No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
PETITIONER

v.

JAMES T. GOLDSMITH

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In Section 563 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, Congress authorized the President to drop from the rolls of the armed forces, and thereby terminate military status and pay, any commissioned officer who has been sentenced to confinement for more than six months by court-martial, after the officer's conviction has become final and the officer has served in confinement for a period of six months. 10 U.S.C. 1161(b)(2), 1167. The questions presented are:

1. Whether the Court of Appeals for the Armed Forces has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to bar the President from exercising his authority to drop a commissioned officer from the rolls under 10 U.S.C. 1161(b)(2) and 1167.

2. Whether the President's exercise of authority under 10 U.S.C. 1161(b)(2) and 1167 in this case would violate the Double Jeopardy Clause of the Fifth Amendment or the *Ex Post Facto* Clause, U.S. Const. Article I, Section 9, Clause 3.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 48 M.J. 84. The order of the Air Force Court of Criminal Appeals (App., *infra*, 22a-24a) is unreported. A prior opinion of the Air Force Court of Criminal Appeals affirming respondent's court-martial conviction (App., *infra*, 30a-38a) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on April 29, 1998.

On July 21, 1998, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 27, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are reproduced at App., *infra*, 39a-40a.

STATEMENT

Following trial by a general court-martial, respondent was convicted of willfully disobeying a "safe sex" order from a superior officer, assault with means likely to produce death or grievous bodily harm, and assault consummated by a battery, in violation of Articles 90 and 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 928. He was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. The Air Force Court of Criminal Appeals affirmed the conviction, and respondent sought no further review of that decision. The Air Force then initiated action to drop respondent from the rolls of the Air Force because of his court-martial conviction and sentence. On respondent's application, the Court of Appeals for the Armed Forces issued an extraordinary writ under the All Writs Act, 28 U.S.C. 1651(a), barring the government from dropping respondent from the rolls of the Air Force.

1. The President, as Commander in Chief of the Armed Forces, commissions all officers of the military. U.S. Const., Art. II, § 3. Since 1870, the President also has had the authority to drop from the rolls of the Army any officer who has been absent from duty for three months without leave. Act of July 15, 1870, ch. 294, § 17, 16 Stat. 319. In 1911, Congress extended the

President's authority to drop from the Army's rolls officers who have been absent in confinement in a prison or penitentiary after final conviction by a civilian court. Act of Jan. 19, 1911, ch. 22, 36 Stat. 894; see also Act of Apr. 2, 1918, ch. 39, 40 Stat. 501 (authorizing President to drop from the rolls of the Navy and Marine Corps officers who have been absent from duty without leave for three months or more or found guilty by civilian authorities of any offense); Act of May 5, 1950, ch. 169, § 10, 64 Stat. 146 (authorizing President to drop from the rolls "of any armed force" officers who have been absent without authority for at least three months or finally sentenced to confinement in a Federal or State penitentiary or correctional institution).

On February 10, 1996, as part of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, Tit. XI, § 563(a)(1)(A) and (b)(1), 110 Stat. 325, codified at 10 U.S.C. 1161(b)(2) and 1167, Congress expanded the President's authority to drop officers from the rolls. Section 1161(b)(2) authorizes the President to "drop from the rolls of any armed force any commissioned officer * * * who may be separated under section 1167 of this title by reason of a sentence to confinement adjudged by a court martial." 10 U.S.C. 1161(b)(2). Section 1167 in turn provides that "a member sentenced by a court-martial to a period of confinement for more than six months may be separated from the member's armed force at any time after the sentence to confinement has become final * * * and the member has served in confinement for a period of six months." 10 U.S.C. 1167.

