of the offenses and at trial, he voluntarily pleaded guilty before a military judge, waived all waivable motions, and specifically conditioned his pleas only on preserving his asserted AOE that a member of the Fleet Reserve cannot be awarded a punitive discharge (which was litigated before the trial court and denied). Under these circumstances, Appellant's failure to raise his equal protection claim before the trial court was an "intentional relinquishment or abandonment of a known right." *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009) (citations and internal quotation marks

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jurisdiction of a court-martial, there would be no need to separately list members of the Fleet Marine Corps Reserve as being persons subject to the UCMJ.").

omitted). Since the equal protection issue was waived, there is no error for this Court to review on appeal. *United States v. Ahern*, 76 M.J. 194, 197 (C.A.A.F. 2017).

While questions of jurisdiction are never waived, a plea of guilty generally waives any non-jurisdictional errors in the proceedings. RULE FOR COURTS-MARTIAL (R.C.M.) 905(e), 907(b), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.); *United States v. Lee*, 73 M.J. 166, 170 (C.A.A.F. 2014) (citations omitted). There are some limitations to the waiver doctrine, but as our superior court has explained,

> those limits are narrow and relate to situations in which, on its face, the prosecution may not constitutionally be maintained. Such limits do not arise where an appellant merely complains of antecedent constitutional violations or a deprivation of constitutional rights that occurred prior to the entry of the guilty plea, rather they apply where on the face of the record the court had no power to enter the conviction or impose the sentence.

Id. at 170 (citations and internal quotations marks omitted) (emphasis added). There is no colorable claim that either on its face the prosecution could not constitutionally be maintained against Appellant or that on the face of the record the court-martial had no power to enter the conviction or impose the sentence. To the contrary, under clear case precedent from both this Court and our superior court, a prosecution at court-martial may constitutionally be maintained against a member of the Fleet Reserve, and nothing on the face of the record suggests the court-martial lacked the power to accept Appellant's pleas, enter his convictions, or impose his sentence. *See United States*

v. Overton, 24 M.J. 309, 311 (C.M.A. 1987) (noting "[t]his type of exercise of court-martial jurisdiction [over a member of the Fleet Marine Corps Reserve] has been continually recognized as constitutional") (citations omitted); *United States v. Dinger*, 76 M.J. 552 (N.M. Ct. Crim. App. 2017) (upholding a court-martial's power to both try and punitively discharge a member of the Fleet Marine Corps Reserve), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492, (2018).[1]

As Appellant's equal protection claim leaves untouched this binding case precedent grounding his court-martial's jurisdiction over him as a member of the Fleet Reserve, his equal protection claim is fundamentally not about a lack of jurisdiction, but about challenging Article 2(a)(6), UCMJ, as "a deprivation of constitutional rights that occurred prior to the entry of [his] guilty plea." *Lee*, 73 M.J. at 170. Appellant's opening brief asserts that his court-martial deprived him variously of his Sixth Amendment right to trial by jury, First Amendment

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1. *See also Solorio v. United States*, 483 U.S. 435, 438 (1987) ("In an unbroken line of decisions from 1866 to 1960, this Court interpreted the Constitution as conditioning the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused.") (internal quotation marks and citations omitted); *United States v. Tyler*, 105 U.S. 244, 246 (1882) (finding, in regard to military retirees, "[i]t is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service").

freedoms, and constitutional right to protection against unequal punishments. These claims simply re-frame old challenges to the military justice system that the Supreme Court has long rejected based on the text and design of the Constitution and "the differences between the military and civilian communities [that] result from the fact that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'" *Parker v. Levy*, 417 U.S. 733, 743 (1974) (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)) (emphasis added); *see also Ex parte Milligan*, 71 U.S. 2, 123 (1866) (explaining why the Sixth Amendment right to a jury trial is, commensurate with the language of the Fifth Amendment right to a grand jury, excepted from those in the land and naval forces).

Narrowed at the en banc oral argument, Appellant's claim now focuses solely on an asserted deprivation of the Sixth Amendment right to be tried by randomly chosen peers who are a representative cross-section of the community.[2] It is well settled that this right does not apply to Service Members tried by court-martial, who instead have the closely-resembled right to be tried by a fair and impartial panel of their fellow Service Members. *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citations omitted); Article 25, UCMJ, 10 U.S.C. § 825. The Supreme Court recently examined the rights afforded to Service Members at court-martial—a judicial institution it noted is "older than the Constitution"—and found that

2. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (accepting "the fair cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment").

> [e]ach level of military court decides criminal "cases" as that term is generally understood, and does so in strict accordance with a body of federal law (of course including the Constitution). The procedural protections afforded to a service member are virtually the same as those given in a civilian criminal proceeding, whether state or federal.

Ortiz v. United States, 138 S. Ct. 2165, 2174-75 (2018) (citation and internal quotation marks omitted) (emphasis added). Appellant asserts that in affording him a jury right that is virtually, but not exactly, the same as what the Sixth Amendment affords to civilians—*i.e.*, the same right Appellant elected to give up by voluntarily pleading guilty before a military judge—his court-martial violated his right to equal protection.

Attacking a statute on grounds of equal protection in this manner must be done at the trial level, or else is subject to waiver. In *United States v. Cupa-Guillen*, for example, the appellant asserted for the first time on appeal that 8 U.S.C. § 1326 violated constitutional equal protection because it sought to punish him based on his status as an "alien"—a suspect classification—after he was deported for a felony conviction and thereafter found again in the United States. 34 F.3d 860, 862-63 (9th Cir. 1994), *cert. denied*, 513 U.S. 1120 (1995). The Court of Appeals for the Ninth Circuit held this facial attack on the statute's constitutionality, on grounds of equal protection, was waived because it was not raised with the trial court. *Id*. at 864. The Court of Appeals for the Sixth Circuit reached the same conclusion regarding a facial equal protection challenge to a state criminal statute, declining to consider such a challenge raised for the first time on appeal based on the "well

established principle of appellate review that appellate courts do not address claims not properly presented below." *Chandler v. Jones*, 813 F.2d 773, 777 (6th Cir. 1987).

The Supreme Court has addressed this issue in the context of a defendant who pleads guilty to a charge and then later claims a violation of the constitutional protection against double jeopardy. The general rule in such cases is that "[w]here the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Menna v. New York*, 423 U.S. 61, 62 (1975). However, the Court established an important exception to this general rule:

> We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute.

Id. at 62 n.2 (emphasis added). Thus, if on the face of the indictment and the existing record, the charge does not appear to violate the constitutional protection against double jeopardy, the appellant's failure to develop the issue at the trial level waives it on appeal. *United States v. Broce*, 488 U.S. 563, 576 (1989).

Similarly, Appellant's assertion here is that constitutional equal protection precludes him from being tried by court-martial for violations of the UCMJ. This challenge cannot be determined on the

face of the attacked statute.[3] And Appellant's failure to lodge this claim with the court below leaves us thin means in the record to address such a weighty constitutional claim of first impression.[4] We have some authority to consider additional extrinsic evidence at this level. *See, e.g.*, *United States v. Oliver*, 57 M.J. 170, 172 (C.A.A.F. 2002) (considering unchallenged medical documentation submitted to appellate court to address jurisdictional challenge brought for first time on appeal). But piecemeal, ad-hoc supplementation of the record at the appellate level was never designed to take the place of litigating these issues before the trial court. To the contrary, the waiver rule exists precisely to avoid this sort of novel constitutional issue from being asserted for the first time on appeal.[5] *See United States v. King*, 58 M.J. 110, 114 (C.A.A.F. 2003) (explaining that the "raise-or-waive" rule is designed "to promote the efficiency of the entire justice system by requiring the parties to

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3. Equal protection requires that "all persons similarly circumstanced shall be treated alike." *Plyler v. Doe*, 457 U.S. 202, 216 (1982) (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). But the determination of whether the persons at issue are "similarly circumstanced" cannot be made without comparative evidence of what their circumstances are, which is not contained in the language of Article 2.

4. This predicament is compounded where, as here, Appellant seeks heightened constitutional scrutiny for his claim, which if applicable would impose an additional evidentiary burden on the Government to develop regarding the attacked statute.

5. In this very case, we initially ordered the Government to produce various "adjudicative facts" based on involuntary recall data for the Navy and Marine Corps.

advance their claims at trial, where the underlying facts can best be determined").[6]

Finally, while our superior court has held "there is a presumption against the waiver of constitutional rights," that presumption is overcome where it is "clearly established that there was an intentional relinquishment of a known right or privilege." *United States v. Sweeney*, 70 M.J. 296, 303-04 (C.A.A.F. 2011) (quoting *United States v. Harcrow*, 66 M.J. 154, 157 (C.A.A.F. 2008)). To make this determination, "we look to the state of the law at the time of trial, and we will not find waiver where subsequent case law 'opened the door for a colorable assertion of the [constitutional] right ... where it was not previously available.'" *Sweeney*, 70 M.J. at 304 (quoting *Harcrow*, 66 M.J. at 157-58).

