No. 20-301

IN THE
Supreme Court of the United States

TIMOTHY B. HENNIS,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This is a case of firsts. Petitioner is the first retired servicemember in U.S. history sentenced to death by a court-martial. He is the first servicemember of *any* status sentenced to death by a court-martial for civilian offenses against civilian victims. And he is the first defendant in *any* U.S. forum whose trial occurred entirely *because* another court had previously acquitted him of the same offenses, and because the Fifth Amendment's Double Jeopardy Clause would have barred his re-trial.

It is thus ironic, given the novelty and the gravity of this capital case, that the government opposes certiorari because "petitioner identifies no conflict of authority," Br. Opp. 18, and because the questions presented are "of little prospective importance." *Id.* at 11. A lack of historical precedent is often "the most telling indication of [a] severe constitutional problem." *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (internal quotation marks omitted). And "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States*, 116 U.S. 616, 635 (1886); *see Stern* v *Marshall*, 564 U.S. 462, 503 (2011).

This Court should grant certiorari because the questions presented are indeed novel and important, but also because Petitioner is *correct* on the merits. Article 3(a) of the Uniform Code of Military Justice (UCMJ) only allowed the Armed Forces to punish offenses committed by Petitioner prior to a break in his service if those offenses were of a kind that "cannot be tried" in a civilian court. 10 U.S.C. § 803(a) (1982).[1] The offenses for which Petitioner was court-martialed did not meet that criteria: they *were* triable in a civilian court; and were in fact tried in the courts of North Carolina—twice.

And even if Article 3(a) perversely authorized Petitioner's court-martial only *because* of his prior acquittal, the Constitution still prohibits military authorities from imposing the death penalty for civilian offenses committed against civilian victims in areas outside of military control, as such crimes do not "aris[e] in the land or naval forces." U.S. CONST. amend. V. Because this court-martial should have never convened, let alone sentenced Petitioner to death, the Petition should be granted and the decision below should be reversed.

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[1] The Army Court of Criminal Appeals held that there was a break in Petitioner's service. Pet. App. 74a–83a. The government does not dispute that holding. Br. Opp. 11 n.2.

I. ARTICLE 3(a) AUTHORIZED COURTS-MARTIAL ONLY OF OFFENSES BEYOND THE JURISDICTION OF CIVILIAN COURTS.

All agree that Congress enacted Article 3(a) to overrule *United States ex rel. Hirshberg* v. *Cooke*, 336 U.S. 210 (1949). *Hirshberg* held that the Navy lacked the authority to try military offenses committed by a U.S. servicemember in a Japanese prisoner-of-war camp in the Philippines because they had occurred prior to a break in the defendant's military service.[2] Congress could have responded by authorizing the military to try anyone still subject to the UCMJ for *any* pre-service-break offenses, but it didn't.[3] Instead, it imposed two limits: the offenses had to be serious, i.e. punishable by at least five years in prison; and they had to be the kind of offenses that could not be tried by a civilian court.

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[2] Hirshberg was convicted of two counts of "maltreatment of any person subject to his orders" for abusing two fellow prisoners of war. *United States ex rel. Hirshberg v. Malanaphy*, 73 F. Supp. 990, 991 & n.1 (E.D.N.Y. 1947).

[3] This is what the current Article 3(a) provides, but it applies only to offenses committed on or after October 23, 1992. *Willenbring v. Neurater*, 48 M.J. 152, 158 (C.A.A.F. 1998).

There is no question *why* Congress imposed these limits: it meant to close only the loophole that *Hirshberg* had opened, and not to dramatically expand the scope of military jurisdiction. As the Chairman of the Senate Armed Services Committee explained when reporting on the text of Article 3(a),

> it was felt that where the Federal or State courts have jurisdiction, such jurisdiction should not be disturbed, and there would be no justification in also giving it to the courts-martial. For that reason, it is provided that the courts-martial are to have jurisdiction only if the civil courts do not have it.

Letter from Sen. Millard Tydings to Sen. Pat McCarran (July 13, 1949), *reprinted in* 96 Cong. Rec. 1366, 1367 (Feb. 2, 1950).