1. Respondent is a commissioned officer in the United States Air Force serving in the rank of Major. After he was diagnosed as HIV-positive, his superior commissioned officer ordered him to inform sexual partners of his HIV status and to employ methods,

including condoms, to prevent the transfer of bodily fluids during sexual relations. App., *infra*, 31a. Respondent nevertheless had unprotected vaginal intercourse with a fellow officer and a civilian without informing them that he was HIV-positive. Respondent was thereafter tried by general court-martial of two specifications of willfully disobeying a "safe sex" order from a superior officer, two specifications of assault with a means likely to produce death or grievous bodily harm, and one specification of assault on a superior commissioned officer, in violation of 10 U.C.M.J. 890 and 928. Respondent was convicted as charged, except that he was acquitted of assault on a superior officer and instead convicted of the lesser-included offense of assault consummated by battery. On March 4, 1994, respondent was sentenced to six years' confinement and forfeiture of $2,500 pay per month for 72 months. On November 20, 1995, the Air Force Court of Criminal Appeals affirmed the conviction. Respondent did not seek further review of that decision and, his conviction therefore became final. See 10 U.S.C. 867(b); Rule 1209(a) of the Rules for Courts-Martial. Respondent was incarcerated at the United States Disciplinary Barracks at Fort Leavenworth, Kansas. App., *infra*, 2a.

On or before December 18, 1996, the Air Force notified respondent that it had initiated action under Section 1161(b)(2) to drop him from the rolls of the Air Force on the basis of his final court-martial conviction and confinement. App., *infra*, 25a-29a. On December 20, 1996, while serving in confinement, respondent petitioned the Air Force Court of Criminal Appeals for extraordinary relief under the All Writs Act, 28 U.S.C. 1651(a), alleging that his receipt of HIV medication had been interrupted. On January 9, 1997, the Air Force Court of Criminal Appeals denied the petition for lack

of jurisdiction. App., *infra*, 22a-24a. On January 23, 1997, respondent filed a combined Petition for Extraordinary Relief and Writ Appeal in the United States Court of Appeals for the Armed Forces, reiterating his claims with regard to his medication, and arguing for the first time that the Air Force's action to drop respondent from its rolls violated the Double Jeopardy and *Ex Post Facto* Clauses. Respondent argued that because his court-martial conviction triggered the Air Force's action to drop him from the rolls, Sections 1161(b)(2) and 1167, which were enacted after his conviction, imposed an *ex post facto* punishment. He similarly contended that the provisions violated the Double Jeopardy Clause because they authorized the infliction of successive punishment based on the same conduct underlying his conviction. App., *infra*, 13a; Resp. C.A. Br. A1-6 to A1-9.

On August 25, 1997, the court of appeals issued an order staying any administrative action to drop respondent from the rolls. App., *infra*, 20a-21a. In October 1997, respondent's sentence expired and he returned to duty status.

3. The court of appeals denied respondent's writ-appeal petition as moot and, by a three-to-two vote, granted his petition for extraordinary relief barring the government from taking action to drop respondent from the rolls. App. *infra*, 1a-19a. The court of appeals rejected the Air Force's contention that the court lacked All Writs Act jurisdiction to entertain respondent's requests for extraordinary relief because the challenged matters constitute "administrative actions which are separate and apart from the processing of any matter against [respondent] under the Uniform Code of Military Justice." Gov't C.A. Br. 9. The court of appeals noted that its earlier deciions had recognized a "broad responsibility with respect to administration

of military justice," and had found jurisdiction to review via the All Writs Act "a case that [the court] cannot possibly review directly." App., *infra*, 5a-6a. The court concluded that it is thus "empowered by the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review in this Court after review in the intermediate court." *Id.* at 6a.

The court then held that respondent at least initially was entitled to bring a writ-appeal petition raising his medical treatment claim, even though his "release from confinement has now mooted his claim." App., *infra*, 8a. The court further found that respondent's failure to raise in the Court of Criminal Appeals his challenge to the Air Force's personnel action was not fatal to the court of appeal's jurisdiction. The court explained that, "consistent with the concept of 'pendent jurisdiction,'" respondent's "proper filing in this Court of a writ-appeal petition as to suspension of necessary medications allowed him to 'piggyback' thereon * * * the issue of lawfulness of dropping him from the rolls of the Air Force." *Id.* at 9a.

