LARRABEE AT THE DISTRICT COURT: MISUNDERSTANDING MILITARY CRIMINAL LAW BY THE ARTICLE III JUDICIARY IS FAR FROM RETIRED

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The U.S. military's criminal justice system is little understood by the public, by Congress, or by the Courts. Despite more than seventy years of steady "civilianization" (I prefer the less condescending "de-militarizing") of its arcane and idiosyncratic features, and despite the U.S. Supreme Court recognizing its "inherently judicial nature" (as opposed to a mere instrument of command discipline) as recently as 2018,[1] federal Article III judges conducting the occasional collateral review of courts-martial still seem to struggle with the nature of the military's internal law for "good order and discipline" and what has come to be called the "Toth Doctrine."[2] As a result, reviewing federal courts' degree of deference – and their explanation of Congress's reasoning for how it has constructed military justice as a unique balance of national security and due process equities – is sometimes jumbled, misleading, and historically inconsistent.

Such is the case in *Larrabee v. Braithwaite*,[3] a recent de novo review out of the U.S. District Court for the District of Columbia, which took the unusual step of holding part of the military justice's personal jurisdiction scheme unconstitutional – not as a due process or equal protection violation, but for exceeding Congress's authority under its "make rules for the regulation and government of the land and naval forces" clause of Article I.[4] This misreading is not ameliorated by the District Court's (probably) correct (or at least fair) outcome; rather, it suggests that Congress – and the military – must a do a better job articulating

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1. Ortiz v. United States, 138 S. Ct. 2165, 2168 (2018).
2. *See infra* Section III.A.
3. No. CV 19-654 (RJL), 2020 WL 6822706 (D.D.C. Nov. 20, 2020).
4. U.S. CONST. art I, § 8.

and supporting its own rationales for its structural choices that look so peculiar to civilian observers and unnecessarily confuse civilian courts.

I. INTRODUCTION

On November 20, 2020, 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!) to Congress and to military court-martial convening authorities.[5] The Court 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.[6] The U.S. Supreme Court has "never squarely addressed a constitutional challenge to the exercise of court-martial jurisdiction over military retirees," [7] so this District Court's decision is an important first look at how the Article III judiciary may approach this species of criminal jurisdiction question long held to be within the singular province of a specialized Article I tribunal. For a field of law accustomed to the federal judiciary's robust deference to Congress's military rule making under the Constitution's Art. I, Sec. 8, cl. 14,[8] the court's conclusion is nothing short of attention-grabbing.[9]

This is not the first foray by civilian courts into the UCMJ's long arm of personal jurisdiction. It is of the same nature as the Supreme Court's invalidation,

5. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *6 (D.D.C. Nov. 20, 2020). Court-martial convening authorities are those military officers in command of specified types of organizations and units, as well as certain civilians (the President, the Secretary of Defense, and the Secretary of the armed service [*e.g.*, Department of the Army, Department of the Navy, Department of the Air Force]), who – at their discretion – may refer a matter to a court-martial based on a probable cause determination and advice from their servicing staff judge advocate. *See* 10 U.S.C. §§ 82–224, and § 834 (Articles 22-24 and 34, UCMJ). These convening authorities also have discretionary authority to dismiss or withdraw charges (Rules for Courts-Martial 402 and 604), to approve a guilty plea (Article 53a, UCMJ), to determine which subordinate officers will serve as fact-finding panel members (Article 25(e)(2), UCMJ), to order depositions (Article 49, UCMJ), and have a limited range of post-conviction clemency discretion (Article 60a, UCMJ). In most relevant ways, these convening authorities – though they are not lawyers or officers of any court – act with the authority of a civilian district attorney. The literature both criticizing and defending this unique aspect of military justice is too voluminous to recount here, other than to direct the reader to some of the more well-known arguments: Curry v. Secretary of the Army et al., 595 F.2d 873, 878 (D.C. Cir. 1979); Donald Hansen, *Judicial Functions of the Commander*, 41 MIL. L. REV. 1 (1968); Richard B. Cole, *Prosecutorial Discretion in the Military Justice System: Is it Time for a Change?*, 19 AM. J. CRIM. L. 395 (199–192); Gen. William C. Westmoreland, *Military Justice—A Commander's Viewpoint*, 10 AM. CRIM. L. REV. 5 (1970).

6. *Larrabee*, 2020 WL 6822706, at *1.

7. *Id.* at *5.

8. Rostker v. Goldberg, 453 U.S. 57, 65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference"), and Orloff v. Willoughby, 345 U.S 83, 93–94 (1953) ("But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates . . . [and] [o]rderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters").

9. Jeff Coyle, *Analysis: Larrabee v. Braithwaite*, CAAFLOG (Nov. 23, 2020), https://www.caaflog.org/home/analysis-larrabee-v-braithwait [https://perma.cc/QVS9-94U6].

in 1957, of the military's jurisdiction over civilian dependents accused of crimes living with active duty servicemembers overseas;[10] it is of the same nature as the Court's invalidation, in 1955, of the military's jurisdiction over discharged ex-servicemembers for crimes committed before they left the service.[11] But, six decades later, the District Court's decision in *Larrabee* evinces previous Article III court decisions about military justice for another, more problematic, reason. It is far from the first time that civilian judges – as well as the government arguing in defense of the Defense Department's code of discipline – have inexplicably mischaracterized the nature of the military's "integrated court-martial system,"[12] even if the court's holding was, ultimately, the right one. There is a long tradition, since the 1950 enactment of the Uniform Code of Military Justice, of the Supreme Court granting *certiorari* to determine whether Congress's extension of court-martial jurisdiction over a person not actively in the armed forces survives constitutional scrutiny. In all such cases, the Court has pushed the class of persons out of the UCMJ's reach, against the military's objections of "disciplinary" necessity and customary military tradition.[13] The *Larrabee* facts foreshadow more of the same, but the *Larrabee* opinion will not provide the necessary analytical coherence that the superior courts should rely on. This article will highlight some apparent weaknesses in both the government's case and the district court's reasoning.

