The *Larrabee* Decision is a Missed Opportunity for the D.C. District Court to Criticize, *and* for the Military to Justify, UCMJ Retiree Jurisdiction on Principled Grounds

Dan Maurer*

On November 20, Judge Leon of the U.S. District Court for the District of Columbia issued a memorandum opinion that – while relatively brief – spoke loudly (even employing an exclamation mark! – Slip Op. at 16). He came to a sweeping conclusion that is infrequently made in civilian federal court – that a "structural" element of the Uniform Code of Military Justice (UCMJ), in this case a court-martial's jurisdiction to try a military retiree for conduct that occurred *after* he retired from active duty, was unequivocally *unconstitutional*.

For readers and pundits accustomed to the federal judiciary's robust deference to Congress's military rule making under the Constitution's Art. I, Sec. 8, cl. 14, such a conclusion is nothing short of attention-grabbing. In this essay, I only hope to supplement Jeff Coyle's excellent recent summary and analysis of the case and its possible impacts by highlighting some apparent weaknesses in both the government's case and the district court's reasoning. Reflecting on both, even if this analysis is too hastily drawn, ought to make for better arguments and better case law when the matter is inevitably decided by the Circuit Court, and possibly by the Supreme Court (as Judge Leon wrote, that Court has "never squarely addressed a constitutional challenge to the exercise of court-martial jurisdiction over military retirees" – Slip Op. at 14).

Facts and Procedural History

The facts of the case are straightforward and were not disputed by either party. In 2015, Larrabee retired from Marine Corps as a Staff Sergeant after twenty years of active duty service. His last duty station was at the Marine Corps Air Station in Iwakuni, Japan, and upon his retirement he took up a second career as a bar manager in the local area. He was, shortly thereafter, accused of sexually assaulting one his bartenders and recording it. The victim was not a service-member; the crime occurred off base; he neither employed nor took advantage of government property for his means and methods of perpetrating his crimes; his motives were unrelated to military service; the crime had no discernible effect on the Air Base, the Marine Corps unit stationed there, any Marine stationed there, the Marine Corps writ large, or any mission or operation then being planned or conducted by the Marines.

Rather than a prosecution by local Japanese authorities, he was charged by military authorities, spent three and half months in pre-trial confinement at the direction of military authorities, and the case was referred to a general court-martial by the Marine Corps chain-of-command at the Air Station. He was convicted and sentenced to eight years of confinement and a reprimand. The convening authority suspended all but ten months of the confinement and disapproved the reprimand. Larrabee appealed, arguing that the court-martial lacked jurisdiction to try him because he was retired – that Article 2(a)(6) of the UCMJ was unconstitutional

* Lieutenant Colonel, Judge Advocate and Assistant Professor of Law, U.S. Military Academy at West Point. The opinions and argument in this post are the author's alone and do not represent the official positions of the U.S. government, U.S. Army Judge Advocate General's Corps, or the U.S. Military Academy.

because it exceeded Congress's power to "make rules for the government and regulation of the land and naval forces." Despite this challenge, his conviction was upheld by the Navy-Marine Corps Court of Criminal Appeals in 2017. The Court of Appeals for the Armed Forces (CAAF) summarily affirmed the lower court's decision in 2018. His petition for a writ of certiorari was denied by the Supreme Court in 2019.[1] Thereafter, he collaterally attacked the constitutionality of the court-martial's jurisdiction in U.S. District Court. In this, Larrabee followed an illustrious line of retired or ex-servicemembers collaterally attacking a court-martial's jurisdiction, dating back to *Dynes v. Hoover* (1857) (usually in the Court of Claims or through a petition for a Habeas writ).