This was hardly a "scattered statement[] by [an] individual legislator[]." Br. Opp. 14. The final House and Senate Reports on the UCMJ, both of which the government cites in its brief, *see id.*, reinforce that Article 3(a) authorized courts-martial only for serious pre-service-break offenses over which civilian courts generally lacked jurisdiction. *See* H.R. REP. No. 81-491, at 5 (1949) ("It provides for a continuing jurisdiction provided . . . that the offense is not triable in a State or Federal court of the United States."); S. REP. No. 81-486, at 8 (1949)

("[T]here [was] no tribunal which [had] any jurisdiction over the person or the offense."). Congress was concerned about servicemembers escaping *one* trial, not two.

The government dismisses the clear and voluminous evidence of Congress's intent by insisting that the *text* of Article 3(a) uses the present tense to address offenses that "cannot be tried" in civilian court at the time of the court-martial, rather than offenses that "could not be tried" in civilian court at the time of their commission. Br. Opp. 13. The government is wrong—both as to what "cannot be tried" means and the time frame it references.

To the former, Congress used the term "cannot be tried" to mean the *types* of offenses over which civilian courts lacked jurisdiction, either because they were uniquely military offenses or because they occurred outside the territorial jurisdiction of civilian courts (or, as in *Hirshberg*, both). On that reading, the *tense* of Article 3(a) is irrelevant; civilian courts clearly had subject-matter jurisdiction over Petitioner's offenses both when they were committed and when court-martial charges were referred.

And as this Court recently reiterated while interpreting another provision of the UCMJ, "[t]he meaning of a statement often turns on the context in which it was made, and that is no less true of

statutory language." *United States* v. *Briggs*, No. 19-108, 2020 WL 7250099, at *3 (U.S. Dec. 10, 2020). Not only does the contextual evidence clearly support Petitioner's reading of Article 3(a), but seven decades of practice confirms it: The government has not identified a single case that depended upon former Article 3(a) to establish court-martial jurisdiction over a servicemember for a crime that was *ever* triable in a civilian court, let alone a crime already tried.[4]

Setting aside the contextual evidence, the government's reading of Article 3(a) would also lead to absurd and potentially unconstitutional results. After all, the government's position is that Petitioner was subject to court-martial—and a death sentence—only *because* his previous acquittal on those offenses by a civilian court barred any re-trial because of the Double Jeopardy Clause.

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[4] *Willenbring* (the only example the government cites, Br. Opp. 15) is not to the contrary. Although CAAF initially suggested that Article 3(a) did not foreclose jurisdiction over a pre-service-break offense for which the civilian statute of limitations had expired, 48 M.J. at 177, the Army Court of Criminal Appeals held on remand that no break had occurred in the defendant's service—rendering CAAF's discussion of Article 3(a) irrelevant. *United States v. Willenbring*, 56 M.J. 671, 676 (A. Ct. Crim. App. 2001).

The government defends this claim by invoking the "separate sovereigns" doctrine and this Court's reaffirmation that the Constitution allows federal and state prosecutors to try the same defendant for the same offense. Br. Opp. 15–16 (citing *Gamble* v. *United States*, 139 S. Ct. 1960, 1964 (2019)). Thus, the government insists, "double jeopardy principles have no application here." *Id.* at 15.

Once again, the government misses the point. Petitioner's claim is not that his court-martial violated the Double Jeopardy Clause; it is that (1) Congress would never have intended the Double Jeopardy Clause to provide the sole, affirmative authority for a successive prosecution; and (2) insofar as it does provide such a basis, Article 3(a) raises serious due process concerns. *See, e.g.*, Pet. 14-19. The government offers no response to these points.

But even if this Court reads the text in a vacuum, the government would still lose. First, "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest possible referent." ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 152 (2012). The "nearest possible referent" to "cannot be tried" in Article 3(a) is when the offenses were "committed," not when they were

"charged." Thus, even out of context, Article 3(a) would still foreclose Petitioner's court-martial.