II. *LARRABEE*'S REACH

A. Facts and Procedural History

The facts of the case are straightforward and were not disputed by either party.[14] In 2015, Larrabee retired from Marine Corps as a Staff Sergeant after twenty years of active duty service.[15] 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.[16] He was, shortly thereafter, accused of sexually assaulting one of his bartenders and recording it.[17] The victim was not

10. Reid v. Covert, 354 U.S. 1 (1957).

11. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

12. Ortiz v. United States, 138 S. Ct. 2165, 2170 (2018).

13. *Toth*, 350 U.S. 11 (Uniform Code of Military Justice [UCMJ] jurisdiction over ex-service members for crimes committed during their service is unconstitutional); *Reid*, 354 U.S. 1 (UCMJ jurisdiction over civilian dependents, accused of capital offenses, accompanying service member overseas is unconstitutional); Kinsella v. United States *ex rel*. Singleton, 361 U.S. 234 (1960) (applying *Reid* to non-capital offenses); Grisham v. Hagan, 361 U.S. 278 (1960) (UCMJ jurisdiction in peacetime over capital offenses by civilian employees of the Armed Forces serving in a foreign country is unconstitutional); McElroy v. United States *ex rel*. Guagliardo, 361 U.S. 281 (1960) (applying *Grisham* to non-capital offenses).

14. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *1 (D.D.C. Nov. 20, 2020).

15. *Id.*

16. *Id.*

17. *Id.*

a service member, though was married to a Marine sergeant;[18] the crime occurred off base;[19] 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.[20] He was convicted and sentenced to eight years of confinement and a reprimand.[21] The convening authority suspended all but ten months of the confinement and disapproved the reprimand.[22] 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 because it exceeded Congress's power to "make rules for the government and regulation of the land and naval forces."[23] Despite this challenge, his conviction was upheld by the Navy-Marine Corps Court of Criminal Appeals in 2017.[24] The Court of Appeals for the Armed Forces (CAAF) summarily affirmed the lower court's decision in 2018.[25] His petition for a writ of certiorari was denied by the Supreme Court in 2019.[26] Thereafter, he collaterally attacked the constitutionality of the court-martial's jurisdiction in U.S. District Court.[27]

In this, Larrabee followed an illustrious line of retired or ex-servicemembers collaterally attacking a court-martial's jurisdiction, dating back to *Dynes v.*

18. Brief for Respondent at 5, Larrabee v. United States, 139 S. Ct. 1164 (2019) (No. 18-306). Thanks to Dwight Sullivan for bringing this fact (which is not discussed in the District Court's opinion) to the author's attention.

19. *See Larrabee*, 2020 WL 6822706, at *1.

20. United States v. Larrabee, No. 201700075, 2017 WL 5712245, at *1 (N.M. Ct. Crim. App. 2017).

21. *Larrabee*, 2020 WL 6822706, at *1.

22. *Id.*

23. *Id.* at *1, 3.

24. *Larrabee*, 2017 WL 5712245.

25. United States v. Larrabee, 78 M.J. 107 (C.A.A.F. 2018).

26. This is not the first time the military appellate court system has addressed this issue. In United States v. Dinger, 77 M.J. 447 (C.A.A.F. 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 that Art. 2(a)(6) of the UCMJ was not an Equal Protection violation. United States v. Begani,79 M.J. 767 (N.M. Ct. Crim. App. 2020). 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." United States v. Begani, 800 M.J. 200 (N.M. Ct. Crim. App. 2020). 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.

27. *Larrabee*, 2020 WL 6822706.

Hoover in 1857, usually in the Court of Claims or through a petition for a Habeas writ.[28]

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."[29] As Judge Leon of the District Court describes it, 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."[30] 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.[31] But under most conditions, civil courts cannot collaterally review the otherwise lawful findings or sentencing of a court-martial.[32] As the Court noted in *Burns v. Wilson*, "when a military decision has dealt fully and fairly with an allegation raised in that [habeas] application, it is not open to a federal civil court to grant the writ simply to re-evaluate the evidence."[33] This is, instead, the function of the military appellate system culminating in the CAAF and the Supreme Court.[34] Judge Leon was correct in asserting that this issue of personal jurisdiction is, indeed, a fundamental "structural" problem that needs

28. *See, e.g.*, Dynes v. Hoover, 61 U.S. 65 (1857); *Ex Parte* Milligan, 71 U.S. 2 (1866); *Ex Parte* Reed, 100 U.S. 13 (1879).

29. 10 U.S.C. § 802(a)(6).

30. 10 U.S.C. § 802(a)(4); United States v. Larrabee, No. 201700075, 2017 WL 5712245, at *1 n.1 (N.M. Ct. Crim. App. 2017).

31. S*ee, e.g.*, *Ex Parte* Mason, 105 U.S. 696 (1881), Keyes v. United States, 109 U.S. 336 (1883), Smith v. Whitney, 116 U.S. 167 (1886), Runkle v. United States, 122 U.S. 543 (1887), Swaim v. United States, 165 U.S. 553 (1897), and Burns v. Wilson, 346 U.S. 137 (1953).

32. Schlesinger v. Councilman, 420 U.S. 738, 746 (1975) ("The valid, final judgments of military courts, like those of any court of competent jurisdiction not subject to direct review for errors of fact or law, have *res judicata* effect, and preclude further litigation of the merits [internal citation omitted]. This Court therefore has adhered uniformly to 'the general rule that the acts of a court martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts, by writ of prohibition or otherwise'" (quoting Smith v. Whitney, 116 U.S. 167 (1883)). *See also* Cossio v. Donley, 527 Fed. Appx. 932, 935 (Fed. Cir. 2013) ("Our review of court-martial decisions is sharply constrained . . . The grounds for collaterally attacking a court-martial must be serious and demonstrate convincingly that in the court-martial proceedings there has been such a deprivation of fundamental fairness as to impair due process") (internal quotations omitted). One example would be when a court-martial failed to follow the procedural requirements of the Rules for Courts-Martial sentencing. *See, e.g.*, Dodson v. Zelez, 917 F.2d 1250 (10th Cir. 1990). When habeas relief is moot, as when a former service-member is no longer confined, collateral review in the Court of Federal Claims may review those decisions and judgments arising from the court-martial. Ex-military plaintiffs at the Court of Federal Claims typically seek backpay or some other form of restoration in their military records, justified on grounds that their conviction or sentence at a court-martial suffered from constitutional irregularities. While that court may address the fundamental fairness of the court-martial, it has no authority to remand the case to a court-martial or to the convening authority for a re-hearing, or to grant relief in the form of dismissing a charge or specification. *See, e.g.*, Matias v. United States, 923 F.2d 821, 823 (Fed. Cir. 1990) (plaintiff sued for back pay under the Tucker Act, 28 U.S.C. § 1491) (quoting Bowling v. United States, 713 F.2d 1558, 1560 (Fed. Cir. 1983)); *accord* Artis v. United States, 506 F.2d 1387, 1391, (Ct. Cl. 1974); *see also* Longval v. United States, 41 Fed. Cl. 291, 295 (1998). Special thanks again to Dwight Sullivan for bringing these cases to my attention.