The positive law on a court-martial's jurisdiction is also straightforward. Article 2(a)(6) of the UCMJ extends military court-martial jurisdiction to "members of the Fleet Reserve and the Fleet Marine Corps Reserve." As Judge Leon describes it (Slip Op. at 2 and note 1), this is the functional equivalent of the "retired" status that – under Article 2(a)(4) – sweeps in all "retired members of a regular component of the armed forces who are entitled to pay." Moreover, it is well-established that the civil courts will only probe into the propriety of a court-martial when the error is a fundamental one – like not having proper subject matter or in personam jurisdiction (*see, e.g.*, *Ex Parte Reed* (1879), *Ex Parte Mason* (1882), *Keyes v. U.S.* (1883), *Smith v. Whitney* (1886), *Runkle v. U.S.* (1887), *Swaim v. U.S.* (1897), and *Burns v. Wilson* (1953)). Civil courts cannot collaterally review the findings or sentencing of a court-martial. This is, instead, the function of the military appellate system culminating in the CAAF under Article 67, UCMJ and the Supreme Court per 28 U.S.C. § 1259. Judge Leon was correct in asserting that this issue is, indeed, a fundamental "structural" problem that needs clarification, and as such the door to the civilian courthouse is a welcoming one.

The Limits of the Court's Holding

The issue is more complicated, though, than the government acknowledged, or the District Court described. First, we should be clear that the court's logic and holding in *Larrabee* may be limited to cases in which a retired enlisted serviceman in the Fleet Marine Corps Reserve commits misconduct after retirement. The opinion *equates* Larrabee's status to that of a retired member of the regular components (Slip Op. at 2, note 1), but the statute under constitutional scrutiny here is not Article 2(a)(4) ("Retired members of a regular component of the armed forces who are entitled to pay") but rather 2(a)(6) alone ("Members of the Fleet Reserve and

[1] This is not the first time the military appellate court system addressed this issue. In U.S. v. Dinger (2018), the CAAF held that a court-martial could punish a member of the Fleet Marine Corps Reserves, with a punitive discharge, for misconduct committed after retirement. The Supreme Court denied Dinger's petition for a writ of certiorari later that year. Moreover, in January 2020, the Navy-Marine Corps Court of Criminal Appeals held, in U.S. v. Begani (a Fleet Reserve member who committed misconduct after retirement), that Art. 2(a)(6) of the UCMJ was not unconstitutional, and held that it was not an Equal Protection violation. In June 2020, the CAAF granted Begani's petition to address the following question: "whether Article 2, UCMJ, violates appellant's right to equal protection where it subjects the conduct of all Fleet Reservists to constant UCMJ jurisdiction, but does not subject retired reservists to such jurisdiction." Thus, there is no current pathway via the military court-martial appellate system to the Supreme Court to address the constitutionality of Article 2(a)(6), or the UCMJ's jurisdiction over retired service-members more generally, under a theory of Congress's role in making rules for the government and regulation of the land and naval forces. This theory, evidently, will only be tested in the Article III courts.

Fleet Marine Corps Reserve").[2] But it is not clear from the record or the court's opinion why they should be equated for the purposes of UCMJ jurisdiction given Congress's specific intent to use members of the Fleet Reserve differently (see footnote 2 above) and that the UCMJ itself separately enumerates these status classifications.

Furthermore, even assuming the opinion can or should be taken to protect *all* retirees from the long arm of military criminal prosecution, the holding may still be limited to crimes committed *after* the accused's official retirement from the service. It may not, for example, reach cases in which the accused's misconduct occurred before retirement but was discovered afterward, nor cases in which pre-retirement misconduct was known but not acted upon until afterward. While Article 2, UCMJ, does not discriminate along these lines, a federal court undertaking a constitutional analysis of a tribunal's fundamental jurisdiction certainly should consider the interaction between what the Framers envisioned the "make rules" clause to cover and Congress's intention for the UCMJ. Given that the court repeatedly asserted that the primary purpose of the UCMJ is "good order and discipline" (Slip Op. at 12, 16, 17) (more on this claim momentarily), it would seem sensible to have considered the extent to which (if at all) the military's jurisdiction over a retiree's misconduct, having no service-connection and is not "martial" or military in nature, meets this purpose.

