No. 18-306

In the Supreme Court of the United States

STEVEN M. LARRABEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
BRIAN A. BENCZKOWSKI
Assistant Attorney General
JEFFREY M. SMITH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Case—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The summary order of the United States Court of Appeals for the Armed Forces (Pet. App. 1a) is reported at 78 M.J. 107. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 3a-20a) is not published in the Military Justice Reporter but is available at 2017 WL 5712245.

JURISDICTION

The judgment of the Court of Appeals for the Armed Forces was entered on August 22, 2018. The petition for a writ of certiorari was filed on September 14, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a guilty plea before a general court-martial, petitioner, a staff sergeant (E-6) in the United States Fleet Marine Corps Reserve, was convicted on

one specification of sexual assault and one specification of indecent recording, in violation of Articles 120 and 120c of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 920c. See Pet. App. 4a. Petitioner was sentenced to eight years of confinement, a reprimand, and a dishonorable discharge from the military. *Ibid.* The convening authority disapproved the reprimand but otherwise approved the adjudicated sentence. *Ibid.* In accordance with a pretrial agreement, the convening authority suspended confinement in excess of ten months. *Ibid.* The United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) affirmed. *Id.* at 3a-20a. The United States Court of Appeals for the Armed Forces (CAAF) granted discretionary review on an issue not relevant here, *id.* at 2a, and affirmed in a summary order in light of its decision in another case resolving that "granted issue," *id.* at 1a.

1. In September 1994, petitioner enlisted in the United States Marine Corps, just days before his 18th birthday. Prelim. Hr'g Ex. 4, at 1-2. An individual who enlists in the Nation's Armed Forces must serve an initial period of six to eight years of enlistment unless discharged for personal hardship. 10 U.S.C. 651(a) (2012); see 10 U.S.C. 1173; see also 10 U.S.C. 651(a) (Supp. V 2017). Such a servicemember may then voluntarily extend his or her period of enlistment for up to four years, 10 U.S.C. 509, and, if qualified for reenlistment, may reenlist for additional term(s) of active-duty service upon the expiration of his or her prior service obligation, 10 U.S.C. 505(d), 508. Petitioner reenlisted and by July 2012, and through July 2014, he was stationed as an active duty Marine at Marine Corps Air Station (MCAS) Iwakuni in Iwakuni, Japan. See Prelim. Hr'g Ex. 2, at 1.

If an enlisted servicemember desires to be discharged from the Armed Forces after completing his or her service obligation, the servicemember may elect to be discharged. An enlisted active-duty Marine, for instance, may obtain a "discharge"—*i.e.*, a "[c]omplete severance from all military status"—upon completion of his or her enlisted military service obligation. Marine Corps Order 1900.16, Marine Corps Separation and Retirement Manual (MCO 1900.16) ¶¶ 1002.18, 1005.1, 1005.3 (Nov. 26, 2013). An enlisted Marine may also sometimes obtain an early discharge within one year of the expiration of his term of enlistment. 10 U.S.C. 1171; see MCO 1900.16 ¶ 1006.4.b (providing that early discharge is normally granted only within 60 days of such expiration). Once discharged from the Armed Forces, the former servicemember is no longer subject to the UCMJ. See 10 U.S.C. 802(a); see also *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 13, 23 (1955).

An enlisted active-duty Marine may, however, forgo discharge and may elect instead to remain in the Armed Forces by applying either for retired status or for a transfer to the Fleet Marine Corps Reserve. An enlisted Marine with at least 30 years of active service "who applies for retirement" will be granted retired status. 10 U.S.C. 6326(a).[1] The decision to obtain retired status, however, brings with it ongoing service obligations.

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[1] In August 2018, Congress redesignated various sections in Title 10 of the United States Code. As relevant here, Sections 5001, 6326, 6330, 6331, 6333, and 6485 will appear in a future edition of the United States Code as, respectively, Sections 8001, 8326, 8330, 8331, 8333, and 8485. See John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, § 807(a)(1), (b)(15), and (17) (Aug. 13, 2018). For ease of reference, this brief cites the 2012 codification of those provisions.

A retired member of the Marine Corps "may be ordered to active duty * * * at any time," 10 U.S.C. 688(a) and (b)(1), for up to 12 months within any 24-month period during peacetime and for any period of time during a national emergency or war. 10 U.S.C. 688(e)(1) and (f).

