No. 18-____

IN THE

Supreme Court of the United States

STEVEN M. LARRABEE,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United States ex rel. Toth* v. *Quarles*, this Court held that the armed forces could not constitutionally court-martial "civilian ex-soldiers who had severed all relationship with the military and its institutions," 350 U.S. 11, 14 (1955), even for offenses committed while on active duty. Petitioner is a retired Marine who was tried and convicted by court-martial for offenses committed after he had been discharged from active duty, and with no relationship to his military status. The lower courts nevertheless rejected his constitutional challenge to the exercise of military jurisdiction, concluding that "those in a retired status remain 'members' of the land and Naval forces who may face court-martial" for any and all crimes they commit while retired. *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017).

The Questions Presented are:

1. Whether the Constitution permits the court-martial of a retired military servicemember.

2. Whether, if so, the Constitution limits the jurisdiction of courts-martial in such cases to offenses that are related to the retiree's military status.

TABLE OF CONTENTS

TABLE OF CONTENTS (CONTINUED)

* * *

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

TABLE OF AUTHORITIES (CONTINUED)

Constitutional Provisions

Statutes, Regulations, and Court Rules

TABLE OF AUTHORITIES (CONTINUED)

Other Authorities

TABLE OF AUTHORITIES (CONTINUED)

* * *

PETITION FOR A WRIT OF CERTIORARI

Petitioner is one of the two million former active-duty U.S. servicemembers who are legally "retired."[1] He receives pay in the form of his military pension, but he holds no active rank; he has no commanding officer or subordinates; he lacks the authority to issue binding orders; he has no obligation to follow orders; he performs no duties; and he participates in no regular military activities. He was nevertheless tried and convicted by court-martial—dressed in civilian clothes—for non-military offenses committed after he retired from active duty, on private property, and against a victim who was not part of the armed forces.

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

For a time, lower courts had distinguished *Toth* on the ground that military retirees, unlike discharged ex-soldiers, continue to receive pay. *See, e.g.*, *United States* v. *Hooper*, 26 C.M.R. 417, 425 (C.M.A. 1958) ("Certainly, one . . . who receives a salary to assure his availability . . . is a part of the land or naval forces.").

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

But in two separate lines of cases, this Court has vitiated that reasoning.

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

Second, in *Barker* v. *Kansas*, 503 U.S. 594 (1992), this Court held that military retired pay is not in fact current income, but is instead "deferred pay for past services." *Id.* at 605. Even if a salary, on its own, could be sufficient to subject the recipient to court-martial, *Barker* confirms that military retirees are pensioners, not part-time, salaried employees. As the lower courts recognized in the ruling at issue here, *Barker* thereby eliminated the central analytical justification for holding that retirees remain members of the "land and naval forces" under the Make Rules Clause—and, in the process, the constitutional rationale for trying them by court-martial. *See United States* v. *Dinger*, 76 M.J. 552, 555 (N-M. Ct. Crim. App. 2017), *aff'd on other grounds*, 77 M.J. 447 (C.A.A.F. 2018).

Lacking any precedential foundation, the lower courts instead resorted to "first principles," *id.* at 556, but nevertheless sustained military jurisdiction here, holding that retirees are still part of the "land and naval forces"—and subject to trial by court-martial—not because they receive pay, but *solely* because they can be involuntarily recalled to active duty. *See id.* at 556–57. Military jurisdiction over retirees is justified, the argument goes, in order to promote "good order and discipline" among those who *may*, at some indefinite point in the future, be needed for additional active-duty service. *See id.*; *see also* Pet. App. 5a n.1 (applying *Dinger* to this case).

This holding is stunning in its breadth. Not only would it mean that every retired servicemember could be subject to court-martial for any crime committed until their death, but it would also mean Congress could authorize courts-martial for any offense committed by any of the 17 million men registered for the Selective Service,[2] who are subject to involuntary induction and activation by the President for training and service at any time, "whether or not a state of war exists." 50 U.S.C. § 3803(a).

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

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2. At the end of 2016, 16,829,936 men were registered for the Selective Service. *See* Selective Serv. Sys., *Annual Report to the Congress of the United States: Fiscal Year 2017*, at 28 (2018).

But even if, by dint of hypothetical future service, retirees remain part of the "land and naval forces," their amenability to court-martial should be limited to crimes bearing some nexus to the military. Courts-martial may exercise only "the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. Thus, although active-duty servicemembers can be tried for offenses with no military connection, *Solorio* v. *United States*, 483 U.S. 435 (1987), reservists can only be tried for offenses committed on active duty or during inactive-duty training—not for every crime they might commit in civilian life. *See, e.g.*, *United States* v. *Morita*, 74 M.J. 116, 122–23 (C.A.A.F. 2015).

If retirees are to be subject to courts-martial at all, then, this Court should at the very least clarify that such jurisdiction is constitutionally limited to crimes related to their residual military status. No matter how broadly that standard is construed, this case fails to meet it. And because this Court has jurisdiction over the questions presented here, but may not in future cases in which they arise, this Petition presents not only immensely important questions about the constitutional scope of military jurisdiction, but also an appropriate vehicle through which to answer them.

DECISIONS BELOW

The order of the Court of Appeals for the Armed Forces (CAAF) is not yet reported. It is reprinted in the Appendix at Pet. App. 1a. CAAF's order granting review of Petitioner's petition for review is reported at 77 M.J. 328 (C.A.A.F. 2018), and is reprinted in the Appendix at Pet. App. 2a. The decision of the Navy-Marine Corps Court of Criminal Appeals (NMCCA) is not reported. It is reprinted in the Appendix, *id.* at 3a.

