No. 21-___

IN THE

Supreme Court of the United States

STEPHEN 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 FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court has long held that the Constitution prohibits the peacetime court-martial of civilians for any offense, even those committed in foreign combat zones during prior service in the armed forces. *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955). This Court has also held that active-duty servicemembers may be court-martialed for any offense, even civilian crimes with no connection to the military. *Solorio* v. *United States*, 483 U.S. 435 (1987). But this Court has never addressed which of these rules applies to *retired* servicemembers—who, by statute, remain subject to non-Article III military prosecution in perpetuity for any civilian or military offense Congress prescribes, even those committed long after they have retired.

The lone Article III court to consider the issue in the past half-century recently held that the extension of military jurisdiction to retirees for post-retirement offenses is unconstitutional. *Larrabee* v. *Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020). In Petitioner's case, however, the Court of Appeals for the Armed Forces (CAAF) came to the opposite conclusion.

The Question Presented is:

When, if ever, does the Constitution permit the court-martial of retired servicemembers for offenses committed after their discharge from active duty?

PARTIES TO THE PROCEEDING

All parties to this proceeding appear in the caption on the cover page of this Petition.

CORPORATE DISCLOSURE STATEMENT

No nongovernmental corporations are parties to this proceeding.

RELATED PROCEEDINGS

Other than the direct appeal that forms the basis for this Petition, there are no related proceedings for purposes of S. CT. R. 14.1(b)(iii).

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INTRODUCTION

Petitioner is one of the two million former active-duty U.S. servicemembers who are legally "retired."[1] He receives deferred compensation stemming from his prior active-duty service, 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; he is under no requirement to maintain any level of physical (or other) readiness; and he participates in no regular military activities of any kind. He was nevertheless tried and convicted by a court-martial—dressed in civilian clothes—for non-military offenses committed after he retired from active duty.

This Court has never decided whether the Constitution permits retired servicemembers to be tried by court-martial for post-retirement offenses. It *has* held that the Constitution forbids the court-martial of ex-servicemembers, even for offenses committed while on active duty. *Toth*, 350 U.S. 11. And it has likewise held that the Constitution forbids courts-martial during peacetime of both civilian dependents of servicemembers and civilian employees of the military—for capital and non-capital offenses alike. *See McElroy* v. *United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham* v. *Hagan*, 361 U.S. 278 (1960); *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid* v. *Covert*, 354 U.S. 1 (1957).

These cases underscore this Court's "repeated caution against the application of military jurisdiction over anyone other than forces serving in active duty."

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1. There were 2,183,326 military retirees as of December 31, 2020. Dep't of Defense, *Military Retirees and Survivors by Congressional District*, at 1 (2021).

United States v. *Ali*, 71 M.J. 256, 269 (C.A.A.F. 2012). That caution, like the decisions reflecting it, promotes the Founding-era principle that military jurisdiction in this country is the exception, not the norm. "[H]aving experienced the military excesses of the Crown in colonial America, the Framers harbored a deep distrust of executive military power and military tribunals." *Loving* v. *United States*, 517 U.S. 748, 760 (1996); *see Lee* v. *Madigan*, 358 U.S. 228, 232 (1958) ("The attitude of a free society toward the jurisdiction of military tribunals . . . has a long history.").

One reason for this caution is because, to this day, courts-martial remain a system apart. *See Parker* v. *Levy*, 417 U.S. 733, 743 (1974). Although their quality has improved in some respects, *see Ortiz* v. *United States*, 138 S. Ct. 2165, 2174 (2018), they still allow non-unanimous convictions by jurors who are not required to represent any cross-section of the community, 10 U.S.C. §§ 825(e)(2), 852(a); they are still presided over by judges lacking even a modicum of statutory independence, *Weiss* v. *United States*, 510 U.S. 163 (1994); they still utilize numerous procedures that would not pass muster in civilian courts, *see, e.g.*, *United States* v. *Akbar*, 74 M.J. 364, 404 (C.A.A.F. 2015); and they still regularly convict defendants for conduct that the Constitution shields from civilian trial. *See, e.g.*, *Parker*, 417 U.S. at 733, 735, 738 & n.4 (upholding the UCMJ's "general articles"—which proscribe, among other things, "conduct unbecoming an officer and a gentleman," "all disorders and neglects to the prejudice of good order and discipline," and "all conduct of a nature to bring discredit upon the armed forces"). Serious concerns thus remain that courts-martial do not adequately protect the rights of those *not* on active duty. *Ali*, 71 M.J. at 269.

Skepticism of expansive military jurisdiction also reflects the separation of powers concerns that arise *whenever* the political branches divert federal adjudicatory authority away from Article III courts. These concerns, as this Court has made clear, are independent of the quality of the non-Article III forum. *See, e.g.*, *Stern* v. *Marshall*, 564 U.S. 462, 502–03 (2011) ("A statute may no more lawfully chip away at the authority of the Judicial Branch than it may eliminate it entirely.").

In the decision below, CAAF threw these concerns to the wind. It upheld Petitioner's court-martial by invoking two different forms of deference. It deferred to Congress's 1950 determination that retirees remain "in" the "land and naval forces" for purposes of the Make Rules Clause so long as they receive deferred compensation and remain subject to future recall. Pet. App. 11a. And it concluded that Congress is entitled to the same deference in this context that it receives when it "subject[s] civilians to a federal criminal code based solely on its regulatory authority." *Id.* at 13a.

In the process, CAAF reached the exact opposite conclusion from the district court in *Larrabee*. On collateral review, *Larrabee* stressed the difference between the considerable deference that this Court's decisions accord the political branches when *regulating* the "land and naval forces," and the lack of deference that this Court has accorded when determining who falls *within* the "land and naval forces" in the first place. 502 F. Supp. 3d at 329.

