No. 22-1082

In the Supreme Court of the United States

STEVEN M. LARRABEE, PETITIONER

v.

CARLOS DEL TORO, SECRETARY OF THE NAVY, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress's determination in Article 2(a)(6) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 802(a)(6), to apply the UCMJ to military service-members like petitioner—a staff sergeant in the United States Fleet Marine Corps Reserve—is a constitutional exercise of Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14.

ADDITIONAL RELATED PROCEEDINGS

General Court-Martial (Camp Foster, Okinawa, Japan):

United States v. *Larrabee* (Nov. 3, 2016, approved, Feb. 15, 2017) (no docket number assigned)

United States Navy-Marine Corps Court of Criminal Appeals:

United States v. *Larrabee*, No. 201700075 (Nov. 28, 2017) (direct appeal)

United States Court of Appeals for the Armed Forces:

United States v. *Larrabee*, No. 18-114/MC (Aug. 22, 2018) (direct review)

United States District Court (D.D.C.):

Larrabee v. *Braithwaite*, No. 1:19-cv-654 (Nov. 20, 2020) (collateral review)

United States Court of Appeals (D.C. Cir.):

Larrabee v. *Del Toro*, No. 21-5012 (Aug. 2, 2022) (appeal on collateral review)

United States Supreme Court:

Larrabee v. *United States*, No. 18-306 (Feb. 19, 2019) (direct review)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-46a) is reported at 45 F.4th 81. The opinion of the district court (Pet. App. 47a-66a) is reported at 502 F. Supp. 3d 322.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2022. A petition for rehearing was denied on December 20, 2022 (Pet. App. 69a). On March 1, 2023, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including May 4, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea before a general court-martial, petitioner, a staff sergeant (E-6) in the United

States Fleet Marine Corps Reserve, was convicted on one specification of sexual assault and one specification of indecent recording, in violation of Articles 120 and 120c of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 920c. Pet. App. 5a, 49a. Petitioner was sentenced to eight years of confinement, a reprimand, and a dishonorable discharge from the military. *Id.* at 49a. The convening authority disapproved the reprimand, and suspended confinement in excess of ten months in conformity with a pretrial agreement, but otherwise approved the adjudicated sentence. *Ibid.* The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. 2017 WL 5712245. The United States Court of Appeals for the Armed Forces (CAAF) affirmed in a summary order on an issue not relevant here, 78 M.J. 107, and this Court denied certiorari, 139 S. Ct. 1164 (No. 18-306).

Petitioner subsequently filed this collateral challenge to his court-martial conviction in district court. The district court granted petitioner judgment on the pleadings. Pet. App. 47a-68a. The court of appeals reversed. *Id.* at 1a-46a.

1. a. In 1994, petitioner enlisted in the United States Marine Corps, just days before his 18th birthday. Pet. App. 28a; Pet. 7. The Marine Corps accepts original enlistments of individuals between 17 and 28 years of age. U.S. Marine Corps, *Recruiting Command Order 1100.1A, Marine Corps Recruiting Command Enlistment Processing Manual* ¶ 2101.1 (May 1, 2020); *id.* at 2-6 (Tbl. 2-1, Rule 1). "Older recruits suffer a higher attrition rate at [Marine Corps] recruit training." *Ibid.* (Tbl. 2-1, note 2). A region's commanding general may therefore waive the maximum age and authorize the enlistment of an individual up to age 34 only upon a deter-

mination that the individual can "participate in the physical rigors associated with service in the Marine Corps" and only then with "[c]aution" and in "unusual circumstances." *Ibid.*; see *id.* ¶ 2103.2.

An individual who enlists in the Nation's Armed Forces must normally serve an initial period of six to eight years of service unless "discharged" earlier for personal hardship. 10 U.S.C. 651(a), 1169; see 10 U.S.C. 1171, 1173. The servicemember may then voluntarily extend his or her period of enlistment for up to four years, 10 U.S.C. 509(a), and if qualified for reenlistment, may reenlist for additional term(s) of active-duty service thereafter, 10 U.S.C. 505(d), 508. Following his initial service period, petitioner reenlisted and, from 2012 to 2014, he was stationed at Marine Corps Air Station (MCAS) Iwakuni in Iwakuni, Japan. Pet. App. 48a. By 2015, petitioner—then about 38 years old—had served 20 years on active duty. *Ibid.*

b. An active-duty enlisted Marine with at least 20 years of active service has three potential options. First, an enlisted servicemember may elect to be "discharged" from the Armed Forces after "his term of service expires," 10 U.S.C. 1169; see 10 U.S.C. 1171, which results in the individual's "[c]omplete severance from all military status," U.S. Marine Corps, Order 1900.16, *Separation and Retirement Manual* ¶¶ 1002.20, 1005.1 (Feb. 15, 2019) (Order 1900.16), https://go.usa.gov/xH5W2. Once legitimately discharged from the Armed Forces, the former servicemember is no longer subject to the UCMJ. See 10 U.S.C. 802(a); see also *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 13, 23 (1955); cf. 10 U.S.C. 803(b) (exception for fraudulently obtained discharge).

