No. 22-1082

IN THE

Supreme Court of the United States

STEVEN M. LARRABEE,

Petitioner,

v.

CARLOS DEL TORO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PROFESSOR ROBERT LEIDER AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Robert Leider is Assistant Professor of Law at George Mason University's Antonin Scalia Law School. His research focuses on the constitutional organization of the military, the Second Amendment, the right of self-defense, and the use of force by law enforcement. Professor Leider has written several recent articles on the constitutional structure of the military, particularly how the distinction that the Framers drew in the Constitution between "army" and "militia" applies today. These articles have also discussed the implications of the army/militia distinction for Congress's power to subject individuals to the military's justice system.[1]

INTRODUCTION

If left undisturbed, the decision below will deprive approximately 1.5 million Americans of their basic civil liberty and fundamental constitutional rights. These Americans, who live as civilians, may not claim their right to trial by jury, they may be imprisoned for speaking ill of the President, and they may be ordered not to display articles of religious observance such as a yarmulke. They will lose these rights for the rest of their lives simply because they served their country in the Armed Forces for more than 20 years. Worse, the rule announced by the court of appeals would permit Congress to extend this sweeping military jurisdiction to

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than amicus curiae and his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amicus' intent to file this brief at least 10 days prior to its due date.

anyone nominally affiliated with the Armed Forces, including the inactive and retired reserve components.

This exercise of military jurisdiction is prohibited by the Fifth Amendment to the Constitution, as understood at the Framing. The Fifth Amendment recognizes two different military statuses. The first status covers members of the "land or naval forces," which, as originally understood, only included members of the regular forces. The second military status covers nonprofessional soldiers ("militia"). Consistent with traditional Anglo-American practice, the Fifth Amendment permitted Congress to impose military law upon members of the regular forces at all times. But nonprofessional soldiers were subject to military jurisdiction only when they were in training or in active service.

The decision below fails to recognize this critical distinction and erroneously treats Fleet Marine Reservists, who are retirees of the regular forces, as if they remained professional soldiers. But Fleet Marine Reservists live primarily as civilians. In peacetime, they may be subject to brief periods of training (which, in practice, rarely if ever happens). Other than for training, they may be recalled to active duty during war, national emergencies, and other temporary periods. Because regular Marines transition into a nonprofessional role upon their retirement into the Fleet Marine Reserve, the proper constitutional rule is that these retirees are subject to military law only when in training or when on active duty. At all other times, they should be subject only to civilian law and thus should retain their full common-law rights.

SUMMARY OF ARGUMENT

The Fifth and Sixth Amendments require that criminal cases proceed according to the traditional requirements of common law. But the Fifth Amendment also contains two military-related exemptions that were well-established at the Framing: first, for "cases arising in the land or naval forces," and second, for cases arising "in the Militia, when in actual service in time of War or public danger." At the time of the Framing, prevailing British law applied military jurisdiction differently depending on whether a person was a professional soldier (or sailor) or a nonprofessional militiaman. Professional soldiers and sailors—those whose principal occupation was in the military—were amenable to military law at all times based on their status as members of the regular forces. Militiamen, however, were subject to military law only when called into active service. When not serving, militiamen lived as civilians and retained their full common-law rights.

The Fifth Amendment adopts this traditional understanding. It permits Congress to apply military law to members of the regular forces at all times. But it only permits Congress to apply military law to members of the militia when they are in actual service. When not in actual service, militiamen must be treated as civilians.

The problem in this case is that, although Congress statutorily defines Fleet Marine Reservists (like petitioner) to be part of the regular forces, their actual terms of service closely match that of Founding-era militiamen. These retired Marines live as civilians and have civilian jobs; their principal occupation is no longer in the military. Like Founding-era militiamen (and unlike regular soldiers), they may be subject only to brief periods of military training in peacetime. And like Founding-era

militiamen, they are highly limited in when they may be called into active duty. Unlike the regular forces, retirees like petitioner do not remain on continual active duty. Because petitioner's regular military service ended when he retired, the Fifth Amendment forbids the application of military law when he is neither in training nor in active service.

But under the D.C. Circuit's decision here, petitioner and others like him could be subjected to military jurisdiction—meaning a significant curtailment of their constitutional rights and the possibility of being court-martialed for any alleged violation of the Uniform Code of Military Justice—because they could be recalled to active service, and thus they have "a formal relationship with the military that includes a duty to obey military orders." Pet. App. 2a.