33. *Burns*, 346 U.S. at 142.

34. 10 U.S.C. § 867, § 867a, and 28 U.S.C. § 1259 (West).

clarification and deserves de novo review, and as such the door to the civilian courthouse is usually a welcoming one.[35]

B. 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,[36] but the statute under Judge Leon's scrutiny 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 Fleet Marine Corps Reserve").[37] 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 and that the UCMJ itself separately enumerates these status classifications.

Second, 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, like Mr. Larrabee's, committed *after* the accused's official retirement from the service. It might 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. This is precisely what the Supreme Court did in holding that the UCMJ's jurisdiction over civilian dependents of service members for capital crimes committed when stationed in foreign countries was an unconstitutional reading of the "make rules" clause of section 8, Article I.[38] These citizens are not in the "land and naval forces" and thus not subject to the disciplinary demands of the chain-of-command, even when living on military bases and enjoying the government entitlements afforded to spouses and children of service members.[39] Finding that the "necessary and proper" clause did not provide the government constitutional cover for ignoring the plain language of clause 14, the Court noted:

> the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method

35. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *3 (D.D.C. Nov. 20, 2020).

36. *Id.* at *2 n.1.

37. For background on the difference between the "Fleet Reserve" type of retiree and that under Article 2(a)(4), see United States v. Begani, 79 M.J. 767, 773 (N.M. Ct. Crim. App. 2020).

38. *See* Reid v. Covert, 354 U.S. 1, 19–20 (1957).

39. *Id.*

> of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.[40]

Given that the *Larrabee* court repeatedly asserted that the primary purpose of the UCMJ is "good order and discipline" (more on this claim below),[41] it would seem sensible to have considered the extent to which (if at all) the military's jurisdiction over a retiree's misconduct (like that of a civilian spouse), having no service-connection and is not "martial" or military in nature, meets this purpose.

III. THE COURT'S ANACHRONISTIC VIEW OF COURTS-MARTIAL

A. Misplaced Emphasis on Toth

The District Court seems uncomfortable with non-trivial details about the character and structure of the military justice. Noting, correctly, that military law's protection of a service-member's rights is somewhat limited, the court erroneously 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 [CMA] could potentially amend the UCMJ at any time to remove or limit certain procedures or rights."[42]

While Congress certainly has,[43] and could still, expand due process protections to the accused, it is concerning that Judge Leon believes a military appellate court, even an Article I court, has authority to "amend the UCMJ" (and it is of-further concern if this federal court was not aware that the CMA has been the CAAF since 1994).[44] Moreover, the court's reasoning suggests that due process for accused servicemembers froze with the enactment of UCMJ in 1950 and the first Supreme Court cases interpreting it. Judge Leon relies excessively (citing it nine times in 18 pages) on United States *ex rel.* Toth v. Quarles[45] for a standard of exacting scrutiny that simply does not exist in Article III precedent addressing the military's criminal jurisdiction.

In *Toth*,[46] a case arising in the wake of the Korean War, an Air Force member was honorably discharged after completing his service tour in Korea.[47] Five months later, when home in Pittsburg and working at a steel plant and with no

40. *Id.* at 21.

41. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *3, 5, 6 (D.D.C. Nov. 20, 2020).

42. *Id.* at 9.

43. For example, when the Uniform Code of Military Justice was first enacted in 1950, it created the first true appellate court, staffed by civilian judges, to rule on issues raised by courts-martial including conventional questions of legal sufficiency in much the same way as civilian jurisdictions. *See* FREDERICK BERNAYS WIENER, THE UNFORM CODE OF MILITARY JUSTICE: EXPLANATION, COMPARATIVE TEXT, AND COMMENTARY 17 (1950)..

44. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103–337, § 924, 108 Stat. 2663 (1994).

45. United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

46. *Id.*

47. *Id.* at 13.

employment connection to the Department of Defense whatsoever, former Airman Toth was arrested by military authorities, who accused him of murder and conspiracy to commit murder back when he was on active duty.[48] He was returned to his former military chain-of-command in Korea, where he was court-martialed.[49] Toth filed a petition for writ of habeas corpus with the District Court, which heard his argument and ordered his release;[50] the Court of Appeals for the District of Columbia reversed, discharging the writ and ordering him returned to military custody, sustaining the UCMJ's jurisdictional reach.[51] The Supreme Court granted *certiorari* to decide whether the Constitution grants Congress, through the UCMJ, authority to exercise military jurisdiction over civilian *ex*-servicemembers for crimes they committed when in the service.[52]

The *Toth* Court said that Article I-based military jurisdiction could not be so extended.[53] A court-martial's personal jurisdiction, the Court clarified, is not based on Congress's Article I power to declare war, nor its power to raise and support armies and navies, nor to punish offenses against the law of nations, nor is jurisdiction over civilians based on the president's commander-in-chief power or any theory of martial law.[54] Rather, the Court explained, the court-martial's long reach is based on Article I's "make rules" clause bolstered by the "necessary and proper" clause, and that this relates to people already *actually in* the armed services: "it has never been intimated by this Court, however, that Article I military jurisdiction could be extended to civilian ex-soldiers who had severed all relationship with the military and its institutions."[55] Any such expansion of court-martial jurisdiction over civilian ex-service members necessarily encroaches on the default jurisdiction of the federal courts set up under Article III, where defendants are "surrounded with more constitutional safeguards then in military tribunals."[56] The Court listed many of the due process safeguards taken for granted in Article III courts: judges are appointed for life; judges' compensation cannot be diminished while in office; a grand jury is required to indict; there is the guarantee of trial by jury in the state where crime happened; and there is the Sixth Amendment right to speedy and public trial.[57] There is a "great difference between" trial by jury and trial by lay members (usually officers) selected for that court-martial duty:

> It is true that military personnel, because of their training and experience, may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged

48. *Id.*
49. *Id.*
50. Toth v. Talbott, 113 F. Supp. 330 (D.D.C. 1953).
51. Talbott v. United States *ex rel.* Toth, 215 F.2d 22 (D.C. Cir. 1954).
52. *Toth*, 350 U.S. at 13.
53. *Id.* at 14.
54. *Id.* at 13–14.
55. *Id.* at 14.
56. *Id.* at 15.
57. *Id.* at 16.