Alternatively, an enlisted Marine like petitioner with 20 years of active service "may, at his request, be transferred to the Fleet Marine Corps Reserve." 10 U.S.C. 6330(b). The Fleet Marine Corps Reserve is a component of the Marine Corps, 10 U.S.C. 5001(a)(2), "[t]he purpose of [which] is to maintain a ready manpower pool of trained marines for recall and mobilization," MCO 1900.16 ¶ 7001.2. A member of the Fleet Marine Corps Reserve may therefore be required during peacetime to perform two months of "active duty" for training in each four-year period, 10 U.S.C. 6485(b), and may be ordered to active-duty service for up to 12 months within a 24-month period, 10 U.S.C. 688(a), (b)(3), and (e)(1). In addition, a member of the Fleet Marine Corps Reserve may be "ordered * * * to active duty without his consent" for any period of time during a national emergency or war. 10 U.S.C. 6485(a)(1) and (2); see 10 U.S.C. 688(e)(1) and (f). A member of the Fleet Marine Corps Reserve is "entitled, when not on active duty, to retainer pay." 10 U.S.C. 6330(c)(1).[2]

Like other Marine Corps servicemembers, members of the Fleet Marine Corps Reserve and Marines on the

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[2] After a member of the Fleet Marine Corps Reserve completes a total of 30 years of service, the member transfers to the "retired list of * * * the Regular Marine Corps" if he or she was a member of "the Regular Marine Corps at the time of his transfer to * * * the Fleet Marine Corps Reserve." 10 U.S.C. 6331(a)(1). Upon transfer to the "retired list," the member is then "entitled to retired pay." 10 U.S.C. 6331(c).

retired list of the Regular Marine Corps who are entitled to pay are subject to the UCMJ, 10 U.S.C. 801 *et seq*. See 10 U.S.C. 802(a)(1), (4), and (6).

In August 2015, after petitioner had served 20 years on active duty, Pet. 9, the Marine Corps granted petitioner's request for a transfer to the Fleet Marine Corps Reserve. Pet. App. 5a; see 10 U.S.C. 6330(b).

2. Upon his transfer to the Fleet Marine Corps Reserve, petitioner remained in Iwakuni, Japan, where he worked as a civilian employee of the Defense Commissary Agency. Prelim. Hr'g Ex. 2, at 1. In addition, petitioner managed two local bars located near the front gate of the Marine Corps air station. Pet. App. 5a; see Appellate Ex. IX, at 45; Prelim. Hr'g Ex. 5, at 7. On November 15, 2015, about three months after his transfer to the Fleet Marine Corps Reserve, petitioner sexually assaulted a woman at Teaserz, one of the bars that he managed. Pet. App. 5a; Prosecution Ex. 1, at 3. Petitioner recorded a video of the assault with his cellphone. Pet. App. 5a.

Petitioner's victim, identified here by her initials (KAH), worked as a bartender at Teaserz and was the dependent wife of an active-duty Marine sergeant stationed at MCAS Iwakuni. Prelim. Hr'g Ex. 2, at 1-2; see Appellate Ex. IX, at 47. KAH recalled that, on the night of her assault, after Teaserz had closed for the evening, she and petitioner were drinking and petitioner was "making her drinks as he had in the past." Appellate Ex. IX, at 47. KAH became heavily intoxicated and passed out standing up while leaning against the bar with her head in her arms. Prosecution Ex. 1, at 3. Petitioner admitted that while KAH was passed out and without her consent, he "pulled down her pants and underwear" and digitally "penetrated her vulva." *Ibid*. In

addition, petitioner's cellphone video shows petitioner "having sexual intercourse with [KAH]" while she "appear[s] to be slumped over a bar with her head down." Appellate Ex. IX, at 45. An investigative report describing the video states that "[a]fter ejaculating, [petitioner] is heard telling [KAH] 'you just woke up,' followed by him laughing." *Ibid.*

KAH recalls "waking up with her face on the bar and her pants pulled down," "confused about what had happened," but feeling "like someone had [had] sex with her." Appellate Ex. IX, at 47. She recalls telling petitioner "not to touch her," *ibid.*, and feeling "disgust, confusion, fright, [and] humiliation," Prosecution Ex. 3, at 1. KAH did not initially report her assault, because she feared that she would not be believed, would be blamed for being drunk, would hurt her family, and would be further humiliated. *Ibid.*

Several months later, after KAH told a friend about the assault, the friend persuaded her to report it to authorities. Prosecution Ex. 3, at 2. On March 22, 2016, KAH made an initial report of her assault to military investigators but asked to delay being interviewed until the following day, by which time she had changed her mind and "did not wish to provide any information." Appellate Ex. IX, at 44-45. The following day, after military investigators again attempted unsuccessfully to interview KAH, they interviewed petitioner. *Id.* at 45.