JURISDICTION

CAAF granted Petitioner's petition for review on March 20, 2018, *id.* at 2a, and issued an order affirming the NMCCA on August 22, 2018. *Id.* at 1a. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3). *See post* at 22–25 (discussing jurisdiction).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Make Rules Clause authorizes Congress "[t]o make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I, § 8, cl. 14. The Fifth Amendment exempts from its requirement of a grand jury indictment "cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." *Id.* amend. V.

Articles 2(a)(4) and 2(a)(6) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 802(a)(4) and 802(a)(6), provide that "[r]etired members of a regular component of the armed forces who are entitled to pay" and "[m]embers of the Fleet Reserve and Fleet Marine Corps Reserve" are subject to the UCMJ—and to court-martial for the offenses prescribed therein.

STATEMENT OF THE CASE

A. Legal Background

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

Retired Officer: Status, Duties, and Responsibilities, 26 A.F. L. REV. 111, 113 (1987).

Against that background, this Court held in *United States* v. *Tyler*, 105 U.S. 244 (1882), that a military retiree receiving pay was still "serving" in the military for purposes of a statute that provided for raises for every five years of a military officer's service. For retirees such as Tyler, "the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only." *Id*. at 245. And although *Tyler* only raised the scope of a specific federal benefit, it suggested in dicta that retirees "may be tried, not by a jury, as other citizens are, but by a military court-martial." *Id*. *Tyler* thus "first tacitly recognized the power of Congress to authorize court-martial jurisdiction" over retirees. *Dinger*, 76 M.J. at 555; *see also* Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 332 (1964) ("[T]he amenability of retired regulars to court-martial, though unknown to the founding fathers, is as old as the retired list itself, which was also unknown to them.").

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

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

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

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

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

But whatever was left of that rationale was washed away by this Court's decision in *Barker*.[3] There, in considering how retiree pay should be treated for purposes of a state tax scheme, this Court concluded that "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services." 503 U.S. at 605. Among other things, as Justice White wrote for the unanimous Court, "[t]he amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement." *Id*. at 599 (citation and internal quotation marks omitted); *cf. United States* v. *Carpenter*, 37 M.J. 291, 295 (C.M.A. 1993) ("[A] retired officer has no duties . . . ."), *vacated on other grounds*, 515 U.S. 1138 (1995) (mem.).

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

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

Instead, the *Barker* Court held that, at least for purposes of the relevant federal statute, "military retirement benefits are to be considered deferred pay for past services." *Id.* at 604.[4]

"From these developments it is clear that the receipt of retired pay is neither wholly necessary, nor solely sufficient, to justify court-martial jurisdiction [over retirees]." *Dinger*, 76 M.J. at 555–56. But in the 26 years since *Barker* was decided, this Court has not had occasion to consider how—if at all—that ruling calls into question the continuing constitutionality of military jurisdiction over retired servicemembers.

B. Procedural History

On August 1, 2015, after 20 years of service in the U.S. Marine Corps, Petitioner Steven M. Larrabee retired from active duty as a Staff Sergeant, and was transferred to the Fleet Marine Corps Reserve.[5] After his retirement, Petitioner continued to reside in Iwakuni, Japan (his final duty station), and began managing two local bars. On November 15, 2015, after a night of drinking, Petitioner sexually assaulted a bartender at one of the bars he managed and used his cell phone to record the incident. The victim, identified

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

5. Members of the Fleet Marine Corps Reserve receive "retainer pay," not "retired pay." For all practical purposes, however, including the military's statutory and constitutional jurisdiction, this is a distinction without a difference. *See United States* v. *Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001). Indeed, its name aside, the "Fleet Marine Corps Reserve" is not actually a reserve component of the armed forces. *See* 10 U.S.C. § 10101 (listing the seven reserve components).

in court records as "KAH," was not a member of the armed forces, although her spouse was.

Petitioner was subsequently convicted by a court-martial, pursuant to his pleas, on one count of sexual assault and one count of indecent recording in violation of Articles 120 and 120c of the UCMJ, 10 U.S.C. §§ 920 and 920c. The military judge sentenced Petitioner to eight years' confinement, a reprimand, and a dishonorable discharge. As part of a pre-trial agreement, however, the Convening Authority disapproved the reprimand, suspended confinement in excess of 10 months, and, except for that part of the sentence extending to the dishonorable discharge, ordered the sentence executed.

Petitioner raised four claims in his appeal to the NMCCA. As relevant here,[6] Petitioner argued that, because he was retired, the court-martial's exercise of jurisdiction over him was unconstitutional. And even if it was not, Petitioner argued that 10 U.S.C. § 6332 deprived the court-martial of the power to sentence him to a punitive discharge subsequent to his transfer to the Fleet Marine Corps Reserve.[7]

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

7. That provision specifies that "when a member of the naval service is transferred . . . to the Fleet Marine Corps Reserve," "the transfer is conclusive for all purposes," including grade and rate of pay based on years of service to that point. 10 U.S.C. § 6332. Earlier decisions by CAAF's predecessor had interpreted this language to prohibit punitive discharges of retirees. *See United States* v. *Sloan*, 35 M.J. 4 (C.M.A. 1992); *United States* v. *Allen*, 33 M.J. 209 (C.M.A. 1991). CAAF overruled those decisions in *Dinger*, 77 M.J. 447.

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

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

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

Based on *Dinger*, the NMCCA rejected Petitioner's similar challenges, and affirmed the trial judge's findings and sentence in his case. Pet App. 5a n.1, 20a. Petitioner then filed a petition for review in CAAF, seeking discretionary review of three issues: Whether (1) the unlawful command influence in his case was harmless beyond a reasonable doubt; (2) the assertion of jurisdiction was constitutional; and (3) a retiree can lawfully be sentenced to a punitive discharge.

On March 20, 2018, CAAF granted review in Petitioner's case, but only with respect to the sentencing issue. *Id.* at 2a. After it affirmed the NMCCA's resolution of that question in a published opinion in *Dinger*, 77 M.J. 447, CAAF issued a summary order in Petitioner's case on August 22, 2018, affirming the NMCCA's decision in this case "in light of *Dinger*." *Id.* at 1a.

