IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, Appellee/ Cross-Appellant	)	SUPPLEMENTAL ANSWER ON BEHALF OF APPELLEE/CROSS-APPELLANT
	)	Crim.App. Dkt. No. 201800082
v.	)	
	)	USCA Dkt. Nos. 20-0217/NA and 20-0327/NA
Stephen A. BEGANI Chief Petty Officer (E-7) U.S. Navy (Retired) Appellant/ Cross-Appellee	)	

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Supplemental Issue Presented

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

Statement of Statutory Jurisdiction

The Navy-Marine Corps Court of Criminal Appeals had jurisdiction under Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012), because Appellee's approved sentence included a dishonorable discharge and one year or more of confinement. This Court has jurisdiction under Article 67(a)(2)–(3), UCMJ, 10 U.S.C. § 867(a)(2)–(3) (2012).

Statement of the Case

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of attempted sexual assault of a child and two specifications of attempted sexual abuse of a child, in violation of Articles 80, and 120b, UCMJ, 10 U.S.C. §§ 880, 920b (2012). The Military Judge sentenced Appellant to eighteen months of confinement and a dishonorable discharge. Under a Pretrial Agreement, the Convening Authority approved the adjudged confinement and commuted the dishonorable discharge to a bad-conduct discharge.

On direct appeal, a Navy-Marine Corps Court of Criminal Appeals panel set aside and dismissed Appellant's findings and sentence, holding that Articles 2(a)(4) and 2(a)(6), UCMJ, violated the Due Process Clause of the Fifth

Amendment. *United States v. Begani*, 79 M.J. 620, 631 (N-M. Ct. Crim. App. 2019).

On September 4, 2019, the United States requested reconsideration, which the lower court granted on October 1, 2019, withdrawing the earlier panel decision. Sitting *en banc*, the lower court affirmed on January 24, 2020. *United States v. Begani*, 79 M.J. 767, 783 (N-M. Ct. Crim. App. 2020).

Appellant timely petitioned this Court for review on April 24, 2020, and this Court granted review on June 25, 2020. The Judge Advocate General of the Navy timely filed a certificate for review on July 23, 2020, and on the same day, this Court consolidated the granted and certified issues. Appellant filed his Brief and the Joint Appendix on August 31, 2020. Appellee filed its Answer on November 4, 2020. Appellant filed his Reply on November 16, 2020.

On November 23, 2020, Appellant moved this Court to reconsider, out-of-time, its partial denial of the petition for grant of review. On December 8, 2020, this Court granted Appellant's Motion and ordered briefing on the Additional Issue. On December 30, 2020, Appellant filed his Brief on the Additional Issue.

Statement of Facts

Appellant/Cross-Appellee adopts the Statement of Facts from its Answer, dated November 4, 2020, and provides further facts below.

Appellant enlisted in the United States Navy on November 11, 1992. (DD Form 214, June 30, 2017; J.A. 340.) He served uninterrupted for twenty-four years, seven months, and twenty-two days on active duty in the Navy. (*Id.*) When his active duty service ended on June 30, 2017, he did not choose to be discharged from the armed forces. (*Id.*) Instead, Appellant requested to be "transferred to the Fleet Reserve" and his "effective date of transfer to Fleet Reserve status" was June 30, 2017. (*Id.*) Upon transfer to the Fleet Reserve, Appellant was also transferred from his old command ("VRC 30 Detachment 5 Atsugi, Japan") to a new command ("Commander, Navy Personnel (PERS-912), Millington, Tennessee"). (*Id.*) Appellant was given notice that as a Fleet Reservist he would be "subject to active duty recall by [the] Secretary of the Navy." (*Id.*)

After his transfer to the Fleet Reserve, Appellant was hired by "KBRWyle," (J.A. 334), "a contracting company that deals a lot with the military," (J.A. 331). While still a Fleet Reservist, Appellant attempted to sexually assault and sexually abuse a child in Iwakuni, Japan. (Charge Sheet, Sept. 22, 2017; J.A. 297–99, 334–35.) First, Appellant held sexually explicit conversations with "Mandy," a person Appellant believed was the child of a United States Marine. (J.A. 334–35.) Later,

Appellant drove to what he believed was the child's home on Marine Corps Air Station (MCAS) Iwakuni, intending to sexually assault the child. (J.A. 335.)

Appellant remained a Fleet Reservist at the time of his court-martial. (Stipulation of Fact; J.A. 334.)

Argument

CONGRESS CREATED THE NAVY'S FLEET RESERVE AS PART OF THE "LAND AND NAVAL FORCES" AND APPELLANT CONCEDES HE IS A MEMBER OF THE FLEET RESERVE. THE SUPREME COURT HAS MADE CLEAR SUCH STATUS ALONE IS SUFFICIENT FOR CONGRESS TO SUBJECT APPELLANT TO COURT-MARTIAL JURISDICTION UNDER ARTICLE 2(a)(6).

A. The standard of review is de novo.

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

B. Under Article I, Section 8, Clauses 12–13, Congress has the power to raise and support the land and naval forces. This includes the authority to create rules for entry, advancement, and discharge from the land and naval forces.