Second, if an enlisted Marine has (like petitioner) accumulated between 20 and 30 years of active service, he "may, at his request, be transferred to the Fleet Marine Corps Reserve." 10 U.S.C. 8330(b); see 10 U.S.C. 8331(a). If that request is approved, see Order 1900.16 ¶¶ 7001.4, 7004, 7012.2, the Marine may then serve no more than ten years in the Fleet Marine Corps Reserve. Once the Marine has accrued 30 years of total service (including service in the Fleet Marine Corps Reserve) —or earlier if "he is found not physically qualified"— the Marine "shall be transferred" out of the Fleet Marine Corps Reserve to the relevant retired list. 10 U.S.C. 8331(a)(1); see Order 1900.16 ¶ 7018.1 and .2.

The Fleet Marine Corps Reserve is a component of the Marine Corps, 10 U.S.C. 8001(a)(2), established "to maintain a ready manpower pool of trained Marines for recall and mobilization." Order 1900.16 ¶ 7001.2. Members can "be organized without further training to fill billets requiring experienced personnel in the first stages of mobilization during an emergency or in time of war." 7B U.S. Dep't of Def., *DoD 7000.14-R, Financial Management Regulation*, Ch. 2, ¶ 1.1.1 (May 2022), https://go.usa.gov/xH5WB. And they are required by statute to maintain physical readiness. See 10 U.S.C. 8331(a)(1) (specifying that a member "found not physically qualified * * * shall be transferred" out of the Fleet Marine Corps Reserve); see also Order 1900.16 ¶ 7018.1.

Accordingly, a member of the Fleet Marine Corps Reserve may be "ordered * * * to active duty without his consent" for any period of time during a national emergency or war "and for six months thereafter" or "when otherwise authorized by law." 10 U.S.C. 8385(a); see 10 U.S.C. 688(e)(1) and (f). In addition, a member

may be required during peacetime to serve two months on "active duty" for training in each four-year period, 10 U.S.C. 8385(b), and may be ordered to active-duty service for up to 12 months within a 24-month period, 10 U.S.C. 688(a), (b)(3), and (e)(1). Such a member is "entitled, when not on active duty, to retainer pay." 10 U.S.C. 8330(c)(1).

Under Article 2(a)(6) of the UCMJ, "[m]embers of the * * * Fleet Marine Corps Reserve"—enlisted Marines who have not been discharged from the Armed Forces—"are subject to this chapter." 10 U.S.C. 802(a)(6). The UCMJ further provides that the punishment for enlisted members convicted of certain serious offenses, including sexual assault, "shall include * * * dishonorable discharge" from the Armed Forces. 10 U.S.C. 856(b)(1) and (2)(B); see Rule for Courts-Martial 1003(b)(8)(A) and (B) (2019) (distinguishing "dismissal," which applies only to officers, from "discharge"); cf. 10 U.S.C. 804, 857(a)(4).

Third, when an enlisted active-duty Marine has accumulated 30 or more years of active service (which petitioner did not do), he may elect to be transferred directly to the relevant retired list rather than be discharged. 10 U.S.C. 8326(a). A retired member of the Marine Corps "may be ordered to active duty * * * at any time," 10 U.S.C. 688(a) and (b)(1), for any period of time during a national emergency or war and, in addition, for up to 12 months within any 24-month period during peacetime. 10 U.S.C. 688(e)(1) and (f). "Retired members of a regular component of the armed forces who are entitled to pay" are subject to the UCMJ. 10 U.S.C. 802(a)(4).

c. Petitioner, who had not accumulated enough active-duty service to be eligible for the retired list,

elected service in the Fleet Marine Corps Reserve, rather than a discharge. In August 2015, the Marine Corps granted his request to transfer to the Fleet Marine Corps Reserve based on his 20 years of active-duty service. Pet. App. 5a, 48a. Upon that transfer, petitioner remained in Iwakuni, Japan, where he worked as a civilian employee on his former base. *Id.* at 5a. In addition, petitioner managed two local bars located near the Marine Corps air station. *Ibid.*

2. "The facts in this case are undisputed." Pet. App. 5a. On November 15, 2015, about three months after his transfer to the Fleet Marine Corps Reserve, petitioner sexually assaulted a woman at Teaserz, one of the bars that he managed, and recorded a video of the assault with his cellphone. *Ibid.*; see Br. in Opp. at 5, *Larrabee* v. *United States*, 139 S. Ct. 1164 (2020) (No. 18-306) (18-306 BIO).[1] Petitioner's victim (KAH) worked as a bartender at Teaserz and was the dependent wife of an active-duty Marine sergeant stationed at MCAS Iwakuni. Pet. App. 5a; 18-306 BIO 5.

a. KAH recalled that, on the night of her assault, after Teaserz had closed for the evening, she and petitioner were drinking and petitioner was "making her drinks as he had in the past." 18-306 BIO 5 (citation omitted). KAH became heavily intoxicated and passed out standing up while leaning against the bar with her head in her arms. *Ibid.*

Petitioner admitted that while KAH was passed out and without her consent, he "pulled down her pants and underwear" and digitally "penetrated her vulva." 18-

[1] The parties agreed below that the briefing in petitioner's case while on direct review in this Court (No. 18-306) provides the underlying facts relevant here. Gov't C.A. Br. 8 n.4. This brief therefore cites that briefing when discussing the background facts.

