[ORAL ARGUMENT NOT SCHEDULED]

No. 21-5012

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STEVEN M. LARRABEE,

Plaintiff-Appellee,

v.

THOMAS W. HARKER, in his official capacity as Acting Secretary of the Navy; UNITED STATES,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF AMICI IN SUPPORT OF APPELLEE AND FOR AFFIRMANCE OF DECISION BELOW

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IDENTITY OF AMICUS AND CONSENT OF THE PARTIES

Amici, Joe Wesley Moore, and Joshua Kastenberg are retired military officers who are employed as full-time professors of law American Bar Association accredited law schools. Both Amici are graduates of American law schools and earned Juris Doctor as well as LLM degrees. They have over forty-five active-duty years of military service combined. Professor Moore teaches at the University of North Texas Dallas College of Law; and, Professor Kastenberg teaches at the University of New Mexico School of Law. Both have published scholarship in the field of military law.

Both the United States-Appellant and Steven M. Larrabbee-Appellee have consented to Amici filing without having to motion this Court for leave to do so.

The Length of Amici's brief does not exceed twenty-five (25) pages and in terms of word count, it is less than half of Appellee's brief.

STATEMENT OF AMICUS INTEREST

Amici's interest is in having this Court resolve through a Constitutional analysis, including the Framer's fears of a standing army, that the government's assertion of jurisdiction over retired service members does not withstand scrutiny. In doing so,

this Court will restore the full array of the Bill of Rights to those citizens who have served the nation in uniform the longest. None of the Amici have been paid for this brief by any party, though Amici are in receipt of retirement pay based on their military service and should the United States prevail, they, along with hundreds of thousands of veterans would remain amenable to the jurisdiction of the Uniform Code of Military Justice.

* * *

Introduction

"Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines." *Porter v. McCollum*, 558 U.S. 30, 42 (2009). While Amici do not contend an alleged rapist is deserving of leniency, we argue that no rational basis supports the premise that retirees should stand alone among veterans in forfeiting those rights guaranteed to defendants through the Fifth and Sixth Amendments, and in suffering the diminution of other protections afforded by the Bill of Rights.

In the age of the all-volunteer military, it is remarkable that patriotic citizens willingly agree to forego significant personal liberties in order to more effectively protect the liberties of all citizens. The necessity of this sacrifice has historically been justified by the requirements of good order and discipline, the maintenance of which is entrusted to the Armed Forces whose methods have been accorded great but not unlimited deference.[1] One might surmise that upon the completion of one's service obligation, a grateful nation would willingly restore to the service member those rights so selflessly abandoned. According to the Government's understanding of the relevant authorities, such a restoration is reality for all

[1] See e.g. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981) [Although congressional power in the national defense is broad, the exercise of this power does not enjoy blind deference]. To state it differently, the Government's characterization of Congress' power as "plenary" is simply inaccurate.

categories of former military members, except those who faithfully served for the longest duration, retirees, including medically retired service-members.

The unfounded supposition that a suspected rapist might go un-tried is insufficient justification to subject a category of civilians to a penal code utterly irrelevant to their lives and significantly deleterious of their free participation in a democratic society. Neither the clear meaning of the Constitution, binding precedent, nor current military practice justifies this drastic outcome.

I: The Government's Authorities are Unpersuasive

Of the numerous authorities cited by the government, the only one announcing a binding precedent sufficient to resolve the instant dispute is the holding in *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955), that "the Constitutional power of Congress to authorize trial by court martial [calls for] limitation to 'the least possible power adequate to the end proposed.'" *Id.* at 22, *citing Anderson v. Dunn,* 6 Wheat. 204, 230-231. While the application of the holding in *Toth* to active duty service members has waxed and waned, the underlying rationale has survived intact. Moreover, its applicability to retirees is among Article III courts, the assertions of the Government notwithstanding, a matter of first impression.

Undeniably, Article 2 of the Uniform Code of Military Justice (UCMJ) categorizes retirees such as the Appellee as "persons subject to [the UCMJ]." The

question before this Court is therefore whether Article 2(a)(4) represents a proper exercise of Congressional authority as circumscribed by the *Toth* holding. The District Court was correct in deciding that it does not.