That decision is wrong. The court of appeals was correct that petitioner maintained a military affiliation and had the duty to report for limited service, if called. But the Fifth Amendment's militia exemption provides for that by authorizing a court-martial for conduct that occurs when a person is in actual service. Because petitioner's conviction here resulted from conduct that occurred in his civilian life, the Fifth Amendment requires that he be prosecuted as a civilian and in a civilian court.

ARGUMENT

I. THE FIFTH AMENDMENT PROHIBITS SUBJECTING PART-TIME SOLDIERS TO MILITARY LAW SOLELY BASED ON THEIR AFFILIATION WITH THE ARMED FORCES

This Court has recognized that "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction … intended to be only a *narrow exception* to the normal and preferred method of trial in courts of

law." *Reid* v. *Covert*, 354 U.S. 1, 21 (1957) (plurality opinion) (emphasis added). It is a narrow exception because Congress's constitutional authority "'[t]o make Rules for the Government and Regulation of the land and naval Forces' … authorize[s] military trial of members of the armed services *without* all the safeguards given an accused by Article III and the Bill of Rights." *Id.* at 19 (emphasis added) (quoting U.S. Const. art. I, §8, cl. 14); *see also Ex parte Quirin*, 317 U.S. 1, 40 (1942) (per curiam) ("Such cases are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.").

Moreover, members of the military may be punished for conduct that is constitutionally protected for civilians. For example, they may be punished for violating orders not to wear visible religious articles, such as yarmulkes. *Goldman* v. *Weinberger*, 475 U.S. 503, 509-510 (1986). Officers may be punished for using inappropriate language against the president, Congress, and a governor of a state where they are on duty. 10 U.S.C. §888. And members of the military may be punished for failing to show up for work on time or at all. *Id.* §§885-886. Civilians, in contrast, may display articles of religious faith; have a constitutional right to subject public officials to "vehement, caustic, and sometimes unpleasantly sharp attacks," *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46, 51 (1988); and may change jobs at will. Military law, thus, severely limits a person's traditional constitutional rights and civil liberties because of the need to promote military order and discipline.

But the Framing generation, which cherished the fundamental rights and liberties of Englishmen, also recognized that their curtailment should not be sanctioned except where it is indeed necessary for military discipline. To this end, the Constitution differentiated

between "the land or naval forces" and the "militia." When the Constitution used the phrase "land or naval forces," it referred to members of the regular army or navy, the Founding-era equivalent to the regular components of the Armed Forces of the United States. And when the Constitution used the term "militia," it referred to individuals who were primarily civilians but could be called to perform temporary military service. The modern equivalent to the Founding-era militia includes reservists, national guardsmen, citizens registered with the Selective Service System, and retirees—including petitioner. Historical practice makes clear that only regular members of the armed forces were subject to military jurisdiction at all times. Militiamen were subject to military jurisdiction only when in actual service. Because petitioner is functionally a militiaman under the Fifth Amendment, and because he was not in actual service to the United States at the time of his offense, exercising military jurisdiction over him was unconstitutional.

A. The Constitution Distinguishes Between Professional Forces And Militia

Interpretation of the Constitution "begin[s] with its text." *City of Boerne* v. *Flores*, 521 U.S. 507, 519 (1997). The Constitution uses several words to refer to the military—"Armies," "Navy," "land and naval Forces," "Militia," and "Troops"—and it uses these words in ways that reflect meaningful legal distinctions among armies, navies, and militia.

For example, article I gives Congress broad authority to "raise and support Armies," "[t]o provide and maintain a Navy," and "[t]o make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, §8, cls. 12-14. The Constitution also permits

Congress to determine whether state governments may maintain their own standing armies or navies. *Id.* art. I, §10, cl. 3.

By contrast, the Constitution limits Congress's authority over the "Militia." For instance, article I, section 8, clause 15 permits Congress "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections[,] and repel Invasions." And clause 16 permits Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them *as may be employed in the Service of the United States*." (Emphasis added).

The Bill of Rights recognizes a similar distinction between the regular forces and the militia. The Fifth Amendment's command that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury" is subject to two separate military exceptions. The first is for "cases arising in the land or naval forces," while the second is for cases arising "in the Militia, *when in actual service in time of War or public danger*." U.S. Const. amend. V (emphasis added).

