Dwight Sullivan
September 2022

Who Decides? Separation of Powers and Military Justice Reform

I. Who decides?

The fundamental legal issue in many cases is not the proper outcome, but who decides. *See, e.g., Am. Airlines v. Wolens*, 513 U.S. 219, 234 (1995) ("This case presents two issues that run all through the law. First, who decides …?"); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1822 (2020) (Kavanaugh, J., dissenting) ("Like many cases in this Court, this case boils down to one fundamental question: Who decides?").

An example of a "who decides" rule: Uniform Code of Military Justice art. 24a(c)(2)(B), 10 U.S.C. § 824a(c)(2)(B): "KNOWN AND RELATED OFFENSES.—If a special trial counsel determines that a reported offense is a covered offense, the special trial counsel may also exercise authority over any offense that the special trial counsel determines to be related to the covered offense and any other offense alleged to have been committed by a person alleged to have committed the covered offense."

II. U.S. CONST. art. I, § 8.

The Congress shall have Power …

To raise and support Armies …;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

…

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

III. THE FEDERALIST NO. 23 (Alexander Hamilton) 153-54 (Clinton Rossier ed., 1961).

Whether there ought to be a federal government intrusted with the care of the common defense is a question in the first instance open to discussion; but the moment it is decided in the affirmative, it will follow that the government ought to be clothed with all the powers requisite to complete execution of its trust. And unless it can be shown that the circumstances which may affect the public safety are reducible within certain determinate limits; unless the contrary of this position can be fairly and rationally disputed, it must be admitted as a necessary consequence that there can be no limitation of that authority

which is to provide for the defense and protection of the community in any matter essential to the *formation, direction,* or *support* of the NATIONAL FORCES.

Defective as the present Confederation has been proved to be, this principle appears to have been fully recognized by the framers of it; though they have not made proper or adequate provision for its exercise. Congress have an unlimited discretion to make requisitions of men and money; to govern the army and navy; to direct their operations.

IV. THE FEDERALIST NO. 78 (Alexander Hamilton) 466 (Clinton Rossier ed., 1961).

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

….

[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws in the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. …

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former.

V. An Act to recognize and adapt to the Constitution of the United States the establishment of the Troops raised under the Resolves of the United States in the Congress assembled, and for other purposes therein mentioned, ch. 25, 1 Stat. 95, 96, (Sept. 29, 1789).

….

SEC. 4. *And be it further enacted,* That the said troops shall be governed by the rules and articles of war which have been established by the United States in Congress assembled, or by such rules and articles of war, as may hereafter by law be established.

VI. *Keyes v. United States*, 109 U.S. 336, 340 (1883).

> That the court-martial, as a general court-martial, had cognizance of the charges made, and had jurisdiction of the person of the appellant, is not disputed. This being so, whatever irregularities or errors are alleged to have occurred in the proceedings, the sentence of dismissal must be held valid when it is questioned in this collateral way. …
>
> Where there is no law authorizing the court-martial, or where the statutory conditions as to the constitution or jurisdiction of the court are not observed, there is no tribunal authorized by law to render the judgment.

VII. *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion).

> Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it; the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty, and the civil courts are not the agencies which must determine the precise balance to be struck in this adjustment. The Framers expressly entrusted that task to Congress.

VIII. *Frontiero v. Richardson*, 411 U.S. 677, 688, 690-91 (1973) (plurality opinion).

> The sole basis of the classification established in the challenged statutes is the sex of the individuals involved. Thus, under 37 U.S.C. §§ 401, 403, and 10 U.S.C. §§ 1072, 1076, a female member of the uniformed services seeking to obtain housing and medical benefits for her spouse must prove his dependency in fact, whereas no such burden is imposed upon male members. In addition, the statutes operate so as to deny benefits to a female member, such as appellant Sharron Frontiero, who provides less than one-half of her spouse's support, while at the same time granting such benefits to a male member who likewise provides less than one-half of his spouse's support. Thus, to this extent at least, it may fairly be said that these statutes command "dissimilar treatment for men and women who are … similarly situated." *Reed v. Reed*, 404 U.S. [71, 77 (1971)].
>
> ….
>
> [A]lthough efficacious administration of governmental programs is not without some importance, "the Constitution recognizes higher values than speed and efficiency." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). And when we enter the realm of "strict judicial scrutiny," there can be no doubt that "administrative convenience" is not a shibboleth, the mere recitation of which dictates constitutionality. … On the contrary, any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands "dissimilar treatment for men and women who are … similarly situated," and therefore involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] …." *Reed v. Reed*, 404 U.S. at 77, 76. We therefore conclude that by according differential treatment to male and

female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.

IX. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986).

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. …

These aspects of military life no not, of course, render entirely nugatory in the military context the guarantees of the First Amendment. … But "within the military community there is simply not the same [individual] autonomy as there is in the larger civilian community." *Parker v. Levy*, [417 U.S. 733, 751 (1974)]. In the context of the present case, when evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest. … Not only are courts "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have,'" *Chappell v. Wallace*, [462 U.S. 296 (1983)], quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 187 (1962), but the military authorities have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy. "[Judicial] deference … is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981).