Finally, even if the government is correct that Article 3(a) asks only whether the offenses "cannot be tried" by a civilian court at the time of Petitioner's court-martial, the answer is *still* "no." After all, there is no question that defendants can consent to successive prosecutions otherwise barred by double jeopardy, *Currier* v. *Virginia*, 138 S. Ct. 2144, 2149–52 (2018), and Petitioner has reserved his right to do so here.[5]

This possibility not only underscores the *literal* incorrectness of the government's position, but also the logical force of reading "cannot be tried" as Congress intended—as a reference to offenses (unlike Petitioner's) that are beyond the subject-matter jurisdiction of civilian courts, which the accused can neither waive nor forfeit.

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[5] The government asserts that Petitioner "does not dispute that he now 'cannot be tried'" for the same offenses in North Carolina. Br. Opp. 12–13. But the Petition makes no such concession, and the government does not identify one. To the contrary, Petitioner has repeatedly noted that it is still possible for him to consent to trial in North Carolina. *See* Pet. CAAF Br. 41; Pet. Army CCA Mot. Recon. 11-16.

II. THE CONSTITUTION PRECLUDES THE MILITARY FROM IMPOSING THE DEATH PENALTY FOR PETITIONER'S OFFENSES.

Even if Article 3(a) somehow allowed the military to try Petitioner, the Constitution forbids it from imposing the death penalty for civilian offenses against civilian victims on U.S. soil and outside areas of military control. That is because such cases do not "aris[e] in the land or naval forces." U.S. CONST. amend. V. As Justice Stevens explained for four Justices in *Loving* v. *United States*, 517 U.S. 748 (1996), "when the punishment may be death, there are particular reasons to ensure that the men and women of the Armed Forces do not by reason of serving their country receive less protection than the Constitution provides for civilians." *Id.* at 774 (Stevens, J., concurring).

In arguing against certiorari on this question, the government makes three claims whose incorrectness only underscores the need for this Court's intervention. First, the government claims that the matter was settled by *Solorio* v. *United States*, 483 U.S. 435 (1987). Second, it argues that there is no principled basis for resting military jurisdiction on any distinction between capital and non-capital offenses. Finally, even if the Constitution requires

Petitioner's case to have a sufficient nexus to the military, the government insists Petitioner's does.

Taking *Solorio* first, it "was not a capital case, and [its] review of the historical materials would seem to undermine any contention that a military tribunal's power to try capital offenses must be as broad as its power to try noncapital ones." *Loving*, 517 U.S. at 774 (Stevens, J., concurring).[6] That's because, as Justice Stevens explained, *Solorio*'s historical analysis relied upon the 1776 Articles of War, which authorized courts-martial only for "[a]ll crimes *not capital*, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline." *Solorio*, 483 U.S. at 444 (emphasis added).

As the Petition notes, our Nation unequivocally forbade military authorities from imposing the death penalty for civilian offenses from the Founding well into the twentieth century. *See* Pet. 28 (citing 6 Op. Att'y Gen. 413 (1854)); *see also United States* v. *French*, 27 C.M.R. 245, 251 (C.M.A. 1959). *See generally* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 721–22 (2d ed. 1920). That original understanding of the limits on court-martial authority makes it *at least* an open question whether

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[6] Even CAAF did not think that *Solorio* had settled the matter. *See United States v. Gray*, 51 M.J. 1, 11 (C.A.A.F. 1999).

the Constitution allows courts-martial to impose capital punishment for civilian offenses. And the historical materials upon which the Petition relies—and which the government does not dispute—provide compelling reasons to conclude the answer to that question is "no."

Second, the government suggests that, for purposes of military jurisdiction, there is no "principled distinction between capital and noncapital offenses." Br. Opp. 21. Again, this argument simply ignores the rich history traced in the Petition of military authorities drawing this *precise* distinction through the lion's share of our Nation's existence. It also ignores *Reid* v. *Covert*, 354 U.S. 1 (1957), in which the controlling concurrences held that it was unconstitutional for the military to court-martial civilian dependents only for *capital* offenses committed overseas during peacetime. *See id.* at 45–46 (Frankfurter, J., concurring in the result); *id.* at 77 (Harlan, J., concurring in the result).