The Court's Mischaracterizations and an Anachronistic View of Courts-Martial

The court also seems err with non-trivial details about the character and structure of the "integrated court-martial system." Noting that military law's protection of a service-member's rights is somewhat limited, the court writes: "the UCMJ's protections provide much less comfort to the accused than constitutionally guaranteed rights do because either Congress or the Court of Military Appeals could potentially amend the UCMJ at any time to remove or limit certain procedures or rights" (Slip Op. at 9). While Congress certainly has, and could still, expand due process protections to the accused, I would be concerned that Judge Leon believes a military appellate court, even an Article I court, has authority to "amend the UCMJ" (and would be further concerned if the judge was not aware that the CMA has been the CAAF since 1994).

The court also seems to suggest that due process for accused servicemembers froze with the enactment of UCMJ in 1950 and the first SCOTUS cases interpreting it. Judge Leon relies excessively (citing it nine times in 18 pages) on United States ex rel. Toth v. Quarles (1955) for a

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[2] For background on the difference between the "Fleet Reserve" type of retiree and that under Article 2(a)(4), see the Navy-Marine Corps Court of Criminal Appeals decision in Begani (Slip op. at 8-9). "The Fleet Reserve (and its Marine Corps equivalent, the Fleet Marine Corps Reserve) was established under the Naval Reserve Act of 1938, to serve as a repository to which enlisted members could voluntarily be transferred upon retirement from active duty until they completed 30 years of service. The Fleet Reserve was specifically designed to serve as a trained body of experienced naval Service Members who could be recalled to active duty when needed. Consistent with this underlying purpose, members of the Fleet Reserve are subject to recall to active duty by the Secretary of the Navy "at any time." To that end, they are required to "[m]aintain readiness for active service in event of war or national emergency" and to keep Navy authorities apprised of their location and "any change in health that might prevent service in time of war"; remain "subject at all times to laws, regulations, and orders governing [the] Armed Forces"; and even in peacetime can be required to perform up to two months of active service every four years. In exchange for remaining ready for any rapid recall, they receive a regular salary called "retainer pay," which at least one State court has viewed as payment for current, not past, services rendered" (internal citations omitted).

standard of exacting strict scrutiny that simply does not exist in SCOTUS precedent on military jurisdiction: he seems to see the constitutional basis for court-martial jurisdiction resting two complementary factors: first, the person is "plainly" within the "land and naval forces," and, second, that the exercise of UCMJ jurisdiction is "necessary" for good order and discipline (Slip Op. at 12, 17). *Toth* is still remembered for a few colorful remarks that were strongly critical of military justice's reach of personal jurisdiction: "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III Courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty, or property" and "Military tribunals have not been and probably never can be constituted in such way that they have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts."

For two reasons, Judge Leon's reliance on *Toth* is misplaced. First, the *Toth* Court itself ignored previous SCOTUS descriptions of military justice under the Articles of War from the previous century. In Ex Parte Reed (1879), the Court upheld the lower federal court's denial of a sailor's petition for a writ of habeas corpus under the theory that the petitioner cannot collaterally attack a legitimate military court decision by going to another non-military federal appellate court for a remedy. Of courts-martial, the Court wrote:

> It is the organism provided by law and clothed with the duty of administering justice in this class of cases . . . its judgments, when approved as required, rest on the same basis, and are surrounded by the same considerations which give conclusiveness to the judgments of other legal tribunals.

In Runkle v. US (1887), the Court quoted approvingly Attorney General Bates' 1864 description of courts-martial to President Lincoln:

> The whole proceeding from its inception is judicial. The trial, finding, and sentence are the solemn acts of a court organized and conducted under the authority of and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human rights that are ever placed on trial in a court of justice; rights which, in the very nature of thing, can neither be exposed to danger nor subjected to the uncontrolled will of any man, but which must be adjudged according to law.