Petitioner provided a voluntary sworn statement in which he admitted to "rubbing the outside of [KAH's] vagina with [his] hand" and to "ha[ving] sex" with KAH while she was "bent over [a] bar stool," but petitioner asserted that the acts were consensual. Prelim. Hr'g Ex. 5, at 8. Petitioner also admitted to recording himself "having sex [with KAH] on [his] iPhone" and provided

his phone to investigators. *Ibid.* Contrary to petitioner's "initial characterization of [KAH] as a willing participant, the video depicts [her] as being unresponsive and uncooperative." Prelim. Hr'g Ex. 2, at 2. After KAH was informed of the video's existence, she cooperated with investigators. See Appellate Ex. IX, at 47.

Petitioner was charged with multiple specifications of sexual assault and one specification of indecent recording, in violation of Articles 120 and 120c of UCMJ, 10 U.S.C. 920, 920c. Charge Sheet 1, 3 (July 6, 2016). Petitioner subsequently entered into a pretrial agreement in which he agreed to plead guilty to one specification of sexual assault and one specification of indecent recording. Appellate Ex. XIII, at 2, 6. In that agreement, petitioner acknowledged that his conviction for sexual assault would require his "dishonorable discharge" from the Armed Forces. *Id.* at 5. Petitioner was convicted on the basis of his guilty plea and was sentenced in accord with his pretrial agreement. See Pet. App. 4a.

3. The NMCCA affirmed in a non-precedential opinion. Pet. App. 3a-20a. As relevant here, the NMCCA "summarily reject[ed]" petitioner's argument that his "transfer[] to the Fleet Marine Corps Reserve three months prior to committing the offenses" rendered the application of the UCMJ to him under Article 2(a)(6), 10 U.S.C. 802(a)(6), "unconstitutional in this case." Pet. App. 4a-5a & n.1. The court relied on its previous decision in *United States* v. *Dinger*, 76 M.J. 552 (N-M. Ct. Crim. App. 2017), aff'd on other grounds, 77 M.J. 447 (C.A.A.F.), cert. denied, No. 18-454 (Nov. 13, 2018). Pet. App. 5a n.1.

Dinger involved a Marine who committed two UCMJ offenses "while he was a member of the Fleet Marine

[Corps] Reserve" and an additional offense after his "transfer[] to the active duty retired list." *Dinger*, 76 M.J. at 554. The NMCCA determined that the servicemember was properly subject to court-martial for those offenses. *Id.* at 554-557. The court reasoned that "[t]he Constitution allows 'Congress to authorize military trial of *members* of the armed services,'" *id.* at 556 (quoting *Reid* v. *Covert*, 354 U.S. 1, 19 (1957)), and that a member of the Fleet Marine Corps Reserve and a retired member of the regular Marine Corps "remain 'members' of the land and Naval forces who may face court-martial," *id.* at 557; see *id.* at 557 n.22. "Unlike [a] wholly discharged veteran * * * whose connection with the military ha[s] been severed," the court explained, "a 'retired member of the . . . Regular Marine Corps' and a 'member of the . . . Fleet Marine Corps Reserve' may be 'ordered to active duty by the Secretary of the military department concerned at any time.'" *Id.* at 556-557 (quoting 10 U.S.C. 688).

In October 2017, the CAAF granted discretionary review in *Dinger* limited to a different issue in that case, namely, whether a court-martial may lawfully sentence a retiree to a punitive discharge from the armed forces. *United States* v. *Dinger*, 77 M.J. 65. Cf. *Dinger*, 76 M.J. at 557-559 (NMCCA's resolution of that separate issue).

4. Meanwhile, petitioner petitioned the CAAF for discretionary review under 10 U.S.C. 867(b) on three issues, including whether "Article 2(a)(6), UCMJ, [is] unconstitutional" to the extent that it applies the UCMJ to this case, and whether "a court-martial [may] sentence a retiree to a punitive discharge." Pet. C.A.A.F. Supp. to Pet. for Grant of Review at v (Jan. 24, 2018) (capitalization altered).

The CAAF granted review on only the punitive-discharge issue that was already pending before it in *Dinger*. Pet. App. 2a; see *Dinger*, 77 M.J. at 65 (granting review). The CAAF's order granting review accordingly directed that "[n]o briefs w[ould] be filed" in petitioner's case. Pet. App. 2a. In June 2018, the CAAF issued its decision in *Dinger*, affirming the NMCCA's determination that a military retiree can be sentenced by a court-martial to a punitive discharge. *United States* v. *Dinger*, 77 M.J. 447, 452-454 (C.A.A.F.), cert. denied, No. 18-454 (Nov. 13, 2018).

The CAAF subsequently issued its summary order in this case. 78 M.J. 107 (identifying the order as a summary disposition). The one-sentence order states that "[o]n further consideration of the granted issue, 77 M.J. 328 (C.A.A.F. 2018), and in light of *United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018)," the decision of the NMCCA "is hereby affirmed." Pet. App. 1a.