Finally, the government argues that Petitioner's offenses *were* service-connected—because the victims were dependents of a servicemember. Br. Opp. 22. But even if the service-connection test of *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), is the correct standard for evaluating whether a case "arises in the land or naval forces," *but see Solorio*,

483 U.S. at 454–62 (Marshall, J., dissenting), this Court never identified a victim's dependent status as even *one* of the factors that could establish a service connection—let alone as a conclusive factor. *Relford* v. *Commandant*, 401 U.S. 355, 365 (1971). And the only prior case in which the *military* courts so held was *Solorio* itself. 21 M.J. 251, 255–56 (C.M.A. 1986). That this Court felt compelled to *abolish* the service-connection test for non-capital offenses rather than affirm that analysis is telling support for Justice Marshall's conclusion that nexus was insufficient. *Solorio*, 483 U.S. at 462–66 (Marshall, J., dissenting).

In short, whether the military may constitutionally impose the death penalty for Petitioner's offenses is not only an important question of constitutional law that has never been settled by this Court, but there are compelling reasons to conclude CAAF erred below in holding that it may.

III. THE QUESTIONS PRESENTED IN THE PETITION ARE A MATTER OF LIFE AND DEATH—BOTH IN THIS CASE AND GOING FORWARD.

Petitioner has already explained in detail both the importance of the questions presented and the extent to which CAAF erroneously resolved them in

its decision below. Given that this is a direct appeal in a capital case, those are reasons enough for this Court to grant certiorari.

The government fails to muster any argument for why this Court could not reach the questions presented in the Petition. Instead, it argues only that CAAF's novel holdings do not conflict with any civilian court of appeals decisions and that the Article 3(a) issue is of "little prospective importance," since former Article 3(a) applies only to pre-service-break offenses committed before October 23, 1992. Br. Opp. 11.

Of course, whatever "prospective importance" the Article 3(a) issue may have, it is in this case literally a matter of life or death. The government also downplays the broader implications of its position. There are numerous pre-1992 offenses that carry no statute of limitations under the UCMJ. *See, e.g.*, *Briggs*, 2020 WL 7250099. If the government's reading of Article 3(a) is correct, nothing would stop the armed services from trying servicemembers who committed such offenses during a prior enlistment so long as (1) they were never prosecuted in civilian court and the civilian statute of limitations has

expired; *or* (2) they *were* prosecuted in state[7] court and a re-trial would be barred by the Double Jeopardy Clause. Thus far, that has been a class of one, but there is no reason to assume it would remain so if certiorari is denied.

Nor is the military nexus question of "little prospective importance." On the contrary, our military continues to devote more and more resources to prosecuting civilian, rather than military, offenses. Alongside the federal government's recommitment to the death penalty, *Barr* v. *Lee*, 140 S. Ct. 2590 (2020) (per curiam), it is entirely possible that the armed services will more actively seek capital charges for civilian offenses. Better for this Court to decide the matter now, rather than in a future case that could require it to overturn numerous death sentences.

Finally, there is no good argument for pushing off Petitioner's claims to collateral post-conviction review. Even if Petitioner prevailed in a habeas petition, a district court's interpretation of former Article 3(a), or its imposition of a military nexus requirement, would not bind military courts in any case other than this one. If this Court agrees that

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[7] Court-martial of offenses previously tried on the merits in federal civilian court would be barred by the Double Jeopardy Clause. *United States v. Rice*, 80 M.J. 36, 40 (C.A.A.F. 2020).

these questions should be decided, this Petition, at this juncture, is the vehicle for doing so.

* * *

The U.S. military has never executed a retired servicemember. It has never executed any servicemember for a civilian offense. And it has never before premised its authority to *try* a servicemember on the grounds that a civilian court had already acquitted the accused. If the UCMJ and the U.S. Constitution allow the government to exercise its most solemn and irrevocable power in such an unprecedented manner, it is this Court—and not non-Article III military tribunals—that should say so.

CONCLUSION

For these reasons and those already presented, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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