As *Larrabee* explained, absent improper deference on the latter subject, the defense of retiree jurisdiction collapses. After all, no other inactive personnel are subject to court-martial for offenses committed while

they are inactive—even though most of them are *more* likely to be utilized in an emergency. *Id.* at 332 ("Because military retirees are much less likely to be recalled to active-duty service than Reservists are, the distinction in whether these two similar groups are subject to court-martial jurisdiction seems arbitrary at best."). If Congress has never found it necessary to subject frontline reservists to court-martial for offenses committed while inactive (to say nothing of National Guard troops), there is simply no plausible argument for treating *retirees* more harshly.

The government's appeal in *Larrabee* is pending. But even if the conflict between that decision and CAAF's ruling here dissipates, the importance of the Question Presented will not. Courts-martial of retirees have become far more common in recent years. Public pressure to court-martial retirees has increased at the same time, especially after the violence at the Capitol on January 6. Thus, this is a paradigmatic case in which "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." S. CT. R. 10(c). And because the government has disputed whether collateral review is even *de novo*, this Petition presents an ideal vehicle through which that question can—and should—be resolved.

DECISIONS BELOW

CAAF's decision is not yet reported. It is reprinted in the Appendix at Pet. App. 1a and is available via Westlaw at 2021 WL 2639319. CAAF's three orders granting review of different issues in this case are reported at 80 M.J. 463 (C.A.A.F. 2020); 80 M.J. 289 (C.A.A.F. 2020); and 80 M.J. 200 (C.A.A.F. 2020); and are reprinted in the Appendix at Pet. App. 34a–36a.

The decision of the en banc Navy-Marine Corps Court of Criminal Appeals (NMCCA) is reported at 79 M.J. 767 (N-M. Ct. Crim. App. 2020) (en banc). It is reprinted in the Appendix at Pet. App. 37a. The NMCCA's original panel decision is reported at 79 M.J. 620 (N-M. Ct. Crim. App. 2019) and is reprinted in the Appendix at Pet. App. 112a.

JURISDICTION

As relevant to the Question Presented, CAAF granted Petitioner's petition for review on December 8, 2020, *id*. at 35a, and issued its decision on June 24, 2021. *Id*. at 1a. This Court has jurisdiction under 28 U.S.C. § 1259(3). *See post* at 29–30.

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." *Id*. amend. V.

Articles 2(a)(4) and 2(a)(6) of the UCMJ subject to the Code "[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." 10 U.S.C. § 802(a)(4), (6).

STATEMENT OF THE CASE

A. Legal Background

The status of a "retired" servicemember did not exist at the Founding. Rather, it was first created in 1861, when Congress 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 "former" soldiers who had been separated from the military, those on the retired list were generally entitled to receive annual pay at a reduced rate in exchange for providing an emergency manpower reserve. *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. *Tyler* only raised the scope of a specific federal benefit. But it also noted that, under the Articles of War in effect at the time, retirees "may be tried, not by a jury, as other citizens are, but by a military court-martial." *Id*. Although courts often insist that *Tyler* "tacitly recognized the power of Congress to authorize court-martial jurisdiction" over retirees. *United States* v. *Dinger*, 76 M.J. 552, 555 (N-M. Ct. Crim. App. 2017), all this Court recognized was that Congress *had* authorized such jurisdiction; *Tyler* said nothing about Congress's constitutional power to do so.

No subsequent decision by this Court has gone any further. As the *Larrabee* court explained, "[t]he lack of any Supreme Court case addressing the question is likely due in part to the fact that in the 70-year period since the UCMJ explicitly authorized such jurisdiction, the military has so rarely chosen to exercise it." 502 F. Supp. 3d at 330 n.8. In the handful

of reported cases in which retirees *were* tried, lower courts generally relied upon this Court's dicta in *Tyler*—along with the retirees' continuing receipt of pay and the extent to which they remained at least theoretically subject to recall to active duty.

For example, seven years before *Toth*, the Second Circuit upheld the court-martial of a Fleet Reserve member for an offense committed after he had left active duty. *United States ex rel. Pasela* v. *Fenno*, 167 F.2d 593 (2d Cir. 1948). In that court's view, "[t]he 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 *Toth* and *Covert*, the Court of Military Appeals (today's CAAF) adopted similarly reductive 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. 417, 425 (C.M.A. 1958). *But see Hooper* v. *United States*, 326 F.2d 982, 987 (Ct. Cl. 1964) ("[W]e have certain doubts [that retiree jurisdiction is constitutional]."). *Tyler*'s focus on retiree pay was thus central to courts' consistent—if infrequent—holdings that military retirees could constitutionally be subject

to court-martial. Even after *Grisham* and *Guagliardo* (rejecting the argument that *current* compensation could support courts-martial of civilian employees of the military), this view of *Tyler* persisted. *E.g.*, *United States* v. *Overton*, 24 M.J. 309, 311 (C.M.A. 1987).

In *Barker* v. *Kansas*, 503 U.S. 594 (1992), however, this Court swept away *Tyler*'s foundations. At issue in *Barker* was whether Kansas's tax on the "retired pay"[2] received by military retirees violated 4 U.S.C. § 111.[3] Because Kansas taxed retired pay but *not* state and local government retirement benefits, the tax was consistent with § 111 only if retired pay was more akin to a current salary than to a pension.

In holding that retired pay was a pension (and that Kansas's tax was therefore unlawful), this Court focused its analysis on how retired pay is computed:

> The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. By taking into account years of service, the formula used to calculate retirement benefits leaves open the possibility of creating disparities among members of the same preretirement rank. Such

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2. Even though members of the Fleet Reserve receive "retainer pay" rather than "retired pay," the UCMJ "makes no distinction between retired pay and retainer pay." *United States* v. *Morris*, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001).