1. The Constitution empowers Congress to create the land and naval forces—to include the Navy. In 10 U.S.C. § 8330(a), Congress created the Fleet Reserve as part of the Navy.

Under Article 1, Section 8, Clauses 12–13, Congress has the constitutional authority to "raise and support Armies" and "to provide and maintain a Navy." U.S. Const. art. I, § 8, cls. 12–13; *see also Perpich v. Dep't of Def.*, 496 U.S. 334,

353 n.27 (1990) (Congress's power to raise and support armies is "'plenary and exclusive'" (quoting *Tarble*'s *Case*, 80 U.S. (13 Wall.) 397, 408 (1871))); *Antonuk v. United States*, 445 F.2d 592, 594 (6th Cir. 1971) ("[T]he governmental interest in raising an army has, without exception, been considered by the courts to be paramount." (citation omitted)).

"The term 'land and naval Forces' refers to persons who are members of the armed services . . . ." *Reid v. Covert*, 354 U.S. 1, 19–20 (1957). The term "armed forces" includes the United States Navy. 10 U.S.C. § 101(a)(4). Among the components of the Navy is the Fleet Reserve. 10 U.S.C. § 8330(a) ("The Fleet Reserve . . . [is] composed of members of the naval service."); *see also United States ex rel. Pasela v. Fenno*, 167 F.2d 593, 595 (2d Cir. 1948) ("The Fleet Reserve is so constituted that it falls reasonably and readily within the phrase 'naval forces' in the Fifth Amendment."). Members of the Fleet Reserve are therefore members of the "land and naval Forces."

That decision is consistent with the Supreme Court's acknowledgement that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions," "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 (1881)); *see also, e.g.*, *McCarty v. McCarty*, 453 U.S. 210, 221–22

(1981) ("The retired officer remains a member of the Army and continues to be subject to the Uniform Code of Military Justice." (citation and footnote omitted)).[1]

2. The Constitution empowers Congress to define how a person may join or be conscripted into the land and naval forces. Congress has exercised that authority through 10 U.S.C. §§ 8330–31, providing rules for entering and exiting the Navy's Fleet Reserve.

Under Article 1, Section 8, Clause 13, Congress may "provide and maintain a Navy." U.S. Const. art. I, § 8, cl. 12–13; *see also Perpich*, 496 U.S at 353 n.27 (this includes the power to "determine . . . how the armies shall be raised, whether by voluntary enlistment or forced draft," age requirements, length of service requirements, and compensation (citation and internal quotation marks omitted)); *see also Antonuk*, 445 F.2d at 595.

Congress prescribes that "[a]n enlisted member of the Regular Navy . . . who has completed 20 or more years of active service in the armed forces may at his request be transferred to the Fleet Reserve." 10 U.S.C. § 8330(b). After

[1] Colonel Winthrop, who the Supreme Court has repeatedly denominated "the 'Blackstone of Military Law,'" *Ortiz v. United States*, 138 S. Ct. 2165, 2175 (2018) (citation omitted), likewise explained more than 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 enlisted Army and Marine retired list, to which transfer authorized after thirty years of service).

completing "30 years of service . . . a member of the Fleet Reserve . . . shall be transferred . . . to the retired list of the Regular Navy." 10 U.S.C. § 8331(a)(1).

C. Under its Article I, Section 8, Clause 14 authority to "make Rules," Congress created the Uniform Code to regulate the land and naval forces.

1. Congress asserts court-martial jurisdiction over the land and naval forces through the Uniform Code of Military Justice.

"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); *see also, e.g.*, *Covert*, 354 U.S. at 20 (same). "Exercising this authority, Congress has empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J." *Solorio*, 483 U.S. at 438; *see also Perpich*, 496 U.S. at 353 n.27 (Congress's power in this area is "plenary and exclusive" (citation and internal quotation marks omitted)).

The Supreme Court "interpret[s] the Constitution" as defining the scope of Congress's authority to subject an individual to military court-martial "on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439. The constitutional test for military jurisdiction 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.'" *Id.*; *accord Covert*, 354 U.S. at 42; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955)

(court-martial jurisdiction permitted over "persons who are actually members or part of the armed forces" (citing *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857))).

2. Article 2 of the Code asserts jurisdiction over the land and naval forces under Article I, Section 8, Clause 14.

a. Under its Make Rules authority, Congress may subject all servicemembers to court-martial jurisdiction.

The Constitution empowers Congress to subject all servicemembers to court-martial jurisdiction. Article I, § 8, cl. 14; *see also Solorio*, 483 U.S. at 441 ("On its face there is no indication that the grant of power in Clause 14 was any less plenary than the grants of other authority to Congress in the same section.").

Provisions of the Code, a "carefully designed military justice system established by Congress," are accorded deference. *Schlesinger v. Councilman*, 420 U.S. 738, 753 (1975). In Article 2, Congress lists the categories of members of the land and naval forces it subjects to court-martial jurisdiction. 10 U.S.C. §§ 802(a)(1)–(13). Article 2(a)(6) asserts court-martial jurisdiction over members of the Fleet Reserve. *See* 10 U.S.C. 802(a)(6).