The government cites *United States v. Tyler*, 105 U.S. 244 (1881); and *Closson v. United States ex rel Armes*, 7 App. D.C. 460 (DC Cir 1896) for the proposition that in 2021, the continued extension of court-martial jurisdiction over retirees is, as currently authorized in statute, constitutional. Neither *Tyler* nor *Closson* is dispositive or even particularly persuasive to the issue *sub judice*. No Article III judicial body has ever directly held that under theUCMJ), it is constitutional to maintain direct and discretionary court-martial jurisdiction over retirees. At best, all Article III decisions the government cites are either wholly inapplicable to the instant issue or *dicta*.

Contrary to the government's citation to *Tyler*, an opinion arising from a medically retired officer's claim of backpay in which the Court merely observed that jurisdiction over military retirees existed under the 1874 Articles of War, the Court did not constitutionally recognize jurisdiction. Even in *Closson,* a decision arising out of a retired officer's arrest, this Court at most assumed without deciding a constitutional authority to court-martial a retired officer. *Closson* must be understood, furthermore, in light of subsequent developments in both military law and the nature of military service and retirement, not least of which is the *Toth*

decision. Even in *Closson* this court made an observation reminiscent of pre-*Solorio* military practice: "In the nature of things, some of the articles of war cannot apply to retired officers, for the reason that either in express terms or by necessary implication, they concern the duties of those in active service." *Closson v. United States*, 7 App. D.C. 460, 471.

Whatever historical interest this Court may take in President Woodrow Wilson's 1916 veto of a provision which would nullify jurisdiction over retirees, neither his veto of an appropriations bill nor Congress' response should prove dispositive. (See government brief at pg. 21).[2] Rather, the Constitution's plain text and Article III case law should guide this Court's decision. Of course, Amici concede that the plain text of Article I of the United States Constitution, informs

[2] The fuller history of Wilson's veto not only undermines the Government's reliance thereon, but demonstrates the cost in terms of freedom inherent in the continued jurisdiction over retirees. On August 18, 1916, President Woodrow Wilson vetoed a military appropriations bill that, had it become law, would have terminated the Army's ability to recall a retiree to duty for the purpose of a court-martial. The leadup to Wilson's veto, however, was not that a sizeable congressional opposition to the recall of retirees had demanded a change in the law. Rather, the impetus for the vetoed bill came from one member of the House of Representatives. Congressman John Hay (D-VA), the chairman of the House Military Affairs Committee had earlier taken sides in a dispute between General Frederick Ainsworth, the Army's adjutant general, and General Leonard Wood, the chief of staff of the army. In the midst of a War Department staff reorganization in 1912, Secretary of War Henry Stimson suspended Ainsworth from his position and threatened to charge him with insubordination unless he retired. Hay, who allied with Ainsworth, was upset that the War Department could recall the now-retired Ainsworth to duty and prosecute him in a court-martial if he continued to bring his dispute with Wood to the public. See e.g. "Hay Accepts Wilson's Veto," NEW YORK TIMES, August 22, 1916; "Army Bill Vetoed: May Cause a Fight," NEW YORK TIMES, August 19, 1916; DAVID WOODWARD, THE AMERICAN ARMY AND THE FIRST WORLD WAR, 13-15 (2014); and GODFREY HODGSON, THE COLONEL: THE LIFE AND WARS OF HENRY STIMSON, 1867-1950 (1992)

this Court that Congress possesses the power to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. Art. I, § 8, cl. 14. The government argues, however, that this grant of authority must be given practically unlimited deference. If the government is correct, then the Court, in 1973 wrongly decided *Frontiero v. Richardson*, 411 U.S. 677 (1973) in which Congress authorized a gender-discriminatory scheme of benefits to the detriment of women in the service.

As a matter of constitutional history, Congress's enactment of jurisdiction over persons subject to military law has hardly been given full deference by the Article III judiciary. See e.g., *Ex Parte Milligan*, 71 U.S. 2 (1866); *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) [determining that the military could not extend jurisdiction over civilians in United States territories if the civil courts were fully functioning]; and, *United States ex rel Toth v. Quarles*, 350 U.S. 11, 15 (1955). Indeed, it is ironic that the first judicial opinion the government cites this Court to is *Toth*, in which the Court held:

> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution… Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.