ARGUMENT

Petitioner contends (Pet. 14-22) that in authorizing his court-martial as a member of the Fleet Marine Corps Reserve in Article 2(a)(6) of the UCMJ, 10 U.S.C. 802(a)(6), Congress exceeded its authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14. Petitioner further contends (Pet. 22-26) that this Court has jurisdiction to review the CAAF's decision under 28 U.S.C. 1259, even though the CAAF granted review in this case only on a different issue and did not decide the question that petitioner presents for this Court's review. Both contentions are incorrect. This Court lacks jurisdiction to resolve a question that the CAAF has not decided. And in any event, Congress permissibly authorized the court-martial of members of the Fleet

Marine Corps Reserve, and petitioner identifies no conflict of authority on that question that might warrant this Court's review. No further review is warranted.

1. This Court lacks jurisdiction to decide the question petitioner presents because that question was not resolved by the CAAF's decision in this case. Petitioner errs in contending (Pet. 22-25) that this Court may reach his question under the jurisdictional grant in Section 1259(3).

a. Section 1259 grants this Court authority to review by writ of certiorari only "[*d*]*ecisions* of the [CAAF]" in specified categories of cases. 28 U.S.C. 1259 (emphasis added). Among other things, Section 1259 confers authority to review such "[d]ecisions," *ibid.*, in cases identified by Section 1259(3), *i.e.*, in cases in which the CAAF has granted the petition for review of an accused. 28 U.S.C. 1259(3); see 10 U.S.C. 867(a)(3). Where, as here, the CAAF has granted review on only one issue, see Pet. App. 2a, and the CAAF's "decision" thus resolves only that "granted issue," *id.* at 1a, this Court lacks authority to resolve different issues that were not part of that decision. Accordingly, because the CAAF did not address the constitutionality of Article 2(a)(6) in its decision here, this Court lacks authority to consider that question in this case.

Section 1259's grant of authority to review "decisions" of the CAAF by writ of certiorari in certain military cases precludes this Court's adjudication of other issues not resolved in such "decisions." By 1983, when Congress enacted Section 1259 to authorize certiorari review of decisions of the Court of Military Appeals (CMA), the CAAF's predecessor, Congress had vested the CMA (now the CAAF) with discretionary authority to grant an accused's petition for review for "good cause

shown" in cases reviewed by a court of military review (now a military court of criminal appeals). 10 U.S.C. 867(b)(3) (1982) (now codified at 10 U.S.C. 867(a)(3)). But Congress expressly provided that, "[i]n a case reviewed upon petition of the accused," "action [by the CMA] need be taken *only* with respect to *issues specified in the grant of review*." 10 U.S.C. 867(d) (1982) (emphases added); accord 10 U.S.C. 867(c) (current codification). That express qualification on the scope of the CMA's action reflects that the CMA's decision affirming or reversing an earlier decision by a court of military review would be a decision on the issues actually decided by the CMA, which need not extend beyond the "issues specified in the grant of review." 10 U.S.C. 867(d) (1982); accord 10 U.S.C. 867(c). Section 1259's grant of discretionary authority to this Court to review "[d]ecisions of the [CMA]" in such cases, 28 U.S.C. 1259 (Supp. I 1983), was thus limited to review of the issues actually decided by the CMA's decision. The same holds true today with respect to the Court's review of "[d]ecisions of the [CAAF]," 28 U.S.C. 1259, whose decisional action is similarly qualified, see 10 U.S.C. 867(c).

The limitation of review to issues actually decided by the CAAF reflects Congress's concern with burdening this Court's docket with a new class of cases for review. S. Rep. No. 53, 98th Cong., 1st Sess. 9 (1983) (*Senate Report*). Congress determined that Section 1259 should vest this Court with authority to conduct certiorari review of certain CMA decisions, because the CMA was itself a tribunal independent from military control and "no other major federal judicial body [existed] whose decisions [we]re similarly insulated from direct Supreme Court review." *Id.* at 8-9. But Congress followed the Department of Justice's recommendation to authorize

this Court's discretionary review in circumstances in which "a *decision* of the [CMA] affected military jurisprudence" by enacting legislation "[t]o limit" the new authorization for direct review in such a way as to "permit the Supreme Court to consider issues of public importance" while otherwise "preserv[ing] the role of the [CMA]" as the primary "interpreter of the [UCMJ]." *Id.* at 33 (emphasis added; citation omitted). Allowing review even of issues that the CMA (now the CAAF) has not resolved in a particular case would undermine Congress's deliberate restriction of review to "decisions" in which the CMA or CAAF is setting or applying precedent.

b. Petitioner's arguments for why the CAAF's "decision" may include issues that the CAAF did not decide are unsound.