REASONS FOR GRANTING THE PETITION

Since the end of World War II, this Court has carefully policed the constitutional boundaries of military jurisdiction. In one of the lines of cases discussed above, it has all but foreclosed the military's power to try civilians by court-martial—concluding that they fall outside the "land and naval forces" subject to Congress's plenary regulatory authority under the Make Rules Clause of Article I. *See, e.g.*, *Guagliardo*, 361 U.S. 281; *Grisham*, 361 U.S. 278; *Singleton*, 361 U.S. 234; *Covert*, 354 U.S. 1; *Toth*, 350 U.S. 11.[8] A second line of decisions has recognized the breadth of the military's power to try active-duty servicemembers, interpreting the Make Rules Clause and the exception from the Fifth Amendment's Grand Jury Indictment Clause for "cases arising in the land and naval forces" to allow the military to try *any* offense committed by such personnel. *See Solorio*, 483 U.S. 435. The unifying theme of these decisions has been the sufficiency of the accused's military status for purposes of the Make Rules Clause:

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8. In *United States* v. *Ali*, 71 M.J. 256 (C.A.A.F. 2012), CAAF upheld the court-martial of a non-citizen military contractor for offenses committed in Iraq—but only because, as a non-citizen outside the United States, the accused, per CAAF, lacked jury-trial rights under the Fifth and Sixth Amendments. *Id.* at 269.

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

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

Retired servicemembers "are certainly not obvious members of the armed forces, as are soldiers on active duty; on the other hand they are not 'full-fledged' civilians." Bishop, *supra*, at 318. Thus, even as it has coalesced around these two sets of constitutional rules, this Court has not had the occasion to consider on which side of the constitutional line military retirees fall, either before *Barker* or since in the 26 years since it undermined the prevailing view—that retirees remain part of the land and naval forces because they continue to receive pay.

In its own right, whether retired servicemembers can ever be tried by courts-martial, even for offenses committed after their retirement from active duty that have no relation to their military status, is a sufficiently serious constitutional question to warrant this Court's intervention. But the case for certiorari is all the more compelling in light of the theory on which the NMCCA relied below, which would allow Congress to authorize trial by court-martial of any and all offenses committed by any individual theoretically subject to future active-duty military service.

On that theory, not only would it be constitutional for the military to court-martial octogenarian

Vietnam veterans who commit Medicare fraud or who use "contemptuous words against the President," 10 U.S.C. § 888; it would also be constitutional to court-martial 18-year-olds registered for the Selective Service System who speed on the George Washington Parkway or sell marijuana in a state in which such sales are lawful. *See id.* § 934. Petitioner does not believe that the Constitution abides such a staggering expansion of military jurisdiction. But if it does, it should at the very least be for this Court to say so.

I. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT

As this Court observed in *Toth*, "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed." 350 U.S. at 23 (quoting *Anderson* v. *Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821)). This is so, Justice Black argued three years later, because "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Covert*, 354 U.S. at 21 (plurality opinion); *see also Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 122–23 (1866) ("[I]f ideas can be expressed in words, and language has any meaning, this right—one of the most valuable in a free country—is preserved to everyone accused of crime who is not attached to the army, or navy, or militia in actual service.").

Thus, although this Court has repeatedly shown deference to the military in general and to the system of military justice Congress created in the UCMJ in

particular, *see, e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 753 (1975), the one topic on which it has shown no deference is the scope of what has been described as the military's "personal jurisdiction," *i.e.*, the classes of offenders who may constitutionally be subjected to trial before a military tribunal. *See, e.g.*, *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 585 n.16 (2006).[9]

Not only has this Court repeatedly identified and enforced constitutional limits on military jurisdiction in such cases, but it has recognized an exception to abstention when "[t]he constitutional question presented turned on the status of the persons as to whom the military asserted its power." *Councilman*, 420 U.S. at 759; *see In re Al-Nashiri*, 835 F.3d 110, 133–34 (D.C. Cir. 2016) (summarizing the "status" exception to *Councilman* abstention), *cert. denied*, 138 S. Ct. 354 (2017). As the second Justice Harlan put it, this Court "did not believe that the expertise of military courts extended to the consideration of constitutional claims of the type presented." *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969).

This Petition presents jurisdictional questions of the same gravity. And although it comes to this Court on direct review rather than habeas, the questions are no less urgent. If anything, the fact that Petitioner has exhausted his military remedies—and to no avail—underscores not only the imperative for this Court's resolution of the Questions Presented, but the suitability of this case as an appropriate vehicle for addressing them.

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9. "Personal jurisdiction" may be a misnomer here, because the constitutional objection "is a structural question of subject matter jurisdiction." *Al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring).

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

This Court's unanimous decision in *Barker* necessarily vitiated the rationale upon which the lower courts had long relied in sustaining court-martial jurisdiction over retired servicemembers. After all, although *Barker*'s holding was specific to a single federal statute, its analysis highlights the logical fallacy in the conclusion that individuals remain part of the "land and naval forces" for purposes of Article I so long as they continue to receive pay. Among other things, "a military retiree is entitled to a stated percentage of the pay level achieved at retirement, multiplied by the years of creditable service." *Barker*, 503 U.S. at 599; 10 U.S.C. §§ 1401–15 (setting out statutory rules for retiree pay).

If, as *Barker* held, Congress treats retiree pay as tantamount to a pension,[10] then that remuneration is a benefit paid to a former servicemember, rather than a continuing financial tether to a current one. But those receiving benefits from the military could hardly be said to be "in" the "land and naval forces" as a result. *See Covert*, 354 U.S. at 23 & n.16 (plurality opinion). Instead, *Barker* compels the conclusion, as the NMCCA held in *Dinger*, that military jurisdiction over retired servicemembers can no longer rest on the fact that they continue to receive pay—and perhaps never should have.