"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." *Solorio*, 483 U.S. at 450–51. "Implicit in the military status test" is the principle that the Constitution has "reserved for

Congress" the determination whether to subject servicemembers to court-martial for offenses. *Id.* at 440.

The Supreme Court has made clear that "'judicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged.'" *Id.* at 447 (quoting *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986)).

b. Most civilians are not members of the land and naval forces and therefore are not constitutionally subject to court-martial jurisdiction. This includes former servicemembers who have "severed all relationship with the military and its institutions."

While precedent interpreting the Make Rules Clause unambiguously supports the military status rule, *Solorio*, 483 U.S. at 439–40, court-martial jurisdiction over civilians is more limited, *see, e.g.*, *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 281 (1960) (no jurisdiction over civilian); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 234 (1960) (same); *Grisham v. Hagan*, 361 U.S. 278, 278 (1960) (same); *Covert*, 354 U.S. at 1 (same); *Toth*, 350 U.S. at 11 (same). *But see, e.g.*, *Ex parte Reed*, 100 U.S. 13, 21–22 (1879) (jurisdiction over civilian).

These cases demonstrate the Supreme Court's caution when assessing the constitutionality of statutes extending military jurisdiction beyond servicemembers

to civilians, as jurisdiction in this respect may act "as a deprivation of the right to jury trial and of other treasured constitutional protections." *Covert*, 354 U.S. at 21. *But see* U.S. Const. amend. V (no right to grand jury "in cases arising in the land and naval forces); *Ex parte Quirin*, 317 U.S. 1, 40 (1942) ("Cases arising in the land or naval forces . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.").

In *Toth*, the Supreme Court limited jurisdiction over non-servicemembers to "'the least possible power adequate to the end proposed.'" *Toth*, 350 U.S. at 23 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230–31 (1821)); *see also Guagliardo*, 361 U.S. at 286 (labeling this limitation on "the coverage of Clause 14" the "*Toth* doctrine").

The *Toth* appellant "had no relationship of any kind with the military"—at the time of his arrest, he was an honorably discharged, "civilian ex-soldier . . . wholly separated from the service," back "home in Pittsburgh . . . work[ing] in a steel plant." *Toth*, 350 U.S. at 13, 22. The appellant "severed all relationship with the military and its institutions." *Id.* at 14. The Supreme Court therefore noted that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial present[ed] another instance calling for limitation to '*the least possible power adequate to the end proposed*.'" *Id.* at 23.

The Court held that Congress could not "subject civilians like Toth to trial by court-martial." *Id.* at 23; *see also* 1 Winthrop, Military Law and Precedents (2d ed. 1896), 146 ("[S]tatutes, which in terms or inferentially subject persons formerly in the army, but become finally and legally separated from it, to trial by court-martial, are all necessarily and alike unconstitutional . . . .'"). *But see, e.g.*, *United States v. Cole*, 24 M.J. 18, 22 (C.M.A. 1987) (noting military prisoners subject to court-martial jurisdiction, even if already discharged due to court-martial sentence); *Kahn v. Anderson*, 255 U.S. 1, 7–8 (1921) (same); *Carter v. McClaughry*, 183 U.S. 365, 383 (1902) (same).

Equally clear in *Toth* was its inapplicability to members of the armed forces—that is, those not "wholly," "finally and legally separated" from the land and naval forces. *See Toth*, 350 U.S. at 14 ("This Court has held that [Article I, Section 8, Clause 14] authorizes Congress to subject persons actually in the armed service to trial by court-martial . . . ."); *accord United States v. Dinger*, 76 M.J. 552, 555 n.13 (N-M. Ct. Crim. App. 2017); *Kinsella*, 361 U.S. at 240.

The Supreme Court thus prohibited extension of court-martial jurisdiction over civilian dependents of servicemembers, *see Kinsella*, 361 U.S. at 234; *Covert*, 354 U.S. at 1, and certain civilian contractors accompanying the military abroad, *see, e.g.*, *Guagliardo*, 361 U.S. at 283–84, 286; *Hagan*, 361 U.S. at 278. *Guagliardo*, in particular, highlights the dispositive effect of military status:

despite rejecting jurisdiction over that appellant, the *Guagliardo* Court noted that "[o]ne solution" to properly assert jurisdiction in the future would be to "incorporate those civilian employees . . . directly into the armed services, either by compulsory induction or by voluntary enlistment." 361 U.S. at 286.

The concerns raised in cases involving civilians are inapplicable where, as here, an appellant's status as a member of the armed forces is undisputed.

c. Under the Necessary and Proper Clause, Congress may subject some civilians to court-martial jurisdiction.

Congress may exercise court-martial jurisdiction over certain civilians. *See* 10 U.S.C. §§ 802(a)(7)–(13). The Supreme Court has "recognize[d] that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform." *Covert*, 354 U.S. at 22–23.