First, petitioner contends (Pet. 23) that Section 1259 is similar to Section 1254(1), under which this Court may "consider the entire dispute"—not just issues actually decided—when it grants a writ of certiorari to a court of appeals. But Congress gave this Court much broader authority in Section 1254 by extending certiorari review to "[*c*]*ases* in the courts of appeals." 28 U.S.C. 1254 (emphasis added). Section 1259, in contrast, authorizes more limited review of "[*d*]*ecisions* of the [CAAF] * * * *in* [certain types of military] *cases*." 28 U.S.C. 1259 (emphases added). Section 1259's drafters thus specifically "contrast[ed] the limits in the [text they adopted for Section 1259] to the absence of limits on the reviewability of final decisions from the United States Court of Appeals." *Senate Report* 11.

Moreover, unlike Section 1259, Section 1254 evolved from a statutory provision that itself specified that this Court's certiorari review of cases in the court of appeals

conferred the "same power and authority * * * as if the cause had been brought [to this Court] by unrestricted writ of error or appeal." 28 U.S.C. 347(a) (1925); see 66 Cong. Rec. 2919 (1925) (statement of Sen. Cummins) (provision confirmed the Court's preexisting power to review "the entire merits of the controversy, whatever the controversy may be"). Although the recodification of that provision in 1948 omitted that additional language, the revision "preserve[d] existing law" and accordingly "retain[ed] the power of unrestricted review of cases * * * brought up on certiorari." 28 U.S.C. 1254 note; see *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) ("[N]o changes of law or policy are to be presumed from changes of language" in the 1948 codification "unless an intent to make such changes is clearly expressed."). Section 1259, by contrast, evolved from a longstanding tradition in which this Court did not have any authority to conduct direct review in court-martial cases. See *Senate Report* 8-9, 32-33. Indeed, before Section 1259's enactment in 1983, federal-court review in a military case was limited to the adjudication of "collateral proceedings" such as habeas corpus proceedings. *Id.* at 32-33.

Second, petitioner focuses (Pet. 23-25) on Section 867a(a), which provides that although "[d]ecisions of the [CAAF] are subject to review by the Supreme Court by writ of certiorari as provided in [S]ection 1259," this Court "may not review by a writ of certiorari under this section any action of the [CAAF] in refusing to grant a petition for review." 10 U.S.C. 867a(a). Petitioner contends (Pet. 23-25) that the government's view of jurisdiction "rises and falls on 10 U.S.C. § 867a(a)," which petitioner then asserts was "enacted six years after § 1259(3)"

and, for that reason, should not be understood as a partial implied repeal that "narrow[s] the scope of § 1259(3)." Petitioner's contention is flawed in multiple respects.

To begin with, petitioner errs in viewing Section 867a(a) as the source of a freestanding limitation on the scope of review. In doing so, petitioner disregards Congress's textual limitation in Section 1259 restricting this Court's jurisdiction to a review of "[d]ecisions of the [CAAF]," 28 U.S.C. 1259, and Congress's instruction that a CAAF decision embodying action on an accused's petition for review need be made "*only* with respect to issues specified in the [CAAF's] grant of review," 10 U.S.C. 867(c) (emphasis added). As explained above, those provisions *themselves* limit review to the issues resolved by the CAAF in its decision in this case. See pp. 10-12, *supra*. Section 867a(a) reinforces that conclusion by making clear that Section 1259's grant of authority to review "[d]ecisions of the [CAAF]" does not authorize review of any action of the CAAF "in refusing to grant a petition for review." 10 U.S.C. 867a(a).

Petitioner further errs in asserting that the language in Section 867a(a) postdates Section 1259(3). The text of Section 867a(a) was in fact enacted in 1983 as 10 U.S.C. 867(h) (Supp. I 1983) in the same Act and on the same page of the Statutes of Large as Section 1259(3). See Military Justice Act of 1983, Pub. L. No. 98-209, § 10(a)(1) and (c)(2), 97 Stat. 1406. Congress later moved that text from Section 867(h) to Section 867a(a) without material change. National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1301(a)(1) and (b), 103 Stat. 1569. Petitioner's chronological contentions and his arguments about subsequent congressional repeals by implication are therefore misplaced and without merit.