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10. To similar effect, the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982), generally provides "that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws." Ives & Davidson, *supra*, at 52.

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

In *Dinger*, the NMCCA properly recognized *Barker*'s jurisdictional implications, and agreed that it had to return to "first principles" to resolve whether retirees could be tried by court-martial. 76 M.J. at 556. It nevertheless upheld the military's jurisdiction by pointing to the fact that retirees remain subject to recall at any time. *See id.* at 556–57. The NMCCA's cursory analysis suffers from three separate—but independently material—flaws.

First, the NMCCA justified this "subject to recall" rationale based upon the deference Congress is owed when it legislates under the Make Rules Clause. But it failed to recognize that this deference was derived from cases involving *active-duty* servicemembers—to which there was no question that the Make Rules Clause applied. As Chief Justice Rehnquist wrote for the Court in *Solorio*, "we have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights *of servicemen* were implicated." 483 U.S. at 448 (emphasis added); *see also id.* (citing seven examples, all of which involved active-duty personnel). The NMCCA's conclusion that Congress is entitled to similar deference in extending military jurisdiction to individuals who are *not* active-duty servicemembers does not follow from these cases. At a more basic level, it is also belied by the numerous decisions cited above, *ante* at 15, in which this Court recognized the special need for searching review of claims that the military lacked jurisdiction based upon the status of the offender. *E.g.*, *Noyd*, 395 U.S. at 696 n.8.

Second, the understanding that retirees face a reasonable likelihood of recall to active duty, "like Cincinnatus from the plow," Bishop, *supra*, at 357, is generally anachronistic—and has been for decades. Since Vietnam, if not earlier, the reserve components, rather than the services' retired lists, have been the primary mechanism for augmenting active-duty troops. *See, e.g.*, Library of Congress, *supra*, at 15–17. Thus, the future activation-based argument in favor of military jurisdiction "seems rather more plausible when applied to reservists, who are in reality [more] likely to be called to service in emergencies." Bishop, *supra*, at 357.[11]

This policy shift is reflected not only in the legal framework governing activation of the reserve components, but also in two different constraints on when and how retirees can be recalled. For example, 10 U.S.C. § 690(b) imposes a rigid cap (15 flag officers and 25 other officers from each service branch) on the number of retired officers who can be recalled to active duty under 10 U.S.C. § 688 at the same time—outside a time of war or national emergency.

And current Defense Department regulations all but preclude the involuntary recall to active military duty *any* former servicemember who retired due to disability or who has reached the age of 60. *See* DoD Instruction 1352.01, ¶ 3.2(g)(2) (2016) (noting limits

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11. As noted *ante* at 4, inactive reservists, unlike retirees, are *not* subject to trial by court-martial for any offense committed at any time. Instead, Congress has limited jurisdiction in such cases to offenses committed while the reservist was "on active duty" or "on inactive-duty training." 10 U.S.C. § 802(d)(2). There is no plausible explanation for why jurisdiction over reservists—who are far more likely to be called to active duty—should be so heavily limited when jurisdiction over retirees is not.

on recall of "Category III" retirees).[12] "Theoretically," under current law, "only death cuts off the military's ability to recall its retired members to active duty and/or to subject them to court-martial jurisdiction." Ives & Davidson, *supra*, at 8. In reality, however, the vast majority of military retirees face no prospect of involuntary recall to active duty.

Third, if even the illusory specter of activation suffices to justify the assertion of military jurisdiction, then the exact same can be said about the Selective Service System, whose 17 million registrants are "liable for training and service in the Armed Forces of the United States." 50 U.S.C. § 3803(a). Indeed, just as 10 U.S.C. § 688 authorizes the involuntary recall to active duty of retired servicemembers "at any time," the Selective Service Act empowers the President,

> whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces.

50 U.S.C. § 3803(a). The UCMJ does not currently authorize the court-martial of Selective Service registrants. But if *Dinger*'s reasoning is correct, it could. *Cf. The Selective Draft Law Cases*, 245 U.S. 366, 377–78 (1918) (holding that the Constitution allows Congress, in appropriate circumstances, to provide for the involuntary conscription of all citizens).

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

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

And yet, *Dinger*'s analysis requires exactly that result. If the fact that retirees remain subject to recall to active duty alone provides a sufficient basis for treating them as part of the "land and naval forces," there is no obvious reason why Selective Service registrants—whose activation would be far more likely in a true emergency—are not similarly situated. Under *Dinger*, then, not only could Congress provide for military jurisdiction over each of the two million current military retirees; it could also authorize trial by court-martial of the 17 million men who have registered with the Selective Service, whether or not they are ever actually inducted into the military.

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

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

Even if the NMCCA in *Dinger* was correct that the Make Rules Clause empowers Congress to subject to military jurisdiction anyone who is currently subject to future activation, that conclusion would only provoke a related constitutional question—whether, by limiting such cases to those "*arising in* the land or naval forces," the Grand Jury Indictment Clause of the Fifth Amendment requires that the offense have some relationship to the retiree's military status. Certiorari is therefore warranted not only to resolve whether retirees are *ever* subject to trial by court-martial, but, even if the answer is yes, to clarify the circumstances in which they may be so tried.

To be sure, *Solorio* rejected the argument that the Constitution requires offenses by active-duty servicemembers to be connected to their military service in order to be subject to military jurisdiction. 483 U.S. at 450–51 ("The requirements of the Constitution are not violated where, as here, a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged."). But this Court's analysis was predicated entirely on the view that, where active-duty servicemembers were at issue, their status necessarily brought them within the regulatory scope of the Make Rules Clause and therefore settled their amenability to court-martial jurisdiction. *See, e.g.*, *id.* at 439–40. Where other classes of individuals who are outside any active chain of command are subjected to military jurisdiction, however, not only does *Solorio* not govern, but its reasoning militates in favor of the opposite conclusion.