3. Under this statute, the United States has consented to state taxation of "pay or compensation for personal service as an officer or employee of the United States" only if "the taxation does not discriminate against the officer or employee because of the source of the pay or compensation." 4 U.S.C. § 111(a).

> disparities cannot be explained on the basis of "current pay for current services," since presumably retirees subject to these benefit differentials would be performing the same "services."

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

Although *Barker* decided the issue only in the context of 4 U.S.C. § 111, its characterization of retired pay had nothing to do with *that* statute; it was based instead on the Title 10 statutes governing the calculation of retired pay—which apply in all relevant circumstances. *See id*. at 599 (citing Brief for the United States as *Amicus Curiae* at 11 n.16, *Barker*, 503 U.S. 594 (No. 91-611), 1992 WL 12012042).

What *Barker* makes clear is that, in contrast to what was true when *Tyler* was decided, retired pay and retainer pay *today* are properly understood as deferred compensation for *prior* active-duty service. *See Larrabee*, 502 F. Supp. 3d at 330 ("The Government's position rests on the longstanding, but largely inaccurate, assumption that this retainer pay represents reduced compensation for current part-time services.").[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. Indeed, Congress has recognized as much, since even certain

4. Congress has adopted this understanding in the Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, tit. X, 96 Stat. 718, 730 (1982), which treats retired pay as property divisible upon divorce per state martial property laws—rather than as income that is not.

"*former* member[s]," are entitled to receive retired pay. *See* 10 U.S.C. § 1408(a)(5). If nothing else, this underscores how modern developments destabilized the rationale on which lower courts had previously rested retiree jurisdiction—and helped to provoke the conflict between *Larrabee* and CAAF's decision here.

B. Procedural History

As the NMCCA summarized below,

> After 24 years of active duty service, and numerous voluntary reenlistments, Appellant elected to transfer to the Fleet Reserve. . . .[5]
>
> 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.

Pet. App. 39a–40a (footnotes omitted).

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5. Its name aside, the Fleet Reserve "is *not* a 'reserve component' of the military." *Larrabee*, 502 F. Supp. 3d at 324 (quoting 10 U.S.C. § 10101). Rather, it is the body to which enlisted Navy personnel literally "retire" after completing 20 years of service—in lieu of being discharged. *Id.* As the en banc NMCCA put it below, when Petitioner transferred to the Fleet Reserve, "for all intents and purposes, he retired." Pet. App. 39a.

Petitioner subsequently agreed to plead guilty to 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 of the UCMJ, 10 U.S.C. §§ 880, 920b. He was sentenced to 18 months' confinement and a bad-conduct discharge.

A unanimous NMCCA panel held on appeal that the assertion of military jurisdiction over Petitioner violated equal protection. Pet. App. 112a.[6] But on rehearing en banc, the NMCCA affirmed Petitioner's conviction in a fractured, 4-3 ruling. *Id.* at 37a.[7] As relevant here, the court held that, as a member of the Fleet Reserve, Petitioner remained part of the "land or naval forces," and therefore remained subject to court-martial for post-retirement offenses under the NMCCA's prior decision in *Dinger* and the 1987 Court of Military Appeals ruling in *Overton*. *Id.* at 41a–53a.

Petitioner timely petitioned CAAF for review of three issues, including his equal protection claim and his broader challenge to court-martial jurisdiction over retirees. Although CAAF initially granted review only as to the equal protection issue, it granted

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6. Specifically, the panel held that Article 2 triggered—and failed—strict scrutiny through its differential treatment of active-duty retirees like Petitioner and those who retire from a reserve component, who are subject to the UCMJ only while "receiving hospitalization from an armed force." 10 U.S.C. § 802(a)(5); *see* Pet. App. 129a–35a.

7. As part of its en banc review, the NMCCA ordered the Navy to "produce information regarding involuntary recalls" including whether any retirees were "involuntarily recalled to active duty" for anything "other than disciplinary purposes" from 2000 to 2017. Pet. App. 112a. After the Navy objected that providing such data would be too onerous, the NMCCA withdrew its order. *See id.* at 110a.

Petitioner's subsequent petition for rehearing—and agreed to resolve the broader jurisdictional question—after the district court's decision in *Larrabee*.

On June 24, 2021, CAAF unanimously affirmed, rejecting Petitioner's argument that court-martial jurisdiction over inactive personnel should be strictly circumscribed. CAAF distinguished this Court's earlier cases by suggesting that none of them were "concerned with whether an individual was a member of the armed forces." *Id.* at 8a. And unlike the civilians at issue in those cases, the court explained, "Fleet Reservists are still paid, subject to recall, and required to maintain military readiness." *Id.* at 8a–9a. Finally, the court explained that requiring the government to provide a specific justification for continuing to subject retirees to the UCMJ "would run counter to the Supreme Court's broad deference towards Congress in enacting federal criminal statutes pursuant to Congress's regulatory powers." *Id.* at 12a.[8]

Judge Maggs (joined by Judge Hardy and Senior Judge Crawford) joined the majority opinion "in full," but wrote separately to explain why he did not believe Petitioner had demonstrated that court-martial jurisdiction over retirees was inconsistent with the original understanding of the Constitution. *Id.* at 18a (Maggs, J., concurring).

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8. CAAF also rejected Petitioner's equal protection claim, holding that Congress only needed (and had) a rational basis for treating those who retired from active-duty differently from reservist retirees. Pet. App. 14a–17a. Petitioner is not pursuing that claim in this Court.

REASONS FOR GRANTING THE PETITION

Even without the conflict between the district court's decision in *Larrabee* (holding that military jurisdiction over post-retirement offenses is unconstitutional) and CAAF's contrary decision here, the juxtaposition of these rulings underscores why this Court's review is imperative. First, both rulings recognize that court-martial jurisdiction over retirees implicates a significant constitutional question that this Court has never squarely answered—and the answer to which will directly affect millions of Americans. Even if they weren't diametrically opposed, these lower-court rulings drive home the unmistakable *importance* of the Question Presented.