Looking to the state of the law at the time of Appellant's trial, we find no subsequent development in the law that opened the door for his equal protection claim in a way that was not previously available. To whatever extent his claim is colorable now, it was colorable to no less a degree at the time of

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6. Respectfully, the dissent's position both that strict scrutiny applies and that this issue can nevertheless be resolved "on almost exclusively legal grounds, requiring little factual development," does not acknowledge the protracted litigation of such issues that routinely occurs at the trial level, where initial decisions often turn on the presence or absence of evidence in support of the claim asserted. *See, e.g.*, *Nat'l Coal. For Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568, 579 (S.D. Tex. 2019) (pointing to lack of certain "demonstrable facts" and other evidence as justification for the court's legal conclusions on an equal protection claim). Imposing an evidentiary requirement (heightened or otherwise) at a forum level unsuitable for developing evidence on the issues involved seems merely a recipe to strike down a statute.

his trial. Thus, in light of his voluntary decision to plead guilty before a military judge, waive all waivable motions, and specifically condition his pleas only on preserving a different issue, Appellant's failure to raise his equal protection claim at trial was a clear, intentional relinquishment of a known right.[7] This claim is fundamentally not about whether his court-martial had jurisdiction over him—which it most assuredly did, based on both the existing record and binding case precedent from our superior court—rather, it is about whether exercise of that jurisdiction deprived him of a discrete procedural right—which equally-binding precedent has long established the

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7. The dissent argues that applying waiver in this case "would diverge from the Court's recent practice regarding retiree challenges," citing our decisions in *United States v. Dinger*, 76 M.J. 552, 555 (N.M. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018), and *United States v. Larrabee*, No. 201700075, 2017 WL 5712245, 2017 CCA LEXIS 723 (N.M. Ct. Crim. App. 29 Nov. 2017) (unpub op.), *aff'd*, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019), wherein, despite an unconditional plea of guilty, we addressed the issue, raised for the first time on appeal, of whether a court-martial may punitively discharge a member of the Fleet Marine Corps Reserve. But neither of those cases actually addressed the issue of waiver, and *Larrabee* did little more than cite *Dinger* in summarily denying the assertion of error. Practice is not precedent, and even if it were, the application of waiver is and must always be a case-by-case determination. *See United States v. Chin*, 75 M.J. 220, 223 (C.A.A.F. 2016) (discussing that review by the military courts of criminal appeals under Article 66, UCMJ, must include an evaluation of the entire record in each case, including such factors as a "waive all waivable motions" provision or unconditional plea of guilty, in determining whether to approve a finding or sentence). Thus, *Dinger* and *Larrabee* offer little support for the view that this Court must entertain a facial equal protection challenge to a decades-old statute that was never brought in the court below.

Constitution does not afford to someone of Appellant's military status. The issue is therefore waived.

Senior Judge KING concurs.

CRISFIELD, Chief Judge, with whom HITESMAN, Senior Judge, and LAWRENCE, Judge, join (dissenting):

I respectfully dissent from the principal opinion's holding that the Uniform Code of Military Justice's (UCMJ) jurisdictional scheme for retirees satisfies an equal protection analysis and disagree with the concurring opinion that Appellant waived his equal protection claim. I believe that the disparate treatment of retirees from the active and Reserve components offends the Due Process Clause of the Fifth Amendment and that Appellant's claim is a jurisdictional issue which cannot be waived.

I. MEMBERS OF THE FLEET RESERVE ARE SIMILARLY SITUATED WITH RETIRED MEMBERS OF THE REGULAR AND RESERVE COMPONENTS

The principal opinion holds that retired members of the Fleet Reserve are not similarly situated for purposes of maintaining good order and discipline in the armed forces with retired members of the Regular and Reserve components. I acknowledge that there is little case law to guide our determination of whether these groups of retirees are similarly situated for equal protection purposes. I nonetheless feel confident determining that members of the Fleet Reserve, Regular component retirees, and Reserve component retirees are similarly situated because there is no meaningful distinction, legally or factually, between the groups that is relevant to good order and discipline in the armed forces.

Enlisted Sailors of the Navy who have completed at least 20 years of active service will be transferred to the Fleet Reserve at their request. 10 U.S.C. § 8330. Both active and Reserve component enlisted Sailors who meet the criteria can transfer to the Fleet Reserve. Officers are not eligible. Members of the Fleet Reserve have no military duties other than to "[m]aintain readiness for active service in event of war or national emergency" and to keep Navy authorities apprised of their location and "any change in health that might prevent service in time of war." Naval Military Personnel Manual, Art. 1830-040 (Ch-38, 19 Dec 2011). Fleet Reservists are entitled to "retainer pay." DoD Financial Management Regulation, DoD 7000.14-R, para. 020404, Nov. 2013. Once a member of the Fleet Reserve has reached 30 years of total service, they are entitled to transfer to the retired list of the Regular Navy if they were a member of the Regular Navy at the time of their transfer to the Fleet Reserve, or to transfer to the appropriate retired Reserve if they were a member of the Reserve Component at the time of their transfer to the Fleet Reserve. 10 U.S.C. § 6331.

With some exceptions—many of which concern disability retirements—members of the Fleet Reserve, Regular component retirees, and Reserve component retirees have all spent at least 20 years in the armed forces. All three groups include some members who have served in both the Regular and the Reserve components. The members of all three groups are in an inactive status and no longer perform any uniformed military duties.[1] They are all subject to

1. Although members of the Fleet Reserve notionally have an obligation to "[m]aintain readiness for active service in event of war or national emergency" and may be required to perform active duty every four years, the Government has not

recall to active duty. They are all ineligible for further promotion. They are all entitled to retired pay at some point in their retired years. Retirees from an active component begin receiving retired pay immediately upon retirement. Retirees in the Fleet Reserve—whether they were in the active or Reserve components—begin receiving "retainer pay" immediately upon retirement. Retirees from a Reserve component who do not transfer to the Fleet Reserve generally begin receiving retired pay at age 60. For all of these retirees, once they are entitled to retired pay, the pay continues for the duration of their lives and increases according to a cost of living formula. Their retired pay is not contingent on their continued military usefulness or employability. Their actual ability to contribute to the accomplishment of a military mission is completely irrelevant to their status.

Military courts have noted the legal similarity between Fleet Reservists and retired personnel. In *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991), our superior court stated that the Fleet Reserve is "legally, an almost identical status" to retirees. *Id.* at 216 (citing *United States v. Overton*, 24 M.J. 309 (C.M.A. 1987), *cert. denied*, 484 U.S. 976 (1987)).

In this Court's *Dinger* opinion,[2] we treated members of the Fleet Marine Corps Reserve as similarly situated to retired members. "We will refer generally to Fleet Marine Reserve and retired list membership as 'retired status,' as military courts

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represented that they bear any actual duties such as periodic training, musters, medical exams, or physical fitness tests; that they are ever called to active duty; or that there is any consequence for failure to maintain readiness.

2. The Marine Corps analogue to the Fleet Reserve.

have treated the two statuses interchangeably for purposes of court-martial jurisdiction." *United States v. Dinger*, 76 M.J. 552, 554 n.3 (N.M. Ct. Crim. App. 2017), *aff'd*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018).

The Supreme Court has not rendered an opinion on whether these groups of retirees are similarly situated, but in *Barker v. Kansas*, 503 U.S. 594 (1992), the Court made no effort to differentiate them.[3] Retiree pay has traditionally been considered reduced pay for reduced services—*i.e.*, a retainer pay. *See, e.g.*, *United States v. Tyler*, 105 U.S. 244 (1882). But in Barker, the Supreme Court characterized retiree pay as "deferred compensation" for services rendered during active duty for purposes of 4 U.S.C. § 111, a law permitting states to tax Federal employees' pay. *Barker*, 503 U.S. at 605. The Court overturned the Kansas Supreme Court's ruling that military retiree pensions can be taxed differently than state government retiree pensions due to the military pension's nature as "retainer pay," and other nuances of military retiree status. *Id.* Although the *Barker* Court characterized retiree pay as "deferred compensation," it emphasized that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall." *Id.* at 599, 602. The Court made no effort to differentiate between Regular and Reserve retirees within the class and implicitly held

3. *Barker* was a taxpayers' class-action lawsuit in which the class was defined as: "[A]ll retired members of the federal or United States armed forces who are recipients of federal armed forces retirement benefits [under applicable provisions of Title 10 or Title 14 or the United States Code] subject to Kansas state income taxation ...." *Barker v. State*, 249 Kan. 186, 815 P.2d 46, 48 (1991) (first and second alterations in original), *rev'd*, *Barker v. Kansas*, 503 U.S. 594 (1992).

them to be similarly situated with regard to the characterization of their retired pay.

As we consider whether the three groups at issue are similarly situated, we should look to each group's current degree of connectedness to the armed forces—not to past connections. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) (suggesting that retaining jurisdiction over former soldiers, with no relation to active components, would not improve discipline amongst the active ranks). The official Department of Defense (DoD) policy on the utilization of retirees reinforces our opinion that these three groups are in fact similarly situated.

The DoD instruction on "Management of Regular and Reserve Retired Military Members" establishes policy and provides procedures for the activation and employment of retired members. Dep't of Def. Instr. 1352.01: Management of Regular and Reserve Retired Military Members (2016) [hereinafter DoDI 1352.01]. I first note that the instruction states that the Navy's Regular component retired members includes members of the Fleet Reserve. *Id.*, at ¶ 3.1(a)(2). This is consistent with my view that members of the Navy's Fleet Reserve are, in all relevant respects, retired for purposes of this Court's equal protection analysis. It also reflects the reality in the Fleet, where members of the Fleet Reserve refer to themselves as "retired" and have "retirement ceremonies" upon transfer to the Fleet Reserve. Finally, and most convincingly, the Fleet Reserve should be considered similarly situated with Regular component retirees when one considers that the Army, Air Force, and Coast Guard have no analogous category to the Fleet Reserve, yet retirement eligibility rules are uniform across the Services.

I also find it relevant and noteworthy that in describing DoD's four-part policy on the utilization of retired members, the instruction makes no distinction between retired members of the Regular and Reserve components.[4] Similarly, in describing the criteria for retiree mobilization, the instruction does not mention active or Reserve component status as a criterion for mobilization.[5] This formal DoD policy comports with

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4. To wit:

> It is DoD policy that:
>
> a. *Regular retired members and members of the retired Reserve* may be ordered to active duty (AD) as needed to perform such duties as the Secretary concerned considers necessary in the interests of national defense as described in Sections 688 and 12301 of Title 10, U.S.C.
>
> b. *Regular retired members and members of the retired Reserve* must be managed to ensure they are accessible for national security and readiness requirements.
>
> c. *Regular and Reserve retired members* may be used as a manpower source of last resort after other sources are determined not to be available or a source for unique skills not otherwise obtainable.
>
> d. Directors of agencies that have Defense related missions ... may identify military and federal civilian positions that are suitable for fill by *retired military members* in time of war or national emergency. ...