For example, in 1879, the Supreme Court held that a paymaster's clerk was subject to court-martial jurisdiction, reasoning that the "good order and efficiency of the service depend largely upon the faithful performance of their duties." *Ex parte Reed*, 100 U.S. at 21–22; *see also Guagliardo*, 361 U.S. at 285 (discussing *Ex parte Reed* and noting that "there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military"). Again in 1921, the Court held that

discharged military prisoners were subject to court-martial jurisdiction for crimes committed in prison. *Kahn*, 255 U.S. at 7–8.

In such cases, courts ask if it was "necessary" for Congress to subject civilians to court-martial jurisdiction because Congress's authority to do so stems primarily from the Necessary and Proper Clause. *See, e.g.*, *Toth*, 350 U.S. at 21–22; *Guagliardo*, 361 U.S. at 286 (court-martial jurisdiction over "civilians serving with the armed forces" must be limited to "the least possible power adequate to the end proposed").

As discussed, *supra*, the cases where the Supreme Court held court-martial jurisdiction unconstitutional turn on differences between members of the land and naval forces and civilians—not differences between members of different components of the armed forces. *See, e.g.*, *Guagliardo*, 361 U.S. at 281; *Kinsella*, 361 U.S. at 234; *Hagan*, 361 U.S. at 278; *Covert*, 354 U.S. at 1. While the Court defers to Congress's ability to subject servicemembers to trial by court-martial, it shows great concern subjecting civilians to trial by court-martial "where they would be denied jury trials and other constitutional protections." *Covert*, 354 U.S. at 30. This is consistent with the military status test and with Supreme Court cases where court-martial jurisdiction was unconstitutional. *See supra* Section C.2.b.

Still, under certain circumstances, court-martial jurisdiction over civilians is constitutional. *See Covert*, 354 U.S. at 22–23.

D. Appellant's status as a member of the Navy's Fleet Reserve is sufficient for Congress to subject him to military jurisdiction.

1. Appellant voluntarily transferred to the Navy's Fleet Reserve and remained a Fleet Reservist at the time of his offenses and at court-martial. His status is constitutionally determinative.

After joining the Navy, Appellant voluntarily remained on active duty for over twenty-four years before electing to transfer to the Fleet Reserve. (DD Form 214, June 30, 2017; J.A. 340.) As a Fleet Reservist, Appellant is designated a member of the "land and naval Forces," 10 U.S.C. §§ 101, 8330, and falls squarely in the ambit of Congress's authority under the Make Rules Clause, *see generally* U.S. Const. art. I, § 8, cl. 14.

Appellant's status as a servicemember differentiates his case from those where the Supreme Court invalidated jurisdiction under the Code. *Compare Kinsella*, 361 U.S. at 234 (civilian dependent), *Covert*, 354 U.S. at 1 (same), *and Toth*, 350 U.S. at 21 ("wholly separated," "ex-serviceman"), *with* (J.A. 340 (Appellant's DD-214 indicating transfer to Fleet Reserve, not final discharge)).

"Even if it were possible, we need not attempt here to precisely define the boundary between 'civilians' and members of the 'land and naval Forces,'" *Covert*, 354 U.S. at 22–23, because Appellant is indisputably the latter, (*see* J.A. 297–99, 334–35 (a Fleet Reservist at time of his crimes); J.A. 334 (a Fleet Reservist at the time of his court-martial)).

That status is dispositive of the constitutionality of Congress's decision to

subject Appellant to military jurisdiction under Article 2(a)(6), and when reviewing that decision, "judicial deference . . . is at its apogee." *See Solorio*, 483 U.S. at 440–51 (citation and internal quotation marks omitted).

2. Consistent historical practice confirms that Congress may exercise court-martial jurisdiction over the Fleet Reserve.

Congress has subjected Fleet Reservists to court-martial jurisdiction since at least 1925. *See* Act of Feb. 28, 1925, ch. 374, 43 Stat. 1080, 1083. When the Code first took effect in 1951, the jurisdiction provided in Article 2(6) was "an unqualified incorporation of existing law." *See* J. Mackey Ives, et al., *Court-Martial Jurisdiction Over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 Mil. L. Rev. 1, 13 n.57 (2003) (citation and internal quotation marks omitted).

This is consistent with Congress's traditional approach to Retirees: since at least 1861, when Congress first authorized a "retired list" of Army and Marine Corps officers, it has subjected them to court-martial jurisdiction. *See* Act of Aug. 3, 1861, ch. 42, 12 Stat. 287, 289–90. They have been part of the military, by statute, since at least 1878. *See* Ives, et al., *supra*, at 4 nn.7–10 (accumulating sources). And since at least 1861, when Congress first authorized a "retired list" of Army and Marine Corps officers, it has subjected them to court-martial jurisdiction. *See* Act of Aug. 3, 1861, ch. 42, 12 Stat. 287, 289–90. They have been part of the military, by statute, since at least 1878. *See* Ives, et al., *supra*, at 4

nn.7–10 (accumulating sources).