Second, the district court's reasoning in *Larrabee* also illustrates the three analytical flaws that pervaded CAAF's reasoning here: It misread *Toth* and its progeny to require deference to Congress's determination of who is "in" the "land and Naval forces" in the first place. It misstated the current rules and regulations governing military retirees—concluding that retirees are "required to maintain military readiness," Pet. App. 8a–9a, when nothing could be further from the truth. And it misrepresented both *Barker* and its implications—all while abandoning the core holding of earlier decisions that subjecting retirees to the UCMJ is justified at least largely by their continuing receipt of pay.

These errors did not just lead CAAF to the wrong answer; if left intact, they would give Congress power going forward to subject to military trial those without any current military duties or responsibilities—including the 16 million men currently registered for the Selective Service, if not anyone who could *ever* be

called to serve in the future. "Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the least possible power adequate to the end proposed." *Toth*, 350 U.S. at 23 (internal quotation marks omitted). CAAF's decision would turn that principle on its head.

Nor is there reason to await the outcome of the government's appeal in *Larrabee*. Whatever the D.C. Circuit holds in that case, the time has come for *this* Court to settle the matter—once and for all. *See al Bahlul* v. *United States*, 840 F.3d 757, 760 n.1 (D.C. Cir. 2016) (en banc) (Kavanaugh, J., concurring) (noting the importance of "squarely and definitively" resolving open questions about the constitutional scope of military jurisdiction).

I. THE CONSTITUTIONALITY OF COURT-MARTIAL JURISDICTION OVER MILITARY RETIREES IS A QUESTION OF EXCEPTIONAL IMPORTANCE

This Court has long interpreted the Constitution to establish two opposing principles for court-martial jurisdiction. On one side, active-duty personnel may constitutionally be tried by court-martial for whatever offenses Congress chooses to prescribe. *E.g.*, *Solorio*, 483 U.S. 435. On the other side, civilians may *not* be tried by court-martial during peacetime, even for offenses committed while they were active-duty servicemembers. *Toth*, 350 U.S. at 19–21. Like other inactive personnel, retirees fall between these poles. They are, by definition, not active-duty personnel. But the fact that they remain subject to future recall also distinguishes them from civilians with *no* connection to the military like the ex-servicemember in *Toth*.

This Court has never had occasion to resolve whether inactive—but not formally separated—military personnel may constitutionally be tried by court-martial for offenses committed while inactive. Part of why that question has never reached this Court is because Congress has generally not *authorized* courts-martial in such cases. Under the UCMJ, reservists are subject to court-martial only for offenses committed while active or on inactive-duty training. 10 U.S.C. § 802(a)(3)(A)(i). National Guard troops are subject to the UCMJ only under similar circumstances—and only when in "Federal service." *Id*. § 802(a)(3)(A)(ii). That these troops are not subject to the UCMJ *while* they are inactive does not in any way call into question the government's power to activate them when needed; it merely recognizes that they ought not to be subject to military law so long as they are not performing a *present* military function.

More than a mere policy choice on Congress's part, lower courts have repeatedly suggested that the Constitution may *require* these statutory limits—explaining that serious constitutional questions would arise from courts-martial of truly inactive reservists. *See, e.g.*, *Wallace* v. *Chafee*, 451 F.2d 1374, 1380-81 (9th Cir. 1971) (distinguishing the "principle that jurisdiction should be narrowly construed on constitutional grounds" because the UCMJ "purport[ed] to extend only to on-duty periods"); *Murphy* v. *Garrett*, 29 M.J. 469, 471 (C.M.A. 1990) (reserving the "constitutional question whether a member of the inactive reserve who has *no contacts* with an armed force could be ordered to active duty"). *See generally United States* v. *Hale*, 78 M.J. 268, 275–76 (C.A.A.F. 2019) (Ohlson, J., concurring in part and dissenting in part) (discussing reservist jurisdiction).

Retirees are the one exception to this pattern. For reasons that were already anachronistic when the UCMJ was enacted in 1950,[9] and that are even more anachronistic today, Congress has continued to subject those who retire from active-duty components to the UCMJ *while* retired—even as the Individual Ready Reserve has displaced the retired list as the first, the largest, and the all-but-exclusive body from which the government would augment (and has augmented) active-duty troops in a crisis. *See, e.g.*, Dep't of Def. Instruction 1215.06, *Uniform Reserve, Training, and Retirement Categories for the Reserve Components*, encl. 5, § 2(a) (Mar. 11, 2014).

Under the government's own rules and regulations, retirees are literally the *last* body from which the government can (and does) supplement active-duty forces; two-thirds of retirees are not even *eligible* to be recalled under the government's own criteria. *See post* at 25 & n.15. And none of the troops *more* likely to be called upon in such circumstances are subject to the UCMJ while they are inactive. Put simply, whether or not personnel are subject to the UCMJ while they are inactive has nothing to do with how likely—or even whether—they are to be relied upon in a future emergency.

Meanwhile, even as retirees' reserve function has become moribund, their numbers have swelled—from 132,000 when the UCMJ was enacted to one million

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9. Shortly after the UCMJ was enacted, the Secretary of the Army found that "[c]ourt-martial jurisdiction over retired members not on active duty does not contribute to maintenance of good order and discipline and can be eliminated." AD HOC COMMITTEE TO STUDY THE UCMJ, REPORT TO THE HONORABLE WILBER M. BRUCKER 7 (1960) [hereinafter BRUCKER REPORT].

in 1975 to well over two million today. *See* Dep't of Defense, *Statistical Report on the Military Retirement System: Fiscal Year 2015*, at 18–19 (2016).[10] Comparable numbers in *Toth* led this Court to emphasize "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.