DoDI 1352.01 (8 Dec. 2016) at ¶ 1.2(a)-(d) (emphasis added). Note that 10 U.S.C. § 12301 (referenced in para. 1.2(a)) places a statutory limitation on the involuntary activation of retired reservists to times when Congress has declared a time of war or national emergency and the secretary of the military department has made a finding that there are not enough qualified active reserves who are readily available.

5. DoDI 1352.01 at ¶ 3.2(c) ("As part of the criteria for deployment of individuals to specific mobilization billets, the Military Services will consider the criticality of the mobilization

my experience regarding how the various Services seek to integrate their Reserve components as seamlessly as possible with their active components.[6]

The principal opinion agrees with Appellee's argument that retired members of the Reserve components are dissimilar from Regular retirees because they are not required to maintain any military status. They cite Department of Defense Financial Management Regulation 7000.14-R, Vol. 7B, Ch. 6, para. 0604, for this proposition. This chapter concerns "Foreign Citizenship After Retirement" and I find the Financial Management Regulation's interpretation unconvincing. Instead, I would find that the status and obligations of retired reservists are very similar to Regular retirees.

The Navy's Military Personnel Manual describes the obligations and benefits of retired reservists:

> Retired reservists must keep NAVPERSCOM (PERS-912) advised of their current mailing address and of any temporary or permanent changes of residence .... Reservists receiving pay must also update address changes with Defense Finance and Accounting Services ....

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billet, the skills of the individual, and his or her geographic proximity to the place of mobilization.").

6. *See, e.g.*, Chief of Naval Operations General Administrative Message, NAVADMIN 121/05, dtd 3 June 2005, Subject: *Active-Reserve Force Integration* ("We will now refer to all of our sailors, active and reserve, as United States Navy Sailors. This shared title will strengthen the bond between our active and reserve components, and enhance the culture of integration needed to most effectively deliver decisive power from the sea.").

... Retired Navy reservists who plan to travel or reside in any country not within the jurisdiction of an area commander should, upon arrival in and departure from each country (except for brief tours), notify their presence to the nearest U.S. naval attaché, as a matter of courtesy, by personal visit or by letter. In the absence of a naval attaché, notify the U.S. military or air attaché, or the civilian representative of the American embassy or consulate.

... [C]ivil employment and compensation with any foreign government, or any concern controlled in whole, or in part, by a group of governments (including the United States) is subject to the approval of SECNAV and the Secretary of State. ...

... [R]etired personnel not on active duty will be entitled to wear the prescribed uniform of the rank or rating, in which retired, when the wearing of the uniform is considered to be appropriate. ...

... Retired personnel may use their military titles subject to certain restrictions and the exercise of good judgment. Considerable discretion should be shown by members in permitting the use of their name and military title to endorse any commercial enterprise which might, in any way, be perceived as indicating that the Department of the Navy approves of the enterprise and especially to avoid an endorsement or contract which would bring discredit upon the Navy. All reserve members transferred to the Retired Reserve are

> eligible to use "United States Navy–Retired" in their title.
>
> ....
>
> ... Retired members of the Navy Reserve and former members receiving retired pay from the Navy are eligible for TRICARE Prime, Standard, or Extra (from ages 60 through 64) and TRICARE for Life (TFL) (with Medicare Parts A and B coverage) at age 65.
>
> ... Family members, survivors of retired members, and "former members" are eligible for TRICARE Prime, Standard, or Extra. ...
>
> ....
>
> ... Retired members and their family members, including those age 65 and over, are eligible for the Uniform Services Family Health Plan (USFHP), a TRICARE Prime option.

Naval Military Personnel Manual, Art. 1820-030, para. 7 (Ch-53, 1 Dec 2015). Retired reservists are also entitled to the use of the military exchange system, morale welfare and recreation facilities, military commissaries, and space available transportation on military aircraft. *Id*. Retired reservists may also be voluntarily recalled to active duty in a retired status as authorized by the Secretary of the Navy. DoDI 1352.01.

The fact that Article 2(a)(5), UCMJ, subjects retired reservists receiving hospitalization from an armed force to court-martial jurisdiction also hints at some military status for this group. (If Congress' concern was merely to maintain good order and discipline in military hospitals, then it would subject all persons receiving military hospitalization to the Code.) Finally, and most importantly, the fact that

retired reservists are subject to immediate recall into active service under certain circumstances runs counter to the argument that they have no military status whatsoever.

Retired members of both the active and Reserve components are similarly—though not identically—subject to involuntary recall to active duty. While unusual, retired members of both the active and Reserve components may be involuntarily recalled to active duty by a service secretary. The secretary of a military department has authority to involuntarily order a retired member of a Reserve component to active duty for the duration of a war or national emergency and for six months thereafter, provided that Congress has declared a time of war or national emergency and the secretary determines there are not enough qualified reserves in an active status. DoDI 1352.01 at ¶ 3.3(b)(1); *see also* 10 U.S.C. § 12301. In contrast, the secretary of a military department has authority to involuntarily order a retired Regular member to active duty "at any time to perform duties deemed necessary in the interests of national defense in accordance with Sections 688, 689, 690, and 12307 of Title 10, U.S.C." DoDI 1352.01 at ¶ 3.3(b)(2).

Appellee argues that two groups must be "virtually identical" for us to determine that they are similarly situated for equal protection purposes. The principal opinion adopts a "materially identical" standard. I think those standards are too simplistic. Instead, I believe that the particular governmental interest in issue is highly relevant to whether groups are similarly situated and has to be factored into the analysis. Two groups of people may be similarly situated for the purpose of one governmental interest but not for a different interest. The Supreme Court's case law regarding the military's treatment of

servicemen and servicewomen leads to this conclusion. In *Schlesinger v. Ballard*, 419 U.S. 498 (1975), the Court held that male and female Navy officers were not similarly situated for purposes of a statute that treated them differently regarding mandatory discharge after failure to be selected for promotion. The Court contrasted the governmental purpose they were examining with the purpose the Court had analyzed in *Frontiero v. Richardson*, 411 U.S. 677 (1973), that held that servicemen and servicewomen were similarly situated when being treated differently under the law. The particular governmental interest in issue must be considered when analyzing whether groups are similarly situated.

Given that this is an issue of first impression, I have found no precedent in case law standing for—or against—the proposition that retired members of the active and Reserve components are similarly situated for equal protection purposes, but my view is not entirely novel. During testimony on the proposed Article 2, UCMJ, before the House Armed Services Committee, Robert W. Smart, a professional staff member on the House of Representatives' Committee on Armed Services, noted with concern that the jurisdictional scheme would mean "treating two classes of people on the same retired list differently." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. Of the H. Comm. on Armed Services*, 81st Cong. (1949) [hereinafter UCMJ Hearing], *reprinted in* William K. Suter, *Index and Legislative History: Uniform Code of Military Justice* 1261 (William S. Hein & Co. 2000) (1950). As I discuss below, Congress ultimately tolerated the disparate treatment in order to accommodate differences in how the Services managed retirees—differences that are

no longer applicable. But I would find that this bit of legislative history corroborates my sense that retirees of the Reserve and active components are in fact similarly situated.

Based on these considerations, I am convinced that members of the Fleet Reserve, retired members of the Regular components, and retired members of the Reserve components are similarly situated for purposes of equal protection analysis.

II. THE DISPARATE TREATMENT OF REGULAR AND RESERVE RETIREES VIOLATES THE GUARANTEE OF EQUAL PROTECTION UNDER THE LAW

Military and civilian courts have long held that Congress can lawfully subject military retirees to court-martial jurisdiction. This Court has so held on multiple occasions. I believe, however, that this is the first case in any court in which a military retiree has challenged that jurisdiction by claiming that the UCMJ's differing treatment of different categories of retirees violates the equal protection guarantee.

Congress undoubtedly has broad power under Article I, Section 8, clause 14 of the Constitution "[t]o make Rules for the Government and Regulation of the land and naval Forces." Nonetheless, that expansive power is constrained by the Fifth Amendment's guarantee of Due Process and the imputed guarantee of Equal Protection.

The disparate treatment provided to retirees from the active and Reserve components is plain on the face of Article 2. Appellant claims that the distinction violates his right to equal protection because Article 2 deprives him of his constitutional rights to free speech, grand jury indictment, and a jury of his peers,

while preserving those rights for similarly situated retirees from Reserve components.[7]

Court-martial jurisdiction has always been considered a special type of criminal jurisdiction significantly different from civil courts and responsive to the special needs of the armed forces that do not exist in civil society. "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid v. Covert*, 354 U.S. 1, 21 (1957). Military jurisdiction was always intended "to be only a narrow exception to the normal and preferred method of trial in courts of law." *Id.* Therefore, notwithstanding Congress' broad constitutional power, the Supreme Court has held that due to the perceived inadequacies of courts-martial compared to Article III courts, Congress must limit its exercise of court-martial jurisdiction to "*the least possible power adequate to the end proposed*." *Quarles*, 350 U.S. at 23 (emphasis in original) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821)).[8]

Appellant urges us to apply strict scrutiny to Congress' Article 2 jurisdictional scheme because he claims that the unequal treatment he received under

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7. During the second oral argument Appellant stated that he had narrowed his claim and now only complains that he was deprived of the right to a jury trial.

8. "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Quarles*, 350 U.S. at 22.

Article 2 deprived him of fundamental rights. Strict scrutiny analysis requires the challenged statute to serve a "compelling governmental interest," and the means taken to be "narrowly tailored" to accomplish this goal. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Counter-balancing the proposition that strict scrutiny is the appropriate level of review when fundamental rights are in the balance, we have a judicial duty to provide Congress with great deference when it legislates pursuant to its Article I, Section 8 powers. "[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)); *see also Solorio v. United States*, 483 U.S. 435 (1987).

I do not see any contradiction in performing a strict scrutiny analysis while providing Congress with great deference. Judicial deference "does not mean abdication." *Rostker*, 453 U.S. at 70. For instance, in *Nat'l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568 (S.D. Tex. 2019), the district court recognized that "the court's deference to Congress's 'studied choice' is potentially at its height" but still used intermediate-level scrutiny to analyze a gender-based equal protection challenge to Congress' decision to require males, but not females, to register for the Selective Service. *Id.*, at 580.