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

II. THIS PETITION PRESENTS AS GOOD A VEHICLE FOR DECIDING THE QUESTIONS PRESENTED AS IS LIKELY TO ARISE

This Petition not only presents constitutional questions of the first order, but it also provides an appropriate vehicle through which to resolve them. This Court has jurisdiction, and the Petition presents as good a case for resolving the Questions Presented as this Court is likely to see in the near future.

A. This Court Has Jurisdiction Over this Petition

This Court has jurisdiction to review decisions by CAAF in "[c]ases in which [CAAF] granted a petition for review under section 867(a)(3) of title 10." 28 U.S.C. § 1259(3). This is such a case. CAAF granted Petitioner's petition for review and issued a decision

and judgment affirming the NMCCA's findings and sentence. Pet. App. 1a. There is thus no question that the plain text of § 1259(3) is satisfied. *See Ortiz* v. *United States*, 138 S. Ct. 2165, 2172 (2018); *see also United States* v. *Denedo*, 556 U.S. 904, 909–10 (2009) (rejecting a "parsimonious" construction of § 1259).

Despite the clear text of § 1259(3), the Solicitor General has previously contended that this Court's jurisdiction under that provision does not extend to issues on which CAAF did not grant a discretionary petition for review. *E.g.*, Brief for the United States in Opposition at 7 n.2, *Wiechmann* v. *United States*, 559 U.S. 904 (2010) (mem.); Brief for the United States in Opposition at 6, *McKeel* v. *United States*, 549 U.S. 1019 (2006) (mem.). This argument rises and falls on 10 U.S.C. § 867a(a), which provides that this Court "may not review by a writ of certiorari under [§ 1259] any action of [CAAF] in refusing to grant a petition for review."

It is well settled that this Court's power to review "cases" in the courts of appeals under 28 U.S.C. § 1254(1) allows it to consider the entire dispute, and not just the specific grounds of decision relied upon by the court from which review is sought. *See, e.g.*, *Forsyth* v. *City of Hammond*, 166 U.S. 506, 513 (1897) ("The power thus given is not affected by the condition of the case as it exists in the court of appeals."); *see also Dart Cherokee Basin Operating Co.* v. *Owens*, 135 S. Ct. 547, 554–55 (2014). Although § 1259(3) likewise invests this Court with appellate jurisdiction to review CAAF's decisions in "cases" in which it has granted a discretionary petition for review,[13] the

13. Section 1259's mandate that this Court review "decisions" by CAAF is generally understood as a limit on the *timing* of this

Solicitor General's argument appears to be that § 867a(a), enacted six years after § 1259(3), narrows that jurisdiction to review of only the specific *issues* CAAF agreed to resolve.[14]

"It is an unresolved question whether, once [CAAF] grants a petition for review on some issues, the Supreme Court has the power to consider other issues in the case that were not granted review," Shapiro, *supra*, § 2.14, at 130 n.120. But it is not a difficult one. The text of § 867a(a) only precludes this Court from reviewing CAAF's actions in "refusing to grant *a* petition for review." There is no "petition for review" that CAAF "refus[ed] to grant" in this case. *See* Pet. App. 2a (order granting review). Petitioner did not file three petitions for review, two of which were denied; he filed one petition raising three issues, and it was granted as to one of them. Section 867a(a) is therefore inapposite.

Even if § 867a(a) were ambiguous on this point, it is a "cardinal rule" of statutory interpretation that "repeals by implication are not favored," *Cook County, Ill.* v. *United States ex rel. Chandler*, 538 U.S. 119, 132 (2003) (internal quotation marks omitted), including repeals of this Court's appellate jurisdiction. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869). And yet, there

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Court's appellate jurisdiction, not its scope. *E.g.*, Stephen M. Shapiro, et al., *Supreme Court Practice*, § 2.14, at 132 (10th ed. 2013) ("[T]he Court cannot grant certiorari to review a nonfinal judgment of [CAAF], or an appeal from a lower military court judgment that has just been lodged in [CAAF].").

14. Perhaps tellingly, CAAF's own jurisdiction is not so limited. Instead, even in cases in which it grants a discretionary petition for review, it "may specify or act on *any* issue concerning a matter of law which materially affects the rights of the parties," C.A.A.F. R. 5 (emphasis added), not just those identified by the parties.

is no evidence that Congress intended § 867a(a) to narrow the scope of § 1259(3), as opposed to make explicit what had previously been implicit—that § 1259(3) only extends to cases CAAF chooses to hear. *See* H.R. CONF. REP. NO. 101-331, at 656–67 (1989).[15]

But if this Court is of the view that this unresolved, recurring jurisdictional question is indeed difficult, the proper disposition would not be to deny certiorari and leave the matter unsettled, but to add whether this Court has appellate jurisdiction to the Questions Presented and grant certiorari, so that the matter can be fully briefed and argued. *See, e.g.*, *Montgomery* v. *Louisiana*, 135 S. Ct. 1546, 1546 (2015) (mem.). If anything, the opportunity to resolve an unsettled threshold question as to the scope of this Court's appellate jurisdiction only further justifies certiorari.

B. This Court May Not Have Jurisdiction Over These Questions in Future Cases

Nor is there any reason to wait for a future case raising the Questions Presented, with or without this jurisdictional issue. Among other things, there is no realistic possibility of a division of authority among the lower courts. Any appeal of a military retiree's

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15. Section 867a(a) was enacted as section 1301(b) of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1301(b), 103 Stat. 1352, 1569 (1989), which was titled "Restatement of Certiorari Provision." Although "the heading of a section cannot limit the plain meaning of the text," it is one of the "tools available for the resolution of a doubt." *Bhd. of R.R. Trainmen* v. *Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947). That § 867a(a) merely "restates" § 1259 is reinforced by its preceding sentence, which also restates an already settled proposition: "Decisions of the United States Court of Appeals for the Armed Forces are subject to review by the Supreme Court by writ of certiorari as provided in section 1259 of title 28."

court-martial conviction would necessarily go through CAAF—such that there is nothing to be gained by waiting to see if some other lower court reaches a different result on similar facts.