CAAF's holding in this case has a similarly "enormous scope." By its logic, the government could today court-martial Korean War veterans who served alongside Toth (but who retired, rather than separated), along with any other military retiree, for any offense that they commit—even if it has been decades since their retirement from active duty, and even if the offense is one that could never be tried in a civilian court. *See, e.g.*, Chrissy Clark, *Active Duty, Retired Naval Intelligence Members Told They Cannot 'Disrespect' Biden over Afghanistan Debacle*, DailyWire.com, Aug. 27, 2021 (quoting an Office of Naval Intelligence e-mail reminding retirees about 10 U.S.C. § 888, which prohibits use of "contemptuous words" against the President and other government officials); *see also Parker*, 417 U.S. at 750) ("[T]he [UCMJ] regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians.").

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10. Some of this growth is a byproduct of the post-Vietnam shift to an all-volunteer force not dependent upon short-term conscripts. But Congress has also halved retirees' time-in-service requirement—from 40 years to 20. Not only has that move increased the *number* of retirees; it has dramatically increased the time they will spend *as* retirees.

Nor is this concern academic. Although courts-martial of retirees for post-retirement offenses were, for a long time, exceedingly rare, *see Larrabee*, 502 F. Supp. 3d at 330 n.8, there has been a noticeable uptick in recent years. Petitioner's appeal was the fourth such case to be considered by the NMCCA alone since 2017; other service branches have likewise prosecuted retirees; and retired servicemembers' participation in the violence at the Capitol on January 6 and other efforts to overturn the results of the 2020 election has only increased calls for additional courts-martial of such individuals—including from retired flag officers and members of Congress. *See, e.g.*, Donie O'Sullivan, *Flynn Says He Didn't Endorse Myanmar-Style Coup*, CNN.com, June 1, 2021 (quoting Rep. Elaine Luria).

These developments reinforce what both CAAF and the *Larrabee* court well understood even as they reached different results: The Question Presented is of enormous legal *and* practical importance to both the military and the more than two million Americans currently retired from it. For that reason alone, it is a question on which this Court—and not the Article I CAAF—should have the last word.

II. CAAF'S DECISION RESTS ON THREE ERRORS THAT, IF LEFT INTACT, WOULD VITIATE LONG-SETTLED LIMITS ON MILITARY JURISDICTION

The Question Presented is not just gravely important; CAAF's answer to it was deeply and profoundly wrong, and rests upon analytical errors that would empower Congress to run roughshod over well-settled constitutional limits on military jurisdiction. Certiorari is also warranted so that this Court can reassert the judiciary's well-established role in defining and policing those limits.

A. CAAF Wrongly Deferred to Congress's Determination That Retirees Remain "in" the "Land and Naval Forces"

First, and most importantly, CAAF misread the *Toth* line of cases as having nothing to say about which court-martial defendants are "in" the "land and naval forces" for purposes of the Make Rules Clause. In CAAF's view, "*Toth* limited the expanse of UCMJ jurisdiction over *civilians*, and *was not concerned* with whether an individual was a member of the armed forces." Pet. App. 8a (second emphasis added). Instead, CAAF relied upon cases involving personnel whose active-duty status was beyond question—and the broad deference that Congress receives in *that* context. *See id.* at 11a (citing *Solorio*, 483 U.S. at 451).

But as *Larrabee* explained, "the Supreme Court has *never* implied, much less held, that courts have *no* role in determining whether the individuals whom Congress has subjected to court-martial jurisdiction actually fall within the ordinary meaning of the 'land and naval forces' in the Constitution." 502 F. Supp. 3d at 329. More than not *supporting* CAAF's reasoning, this Court's decisions are directly to the contrary.

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

Justice Black's plurality opinion in *Covert* was to the same effect, concluding that "the authority conferred by Clause 14 does not encompass persons

who cannot *fairly* be said to be 'in' the military service," 354 U.S. at 22 (plurality opinion) (emphasis added), without regard to the fact that Congress had provided otherwise. So too, *Singleton*, where the majority stressed that "[t]he test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who *can be regarded* as falling within the term 'land and naval Forces.'" 361 U.S. at 240–41 (second emphasis added).

On CAAF's view, those cases were all easy ones for the simple (and simplistic) reason that none of the accused were defined by statute to be part of the land and naval forces; they were all *formally* civilians. But none of this Court's decisions—in *Toth*, *Covert*, *Singleton*, *Grisham*, or *Guagliardo*—embraced such empty formalism.[11] Instead, each case focused on the *functional* question—whether, given their role, the accused could actually "be regarded as falling within the term 'land and naval forces.'" *See United States* v. *Cole*, 24 M.J. 18, 22 (C.M.A. 1987) ("The Supreme Court has not chosen to delineate a bright-line rule but instead has proceeded on a case-by-case basis to identify those who are civilians and not within the scope of Article I, section 8, clause 14."). Until the decision below, this functional approach was reflected in CAAF's jurisprudence, as well. *See, e.g.*, *Murphy*, 29 M.J. at 471 ("Because of his continuing active contacts with the United States Marine Corps . . . , we need not address [the accused's objection to jurisdiction].").

And the reason why each class of defendants in this Court's cases *failed* the test for military status

11. *Guagliardo* suggested that, if Congress truly wanted to subject civilian employees of the military to court-martial, it would have to conscript them into active service. 361 U.S. at 286.

was because, when assessed under *de novo* review, they had no *actual* military role—not because they simply fell outside Congress's statutory definition of the "armed forces." The accused were civilians not only in form, but in function—as borne out by their lack of military duties, powers, or responsibilities. *E.g.*, *Covert*, 354 U.S. at 19 n.38 (plurality opinion) (noting that the accused "render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity" (internal quotation marks omitted)).