The considered professional judgment of the Air Force is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission. Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.

….

The desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment. Quite obviously, to the extent the regulations do not permit the wearing of religious apparel such as a yarmulke, a practice described by petitioner as silent devotion akin to prayer, military life may be more objectionable for petitioner and probably others. But the First Amendment does not require the military to accommodate

such practices in the face of its view that they would detract from the uniformity sought by the dress regulations. The Air Force has drawn the line essentially between religious apparel that is visible and that which is not, and we hold that those portions of the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity. The First Amendment therefore does not prohibit them from being applied to petitioner even though their effect is to restrict the wearing of the headgear required by his religious beliefs.

[*See also* Samuel J. Levine, *Untold Stories of* Goldman v. Weinberger: *Religious Freedom Confronts Military Uniformity*, 66 A.F.L. REV. 205 (2010).]

X. National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 180, § 508, 101 Stat. 1019, 1086 (1987), *codified at* 10 U.S.C. § 774.

(a) GENERAL RULE.—Except as provided under subsection (b), a member of the armed forces may wear an item of religious apparel while wearing the uniform of the member's armed force.
(b) EXCEPTIONS.—The Secretary concerned may prohibit the wearing of an item of religious apparel—
(1) in circumstances with respect to which the Secretary determines that the wearing of the item would interfere with the performance of the member's military duties; or
(2) if the Secretary determines, under regulations under subsection (c), that the item of apparel is not neat and conservative.
(c) REGULATIONS—The Secretary concerned shall prescribe regulations concerning the wearing of religious apparel by members of the armed forces under the Secretary's jurisdiction while the members are wearing the uniform. Such regulations shall be consistent with subsections (a) and (b).
(d) RELIGIOUS APPAREL DEFINED—In this section, the term "religious apparel" means apparel the wearing of which is part of the observance of the religious faith practiced by the member.

[*See also Singh v. McHugh*, 109 F. Supp. 3d 72 (D.D.C. 2015) (ruling for Sikh college student who wished to join an Army ROTC unit with an accommodation to allow him not to cut his hair or beard and to wear a turban based on the Religious Freedom Restoration Act); *Singh v. Carter*, 168 F. Supp. 3d 216 (D.D.C. 2016) (granting temporary restraining order to Sikh Army officer precluding the Army from requiring the officer to undergo specialized testing to ensure his Sikh articles of faith did not interfere with his helmet and gas mask).]

XI. *Weiss v. United States*, 510 U.S. 163, 176-78, 181 (1994).

Congress, of course, is subject to the requirements of the Due Process Clause when legislating I the area of military affairs, and that Clause provides some measure of protection to defendants in military proceedings. … But in determining what process is

due, courts "must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, § 8."

….

"[T]he tests and limitations of due process may differ because of the military context." … The difference arises from the fact that the Constitution contemplates that Congress has "plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Chappell v. Wallace*, 462 U.S. 296, 301 (1983). Judicial deference thus "is at its apogee" when reviewing congressional decisionmaking in this area. … Our deference extends to rules relating to the rights of servicemembers: "Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military. … We have adhered to this principle of deference in a variety of contexts where, as here, the constitutional rights of servicemen were implicated." *Solorio v. United States*, 483 U.S. 435, 447-448 (1987).

We therefore believe that the appropriate standard to apply in these cases is found in *Middendorf* [*v. Henry*, 425 U.S. 25 (1975)], where we also faced a due process challenge to a facet of the military justice system. In determining whether the Due Process Clause requires that servicemembers appearing before a summary court-martial be assisted by counsel, we asked "whether the factors militating in favor of counsel at summary courts-martial are so extraordinarily weighty as to overcome the balance struck by Congress." We ask the same question here with respect to fixed terms of office by military judges.

….

The absence of tenure as a historical matter in the system of military justice, and the number of safeguards in place to ensure impartiality, leads us to reject petitioner's due process challenge. Petitioners have fallen far short of demonstrating that the factors favoring fixed terms of office are so extraordinarily weighty as to overcome the balance achieved by Congress.

XII. *United States v. Begani*, 81 M.J. 273, 276 (C.A.A.F.), *cert. denied*, 142 S. Ct. 711 (2021).

Though the Constitution gives Congress the power to set rules for the "land and naval Forces," U.S. Const. art. I, § 8, cl. 14, Appellant argues that members of the Fleet Reserve are not currently part of the "land and naval Forces" and so cannot be subject to the UCMJ."

….