Equal protection case law supports the proposition that strict scrutiny is the appropriate level of judicial review of governmental action that impinges on a fundamental right. *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based

denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."); *see also United States v. Marcum*, 60 M.J. 198, 204-05 (C.A.A.F. 2004) (analyzing the nature and scope of the right identified by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Lawrence*'s applicability to Article 125, UCMJ). When a law impinges upon the "exercise of a fundamental right," courts may treat the law as "presumptively invidious." *Plyler*, 457 U.S. at 216-17; *see also Quarles*, 350 U.S. 11 (1955) (invalidating a law that would subject a separated Service Member to court-martial jurisdiction, in spite of traditional deference to Congress on military matters).

Court-martial jurisdiction deprives a defendant of the right to a presentment of the charges to a grand jury under the Fifth Amendment.[9] It also denies a defendant his Article III[10] and Sixth Amendment[11] right to trial by a jury of his peers. "A service member has no right to have a court-martial be a jury of his peers, a representative cross-section of the community, or randomly chosen." *United States v.*

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9. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ." U.S. CONST. amend. V.

10. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art. III, § 2, cl. 3.

11. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

Dowty, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942)).

In the context of determining the proper scope of court-martial jurisdiction, the Supreme Court has stated: "[I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right." *Reid v. Covert*, 354 U.S. 1, 9 (1957). "Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience." *Id*. at 10.

In my view, these rights are undoubtedly "fundamental rights" for equal protection purposes and Appellant was denied their protection by virtue of being subject to the UCMJ. *Covert*, 354 U.S. at 21.

To avoid application of the strict scrutiny standard, Appellee contends that court-martial jurisdiction does not burden any fundamental right. Citing *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004), the Government argues that the rights to grand and petit juries are not fundamental rights because "Appellant, subject to court-martial jurisdiction, has no Sixth Amendment right to a jury chosen from a fair cross-section of the community. His argument for strict scrutiny review fails."[12] This argument, however, starts with the presumption that

12. Government Brief at 10.

the Appellant has been lawfully subjected to court-martial jurisdiction—the very notion he challenges here. That Article 2, UCMJ, subjects the Appellant to court-martial jurisdiction does not alter the fundamental character of these rights for purposes of our analysis. Under the UCMJ as it then existed, neither Robert Toth nor Clarice Covert had a right to trial by jury. Yet in *Toth v. Quarles* and *Reid v. Covert* the Supreme Court's analysis began with the understanding that the rights to grand and petit juries are fundamental.[13]

If, as I believe, fundamental rights are at stake, this Court should determine whether Article 2's different treatment of similarly situated retiree groups is narrowly tailored to advance a compelling government interest.

In my view the purpose of military justice is to maintain good order and discipline in the armed forces.[14] When Congress legislates in the field of military justice, as it has done in Article 2, UCMJ, its objective is to promote good order and discipline in the armed forces, which is undoubtedly a compelling governmental interest.

The principal opinion opines that the Government's compelling interest in this case is being prepared to respond to catastrophic military necessity that could threaten our Nation's existence. I respectfully disagree and believe that this formulation

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13. *See Toth*, 350 U.S. at 16 ("This right of trial by jury ranks very high in our catalogue of constitutional safeguards."); *Covert*, 354 U.S. at 9 ("[I]t seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.").

14. *See* MCM, Preamble, ¶ 3.

is too broad to explain Congress' purpose in enacting the UCMJ. I also believe that if that were, in fact, the compelling government interest, then the relevant subsections of Article 2 would fail even a rational basis test. There is no rational basis for Congress to severely restrict UCMJ jurisdiction over Reserve component retirees if its purpose in doing so is to ensure that the broadest set of military and former military personnel remain ready to respond to existential threats to the nation. In that case the only rational action would be for Congress to maximize UCMJ jurisdiction.

Again, there is no doubt that Congress can lawfully subject military retirees to court-martial jurisdiction. *United States v. Dinger*, 77 M.J. 447, 453 (C.A.A.F. 2018); *see also United States v. Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958). The question for this Court should be whether the jurisdictional scheme that Congress has created in Article 2 is narrowly tailored to its compelling interest in maintaining good order and discipline in the armed forces. In my view it is not.

The legislative history of the creation of the UCMJ provides insight as to why Congress structured Article 2 the way it did.[15] I believe that in creating the UCMJ in 1949, Congress was attempting to tailor the law's jurisdiction to two military services with different administrative structures.[16]

Prior to the adoption of the UCMJ, the Articles for the Government of the Navy and the Articles of War governed the separate justice systems of the Navy and

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15. The current versions of the Article 2 subsections in issue here are nearly unchanged from their 1950 origins.

16. While the Department of the Air Force was formed under the National Security Act of 1947, it derived from, and was structured most similarly to, the Army.

Army, respectively. Each system was tailored to the specific needs of its service. In the Navy, retired members of the Regular and Reserve components were on the same retired list. All retirees were managed and paid by the Navy and amenable to jurisdiction under the Articles for the Government of the Navy. In the Army, on the other hand, Regular retirees were administered by the Army and Reserve retirees were administered by the Veteran's Administration. The Army did not consider its retired reservists as subject to the Articles of War. This discrepancy needed to be resolved by Congress in order to put the "U" in the UCMJ.

The solution was for the Navy to relinquish court-martial jurisdiction over retired reservists in order to be consistent with the Army:

> Mr. Smart.[17] It appears to me—I just cannot tell for certain—that this [draft Article 2] is a relaxation of jurisdiction over Navy retired officers on the retired list. Is that correct?
>
> Admiral Russel.[18] That is correct.
>
> Mr. Larkin.[19] That is correct.
>
> Mr. Smart. You see the point there, Mr. Chairman, is that the physically retired Navy Reserve officer is on the same retired list as the regular officer of the Navy. The physically retired Army officer is certified to VA as being

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17. Robert W. Smart was a Professional Staff Member on the House of Representatives' Committee on Armed Services.

18. Rear Admiral George L. Russel, U.S. Navy, was testifying about the formation of a legal corps within the Navy.

19. Felix Larkin was Assistant General Counsel in the Office of the Secretary of Defense.

> authorized to draw retirement pay—not retired pay but retirement pay.
>
> So there has been a great difference in the past as between physically retired Navy Reserves and Army retired Reserve officers. I just wanted to make certain here that the Navy was relinquishing courts-martial jurisdiction over retired reserve officers. And they say that that is correct.

UCMJ Hearing, *supra*, at 868.

The inequity of subjecting active, but not Reserve, retirees to court-martial jurisdiction was not lost on the House of Representatives committee staff:

> Mr. Smart. I am reluctant to say, Mr. Chairman, what my recommendation [regarding jurisdiction over retirees] would be.
>
> I would point this one thing out to you: It seems a little inconsistent to me that retired personnel of a Regular component are subject when as a matter of fact you have non-Regular personnel in the Navy who are on the same retired list and entitled to the same rights and benefits as the regular.
>
> The Navy apparently here has waived their right to their jurisdiction, so that the retired non-Regular Navy officer, even though he is on the retired list of the Navy will not be any more subject to the code than the non-Regular Army officer who is drawing retirement pay from the Veteran's Administration.
>
> It is treating reserves alike, I will admit, but it is treating two classes of people on the same retired list differently too.

Id. at 1261.

The Committee Report from the House of Representatives succinctly laid out the rationale for the difference in treatment:

> Paragraph (5) [draft Article 2(a)(5), UCMJ] represents a lessening of jurisdiction over retired personnel of a Reserve component. Under existing law, the Navy retains jurisdiction over retired Reserve personnel since such personnel are on the same retired list as members of a regular component. The Army has no such jurisdiction since retirement benefits for non-regular officers are administered by the Veteran's Administration. This paragraph relinquishes jurisdiction over its Reserve personnel except when they are receiving hospitalization from an armed force. This standardizes jurisdiction of the armed forces over Reserve personnel.

H.R. Rep. No. 81-491, at 10 (1949), *reprinted in* Suter, *supra*. An identical explanation appeared in the corresponding Senate report. S. Rep. No. 81-486, at 7 (1949), *reprinted in* Suter, *supra*. I am aware of the potential pitfalls of relying on legislative history to ascribe purposes to Congressional action. Nonetheless, it is noteworthy that the legislative history of Article 2 from 1949 contains no competing rationale, explanation, theory, or conjecture concerning why Congress chose to subject Regular retirees to UCMJ jurisdiction but not Reserve retirees.

If Article 2, UCMJ, was originally tailored by Congress, however awkwardly, to the administrative needs of the Army and Navy, it appears that those needs no longer exist. Instead, it appears that each

Service now manages and administers its own Reserve retirees. *See, e.g.*, 10 U.S.C. § 12731(b) ("Application for [non-Regular] retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be, having jurisdiction at the time of application over the armed force in which the applicant is serving or last served"); *see also* 10 U.S.C. § 12731(f)(3) ("The Secretary concerned shall periodically notify each member of the Ready Reserve ... of the current eligibility age for retired pay of such member under this section, including any reduced eligibility age by reason of the operation of that paragraph. Notice shall be provided by such means as the Secretary considers appropriate taking into account the cost of provision of notice and the convenience of members."). Each Service now administers its retirees, both active and Reserve.

Furthermore, I would find that the structure of Article 2 jurisdiction over current retirees is not narrowly tailored to the compelling government interest in maintaining good order and discipline in the armed forces. UCMJ jurisdiction is simply not related to a retiree's connectedness to the armed forces or ability to effectively contribute to military missions. Active service in the military requires a relatively high level of physical fitness, which is why every military service employs a periodic physical fitness test with negative consequences for Service Members who perform poorly.[20] An elderly and infirm active component retiree is less likely to be able to

20. It is also why active duty personnel are required to submit to periodic health assessments, immunizations, vaccines, vision exams, occupational hearing screenings, and maintain medical and dental readiness, while those in the Fleet Reserve and other retirees have no such requirements.

contribute to the accomplishment of military missions than a middle-aged Reserve component retiree in good health. Yet, the active component retiree of questionable military utility may be court-martialed for violations of the UCMJ, and suffer the deprivation of fundamental rights that such jurisdiction entails, while a younger and more physically fit Reserve component retiree is immune from UCMJ jurisdiction.