Turning to the merits of respondent's challenge to Sections 1161 and 1167, the court of appeals acknowledged that the President's statutory authority to drop an officer from the rolls is "not labeled 'punishment,'" but "[i]nstead * * * is part of a chapter of Title 10 which concerns 'Personnel.'" App., *infra*, 14a. Nevertheless, the court held that, "[a]lthough the issue is a close one, * * * in order fully to accomplish the purposes of the *Ex Post Facto* and Double Jeopardy Clauses," the Air Force's action to drop respondent from the rolls based on a court-martial conviction should be treated as "punitive." *Ibid.* The court explained that Congress enacted Sections 1161 and 1167 as part of the same public law that added Article

58b, 10 U.S.C. 858b, which mandates the forfeiture of military pay following a prescribed sentence imposed by court-martial. App., *infra*, 14a. The court also observed that in *United States* v. *Gorski*, 47 M.J. 370 (C.A.A.F. 1997), it had held that Article 58b is a punitive sanction under the UCMJ that is subject to the *Ex Post Facto* Clause. App., *infra*, 13a. The court further reasoned that an action to drop an officer from the rolls involves a "stigma very akin to that involved in 'punishment.'" *Id.* at 14a. The court of appeals therefore held that "under all the circumstances surrounding enactment of Pub. L. No. 104-106, the provision for 'dropping from the rolls' was 'punitive' for purposes of the Double Jeopardy Clause and, *a fortiori*, for purposes of the *Ex Post Facto* Clause." *Id.* at 15a n.10. In a footnote, the court stated that those same statutory "circumstances" also sufficed to distinguish *Hudson* v. *United States*, 118 S. Ct. 488 (1997), in which this Court had found that an occupational debarment sanction imposed on individuals administratively for their banking violations did not constitute "punishment" under the Double Jeopardy Clause. App., *infra*, 15a n.10.

Judges Cox and Sullivan filed separate concurrences. App., *infra*, 15a-17a. Judge Cox wrote to respond to the dissent's criticism that the court lacked jurisdiction under the All Writs Act to review an "administrative action" to drop an officer from the rolls. App., *infra*, 15a. In his view, the court's "jurisdiction extends only to the Constitutional *ex post facto* question." *Id.* at 16a. Judge Sullivan emphasized the court's "responsibility of protecting the rights of all servicemembers in court-martial matters," especially "when a 'second punishment,' directly tied to [a] court-martial, is imposed * * * by an *ex post facto* law." *Id.* at 17a.

Judge Gierke, joined by Judge Crawford, dissented. App., *infra*, 17a-19a. They observed that "[d]ropping an officer from the rolls (DFR) traditionally has been treated as an administrative measure separate from the court-martial," and unlike the provision at issue in *United States* v. *Gorski*, *supra*, "[Section] 1167 is not part of the Uniform Code of Military Justice but, instead, is part of the United States Code pertaining to personnel matters." App., *infra*, 17a-18a. In their view, dropping an officer from the rolls is purely an "administrative personnel decision, in the same category as a decision to not promote the officer, to reassign the officer, to revoke the officer's security clearance, or to administratively separate the officer for substandard performance." *Id.* at 19a. Thus, Judges Gierke and Crawford would have held that the court lacked jurisdiction to review the Air Force's action to drop respondent from the rolls. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated on constitutional grounds an Act of Congress authorizing the President to drop an officer from the rolls of the armed forces based on the officer's final conviction by court-martial. That holding conflicts with this Court's decisions, which recognize that the Double Jeopardy and *Ex Post Facto* Clauses apply only to *criminal* laws. It also conflicts with the decisions of the circuit courts of appeals, which have held that a servicemember's administrative discharge from the military is not a criminal proceeding implicating double jeopardy concerns. The holding deprives the President of an administrative procedure for removing from military duty officers who have been incarcerated for committing serious crimes and thus are either unavailable for useful military service or whose continued service is incompatible the military's stan-