And these opinions describing the nature of military justice and its character were in the context of the operative Articles of War, which were of course far less protective of due process and far less "civilianized" than the UCMJ was even by the time they wrote the *Toth* opinion.

The second reason the overreliance on *Toth* is troublesome is that the evidence and argument the *Toth* Court relied on to arrive at its conclusion is no longer true. The Court determined that the UCMJ should not be interpreted to extend jurisdiction over ex-servicemembers (who had been simply discharged, not retired) who committed offenses prior their separation while still on active duty. In reaching this conclusion, the Court drew attention to the myriad ways in which military law compared unfavorably to Article III courts and their protections of an accused's constitutional rights: the latter system has judges appointed for life;

their compensation cannot be diminished while in office; a grand jury is required to indict; you are entitled to be tried by a jury in state where the crime happened; and you possess a right to speedy and public trial. While all of these distinctions are irrefutable, they are also a false dichotomy in today's military justice system.

Since the enactment of the UCMJ in the 1950, and over the course of various major amendments (the most significant being in 1968, 1983, and 2016), Congress has steadily increased the protections it grants to accused in lieu of a conventional constitutional protections; it has also codified methods that further guarantee the protections that *do* come unfiltered from the Constitution. While a servicemember's right to free speech and political participation is indeed constrained, for example, it still exists; while a servicemember's protection against unreasonable searches and seizures may feel reduced by a realistically diminished expectation of privacy, the Fourth Amendment's shield still holds: the requirement for a probable cause-based search warrant ("authorization") issued by a neutral a detached officer of the court (usually) remains, as does the test for what a "reasonable expectation of privacy" is. A servicemember's privilege against self-incrimination never went away, and because of the inherently coercive and hierarchical nature of military life, the UCMJ encoded its protection in Article 31 more than a decade before *Miranda* protected everybody else's Fifth Amendment privilege. There are statutory protections in the UCMJ against double jeopardy, against cruel and unusual punishment; it establishes the right to the assistance of defense counsel, it establishes the right to compulsory process for obtaining witnesses, it establishes a statute of limitations, and it creates the right to appeal the legal and factual sufficiency of a conviction and sentence.

While Judge Leon did briefly acknowledge these developments (Slip Op. at 8-9), he also missed an opportunity to emphasize the chief distinguishing characteristics of military justice that leave it as an idiosyncratic system of criminal law without parallel in the state or federal courts: the criminalization of both martial and non-martial (or service-connected and non-service-connected) conduct and the 800-pound gorilla in the room – the role of the commanding officer as a quasi-investigative, quasi-prosecutorial, and quasi-judicial officer. These features are strongly debated – both fiercely defended and criticized – and must be accounted for and defended in any realistic, rational justification for the current reach of modern American military justice, just as they must be accounted for and assessed in any realistic, rational criticism of that system.

Notwithstanding the unusual features of military law, the Supreme Court has certainly not condemned the Code nor invalidated its more peculiar, militaristic, practices and procedures in recent decades. It seems as if Judge Leon forgot about the message of Schlesinger v. Councilman (1975):

> in enacting the Code, Congress attempted to balance these military necessities against the equally significant interest of ensuring fairness to servicemen charged with a military offense, and to formulate a mechanism by which these often competing interests can be adjusted. As a result, Congress created an integrated system of military courts and review procedures, a critical element of which is the Court of Military Appeals consisting of civilian judges completely removed from all military influence or persuasion.

Furthermore, the *Schlesinger* Court noted that "implicit in the Congressional scheme embodied in the Code is the view that the military court system is adequate to and responsibly will perform its assigned task. We think this congressional judgment must be respected, and that it must be assumed that the military court system will vindicate servicemen's' constitutional rights."