Article 2(a)(4) states that a retired member of a Regular component "entitled to pay" is subject to the UCMJ. Such language indicates that Congress may have viewed entitlement to pay as a useful criterion for determining UCMJ jurisdiction. In my view, entitlement to pay fails entirely as a narrowing criterion, however, because many Reserve component retirees are also entitled to pay and yet remain outside UCMJ jurisdiction.[21] The retired pay structure for Reserve retirees is also completely disconnected from a Reserve retiree's actual ability to contribute to military missions. Indeed, for Reserve component retirees the relationship between entitlement to pay and military utility is essentially inverted. When a Reserve retiree is younger, they are more likely to be able to withstand the physical rigors of active military service and less likely to be receiving retired pay. When older, they are more likely to be receiving retired pay and less likely to be militarily useful. For both Regular and Reserve retirees, once they are entitled to retired pay, the entitlement continues for the duration of their lives and increases according to a set formula. Neither's retired pay is contingent on

21. Retirees from a reserve component are generally entitled to retired pay, but they do not start receiving it until age 60. Some retired reservists can earn retired pay as early as age 50 if they qualify under rules that reduce the age at which they start receiving pay. *See* 10 U.S.C. § 12731(f).

their continued military usefulness. In my view, entitlement to pay does not help tailor Article 2's jurisdictional scheme to Congress' compelling interest in maintaining good order and discipline in the armed forces.

My review indicates that Article 2 is not narrowly tailored to the achievement of a compelling government interest. Instead, it appears that Article 2's retiree jurisdiction structure is an anachronistic vestige of Congress' effort to create a uniform code of military justice for military services that traditionally had different administrative needs. Article 2's retiree jurisdiction rules reflect an administrative compromise that has outlived its necessity and is not tailored to current governmental interests.

It is clear to me that Congress could lawfully subject all retirees of the armed forces to UCMJ jurisdiction. Conversely, it could subject no retirees of the armed forces to jurisdiction.[22] It could also narrowly tailor retiree jurisdiction in such a way to

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22. The majority claims that subjecting no retirees to the Code would lead to the absurd result that the Government would not be able to court-martial retirees who did not comply with orders to return to duty. I do not view this as a realistic problem since Article 2(a)(1), UCMJ, subjects to UCMJ jurisdiction all "persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it." It is also precisely the current situation with regard to Reserve personnel. The majority also opines that subjecting all retirees to UCMJ jurisdiction would lead to an absurd result: retired reservists, who were not subject to the Code during their years of active participation in the reserves except when they were performing duties, would be subject to the Code as retirees even when not performing duties. This example is accurate, but could be easily solved by tying UCMJ jurisdiction to entitlement to retired pay. This would also solve the equal protection problem.

satisfy the compelling interest in maintaining good order and discipline in the armed forces. Article 2 as structured, however, is not narrowly tailored to that interest. Accordingly, I would find that the UCMJ's jurisdictional structure for retirees violates the right of equal protection imputed to the Fifth Amendment.

III. APPELLANT'S ISSUE CONSTITUTES A JURISDICTIONAL CLAIM WHICH CANNOT BE WAIVED

I also respectfully disagree with the concurring opinion's position that Appellant waived appellate consideration of his equal protection claim by failing to raise it at his court-martial, by unconditionally pleading guilty, and by agreeing to waive all "waivable" motions in his pretrial agreement.

Ordinarily, motions not raised at trial and not preserved through a not guilty plea or a conditional guilty plea are waived. Rules for Courts-Martial (R.C.M.) 905(e), Manual for Courts-Martial (MCM), United States (2016 ed.). Jurisdictional defects are an exception to this general rule and are never waived. R.C.M. 905(b)(1). The concurring opinion would hold that the subject of Appellant's claim is equal protection, not jurisdiction. As I view the issue, however, it is plainly jurisdictional. It directly concerns the constitutionality of Article 2, UCMJ, the Article that establishes which persons are subject to personal jurisdiction under the UCMJ.

If Appellant is correct, then there is a jurisdictional defect in his court-martial. Since jurisdictional challenges are never waived—even by an unconditional guilty plea—the issue is appropriate for review. *United States v. Bradley*, 68 M.J. 279, 281 (C.A.A.F. 2010) (holding that an unconditional guilty plea waives only nonjurisdictional defects).

My concurring colleagues would also hold that Appellant's pretrial agreement with the convening authority waives this issue on appeal. Since the Rules for Courts-Martial prohibit any pretrial agreement term that purports to waive the accused's right to challenge the jurisdiction of the court-martial, and I believe that this is a jurisdictional claim, I believe that Appellant's issue is not waived. R.C.M. 705(c)(1)(B).

The concurring opinion cites this Court's opinion in Dinger for the proposition that this claim is waived. I note that the appellant in *Dinger* also unconditionally pleaded guilty at his court-martial before raising his claim alleging that as a retiree he was not subject to a punitive discharge. Arguably, the appellant in *Dinger* was in a worse position regarding waiver than the instant Appellant, since Gunnery Sergeant Dinger signed a pretrial agreement in which he acknowledged that a punitive discharge "[m]ay be approved as adjudged."[23] Nevertheless, this Court did not hold that he waived his claim. Similarly, in *United States v. Larrabee*, No. 201700075, 2017 WL 5712245, 2017 CCA LEXIS 723 (N.M. Ct. Crim. App. 29 Nov. 2017) (unpub op.), *aff'd*, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019), this Court did not find waiver when a member of the Fleet Marine Corps Reserve, who was convicted pursuant to his pleas, challenged his amenability to a punitive discharge. In that case, the appellant even signed a pretrial agreement explicitly stating that he understood that a dishonorable discharge was mandatory for the offense to which he was pleading guilty. Still, we did not apply waiver. Applying waiver in the instant case

23. AE VII, *United States v. Dinger*, No. 201600108, Record of General Court-Martial Proceedings.

would diverge from this Court's practice regarding retiree challenges.

The concurring opinion also states that by not invoking waiver, this Court is forced to adjudicate a complex issue that was not factually developed at the court-martial. That is true, but it is true of any unwaivable issue that is raised for the first time on appeal. Indeed, the instant issue is more amenable to original appellate adjudication than many jurisdictional issues since it may be resolved on almost exclusively legal grounds, requiring little factual development.

Senior Judge HITESMAN and Judge LAWRENCE concur.

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Stephen A. BEGANI
Chief Petty Officer (E-7)
U.S. Navy, Retired
Appellant

NMCCA No. 201800082

The Court En Banc

ORDER

Rescinding 21 October 2019 Order to Produce

On 21 October 2019, the Court ordered the Government to produce certain information from the records of the Bureau of Naval Personnel. In response, the Government, on 7 November 2019, moved the Court to reconsider its Order on the basis of representations by officials of Bureau of Naval Personnel that the data would be labor-intensive and time-consuming to produce and that the term "involuntary" as used in the Court's Order is ambiguous given the way the Bureau of Naval Personnel categorizes recall orders.

Accordingly, it is, by the Court, this 14th day of November 2019,

ORDERED:

That the Court's 21 October 2019 Order is hereby **WITHDRAWN**.

FOR THE COURT

/s/
RODGER A. DREW, JR.
Clerk of the Court

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

UNITED STATES
Appellee

v.

Stephen A. BEGANI
Chief Petty Officer (E-7)
U.S. Navy, Retired
Appellant

NMCCA No. 201800082

The Court En Banc

ORDER

To Produce Information Regarding Involuntary Recalls

In accordance with Military Rule of Evidence 201 and *United States v. Paul*, 73 M.J. 274, 278, (C.A.A.F. 2014) (The Court of Appeals for the Armed Forces "has consistently recognized the ability of appellate courts to take judicial notice of indisputable facts."), it is, by the Court, this 21st day of October 2019,

ORDERED:

That Appellee will, no later than 8 November 2019, produce from the records of the Bureau of Naval Personnel, or other source whose accuracy cannot reasonably be questioned, the following adjudicative facts:

> From 1 January 2000 through 31 December 2017, how many individuals in each of the following groups were *involuntarily* recalled to active duty each year, other than for

disciplinary purposes and without counting orders-extensions:

1. Fleet Reservists?
2. Fleet Marine Corps Reservists?
3. Navy Regular Component Retirees?
4. Marine Corps Regular Component Retirees?
5. Navy Reserve Component Retirees receiving retired pay?
6. Marine Corps Reserve Component Retirees receiving retired pay?
7. Navy Reserve "Gray Area Retirees" (i.e., reserve personnel transferred to the retired list with over twenty years of service but noy yet entitled to receive retired pay)?
8. Marine Corps Reserve "Gray Area Retirees" (i.e., reserve personnel transferred to the retired list with over twenty years of service but noy yet entitled to receive retired pay)?

That Appellant may, no later than 8 November 2019, file any objections to whether the foregoing are properly the subject of this Court taking judicial notice.

FOR THE COURT

/s/
RODGER A. DREW, JR.
Clerk of the Court

UNITED STATES NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellee

v.

Stephen A. BEGANI
Chief Petty Officer (E-7)
U.S. Navy (Retired),
Appellant

No. 201800082

Argued: 29 Mar 2019[1]
Decided: 31 July 2019

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Captain Stephen C. Reyes, JAGC, USN. Sentence adjudged 1 December 2017 by a general court-martial convened at Fleet Activities Yokosuka, Japan, consisting of a military judge sitting alone. Sentence approved by the convening authority: confinement for 18 months and a bad-conduct discharge.

Chief Judge CRISFIELD delivered the opinion of the Court, in which Senior Judge FULTON and Senior Judge HITESMAN joined.