Id., at 22.[3]

A long line of judicial opinions establish anything but blind deference by the Judiciary to Congress in matters of personal jurisdiction: *Reid v. Covert*, 354 U.S. 1, 2o (1957) [Civilian dependents residing on military reservations or areas under military control cannot be subject to military jurisdiction]; *Kinsella v. United States ex rel Singleton*, 361 U.S. 234 [military cannot constitutionally possess jurisdiction to prosecute civilians for non-capital offenses]; and, *McElroy v. United States*, 361 U.S. 281, 284 (1960) [civilian employees of the armed services stationed overseas are not amenable to military jurisdiction]; and, *Grisham v. Hagen*, 361 U.S. 278 (1960) [civilian employed by military charged with capital offense not amenable to military jurisdiction].

From the beginning of the nation, there was an acceptance that "military law cannot be applied for the regulation of the conduct of persons in private or civil life." William Chetwood De Hart, Observations on Military Law, and the Constitution and Practice of Courts Martial, 16 (1846). This limitation on both personal and subject matter jurisdiction was insisted upon becausethe Constitution's Framers and their immediate successors incorporated the fear of

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[3] Moreover, in Toth, the Court's cite to *Dynes v. Hoover*, 61 U.S. 65 (1857) should not bear any weight before this Court. Dynes arises from a challenge to the subject matter jurisdiction of a naval court- martial, and Frank Dynes conceded the court-martial possessed personal jurisdiction over him. Dynes, 61 U.S., at 78

standing armies into the Constitution and the laws, military regulations, and norms of military service. See e.g., Federalist No. 29, [Concerning the Militia]; Earl F. Martin, *America's Anti-Standing Army Tradition and the Separate Community Doctrine*, 76 Miss. L. J. 135, 145-147 (2005); Thomas Cooley, A Treatise of Constitutional Limitations, 350 (1868); Richard Kohn, Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802, 2 ["no principle of government was more widely understood or more completely accepted by the generation of Americans that established the United States than the danger of a standing army in peacetime.] *Id.*

The government argues, in citing to *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) an opinion arising out of the Kent State University shootings in which surviving civilian students and other concerned citizens sought judicial supervision over the Ohio National Guard, that "[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence." *Id*. The government also cites to *Chappell v. Wallace*, 462 U.S. 296 (1983) for the proposition that the federal judiciary must defer to Congress on military policy decisions. *Chappell* arose from several enlisted sailors suing their commanding officer and others for permitting racial discrimination onboard a naval vessel. *Id.*, at 297-8. Neither of these two opinions should be considered on the jurisdiction issue as neither are applicable. First, neither Appellee nor Amici are seeking for

this Court to supervise military operations. Second, in Chappell, the Court at least acknowledged that the military establishment had internal administrative mechanisms for addressing allegations of discrimination. *Id*., at 302-303.[4]

Likewise, the government's reliance on *United States ex rel Cleary v. Weeks* for the proposition that Congress possesses plenary and specific power under Art I, arises not from a jurisdictional matter relevant to the instant issue at all. *Weeks* originated as a challenge to administrative rules governing retention on active duty as a result of the post-World War I Army Reorganization Act which significantly reduced the Army's size. *Id*., at 343.

Only one Article III court that the government cites, *United States ex rel. Pasela v. Fenno*, 167 F.2d 593 (2d Cir. 1948), refers to the constitutionality of court-martialing retired Fleet Reservists, but it does so passingly, and Pasela appears to have made a partial waiver of jurisdiction in his appeal. The facts of that appeal differ from the instant issue in four respects. At the time of Pasela's court-martial, the nation remained at war and the law permitted a recall for the