dards of conduct for officers. The court of appeals' decision is also flawed in holding that the All Writs Act provides a jurisdictional basis for the court to review the constitutionality of an administrative personnel action. Congress specifically limited the jurisdiction of the Court of Appeals for the Armed Forces to direct review of certain court-martial cases. The court's expansion of its jurisdiction beyond those limits and into military personnel matters conflicts with the language of the All Writs Act and the Court's precedents limiting the applicability of the Act to cases within a court's jurisdiction. Accordingly, this Court's review is warranted.

1. The court of appeals lacked jurisdiction over respondent's challenge to the constitutionality of Sections 1161(b)(2) and 1167. The Court of Appeals for the Armed Forces is an Article I court whose jurisiction is limited to court-martial cases reviewed by a Court of Criminal Appeals involving specific types of sentences: a sentence of death; a sentence including dismissal of a commissioned officer; a sentence including the punitive discharge of an enlisted servicemember; or a sentence to confinement for one year or more. 10 U.S.C. 866(b), 867(a); *Weiss* v. *United States*, 510 U.S. 163, 168 (1994); *Parisi* v. *Davidson*, 405 U.S. 34, 41 n.7, 44 (1972). The Court of Appeals for the Armed Forces thus "may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals." 10 U.S.C. 867(c).

There is no dispute that the court of appeals lacked jurisdiction under 10 U.S.C. 867 to hear respondent's challenge to the Air Force's personnel action to drop him from the rolls; that action is not part of a sentence adjudged by a court-martial. Nor does the court of appeals have jurisdiction over respondent's challenge

pursuant to the All Writs Act, 28 U.S.C. 1651(a). That Act authorizes courts to issue writs "in aid of their respective jurisdictions," 28 U.S.C. 1651(a). That language means that courts may issue writs only in cases otherwise within their jurisdiction; it does not expand the bases for jurisdiction. See *Pennsylvania Bureau of Correction* v. *United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (Act does not authorize review "where jurisdiction [does] not lie under an express statutory provision"); see also *McClung* v. *Silliman*, 19 U.S. (6 Wheat.) 598, 601 (1821) (the Act "vest[s] the power * * * in cases where the jurisdiction already exists"); *Jackson* v. *Vasquez*, 1 F.3d 885, 889 (9th Cir. 1993) ("An order is not authorized under the Act unless it is designed to preserve jurisdiction that the court has acquired from some other independent source in law.").[1] Accordingly, the court of appeals erred in invoking the All Writs Act "in a case that it cannot possibly review directly." App., *infra*, 6a.

The court of appeals has asserted a broad, and erroneous, view of its All Writs Act authority in a number of cases that fall outside the limits of 10 U.S.C. 867. See, *e.g.*, *Fletcher* v. *Covington*, 42 M.J. 215 (C.A.A.F. 1995) (issuing stay in Article 15 proceedings over which court of appeals has no jurisdiction); *Unger* v. *Ziemniak*, 27 M.J. 349, 351 (C.M.A. 1989) (exercising

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[1] This Court therefore has recognized "the power of the Court of Military Appeals to issue an emergency writ * * * in cases * * * which may ultimately be reviewed by that court," and cautioned that "[a] different question would, of course, arise in a case which the Court of Military Appeals is not authorized to review under the governing statutes." *Noyd* v. *Bond*, 395 U.S. 683, 695 n.7 (1969); cf. *Parisi* v. *Davidson*, 405 U.S. at 44-45 (noting "conceptual difficulty" with Court of Military Appeals' jurisdiction under the All Writs Act to consider a servicemember's claim for discharge from the military as a conscientious objector).

jurisdiction over special court-martial while acknowledging that case does not "qualify for review" under 10 U.S.C. 867); *United States Navy-Marine Corps. Court of Military Review* v. *Carlucci*, 26 M.J. 328, 330-334 (C.M.A. 1988) (reviewing Department of Defense Inspector General's judicial corruption investigation); see also App., *infra*, 5a n.3. The effect of that expansive and incorrect view is to propel the court of appeals into military personnel matters over which it has no proper cognizance.