CRISFIELD, Chief Judge:

Congress has determined that some, but not all, military retirees should remain subject to the Uniform Code of Military Justice (UCMJ) while they are

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1. We heard oral argument in this case at Pennsylvania State University Law School, State College, Pennsylvania.

retired. Retirees from a regular (i.e., active) component, which in the Navy includes those in the Fleet Reserve, are subject to UCMJ jurisdiction at all times and in all places for as long as they live. Retirees from a reserve component are only subject to the UCMJ while receiving hospitalization from an armed service. The question before us is whether this disparate treatment offends the Due Process Clause of the Fifth Amendment. Applying strict scrutiny to the treatment of these similarly situated groups, we determine that UCMJ jurisdiction over retirees is not narrowly tailored to accomplish the goal of good order and discipline in the armed forces. Accordingly, the sections of the UCMJ subjecting regular component retirees to UCMJ jurisdiction are unconstitutional.

I. BACKGROUND

On 30 June 2017, after 24 years on active duty, the appellant, Chief Petty Officer Stephen A. Begani retired from active duty and transferred to the Fleet Reserve. He remained in the area of his final duty station, Marine Corps Air Station Iwakuni, Japan, and found employment with a contractor performing aircraft maintenance work for the U.S. military. The appellant soon began communicating with "Mandy," whom he believed to be a 15-year-old female, but was actually an undercover Naval Criminal Investigative Service (NCIS) agent. They communicated through an online chat platform and their communications were sexual in nature. On 5 August 2017, NCIS agents apprehended Mr. Begani when he arrived at an on-base residence on Marine Corps Air Station Iwakuni. The appellant had come to the residence with the intent to have sex with "Mandy," whom he believed was waiting inside.

As a member of the Fleet Reserve, the appellant was subject to UCMJ jurisdiction in accordance with Article 2(a)(6), UCMJ. 10 U.S.C. § 802(a)(6) (2012). Charges were preferred against the appellant and he unconditionally waived his right to an Article 32, UCMJ, preliminary hearing. Charges were then referred to a general court-martial. The appellant and the convening authority reached a pretrial agreement in which the appellant agreed to waive his right to trial by members and plead guilty. At trial, the appellant pleaded guilty to, and was found guilty of, one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child, in violation of Articles 80 and 120b, UCMJ. He raised no motions at trial other than one arguing that a punitive discharge is not an authorized punishment for a retired Service Member, which was denied.

For the first time on appeal, the appellant argues that the UCMJ's jurisdictional scheme, whereby he, as a retired regular component member, is subject to the UCMJ, while retired Navy Reserve members are not, violates the Fifth Amendment Due Process Clause's guarantee of equal protection of the laws. He argues that this unequal jurisdictional scheme unconstitutionally deprived him of his right to a jury of his peers, the right to a grand jury, and the right to free speech when a similarly situated reserve retiree would enjoy those rights.

The appellant also asserts four other assignments of error: (1) that he is a "former member" of the armed forces and therefore not subject to jurisdiction under the UCMJ; (2) that he did not receive notice that he was subject to UCMJ jurisdiction as required by Article 137, UCMJ; (3) that once retired, a Service Member is no longer subject to a punitive discharge; and (4) that a retired Service Member cannot be

subject to court-martial without first being recalled to active duty.[2] Based on our resolution of the appellant's equal protection claim, we need not reach his other assignments of error.

II. DISCUSSION

A. Jurisdictional Claim Not Waived by Unconditional Guilty Plea or Pretrial Agreement

As a threshold issue we must determine whether, as the appellee asserts, the appellant waived appellate consideration of his equal protection claim by failing to raise it at his court-martial, by unconditionally pleading guilty, and by agreeing to waive all "waivable" motions in his pretrial agreement.

Ordinarily, motions not raised at trial and not preserved through a not guilty plea or a conditional guilty plea are waived. RULES FOR COURTS-MARTIAL (R.C.M.) 905(e), MANUAL FOR COURTS-MARTIAL (MCM), UNITED STATES (2016 ed.). Jurisdictional defects are an exception to this general rule and are never waived. R.C.M. 905(b)(1). The appellee argues that the subject of the appellant's claim is equal protection, not jurisdiction. As we view the issue, however, it is plainly jurisdictional. It concerns the constitutionality of Article 2, UCMJ, the article that establishes which persons are subject to personal jurisdiction under the UCMJ. Since jurisdictional challenges are never waived—even by an unconditional guilty plea—the issue is appropriate for review. *United States v. Bradley*, 68 M.J. 279, 281

2. The final assignment of error is raised by the appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

(C.A.A.F. 2010) (holding that an unconditional guilty plea waives only nonjurisdictional defects).

The appellee also argues that the appellant's pretrial agreement with the convening authority waives this issue on appeal. This argument is similarly unconvincing since the Rules for Courts-Martial prohibit any pretrial agreement term that purports to waive the accused's right to challenge the jurisdiction of the court-martial. R.C.M. 705(c)(1)(B). Accordingly, the appellant's jurisdictional claim is not waived.

We review jurisdictional claims de novo. *United States v. Wright*, 53 M.J. 476, 478 (C.A.A.F. 2000). We have authority to review the constitutionality of Article 2(a), UCMJ, (codified as 10 U.S.C. § 802(a)). *See United States v. Matthews*, 16 M.J. 354, 366 (C.M.A. 1983) ("we are sure that Congress intended for [the Court of Military Appeals] to have unfettered power to decide constitutional issues — even those concerning the validity of the Uniform Code.").

B. This Constitutional Issue Cannot be Avoided

As a secondary issue, we must determine whether there is a way to resolve the appellant's jurisdictional claim without reaching the constitutional question. Two rules are relevant. The first, a procedural rather than interpretive rule, states that if a case can be decided by resort to statutory construction or general law, rather than constitutional law, it should be decided on the former grounds. *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247-51 (2012). The second is the canon of constitutional doubt, which requires us to interpret statutes in a way that avoids a constitutional question

if such an interpretation is possible. *Gomez v. United States*, 490 U.S. 858, 864 (1989); *see also* Scalia & Garner, *supra* at 251. With these imperatives in mind, we have explored alternative interpretations and procedural approaches to the appellant's issue. We cannot find, and have not been presented with, any alternative resolution or reasonable alternative interpretation that permits us to avoid an equal protection analysis of the stark and facially inscrutable lines that Congress has drawn between classes of retired military personnel in Article 2.

C. Members of the Fleet Reserve are Similarly Situated with Retired Members of the Regular and Reserve Components

A predicate to an equal protection analysis is the existence of similarly situated groups of people who receive different treatment under the law. There is little case law to guide our determination of whether these two groups of retirees are "similarly situated" for equal protection purposes. We nonetheless feel confident determining that members of the Fleet Reserve, regular component retirees, and reserve component retirees are similarly situated because there is no meaningful distinction, legally or factually, between the groups that is relevant to good order and discipline in the armed forces.[3]

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3. Members of a reserve component on inactive duty training are subject to the UCMJ. Art. 2(a)(3), UCMJ. The appellant argues that members of a reserve component that are not on inactive duty training or active duty (reservists on active duty would be subject to the UCMJ under Art. 2(a)(1)) should also be considered similarly situated with the appellant for UCMJ jurisdictional purposes. We disagree, seeing obvious differences between retired personnel of the active and reserve components on the one hand, and reservists who are not currently performing any military duties, have not transferred to

The Fleet Reserve is a type of retiree status unique to the Navy and Marine Corps.[4] Enlisted Sailors of the Navy who have completed at least 20 years of active service will be transferred to the Fleet Reserve at their request. 10 U.S.C. § 6330(b). Members of the Fleet Reserve have no military duties other than to "[m]aintain readiness for active service in event of war or national emergency" and to keep Navy authorities apprised of their location and "any change in health that might prevent service in time of war." Naval Military Personnel Manual, Art. 1830-040 (Ch-38, 19 Dec 2011). Fleet Reservists are entitled to "retainer pay." 10 U.S.C. § 6330(c)(1). Once a member of the Fleet Reserve has reached 30 years of service, they are entitled to transfer to the Navy's retired list. 10 U.S.C. § 6326(a).

With some exceptions—many of which concern disability retirements—members of the Fleet Reserve, regular component retirees, and reserve component retirees have all spent at least 20 years in the armed forces. All three groups include some members who have served in both the regular and the reserve components. The members of all three groups are in an inactive status and no longer perform any uniformed military duties. They are all subject to recall to active duty. They are ineligible for further promotion. They are entitled to retired pay at some point in their retired years. Retirees from an active

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a retired status, and may not even be eligible to retire, on the other. In addition to finding that inactive reservists are not similarly situated with retirees, we can conceive of compelling reasons why Congress would not subject these reservists to UCMJ jurisdiction.

4. The Marine Corps' analogue is called the Fleet Marine Corps Reserve.

component, including the Navy's Fleet Reserve, begin earning retired pay ("retainer pay" for the Fleet Reserve) immediately upon retirement. Retirees from a reserve component generally begin receiving retired pay at age 60. For all of them, once they are entitled to retired pay, the pay continues for the duration of their lives and increases according to a cost of living formula. Their retired pay is not contingent on their continued military usefulness. Their actual ability to contribute to the accomplishment of a military mission is completely irrelevant.

As we consider whether the three groups at issue are similarly situated, we look to each group's current degree of connectedness to the armed forces—not to past connections. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22 (1955) (suggesting that retaining jurisdiction over former soldiers, with no relation to active components, would not improve discipline amongst the active ranks). Although not dispositive, the official Department of Defense (DoD) policy on the utilization of retirees informs our determination that these three groups are in fact similarly situated.

The DoD instruction on "Management of Regular and Reserve Retired Military Members" establishes policy and provides procedures for the activation and employment of retired members. Dep't of Def. Instr. 1352.01, Management of Regular and Reserve Retired Military Members (8 Dec. 2016) [hereinafter DODI 1352.01]. We first note that the instruction states that the Navy's regular component retired members includes members of the Fleet Reserve. *Id*., at ¶ 3.1(a)(2). This is consistent with our determination that members of the Navy's Fleet Reserve are, in all relevant respects, retired for purposes of our equal protection analysis. This determination also reflects

the reality in the fleet, where members of the Fleet Reserve refer to themselves as "retired" and have "retirement ceremonies" upon transfer to the Fleet Reserve. Finally, and most convincingly, the Fleet Reserve has to be considered similarly situated with regular component retirees when one considers that the Army, Air Force, and Coast Guard have no analogous category to the Fleet Reserve, yet retirement eligibility rules are uniform across the armed services.