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[4] In Bois v. Marsh, 801 F.2d 462 (D.C. Cir. 1986), this Court held that in civil claims against the military, plaintiff service-members must first exhaust administrative remedies so as not to have the court intrude on command decisions. Id., at 496. In criminal law, there is no administrative exhaustion doctrine applicable to the issue before this Court. What is at stake, however, is that the mere recall to duty for a court-martial carries with it, the discriminatory aura of unlawful command influence. That is, a recall will suggest to the court-martial panel, that an accused is likely guilty, because it is either a secretary of defense or service secretary who issues the order. See, 10 U.S. Code § 688(a); Army Regulation, Military Justice, 27-10, 5-4, dated 20 November 2020; and Air Force Instruction, Administration of Military Justice, 51-201, 4.16, 18 January 2019

purpose of a court-martial in wartime. See e.g. *Lee v. Madigan* 358 U.S. 228, 230 (1959)[state of war with Japan not terminated until 1949]. Secondly, Pasela was convicted in federal court for the theft of Navy property and the court-martial charges against him arose out of this theft, making the offense military in nature. 167 F.2d., at 593. Thirdly, *Pasela* was decided prior to the UCMJ under the older Naval Articles of War. Finally, *Pasela* was decided prior to *Toth*, *Kinsella*, and *Reid*.

The government finally cites to *Solorio v. United States*, 483 U.S. 435 (1987) in which the Court overturned *O'Callahan v. Parker*, 395 U.S. 258 (1969) to reaffirm that Congress may enact subject matter jurisdiction crimes, beyond those that are purely military in nature. While the Court in *Solorio* enabled expanded subject matter jurisdiction – a vast departure from the pre-UCMJ laws which only enabled subject matter jurisdiction in the United States during peacetime to purely military offenses – the Court did not consider the personal jurisdiction aspects of courts-martial at all. On the matter of limited subject matter jurisdiction prior to 1950, see e.g. *Kahn v. Anderson*, 255 U.S. 1, 9 (1921); and *O'Callahan*, infra. See also, Willian Winthrop, Military Law and Precedents, 666-668.

In fact, decisions pre-dating the UCMJ should be read with the caution that any exercise of jurisdiction over a retiree in the pre-*Solorio* era had at least the

assurance of some stated nexus to military duties. While *Solorio* makes perfect sense in the context of a standing, globally deployed military, that was not the military envisioned by the Framers when they drafted Article I. Furthermore, the combined effect of Article 2(a)(4) and *Solorio* is what pushes Article 2(a)(4) well beyond the limits set forth in *Toth*.

Tarble's Case, 80 U.S. (13 Wall.) 397 (1871), an 1871 opinion on which the government appears to place great reliance, is particularly misguided for three reasons. Tarble had actually enlisted into the Army as a minor and then deserted. Thus, unlike a retiree, Tarble was required to wear his uniform and comply with orders. Second, a Wisconsin state commissioner issued a *habeas* writ for his release, and the Wisconsin Supreme Court upheld the writ. *In re Tarble*, 25 Wis. 390 (WI 1870). It was common practice for state judicial officials to issue habeas writs on military officers holding soldiers in custody, and the Court in *Tarble's Case*, determined that the century-old practice had worked to impede an exclusive function of the federal government. See *Duffield v. Smith*, 3 Serg. & Rawl 590 (PA 1818); also, Edward A. Hartnett, *The Constitutional Puzzle of Habeas Corpus*, 46 B.C. L. Rev, 251 258 (2005); Todd E. Pettys, *State Habeas Relief for Federal Extrajudicial Detainees*, 92 Minn. L. Rev 265, 267 (2007); and, Lee Kovarsky, *A Constitutional Theory of Habeas Power*, 99 Va. L. Rev 753, 786 (2013). Finally, in authoring *Tarble's Case*, Justice Stephen A. Field relied almost exclusively on

Ableman v. Booth and *United States Booth*, 80 U.S., at 402, two opinions foisting the alleged supremacy of the Fugitive Slave Law on state courts in states which prohibited slavery. [5] *Tarble's Case* has, to be sure, come under criticism. See, e.g., Akhil Reed *Amar, Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1509 (1987). The government's citation to *Tarble's Case,* a backdoor vestige of a lamentable period should be disregarded for both its lack of application to retirees who are not immediately subject to a commanding officer's orders but also because that opinion was settled on the strict *habeas* test that was later abandoned in *Burns v. Wilson*, 346 U.S. 147 (1953).