In short, the Constitution recognizes two broad categories of military forces: armies and the navy on one hand, and the militia on the other. And as discussed in the next subsection, the original meaning of these clauses demonstrates that the critical legal distinction between the "militia" and the other services is that the militia comprised nonprofessional citizen-soldiers, while the armies and navy were regular forces.

B. Part-Time Citizen-Soldiers Are "Militia" And Traditionally Subject To Military Jurisdiction Only When In Actual Service

In the Framers' understanding, the distinction between an "army" and a "militia" was whether military service was a person's principal occupation. As Adam Smith put it, "[t]he practice of military exercises is the sole or principal occupation of the soldiers of a standing army, and the maintenance or pay which the state affords them is the principal and ordinary fund of their subsistence." 5 Smith, *Wealth of Nations*, ch. 1, at 541-542 (Soares ed., MetaLibri 2007). In contrast, the "practice of military exercises is only the occasional occupation of the soldiers of a militia, and they derive the principal and ordinary fund of their subsistence from some other occupation." *Id.* at 542. In other words, "[i]n a militia, the character of the labourer, artificer, or tradesman, predominates over that of the solider; in a standing army, that of the soldier predominates over every other character." *Id.* "[T]his distinction," Smith explained, "seems to consist the essential difference between those two different species of military force." *Id.*

The Framing generation shared Smith's understanding of how to distinguish an "army" from a "militia." When discussing how the United States should supply troops for peacetime garrisons, Alexander Hamilton wrote that they "must either be furnished by *occasional* detachments from the militia, or by *permanent* corps in the pay of the government ... [which] amounts to a standing army[.]" *Federalist No. 24* (Hamilton) (emphasis added). When not a part of an occasional detachment, militiamen were "daily mingling with the rest of their countrymen[.]" *Federalist No. 29* (Hamilton). Such "daily mingling" set the militia apart from the regular forces, which were a separate armed society with

"severe" rules and discipline. Letter from Samuel Adams to James Warren (Jan. 7, 1776), *in* 3 *The Writings of Samuel Adams* 250, 250 (Cushing ed., 1907).

A person's amenability to military jurisdiction depended upon the kind of military force to which he was a member. Regular forces were always amenable to military jurisdiction. "A citizen on entering the army becomes liable to special duties as being 'a person subject to military law,'" and the soldier may "be tried and punished by a Court-martial" rather than by the usual process of common law. Dicey, *Introduction to the Study of the Law of the Constitution* 282 (3d ed. 1889); *see also* 1 Clode, *The Military Forces of the Crown* 178-179 (1869) (explaining that military law traditionally only applied to members of the army in active service and explaining the controversy over, and eventual rejection of, the application of military law to half-pay officers not in service).

In contrast, a militiaman had a part-time status and was subject to much more limited military jurisdiction. At most, militiamen trained a few days a year, and they often received little or no training during periods of peace. McCormack, *Embodying the Militia in Georgian England* 103 (2015) (explaining that "[m]ilitiamen were required, 'on a just Occasion, to perform the Business of a Soldier'") (quoting *Proposals for Amending the Militia Act so as to Establish a Strong and Well-Disciplined National Militia* 40 (London, n.d. [1759?])); *see* Leider, *Deciphering the "Armed Forces of the United States,"* 57 Wake Forest L. Rev. 1195, 1213-1215 (2022) (describing militia training periods). Unlike a regular soldier, a militiaman could be subjected to military jurisdiction *only* when he was in actual service or in training. *See* Dicey, *supra*, at 285; *see also* 1 Clode, *supra*, at 181 ("[A]ll the

Reserve forces of the Crown are subject to the Military Code whenever they are called out for actual service.").

At the time of the Framing, British law had also evolved to exclude anyone considered a "civilian" from military jurisdiction. Before the seventeenth century, England had subjected a variety of individuals to martial law, including (among others) members of the armed forces, rebels, and rioters. Capua, *The Early History of Martial Law in England from the Fourteenth Century to the Petition of Right*, 36 Cambridge L.J. 152, 153 (1977). But this practice, in derogation of a British subject's traditional common-law rights, led to objections, and in the 1628 Petition of Right, the Crown renounced the authority to subject civilians to military law. *Id.* at 171-172 & n.77; *see* Petition of Right, 1628, 3 Car., c. 10 (Eng.); *see also* 1 *Blackstone's Commentaries* 413 ("And it is laid down, that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by colour of martial law, this is murder; for it is against *magna carta*." (footnotes omitted)).