And at bottom, petitioner effectively asks this Court to do what Section 867a(a) forbids. The CAAF refused to grant petitioner's request to review the Article 2(a)(6) issue reflected in the question that petitioner now presents to this Court. See pp. 8-9, *supra*. Although petitioner included that request in the same filing in which he sought review of other issues, his petition was effectively denied in relevant part. The CAAF's decision affirming the NMCCA in this case was limited to its further "consideration of the granted issue" that had since been resolved in *Dinger*. Pet. App. 1a. Because petitioner does not seek review on any issue resolved by the CAAF's decision in this case, this Court lacks authority to grant his certiorari petition.

Finally, petitioner appears to suggest (Pet. 25-26) that the Court should assert jurisdiction over the Article 2(a)(6) issue that he presents on the theory that the issue might otherwise evade review altogether. He posits (*ibid.*) that the CAAF might not itself decide that issue in the future and "collateral relief via habeas corpus may be unavailable." But petitioner's tentative statement that habeas relief "may" be unavailable itself indicates the potential for further consideration of the question presented in the courts of appeals. Thus, even if the question presented warranted review, no need exists to stretch this Court's direct-review jurisdiction over the CAAF in order to consider it.

As petitioner himself acknowledges, federal courts do not abstain from adjudicating habeas petitions during the pendency of court-martial proceedings when the habeas petitioner challenges a military tribunal's authority to try him or her on the purely legal ground that he or she is part of a "class[] of offenders who may [not] constitutionally be subjected to trial" by court-martial.

Pet. 15 (citing, *e.g.*, *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975)). That involves the same type of challenge as petitioner makes here. Petitioner contends that Article 2(a)(6) is unconstitutional because it authorizes the court-martial of members of the Fleet Marine Corps Reserve like petitioner who, in petitioner's view, cannot be constitutionally subjected to trial by court-martial. Pet. 5, 12-20. Thus, even on petitioner's view, that question could be considered in other cases in the regional courts of appeals. And the absence of a division of authority on that question underscores that review is unwarranted here.

2. In any event, even assuming the Court had jurisdiction, petitioner's underlying contentions lack merit. "The Constitution grants to Congress the power '[t]o make Rules for the Government and Regulation of the land and naval Forces.'" *Solorio* v. *United States*, 483 U.S. 435, 438 (1987) (quoting U.S. Const. Art. I, § 8, Cl. 14). Congress "[e]xercis[ed] this authority" when it "empowered courts-martial to try servicemen for the crimes proscribed by the U.C.M.J.," *ibid.*, including—in Article 2(a)(6)—servicemen who are "[m]embers of the * * * Fleet Marine Corps Reserve," 10 U.S.C. 802(a)(6). That provision is constitutional because members of the Fleet Marine Corps Reserve are part of the Nation's land and naval forces.

a. This Court has long "interpreted the Constitution" as defining the scope of Congress's authority to subject an individual to military court-martial "on one factor: the military status of the accused." *Solorio*, 483 U.S. at 439. The constitutional test under the UCMJ is therefore "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval

Forces.'" *Ibid.* (quoting *Kinsella* v. *United States ex rel. Singleton*, 361 U.S. 234, 241 (1960)).

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

Congress has determined that the Fleet Marine Corps Reserve—like the Regular Marine Corps and the Marine Corps Reserve—is a component of the United States Marine Corps. 10 U.S.C. 5001(a)(2). Petitioner does not dispute that members of the Marine Corps are members of the Armed Forces. See 10 U.S.C. 101(a)(4). And Congress has accordingly determined that servicemen like petitioner who are transferred upon their *own request* to the Fleet Marine Corps Reserve after 20 or more years of active service rather than being discharged from the Armed Forces, see pp. 3-4, *supra*, are part of the Nation's land and naval forces subject to court-martial. See 10 U.S.C. 802(a)(6). That determination is consistent with this Court's own longstanding recognition that "[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall" and to punishment by "'military court-martial.'"

Barker v. *Kansas*, 503 U.S. 594, 599, 600 n.4 (1992) (quoting *United States* v. *Tyler*, 105 U.S. 244, 246 (1882)); see also, *e.g.*, *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981) ("The retired officer remains a member of the Army and continues to be subject to the Uniform Code of Military Justice.") (internal citation and footnote omitted).[3]

Petitioner acknowledges (Pet. 7) that courts have "consistent[ly]" understood "[f]or over a century" that "military retirees could constitutionally be subject to court-martial." That foundation for a court-martial is particularly strong in the context of this case, where petitioner elected not to be discharged from the Armed Forces upon the expiration of his period of enlistment and instead *affirmatively requested* to be transferred to the Fleet Marine Corps Reserve, the servicemembers of which are paid "retainer pay" when not on active duty and, in addition, can be required to serve on active duty for training two months every four-year period and can be ordered to active duty during peacetime and war. See p. 4, *supra*; cf. *Ortiz* v. *United States*, 138 S. Ct. 2165, 2187 n.2 (2018) (Thomas, J., concurring) (stating that servicemembers "consent" to court-martial authority "when they enlist."). Indeed, one of the penalties imposed in this case was a dishonorable discharge,