The Executive Branch, too, has long recognized that Fleet Reservists and Retirees are amenable to court-martial jurisdiction. *Id.* at 11, 16–33 (summarizing courts-martial of Fleet Reservists and Retirees from 1872 to 1998). Considered opinions of the Judge Advocate General in 1896, 1912, and 1942 were supportive. *See id.* at 12–13, 25 & nn.49, 53–54, 142 (citing opinions). The Manual for Courts-Martial also provided for jurisdiction over Retirees since at least 1895. *Id.* at 13 & n.55. While the Navy did not try most retired enlisted servicemembers by court-martial until the Code was enacted in 1951, it did subject Fleet Reserve members to court-martial jurisdiction before then. *Id.* at 13 & n.57, 25; *see also Fenno*, 167 F.2d at 593.

Thus it has long been clear that Congress is entrusted with the power to determine which members of the armed services—including "which categories of [non-active duty] members of the Armed Forces"—may be tried by court-martial. *See, e.g.*, *Taussig v. McNamara*, 219 F. Supp. 757, 762 (D.D.C. 1963).

3. The constitutionality of Congress's assertion of Article 2 jurisdiction over the land and naval forces is not governed by the "overriding demands of discipline and duty."

In *Solorio*, the Supreme Court cited "overriding demands" as a consideration against which Congress balances the rights of members of the land and naval

forces when determining the scope of offenses defined under the Code. The relevant section, in context, is:

> Implicit in the military status test was the principle that determinations concerning the scope of court-martial jurisdiction over offenses committed by servicemen was a matter reserved for Congress:
>
> The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

Solorio, 483 U.S. at 440 (quotations marks and citation omitted).

This passage concerns the deference Congress receives when determining the scope of subject-matter jurisdiction—that is, "jurisdiction over offenses," *id.*—and in no way obligates courts to "explain[] how the 'demands of discipline and duty' . . . are advanced by subjecting military retirees to trial by court-martial," (*Contra* Appellant's Supp. Br. at 19).

But Appellant arrives at the opposite conclusion by taking the "overriding demands" quote out of context, mistakenly urging this Court to cast the phrase into a constitutional proscription of Congress's Make Rules authority. (*See* Appellant's Supp. Br. at 17–18 (quoting *Solorio*, 483 U.S. 440).)

The district court judge in *Larrabee v. Braithwaite*, No. 19-654 (RJL), 2020 U.S. Dist. LEXIS 219457, at *11 (D.D.C. Nov. 20, 2020), makes the same error.

See Larrabee, 2020 U.S. Dist. LEXIS 219457, at *11 (grafting "overriding demands of discipline" requirement onto *Solorio*'s military status test).

But Appellant's military status is dispositive. *See supra* Sections C.2.a, D.1. *See generally Solorio*, 483 U.S. at 440, 450–51.

4. *Solorio*'s military status test is not limited to active duty servicemembers. Congress explicitly designates Fleet Reservists as members of the land and naval forces.

The Constitution does not limit court-martial jurisdiction to active duty members. *See* U.S. Const. art. I, § 8, cl. 14 (no limit on plenary authority beyond "the land and naval Forces"); *Covert*, 354 U.S. at 19–20 ("'[L]and and naval Forces' refers to persons who are members of the armed services . . . ."); *see also Solorio*, 483 U.S. at 439 (jurisdiction premised "on one factor: the military status of the accused"). Nor is there any statutory basis to claim that "members of the armed services" include only those on active duty. *Compare* 10 U.S.C. § 101(a)(4) ("armed forces" includes the Navy), *with* 10 U.S.C. § 8330 (the Navy includes the Fleet Reserve, which is composed of members of the regular component).

In several cases before and after *Toth*, the Supreme Court acknowledged that non-active duty servicemembers may be part of the land and naval forces. *Compare Tyler*, 105 U.S. at 245 (pre-*Toth*, noting Retirees are "a part of the army"), *and Kahn*, 255 U.S. at 6–7 (pre-*Toth*, noting "it is not open to question . . . that [retired] officers are officers in the military service of the United States"), *with*

Barker, 503 U.S. at 599–600 n.4 (post-*Toth*, noting undischarged Retirees "unquestionably remain in the service" and are subject to court-martial), *and* *McCarty*, 453 U.S. at 221–22 (post-*Toth*, noting "[t]he retired officer . . . continues to be subject to the Uniform Code of Military Justice").[2] The Supreme Court has acknowledged that Congress could define "a person [as] 'in' the armed services" and subject to court-martial jurisdiction "even [if] he . . . did not wear a uniform." *Covert*, 354 U.S. at 22–23.

Yet still, Appellant mistakenly asks this Court to restrict Congress's ability to define the "land and naval forces" to active duty servicemembers. (*See* Appellant's Supp. Br. at 26–27 (suggesting that because Fleet Reservists are not on active duty, they "should therefore be treated as *former members*, entitled to pay for past service but not 'members' of the 'land and naval Forces' subject to constant jurisdiction" (emphasis in the original)).)