> against a soldier is purely military, such as disobedience of an order, leaving post, etc.[58]

But for ordinary, non-military, crimes, the Court said, the Founders believed that ordinary common lay citizens ("plain people") are better equipped to secure justice and liberty than experts when judging criminal offenses.[59] Consequently, "military tribunals," the Court held, "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."[60] So distinguished,

> [w]e 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. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars . . . trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function.[61]

In other words, the Court imputed a belief to Congress (and by extension to the military itself) that trying cases did not serve the fighting purpose of the military; rather, it was a distraction or diversion. This non-judicious attitude toward preventing, adjudicating, and punishing crime within the military community should, in the Court's view, be important when considering the military's purported grip on certain persons who are not obviously members of the active armed forces traditionally bound by such rules of discipline.

Fundamentally, the *Toth* Court balanced the expected and default protections of the Constitution against implied assertions of national security (implied, because the government never attempted to argue that prosecuting ex-servicemembers for such crimes was "necessary" to achieve that compelling government interest). The "make rules" clause supplemented by the "necessary and proper" clause as a package does not give Congress freedom to deprive people of their "Bill of Rights safeguards."[62] In a common-sense, but all-too-infrequent, rebuttal by civilian authorities over claims made the military, the *Toth* Court dismissively said that "[i]t is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."[63] And even if the military (or Congress) could demonstrate empirically or historically that good order and discipline is damaged in meaningful ways when such civilians escape court-martial, "considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of

58. *Id*. at 17–18.
59. *Id*. at 18.
60. *Id*. at 17.
61. *Id*.
62. *Id*. at 21–22.
63. *Id*. at 22.

the normal and constitutionally preferable system of trial by jury."[64] Reaching for the high ground of what appears to be international common law of military discipline, the Court wrote that "[f]ree countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service."[65] Therefore, the Court held that "[d]etermining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for a limitation to *the least possible power adequate to the end proposed.*[66]

This has come to be called the "*Toth* Doctrine" and it subsequently justified the Court's invalidation ofthe UCMJ's jurisdiction over several classes of civilians accompanying the Armed Forces abroad.[67] The problem, now, lies in that it is not always clear what the government's proposed "ends" are when it comes to personal jurisdiction. This makes judging the military's *means* an exercise in speculation, which actually seemed to be one of Judge Leon's more trenchant criticisms of the government's argument. The *Larrabee* court seems to read *Toth* as, at least, implying that the constitutional basis for court-martial jurisdiction rests on 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."[68] But that is taking *Toth* too far.

For two reasons, Judge Leon's reliance on *Toth* is misplaced. First, while that case's outcome – shrinking the sphere of the military's disciplinary influence – was the Constitutionally-consistent one, the *Toth* Court itself ignored previous Supreme Court descriptions of military justice under the Articles of War from the previous century. Seventy-six years earlier, in *Ex Parte Reed*,[69] 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.[70] 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 . . . [i]ts 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.[71]

64. *Id*. at 22–23.

65. *Id*. at 22.

66. *Id*. at 23 (italics in the original; quoting Anderson v. Dunn, 19 U.S. 204, 231 (1821)).

67. *See* cases cited in *supra* note 13. For a near-contemporaneous review of this line of cases and what questions they left opened to puzzle future courts, see Joseph W. Bishop, Jr., *Court-Martial Jurisdiction Over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317 (1964).

68. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *7 (D.D.C. Nov. 20, 2020).

69. *Ex parte* Reed, 100 U.S. 13 (1879).

70. *Id*. at 23.

71. *Id*.

Less than a decade later, in *Runkle v. United States*,[72] 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 things, can neither be exposed to danger, nor subjected to the uncontrolled will of any man, but which must be adjudged *according to law*.[73]

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"[74] than the UCMJ was even by the time they wrote the *Toth* opinion.[75]

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 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. While all of these distinctions (and negative comparisons) were irrefutable at the time, 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 its various major amendments (the most significant being in 1968, 1983, and 2016[76]), 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

72. Runkle v. United States, 122 U.S. 543 (1887).

73. *Id*. at 557–58.

74. *See generally* Edward F. Sherman, *The Civilianization of Military Law*, 22 ME. L. REV. 3 (1970); JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE: A STUDY OF MILITARY LAW (1974). *But see* ROBERT SHERILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 2 (1970); O'Callahan v. Parker, 395 U.S. 258, 265 (1969) (the "court-martial as an institution [is] singularly inept in dealing with the nice subtleties of constitutional law"). O'Callahan created a service-connection test for court-martial jurisdiction, but it was later overruled by Solorio v. United States, 483 U.S. 435, 436 (1987). The majority opinion in *Solorio* thinks less reverently of the so-called *Toth* Doctrine; it refers to the "least possible power adequate to the end proposed" principle as simply "dictum" relevant only to the scope of *Toth*'s personal jurisdictional question. *Solorio*, 483 U.S. at 440 n.3. However, there are some reasons to ignore *Solorio*'s dimming of this principle, for that case dealt with subject matter jurisdiction of a court-martial – what offenses could be lawfully within its purview under Congress's broad authority to "make rules" for the military – whereas *Toth* dealt more specifically with scope of the UCMJ's personal jurisdiction, or who could be brought before the court-martial, the specific kind of authority at issue in *Larrabee*.

75. For example, three years before *Toth*, the Court noted the recently enacted UCMJ favorably modernized the protection of rights long held sacrosanct and constitutionally protected in civilian courts. Burns v. Wilson, 346 U.S. 137, 141–42 (1953).

76. Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); Military Justice Act of 1983, Pub. L. No. 98-209, § 801, 97 Stat. 1393 (1983); Military Justice Act of 2016, Pub. L. No. 114-328, § 5001, 130 Stat. 2894 (2016).

constrained, for example, it still exists.[77] 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.[78] 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.[79] There are statutory protections in the UCMJ against double jeopardy,[80] against cruel and unusual punishment;[81] it establishes the right to the assistance of defense counsel,[82] it establishes the right to compulsory process for obtaining witnesses,[83] it establishes a statute of limitations,[84] and it creates the right to appeal the legal and factual sufficiency of a conviction and sentence.[85]

While Judge Leon did briefly acknowledge some of these developments,[86] he also missed an opportunity to emphasize the two *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.[87] These features are

77. Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

78. United States v. Huntzinger, 69 M.J. 1, 4–5 (C.A.A.F. 2010) (holding that the 4th Amendment right of privacy and protection from unreasonable searches and seizures by government authorities has no combat or deployment exception).