In addition, and most importantly, there is no guarantee that, in future cases in which retirees are subject to court-martial, CAAF will grant a petition for review on *any* issue—and thereby open the door to direct review by this Court. That CAAF declined to grant discretionary review of the constitutional issues presented in this Petition either in this case or in *Dinger* suggests that CAAF sees those matters as settled by its own precedent—even though, as the NMCCA's ruling in *Dinger* makes clear, they are not.

In such circumstances, it may be unwise for this Court to assume that, in a future case in which the only issue is the constitutionality of a retiree's court-martial, CAAF would grant review. And not only will this Court lack appellate jurisdiction if CAAF denies subsequent petitions for review raising this issue, but collateral relief via habeas corpus may be unavailable, as well.[16] Thus, this case is not only an appropriate vehicle for this Court to resolve the constitutionality of military jurisdiction over retirees; it may be the last good opportunity to do so for some time.

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16. Collateral review of courts-martial via habeas corpus is generally limited to claims that were not "fully and fairly" considered by the military courts. *See Burns* v. *Wilson*, 346 U.S. 137, 142 (1953) (plurality opinion); *Thomas* v. *U.S. Disciplinary Barracks*, 625 F.3d 667, 671 (10th Cir. 2010). It is not settled whether that standard applies to jurisdictional objections such as those presented here. *See, e.g.*, *Penland* v. *Mabus*, 78 F. Supp. 3d 484, 493 (D.D.C. 2015). Either way, a claim can be "fully and fairly" considered even if CAAF denies a petition for review. *See, e.g.*, *Armann* v. *McKean*, 549 F.3d 279, 292–96 (3d Cir. 2008).

* * *

Petitioner's case "may seem innocuous at first blush." *Stern* v. *Marshall*, 564 U.S. 462, 503 (2011). But "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture." *Covert*, 354 U.S. at 39 (plurality opinion). For decades, lower courts sustained the military's authority to try retirees by court-martial based upon cryptic—and since discredited—dicta about retiree pay in this Court's 1882 decision in *Tyler*. But rather than confess error, the lower courts have now gravitated toward a new theory, one with far broader—and potentially startling—implications.

As in *Toth*, "[t]o allow this extension of military authority would require an extremely broad construction of the language used in the constitutional provision relied on." 350 U.S. at 14–15. Throughout its history, this Court has repeatedly rejected such broad constructions of the Constitution, recognizing that "[t]here are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution." *Id*. at 22. As in those cases, the jurisdiction of courts-martial over military retirees presents "another instance calling for limitation to 'the least possible power adequate to the end proposed." *Id*. at 23 (quoting *Anderson*, 19 U.S. (6 Wheat.) at 230–31).

But at the very least, if such a construction *is* to be the law of the land, it ought to come from this Court's hand, and not that of the NMCCA.

CONCLUSION

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

Respectfully submitted,

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September 17, 2018

APPENDIX

APPENDIX
TABLE OF CONTENTS

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

United States,
Appellee

v.

Steven M. Larrabee,
Appellant

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

ORDER

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

ORDERED:

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

FOR THE COURT

/s/ Joseph R. Perlak
Clerk of the Court

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

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

United States,
Appellee

v.

Steven M. Larrabee,
Appellant

No. 18-0114/MC
CCA 201700075

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 the Court, this 20th day of March, 2018,

ORDERED:

That said petition is hereby granted on the following issue:

10 U.S.C. § 6332 STATES THAT THE TRANSFER OF A SERVICEMEMBER TO RETIRED STATUS IS "CONCLUSIVE FOR ALL PURPOSES." CAN A COURT-MARTIAL SENTENCE A RETIREE TO A PUNITIVE DISCHARGE?

No briefs will be filed under Rule 25.

FOR THE COURT

/s/ Joseph R. Perlak
Clerk of the Court

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

UNITED STATES NAVY-MARINE CORPS COURT OF APPEALS

No. 201700075

UNITED STATES OF AMERICA
Appellee

v.

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

Appeal from the
United States Navy-Marine Corps Trial Judiciary

Military Judges: Lieutenant Colonel Eugene H. Robinson, Jr., USMC.

Convening Authority: Commanding General, Marine Corps Installations Pacific, Okinawa, Japan.

Staff Judge Advocate's Recommendation:
Major Christopher W. Pehrson, USMC.

For Appellant:
Commander Brian L. Mizer, JAGC, USN.

For Appellee: Lieutenant Commander Justin C. Henderson, JAGC, USN; Lieutenant George R. Lewis, JAGC, USN

Decided 28 November 2017

Before HUTCHISON, FULTON, AND SAYEGH,
Appellate Military Judges

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

SAYEGH, Judge:

At a general court-martial, a military judge convicted the appellant, pursuant to his pleas, of one specification of sexual assault and one specification of indecent recording in violation of Articles 120 and 120c, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 920 and 920c. The military judge sentenced the appellant to eight years' confinement, a reprimand, and a dishonorable discharge. The convening authority (CA) disapproved the reprimand, but approved the remainder of the sentence. In accordance with the pretrial agreement (PTA), the CA suspended confinement in excess of 10 months, and, except for that part of the sentence extending to the dishonorable discharge, ordered the sentence executed.