Judicial Respect for a System Whose Primary Purpose is Justice, not Obedience

Of course, cases like *Schlesinger*, *Runkle*, and *Reed* do not deal with the express question presented in *Larrabee*. They deal with another critical subject that speaks to the degree to which courts-martial can be trusted as a due process-respecting tool of law and order: that is, shielding their judgments from collateral attacks in Article III courts. But if the district court wished to suggest that the inherent nature of military justice is inferior in its protections of civil liberties and due process, and that the "demands of good order and discipline" are the "principal objectives" underlying military justice's jurisdictional reach (Slip Op. at 17), Judge Leon should have squared that conclusion with SCOTUS's modern-day approach to describing the UCMJ and courts-martial.

That deferential approach, in light of military law's gradual civilianization and Congress's role in "making rules" for the military, is best articulated in cases like Weiss v. United States (1994). "By enacting the Uniform Code of Military Justice in 1950, and through subsequent statutory changes, Congress has gradually changed the system of military justice so that it has come to more closely resemble the civilian system. But the military in important respects remains a 'specialized society separate from civilian society'" (quoting Parker v. Levy). The Court has also stated: "judicial deference to such congressional exercise of authority 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" (Rostker v. Goldberg (1981)). When addressing a due process challenge – for example, to the non-life tenure positions of military judges in *Weiss* and whether defense counsel should be afforded to accused in Summary Courts-Martial in Middendorf v. Henry (1976) – the court will only ask whether the reasons for the due process sought are so "extraordinarily weighty as to overcome the balance struck by Congress."

Judge Leon's citation to *Middendorf* (Slip Op. at 9, note 4), however, mischaracterizes that case's relevance. Rather than a broad statement of judicial deference it was intended to be, he instead believes it supports his proposition that "the UCMJ's protections provide much less comfort to the accused than constitutionally guaranteed rights do." But *Middendorf*, as his own footnote explains, only held that the due process required under the Fifth Amendment and right to counsel under the Sixth Amendment do not require defense counsel for accused at *summary* courts-martial. That distinction matters: summary courts-martial are not even considered by Congress to be criminal convictions anyway (they are "non-criminal forums").

The Court's contemporary description of the nature of military justice is best articulated in Ortiz v. United States (2018). In explaining why the CAAF and the Supreme Court properly have jurisdiction over the military court system, despite courts-martial being an executive branch function, the Court clearly departed from the kind of parental concern it expressed at the dawn of

the UCMJ during the 1950s. For example, in Reid v. Covert (1957), the Court restricted personal jurisdiction of the UCMJ by removing civilian dependents of servicemembers from its reach. In justifying its conclusion that military law should regulate only a minimum range of people necessary to accomplish its purpose, the *Reid* Court said:

> traditional military justice has been a rough form of justice emphasizing summary procedures, speedy convictions, and stern penalties with a view to maintaining obedience and fighting fitness within the ranks. (at 35) . . .
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> because of its very nature and purpose, the military must place great emphasis on discipline and efficiency. Correspondingly, there has always been less emphasis in the military on protecting the rights of the individual than in civilian society and in civilian courts. (36) . . .
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> Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice (38)

and that its tribunals are "simply executive tribunals whose personnel are in the executive chain of command." But by the second decade of the twenty-first century, the Court was far more generous. In *Ortiz*, Justice Kagan defended the "judicial nature" of courts-martial and its appellate processes. She listed a half-dozen examples where the military system is strikingly similar to a typical civilian criminal justice system (*e.g.*, various due process protections for the accused, an appellate review system, a stable body of governing case and statutory law, the *res judicata* effect of its decisions, offenses – and punishments – that are indistinguishable from civilian jurisdictions) (*Ortiz*, Slip Op. at 8-9). Furthermore, the *Ortiz* Court writes, "courts-martial have operated as instruments of military justice, not (as the dissent would have it) mere 'military command.' . . . [a]s one scholar has noted, courts-martial 'have long been understood to exercise 'judicial' power of the same kind wielded by civilian courts" (Ortiz, *Slip* Op. at 10). In a subsequent footnote (*Ortiz*, Slip Op. at 11, note 5), the court again remarks:

> the independent adjudicative nature of courts-martial is not inconsistent with their disciplinary function, as the dissent claims. By adjudicating criminal charges against service members, courts-martial of course help to keep troops in line. But the way they do so—in comparison to, say, a commander in the field—is fundamentally judicial.