Here, respondent sought extraordinary relief from the Air Force's *personnel* action to drop him from the rolls, which was not part of respondent's sentence imposed by court-martial. Indeed, respondent brought his petition against the President, the Secretary of Defense, and other military officials who were not even parties to the court-martial, and he sought relief after his court-martial conviction had become final through the lapse of time to appeal under 10 U.S.C. 867(b). See also 10 U.S.C. 1167 (authorizing separation only "after the sentence to confinement has become final under [the UCMJ]"). Accordingly, the court of appeals' writ preventing the Air Force from dropping respondent from its rolls was not "necessary or appropriate in aid of" the court's limited jurisdiction under 10 U.S.C. 867 to review court-martial convictions. While the court has said that it has "broad responsibility with respect to administration of military justice," App., *infra*, 5a, no such general view of its mission can authorize it to overrun statutory limits on its jurisdiction.[2]

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[2] The breadth of the court's view of its All Writs Act power is underscored by its assertion of jurisdiction over respondent's challenge to the Air Force's personnel action based on a theory that such a claim is "pendent" to respondent's claim that he received improper medical treatment while in confinement. App.,

Under the jurisdictional theory applied in this case, the Court of Appeals for the Armed Forces could review any servicemember's challenge to a personnel action, such as a loss of a security clearance or non-selection for promotion, as long as the servicemember claims that he is being sanctioned for conduct for which he was previously convicted by a court-martial. The court's holding thus permits it to adjudicate constitutional claims that arise not from the court-martial itself, but from collateral consequences of the conviction within the military. Such an expansive concept of jurisdiction conflicts with Congress' assignment of the responsibility for reviewing such claims to the federal district courts or the Boards for Correction of Military Records under 10 U.S.C. 1552. See generally *Chappell* v. *Wallace*, 462 U.S. 296, 303 (1983); *Holley* v. *United States*, 124 F.3d 1462 (Fed. Cir. 1997); *Guerra* v. *Scruggs*, 942 F.2d 270 (4th Cir. 1991).

2. a. On the merits, the court of appeals erred in holding that an action to drop an officer from the rolls on the basis of a prior conviction was "punitive" for purposes of the Double Jeopardy and *Ex Post Facto*

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infra, 9a. As an initial matter, the court of appeals lacked jurisdiction over respondent's medical treatment claim, because the court may only act with respect to "the findings and sentence as approved by the convening authority." 10 U.S.C. 867(c). Moreover, respondent's conviction was already final at the time of the filing of the petition for extraordinary relief. In any event, respondent's challenge to the constitutionality of 10 U.S.C. 1161(b) and 1167, which petitioner raised for the first time in the court of appeals, is not sufficiently related to his challenge to his medical treatment to constitute a pendent claim. See generally *Swint* v. *Chambers County Com'n*, 514 U.S. 35, 51 (1995); *United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 725 (1966); cf. 28 U.S.C. 1367(a) (providing for supplemental jurisdiction over pendent claims and parties when claims are "so related * * * that they form part of the same case or controversy").