Appellant's reference to the Code of Federal Regulations is inapposite: he relies on language related to Retired Reservists, not Fleet Reservists. *Compare* 32 C.F.R. § 161.12 (2018) ("former members" are those eligible to receive pay at age sixty for non-regular service), *with* 10 U.S.C. § 8332 (Fleet Reservists need not

[2] Notably none of these cases limited Congress's "plenary and exclusive" constitutional power to define, govern, and regulate the land and naval forces in the first instance. *Perpich*, 496 U.S. at 353 n.27 (citation and internal quotation marks omitted).

wait until age sixty to receive pay), *and* 10 U.S.C. § 8330(b) (Fleet Reservists have completed twenty or more years of regular service). (*See generally* Appellant's Supp. Br. at 26–27.)

To the extent Appellant believes the Fifth Amendment's reference to "actual service" is meant to limit the scope of the Exception Clause, the Supreme Court has held that "in actual service" modifies only "the militia." *Compare* (Appellant's Supp. Br. at 15–16), *with Ex parte Mason*, 105 U.S. 696, 701 (1881) ("The limitation as to 'actual service in time of war or public danger' relates only to the militia.").

5. No authority supports redefining "wholly separated" to mean only separated "in all meaningful ways."

Appellant inappropriately invites this Court to abandon *Toth*'s rule that complete separation from the military is required to sever jurisdiction, urging an unprecedented rule that extinguishes jurisdiction when servicemembers shift from one component of the armed forces to another. *Compare Toth*, 350 U.S. at 21 (jurisdiction unconstitutional over "civilian ex-soldier who has been wholly separated from the service"), *with* (Appellant's Supp. Br. at 27 ("[L]ike . . . the defendant in *Toth*, prior active-duty retirees like [Appellant] are 'ex-soldier[s] . . . wholly separated' in all meaningful ways 'from the service.'" (quoting *Toth*, 350 U.S. at 21)). But no court has abandoned *Toth*'s rule, and this Court should decline Appellant's invitation.

A servicemember "connected with [the military or naval service] is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts." *Ex parte Milligan*, 71 U.S. 2, 123 (1866). This "longstanding," "consistent," and "undisputed" historical practice supports this exception to Article III. *See Bahlul v. United States*, 840 F.3d 757, 764–68 (D.C. Cir. 2016) (Kavanaugh, J., concurring).

Appellant's belief otherwise is incorrect. *See generally Solorio*, 483 U.S. at 450–51 (Constitution not violated where accused is a member of armed forces at time of court-martial and at time of charged offense).

6. Because Fleet Reservists are in the land and naval forces, crimes they commit while in that status are subject to the Fifth Amendment's Exception Clause. The Sixth Amendment right to jury trial is inapplicable.

While it is true that courts apply the *Toth* doctrine when military jurisdiction deprives a person "of the right to a jury trial and of other treasured constitutional protections," *Covert*, 354 U.S. at 21; *Toth*, 350 U.S. at 23, that concern is inapplicable to Fleet Reservists, *see* U.S. Const. amend. V (no right to grand jury "in cases arising in the land and naval forces"); *Ex parte Quirin*, 317 U.S. at 40 ("Cases arising in the land or naval forces . . . are expressly excepted from the Fifth Amendment, and are deemed excepted by implication from the Sixth.").

Appellant, like the district court judge in *Larrabee*, incorrectly reasons that persons subject to Article 2(a)(6) are not covered by the Fifth and Sixth Amendment exception because Fleet Reservists are not "in actual service." *Larrabee*, 2020 U.S. Dist. LEXIS 219457, at *19; (Appellant's Supp. Br. at 15–16).

But, as discussed earlier, the Supreme Court holds that "[t]he limitation as to 'actual service in time of war or public danger' relates only to the militia." *Ex parte Mason*, 105 U.S. at 701; *see also supra* Section D.4. Congress's assertion of jurisdiction over persons listed in Article 2(a)(6) is not an expansion of court-martial jurisdiction and is not subject to analysis under the *Toth* doctrine. *Contra Larrabee*, 2020 U.S. Dist. LEXIS 219457, at *11. As a corollary, Congress retains discretion under the Make Rules clause to place statutory limits on military jurisdiction over members of the land and naval forces. *See, e.g.*, Art. 2(a)(4), UCMJ (retired members of regular components only subject to jurisdiction if "entitled to pay"); Art. 2(a)(5), UCMJ (retired members of reserve components excused from military jurisdiction unless hospitalized).

7. Retainer pay and amenability to recall do not determine whether Appellant, indisputably a Fleet Reservist, is a statutorily defined member of the land and naval forces subject to military jurisdiction under Article 2(a)(6).

Precedent interpreting the Make Rules Clause unambiguously supports the military status rule. *See Solorio*, 483 U.S. at 439–40. Military compensation is

neither a prerequisite to, nor a basis for, court-martial jurisdiction.[3] *Compare Kahn*, 255 U.S. at 7–8 (military prisoners, though discharged and receiving no pay, still subject to court-martial jurisdiction), *with Guagliardo*, 361 U.S. at 286–87 (civilian employees of the armed forces not subject to court-martial jurisdiction).