306 BIO 5 (citation omitted). In addition, petitioner's cellphone video shows petitioner "having sexual intercourse with [KAH]" while she "appear[s] to be slumped over a bar with her head down." *Id.* at 6 (citation omitted). An investigative report describing the video states that "[a]fter ejaculating, [petitioner] is heard telling [KAH] 'you just woke up,' followed by him laughing." *Ibid.* (citation omitted).

KAH recalls "waking up with her face on the bar and her pants pulled down," "confused about what had happened," but feeling "like someone had [had] sex with her." 18-306 BIO 6 (citation omitted). She recalls telling petitioner "not to touch her" and feeling "disgust, confusion, fright, [and] humiliation." *Ibid.* (citations omitted). KAH did not initially report her assault, because she feared that she would not be believed, would be blamed for being drunk, would hurt her family, and would be further humiliated. *Ibid.*

Several months later, after KAH told a friend about the assault, the friend persuaded her to report it to authorities. 18-306 BIO 6. On March 22, 2016, KAH made an initial report of her assault to military investigators but asked to delay being interviewed until the following day, by which time she had changed her mind and "did not wish to provide any information." *Ibid.* (citation omitted). The day after that, following another unsuccessful attempt to interview KAH, military investigators interviewed petitioner. *Ibid.*

Petitioner provided a voluntary sworn statement in which he admitted to "rubbing the outside of [KAH's] vagina with [his] hand" and to "ha[ving] sex" with KAH while she was "bent over [a] bar stool," but asserted that the acts were consensual. 18-306 BIO 6 (citation omitted). Petitioner also admitted to recording himself

"having sex [with KAH] on [his] iPhone" and provided his phone to investigators. *Id.* at 6-7 (citation omitted). Contrary to petitioner's "initial characterization of [KAH] as a willing participant, the video depicts [her] as being unresponsive and uncooperative." *Id.* at 7 (citation omitted). After KAH was informed of the video's existence, she cooperated with investigators. *Ibid.*

b. Petitioner was charged with multiple specifications of sexual assault and one specification of indecent recording, in violation of Articles 120 and 120c of the UCMJ, 10 U.S.C. 920, 920c. Pet. App. 5a; 18-306 BIO 7. Petitioner subsequently entered into a pretrial agreement in which he agreed to plead guilty to one specification of sexual assault and one specification of indecent recording. 18-306 BIO 7. In that agreement, petitioner acknowledged that his conviction for sexual assault would require his "dishonorable discharge" from the Armed Forces. *Ibid.* (citation omitted); see 10 U.S.C. 856(b)(1) and (2)(B).

Petitioner was convicted on the basis of his guilty plea. 18-306 BIO 1-2. His sentence included eight years of confinement and a dishonorable discharge from the Armed Forces. *Id.* at 2, 7. The convening authority approved those portions of the sentence but, consistent with petitioner's pretrial agreement, suspended all but ten months of his confinement. *Ibid.*; Pet. App. 49a.

c. The NMCCA affirmed. 2017 WL 5712245. Among other things, the NMCCA summarily rejected petitioner's contention that Article 2(a)(6) of the UCMJ, 10 U.S.C. 802(a)(6), "unconstitutional[ly]" extends court-martial jurisdiction to members of "the Fleet Marine Corps Reserve." 2017 WL 5712245, at *1 & n.1. The court relied (*id* at *1 n.1) on its then-recent decision in *United States* v. *Dinger*, 76 M.J. 552 (N-M. Ct. Crim.

App. 2017), aff'd on other grounds, 77 M.J. 447 (C.A.A.F.), cert. denied, 139 S. Ct. 492 (2018), which had involved a Marine who was prosecuted based on Article 2(a)(4), 10 U.S.C. 802(a)(4), for conduct that occurred after he had transferred from the Fleet Marine Corps Reserve to the retired list. 76 M.J. at 553-554. The NMCCA had stated in *Dinger* that enlisted Marines "in a retired status remain 'members' of the land and Naval forces who may face court-martial." *Id.* at 557.

The CAAF granted discretionary review in petitioner's case on a separate issue, 77 M.J. 328, and summarily affirmed in light of its decision on that issue in another case, 78 M.J. 107. Petitioner then petitioned this Court for review on the question "[w]hether the Constitution permits the court-martial of a retired military servicemember." Pet. at i, *Larrabee*, *supra* (No. 18-306). In February 2019, this Court denied certiorari. 139 S. Ct. 1164.

3. Less than one month later, petitioner filed in district court this collateral, non-custodial challenge to his court-martial conviction, again arguing that Article 2(a)(6), 10 U.S.C. 802(a)(6), unconstitutionally authorizes the court-martial of members of the Fleet Marine Corps Reserve. Pet. App. 50a-51a.

a. The district court granted petitioner judgment on the pleadings. Pet. App. 47a-68a. The court took the view that "court-martial jurisdiction must be narrowly limited" and that Congress may authorize such jurisdiction over individuals only where "necessary to maintain good order and discipline." *Id.* at 54a, 63a. And in the court's view, "overriding demands of discipline" did not require court-martial jurisdiction over members of the Fleet Marine Corps Reserve. *Id.* at 57a, 65a-66a (citation omitted). The government appealed.