Clauses. Those Clauses apply to only criminal laws or proceedings. *Hudson* v. *United States*, 118 S. Ct. 488, 493 (1997) ("We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, in common parlance, be described as punishment. The Clause protects only against the imposition of multiple *criminal* punishments for the same offense.") (internal quotations marks and citation omitted); *Kansas* v. *Hendricks*, 117 S. Ct. 2072, 2081 (1997) (Double Jeopardy and *Ex Post Facto* Clauses apply to "criminal proceedings"); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594 (1952) ("It has always been considered that [the *Ex Post Facto* Clause] forbids * * * penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment."); see also *Calder* v. *Bull*, 3 U.S. (3 Dallas) 386, 390 (1798).

As this Court recently made clear, the question whether a particular sanction is criminal or civil is initially a matter of legislative intent. *Hudson*, 118 S. Ct. at 493. If the legislature intends to create a civil sanction, that is the end of the matter unless there is "the clearest proof" that "the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty." *Ibid.* (internal quotation, brackets, and citations omitted); see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2081-2082; *United States* v. *Ursery*, 518 U.S. 267, 288 (1996); *United States* v. *Ward*, 448 U.S. 242, 248-249 (1980). In conducting the latter inquiry, the factors identified in *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963), and subsequent cases provide guidance; those factors include whether the sanction historically has been regarded as punishment; whether it involves an affirmative disability or restraint; whether it promotes the traditional goals of

punishment; and whether it is proportionate to a non-punitive purpose. See, *e.g.*, *Hudson*, 118 S. Ct. at 495-496; *Kansas* v. *Hendricks*, 117 S. Ct. at 2082-2083. The fact that the conduct being sanctioned may also constitute a crime or that the sanction was intended to deter similar conduct "is insufficient to render a sanction criminal." *Hudson*, 118 S. Ct. 496; see also *Kansas* v. *Hendricks*, 117 S. Ct. at 2082; *Ursery*, 116 S. Ct. at 2149.

b. Under that analytical framework, an action to drop an officer from the rolls is not a punitive measure subject to double jeopardy and *ex post facto* restrictions. Congress clearly intended 10 U.S.C. 1161(b)(2) and 1167 to be a civil remedy. Sections 1161(b)(2) and 1167 are not contained in the Uniform Code of Military Justice, 10 U.S.C. 801-946. See App., *infra*, 14a. Instead, Sections 1161 and 1167 are included in Chapter 59 of Title 10 of the U.S. Code, which is entitled "Separation" and concerns military personnel matters. Before 1996, Section 1161 had authorized the President to drop from the rolls officers absent without leave or convicted by a civilian court. In 1996, Congress amended Section 1161 and enacted Section 1167 to extend that authority to certain officers convicted by courts-martial; it did so as part of Title V of the National Defense Authorization Act for Fiscal Year 1996, which is entitled "Military Personnel Policy." Pub. L. No. 104-106, 110 Stat. 290; see also App., *infra*, 3a (referring to Air Force's "administrative action to drop [respondent] from its rolls"). Congress's classification of an action to drop officers from the rolls as an administrative personnel action, rather than as a feature of a court-martial sentence under the UCMJ, reveals that Congress regarded that action to be civil in character. See *Kansas* v. *Hendricks*, 117 S. Ct. at 2082 (Kansas's placement of involuntary commitment pro-

ceedings in State's "probate code, instead of the criminal code" supported finding that legislature intended proceedings to be civil). Contrary to the court of appeals' view, it does not matter that this civil provision was enacted simultaneously with the provision that the court of appeals regarded as punitive. App., *infra*, 14a. Congress frequently provides both a civil and a criminal sanction for the same conduct. *Helvering* v. *Mitchell* 303 U.S. 391, 397-398 (1938) (no double jeopardy bar to civil and criminal sanction for tax evasion); cf. *FDIC* v. *Mallen*, 486 U.S. 230 (1988) (rejecting due process challenge to suspension of indicted bank officer).