The appellant raises four assignments of error (AOEs): (1) the staff judge advocate (SJA) created unlawful command influence (UCI) by attempting to have the military judge reassigned a year before he was scheduled to leave his judicial assignment in Okinawa, Japan; (2) the CA abused his discretion by not approving the appellant's request for a post-trial Article 39(a) session to investigate the appellant's allegations of UCI; (3) application of jurisdiction under Article 2(a)(6), UCMJ, is unconstitutional in this case where the appellant was transferred to the

Fleet Marine Corps Reserve three months prior to committing the offenses to which he pleaded guilty; and (4) a court-martial cannot sentence a service member transferred to retired status to a punitive discharge.[1]

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

I. BACKGROUND

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

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

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

2016, an initial review officer (IRO) determined grounds existed to retain the appellant in PTC.

In August 2016, the appellant's trial defense counsel (TDC) filed a motion alleging the IRO abused his discretion and seeking the appellant's immediate release from PTC. On 14 September 2016, the military judge ruled that the IRO abused his discretion and ordered the appellant released from PTC. Five days later, on 20 September 2016, the appellant was released from PTC and placed on pretrial restriction. On 26 October 2016, the TDC filed a motion, pursuant to Article 13, UCMJ, for illegal pretrial punishment.

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

The SJA denied that his disagreements were personal or that they in any way affected his approach

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3. Record at 58.

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

to his duties. The SJA described his personal opinion regarding previous rulings by the military judge:

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

In support of the Article 13, UCMJ, motion, the appellant submitted an affidavit from one of his TDCs, Captain N, alleging specific comments by the SJA about the military judge. The comments were made during, and in the context of, pretrial negotiations in the appellant's case. The affidavit states that the SJA indicated he would not support the proposed PTA because, in light of the military judge's decision to order day-for-day PTC credit, it did not provide for enough confinement. The SJA further explained that he was dissatisfied with the military judge's sentences in two previous cases. Captain N quotes the SJA as saying, "Okinawa is dealing with a military judge who just does whatever he wants to do" and "[The military judge] does whatever he wants to do when I try to do everything right."[6] The SJA testified that he did not recall making the specific statements alleged in Captain N's affidavit, but he did acknowledge that

5. Record at 69.

6. AE XVII at 7.

during the previous "Article 6" visit he discussed with the SJA to the Commandant of the Marine Corps (CMC) the need for more judge advocates and another military judge in Okinawa.[7] The SJA denied that he requested the military judge be removed or replaced—he testified that the discussion was intended to facilitate assignment of more judge advocates and a second military judge to Okinawa in order to improve case processing times.[8] The SJA admitted he made similar remarks about judge advocate manning in Japan to the Deputy Commander, Marine Corps Installations Pacific, a week prior to his testimony.[9]

Based on the SJA's testimony, the military judge approved the TDC's request to conduct voir dire of the military judge.[10] During this voir dire, the military judge indicated that his current tour as a military judge was due to end in the summer 2018 and that he had taken no action to request reassignment sooner.[11] The military judge stated that he had received a phone call in late September or early October 2016 from Headquarters, Marine Corps. The purpose of the phone call was to inform the military judge that he would be reassigned during the upcoming summer of 2017.[12] The military judge was not given a reason for the early reassignment, only that his replacement was

7. Record at 62.

8. *Id.* at 63–64.

9. *Id*. at 64.

10. *Id*. at 72.

11. *Id*.

12. *Id*. at 73.

a newly promoted Colonel.[13] At the conclusion of the voir dire, the military judge indicated he had no reservations about his ability to continue to impartially try the appellant's case, and that he did not believe a third party, who knew all of the facts, would have any reservations with him remaining as the military judge in this case.[14]

During argument on the Article 13, UCMJ, motion, the TDC suggested there was UCI, stating: "Sir, just as a preliminary matter, our questions regarding the—what has been accused of tampering with the military judge and by the SJA to get him relocated, we do believe that we have raised at least the appearance of UCI enough to shift the burden with regards to that issue onto the government."[15] The TDC made no further references to UCI. During the government's argument in rebuttal, the TC commented:

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

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13. *Id*.

14. *Id*. at 74–75.

15. *Id*. at 76–77.

16. *Id*. at 79.

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

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

II. DISCUSSION

A. UCI

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

States v. Simpson, 58 M.J. 368, 374 (C.A.A.F. 2003) (citation and internal quotation marks omitted).

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

We first turn our attention to whether the appellant properly raised the issue of UCI at trial. The appellant's brief asserts that UCI was raised at trial but "[t]he military judge simply ignored the defense request to address the [UCI] directed at the military judge."[17] We disagree. "The threshold for raising the [UCI] issue at trial is low, but more than mere allegation or speculation." *United States v. Biagase*, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *United States v. Johnston*, 39 M.J. 242, 244 (C.M.A. 1994)). The

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

appellant in this case did not file a written UCI motion or make one orally on the record. In the absence of a written or oral motion, the TDC's references to possible UCI during argument on a distinctly separate issue was not sufficient to properly raise UCI at trial.[18] Therefore, we analyze the appellant's UCI claim as one first raised on appeal.

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

Although neither a commander nor a CA, actions by an SJA may constitute UCI, because "'a[n SJA] generally acts with the mantle of command authority.'" *United States v. Hamilton*, 41 M.J. 32, 37, (C.M.A. 1994) (quoting *United States v. Kitts*, 23 M.J. 105, 108 (C.M.A. 1986)). Likewise, the Court of Appeals for the Armed Forces has found UCI where the government sought to remove a sitting military judge and where government actions compelled a

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

19. Appellant's Brief at 11, 16.

military judge to recuse themself. *See Salyer*, 72 M.J. at 415; *Lewis*, 63 M.J. at 405.

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

The appellant avers there is apparent UCI because "the public would be appalled to know the trial

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

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

Assuming, without deciding, that the appellant has met the low threshold of "some evidence," the burden of proof shifts to the government to prove beyond a reasonable doubt that the facts as presented do not constitute apparent UCI. *Boyce*, 76 M.J. at 249.