While the government's appeal was pending, the CAAF issued its decision in *United States* v. *Begani*, 81 M.J. 273, 275 (C.A.A.F.), cert. denied, 142 S. Ct. 711 (2021), which presented the question whether members of the Fleet Reserve—a component of the United States Navy that parallels the Fleet Marine Corps Reserve, see 10 U.S.C. 8001(a)(1), 8330(b), 8331(a)—"have sufficient current connection to the military for Congress to subject them" to the UCMJ under Article 2(a)(6). See *Begani*, 81 M.J. at 275; see also 10 U.S.C. 802(a)(6). The CAAF unanimously determined that Article 2(a)(6) constitutionally applies court-martial jurisdiction to such members. *Begani*, 81 M.J. at 276-280. And Judge Maggs, joined by Judge Hardy and Senior Judge Crawford, while "join[ing] the [CAAF's] opinion in full," wrote separately to explain why the CAAF's conclusion is consistent with "the original meaning of U.S. Const. art. I, § 8, cl. 14, and the Grand Jury Clause of the Fifth Amendment." *Id.* at 282-288 (Maggs, J., concurring).

Begani petitioned for a writ of certiorari on the question whether "the Constitution permit[s] the court-martial of retired servicemembers for offenses committed after their discharge from active duty." 21-335 Pet. at i, *Begani*, *supra* (No. 21-335). This Court denied certiorari. 142 S. Ct. 711.

b. The court of appeals here subsequently reversed the district court's decision in petitioner's case. Pet. App. 1a-46a. The court explained that members of the Fleet Marine Corps Reserve are part of the "land and naval Forces" that Congress has constitutionally subjected to court-martial jurisdiction under Article 2(a)(6) of the UCMJ. *Id.* at 2a, 4a, 31a.

Quoting this Court's decision in *Solorio* v. *United States*, 483 U.S. 435 (1987), the court of appeals ex-

plained that the question whether Congress's authority to "make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, permits Congress to subject an individual to court-martial jurisdiction "turns 'on one factor: the military status of the accused.'" Pet. App. 13a-14a (quoting *Solorio*, 483 U.S. at 439). And based on this Court's decisions addressing that authority, the court determined that an individual has the requisite military status "if he has a formal relationship with the armed forces that includes a duty to obey military orders." *Id.* at 19a; see *id.* at 14a-19a.

The court of appeals accordingly found that petitioner —who "maintained a legal relationship with the armed forces" when "he elected to transfer to the Fleet Marine [Corps] Reserve" and "assumed an obligation to obey" military orders to re-enter active-duty service for military readiness training or other purposes—retained military status and could constitutionally be subject to the UCMJ. Pet. App. 28a-29a. The court emphasized that upholding Congress's application of the UCMJ here was supported by decisions of this Court repeatedly recognizing that "military retirees [are] part of the nation's armed forces," *id.* at 30a-31a; "consistent with the settled position of the CAAF" as recently reaffirmed in *Begani*, *id.* at 29a; and conforms with the holding of the only other court of appeals to have addressed a similar argument, *id.* at 30a.

The court of appeals additionally explained why its understanding of the scope of Congress's authority was consistent with "the original meaning of the Make Rules Clause." Pet. App. 19a; see *id.* at 19a-27a. The court explained that "the term 'land and naval Forces'" would have been understood at the Founding to include

"inactive-duty personnel who remained obligated to obey military orders, including orders to serve again if called." *Id.* at 20a. The court described historical military practices illustrating that view, namely, the "pre-Revolutionary example of [British] 'half-pay officers'" who returned to civilian life subject to recall to active service who could be subject to court-martial, *id.* at 20a-23a; the Continental Congress's 1781 adoption of an analogous half-pay officer system; *id.* at 23a-24a; and the Continental Congress's application of court-martial jurisdiction to inactive-duty soldiers who had been furloughed at the end of the Revolutionary War subject to recall but who were unlikely ever to be recalled to active duty again, *id.* at 24a-26a.

c. Judge Tatel concurred in part and dissented in part. Pet. App. 41a-46a. Judge Tatel agreed that court-martial jurisdiction applies to those with "military status" and therefore covers an individual with "a formal relationship with the military that include[s] an obligation to obey military orders." *Id.* at 41a. But he took the view that "the type of order to which [petitioner] is potentially subject," an order recalling him to active duty, is not "like any other military order," *ibid.*, and that members of the Fleet Marine Corps Reserve are subject to court-martial jurisdiction only when actually recalled to active duty, *id.* at 43a-44a.

ARGUMENT

Petitioner contends (Pet. 19-31) that Congress exceeded its authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, by enacting Article 2(a)(6) of the UCMJ, 10 U.S.C. 802(a)(6), which authorizes the court-martial of members of the Fleet Marine Corps Reserve. The court of appeals correctly rejected that

contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. This Court recently denied review of similar questions in *Begani* v. *United States*, 142 S. Ct. 711 (No. 21-335), and *Larrabee* v. *United States*, 139 S. Ct. 1164 (No. 18-306). It should follow the same course here.