This practice reflected concern that military jurisdiction was in tension with a citizen's common-law rights, and therefore, should be narrowly drawn. Sir Matthew Hale contended that martial law (which then included military law) was "in truth and reality … not a law, but something indulged, rather than allowed, as a law" and justified only by "[t]he necessity of government, order, and discipline, in an army[.]" Hale, *The History of the Common Law of England* 42 (Runnington ed., 6th ed. 1820). England only grudgingly and gradually accepted it. "Before the Mutiny Act came into operation, it was thought that there could not be in time of peace any martial law applied even to soldiers[.]" 4 Hume et al., *The History of England* 426 (1873). Even after the

Mutiny Act authorized military law in peacetime for regular soldiers, its annual renewal was routinely opposed in Parliament because it "violate[d] every principle upon which justice is administered in England." 1 Clode, *supra*, at 152.

After the Revolution, traditional Anglo-American limitations on military jurisdiction were codified in the Fifth Amendment. The original Constitution gave Congress power to provide for disciplining the militia. U.S. Const. art. I, §8, cl. 16. The Anti-Federalists objected that Congress might abuse this power by applying military law to all able-bodied men simply because they were technically members of the militia and subjected to military service when called. Leider, *supra*, at 1206 & n.59 (collecting Anti-Federalist commentary). The Fifth Amendment answered these complaints. As discussed above, the amendment required a grand jury to initiate criminal charges, subject to two military exceptions: (1) "cases arising in the land or naval forces" (i.e., the regular forces), and (2) "cases arising ... in the Militia, when in actual service." The Framers, thus, permitted military jurisdiction for regular forces at all times, commensurate with their status as full-time soldiers and sailors. But part-time forces could only be subject to military law when they were in actual service. Congress, thus, had no power to subject part-time soldiers to perpetual military law simply because they were enrolled in an armed force and might be called into future active service.

C. The Modern Equivalent Of The Founding-Era Militia Are The Various Military Components Of Nonprofessional Soldiers

Today, the militia includes active, inactive, and retired members of the Armed Forces Reserve; members

of the National Guard; civilians registered with the Selective Service System; and active-duty retirees including members of the Fleet Marine Reserve. Like those in the Framing-era militia, individuals serving in these entities are primarily civilians who perform temporary military service when called to do so.

1. Armed Forces Reserve

The Armed Forces Reserve has seven individual reserve components: the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. 10 U.S.C. §10101. These seven components are divided among three categories: the Ready Reserve, the Standby Reserve, and the Retired Reserve. *Id.* §10141.

a. The Ready Reserve contains Reserve and National Guard members who can be called to active federal service during a war or other national emergency. 10 U.S.C. §10142(a). It has three subcomponents: the Selected Reserve, the Individual Ready Reserve (IRR), and the inactive National Guard.

The Selected Reserve is the active component of the military reserve. Members of the Selected Reserve participate in military training one weekend a month and two weeks per year; they are otherwise full-time civilians. Congressional Research Service, *Defense Primer: Reserve Forces* 1 (updated Jan. 17, 2023). The Selected Reserve, thus, functions as the analogue of the Founding-era volunteer militia, which were active militia units that underwent enhanced training and were the front-line of defense. Leider, *supra*, at 1215-1216, 1254.

The remaining members of the Ready Reserve operate essentially as a pool of emergency manpower.

Members of the IRR do not normally train at all—and thus are true full-time civilians—but they may be called to active service under certain circumstances. *Defense Primer*, *supra*, at 1. The inactive National Guard is made up of those Army National Guard members who are in an inactive federal status. *Id.* Like the IRR, they do not normally train but may be called to active service under certain circumstances with the consent of their state's governor. *Id.*; 10 U.S.C. §12301(h)(3).

b. The Standby Reserve consists of personnel who have been designated key civilian employees, or who have a temporary hardship or disability. *Defense Primer*, *supra*, at 1; 10 U.S.C. §10151. Members of the Standby Reserve are not required to participate in military training (though they may choose to do so) and they may be called to active duty only in time of war or national emergency. 10 U.S.C. §§12301(d), 12306.

c. The Retired Reserve consists of all reservists who receive retired pay on the basis of either active duty or reserve service and those who will receive that pay when they turn sixty years old. 10 U.S.C. §10154. Members of the Retired Reserve may be ordered to active duty only in limited circumstances, when the appropriate military department head considers such a call-up "necessary in the interests of national defense." *Id.* §688(c).