79. 10 U.S.C. § 831 (Art. 31, UCMJ); *see* Miranda v. Arizona, 384 U.S. 436, 489 (1966) ("the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement and that any statement he makes may be used against him").

80. 10 U.S.C. § 844 ("Former Jeopardy" prohibited).

81. *Id.* § 855 ("Cruel and unusual punishments" prohibited).

82. *Id.* § 827, § 838.

83. *Id.* § 846.

84. *Id.* § 843.

85. *Id.* § 866. Note, however, that the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, H.R. 6395, 116th Cong, (2020) amends Article 66(b) of the UCMJ to remove "factual sufficiency review" except when raised by the appellant with "a specific showing of a deficiency in proof." If the Court of Criminal Appeals [CCA] is "clearly convinced" that the finding of guilty is "against the weight of the evidence" then the CCA can dismiss, set aside, or modify the findings or affirm a lesser included offense. So, to quote the "retired" court doctor Miracle Max (actually, he was fired), factual sufficiency review is "only *mostly* dead." "There's a big difference between *mostly* dead and *all* dead. *Mostly* dead is slightly alive." THE PRINCESS BRIDE (20th Century Fox 1987) (emphasis added).

86. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *4 (D.D.C. Nov. 20, 2020).

87. *See, e.g.*, 10 U.S.C. § 815 (authority of commander to use "non-judicial punishment" for certain offenses and offenders); § 825(e)(2) (authority of the general court-martial convening authority to personally select members of the fact-finding panel according to certain fixed qualification criteria); MANUAL FOR COURTS-

strongly debated – both fiercely defended[88] and criticized[89] – 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. The practical utility these features supposedly delivered to commanders were of paramount relevance when Congress enacted the UCMJ, committing that the military's legal code (including its jurisdictional reach) would strike a reasonable balance between the commander's ability to use it an "instrument" of command and control on the one hand, and fundamental fairness and a recognition of due process norms and Constitutional demands on the other.[90] Yet neither the government in its defense, nor the *Larrabee* court in its attack, discuss these features with respect to Larrabee himself – what, for instance, was the chain-of-command's disciplinary objective, or its interest, in bringing a former Marine to trial for a crime that had no martial bearing?

B. Missing the Supreme Court's Modern Sympathies

Notwithstanding these unusual features of military law, the Supreme Court has certainly not condemned the Code's more peculiar, militaristic, practices and procedures in recent decades, nor invalidated them in facial or as-applied challenges. Rather, the opposite has occurred. In *Schlesinger v. Councilman*,[91] an

MARTIAL UNITED STATES A15–5 (2019) (Rule 303) ("Preliminary Inquiry into reported offenses."); *id.* at II-21–22 (Rule 304) (authority of a commander to place a service-member under certain forms of "pretrial restraint," including "conditions on liberty" and arrest); *id.* at A15-5 (Rule 305) (authority of a commander to place a service-member in "pretrial confinement" under certain conditions); *id.* at II-27–29 (Rule 306) (authority of commander to use independent discretion in "disposing" of a suspected offense, though various actions including taking no action, using administrative corrective measures, employing "nonjudicial punishment," or charging the servicemember with a view toward a referral to court-martial). *See also* Curry v. Sec'y of Army, 595 F.2d 873, 878 (D.C. Cir. 1979) ("The power of the convening authority to refer charges to the court-martial is justifiable on two grounds. First, prosecutorial discretion may be essential to efficient use of limited supplies and manpower. The decision to employ resources in a court-martial proceeding is one particularly within the expertise of the convening authority who, as chief administrator as well as troop commander, can best weigh the benefits to be gained from such a proceeding against those that would accrue if men and supplies were used elsewhere. The balance struck is crucial in times of crisis when prudent management of scarce resources is at a premium. Second, as we previously have stated, maintenance of discipline and order is imperative to the successful functioning of the military").

88. *E.g.*, Christopher W. Behan, *Don't Tug on Superman's Cape: In Defense of Convening Authority Selection and Appointment of Court-Martial Panel Members*, 176 MIL. L. REV. 190 (2003); Geoffrey S. Corn, Chris Jenks, & Timothy C. MacDonnell, *A Solution in Search of a Problem: The Dangerous Invalidity of Divesting Military Commanders of Disposition Authority for Military Criminal Offenses*, JUST SECURITY (June 29, 2020), https://www.justsecurity.org/71111/introducing-an-open-letter-from-former-u-s-military-commanders-judge-advocates-commander-authority-to-administer-the-ucmj/ [https://perma.cc/9EFC-ZHTR].

89. Major Elizabeth Murphy, *The Military Justice Divide: Why Only Crimes and Military Lawyers Belong in the Court-Martial Process*, 220 MIL. L. REV. 129 (2014); Anthony J. Ghiotto, *Back to the Future with the Uniform Code of Military Justice: The Need to Recalibrate the Relationship Between the Military Justice System, Due Process, and Good Order and Discipline*, 90 N.D. L. REV. 485 (2014); Eugene R. Fidell, *Rube Goldberg and Military Justice*, JUST SECURITY (Apr. 6, 2020), https://www.justsecurity.org/68935/rube-goldberg-and-military-justice/ [https://perma.cc/HMS6-A72E].

90. *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Servs.*, 81st Cong. 599 (1949) (Statement of Professor Edmund M. Morgan Jr., Harvard Law School).