In *Runkle v. United States*, 122 U.S. 543 (1887), also cited by the government, the Court found that in the absence of a presidential approval of a dismissal, a retired court-martialed officer was entitled to retain retired status and commensurate pension. *Id*., at 556. In a broad sense, the Court determined that a president's non-compliance with procedural rules rendered a court-martial's

[5] Although Amici are not alleging that the government is promoting racial or other disparity in the military, it should be considered by this Court that there remains racial disparity in courts-martial. See General Accountability Office, Military Justice: DoD and Coast Guard Need to Improve Their Capabilities to Assess Racial Disparities, Published: Jun 16, 2020 [Black and Hispanic Servicemembers Were More Likely to Be Subjects of Recorded Investigations and Tried in General and Special Courts-Martial]. See also, Air Force Inspector General , Report of Racial Inquiry, Independent Racial Disparity Review, December 2020 [finding that enlisted black service members were 72% more likely than enlisted white service members to receive UCMJ, Article 15, commanding officer's non-judicial punishment (NJP), and 57% more likely than white service members to face courts-martial. Thus, if this Court were to overturn Judge Leon's decision, it would be subjecting retired service-members to a system in which Congress has acknowledged exists with racial disparities.

cashiering sentence a nullity. In *United States v. Page*, 137 U.S. 673 (1891), the Court determined that a presidential signature was not statutorily required as proof a president had followed the law in approving a court-martial sentence of a retiree. *Id*., at 680. The government in the instant issue has cited to *Page* as proof of personal court-martial jurisdiction, but since Page never raised the issue of jurisdiction and appealed through the Court of Claims that a lack of a presidential signature constituted non-compliance with the law, the government's citation to *Page* for the purpose of retiree jurisdiction is inapposite.

The government completely misapprehends *United States v. Fletcher*, 148 U.S. 84 (1893), namely because Fletcher conceded that the court-martial had jurisdiction over him, and he also conceded the validity of his punitive discharge. See, *Fletcher v. United States*, 26 Ct. Cl. 541 (Cl. Ct. 1891). Instead, Fletcher argued that, in following *Runkle*, the processing of his court-martial failed to conform to statute. *Id.*, at 544-45. Fletcher, in fact, filed a collateral claim against the government for backpay during the period that he believed the record of his court-martial languished in the executive branch. He also claimed that the Army had court-martialed him for his personal indebtedness, which was not a crime listed in the Articles of War, and is a subject matter-based appeal. *Id*. The Court found that the post-trial processing substantially conformed to law and that the court-martial was competent to adjudicate the subject matter issue. Thus, *Fletcher*

provides no strength to the government's argument that personal jurisdiction over retirees is a settled constitutional matter.

It is true that the United States District Court for the District of Columbia in *Taussig v. McNamara* upheld employment restrictions for military retirees. 519 F. Supp. 575 (D.D.C. 1963). But *Taussig* did not arise from a court-martial. Likewise, in *White v. Treibley*, 19 F.2d 712 (D.C. Cir. 1927) this Court determined that an incapacitated retired naval officer whose incapacity arose incident to his military service remained subject to the Secretary of Navy's jurisdiction in regard to medical care. Neither of these support the subjugation of the retiree to the entire UCMJ.

Finally, in quoting Winthrop's statement, "retired officers are a part of the army and so triable by court-martial—a fact indeed never admitting of question," the government missed the fact that Winthrop, after authoring Military Law and Precedents, questioned this very fact. See e.g., *In re Winthrop*, 31 Ct. Cl. 35 (Ct Cl 1895); and Joshua Kastenberg, The Blackstone of Military Law: Colonel William Winthrop, 306-307 (2009).

There is much to commend to Winthrop's writings, and reliance on his Military Law and Precedents is often appropriate in understanding such topics as *lex non scripta*, general court-martial practice and the law of armed conflict. However, in reviewing, such as in the instant case, a challenge against subjecting

persons to presidential military authority, it must be pointed out that he sought to increase presidential power when he sided with Chief Justice Salmon Chase's *Milligan* concurrence. That is, Winthrop claimed that *Milligan* was wrongly decided and that Congress could create military trials over citizens in times of public danger regardless of the functioning of civil courts. See Winthrop, Military Law and Precedents, 817-818. Winthrop also served as the judge advocate in the military trial of Benjamin Gwinn Harris, a member of the House of Representatives, in what should be considered an incredible departure from the Separation of Powers essential to the preservation of a Republican form of government. See, Joshua Kastenberg, A Confederate in Congress: The Civil War Treason Trial of Benjamin Gwinn Harris, 125-146 (2016); and Winthrop, Military Law and Precedents, 286. Winthrop even professed that the military trial had the authority to disqualify a duly elected member of Congress from ever holding office again. Military Law and Precedents, at 633. Suffice it to say, the limits of executive authority is uniquely an area of military law as to which history has judged Winthrop less than authoritative.