In all these components, members serve, at most, on a part-time, temporary basis. When not training or on active-duty orders, they live a civilian life, usually with a civilian occupation—just like their Framing-era militia counterparts.

2. Civilians Subject To Military Service

At the Founding, the militia was divided into a volunteer militia and a general militia. While the volunteer militia were frontline units that underwent enhanced training, the general militia consisted of the entire able-bodied population who could be drafted into military service. The general militia trained occasionally, if at all. Leider, *supra*, at 1215-1216.

Today, the bulk of the modern general militia consists of civilians registered with the Selective Service System. As this Court has explained, "It is undoubtedly true that all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States[.]" *Presser* v. *Illinois*, 116 U.S. 252, 265 (1886); *see also* 10 U.S.C. §246 (defining the militia as "all able-bodied males at least 17 years of age and ... under 45 years of age"). The Selective Service System is the contemporary method by which the federal government conscripts military manpower from able-bodied civilians. Presently, only men between the ages of 18 and 26 are required to register. 50 U.S.C. §3802(a). Congress has greatly expanded this age range in wartime, making it coextensive with the entire militia. *See, e.g.*, Selective Service Act Amendment, Pub. L. No. 65-210, §3, 40 Stat. 955, 955 (1918) (expanding the age range for registration to eighteen through forty-five).

3. Fleet Marine Reserve

Despite its name, the Fleet Marine Reserve (FMR) is not officially a "reserve component" of the military. 10 U.S.C. §10101. Instead, the FMR is a component of the Marine Corps that consists of servicemembers who left active duty after served at least 20 years in the Corps. *Id.* §§8001(a)(2), 8330(b). A member of the FMR may be

ordered back to active duty in a time of war or national emergency, or as otherwise authorized by law. *Id.* §8385(a); *see also id.* §688(e) (authorizing limited one-year call-ups). He or she may also be required to perform two months of active-duty training every four years. *Id.* §8385(b). After thirty years of total service, a member of the FMR is formally retired. *Id.* §8331(a).

According to petitioner, retirees are "almost never" recalled into active duty. Pet. 5. If accurate, the Fleet Marine Reserve operates similar to the Founding-era general militia: a pool of emergency military manpower that may be called into active duty in emergencies, but otherwise performs little or no active service or training.

Real-world practice aside, the statutory terms of service that govern the FMR are almost identical to that of a Framing-era militiaman. Congress has authorized the president to temporarily call forth members of the FMR only when specifically authorized by law. *See* 10 U.S.C. §8385(a); *cf.* U.S. Const. art. I, §8, cl. 15 (authorizing Congress, not the president, to provide for calling forth of the militia). Specifically, the president may order members of the FMR to full-time active military service in only three circumstances: (1) "in time of war or national emergency declared by Congress, for the duration of the war or national emergency and for six months thereafter;" (2) "in time of national emergency declared by the President;" and (3) "when otherwise authorized by law." 10 U.S.C. §8385(a). This closely parallels Congress's constitutional power to call forth the militia, which is limited to times of insurrection, invasion, and when needed for domestic law enforcement. U.S. Const. art. I, §8, cl. 15.

Much like a Founding-era militiaman, moreover, a Fleet Marine Reservist may not be kept on indefinite

active duty. His active service ends either on the expiration of the emergency prompting his call, 10 U.S.C. §8385(a), or at the conclusion of a brief period of service, *id.* §688 (no more than 12 months active service in any two-year period). This contrasts with the regular standing army, which consists of those soldiers "whose continuous service on active duty *in both peace and war* is contemplated by law." *Id.* §7075(a) (emphasis added); *see also id.* §9066(a) (same for the regular Air Force), §9085(a) (same for the regular Space Force).

Finally, federal law limits peacetime training for FMR members to "not more than two months … in each four-year period." 10 U.S.C. §8385(b). This replicates militia practice soon after the Founding, which fluctuated from no military training to approximately two weeks per year. Leider, *supra*, at 1213-1215. And Fleet Marine Reservists, just like militiamen, return to their civilian occupations when they are not training. *See Dunne* v. *People*, 94 Ill. 120, 138 (1879) (explaining that militiamen, unlike troops, "when not engaged at stated periods in drilling and other exercises … return to their usual avocations").