Finally, the Court stated: "when a military judge convicts a service member and imposes punishment . . . he is not meting out extrajudicial discipline. He is acting as a judge, in strict compliance with legal rules and principles—rather than as an arm of military command."

As I have argued elsewhere, it is difficult to reconcile this description of military justice with the older, conventional, view of a commander-driven system that emphasizes the leader's need for obedience and disciplined troops in order to be militarily successful. The view has evolved from one that stressed the system's function as an "instrument" through which military leaders maintained command and control under the most desperate, uncertain, and dangerous of

conditions, to one that sees the system's role as protector of rights and mechanism for achieving "justice" for accused servicemembers and victims of criminal conduct – the benefit to the command is noticeable, but only "incidental." Therefore, *Ortiz's* rationale is incompatible with Judge Leon's outdated description of military justice's *raison d'être*. It is more than a little surprising that he cited William Winthrop's century-old treatise (Slip Op. at 11, note 5) but took no cognizance whatsoever of the Supreme Court's most recent description of the "integrated court-martial system."

But assuming arguendo…

Nevertheless, *even if* we grant that Judge Leon is correct about the prominence of "good order and discipline" (which is not at all clearly the main goal of military justice), and *even if* we assume a common meaning of the phrase (which we should not assume), he seems to ignore the deference the courts give to the military's determination of what "good order and discipline" actually requires in practice. In Parker v. Levy, the Court upheld Articles 133 and 134 against claims of unconstitutional overbreadth (a First Amendment concern) and vagueness (a Fifth Amendment due process concern) as applied to Dr. (Captain) Levy's problematic conversations with junior enlisted soldiers during the Vietnam War. Of the UCMJ, the Court said:

> it cannot be equated to a civilian code . . . while a civilian code carves out a relatively small segment of potential conduct and declares it criminal, the UCMJ essays a more varied regulation of a much larger segment of activities of the more tightly knit military community.

The Court observed that the UCMJ permits scaled forms of discipline for relatively minor offenses in its Article 15 procedure: this makes some forms of command-driven discipline "akin to administrative or civil sanctions" and less like civilian criminal sanctions:

> the availability of these lesser sanctions is not surprising in view of the different relationship of the government to members of the military. It is not only that of lawgiver to citizen, but also that of employer to employee . . . the government is often employer, landlord, provisioner, and law-giver rolled into one. That relationship also reflects the different purposes of the two communities . . . there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian commander in chief and the civilian department heads under him, and its function is to carry out the policies made those civilian superiors.

Consequently, a statute like the UCMJ that criminalizes otherwise constitutionally protected conduct may in fact be perfectly reasonable. Indeed, it may be narrowly tailored to achieve a compelling government interest when it is designed to deter actions that undermine the chain-of-command's ability to manage troops by compelling obedience to lawful orders regardless of the physical risk, unpleasantness, or moral unease such orders induce.[3] A few years after *Parker*, the Court again focused on why Congress could justifiably criminalize such a broad

[3] I use the phrase "narrowly tailored . . ." in the sense of what the Court's review would focus on if it were to review such alleged liberty and due process violations through a strict scrutiny analysis, which the Court usually does *not* articulate when adjudicating the few military cases involving constitutional claims it agrees to hear.

range of conduct and expression: "the inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex, with no time for debate or reflection . . . this becomes imperative in combat, but conduct in combat inevitably reflects the training that precedes combat; for that reason, centuries of experience have developed a hierarchical structure of discipline and obedience to command" (Chappell v. Wallace, 1983).