91. 420 U.S. 738 (1975).

army captain collaterally attacked the jurisdiction of a court-martial, arguing that the drug offenses with which he was charged under UCMJ authority were not "service-connected" (and thus violated the "service-connection" test then operative).[92] The federal district court granted an injunction, preventing the court-martial from proceeding.[93] The Court of Appeals for the 10th Circuit affirmed.[94] The Supreme Court clarified that the UCMJ did not deprive Article III courts of their ability to collaterally review courts-martial (under, for example, a 28 U.S.C. § 2241 habeas petition, or a 28 U.S.C. § 1331 claims petition).[95] The Court nevertheless reversed the 10th Circuit's decision, holding that "the balance of factors governing exercise of equitable jurisdiction by federal courts normally weighs against intervention, by injunction or otherwise, in pending court-martial proceedings" and nothing about Captain Councilman's particular complaint was outside the ability of the military trial and appellate system's area of judicial competence.[96] Forty-five years later, it seems as if the District Court in *Larrabee* has misplaced the message of *Schlesinger*:

> 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.[97]

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.[98]

The Court believed that there are "strong considerations favoring exhaustion of remedies within the military courts" to protect the "integrity of the military court process."[99] It is certainly true Judge Leon would have been wrong if he had *relied* on *Schlesinger* to dismiss Larrabee's arguments about Article III's jurisdictional reach and deny the writ. Larrabee had exhausted his military court remedies and was not asking Judge Leon to grant an injunction halting a pending court-martial. But *Schlesinger* remained important – and worth the time to understand – because its attitude of Article III respect for the military's law (when that law is properly employed), enacted by Congress, is found in the Court's

92. *Id*. at 740–44.
93. *Id*.
94. *Id*.
95. *Id*. at 745–46.
96. *Id*. at 740.
97. *Id*. at 757–58.
98. *Id*. at 758.
99. *Id*. at 761.

deferential approach, its reticence to intervene, and—most importantly—its most recent framing of military justice as a code that emphasizes the word *justice* over the word *military*.[100]

IV. JUDICIAL RESPECT FOR A SYSTEM WHOSE PRIMARY PURPOSE IS JUSTICE, NOT OBEDIENCE

Cases like *Burns*, *Schlesinger*, *Runkle*, and *Reed* do not, of course, deal with the express question presented in *Larrabee*. They deal with the critical subject of shielding court-martial judgments from collateral attacks in Article III courts; itspeaks to the degree to which courts-martial can or cannot be trusted as a due process-respecting tool of law and order. 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,[101] Judge Leon should have squared that conclusion with the Supreme Court's modern-day approach to describing the UCMJ and courts-martial.

That 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*.[102] In *Weiss*, the petitioners were Marines convicted after pleading guilty to larceny and drug offenses.[103] On appeal, they argued that their convictions and sentences were void because the method the Judge Advocate General's Corps (and by extension the Department of Defense and the President) used for appointing military officers as military judges, and the fact that their appointment as a trial judge is really a non-tenured duty assignment, violate the Constitution's appointments and due process clauses.[104]

The *Weiss* Court rejected both arguments.[105] It pointed out that

> [b]y 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.[106]

100. *See* discussion of *Ortiz*, *infra* Part IV.
101. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *7 (D.D.C. Nov. 20, 2020).
102. Weiss v. United States, 510 U.S. 163 (1994).
103. *Id.* at 165.
104. *Id*. at 166.
105. *Id.* at 170.
106. *Id.* at 174 (quoting Parker v. Levy, 417 U.S. 733, 743 (1974)).

Citing *Rostker v. Goldberg*[107] and *Middendorf v. Henry*,[108] the Court, addressing due process challenges to the court-martial, favored an unambiguously deferential standard of review.[109] In *Rostker*, the Court upheld a challenge to the Selective Service Act, holding that Congress's calculated decision to exclude women from the requirement of draft registration was not a Fifth Amendment violation despite apparently discriminating based on gender.[110] The Court wrote:

> 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.[111]

When addressing a due process challenge – for example, to the non-life tenure positions of military judges in *Weiss* and whether Congress can enact a system of draft registration that knowingly selects only men for involuntary military service in *Rostker* – the Article III judiciary will only ask whether the reasons for the due process sought are so "extraordinarily weighty as to overcome the balance struck by Congress."[112]

Judge Leon's citation to *Middendorf*, 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."[113] 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.[114] That distinction matters: a finding of guilty at a summary court-martial is not even considered by Congress to be a criminal conviction anyway, for it involved no in-court representation, no trained and independent judge, and no possibility of imprisonment (greater than thirty days) or discharge from the military (in other words, they are "non-criminal forums").[115] *Middendorf* is relevant not because it suggests there are fewer constitutionally guaranteed rights in the military justice system, as Judge Leon suggests; it is relevant rather for the level of scrutiny or deference the Article III judiciary will give to Congress's determination of what rights and duties are owed to and by service members. The question is simply whether "factors militating in favor" of a particular due process

107. 453 U.S. 57 (1981).

108. 425 U.S. 25 (1976).

109. It makes little to no difference that *Weiss* was not decided on habeas collateral review, for – just as in *Burns*, which *was* a habeas case – the underlying question was one of constitutional due process.

110. *Rostker*, 453 U.S. at 83.

111. *Id.* at 70.

112. *Middendorf*, 425 U.S. at 44.

113. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *4 (D.D.C. Nov. 20, 2020).

114. *Middendorf*, 425 U.S. at 34 n.13.

115. 10 U.S.C. § 820(b) ("A summary court-martial is a non-criminal forum. A finding of guilty at a summary court-martial does not constitute a criminal conviction").

right (*e.g.*, right to counsel, or fixed terms of judicial tenure) "are so extraordinarily weighty as to overcome the balance struck by Congress."[116]

The Court's contemporary description of the nature of military justice is best articulated in *Ortiz v. United States*.[117] 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*, the Court restricted personal jurisdiction of the UCMJ by removing civilian dependents of servicemembers, accused of capital crimes, from its reach.[118] 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 . . . 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 . . . 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[and that its courts are] "simply executive tribunals whose personnel are in the executive chain of command."[119]

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.[120] 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).[121] 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

116. *Middendorf*, 425 U.S. at 44 (holding that the lack of mandatory defense counsel representation in "summary courts-martial" was not a Fifth Amendment due process violation); Weiss v. United States, 510 U.S. 163, 177–78 (applying *Middendorf* deference, finding that the lack of fixed terms for military trial and appellate judges does not violate the Due Process Clause of the Fifth Amendment); *see also* Loving v. United States, 517 U.S. 748, 768 (1996) ("we give Congress the highest deference in ordering military affairs" (internal citation omitted)).

117. Reid v. Covert, 354 U.S. 1, 34–35 (1955).

118. *Id.*

119. *Id.* at 35–38.

120. Ortiz v. United States, 138 S. Ct. 2165, 2170–84 (2018).

121. *Id.* at 2174–75.

been understood to exercise 'judicial' power of the same kind wielded by civilian courts."[122] In a subsequent footnote, 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.[123]

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."[124]

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.[125] 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, Judge Leon's outdated description of military justice's *raison d'être* is incompatible with *Ortiz*'s rationale. It is more than a little surprising that he cited Colonel William Winthrop's century-old treatise[126] but took no cognizance whatsoever of the Supreme Court's most recent description of the "integrated court-martial system."