Petitioner's service reflects the foregoing. Petitioner served for twenty years on active duty with the Marine Corps, after which he was transferred to the FMR. Before retiring, petitioner was a paradigmatic member of the "land or naval forces," serving full-time on active duty in the Marine Corps. As such, petitioner was "employ[ed] … in the constant practice of military exercises," to the exclusion of any civilian trade or profession. 5 Smith, *supra*, at 541. And he could constitutionally be subjected to military law and to trial by courts martial for any misconduct—whether committed on duty or off duty. *Solorio* v. *United States*, 483 U.S. 435, 439-440 (1987).

Petitioner's military status, however, underwent a fundamental change when he left active duty and joined the FMR. Upon doing so, petitioner ceased military service and took on a civilian occupation managing two bars. Pet. 7-8.

When he transferred to the FMR, petitioner stopped being a member of the "land or naval forces" and became a militiaman, as each of those statuses was understood at the time of Framing. Militiamen, "when not engaged at stated periods in drilling and other exercises[,]" "return to their usual avocations" and "are subject to call when the public exigencies demand it." *Dunne*, 94 Ill. at 138; *United States* v. *Miller*, 307 U.S. 174, 178 (explaining that the militia constituted "civilians primarily, soldiers on occasion"). Upon retirement, petitioner was no longer part of "an armed body of soldiers, whose sole occupation is war or service," *Dunne*, 94 Ill. at 138. As a Fleet Marine Reservist, he was subject to active duty only for highly limited periods "when the public exigencies demand it." *Id.* Because petitioner was a militiaman for Fifth Amendment purposes, he could not lawfully be court martialed for conduct that occurred when he was neither training nor called to actual service.

* * *

Members of the FMR are subject only to temporary military service in peacetime and to unrestricted full-time active service in war. These terms of service are analogous to Founding-era "Militia," and a world away from the full-time status of members of the "land or naval forces." Part-time soldiers—including petitioner—enjoy the protections of the Fifth and Sixth Amendments, save "when in actual service in time of War or public danger," U.S. Const. amend. V. Because

petitioner indisputably was not in active service or in training at the time of his offense, he could neither be subjected to military law nor to trial by court-martial.

II. THE DECISION BELOW ALLOWS EXCESSIVELY BROAD MILITARY JURISDICTION

A. The D.C. Circuit's Analysis Fails To Recognize A Militia Status

The D.C. Circuit held that "a person has 'military status' if he has a formal relationship with the military that includes a duty to obey military orders." Pet. App. 2a. According to the court of appeals, moreover, a person can have a "duty to obey military orders" even if the only order the person has a duty to obey is to report to active-duty service if called. In the court's words, "[w]e fail to see why a servicemember who must obey one order is less a part of the 'land and naval Forces' than his peer who must obey two." *Id.* 34a. In any event, the court further reasoned, a Fleet Marine Reservist, such as petitioner, has "multiple military obligations," including "a duty to report to active duty for training in peacetime, and a duty to comply with the military's employment and reporting regulations." *Id.* 35a.

The D.C. Circuit's "duty-to-obey-any-order" test would enable the curtailment of the constitutional rights of a vast number of individuals who have only a limited relationship to the military. That approach is starkly inconsistent not only with the Fifth Amendment's textual distinction between the regular military and the militia, but also (and relatedly) with the Framing-era generation's opposition to the expansion of military law into civilian society.

The D.C. Circuit justified its departure from Founding-era understandings by citing this Court's decision in

Solorio v. *United States*. According to the court of appeals, that decision—which held that any "member of the Armed Services at the time of the offense charged" can be subjected to a court martial, 483 U.S. at 451—"was not limited to active-duty troops." Pet. App. 38a. But *Solorio* never considered whether status-based jurisdiction was constitutional for part-time forces. The D.C. Circuit's expansion of *Solorio* simply begs the question here, which is whether someone with a part-time military status is properly considered a member of the Armed Services when not in active service. For all the reasons given, the answer is no.

B. The D.C. Circuit's Historical Examples Are Inapt

The court of appeals also sought to support its ruling by pointing to categories of individuals in Anglo-American history who were ostensibly members of the land and naval forces (and sometimes court martialed) despite not being in regular active service. These included British "half-pay" officers from 1749-1751 and American soldiers who were furloughed at the conclusion of the Revolutionary War. Pet. App. 19a-26a. Neither example supports the court's decision.