There is no indication, much less "the clearest proof," *Hudson*, 118 S. Ct. at 493, *Kansas* v. *Hendricks*, 117 S. Ct. at 2082, that an action to drop an officer from the rolls is so punitive in purpose or effect as to negate Congress's intent to establish a civil, administrative scheme. In *Hudson*, the Court held that occupational debarment from the banking industry for banking violations was not punitive. 118 S. Ct. at 495. The same conclusion applies here. Dropping from the rolls has historically been regarded as remedial. It has long been recognized that "[t]he authority to drop is a special power conferred by Congress for the purpose of relieving the army of a useless member who has himself practically abandoned it, and the treasury from the obligation of paying for services no longer rendered." William Winthrop, *Military Law and Precedents* 746 (2d ed. 1920); see also 36 Op. Atty Gen. 186, 186 (1930) (the purpose of an action to drop an officer from the rolls is "not to impose additional punishment upon naval officers convicted of a crime, but rather to promote the efficiency of the Navy and to maintain the high standard of its officer personnel by providing that officers who fail to maintain a certain standard of

conduct may be dropped from the rolls and rendered ineligible for reappointment").

Moreover, in extending the conditions under which officers may be dropped from the rolls to include confinement for an extended period following a final court-martial conviction, Congress reasonably furthered the legitimate remedial objective of separating officers who are not performing any service for the military (because they are in confinement) or whose continuation in active service is inconsistent with good order and discipline. Dropping from the rolls imposes no affirmative disability or restraint "approaching the 'infamous punishment' of imprisonment." *Hudson*, 118 S. Ct. at 496 (quoting *Flemming* v. *Nestor*, 363 U.S. 603, 617 (1960)). And an administrative action to drop an officer from the rolls carries with it no characterization as to the conditions under which the officer was separated. It removes a person from the rolls of the military, without the stigma associated with criminal punishment. See App., *infra*, 26a (notifying respondent that his "service will not be characterized"); see also *Helmich* v. *Nibert*, 543 F. Supp. 725, 728 (D. Md. 1982) ("[S]eparation * * * by dropping * * * from the rolls * * * is clearly not equivalent to a discharge. It is purely a non-disciplinary administrative action which carries no connotations, good or bad.") (citation omitted).

The court of appeals' treatment of dropping from the rolls as "punishment" conflicts with the consistent view of the circuit courts of appeals that have held that a servicemember's discharge from the military is not criminal punishment. See *United States* v. *Rice*, 109 F.3d 151, 153 (3d Cir. 1997) (rejecting defendant's claim that a "general discharge was punishment and the functional equivalent of a criminal prosecution barring subsequent prosecution for the same offense"); *United*

States v. *Smith*, 912 F.2d 322, 323-324 (9th Cir. 1990) (rejecting claim that administrative discharge in lieu of court-martial barred subsequent criminal charges arising out of same conduct); cf. *United States* v. *Reyes*, 87 F.3d 676, 680 (5th Cir. 1996) (in rejecting double jeopardy challenge to conviction following civilian employee's suspension from military, court held "constitutional restrictions on governmental action in its capacity as an employer are not a persuasive basis on which to hold that 'punishment' for Double Jeopardy Clause purposes embraces adverse employment action taken by the government in its capacity as employer, rather than as sovereign"). In ruling that the Constitution forbids the President from dropping from the rolls officers who have been previously convicted of a crime, the Court of Appeals for the Armed Forces has departed from the uniform course of lower court decisions.

3. The constitutional principle embraced by the court of appeals not only conflicts with the Court's longstanding jurisprudence under the Double Jeopardy and *Ex Post Facto* Clauses; it also imposes an unwarranted intrusion upon the President's authority, as Commander in Chief, to enforce standards for behavior for those who serve as officers in the Armed Forces. The court of appeals' decision prevents the President from dropping from the rolls an officer who has committed a serious crime and thereby eliminates a tool provided by Congress to deal with the presence of a convicted officer in the military's leadership ranks.