1. The court of appeals correctly rejected petitioner's collateral challenge to his court-martial. "The Constitution grants to Congress the power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Solorio* v. *United States*, 483 U.S. 435, 438 (1987) (quoting U.S. Const. Art. I, § 8, Cl. 14) (brackets in original). Congress "[e]xercis[ed] this authority" when it "empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J.," *id.* at 438-439, including—in Article 2(a)(6) of the UCMJ—servicemen who are "[m]embers of the * * * Fleet Marine Corps Reserve," 10 U.S.C. 802(a)(6). That provision is constitutional because members of the Fleet Marine Corps Reserve are part of the Nation's land and naval forces.

This Court has long "interpreted the Constitution" as defining the scope of Congress's authority to subject an individual to military court-martial based "on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439. The constitutional test under the UCMJ is therefore "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.'" *Ibid.* (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 241 (1960)).

"Implicit in the military status test" is the principle that the Constitution has "reserved for Congress" the determination whether to subject servicemembers to

courts-martial for offenses, *Solorio*, 483 U.S. at 440, and that Congress accordingly has "primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military," *id.* at 447. As a result, this Court has "h[e]ld that the requirements of the Constitution are not violated where * * * a court-martial is convened to try a serviceman who was a member of the Armed Services at the time of the offense charged." *Id.* at 450-451. That holds true even if the offense charged was committed on the servicemember's own time in the "civilian community" and thus lacks any type of "'service connection.'" *Id.* at 436-437.

Congress has determined that the Fleet Marine Corps Reserve—like the Regular Marine Corps and the Marine Corps Reserve—is a component of the United States Marine Corps. 10 U.S.C. 8001(a)(2). Petitioner does not dispute that members of the Marine Corps are defined as members of the Armed Forces. See 10 U.S.C. 101(a)(4). And Congress has determined that servicemembers like petitioner—who are transferred on their own request to the Fleet Marine Corps Reserve after 20 or more years of active service, rather than being discharged from the Armed Forces—are part of the Nation's land and naval forces subject to courts-martial. See 10 U.S.C. 802(a)(6). As the court of appeals recognized, such servicemembers have "a formal relationship with the armed forces," including "a duty to obey military orders," that reflects their military status as members of the Nation's armed forces, and can be treated as members of the military for both statutory and constitutional purposes. Pet. App. 14a-19a.

That determination is consistent with the decisions of this Court. For nearly 150 years, the Court has consistently recognized that even "[m]ilitary retirees un-

questionably remain in the service and are subject to restrictions and recall" and to punishment by "'military court-martial.'" *Barker* v. *Kansas*, 503 U.S. 594, 599, 600 n.4 (1992) (quoting *United States* v. *Tyler*, 105 U.S. 244, 246 (1882)); see, *e.g.*, *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981) ("The retired officer remains a member of the Army and continues to be subject to the [UCMJ].") (citation and footnote omitted); *Denby* v. *Berry*, 263 U.S. 29, 35-36 (1923) (contrasting officers "retired from active service" with those who "become a civilian" when they are "wholly retired" and "removed from the service entirely"); *Tyler*, 105 U.S. at 246 (holding that "retired officers [remain] in the military service of the government" and that it "is impossible" to hold otherwise).

Congress's determination is also consistent with the authoritative treatise penned by Colonel Winthrop, whom this Court has repeatedly referred to as "the 'Blackstone of Military Law.'" *Ortiz* v. *United States*, 138 S. Ct. 2165, 2175 (2018) (citation omitted). Colonel Winthrop emphasized well over a century ago that the proposition that "retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitting of question." William Winthrop, *Military Law and Precedents* 87 n.27 (2d ed. 1920) (posthumous reprint of 1896 edition). Cf. Act of Feb. 14, 1885, ch. 67, 23 Stat. 305 (creating retired list for enlisted members of the Army and Marine Corps to which transfer was authorized after 30 years of service); Act of Aug. 3, 1861, ch. 42, §§ 15, 18, 21, 24, 12 Stat. 289-291 (providing that any officer of the Army, Navy, or Marine Corps, "upon his own application," be "placed on the list of retired officers" after 40 years of service; authorizing ongoing

pay; and subjecting those retired officers "to trial by general court-martial").

The foundation for a court-martial is particularly strong in a context like this, where petitioner elected not to be discharged from the Armed Forces upon the expiration of his period of active-duty enlistment, but instead requested to be transferred to the Fleet Marine Corps Reserve, whose servicemembers receive "retainer pay" (or, when applicable, active-duty pay) and can be required to serve on active duty under various circumstances in peacetime as well as in time of national emergency or war. See pp. 4-6, *supra*; cf. *Ortiz*, 138 S. Ct. at 2187 n.2 (Thomas, J., concurring) (stating that servicemembers "consent" to court-martial authority "when they enlist"). Indeed, one of the penalties imposed in this case was a dishonorable discharge, Pet. App. 49a, which necessarily reflects petitioner's military status. See 10 U.S.C. 856(b)(1) and (2)(B). Petitioner "could hardly be court-martialed and dismissed from a service he was not in." Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. Pa. L. Rev. 317, 351 (1964). And petitioner himself does not appear to dispute the necessity of a discharge in order for him to leave military service.