Similarly, a servicemember's amenability to recall does not determine whether Congress may constitutionally subject a Fleet Reservist to military jurisdiction.[4] *See Solorio*, 483 U.S. at 439–40. How a particular administration exercises its executive discretion to involuntarily recall servicemembers to active duty does not serve as a limit on Congress's constitutional power to assert jurisdiction under its Make Rules authority. *See Solorio*, 483 U.S. at 441 (Congress has significant power to regulate the armed forces); *Schlesinger*, 420 U.S. at 753 (these decisions afforded deference).

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[3] Under Article 2(a)(4), "entitle[ment] to pay" is a prerequisite for jurisdiction of "[r]etired members of a regular component of the armed forces." *See, e.g.*, *Pearson v. Bloss*, 28 M.J. 376, 378 (C.M.A. 1989). The same is not true under Article 2(a)(6), which categorically asserts jurisdiction over "Members of the Fleet Reserve and Fleet Marine Corps Reserve."

[4] Even still, recent history contradicts Appellant's personal belief that the possibility of recall for non-active duty servicemembers is "anachronistic." *Compare* (Appellant's Supp. Br. at 30), *with Dinger*, 76 M.J. at 557, *aff'd on other grounds*, 77 M.J. 447 (C.A.A.F. 2018) ("[I]n both of our wars with Iraq, retired personnel of all services were actually recalled . . . ." (alteration in the original)), *and* Proclamation No. 13814, 82 Fed. Reg. 49273, 49273 (Oct. 20, 2017) (2017 Executive Order invoking "[t]he authorities available for use during a national emergency" to authorize recall to active duty, *inter alia*, members of the Fleet Reserve).

Appellant provides no authority to limit Congress's power "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. art. I, § 8, cl. 14, based on either how courts characterize retainer pay or on the probability that some contingency will require recall of Fleet Reservists to active duty in response to national emergency or war. While both Fleet Reservists' pay and amenability to recall are relevant to the equal protection issue also granted in this case, (*See* Appellee/Cross-Appellant's Ans. at 19–26 (service, pay, and recallability demonstrate why Fleet Reservists and Retired Reservists are not similarly situated)), they are irrelevant to the issue presented here.

E. Binding precedent holds that Retirees may be tried by court-martial.

1. The Court of Military Appeals held that court-martial jurisdiction under Article 2(a)(6) is constitutional.

In *Overton*, the Court of Military Appeals found that "Congress, in its wisdom," subjected members of the Fleet Marine Corps Reserve to military jurisdiction. *United States v. Overton*, 24 M.J. 309, 311 (C.M.A. 1987). The Court noted that court-martial jurisdiction over Retirees "has been continually recognized as constitutional." *Id.* (citing *McCarty*, 453 U.S. at 221–22; *Tyler*, 105 U.S. at 246; *United States v. Bowie*, 14 C.M.A. 631, 632 (C.M.A. 1964); *United States v. Hooper*, 9 C.M.A. 637, 645 (C.M.A. 1958)). And the Court noted it was "uncontroverted that appellant was a member of the Fleet Marine Corps Reserve." *Overton*, 24 M.J. at 311.

The Court also noted that as a member of the Fleet Marine Corps Reserve, the *Overton* appellant had statutory obligations and benefits: he was subject to recall and was due "retainer pay." *Id.* Nothing in *Overton* suggests that the obligations and benefits were prerequisites to the *Overton* appellant's susceptibility to military jurisdiction. *Overton*'s holding is singular: "Congress, in its wisdom, has decided that court-martial jurisdiction may be exercised over *members of the Fleet Marine Corps Reserve*." *Id.*

Appellant nonetheless argues *Overton* was poorly reasoned because it "rel[ied] largely on *Hooper*'s own (flawed) analysis." (Appellant's Supp. Br. at 14, 38.) But nothing in *Overton* indicates it relied on *Hooper* any more than it relied on the other cited cases, including *McCarty*, *Tyler*, and *Toth*. *See Overton*, 24 M.J. at 311 (citing *McCarty*, 453 U.S. at 221–22; *Tyler*, 105 U.S. at 246; *Toth*, 350 U.S. at 11).

Moreover, Appellant's reading of *Hooper* is inaccurate. *Hooper*'s survey of cases culminated in the conclusion that, consistent with *Solorio*, "[o]fficers on the retired list . . . [are] part of the land or naval forces." *Hooper*, 9 C.M.A. at 640–45. And while *Hooper*'s recitation of a retired officer's benefits and obligations evidenced the appellant's membership in a component, such evidence is unnecessary here: Appellant's military status is undisputed. (Appellant's Supp. Br. at 2.)

Appellant, however, cites *Hooper* to suggest that "military jurisdiction cannot be justified solely because the defendant receives some form of compensation from the military." (Appellant's Supp. Br. at 9.) But neither *Hooper* nor *Overton* make this claim, *see Overton*, 24 M.J. at 311–12; *Hooper*, 9 C.M.A. at 645, and this is not the position of the United States, *see infra* Section D.4.a (retainer pay may evidence status where status is disputed, but it is not a basis for jurisdiction).