Although Amici's brief centers on Article III jurisprudence, Amici believe it is incumbent on this Court to consider the dangers of applying *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958) to the instant issue. Retired Admiral Seldon Hooper was arrested, court-martialed, convicted, and dismissed for

suspected homosexual conduct. While it is true that this occurred prior to *Lawrence v. Texas*, 539 U.S. 558 (2003), *Hooper* amplifies the possibility that a retiree may be court-martialed for engaging in conduct lawful for a citizen, but prohibited by the military, including the exercise of free speech. Perhaps this is why the Court of Claims, in 1964 noted, in upholding Hooper's dismissal, "We believe the function of this Court is to uphold an act of Congress unless the same is clearly unconstitutional. In the case at bar, while we have certain doubts, we cannot say that the act is clearly unconstitutional." *Hooper v. United States*, 326 F.2d 982, 986 (Ct. Cl. 1964)

Thus, none of the decisions cited to this Court have ever squarely addressed the constitutionality of court-martial jurisdiction over retirees. And certainly no Article III court has addressed this question in regard to the Bill of Rights or the changed status of retirees.

II: Current Military Practice Does Not Justify Jurisdiction Over Retirees

The military services' own publications bely any contention that they even consider retirees part of the "land and naval forces." Recruits are publicly enticed with the promise of a "pension" upon "retirement,"[6] and the Department of

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[6] "After 20 years of active-duty service in the Marine Corps, Marines earn retirement benefits and a pension, which enables retirement at an earlier age than what is offered through most civilian opportunities. Many retired Marines lead full civilian careers in their communities after their Marine service, knowing they have the added financial security of a Marine Corps pension." https://www.marines.com/life-as-a-marine/benefits/salary-compensation.html, last visited May 28, 2021. "As life gets more expensive and lasts longer, more Americans find

Defense promotes at least one component of its retirement plan as, "Defined Benefit – Monthly retired pay for life after at least 20 years of service."[7] Even the guidance provided to prospective Marine Corps retirees mentions only the possibility of recall to active duty, not the continued subjugation of the retiree to the UCMJ nor the concomitant relinquishment of those rights and privileges inherent in an Article III trial, much less those usurped by the UCMJ itself.[8] Adopting the government's formulation would not only contradict the armed services' course of practice, which treats retirees much more like former members than active duty members or even reservists, but would also subject military retirees to a "bait and switch" of colossal proportions.

Another relatively recent alteration of the status of retirees concerns Congress' unilateral withdrawal of health care for life and the requirement that

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themselves unable to retire easily. Sailors who serve 20 years receive a guaranteed steady retirement income. To give you some perspective, by age 38, you could retire with a monthly paycheck for the rest of your life, freeing up time for travel, family and passions. With military retirement pay on top of what you will have saved through the Thrift Savings Plan …, you can play the long game — and win." https://www.navy.com/what-to-expect/military-pay-and-benefits, last visited May 25, 2021. *See also,* https://www.goarmy.com/benefits/after-the-army.html, last visited May 25, 2021 and https://www.airforce.com/careers/pay-and-benefits#generous-retirement-package, last visited May 25, 2021.

[7] Defense Finance and Accounting Service, Office of Financial Readiness, "A Guide to the Uniformed Services Blended Retirement System," undated (available at https://militarypay.defense.gov/Portals/3/Documents/BlendedRetirementDocuments/A%20Guide%20to%20the%20Uniformed%20Services%20BRS%20December%202017.pdf?ver=2017-12-18-140805-343).