"Good Order and Discipline" is not a catchphrase, but it is treated like one

All that said, Judge Leon is rightfully skeptical about the government's dubious claim that good order and discipline is enhanced or protected by having this jurisdiction over (at least a certain subset of) military retirees. The government never seeks to define what it means by "good order and discipline." But neither does the court, which makes it very hard to claim non-martial/non-service-connected misconduct has any bearing on the issue. The Preamble to the Manual for Courts-Martial identifies three objects of military law, all aimed at achieving stronger national security: (1) justice, (2) good order and discipline, and (3) efficiency and effectiveness in the military establishment, and in that order. None of these terms are defined or prioritized in the Manual, or in the UCMJ, and not in any military or civilian case law I could find.

The good news is that we get closer to a working definition (or perhaps test) of what the military means when it says "good order and discipline" when we look at how the Manual explains what makes "extramarital sexual conduct" criminalizable under Article 134, UCMJ. At least in *that* context, the Manual explains that it is the behavior's *prejudicial significance*, defined as "conduct that has an obvious, and measurably divisive effect on unit or organization discipline, morale, cohesion, or is clearly detrimental to the authority or stature of or respect toward a Servicemember." Factors to consider include: the accused's rank, grade, or position; the impact on others' ability to "perform their duties in support of the armed forces;" the "misuse" of Government time and resources to facilitate the commission of the conduct;" and a "detrimental effect on unit or organization morale, teamwork, and efficiency."

Conduct "to the prejudice of" good order and discipline as a stand-alone offense has roots dating back even farther than the English articles of war that Judge Leon cites – in fact, all the way back to ancient Roman codes (*see, e.g.*, Arrius Menander, *Libro Tertio de re Militari* ("Military Affairs, Book III"), quoted in C.E. Brand's *Roman Military Law* (1968)). There, as well as in Swedish King Gustavus Adolphus' 1621 Articles, and with the English codes that followed later, this term dealt exclusively with *martial* offenses. Had the government made a full-throated effort to defend this expansive jurisdictional reach, it should have made some effort to acknowledge that – historically – conduct that prejudices good order and discipline tends to fall into certain kinds of recognizable effect-centric categories:

1. acts or omissions that render the individual servicemember less ready to do his duty or perform the mission (*e.g.*, modern codes prohibit and punish absence without leave, unfitness because of excessive alcohol consumption or drugs, and certain types of self-injury and recklessness[4]);

[4] *See, e.g.*, 10 U.S.C. §§ 886, 912, 912a, 914, 934 (for the latter, *see* M.C.M. (2019 ed.), pt. IV, paras. 100 and 107); *and see* British Armed Forces Act (2006), Chapter 52, Section 20.

2. acts or omissions that endanger or harm other servicemembers or government military property (*e.g.*, hazarding a vessel, dangerous flying, maltreating subordinates, hazing[5]);

3. acts or omissions that interfere with command's self-policing law enforcement authorities (resisting arrest, obstructing the police, allowing prisoners to escape, false official statements[6]);

4. acts or omissions that interfere with or degrade the command's ability to execute its mission (AWOL, desertion, making false records, contravention of standing orders, disobedience to lawful commands, disrespecting non-commissioned officers[7]);

5. acts or omissions that aid the enemy in a time of conflict (desertion, misconduct as a sentry or guard, disclosure of information useful to the enemy, mutiny, sedition, espionage[8]);

6. acts or omissions that depict, for no other reason than their inherent scandalous, shocking or immoral nature, the servicemember as something other than a morally-upstanding servicemember, or which embarrass the service itself (disgraceful conduct of a cruel or indecent kind, conduct unbecoming an officer and gentlemen, conduct of a nature to bring discredit upon the armed forces[9]);

7. acts or omissions that prejudice "good order and discipline" for some other case-specific, fact-dependent reason.[10]