This Court has warned that British "practices and understandings at any given time in history cannot be indiscriminately attributed to the Framers of our own Constitution." *New York State Rifle & Pistol Association* v. *Bruen*, 142 S. Ct. 2111, 2136 (2022). This warning applies to the example of half-pay officers, who were inactive officers paid a reduced salary during peacetime periods. The subjugation of British half-pay officers to military law was extremely controversial in Britain and almost immediately abandoned. 1 Smollett, *Continuation of the Complete History of England* 6-8 (1760); 1

Clode, *supra*, at 178-181. And while the court of appeals noted that the Continental Congress debated providing half-pay for American retired officers, Pet. App. 23a, it had no evidence that Congress ever intended to condition their receipt of half pay on perpetual application to military law while in retirement. This hardly shows American law's acceptance of status-based jurisdiction for all military personnel who have left active service or who serve part-time.

The court of appeals likewise placed too much weight on the example of Continental Army soldiers who were furloughed at the end of the Revolutionary War yet court-martialed during their furlough period. These soldiers were given "conditional discharge papers" pending the conclusion of a full peace with Great Britain. Pet. App. 25a. This example is unpersuasive for two reasons.

First, a person may be in continual active service even though he is on temporary leave. A furlough is nothing more than an extended absence from the military. An extended absence does not change one's principal occupation.

Second, there will always be borderline cases about who remains in active service. Today, for example, soldiers could face courts-martial for committing military offenses after they conclude their last military assignment but before they are formally discharged. *See* 10 U.S.C. §802(a)(1). The existence of such borderline cases does not support the conclusion that the Framers accepted the broad application of military law to those who were no longer in active military service at all.

C. The Question Presented Warrants Resolution In This Case

Even apart from the need to resolve the conflict between the decision below and precedent from the Court of Appeals for the Armed Forces, certiorari to correct the D.C. Circuit's error is warranted for three reasons.

First, by subjecting people to military jurisdiction improperly, the decision below treads on important individual rights. As this Court has explained, "the Framers harbored a deep distrust of executive military power and military tribunals." *Loving* v. *United States*, 517 U.S. 748, 760 (1996). In its military cases, therefore, this Court has recognized that "[t]here are dangers lurking in military trials which were sought to be avoided by the Bills of Rights and Article III[.]" *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955). The decision below makes those "dangers" a reality.

Second, the court of appeals' decision blesses Congress's improper transfer of authority from the federal judiciary to the executive branch. "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts[.]" *Covert*, 354 U.S. at 21 (plurality opinion). By extending court-martial jurisdiction over retired FMR members, Congress has improperly allowed the president to exercise adjudicatory power over individuals who are de facto civilians and thus should be tried, if at all, in civilian courts.

Third, the court of appeals' decision has important consequences for the Incompatibility Clause of the Constitution, which forbids members of Congress from holding another federal office simultaneously. U.S. Const. art. I, §6, cl. 2. In its brief below, the government noted that "[c]ourts and Attorneys General have in a long line of decisions held that officers of the Army on the retired

list hold public office." Resp. C.A. Br. 21 (Apr. 26, 2021), Doc #1896059. Many retired military officers have been elected to Congress. For example, Senator John McCain and Representatives Joe Sestak and Ronny Jackson all retired from the regular military before their time in Congress. *John S. McCain III: A Brief Navy Biography, Naval History and Heritage Command* (Sept. 18, 2018), https://www.history.navy.mil/browse-by-topic/people/profiles-in-duty/profiles-in-duty-vietnam/john-s--mccain-iii/john-s--mccain-iii--a-brief-navy-biography-.html; *Rear Admiral Joseph Sestak Jr.*, https://www.navy.mil/DesktopModules/ArticleCS/Print.aspx?PortalId=1&ModuleId=692&Article=2235968 (visited June 7, 2023); Shane, *Veterans in the 117th Congress, by the Numbers*, Military Times (Jan. 2, 2021). If their status as retirees means they still hold federal office as officers in the military, then their simultaneous congressional service violates the Incompatibility Clause. And with good reason: It would give the president undue influence over the legislature if he could convene courts-martial against its members. Under the government's theory that retired officers hold public office in the Armed Forces, "retired" military officers cannot be seated in Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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