Although the court of appeals' decision expressly prohibits only an action to drop an officer from the rolls, its reasoning has broader implications that could affect the military's ability to discharge any servicemember on the basis of a prior court-martial conviction. A commissioned officer who is convicted in a court-martial

and sentenced to more than six months' imprisonment is frequently given a sentence of dismissal. See Rule 1003(b)(9)(A) of the Rules for Courts-Martial (authorizing sentence including dismissal). Where a sentence of dismissal is not imposed, however, the military may initiate either an action to drop from the rolls or an administrative discharge proceeding under 10 U.S.C. 1181(b), which also results in the loss of military pay and status. There are distinctive substantive and procedural features of administrative discharge proceedings that underscore their remedial role in maintaining standards of conduct for military servicemembers.[3] Those features may lead the court of appeals to exempt those proceedings from double jeopardy scrutiny. Nevertheless, given the court's broad reasoning that respondent's termination of military status and pay would be unconstitutional because it "result[s] from punitive action taken pursuant to the UCMJ," App., *infra*, 14a, the court may well extend its ruling in this case beyond an action to drop from the rolls under Section 1161(b)(2).

Even if the court of appeals does not extend its ruling to prohibit an administrative discharge proceeding

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[3] Section 1181 permits separation of officers because of "misconduct" or "moral or professional dereliction" or because "his retention is not clearly consistent with the interests of national security." 10 U.S.C. 1181(b). The Armed Forces may employ similar administrative mechanisms to discharge enlisted members for misconduct. 10 U.S.C. 1169 (authorizing Secretary of an armed force to prescribe regulations for discharge of enlisted members); 32 C.F.R. Pt. 41, App. A. After the court of appeals stayed the Air Force's action to drop respondent from the rolls under Sections 1161(b)(2), but before the court of appeals issued its decision, the Air Force instituted an administrative discharge proceeding against respondent under Section 1181. The military has deferred that proceeding pending the resolution of this case.

under Section 1181 against respondent and other similarly situated officers, an administrative discharge proceeding is more cumbersome, time-consuming, and resource-intensive than an action to drop an officer from the rolls.[4] The court's decision thus impairs the President's ability to remove promptly an officer whose authority in the military chain of command has been undermined and whose service no longer furthers the military mission. See *Chappell* v. *Wallace*, 462 U.S. 296, 306 (1983) (noting that "no military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting" and that "the established relationship between enlisted military personnel and their superior officers * * * is at the heart of the necessarily unique structure of the Military"); *Parker* v. *Levy*, 417 U.S. 733, 744 (1974) (recognizing that "a military officer holds a particular position of trust and command in the Armed Forces").

The court of appeals' holding raises matters fundamental to the administration of military personnel matters. Great deference is owed to the judgments of the political branches in this area. See, *e.g.*, *Weiss*, 510 U.S. at 177 (1994) ("Judicial deference * * * 'is at its apogee' when reviewing congressional decisionmaking" in the military context) (quoting *Rostker* v. *Goldberg*, 453 U.S. 57, 70 (1981)); *Loving* v. *United States*, 517 U.S. 748, 768-773 (1996). Despite that principle, the

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[4] For instance, an action under Section 1181 generally requires an evidentiary hearing before a convened Board of Inquiry during which the officer has a right to counsel and subsequent consideration by a Board of Review. 10 U.S.C. 1182-1185; Air Force Instruction 36-3206, Chs. 7-8 (Oct. 14, 1994). By contrast, an action to drop an officer from the rolls is a summary procedure in which the officer is notified of the action and has "10 calendar days to submit comments on his or her defense." Air Force Instruction 36-3207, Ch. 4.2.3 (May 29, 1997).

Court of Appeals for the Armed Forces, an Article I court, has invalidated on constitutional grounds an act of Congress exercising the Legislative Branch's power under the Constitution to "make Rules for the Government and Regulation of the land and naval Forces," Art. I, § 8, Cl. 14—and did so by extending its reach to personnel matters that fall outside the court's limited jurisdiction. Those holdings warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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