V. IS "GOOD ORDER AND DISCIPLINE" DEFINABLE, OR JUST A TALISMANIC CATCHPHRASE?

Nevertheless, *even if* Judge Leon is correct about the prominence of "good order and discipline" (which is not at all clearly the main goal of military justice[127]), and *even if* we assume a common meaning of the phrase (which we

122. *Id*. at 2175.

123. *Id*. at 2176, n.5.

124. *Id*.

125. Dan Maurer, *Are Military Courts Really Just Like Civilian Criminal Courts?*, LAWFARE (July 13, 2018), https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts [https://perma.cc/9JVM-5GJN].

126. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *5 n.5 (D.D.C. Nov. 20, 2020).

127. JONATHAN LURIE, THE SUPREME COURT AND MILITARY JUSTICE 2 (2013) (identifying the "tension seen in appropriate High Court cases between military justice and military discipline [which] is far more than just a question of semantics involved in this distinction [for [i]t is impossible to take the military out of the concept 'military justice,' nor should we try . . . [b]ut . . . while discipline rather than justice may appear to be the goal, both our legal history and the appropriate congressional statute focus on military justice"); *Compare* David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's – A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 11 (1991) ("There should be no doubt, however, that if military justice is to be viewed as a legitimate system of criminal justice in today's society, it must be viewed primarily as a tool of justice."), *with* David A. Schlueter, *The Military Justice Conundrum: Justice or Discipline?*, 215 MIL. L. REV. 1, 77 (2013) ("the Preamble to the MCM should be amended to put good order and discipline in first

should not assume[128]), 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*,[129] 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.[130] 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.[131]

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 lawgiver 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.[132]

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

place, as the true primary purpose of military justice, but recognize the need to provide due process of law"). Schlueter's views on this seems relevant: the *Ortiz* Court (the majority and the dissent) cites his treatise, and an earlier law review article he wrote about the history of courts-martial stretching back through pre-Glorious Revolution English history, five times.

128. Jeremy S. Weber, The Disorderly, Undisciplined State of the "Good Order and Discipline" Term 1 (Feb. 16, 2016) (unpublished Research Report) (on file with the U.S. Air War College), https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423 [https://perma.cc/R5E8-VBUF] (noting an irony–"[t]he military frequently invokes the term 'good order and discipline,' asserting it represents a unique obligation to ensure mission success. Many who have served in the military have a notion of what good order and discipline means, and seem to assume everyone holds the same understanding" but the term is used by those in and out of the uniform in an undisciplined, haphazard, overgeneralized and inconsistent way primarily to rebut proposals to personnel and social (and legal) changes withing the military with which they are uncomfortable).

129. 417 U.S. 733 (1974).

130. *Id.* at 761–62.

131. *Parker*, 417 U.S. at 749.

132. *Id.* at 751.

troops by compelling obedience to lawful orders regardless of the physical risk, unpleasantness, or moral unease such orders induce.[133]

A few years after *Parker*, the Court in *Chappell v. Wallace*[134] again focused on why Congress could justifiably criminalize such a broad 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.[135]

All that said, the *Larrabee* court 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 defines 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.[136] None of these terms are defined or prioritized in the Manual, or in the UCMJ, and not in any military or civilian case law.[137]

But it was certainly not impossible for either the government or the Court to get closer to a working definition (or perhaps a functional test) of what the military means by "good order and discipline." The Manual explains what makes "extramarital sexual conduct" criminalizable under Article 134, UCMJ. At least in *that* context, 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."[138] The Manual offers a series of non-dispositive factors to consider, including: 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

133. 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.

134. 462 U.S. 296 (1983).

135. *Id.* at 300.

136. MANUAL FOR COURTS-MARTIAL UNITED STATES, at I-1 (2019).

137. Jeremy S. Weber, *Whatever Happened to Military Good Order and Discipline?*, 66 CLEV. ST. L. REV. 123, 131–35 (2017) (summarizing examples of frustrated attempts to discern a workable, intelligible meaning of the term).

138. MANUAL FOR COURTS-MARTIAL UNITED STATES, at IV-145 (2019) (Article 134).

the conduct;" and a "detrimental effect on unit or organization morale, teamwork, and efficiency."[139] All of those factors are case-specific.

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 *Larrabee* – in fact, all the way back to ancient Roman codes.[140] There, as well as in Swedish King Gustavus Adolphus' 1621 Articles,[141] and with the later English codes on which the American Articles of War were based, this term dealt exclusively with *martial* offenses. Had the government made an honestly full-throated effort, in *Larrabee*, to defend this expansive jurisdictional reach, it should have made some effort to acknowledge that – historically – conduct prejudicing good order and discipline tends to fall into certain kinds of recognizable effect-centric categories:

- 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);[142]
- acts or omissions that endanger or harm other servicemembers or government military property (*e.g.*, hazarding a vessel, dangerous flying, maltreating subordinates, hazing);[143]
- 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);[144]
- 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);[145]
- 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);[146]
- 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

139. *Id.*

140. S*ee, e.g.*, Arrius Menander, *Libro Tertio de re Militari* ("Military Affairs, Book III"), reprinted and translated from Latin in C.E. BRAND, ROMAN MILITARY LAW 183 (1968).

141. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENT 907–18 (1920 reprint) (reprinting English translation of the 1621 Swedish Articles); *see also* Norman G. Cooper, *Gustavus Adolphus and Military Justice*, 92 MIL. L. REV. 129 (1981).

142. *See, e.g.*, 10 U.S.C. §§ 886, 912, 912a, 914, 934.

143. *See, e.g.*, 10 U.S.C. §§ 893, 893a, 910; *see also* Armed Forces Act (2006) §§ 22, 33 (U.K).

144. *See, e.g.*, 10 U.S.C. §§ 887a, 896, 907, 931b, 931g; *see also* Armed Forces Act (2006) §§ 27, 28 (U.K).

145. *See, e.g.*, 10 U.S.C. §§ 885, 886, 889, 890, 891, 892.