The particular circumstances of this case also illustrate the military's strong interest in applying court-martial jurisdiction. Where a Fleet Marine Corps Reservist like petitioner remains part of an overseas military community and commits a crime within that community, the government has a significant interest in punishing the crime and dishonorably discharging the offender from the Armed Forces. As this case itself demonstrates, such offenses can have a significant and

adverse effect on military functions: petitioner's sexual assault of the wife of a forward-deployed active-duty Marine in Japan resulted in the Marine's reassignment back to the United States. See Pet. App. 38a n.17.

2. Petitioner's position (Pet. 8, 22, 24; see Pet. App. 2a) that members of the Fleet Marine Corps Reserve fall outside Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, has dramatic implications. On that view, Congress would not be able to use that authority to make rules for the Fleet Marine Corps Reserve *at all*.[2] Petitioner identifies no sound basis for overturning Congress's judgment that servicemembers like petitioner are part of the Nation's Armed Forces, subject to congressional rulemaking, including the potential for court-martial under the UCMJ.

a. As a threshold matter, petitioner does not address significant portions of the court of appeals' analysis. Petitioner largely focuses (Pet. 19-24) on a portion of the CAAF's analysis in *United States* v. *Begani*, 81 M.J. 273, cert. denied, 142 S. Ct. 711 (2021), concerning deference to Congress, which the court of appeals in this case did *not* follow. Petitioner then incorrectly asserts (Pet. 30) that the "only rationale" remaining in support of the court of appeals' decision is the court's discussion of Founding-era military practice.

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[2] Although petitioner has also invoked the Fifth Amendment's Grand Jury Clause, the petition does not include any argument based on it. In any event, as he describes his Fifth Amendment argument below—that "his case did not 'aris[e] in the land or naval forces,'" Pet. 8-9 (brackets in original)—it appears to parallel his argument that the Fleet Marine Corps Reserve is not part of the "land and naval Forces" under the Make Rules Clause.

To the contrary, however, the court of appeals relied extensively on the principles in this Court's decisions. It discussed at length decisions demarking the line between members of the Armed Forces subject to court-martial and civilians. Pet. App. 13a-19a. And it identified decisions of this Court and other courts that, for well over a century, have consistently made clear that military retirees are part of the Nation's Armed Forces subject to court-martial. See *id.* at 30a-31a; see also pp. 14-15, *supra*. The court of appeals also specifically noted that its decision, in recognizing the constitutionality of Congress's application of the UCMJ to petitioner, was in accord with "the settled position of the CAAF" and the holding of the only other court of appeals to have addressed a similar question. Pet. App. 29a-30a.

Petitioner does not engage with the overwhelming weight of that longstanding and uniform authority. In light of it, the decision below is neither remarkable nor revolutionary. Individuals with petitioner's status, or even equivalent or lesser status, have long been defined as members of the Armed Forces and understood to be constitutionally subject to court-martial jurisdiction, without significant problem.

b. As to the historical discussion itself, petitioner's objections are misplaced. As a threshold matter, although petitioner criticizes (Pet. 13, 24, 30) the court of appeals for addressing history that was not "fully and properly briefed," Pet. 30, the court's discussion reflects consideration of developed arguments supporting his position. In any event, most of the basic historical facts are undisputed, and petitioner's efforts to undermine the implications of them lack merit.

i. The court of appeals made clear that its analysis of court-martial jurisdiction of furloughed soldiers at the end of the War of Independence was based on Judge Maggs's parallel analysis in *Begani*. Pet. App. 24a n.10; see *Begani*, 81 M.J. at 284-285 (Maggs, J., concurring). Judge Maggs, in turn, had commended Begani "for briefing th[e CAAF] on historical sources pertinent to [its] interpretation." *Begani*, 81 M.J. at 282.

In post-briefing letters discussing *Begani*, petitioner disclaimed a need for supplemental briefing in this case, 6/24/2021 Pet. C.A. Letter 2, and when the government highlighted Judge Maggs's analysis, 7/2/2021 Gov't C.A. Letter 2, petitioner responded only by identifying an LL.M. candidate's unpublished paper favorable to his position, 4/22/2022 Pet. C.A. Letter 1-2. That paper addressed both the furlough example and the example of British half-pay officers. *Id.* Attach. 19-34. The court of appeals expressly considered that paper, but found it unpersuasive. See Pet. App. 23a n.8.

ii. In any event, petitioner's substantive critiques of the decision's historical analysis are unsound. Petitioner does not meaningfully dispute the factual underpinnings of the court of appeals' observation that British half-pay officers "were recognized as having military status," even though their "only connection to the military was their ongoing service obligation." Pet. App. 20a-21a. And as the court explained, Parliament had expressly subjected half-pay officers to court-martial during peacetime, and that the fact that Parliament later "reverse[d] course" in the face of "public opposition" did not suggest any lack of "*authority*" to subject such members of the armed forces to court-martial. *Id.* at 21a-22a, 23a n.8. Indeed, Parliament later again

subjected certain half-pay brevet-rank officers to court-martial. *Id.* at 22a.