With these categories in mind, it could have developed a more focused and persuasive account for how the effect of retiree conduct like Larrabee's meets one or more of these categories, thereby bringing the misdeeds to the attention of a chain-of-command, whose "primary business [is] to fight or be ready to fight wars (here would have been a relevant and reasonable use of *Toth*). Instead, the government relied on two bases alone: (1) that members of the Fleet Marine Corps Reserve are still paid in their retirement by the federal government and (2) their agreement to a status subjecting them to possible recall into active service. Judge Leon does an admirable job of dismantling the government's argument on both fronts (Slip Op. at 12-15) but could also have taken the opportunity to explain what he meant by "good order and discipline" and why a retiree like Larrabee's conduct bore no rational relationship to its meaning. Afterall, to Judge Leon, the "ultimate question" in the case was "whether the Government has adequately demonstrated that court-martial jurisdiction over military retirees is *necessary* to

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[5] *See*, *e.g.*, 10 U.S.C. §§ 893, 893a, 910; *and see* British Armed Forces Act (2006), Chapter 52, Sections 22 and 33.

[6] *See*, *e.g.*, 10 U.S.C. §§ 887a, 896, 907, 931b, 931g; *and see* British Armed Forces Act (2006), Chapter 52, Sections 27, 28.

[7] *See*, *e.g.*, 10 U.S.C. §§ 885, 886, 889, 890, 891, 892. With respect to acts or omissions that are committed in armed conflict and violate the customs, norms, specific prohibitions of the Law of War, by service-members, *see supra*, note 108 (and accompanying text), and *see infra*, note 232 (and accompanying text).

[8] *See*, *e.g.*, 10 U.S.C. §§ 885, 894, 895, 903a; *and see* British Armed Forces Act (2006), Chapter 52, Section 17.

[9] *See*, *e.g.*, 10 U.S.C. §§ 933, 934; *and see* British Armed Forces Act (2006), Chapter 52, Section 23.

[10] *See*, *e.g.*, 10 U.S.C. § 934, *and see* British Armed Forces Act (2006), Chapter 52, Section 19.

maintain good order and discipline" (Slip Op. at 16) (emphasis added). This seemed to be, in actuality, a pointed question directed at Congress.

Judge Leon states that he is "not concluding today that Congress could never authorize the court-martial of some military retirees, but merely that Congress has not shown on the current record why the exercise of such jurisdiction over all military retirees is necessary to good order and discipline" (Slip Op. at 17). This seems like a sensible invitation, and one that Congress should try to answer. Congress has already given the military tools that, ironically, Congress itself could use to make this argument.

First, Congress has provided various types of commanders the responsibility of court-martial convening authority which comes with the quasi-prosecutorial discretion to refer cases to court-martial based in part upon the advice of legal counsel. Second, Congress has directed the president, through the Secretaries of Defense and Homeland Security, to provide "non-binding disposition guidance" to those commanders and their judge advocate legal advisors (see Appendix 2.1, para. 2.1, in the 2019 Manual for Courts-Martial). While these factors are based mostly on civilian prosecutorial standards, they are a fairly inclusive listing of relevant considerations that a military commander would find important when deciding whether to court-martial anybody, including retired members of the military community who are not taking daily orders from within the chain-of-command, nor tasked with contributing to the preparation for, planning of, support to, or fighting in combat.

Conversely, these *same* tools could be used to argue the contrary – in fact, it is probably more difficult to rationally justify a retiree's prosecution for conduct post-retirement when we consider those disposition factors from the point of view of a convening authority and what we think we mean by "good order and discipline" generally. In either case, both the government and the courts owe a more thorough analysis – one that does not make bold assertions without defining its terms and one that acknowledges what the Court in *Ortiz* is now saying about the purpose and nature of military criminal law. This is especially valuable, and necessary, when a question as "fundamental" as the jurisdictional reach of a court-martial is exposed to constitutional scrutiny by civilian courts.