Thus, although this Court has never precisely defined the boundary between those who are "in" the "land and naval forces" and those who are not, *see id.* at 22, its decisions have consistently made clear that the boundary is heavily informed by the accused's military *function*—by whether the accused has any authority or obligation to act in a military capacity. Military prisoners, for example, may lack the capacity to *give* lawful orders, but they unquestionably remain obligated to follow them. *See Kahn* v. *Anderson*, 255 U.S. 1 (1921) (upholding courts-martial of prisoners for offenses committed while in military custody). So too for cadets in the service academies. *See* 10 U.S.C. § 802(a)(2).

As this Court's decisions make clear, drawing that line is a quintessential judicial task—and one in which Congress receives no deference. Congress's role in determining who is in the "land and naval forces" comes when it chooses in whom to invest what military responsibilities, *see Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion), not when it defines the armed forces by statute. The question CAAF *should* have asked is whether retirees satisfy that functional standard.

By sidestepping retirees' (lack of) military function, CAAF's analysis rested on question-begging formalisms—that Congress deems retirees to be "in" the "land and naval forces"; that retirees continue to receive deferred compensation; and that retirees remain theoretically subject to involuntary future recall. None of these have anything to do with retirees' actual, *current* military status. Nor is it necessary to subject retirees to the UCMJ while retired to ensure they will answer involuntarily recall to active duty.[12]

In wrongly circumventing this Court's precedents, CAAF also wrongly relieved the government of its burden to establish that subjecting retirees to the UCMJ for post-retirement offenses is "absolutely essential to maintaining discipline among troops in active service." *Toth*, 350 U.S. at 22. Indeed, nowhere in CAAF's ruling is there *any* discussion of why retiree jurisdiction advances "discipline among troops in active service," let alone why it is "absolutely essential" to do so. The only answer CAAF could offer was "because Congress said so." *See, e.g.*, Pet. App. 11a. In *Larrabee*, in contrast, where the government *was* put to its paces, it lost. *See* 502 F. Supp. 3d at 332 ("Congress has not shown on the current record why the exercise of such jurisdiction over all military retirees is necessary to good order and discipline").

CAAF rested its analysis instead on a far more inapt analogy—comparing Congress's power to

12. The military may court-martial those who refuse to appear when lawfully called to active duty. *Billings* v. *Truesdell*, 321 U.S. 542, 544 (1944); *United States* v. *Lwin*, 42 M.J. 279, 282 (C.A.A.F. 1995). These accused are not court-martialed *while* inactive; they are court-martialed while active for refusing to acknowledge that they were lawfully activated.

subject retirees to court-martial to its power to prescribe *civilian* criminal offenses triable in Article III civilian courts. Such desultory analysis not only consigns *Toth*'s reasoning to oblivion; it also cannot be reconciled with this Court's copious decisions reiterating the need to carefully circumscribe *all* adjudication by non-Article III federal courts. As the Chief Justice explained a decade ago,

> Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decisionmaking if the other branches of the Federal Government could confer the Government's "judicial Power" on entities outside Article III. That is why we have long recognized that, in general, Congress may not withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty.

Stern, 564 U.S. at 484 (internal quotation marks omitted); *see Oil States Energy Servs., LLC* v. *Greene's Energy Group, LLC*, 138 S. Ct. 1365, 1372–73 (2018).

To nevertheless conclude, as CAAF did, that Congress is entitled to the same deference when deciding who is subject to the UCMJ as it receives when defining new offenses to be tried by Article III civilian courts is to pretend that this Court's wariness of non-Article III jurisdiction doesn't exist. If Congress can evade Article III by deeming individuals with no ongoing military duties to be part of the "land and naval forces," then "Article III would be transformed from the guardian of individual liberty and separation of powers we have long recognized into mere wishful thinking." *Stern*, 564 U.S. at 495.

B. CAAF Wrongly Described Military Retirees' (Lack of) Responsibilities

Because CAAF misread *Toth* and its progeny, it paid little attention to the functional analysis that this Court's jurisprudence requires. Instead, it concluded that retirees like Petitioner remain "in" the "land and naval forces" entirely and only because they "are still paid, subject to recall, and required to maintain military readiness." Pet. App. 8a–9a.

Other than a vague and unenforceable regulatory exhortation, *see id.* at 10a, CAAF offered no proof that retirees are "required to maintain military readiness"—probably because none exists. No statute or regulation requires retirees to participate in any regular (or even irregular) training activities while they are retired.[13] Retirees are subject to none of the annual fitness (or periodic drug) tests that even inactive reservists must pass. *Cf.* Marine Corps Order 5300.17A, Marine Corps Substance Abuse Program app. B ¶ 1(c)(4) (June 25, 2018). And retirees are not required to maintain *any* specific degree of physical, mental, or matériel preparedness. To drive the point home, the government has been unable to identify "any consequence for failure to maintain readiness." Pet. App. 83a n.1 (Crisfield, C.J., dissenting).

13. CAAF cited 10 U.S.C. § 8385(b), under which members of the Fleet Reserve "may be required to perform not more than two months' active duty for training in each four-year period." Pet. App. 14a. Leaving aside that such training only *follows* a retiree's recall to active duty, the government has also offered no evidence that any member has ever been recalled for such training. *Cf. United States* v. *Nettles*, 74 M.J. 289, 292 & n.5 (C.A.A.F. 2015) (holding that a statute that imposes an unenforced training obligation on inactive reservists does not create a military duty).