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[3] Colonel Winthrop, who this Court has repeatedly denominated "the 'Blackstone of Military Law,'" *Ortiz* v. *United States*, 138 S. Ct. 2165, 2175 (2018) (citation omitted), likewise explained more than a century ago that the proposition that "retired officers are a part of the army and so triable by court-martial [is] a fact indeed never admitting of question." William Winthrop, *Military Law and Precedents* 87 n.27 (2d ed. 1920) (posthumous reprint of 1896 edition). Cf. Act of Feb. 14, 1885, ch. 67, 23 Stat. 305 (creating retired list for enlisted members of the Army and Marine Corps to which transfer was authorized after 30 years of service).

which petitioner himself recognized was a required punishment, see Appellate Ex. XIII, at 5; p. 7, *supra*, and which necessarily reflects petitioner's military status. No sound basis exists for overturning Congress's judgment that servicemembers like petitioner are part of the Nation's Armed Forces subject to court-martial under the UCMJ.

b. Petitioner contends (Pet. 16) that this Court's "decision in *Barker* necessarily vitiated the rationale upon which the lower courts had long relied" in holding that "retired servicemembers" are subject to court-martial, because, according to petitioner, "*Barker* held" that "Congress treats retiree pay as tantamount to a pension" and therefore suggests that retiree pay is "paid to a former servicemember" rather than a "current one." See Pet. 8 (stating that *Barker* "washed away" the lower courts' rationale). That is incorrect. *Barker* merely held that, "[*f*]*or purposes of 4 U.S.C. § 111*, military retirement benefits are to be considered deferred pay for past services." *Barker*, 503 U.S. at 605 (emphasis added).

Barker addressed whether Section 111—which provides that the United States consents to certain nondiscriminatory state "taxation of pay or compensation for personal service" as a federal officer or employee—prohibited Kansas from taxing the federal benefits received by military retirees, where the State did not tax benefits received by retired state and local employees. *Barker*, 503 U.S. at 596 (quoting 4 U.S.C. 111). The Court applied its Section 111 jurisprudence, which requires a determination "whether the inconsistent tax treatment is directly related to, and justified by, significant differences between the two classes." *Id.* at 598

(citation and internal quotation marks omitted). In applying that test, the Court concluded that "Congress *for many purposes* does not consider military retirement pay to be current compensation for current services," and ultimately concluded that similar treatment was warranted for purposes of Section 111. *Id.* at 604-605 (emphasis added). As a result, *Barker* addresses how to characterize the nature of military retirement benefits in a particular statutory context; it does not address whether servicemembers like petitioner who have been transferred on their request to the Fleet Marine Corps Reserve remain members of the Nation's land or naval forces for whom Congress may establish rules governing prosecution under the UCMJ.

To the contrary, *Barker* itself stated that "[m]ilitary retirees *unquestionably remain in the service* and are subject to restrictions and recall" as well as to ongoing punishment by "'military court-martial.'" *Barker*, 503 U.S. at 599, 600 n.4 (emphasis added; citation omitted). The Court also made clear that its precedents recognized that "although military retirement pay bears some of the features of deferred compensation, two indicia of retired military service include a restriction on activities and a chance of being recalled to active duty." *Id.* at 602. For that reason, the Court has recognized "the possibility that Congress intended military retired pay to be *in part current compensation* for those risks and restrictions" and warned that "States must tread with caution in this area, lest they disrupt the federal scheme." *Ibid.* (quoting *McCarty*, 453 U.S. at 224 n.16) (emphasis altered).

In any event, the "retainer pay" paid to members of the Fleet Marine Corps Reserve like petitioner, 10 U.S.C. 6330(c)(1), clearly represents at least in part current

compensation for petitioner's continued status as a member of the Armed Forces. A similarly situated Marine who opted to be discharged upon completion of his term of enlistment would not receive any retainer pay, even if the Marine had provided the Nation exactly the same past military service as petitioner. The difference that warrants retainer pay is petitioner's continued status as a member of the Armed Forces. Although the amount of an enlisted servicemember's retainer pay is largely based on the pay grade he or she previously obtained and the duration of his or her past service, see 10 U.S.C. 6330(c)(1), 6333(a) (Formula C); see also 10 U.S.C. 1406(d), 1407, 1409(a)(2) and (b)(1), that payment calculation is a reflection of how the government determines the appropriate compensation for a servicemember's ongoing role as a member of the Fleet Marine Corps Reserve.