We also find it relevant that in describing DoD's four-part policy on the utilization of retired members, the instruction makes no distinction between retired members of the regular and reserve components.[5]

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5. To wit:

> It is DoD policy that:
>
> a. *Regular retired members and members of the retired Reserve* may be ordered to active duty (AD) as needed to perform such duties as the Secretary concerned considers necessary in the interests of national defense as described in Sections 688 and 12301 of Title 10, U.S.C.
>
> b. *Regular retired members and members of the retired Reserve* must be managed to ensure they are accessible for national security and readiness requirements.
>
> c. *Regular and Reserve retired members* may be used as a manpower source of last resort after other sources are determined not to be available or a source for unique skills not otherwise obtainable.
>
> d. Directors of agencies that have Defense related missions ... may identify military and federal civilian positions that are suitable for fill by *retired military members* in time of war or national emergency. ...

DODI 1352.01 at ¶ 1.2(a)-(d) (emphasis added). Note that 10 U.S.C. § 12301 (referenced in para. 1.2(a)) places a statutory limitation on the involuntary activation of retired reservists to

Similarly, in describing the criteria for retiree mobilization, the instruction does not mention active or reserve component status as a criterion for mobilization.[6] This formal DoD policy comports with our own experience regarding how the various armed services seek to integrate their reserve components as seamlessly as possible with their active components.

Retired members of both the active and reserve components are similarly—though not identically—subject to involuntary recall to active duty. While unusual, retired members of both the active and reserve components may be involuntarily recalled to active duty by a service secretary. The secretary of a military department has authority to involuntarily order a retired member of a reserve component to active duty for the duration of a war or national emergency and for six months thereafter, provided that Congress has declared a time of war or national emergency and the secretary determines there are not enough qualified reserves in an active status. DODI 1352.01 at ¶ 3.3(b)(1); *see also* 10 U.S.C. § 12301. In contrast, the secretary of a military department has authority to involuntarily order a retired regular member to active duty "at any time to perform duties deemed necessary in the interests of national defense

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times when Congress has declared a time of war or national emergency and the secretary of the military department has made a finding that there are not enough qualified active reserves who are readily available.

6. DODI 1352.01 at ¶ 3.2(c) ("As part of the criteria for deployment of individuals to specific mobilization billets, the Military Services will consider the criticality of the mobilization billet, the skills of the individual, and his or her geographic proximity to the place of mobilization.").

in accordance with Sections 688, 689, 690, and 12307 of Title 10, U.S.C." DODI 1352.01 at ¶ 3.3(b)(2).

While we have found no precedent in case law standing for the proposition that retired members of the active and reserve components are similarly situated, our conclusion is not entirely novel. During testimony on the proposed Article 2, UCMJ, before the House Armed Services Committee, Robert W. Smart, a professional staff member on the House of Representatives' Committee on Armed Services, noted with concern that the jurisdictional scheme would mean "treating two classes of people on the same retired list differently." *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong. (1949) [hereinafter UCMJ Hearing], *reprinted in* William K. Suter, *Index and Legislative History: Uniform Code of Military Justice* 1261 (William S. Hein & Co. 2000) (1950). As we discuss below in our Equal Protection analysis, Congress ultimately tolerated the disparate treatment in order to accommodate differences in how the services managed retirees—differences that, as we will see, are no longer applicable. But we find that this bit of legislative history corroborates our sense that retirees of the reserve and active components are in fact similarly situated.

Based on these considerations, we are convinced that members of the Fleet Reserve, retired members of the regular components, and retired members of the reserve components are similarly situated for purposes of equal protection analysis.

D. Equal Protection Analysis

Congress has broad power under Article I, Section 8, clause 14 of the Constitution "[t]o make Rules for the Government and Regulation of the land and naval

Forces." Pursuant to that grant of authority from the people, Congress has subjected the following categories of people to the UCMJ: active duty military personnel,[7] cadets and midshipmen,[8] military prisoners,[9] prisoners of war and certain other detainees,[10] members of government agencies when assigned to the armed forces,[11] and certain civilians under limited circumstances.[12] Article 2, UCMJ, also includes the following groups that are relevant to our equal protection analysis:

Art. 2(a)(3): Members of a reserve component while on inactive duty training.

Art. 2(a)(4): Retired members of a regular component of the armed forces who are entitled to pay.

Art. 2(a)(5): Retired members of a reserve component who are receiving hospitalization from an armed force.

Art. 2(a)(6): Members of the Fleet Reserve and Fleet Marine Corps Reserve.

The disparate treatment provided to retirees from the active and reserve components is plain on the face of Article 2. The appellant claims that the distinction violates his right to equal protection because Article 2 deprives him of his constitutional rights to free speech, grand jury indictment, and a jury of his peers,

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7. Art. 2(a)(1), UCMJ.

8. Art. 2(a)(2), UCMJ.

9. Art. 2(a)(7), UCMJ.

10. Art. 2(a)(9), 2(a)(13), UCMJ.

11. Art. 2(a)(8), UCMJ.

12. Art. 2(a)(10), (11), (12), UCMJ.

while preserving those rights for similarly situated retirees from reserve components.

There is no equal protection clause in the text of the Fifth Amendment, but in *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Supreme Court determined that an equal protection guarantee exists in the amendment's Due Process clause. "In view of our decision that the Constitution prohibits the states from [violating the 14th Amendment's guarantee of equal protection], it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* Thus, the Fifth Amendment's Due Process Clause also guarantees the right of equal protection to those affected by Federal statutes.

Court-martial jurisdiction has always been considered a special type of criminal jurisdiction significantly different from civil courts and responsive to the special needs of the armed forces that do not exist in civil society. "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid v. Covert*, 354 U.S. 1, 21 (1957). Military jurisdiction was always intended "to be only a narrow exception to the normal and preferred method of trial in courts of law." *Id.* Therefore, notwithstanding Congress' broad constitutional power, the Supreme Court has held that due to the perceived inadequacies of courts-martial compared to Article III courts, Congress must limit its exercise of court-martial jurisdiction to "*the least possible power adequate to the end proposed*." *Quarles*, 350 U.S. at 23 (emphasis in original) (quoting

Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 230-31 (1821)).[13]

The appellant urges us to apply strict scrutiny to Congress' Article 2 jurisdictional scheme because he claims that the unequal treatment he received under Article 2 deprived him of fundamental rights. Strict scrutiny analysis requires the challenged statute to serve a "compelling governmental interest," and the means taken to be "narrowly tailored" to accomplish this goal. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Counter-balancing the proposition that strict scrutiny is the appropriate level of review when fundamental rights are in the balance, we have a judicial duty to provide Congress with great deference when it legislates pursuant to its Article I, Section 8 powers. "[J]udicial deference ... is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)); *see also Solorio v. United States*, 483 U.S. 435 (1987).

We do not see any contradiction in performing a strict scrutiny analysis while providing Congress with great deference. Judicial deference "does not mean abdication." *Rostker*, 453 U.S. at 70. For instance, in *Nat'l Coal. for Men v. Selective Serv. Sys.*, 355 F. Supp. 3d 568 (S.D. Tex. 2019), the district court recognized

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13. "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Quarles*, 350 U.S. at 22.

that "the court's deference to Congress's 'studied choice' is potentially at its height" but still used intermediate-level scrutiny to analyze a gender-based equal protection challenge to Congress' decision to require males, but not females, to register for the Selective Service. *Id.*, at 580.

Equal protection case law supports the proposition that strict scrutiny is the appropriate level of judicial review of governmental action that impinges on a fundamental right. *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("In determining whether a class-based denial of a particular right is deserving of strict scrutiny under the Equal Protection Clause, we look to the Constitution to see if the right infringed has its source, explicitly or implicitly, therein."); *see also United States v. Marcum*, 60 M.J. 198, 204-05 (C.A.A.F. 2004) (analyzing the nature and scope of the right identified by the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) and *Lawrence*'s applicability to Article 125, UCMJ). When a law impinges upon the "exercise of a fundamental right," courts may treat the law as "presumptively invidious." *Plyler*, 457 U.S. at 216-17; *see also Quarles*, 350 U.S. 11 (1955) (invalidating a law that would subject a separated Service Member to court-martial jurisdiction, in spite of traditional deference to Congress on military matters).

Court-martial jurisdiction deprives a defendant of the right to a presentment of the charges to a grand jury under the Fifth Amendment.[14] It also denies a

14. "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces . . . ." U.S. CONST. amend. V.

defendant his Article III[15] and Sixth Amendment[16] right to trial by a jury of his peers. "A service member has no right to have a court-martial be a jury of his peers, a representative cross-section of the community, or randomly chosen." *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004) (citing *Ex parte Quirin*, 317 U.S. 1, 39-41 (1942)).

We are certain that these rights—explicitly described in the Constitution—constitute "fundamental rights" for equal protection purposes. In the context of determining the proper scope of court-martial jurisdiction, the Supreme Court has stated: "[I]n view of our heritage and the history of the adoption of the Constitution and the Bill of Rights, it seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right." *Reid v. Covert*, 354 U.S. 1, 9 (1957). "Trial by jury in a court of law and in accordance with traditional modes of procedure after an indictment by grand jury has served and remains one of our most vital barriers to governmental arbitrariness. These elemental procedural safeguards were embedded in our Constitution to secure their inviolateness and sanctity against the passing demands of expediency or convenience." *Id*. at 10.

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15. "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." U.S. CONST. art. III, § 2, cl. 3.

16. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI.

We find that these rights are undoubtedly fundamental. The appellant was denied their protection by virtue of being subject to the UCMJ.