Unlike the military judges in *Salyer* and *Lewis* who recused themselves, the military judge here indicated he had no reservations about his ability to continue to impartially try the appellant's case, and was not challenged by either party on his ability to do so. The SJA denied on the record making any statements or taking any action intended to have the military judge reassigned.[22] The SJA testified that his attempts to facilitate assignment of additional judge advocates and another military judge to Okinawa were not based

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

22. Record at 64.

on his personal dissatisfaction with the military judge's past rulings, or any rulings in this case. This testimony was unrebutted by the appellant. Although the SJA admitted to discussing the need for additional legal personnel in Okinawa with the SJA to the CMC, there is no evidence that this discussion had any influence on the Headquarters, Marine Corps' phone call to the military judge.

The appellant's speculation regarding the SJA's motives "amounts to no more than a claim of [UCI] in the air." *United States v. Shea*, 76 M.J. 277, 282 (C.A.A.F. 2017). Morever, the military judge's Article 13, UCMJ ruling—awarding the appellant 111 additional days of PTC credit—demonstrated his ability to remain impartial despite the SJA's comments.[23] "We will not presume that a military judge has been influenced simply by the proximity of events which give the appearance of [UCI] in the absence of a connection to the result of a particlar trial." *United States v. Allen*, 33 M.J. 209, 212 (C.M.A. 1991) (citing *Thomas*, 22 M.J. at 389 (additional citation oitted). We find the government has proven beyond a reasonable doubt that the facts as presented do not constitute apparent UCI.

However, assuming arguendo the government failed to meet its burden, we would nonetheless find that the government proved beyond a reasonable doubt that the UCI did not place an intolerable strain on the public's perception of the military justice system because "an objective, disinterested observer,

23. *Id*. at 85.

fully informed of all the facts and circumstances, would harbor a significant doubt about the fairness of the proceeding." *Boyce*, 76 M.J. at 248 (quoting *Lewis*, 63 M.J. at 415). Unlike actual UCI, which requires prejudice to the accused, "no such showing is required for a meritorious claim of an appearance of [UCI]. Rather, the prejudice involved ... is the damage to the public's perception of the fairness of the military justice system as a whole[.]" *Id.*

The facts and circumstances surrounding this case include an SJA who voiced his personal displeasure with the military judge to the TDC during pretrial negotiations. As stated above, these comments were not intended for the public, nor were they substantively UCI. The SJA made a specific request directly to the SJA to CMC for an additional military judge to be assigned to Japan, and there was a subsequent phone call to the military judge from Headquarters, Marine Corps informing him that he was being reassigned a year early. However, the reasons for the phone call are not clearly established on the record, and ultimately the military judge was never reassigned. Morever, following voir dire, where the military judge stated on the record he could impartially try the case, the TDC was apparently satisfied and declined to challenge him for cause. Finally, a different SJA provided the CA the required post-trial advice and recommendations.[24] Under these

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

facts, we find that the government has proven beyond a reasonable doubt that any apparent UCI "did not place 'an intolerable strain' upon the public's perception of the military justice system and that 'an objective, disinterested observer, fully informed of all the facts and circumstances, would [not] harbor a significant doubt about the fairness of the proceeding.'" *Boyce*, 76 M.J. at 249 (quoting *Salyer*, 72 M.J. at 423).

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

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

R.C.M. 1102(b)(2) and (d) provide authority for a CA to direct a post-trial Article 39(a), UCMJ, session for the purpose of inquiring into, and when appropriate, resolving "any matter that arises after trial and that substantially affects the legal sufficiency of any findings of guilty or the sentence." R.C.M. 1102(b)(2). "When an appellant requests the [CA] to order a post-trial Article 39(a) session, it is a matter for the [CA's] sound discretion whether to grant the request." *United States v. Ruiz*, 49 M.J. 340,

25. Appellant's Brief at 19.

348 (C.A.A.F. 1998). In as much as a CA may be persuaded by facts, a CA is not compelled to approve a request "based merely on unsworn, unsubstantiated assertions." *Id*. "We review a convening authority's decision not to grant a post-trial hearing for an abuse of discretion." *United States v. Lofton*, 69 M.J. 386, 391 (C.A.A.F. 2011) (citing *Ruiz*, 49 M.J. at 348). Both *Lofton* and *Ruiz* found that it was an abuse of discretion for a CA to deny a request for a post-trial 39(a) session that was based on substantiated assertions. *Lofton*, 69 M.J. at 392; *Ruiz*, 49 M.J. at 348.

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

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

The appellant's request alleges apparent UCI through the actions of the SJA and that the military judge was being reassigned early due to "defense

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

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

We find the appellant's request did not substantiate his assertions. The affidavit presented to the CA included comments between the SJA and a TDC made in the context of discussing a PTC issue associated with an unrelated case. The comments were unprofessional, but not intended for the public, nor did they constitue UCI on the part of the SJA. The request alluded to the SJA creating apparent UCI through his actions, but provide the CA no additional evidence to substantiate that allegation. The

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27. *Id*. at 4.

28. *Id*.

29. *Id*. Encl. (1) to Encl. (1).

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

appellant asserts the military judge was being reassigned early because of his previous rulings, but includes nothing to support the claim. Similarly, the appellant's allegation that the SJA intentionally fabricated evidence before an unrelated administrative discharge board hearing that occurred after the appellant's trial is not relevant to the appellant's court-martial. Although the allegations in the appellant's request may raise questions regarding the character and conduct of the SJA, they do not substantiate the allegation that the SJA was able to influence the military judge's rulings in this case, or influence the decision of Headquarters Marine Corps to notify the military judge of a potential early reassignment.

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

III. CONCLUSION

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

Senior Judge HUTCHISON and Judge FULTON concur.

For the Court

[SEAL]

R.H. TROIDL
Clerk of Court