Congress has plenary authority to "raise and support Armies" and to "provide and maintain a Navy." U.S. Const. art. 1, § 8, cls. 12-13. Congress also has plenary authority

to "make Rules for the Government and Regulation of the land and naval Forces." *Id*. at cl. 14. This power is vast, permitting even compulsory service. …

Pursuant to this governing authority over the land and naval forces, "Congress has empowered courts-martial to try servicemen for the crimes prescribed by the UCMJ." *Solorio v. United States*, 483 U.S. 435, 438-39 (1987). …

As part of maintaining a Navy, Congress created multiple categories into which naval personnel fall, one being the Fleet Reserve. …

For well over a hundred years, Congress, the military, and the Supreme Court have all understood retired members of all branches of service of the armed forces who continue to receive pay are still a part "of the land and naval Forces" and subject to the UCMJ or its predecessors. … "The test for jurisdiction … 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.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-41 (1960).

….

Congress has explicit and extremely broad powers over the military under Article I of the Constitution and there is no constitutional requirement that all members of the armed forces be on continuous active duty. Congress elected to create two components of the armed forces in the Department of the Navy comprised of recent retirees, whom it continues to pay, in exchange for the potential to be recalled as our national security demands. These members of the Fleet Reserve and Fleet Marine Corps Reserve can constitutionally be considered part of the land and naval forces, and Congress has determined that they need to be subject to the UCMJ. To this determination we defer. …

Appellant asks us to adopt a narrow construction of Congress's express 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 excluding retirees from that power, but to do so would run counter to the Supreme Court's broad deference towards Congress in enacting federal criminal statutes pursuant to Congress's regulatory powers. … The "make Rules" clause has long been interpreted as providing Congress with the power to regulate the trial and punishment of members of the land and naval forces. *Dynes v. Hoover*, 61 U.S. 65, 71 (1857). Given Congress's broad authority to subject civilians to a federal criminal code based solely on its regulatory authority, we see no reason to narrowly construe Congress's express power to "make Rules" for the armed forces.

XIII. *Larrabee v. Del Toro*, 45 F.4th 81 (D.C. Cir. 2022).

At the outset, we address the government's argument that this court must defer to Congress in determining whether Fleet Marine Reservists are properly subject to court-martial jurisdiction under the Make Rules Clause. Because "any expansion of court-martial jurisdiction … necessarily encroaches on the jurisdiction of federal courts set up

under Article III of the Constitution," [*United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955)], we cannot simply defer to Congress' decision to extend court-martial jurisdiction over Fleet Marine Reservists. Such extension is constitutional only if Fleet Marine Reservists "can be regarded as falling within the term 'land and naval Forces,'" [*Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 241 (1960)]—a question that turns on "the military status of the accused," [*Solorio v. United States*, 483 U.S. 435, 439 (1987)].

When confronted with a UCMJ provision allowing court-martial jurisdiction over a class of persons, the Supreme Court has repeatedly declined to defer to Congress. … Instead the Court has asked whether the accused was "actually [a] member[] or part of the armed forces," or else was a "civilian[] … entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III." *Toth*, 350 U.S. at 15, 23. Although Congress maintains "plenary" authority under the Make Rules Clause to determine which offenses may be punished by court-martial, *Solorio*, 483 U.S. at 441, it does not possess the anterior authority to define which persons may be constitutionally court-martialed.

The government argues that this case is unique because Congress has not only authorized the court-martialing of Fleet Marine Reservists under the Make Rules Clause but has also defined the Fleet Marine Reserve as part of the "armed forces" pursuant to its authority under the Army and Navy Clauses. 10 U.S.C. §§ 101(a)(4), 8001(a)(2); U.S. CONST. art. I, § 8, cls. 12–13 ("Army and Navy Clauses") (authorizing Congress to "raise and support Armies" and "provide and maintain a Navy"). Without question, Congress' power to raise and support the nation's fighting forces is capacious and entitled to substantial deference. *See United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."). It follows, the government argues, that if Congress raises a military force pursuant to the Army and Navy Clauses, individuals in that force are *ipso facto* in "the land and naval Forces" covered by the Make Rules Clause.

….

Because these Clauses are not perfectly overlapping, it is not necessarily the case that if a person is part of the forces Congress has raised under the Army and Navy Clauses, he may be court-martialed under the Make Rules Clause. The fact that Congress has chosen to define the Fleet Marine Reserve as part of the armed forces is therefore not sufficient to make its members constitutionally amenable to court-martial.

The Supreme Court has not deferred to Congress' judgments in this area, but instead has assessed whether a person was actually in the armed forces, or instead was a civilian. In *Guagliardo*, the Court indicated that if Congress wanted to subject military contractors to court-martial jurisdiction, it could draft them into the armed forces. *See* [*McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 286 (1960)]. For Congress to invoke its power under the Army and Navy Clauses and label them part of the "land and naval

Forces" would not have been enough. Similarly, in *Toth*, the Court held that Congress could not extend court-martial jurisdiction over a former serviceman who had been discharged from the army and returned to civilian life. *See* 350 U.S. at 22–23. Nothing in *Toth* or its successor cases suggests that if Congress had just defined the accused civilian as a member of the "land and naval Forces," the Court would have reached a different result. Congress may not, through an act of legislative bootstrapping, expand the scope of the Make Rules Clause by defining (or redefining) its terms.

….

n.† Circuit Judge Walker joins the majority opinion as to all except Part III.