To avoid application of the strict scrutiny standard, the government contends that court-martial jurisdiction does not burden any fundamental right. Citing *United States v. Dowty*, 60 M.J. 163, 169 (C.A.A.F. 2004), the government argues that the rights to grand and petit juries are not fundamental rights because "Appellant, subject to court-martial jurisdiction, has no Sixth Amendment right to a jury chosen from a fair cross-section of the community. His argument for strict scrutiny review fails."[17] This argument, however, starts with the presumption that the appellant is subject to court-martial jurisdiction—the very notion he challenges here. That Article 2, UCMJ, subjects the appellant to court-martial jurisdiction does not alter the fundamental character of these rights for purposes of our analysis. Under the UCMJ as it then existed, neither Robert Toth nor Clarice Covert had a right to trial by jury. Yet in *Toth v. Quarles* and *Reid v. Covert* the Supreme Court's analysis began with the understanding that the rights to grand and petit juries are fundamental.[18]

Having concluded that fundamental rights are at stake, we must determine whether Article 2's different treatment of similarly situated retiree

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17. Government Brief at 10.

18. *See Toth*, 350 U.S. at 16 ("This right of trial by jury ranks very high in our catalogue of constitutional safeguards."); *Covert*, 354 U.S. at 9 ("[I]t seems peculiarly anomalous to say that trial before a civilian judge and by an independent jury picked from the common citizenry is not a fundamental right.").

groups is narrowly tailored to advance a compelling government interest.

We find that the purpose of military justice is to maintain good order and discipline in the armed forces.[19] When Congress legislates in the field of military justice, its objective is to promote good order and discipline in the armed forces, which is undoubtedly a compelling governmental interest.

There is no doubt that Congress can lawfully subject military retirees to court-martial jurisdiction. *United States v. Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (relying on the fact that retired members are "part of the land or naval forces" to support continuing jurisdiction over retirees), *aff'd on other grounds*, 77 M.J. 447 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 492 (2018); *see also United States v. Hooper*, 9 U.S.C.M.A. 637, 645 (C.M.A. 1958). The question for us is whether the jurisdictional scheme that Congress has created in Article 2 is narrowly tailored to its compelling interest in maintaining good order and discipline in the armed forces.

The legislative history of the creation of the UCMJ provides insight as to why Congress structured Article 2 the way it did.[20] We find that in creating the UCMJ in 1949, Congress was attempting to tailor the law's jurisdiction to two military services with different administrative structures.[21]

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19. *See* MCM, Preamble, ¶ 3.

20. The current versions of the Article 2 subsections in issue here are nearly unchanged from their 1950 origins.

21. While the Department of the Air Force was formed under the National Security Act of 1947, it derived from, and was structured most similarly to, the Army.

Prior to the adoption of the UCMJ, the Articles for the Government of the Navy and the Articles of War governed the separate justice systems of the Navy and Army, respectively. Each system was tailored to the specific needs of its service. In the Navy, retired members of the regular and reserve components were on the same retired list. All retirees were managed and paid by the Navy and amenable to jurisdiction under the Articles for the Government of the Navy. In the Army, on the other hand, regular retirees were administered by the Army and reserve retirees were administered by the Veteran's Administration. The Army did not consider its retired reservists as subject to the Articles of War. This discrepancy needed to be resolved by Congress in order to put the "U" in the UCMJ.

The solution was for the Navy to relinquish court-martial jurisdiction over retired reservists in order to be consistent with the Army:

> Mr. Smart.[22] It appears to me—I just cannot tell for certain—that this [draft Article 2] is a relaxation of jurisdiction over Navy retired officers on the retired list. Is that correct?
>
> Admiral Russel.[23] That is correct.
>
> Mr. Larkin.[24] That is correct.
>
> Mr. Smart. You see the point there, Mr. Chairman, is that the physically retired Navy

22. Robert W. Smart was a Professional Staff Member on the House of Representatives' Committee on Armed Services.

23. Rear Admiral George L. Russel, U.S. Navy, was testifying about the formation of a legal corps within the Navy.

24. Felix Larkin was Assistant General Counsel in the Office of the Secretary of Defense.

> Reserve officer is on the same retired list as the regular officer of the Navy. The physically retired Army officer is certified to VA as being authorized to draw retirement pay—not retired pay but retirement pay.
>
> So there has been a great difference in the past as between physically retired Navy Reserves and Army retired Reserve officers. I just wanted to make certain here that the Navy was relinquishing courts-martial jurisdiction over retired reserve officers. And they say that that is correct.

UCMJ Hearing, *supra*, at 868.

The inequity of subjecting active, but not Reserve, retirees to court-martial jurisdiction was not lost on the House of Representatives committee staff:

> Mr. Smart. I am reluctant to say, Mr. Chairman, what my recommendation [regarding jurisdiction over retirees] would be.
>
> I would point this one thing out to you: It seems a little inconsistent to me that retired personnel of a Regular component are subject when as a matter of fact you have non-Regular personnel in the Navy who are on the same retired list and entitled to the same rights and benefits as the regular.
>
> The Navy apparently here has waived their right to their jurisdiction, so that the retired non-Regular Navy officer, even though he is on the retired list of the Navy will not be any more subject to the code than the non-Regular Army officer who is drawing retirement pay from the Veteran's Administration.

> It is treating reserves alike, I will admit, but it is treating two classes of people on the same retired list differently too.

Id. at 1261.

The Committee Report from the House of Representatives succinctly laid out the rationale for the difference in treatment:

> Paragraph (5) [draft Article 2(a)(5), UCMJ] represents a lessening of jurisdiction over retired personnel of a Reserve component. Under existing law, the Navy retains jurisdiction over retired Reserve personnel since such personnel are on the same retired list as members of a regular component. The Army has no such jurisdiction since retirement benefits for non-regular officers are administered by the Veteran's Administration. This paragraph relinquishes jurisdiction over its Reserve personnel except when they are receiving hospitalization from an armed force. This standardizes jurisdiction of the armed forces over Reserve personnel.

H.R. Rep. No. 81-491, at 10 (1949) *reprinted in* Suter, *supra*. An identical explanation appeared in the corresponding Senate report. S. Rep. No. 81-486, at 7 (1949) *reprinted in* Suter, *supra*.

If Article 2 was originally tailored by Congress, however awkwardly, to the administrative needs of the Army and Navy, it appears that those needs no longer exist. Instead, it appears that each service now manages and administers its own reserve retirees. *See, e.g.*, 10 U.S.C. § 12731(b) ("Application for [non-regular] retired pay under this section must be made to the Secretary of the military department, or the Secretary of Homeland Security, as the case may be,

having jurisdiction at the time of application over the armed force in which the applicant is serving or last served"). *See also* 10 U.S.C. § 12731(f)(3) ("The Secretary concerned shall periodically notify each member of the Ready Reserve . . . of the current eligibility age for retired pay of such member under this section, including any reduced eligibility age by reason of the operation of that paragraph. Notice shall be provided by such means as the Secretary considers appropriate taking into account the cost of provision of notice and the convenience of members."). Each service now administers its retirees, both active and reserve.

Furthermore, we find that the structure of Article 2 jurisdiction over current retirees is not narrowly tailored to the compelling government interest in maintaining good order and discipline in the armed forces. UCMJ jurisdiction is simply not related to a retiree's connectedness to the armed forces or ability to effectively contribute to military missions. An elderly and infirm active component retiree is less likely to be able to contribute to the accomplishment of military missions than a middle-aged reserve component retiree in good health. Yet, the active component retiree of questionable military utility may be court-martialed for violations of the UCMJ, and suffer the deprivation of fundamental rights that such jurisdiction entails, while a younger and more physically fit reserve component retiree is immune from UCMJ jurisdiction.

Article 2(a)(4) states that a retired member of a regular component "entitled to pay" is subject to the UCMJ. Such language indicates that Congress may have viewed entitlement to pay as a useful criterion for determining UCMJ jurisdiction. Entitlement to pay fails entirely as a narrowing criterion, however,

because many reserve component retirees are also entitled to pay and yet remain outside UCMJ jurisdiction.[25] The retired pay structure for reservists is also completely disconnected from a reservist's actual ability to contribute to military missions. Indeed, for reserve component retirees the relationship between entitlement to pay and military utility is essentially inverted. When a reserve retiree is younger, they are more likely to be able to withstand the physical rigors of active military service and less likely to be receiving retired pay. When older, they are more likely to be receiving retired pay and less likely to be militarily useful. For both regular and reserve retirees, once they are entitled to retired pay, the entitlement continues for the duration of their lives and increases according to a set formula. Neither's retired pay is contingent on their continued military usefulness. We find that entitlement to pay does not help tailor Article 2's jurisdictional scheme to Congress' compelling interest in maintaining good order and discipline in the armed forces.

Our review indicates that Article 2 is not narrowly tailored to the achievement of a compelling government interest. Instead, it appears that Article 2's retiree jurisdiction structure is an anachronistic vestige of Congress' effort to create a uniform code of military justice for military services that traditionally had different administrative needs. Article 2's retiree jurisdiction rules reflect an administrative

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25. Retirees from a reserve component are generally entitled to retired pay, but they do not start receiving it until age 60. Some retired reservists can earn retired pay as early as age 50 if they qualify under rules that reduce the age at which they start receiving pay. *See* 10 U.S.C. § 12731(f).

compromise that has outlived its necessity and is not tailored to current governmental interests.

It is clear to us that Congress could lawfully subject all retirees of the armed forces to UCMJ jurisdiction. Conversely, it could subject no retirees of the armed forces to jurisdiction. It could also narrowly tailor retiree jurisdiction in such a way to satisfy the compelling interest in maintaining good order and discipline in the armed forces. Article 2 as structured, however, is not narrowly tailored to that interest. Accordingly, we find that the UCMJ's jurisdictional structure for retirees violates the right of equal protection imputed to the Fifth Amendment.

III. CONCLUSION

After careful consideration of the record and briefs and oral argument of appellate counsel, we hold that Articles 2(a)(4) and 2(a)(6) of the UCMJ violate the Due Process Clause's guaranty of equal protection of the laws and are therefore unconstitutional. Accordingly, the findings and sentence as approved by the convening authority are DISMISSED.

Senior Judges FULTON and HITESMAN concur.