Petitioner asserts (Pet. 18) that an individual's status as a member of the Armed Forces should not be based on the fact that he or she may be ordered back to active-duty status because that rationale is "generally anachronistic." Nothing is anachronistic about the statutory duty of experienced servicemembers in retired status to be ordered to active service. In both Iraq wars, for instance, "'retired personnel of all services were actually recalled,'" illustrating "Congress' continued interest in enforcing good order and discipline amongst those in a retired status." *United States* v. *Dinger*, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (citation omitted), aff'd on other grounds, 77 M.J. 447 (C.A.A.F.), cert. denied, No. 18-454 (Nov. 13, 2018). In any event, petitioner provides no sound basis for judging the scope of Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const.

Art. I, § 8, Cl. 14, by the perceived likelihood that Congress will in the future call up servicemembers for active-duty service.[4]

Petitioner posits (Pet. 19) that the rationale of the NMCCA's decision in *Dinger* would allow anyone required to register with the Selective Service System to be constitutionally subject to court-martial. But any such hypothetical scenario, involving a statute that Congress has never enacted, was not at issue in *Dinger*. In any event, petitioner's hypothetical is misconceived. To the extent that petitioner suggests that individuals "select[ed] and induct[ed] into the Armed Forces" under the Selective Service System, 50 U.S.C. 3803(a) (Supp. V 2017), would be subject to the UCMJ (if Congress were to reinstate the draft),[5] such individuals would become members of the Armed Forces, and the application of the UCMJ to them would be entirely appropriate. But to the extent that petitioner suggests that the mere possibility of such selection and induction is

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[4] Petitioner notes (Pet. 18 n.11) that Congress has not generally made inactive reservists subject to the UCMJ when they are not serving on active duty or inactive-duty training. See 10 U.S.C. 802(d) (2012 & Supp. V 2017). But see 10 U.S.C. 802(a)(5) (making retired members of a reserve component subject to the UCMJ when they receive hospitalization by an armed force). But that statutory limitation on the application of the UCMJ simply reflects Congress's evaluation of policy considerations specific to reserve service, not a constitutional limitation on Congress's Article I power.

[5] The authority to induct individuals into the Armed Forces under Section 3803 expired 45 years ago. See 50 U.S.C. 3815(c) (Supp. V 2017) ("Notwithstanding any other provisions of this chapter, no person shall be inducted for training and service in the Armed Forces after July 1, 1973, except [for persons with draft deferments upon the expiration of their deferments]."). For that reason, "any actual conscription would require further congressional action." *Rostker* v. *Goldberg*, 453 U.S. 57, 60 n.1 (1981).

enough to subject an individual to the UCMJ, petitioner is incorrect. The constitutional test under the UCMJ is "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.'" *Solorio*, 483 U.S. at 439 (citation omitted). The mere possibility that an individual might in the future become a member of the Armed Forces is insufficient to satisfy that test. Petitioner, by contrast, was already a member of the Armed Forces, decided not to be discharged therefrom, and was transferred from active-duty service to the Fleet Marine Corps Reserve upon his own request. The only contingency is whether he will be recalled to active duty, not whether he is still enrolled in the Marine Corps. By his own choice to be transferred to the Fleet Marine Corps Reserve, petitioner remains a member of the Armed Forces subject to the UCMJ.

c. Finally, petitioner contends (Pet. 21-22) that even if he remains a member of the Armed Forces, Congress's constitutional authority to apply the UCMJ to servicemembers in the Fleet Marine Corps Reserve should be limited to "offense[s] hav[ing] some relationship to the [individual's] military status." But this Court in *Solorio* specifically rejected a "service connection" limitation, *Solorio*, 483 U.S. at 436, on Congress's authority "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14. The Court found "no indication" in Article I's text that "the grant of power in Clause 14 [of Section 8] was any less plenary than the grants of other authority to Congress in the same section." *Solorio*, 483 U.S. at 441. The Court also emphasized that the

"service connection requirement" that had been imposed by *O'Callahan* v. *Parker*, 395 U.S. 258 (1969)—which *Solorio* expressly overruled—had resulted in "confusion" stemming from "the complexity" of applying that requirement in the context of actual cases. *Solorio*, 483 U.S. at 449. Petitioner offers this Court no path for avoiding the "confusion [previously] wrought" by the service-connection requirement, *id.* at 450, which no court has ever attempted to reimpose in any military context. Like petitioner's primary argument—which would inject uncertainty into *whether* someone is a servicemember—petitioner's alternative argument would introduce confusion into an area that has long been understood to follow clear rules. No sound basis exists for this Court's review of either contention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
BRIAN A. BENCZKOWSKI
Assistant Attorney General
JEFFREY M. SMITH
Attorney

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