[8] Marine Corps Retirement Guide, NAVMC 2642, MMSR-6, June 30, 2005 (available at https://www.marines.mil/portals/1/Publications/NAVMC%202642.pdf?ver=2012-10-11-163935-047).

retirees financially contribute to their health care should they desire it. See e.g. *Schism v. United States*, 316 F.3d 1259 (2002). While the Federal Circuit determined that the federal judiciary was not a competent body to enforce governmental promises, this Court can certainly consider this development along with the absence of retiree fitness or dress and appearance standards or drug testing as a definitive rebuttal to any contention the armed forces have an interest in the continued fitness for duty of their retirees. See also, *United States ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371 (CA 2 1968) [Courts are not appropriate for adjudicating regulatory violations to the detriment of reservist]. Thus, what the government is seeking, in the instant case, is for retirees to financially contribute to their own jurisdiction without the full array of due process or judicially enforceable procedural safeguards.

III: Military Courts Are Not Competent Tribunals to Alter the Status of Retirees to Service-Members Amendable to Military Jurisdiction

In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court determined that a statute imposing loss of citizenship upon service members convicted at court-martial of desertion in time of war violated the Eighth Amendment. Implicit in the Court's opinion, is that military trials are not competent to alter the status of a citizen. *Id.*, at 91. The Court noted that in deciding *Trop*, it had been "confronted with cases presenting important questions bearing on the proper relationship between civilian and military authority in this country." Id., at 91. The *Trop* Court cited to *Toth*

and *Reid* (already addressed in this brief) and *Harmon v Brucker*, 355 U.S. 579 (1958). Although *Harmon* and its companion case *Abramovitz v. Brucker* were decided on statutory rather than constitutional grounds, it should be important to this Court that the justices in *Harmon* were expressly concerned with the deleterious effects on civilian life that a less than honorable administrative discharge imposes on citizens. See e.g., Joshua E. Kastenberg, Shaping U.S. Military Law: Governing a Constitutional Military, 14-15 (2014). In the instant case, not only does the government seek to divest retirees of significant concomitants of citizenship without even the formality of a trial, they further seek to subject them to the stigma of an administrative discharge and loss of a retirement previously characterized as "vested."

Recall of retirees for the purpose of a court-martial, in fact, creates a status more deleterious than a social stigma. It strips a retiree of several basic rights enshrined in the Bill of Rights. As Justice O'Connor noted for a plurality of the Court in dealing with international terror directed at the United States, "our calculus [must] not give short shrift to the values that this country holds dear or to the privilege that is American citizenship," *Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004). Indeed, this Court should consider that the government's insistence on keeping all retired service-members amenable to a criminal justice system that worries about the existence of unlawful command influence, is clearly antithetical

to the Framers' standing army fears. While unlawful command influence is prohibited per 10 U.S. Code § 837, the military justice system permits officers with command authority as well as a commander-in-chief, defense secretary, and departmental secretaries to stress their views and departmental policies that may influence courts-martial. Courts-martial are, as a function of the Constitution and the UCMJ, populated with service-members subject to the orders of such command authorities, in a manner that would be intolerable in any other criminal court.[9] And at no time in the history of the UCMJ has an officer who has been found to violate 10 U.S. Code § 837 ever been court-martialed. See e.g., Rachel Vanlandingham, Military Due Process: Less Military & More Process, 94 TULANE L. REV 1, 37 (2019). Thus, for over seventy-years, the prohibition against unlawful command influence has not been deterred by the use of the very system this Court is now reviewing.

The Sixth Amendment, which contains no military exemption, lists, in pertinent part a right to a public trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

[9] See e.g. United States v Bergdahl, 80 M.J. 230 (C.A.A.F. 230), finding that while both (then) President Trump and Senator John McCain acted in a deleterious manner to Bergdahl's right to a fair trial, the conduct did not create "an intolerable strain" on the military justice system. Id., at 241. Also, United States v. Reed, 65 M.J. 487 (C.A.A.F. 2008), finding that a commanding general's public statements that housing fraud results in an automatic referral to court-martial thereby divesting subordinate commanders the discretion to resolve offenses at an administrative level was not unlawful command influence. Id.., at 498. There are numerous other examples.

previously ascertained by law…" U.S. Const. VI Amend. Military trials are neither a trials by a jury of one's peers nor do they require a unanimous vote to determine guilt. See e.g., *United States v. Easton*, 71 M.J. 168 (C.A.A.F. 2012), citing to *Ex parte Quirin*, 317 U.S. 1, 39 (1944). Indeed, every member assigned to a court-martial panel must be of greater rank than that of the accused, unless it is impracticable to do so. 10 USCS § 825 *et. seq*. Not only do the Rules for Courts-Martial place the selection of panel members in the hands of a court-martial convening authority, a military judge is unable to select alternate panel members unless the convening authority authorizes such. See R.C.M. 503 and R.C.M. 912(A) respectively. In contrast to a court-martial, an impartial and unanimous jury is a right of every person prosecuted in the nation's other criminal courts. See e.g., *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395, (2020).