Petitioner suggests (Pet. 25) only that "the absence of a 'dispute' over Parliament's 'authority' proves nothing about Founding-era British *practice*." But it is the former, not the latter, that illustrates the Founding-era understanding of what constituted the land and naval forces that Congress was granted the authority to regulate. Perhaps even more than British parliamentarians, the elected officials in Congress would be answerable to the people on the ways in which that authority might be exercised.

Petitioner also argues (Pet. 27-29) that the furloughed American soldiers who mutinied in June 1783, see Pet. App. 24a-26a, did not "accept" the furlough orders and therefore were still active-duty soldiers when they were recognized as subject to court-martial. But petitioner does not explain why those soldiers were aggrieved, as all agree that they were, by a policy of granting "furloughs that would turn into discharges" and thereby "deprive them of pay to which they believed they were entitled," Pet. 28, if the soldiers had been able to validly reject the furloughs.

Finally, petitioner's assertion that a "'furlough'" in this context was merely a "temporary physical reprieve from the front lines," Pet. 28-29, fails to account for the relevant historical context. The Continental Congress directed those furloughs after hostilities with Britain had ceased, allowing soldiers "to return indefinitely to civilian life" pending the official ratification of the Treaty of Paris that formally ended the Revolutionary War, at which point the furloughs automatically converted into discharges. See Pet. App. 25a & n.11. Such furloughs, though contingent on the consummation of

the peace treaty, would not have been understood as a mere temporary reprieve from active-duty service. See, *e.g.*, George Washington, Letter to President of the Continental Congress (Sept. 19, 1793), in 27 *The Writings of George Washington* 156 (John C. Fitzpatrick ed., 1938) (General Washington's explanation, before the ratification of the Treaty of Paris, that he "call[s the furloughs] discharges, because it is in this light the Furloughs have all along been considered").

c. Petitioner briefly suggests that the court of appeals erred in failing to limit "courts-martial to 'the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.' " Pet. 6, 20 (quoting *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 22 (1955)). But *Toth*'s observation that "[f]ree countries of the world have tried to restrict military tribunals" in that manner, 350 U.S. at 22, does not suggest that Congress lacks the authority to apply the UCMJ to non-discharged members of the Armed Forces, included members of the Fleet Marine Corps Reserve. Pet. App. 34a; see *id.* at 14a, 17a-18a.

Toth simply held that an individual who had been "*discharged*" from the Armed Forces—and who therefore "had no relationship of any kind with the military" —was not subject to court-martial based on events that occurred prior to his discharge. *Toth*, 350 U.S. at 13 (emphasis added). In other words, "Article I military jurisdiction" does not "extend[] to civilian ex-soldiers who ha[ve] severed all relationship with the military and its institutions." *Id.* at 14. Petitioner, however, elected not to sever his relationship with the Armed Forces, but instead chose to transfer to the Fleet Marine Corps Reserve.

d. Petitioner states that this Court in *Barker* v. *Kansas*, *supra*, determined that military retirees receive "'deferred pay for past services,' not 'current compensation'" for ongoing military service. Pet. 5 (citation omitted). But *Barker* merely held that, "[*f*]*or purposes of 4 U.S.C. § 111*, military retirement benefits are to be *considered* deferred pay for past services." *Barker*, 503 U.S. at 605 (emphases added). The Court in *Barker* concluded that the state taxation at issue ran afoul of Section 111, which provides the United States' consent only to certain nondiscriminatory state "taxation of pay or compensation for personal service" as a federal officer or employee. *Id.* at 596 (quoting 4 U.S.C. 111 (1998)).

While *Barker* observed that "Congress for many"—but not all—"purposes" treats military retirement pay as compensation for past services rather than "current compensation," 503 U.S. at 604-605, it is clear that the "retainer pay" paid to Fleet Marine Corps Reservists like petitioner, 10 U.S.C. 8330(c)(1), represents at least in part current compensation for continued status as members of the Armed Forces. A servicemember similarly situated to petitioner who opted to be discharged upon completion of his term of enlistment would not receive any retainer pay, even if he had provided the Nation exactly the same past military service as petitioner.

The difference that warrants retainer pay is petitioner's continued status as a member of the Armed Forces. Indeed, *Barker* itself observed that "[m]ilitary retirees unquestionably remain in the service" and "are subject to restrictions and recall" as well as ongoing punishment by "'military court-martial.'" 503 U.S. at 599, 600 n.4 (citation omitted).

3. a. Petitioner does not identify any division of authority that warrants this Court's review. Although he

emphasizes (Pet. 19-24) differences between the rationales of *Begani* and the decision below, he does not dispute that both reach congruent results—sustaining Congress's authority to apply the UCMJ to a member of the Fleet Marine Corps Reserve or Fleet Reserve.