Indeed, the only requirements retirees face *while* they are retired are to keep the military apprised of a current mailing address and to let the military know within 30 days if they move out of the country. Pet. App. 10a. In the unlikely event that they are ever involuntarily recalled to active duty, *but see ante* at 11 n.7 (noting the government's inability to provide any evidence of such recalls),[14] no one disputes that they must answer the call (these requirements help to ensure as much). At that point, the recalled personnel are—axiomatically—no longer retired. But even that logic applies only to the small minority of retirees who are *legally* eligible for recall. An overwhelming majority of the millions of Americans whom the government claims must remain subject to the UCMJ to preserve their readiness for future military service are legally ineligible to ever *provide* future military service.[15]

To similar effect, retirees are not assigned to a specific command—and so have no immediate commanding officer. They can neither give nor receive orders (other than an order recalling them to active

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14. In claiming that recalls are "not the rare occurrence that [Petitioner] suggests," CAAF cited only to examples of *voluntary* recalls. Pet. App. 11a.

15. The government's mobilization criteria effectively disqualify over two-thirds of military retirees from ever being recalled to active duty—since they preclude the recall of disabled retirees or those who are 60 or older. *See Larrabee*, 502 F. Supp. 3d at 332 (citing DoD Instruction 1352.01, ¶ 3.2(g)(2) (2016)). And the Navy also treats as "retired" those personnel who have engaged in various forms of misconduct, who are "automatically exclude[d]" from even "a general recall of personnel in the event of war or national emergency." Dep't of the Navy, Military Personnel Manual (MILPERSMAN) 1900-040, § 1-4 (2008).

duty). They are ineligible for promotion *while* retired. They cannot refer charges to a court-martial. Even the government's own Board of Correction for Naval Records interprets the statutory phrase "civilians" in its enabling legislation to *include* members of the Fleet Reserve like Petitioner. *See Nicely* v. *United States*, 147 Fed. Cl. 727, 739–42 (2020).

Unlike CAAF, Petitioner does not suggest that such a formalism resolves the issue. Rather, the relevant point for present purposes is that retirees possess none of the ongoing duties or responsibilities that could possibly satisfy this Court's own test for military status. Like the defendant in *Toth*, retirees are "ex-soldier[s] . . . wholly separated" in all relevant ways "from the service for months, years, or perhaps decades." 350 U.S. at 21. Not only was CAAF therefore wrong that retirees are "required to maintain military readiness," but had CAAF actually gone further and applied the functional analysis that this Court's jurisprudence requires, it would have necessarily reached the same answer as the court in *Larrabee*.[16]

16. The concurring opinion in the Court of Appeals found support for that court's result in Founding-era treatment of furloughed soldiers—who remained subject to the Articles of War while furloughed. Pet. App. 23a–28a (Maggs, J., concurring). But furlough was, by definition, a temporary leave of absence from a specific geographic location, not a permanent change in service status. Indeed, now-defunct statutes expressly *exempted* retirees from furlough—since, unlike active-duty personnel, they were categorically inactive. *See, e.g.*, 10 U.S.C. § 6406(a) (repealed 1970) ("The Secretary of the Navy may furlough any officer of the Regular Navy or the Regular Marine Corps, other than a retired officer.").

C. CAAF Wrongly Interpreted *Barker* to Reinforce Retiree Jurisdiction

CAAF's reasoning also wrongly dismissed the significance of this Court's decision in *Barker*—which held that the pay military retirees receive is deferred compensation for prior active-duty service. Citing a throwaway statement from Justice White's majority opinion—that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall"—CAAF concluded that "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." Pet. App. 10a.

This misconstrues both *Barker* and Petitioner's argument. *Barker* was not about *state* income tax consequences; it was about whether a state income tax rule could lawfully be applied to military retirees via a federal statutory waiver of intergovernmental tax immunity. This Court had to parse the Title 10 formulae for retired pay—focusing its analysis, with help from the Solicitor General as an *amicus curiae*, on how that pay is computed.

Given that retired pay is based entirely on a retiree's time in active-duty service and rank at retirement, *see* 10 U.S.C. §§ 8330(c)(1), 8333(a), it would be nonsensical to treat it as a current salary—let alone as deferred compensation for some purposes, but current salary for others.[17] Instead of grappling

17. This paradigm shift in both the purpose and structure of retired pay—and its jurisdictional implications—was understood by the government as early as 1960. *See* BRUCKER REPORT, *supra*, at 175 ("The former attitude that members drew retired pay to

with the import of this analysis for prior decisions sustaining military jurisdiction over retirees, CAAF moved the goalposts. In the Court of Appeals' view, "Being paid didn't confer military status—[Petitioner] is paid *because* of his status." Pet. App. 9a. In other words, CAAF sidestepped *Barker* only by repudiating the claim that court-martial jurisdiction is justified *because* retirees continue to receive pay. Either that reading of *Barker* is incorrect, or the case for trying retirees by court-martial is even weaker.

Petitioner's argument is *not* that *Barker* "implicitly held what it explicitly disclaimed," *i.e.*, that the Constitution forecloses court-martial jurisdiction over retirees. Rather, Petitioner's argument is that *Barker*'s reasoning necessarily undermines one of the grounds on which such jurisdiction had previously been sustained—a point neither briefed nor discussed in *Barker*. Whether there are *other* grounds to support the constitutionality of retiree jurisdiction is the exact question that CAAF *should* have answered below.

These errors are more than case-specific missteps. Rather, they reflect a fundamental misunderstanding of the constitutional relationship between courts-martial and Article III—and a clear abdication of CAAF's responsibility not just to carefully police the line between civilian and military courts, but to show fidelity toward this Court's decisions doing the same. To leave its decision undisturbed is to give CAAF the last (and profoundly incorrect) word on this critical

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keep themselves ready to return to active duty has been replaced by the concept that retired pay is a vested right accruing from honorable service for a prescribed time. Thus one of the main rationalizations for continuation of court-martial jurisdiction largely has evaporated.").

constitutional question—and to open the door to further expansions of military jurisdiction by Congress over individuals with no ongoing (and only potential future) military authority or responsibility.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This Petition not only presents a constitutional question of the first order, but it also provides an ideal vehicle through which to resolve it. Unlike the petition in the direct appeal in *Larrabee*, this Court clearly has jurisdiction over CAAF's decision below. Moreover, the government's own briefing in *Larrabee* has suggested that Petitioner may not be entitled to the same relief if he is left to pursue collateral review in an Article III court. And because the Petition involves offenses not unique to military law which could have been prosecuted in civilian court, it presents an ideal vehicle for resolving which post-retirement offenses (if any) courts-martial may constitutionally prosecute.