This Court should reject Appellant's invitation to overturn *Overton*.

2. The Supreme Court held that Retirees are subject to trial by court-martial.

In cases like *United States v. Fletcher*, 148 U.S. 84, 91–92 (1893), and *Tyler*, 105 U.S. at 245, the Supreme Court affirmed court-martial jurisdiction over Retirees without analyzing "service connectedness."

Shortly after World War II, the Court held that fully discharged servicemembers—unlike members of a retired component of the land and naval forces—may not be tried by court-martial because they are no longer "actually in the armed service." *Toth*, 350 U.S. at 14 (citing *Dynes v. Hoover*, 61 U.S. 65 (1857)). After *Toth*, the Court reaffirmed that Retirees are different: "The retired officer remains a member of the Army and continues to be subject to the Uniform Code of Military Justice." *McCarty*, 453 U.S. at 221–22. Retirees

"unquestionably remain in the service" and are subject to punishment by "military court-martial." *Barker*, 503 U.S. at 599, 600 n.4 (quoting *Tyler*, 105 U.S. at 246).

These statements in *McCarty* and *Barker* were not part of the Court's holdings. Both cases struck down state efforts to interfere with military retired pay, and the results did not depend on whether Retirees were subject to court-martial. *See also Tyler*, 105 U.S. at 246 (recognizing that Retirees are statutorily subject to trial by military court-martial). But the Court's "considered dicta" that Retirees may be tried by court-martial should be "regarded as forceful, even though it is not binding." *Ctr. for Biological Diversity v. United States DOI*, 563 F.3d 466, 481 (D.C. Cir. 2009) (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).

In *Barker*—a retirement-benefits taxation case, which did not turn on military status—the Court left untouched prior statements that Retirees are in the armed forces and subject to court-martial, even as it reversed a state court decision that relied on those statements. 503 U.S. at 599.

And in *Tyler*, the prospect of trial by court-martial and dishonorable discharge were extrinsic evidence, in addition to statutorily defined membership in the land and naval forces, that a military retiree had performed "military service" for retirement benefits purposes. 105 U.S. at 244.

F. Appellant's proposed standard is no more compelling now than it was in 1987, when *Solorio* embraced the Constitution's plain text and rejected a service-connection standard.

The Supreme Court holds 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." *Solorio*, 483 U.S. at 450–51. This holds true even if the offense charged was committed on the serviceman's own time in the "civilian community" and thus lacks any type of "'service connection.'" *Id*. at 436–37.

In *United States v. Hennis*, 79 M.J. 370 (C.A.A.F. 2020), this court addressed an appellant's assertion that his case merited an exception to *Solorio*'s rejection of the *O'Callahan v. Parker*, 395 U.S. 258 (1969), "service-connection" test. *Id.* at 379–79. Relying on a concurring opinion in *Loving v. United States*, 517 U.S. 748, 774 (1996), the appellant argued that *Solorio* left open whether there was a "service connection" requirement in capital cases. *Hennis*, 79 M.J. at 379. This Court rejected that argument and concluded that "the Fifth Amendment's exclusion of 'cases arising in the land or naval Forces' from its ambit makes no distinction between the treatment of capital cases and that of infamous crimes." *Id*.

As in *Hennis*, this case presents no legitimate basis to carve out a service-connection exception to *Solorio*. (*Contra* Appellant's Supp. Br. at 36 (urging a

service-connection requirement for "classes of individuals who are outside any active chain of command").) Nothing in the Constitution, its history, or this Court's precedent imposes a "service connection" limitation upon Congress's plenary authority to govern members of the land and naval forces. *Cf. Solorio*, 483 U.S. at 447 (emphasizing "the dearth of historical support for the *O'Callahan* holding" and concluding "the plain language of the Constitution . . . should be controlling on the subject of court-martial jurisdiction"); *Hennis*, 79 M.J. at 379 (noting *Solorio* "did not qualify its conclusion that 'military jurisdiction has always been based on the status of the accused'"). Furthermore, Appellant offers no way to avoid the "confusion [previously] wrought" by the service-connection requirement. *Cf. Solorio*, 483 U.S. at 450.

Even if this Court revives *O'Callahan*'s service-connection requirement and applies it to Congress's plenary authority to regulate components of the armed forces, Appellant still loses: both the United States and Appellant agree he engaged in sexually explicit conversations with someone he believed was the child of a United States Marine and drove onto a military base to sexually assault that child at home. (J.A. 334–35.) As in *Solorio* and *Hennis*, this court should "have no doubt" that Appellant's crimes are "service related." *Hennis*, 79 M.J. at 379 (noting decision to "slaughter[] the wife and two children of a military member"

was service connected); *Solorio*, 21 M.J. at 255–56 (noting "off-base sexual abuse of the dependents of Coast Guardsmen [were service] connected").

Like Appellant's primary argument, which casts uncertainty onto whether someone is a "servicemember," Appellant's alternative argument muddies otherwise well-settled law. This Court should decline to accept either.

Conclusion

The United States respectfully requests that this Court affirm.

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