Military trial judges are commissioned officers subject to a chain of command, and, unless retirement is pending, under consideration for promotion in rank. See e.. *Weiss v. United States*, 510 U.S. 163, 168-169 (1994); and *United States v. Salyer*, 72 M.J. 415 (C.A.A.F. 2013). Justice Scalia observed, in his concurrence in *Weiss*, that while there are laws and regulations designed to protect against unlawful command influence placed on military trial judges, the majority, in accepting the historic practice underpinning the acceptance of inferior officers serving as military trial judges ignored the fact that "no one can suppose that

similar protections against improper influence would suffice to validate a state criminal-law system in which felonies were tried by judges serving at the pleasure of the Executive." *Weiss v. United States*, 510 U.S. 196, 198 [Scalia, J. Concurring]. Enabling military jurisdiction over retirees may serve to permanently deny a class of citizen of a due process safeguard considered by Justice Scalia to be a benchmark right.

Furthermore, courts-martial are convened under the U.C.M.J.'s worldwide jurisdiction concept and not constrained by the Vicinage Clause. U.S. Const. Amend VI; *Gosa v. Mayden*, 413 U.S. 665, 686 (1973). In *Gosa,* the Court noted in citing to Winthrop: General court-martial jurisdiction is not restricted territorially to the limits of a particular State or district…. [a]nd the vicinage requirement has primary relevance to trial by jury." *Id*. Thus, the Vicinage Clause, which is a due process safeguard, has no relevance to a military trial. See, *Chenowith v. Van Arsdall*, 46 C.M.R 183,186 (C.M.A. 1973).

Finally, the threat of a court-martial may serve to curb the First Amendment Rights of retirees and retiree recall for the purpose of court-martial is so seldom – as noted by Appellee - as to fall into the specter of selective prosecution.[10] For

[10] In reviewing the government's concession that racial disparity plagues military justice as noted in footnote five, this Court should also consider whether the military courts are competent to assess selective prosecution in regard to retirees to the degree of capability that an Article III court possesses.

instance, in the so-called "Fat Leonard Scandal," the government prosecuted retired senior naval officers who specifically committed an offense deleterious to the Navy's overseas capabilities in U.S. District Court thereby preserving the retired senior officers' pensions.[11] Furthermore, if Larrabee should be answerable in retirement to Article 120 of the UCMJ, so too might 200+ retired Generals and Admirals who spoke out against President Trump[12] and the 120+ retired Generals and Admirals currently speaking out against President Biden[13] be equally answerable for violating Article 88 [prohibiting contemptuous words against a president].

CONCLUSION

For the foregoing reasons, as well as those raised by Appellee, this Court should uphold the lower court's decision

[11] See, Craig Whitlock & Kevin Uhrmacher, Prostitutes, Vacations and Cash: The Navy Officials 'Fat Leonard' Took Down, WASHINGTON POST, Nov. 5, 2017; and Carl Prine, Navy Upbraids retired Admiral caught up in the Fat Leonard Scandal, SAN DIEGO UNION TRIBUNE, November 29, 2017

[12] Kourtney Kube and Dan De Luce, "More than 200 retired generals, admirals endorse Biden, including some who served under Trump," September 24, 2020, (https://www.nbcnews.com/politics/2020-election/more-200-retired-generals-admirals-endorse-biden-including-some-who-n1240842).

[13] Emma Colton, "More than 120 retired generals and admirals sign letter questioning 2020 election and Biden's mental health," May 12, 2021, (https://www.msn.com/en-us/news/politics/more-than-120-retired-generals-and-admirals-sign-letter-questioning-2020-election-and-biden-s-mental-health/ar-BB1gEWY3).

Respectfully Submitted

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