Nor does petitioner show that the issue of Congress's authority to do so arises frequently. He acknowledges that the issue has arisen "exceedingly rare[ly]" in the past, and his suggestion of increasing recent importance is supported by reference to only four cases over six years. Pet. 18. In any event, if the issue does begin to arise with any significant frequency, the defendants in future courts-martial can seek review through habeas corpus proceedings in the districts in which they are detained. And more appellate courts will have the opportunity to address arguments like petitioner's. But no sound reason supports review of the issue in this Court now.

b. In an effort to nonetheless characterize (Pet. 2, 13-19) this case as presenting an "exceptionally important question" that warrants immediate intervention, petitioner seeks to broaden it to include all military retirees. That effort is misplaced and relies on arguments inapplicable to this case, which involves only Congress's application of court-martial jurisdiction to members of the "Fleet Marine Corps Reserve," 10 U.S.C. 802(a)(6).

Petitioner, for instance, asserts (Pet. 2, 11) that a 90-year-old Korean War retiree might be court-martialed and emphasizes (Pet. 16) that current mobilization criteria generally prohibit the recall of retirees older than 60. But no 90-year-old could be a member of the Fleet Marine Corps Reserve. And petitioner fails to identify

any example of a Fleet Marine Corps Reservist being prohibited from recall.

The Marine Corps accepts original enlistments only of individuals aged 17 to 28 years old (with rare exception for exceptional cases) because of the physical rigors particular to enlisted service in the Corps. See pp. 2-3, *supra*. An enlisted Marine may elect to transfer to the Fleet Marine Corps Reserve after 20 years of active-duty service, 10 U.S.C. 8330(b), but even if he remains physically qualified, the Marine may then serve in the Fleet Marine Corps Reserve only until he accrues 30 years of total service, 10 U.S.C. 8331(a)(1); p. 4, *supra*. A career Marine like petitioner who enlisted when he was about 18 years old therefore would complete his service in the Fleet Marine Corps Reserve around age 48. And even if a career Marine enlisted at the (maximum) age of 28, he would cease his service in the Fleet Marine Corps Reserve around age 58, unless that service ended earlier because of physical disqualification.

During that service, the Marine is not only subject to recall to active-duty service, he is also "subject to employment restrictions, as well as military reporting requirements. Pet. App. 28a; *id.* at 4a; cf. *Begani*, 81 M.J. at 278 (noting that Fleet Reserve status requires that servicemembers "maintain readiness for future recall"); U.S. Navy, *MILPERSMAN 1830-040* ¶ 9.c(1)(a) (Sept. 9, 2020) (requiring that Fleet Reservists "[m]aintain readiness for active service"). And Congress has specifically required that any Fleet Marine Corps Reservist who is "found not physically qualified * * * shall be transferred" out of the Fleet Marine Corps Reserve to

the retired list. 10 U.S.C. 8331(a)(1); see Order 1900.16 ¶ 7018.1.[3]

Those real-world limits relating to military readiness reflect the Fleet Marine Corps Reserve's important function as a source of fully trained and experienced enlisted Marines who can be promptly recalled to active duty to fill billets requiring experienced and capable military personnel. See p. 4, *supra*. Although petitioner disparages that function as "anachronistic," Pet. 16-17, during both Iraq wars, even "'retired personnel of all services were actually recalled.'" *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (citation omitted), aff'd on other grounds, 77 M.J. 447 (C.A.A.F.), cert. denied, 139 S. Ct. 492 (2018).

Petitioner's effort (*e.g.*, Pet. 18) to make this case about "more than two million" military retirees, however, is mistaken. Different statutory provisions prescribe the UCMJ's application to members of the "Fleet Marine Corps Reserve," 10 U.S.C. 802(a)(6), and to "[r]etired members of a regular component of the armed forces who are entitled to pay," 10 U.S.C. 802(a)(4). While a small number of cases pending in the lower courts involve military retirees, this case is not a suitable vehicle for addressing their distinct circumstances. Although various justifications for subjecting Fleet Marine Corps Reservists may overlap with those

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[3] That physical-readiness requirement undercuts the premise of Judge Tatel's dissenting opinion—namely, that recall is the only "order" to which Fleet Marine Corps Reservists are subject when not on active duty. Pet. App. 41a, 43a. That premise was essential to his ultimate view; as he recognized, "a formal relationship with the military that include[s] an obligation to obey military orders" would generally suffice for court-martial jurisdiction, *id.* at 41a (citation omitted).

for the distinct category of retired members of regular (non-reserve) components of the Armed Forces, the justifications are not the same. Petitioner's own focus on disabled and geriatric military retirees underscores that petitioner seeks to litigate circumstances that are not presented here, and which this Court presumably could not resolve if the Court were to grant review in this case involving the court-martial of a Fleet Marine Corps Reservist.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner's focus (Pet. 2, 5, 11, 18) on the statutory prohibition against "contemptuous words against the President" and other high-level officials, 10 U.S.C. 888, is similarly misplaced. That prohibition applies only to a "commissioned officer," *ibid.*, and therefore has no application to noncommissioned enlisted Marines in the Fleet Marine Corps Reserve, like petitioner.