

## UCMJ is Applicable to Retirees

The U.S. Supreme Court has upheld the Defense Department's authority to prosecute retired service members for crimes they commit, even after retirement. The court on 22 February 2019 chose not to hear the case of a retired Marine who was court-martialed for a sexual assault he committed three months after leaving the service in August 2015. By not accepting the case, Larrabee v. United States, the court upheld the status quo: **that military retirees are subject to the Uniform Code of Military Justice**. The denial of Larrabee's petition marks the high court's second rebuff in a year of a case involving a military retiree accused of non-military crimes in retirement.

Retired Marine Corps Staff Sgt. Steven Larrabee was convicted of sexually assaulting a bartender, the wife of an active-duty Marine, at a bar in Iwakuni, Japan, where he worked as a civilian. He had been retired—technically, placed on the Fleet Marine Corps Reserve status list for three months. Following a general court-martial in which he wore civilian clothes, Larrabee was sentenced to eight years' confinement, a reprimand and a dishonorable discharge. In a pre-trial agreement, Larrabee's prison term was reduced to 10 months. Larrabee served his sentence but tried to have his conviction overturned on appeal, arguing that he should have been tried in a civilian court, as the offenses occurred after he was retired.

The case closely resembles that of retired Gunnery Sgt. Derek Dinger who, also while living on Okinawa and on the Fleet Marine Corps Reserve list and, later, the Active Duty Retired List, was found to be in possession of and producing child pornography. He was arrested and initially indicted within the civilian courts, but his case ended up in the military court system, where he was convicted and sentenced to nine years' confinement and a dishonorable discharge. Dinger appealed his discharge, arguing that the case should not have fallen under the military court system and that a dishonorable discharge should be reserved for "those who separated under conditions of dishonor." His challenge also was petitioned to the U.S. Supreme Court. It was denied last June.

Attorneys for both Marines argued that the cases should have been considered by the U.S. Supreme Court because they have far-reaching consequences for military retirees. The law stipulates that "retired members of a regular component of the armed forces who are entitled to pay" and "members of the Fleet Marine Corps Reserve" are subject to court-martial jurisdiction. The reasoning, the government argues, is that retirement is simply a change of military status and retired personnel are subject to recall should the need arise. But Stephen Vladeck, a University of Texas law professor who represented Larrabee, said that this argument no longer holds true with the rise of the reserve component. He called the idea that retirees are reserved for future service "anachronistic," adding that military retirees are no longer among the "pool of persons at the ready" and thus should not be subject to the UCMJ. "Increasingly, the function has been performed by reserves, not retirees," he said.

Furthermore, Vladeck said in an interview with Military.com, there are articles in the UCMJ that could place many military retirees at risk for arrest, and the U.S. Supreme Court has an interest in weighing in on how cases involving retirees are handled. He cited one provision in the UCMJ

that makes "contemptuous words" used by a commissioned officer "against the president, the vice president, Congress" and others as punishable by court-martial. "From Adm. Bill McRaven to Gen. Michael Hayden and Gen. Martin Dempsey, some of President Donald Trump's more visible 31 critics of late have been retired military officers. And a provision of federal law ... makes it a crime, triable by courtmartial," he wrote in a blog post on Lawfare.

"But does the Constitution really allow the government to subject to military trial those who have retired from active duty -- in some cases, long ago -- even for offenses committed while they are retired?" Yes, it does, according to the Supreme Court, in its denial of Larrabee's and Dinger's writs of certiorari. Retired Maj. Gen. Charles Dunlap, former deputy judge advocate general of the Air Force, concurs. In a 16 FEB post on Duke University School of Law's Lawfire blog, Dunlap said Congress explicitly states that the UCMJ applies to retirees and that Vladeck's arguments about the impropriety of senior officers speaking out against the president, as well as the "anachronistic" idea that retirees can be recalled to active duty, aren't valid.

He added that the very act of receiving retired pay means that retired personnel are choosing to keep a relationship with the military and accept all that goes with the choice not to terminate their commission or request a discharge. "As a retired service member subject to military jurisdiction, count me among those of my comrades-in-arms who believe it a small price to pay to maintain the connection with the armed forces," Dunlap wrote. Meanwhile, the Supreme Court's refusal to hear the Larrabee case may not be the end of the legal road for the retired Marine. According to Vladeck, Larrabee may consider suing for back pay in the Court of Federal Claims. Vladeck believes his client is entitled to do so under the Military Pay Act.