A. This Court Has Jurisdiction

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). CAAF granted such a petition 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*, 138 S. Ct. at 2172.

When the Question Presented in this Petition last reached this Court three years ago on direct appeal in *Larrabee*, the government opposed certiorari. At the heart of its opposition was the claim that this Court lacked statutory jurisdiction under 28 U.S.C. § 1259(3). Even though CAAF *had* granted a petition

for review in that case, it had not specifically agreed to address (and had not addressed) the constitutional validity of retiree jurisdiction. Thus, the government argued, CAAF had not in fact rendered a "decision" subject to this Court's review under § 1259(3). Brief for the United States in Opposition at 10–16, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2019) (No. 18-306), 2019 WL 157946 [hereinafter *Larrabee* BIO].

There can be no question that § 1259(3) is satisfied here. After denying review on the jurisdictional issue, CAAF granted rehearing, granted Petitioner's petition for review, and rejected his jurisdictional claims on their merits. This case therefore does not present the vehicle concern that the government relied upon in *Larrabee*.

B. The Government's Prior Position and the Nature of Petitioner's Offenses Further Support Direct Review

The government also argued in opposing certiorari in *Larrabee* that, even if this Court did have jurisdiction to review CAAF directly, it should wait for collateral review in the civilian courts to run its course before weighing in. *See id*. at 16. Even though civilian courts usually review military convictions only to ensure that the defendant's constitutional objections received "full and fair consideration" from the military, *Burns*, 346 U.S. at 142 (plurality opinion), the government's opposition intimated that challenges to the subject-matter jurisdiction of a court-martial were necessarily different. *See Larrabee* BIO, *supra*, at 16.

On collateral review before the district court in *Larrabee*, though, the government turned around and argued *against de novo* review—claiming that non-

custodial collateral review, even of jurisdictional questions, must be "'searching' *and* 'deferential.'"[18] The district court in *Larrabee* correctly rejected the government's argument and applied *de novo* review. *See* 502 F. Supp. 3d at 326–27. But this attempted bait-and-switch only reinforces why direct review of the Question Presented is far preferable to collateral review. There is no question here that this Court's review is *de novo*. The government's litigating position in *Larrabee*, in contrast, raises whether that would be true if Petitioner is left to a collateral attack.

Finally, this case also presents an ideal vehicle for resolving whether, even if the Constitution permits courts-martial of retirees for *some* post-retirement offenses, it nevertheless limits such jurisdiction to military offenses beyond the jurisdiction of civilian courts, *i.e.*, those that would otherwise escape prosecution. *See* FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-22.30 (5th ed. Matthew Bender & Co. 2020) ("Rather than [maintaining] general jurisdiction over retired personnel . . . [there should be] limited jurisdiction contingent upon a strong 'service connection' test").

There is no question that the offenses for which Petitioner was convicted were civilian offenses for which he could have been tried under the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261–67 (if he was *not* subject to court-martial), or 18 U.S.C. § 2423(e), an extraterritorial federal criminal statute. Pet. App. 40a. If courts-martial may constitutionally try retirees only for some offenses—including those beyond the jurisdiction of civilian courts, *cf. Ali*, 71

18. The government's district court brief in *Larrabee* is available at 2020 WL 5088233.

M.J. at 280–81 (Effron, J., concurring in part and in the result) (so arguing with respect to private military contractors)—then this case also presents a suitable vehicle for such a holding.

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Petitioner's case "may seem innocuous at first blush." *Stern*, 564 U.S. at 503. 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 court-martial retirees based upon cryptic dicta in this Court's 1882 decision in *Tyler*—which has been overtaken by subsequent events. The district court in *Larrabee* correctly explained why that understanding can't survive either the *Toth* line of cases or *Barker*. And yet, in the decision below, CAAF persisted.

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 Make Rules Clause, 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.

In those cases, as in this one, whether to permit military trials presents "another instance calling for limitation to the least possible power adequate to the end proposed," *id.* at 23 (internal quotation marks omitted), *i.e.*, only when they are "absolutely essential to maintaining discipline among troops in active service." *Id.* at 22.

This skepticism of military jurisdiction is not just a vestigial remnant of precedents from a different era; it is because courts-martial *still* have the power to prosecute substantive offenses that the Constitution would not abide in civilian courts, *see, e.g.*, *Parker*, 417 U.S. at 735, and *still* utilize procedures forbidden in every other American criminal forum. *Compare* 10 U.S.C. § 852(a)(3) (authorizing convictions in non-capital courts-martial by three-fourths of the members), *with Ramos* v. *Louisiana*, 140 S. Ct. 1390 (2020) (incorporating the right to unanimous guilty verdicts against the states).

Military necessity may well justify those departures where active-duty personnel are involved. But just "[a]s necessity creates the rule, so it limits its duration." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 127 (1866); *see also Larrabee*, 502 F. Supp. 3d at 327 ("Experience has clearly demonstrated the baseline proposition that court-martial jurisdiction *must* be narrowly limited.").

Given both the systematic inapplicability of the UCMJ to other inactive personnel and the lack of duties and authorities possessed by members of the Fleet Reserve such as Petitioner, there is simply no good argument for why military retirees *need* to be subject to the UCMJ while they are retired. And so long as military jurisdiction in this country is to remain the exception, and Article III the norm, there are compelling prudential, historical, and constitutional reasons why they should not be—and why this Court should grant certiorari and say so.

CONCLUSION

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

Respectfully submitted,

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