146. *See, e.g.*, 10 U.S.C. §§ 885, 894, 895, 903a; *see also* Armed Forces Act (2006) § 17 (U.K).

kind, conduct unbecoming an officer and gentlemen, conduct of a nature to bring discredit upon the armed forces);[147]

- acts or omissions that prejudice "good order and discipline" for some other case-specific, fact-dependent reason.[148]

With these categories in mind, the government could have developed a more focused and (possibly) persuasive account for how the prejudicial 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*).[149] 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.[150] But he could also have taken the opportunity to explain what he meant by "good order and discipline" and why conduct by a retiree like Larrabee bore no rational relationship to its meaning. He too could have found – in references and citations to these ancient sources of positive and "customary" military law in Supreme Court precedent – an apt description of conduct that fits one or more of the seven categories listed above. 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 maintain good order and discipline."[151] 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."[152] While I have argued that this test is too stringent and inconsistent with Supreme Court's deferential view, 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.

Here's how: first, Congress has provided various types of commanders the responsibility of court-martial "convening authority."[153] This comes with the quasi-prosecutorial discretion to refer cases to court-martial based in part upon the advice of legal counsel.[154] 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.[155]

147. *See, e.g.*, 10 U.S.C. §§ 933, 934; *see also see also* Armed Forces Act (2006) § 23 (U.K).
148. *See, e.g.*, 10 U.S.C. § 934, *see also* Armed Forces Act (2006) § 19 (U.K).
149. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955).
150. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *5–6 (D.D.C. Nov. 20, 2020).
151. *Id.* at *6 (emphasis added).
152. *Id.* at *7.
153. *See* 10 U.S.C. § 822.
154. *See* 10 U.S.C. §§ 822–24, and § 834.
155. MANUAL FOR COURTS-MARTIAL UNITED STATES A2.1–1 (2019).

While these factors are based mostly on civilian prosecutorial standards,[156] 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 opposite – in fact, it is probably more difficult to rationally justify a military retiree's prosecution for conduct post-retirement when we consider those disposition factors prescribed by the President in the *Manual*, from the point of view of a convening authority, and what we think we mean by "good order and discipline" generally. It is unclear, for instance, how it is possible for a retiree's misconduct (in all but the most exceptional of cases) to affect the "mission-related responsibilities of the command" – a unit in which he is not a member with any professional duty or obligation, nor how it is possible for that misconduct to degrade the "morale, health, welfare, and good order and discipline" of that unit or organization.[157] If these factors are only tenuously met by the military with weak facts and factitious arguments, or deemed less relevant to a particular retiree than the other dozen non-military disposition factors (*e.g.*, strength of the evidence, extent of harm caused, willingness to cooperate, culpability, criminal history, probable sentence[158]), then what legitimate purpose would a court-martial serve?

It is on *this* problem that the court in *Larrabee* should have focused its analysis and skepticism. At that point, the some of the conclusions drawn in *Toth* do matter, and can be analogized to the case of a retiree: **"**[i]t is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians."[159]

Judge Leon rightly quotes *Toth* for the proposition that "considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury."[160] But it should have been within a larger reading of what "discipline" might actually mean beyond a catchphrase and talisman, and whether that meaning is in harmony with the *Ortiz* Court's emphasis that the UCMJ's "integrated court-martial system" is justice-oriented – not discipline-oriented.[161]

156. *Id.* at A2.1–4 ("The disposition factors contained in this appendix are adapted primarily from three sources: the Principles of Federal Prosecution issued by the Department of Justice; the American Bar Association (ABA), Criminal Justice Standards for the Prosecution Function; and the National District Attorneys Association (NDAA), National Prosecution Standards . . . [but] have been adapted with a view toward the unique nature of military justice and the need for commanders and convening authorities to exercise wide discretion to meet their responsibilities to maintain good order and discipline.").

157. *Id.* at A2.1–2.

158. *Id.*

159. United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 22 (1955).

160. *Id.* at 22–23.

161. *See* Ortiz v. United States, 138 S. Ct. 2165, 2170–71 (2018).

VI. CONCLUSION

We do not write on a clean slate. The attitude of a free society toward the jurisdiction of military tribunals – our reluctance to give them authority to try people for nonmilitary offenses – has a long history.[162]

Both the government and the courts owe a more thorough analysis – one that does not make bold assertions without defining its terms, one that addresses the preliminary issue of conventional deference to Congress acting under its authority to "make rules" for the military, and one that acknowledges what the Court (in *Ortiz*) is now saying about the purpose 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.

The District Court correctly conceded that it is "beyond question that the courts should not second guess the policy judgment of Congress to extend court-martial jurisdiction to offenses by individuals who plainly fall within 'the land and naval forces'" clause of Article I.[163] To do so would undercut the very justification for a separate criminal code applicable to the armed forces, a much wider and more complex (if not historically validated) subject beyond the reach of this article. But Judge Leon was also correct that the Supreme Court has not foreclosed review of whether a particular class of people fits within the plain "ordinary meaning" of that clause. It should do so in Larrabee's case just as it did in *Toth*, *Reid*, *Kinsella*, *Grisham*, and *McElroy*.[164] But doing so necessarily demands the Court address the historical deference the judiciary extends to Congress's Article I, Section 8, clause 14 decisions.[165]

As in those earlier cases, answering the fundamental question of jurisdictional reach turned on two preliminary issues: first, how we define, reasonably, the boundaries of employment in the armed services; second, the availability of constitutional safeguards characterizing the due process of military justice compared to the due process of civilian justice.[166] In other words, on the issue of personal jurisdiction of the UCMJ, the text of Article I's "make rules" clause is necessarily intertwined with a more searching due process skepticism. The *Larrabee* Court got at least that far. But these earlier cases underscore that both preliminary issues are dependent on addressing *what* "discipline" means, what the military needs it *for*, from *whom* the military needs it, and *how* it relates to military justice's goals or "ends." These last questions are answered differently in the wake of *Ortiz* than they were in the first decades after the UCMJ was enacted.

162. Lee v. Madigan, 358 U.S. 228, 232 (1959).

163. Larrabee v. Braithwaite, No. CV 19-654 (RJL), 2020 WL 6822706, at *4 (D.D.C. Nov. 20, 2020).

164. *See* cases cited *supra* note 13.

165. *See* discussions of *Rostker* and *Weiss*, *supra* Part IV.

166. As one Justice has noted, "due process" has traditionally meant something different in civilian courts than it does in military practice. Burns v. Wilson, 346 U.S. 137, 149 (1953) (Frankfurter, J., dissenting). His point is less substantiated now, after more than seven decades of further "civilianization" of military justice alluded to in *Ortiz*.

Though it could have, and should have, this was a complication that the *Larrabee* court did not sufficiently consider.