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COURT-MARTIAL JURISDICTION OVER RETIREES UNDER ARTICLES 2(4) AND 2(6): TIME TO LIGHTEN UP AND TIGHTEN UP?

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I. Introduction

A retired Regular Army officer working as a General Services (GS) federal employee becomes enraged during an argument with his military division head, an Army Colonel, and impolitely suggests that the senior officer perform certain anatomically impossible feats. The Colonel seeks to prefer charges against the retired officer for disrespect to a superior commissioned officer. Similarly, the retired officer then encounters a disrespectful active duty Army Captain, prompting the retired officer to prefer charges against the junior officer. A popular radio talk show host and his guest, who are both retired military officers of the regular components, publicly denounce the President and Congress, prompting another retired

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officer to request that charges be preferred against them for violating Article 88 of the Uniform Code of Military Justice.

Are retired officers subject to court-martial for these acts, even though committed long after they have retired? May the active duty officer be court-martialed for disrespect to the retired officer? Is the status of a retired officer merely honorific, or does the law treat retirees as full-fledged—albeit dormant—members of the armed forces? Although no published cases have addressed these scenarios, the law is sufficiently unclear and undeveloped that a literal reading of existing law would support court-martial jurisdiction over all of these potential accused.

To the extent the law has some clarity in the retiree arena, it is clear that retired personnel are not civilians but are instead members of the armed forces. They enjoy certain associated privileges and bear numerous responsibilities. Most significantly, as retirees they remain subject to the Uniform Code of Military Justice (UCMJ) with few, if any, legal limitations, and only ambiguous and largely unenforceable policy limitations on the exercise of military jurisdiction over them. However, beyond purely jurisdictional issues, military case law concerning the rights and responsibilities of retired military personnel is sparse.

This article discusses the status of retired members of the armed forces, reviewing existing case law involving the exercise of court-martial jurisdiction. Further, the authors address the role of retired pay and ques-

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tion whether modern treatment of retired pay by both Congress and the courts undermines one major justification for UCMJ jurisdiction over retirees. Next, the authors highlight the broad scope of military jurisdiction, examine the narrow class of offenses that may be beyond the reach of military jurisdiction for retirees, and advocate the adoption of a capacity defense in the retiree context. The article also compares the various Service standards for the discretionary exercise of such jurisdiction. Finally, the article reviews recent statutory changes affecting federal criminal jurisdiction to determine what, if any, affect these legislative developments have, or should have, on military jurisdiction over military retirees.

II. Status of Retirees

The first Army retired list was not established until 1861, and it applied only to officers.[3] The legislation provided for retirement of officers for either physical disability or upon the completion of forty years of service.[4] In 1878, Congress also drew a distinction between two types of retirement for officers. Some officers received one year's salary as a form of severance pay and were considered completely removed from military service.[5] In a system similar to the modern retirement system, other officers received reduced pay—"seventy-five *per centum* of the pay upon which they retired"—but were "only being retired from *active* service."[6] Further, the 1878 legislation, and subsequent Acts, made it clear that, at least from that time, military officers on the retired list were considered to

3. Brigadier General (Ret.) Frank O. House, *The Retired Officer: Status, Duties, and Responsibilities*, 26 A.F. L. REV. 111, 113 (1987) (citing Act of Aug. 3, 1861, 12 Stat. 289, 290, which applied to both officers of the Army and the Marine Corps); *see also* RUSSELL F. WEIGLEY, HISTORY OF THE UNITED STATES ARMY 230 (1967) ("[The] act of August 3, 1861, gave the Army its first retirement system, by authorizing retirement, with adequate pay and allowances, for officers . . . .").

4. WEIGLEY, *supra* note 3, at 230.

5. House, *supra* note 3, at 113 (citing REVISED STATUTES OF THE UNITED STATES § 1275 (2d ed. 1878) [hereinafter REVISED STATUTES] (passed at the first session of the forty-third Congress, 1873-1874); *see also* United States v. Tyler, 105 U.S. 244, 245 (1881) ("[O]ne year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended.").

6. House, *supra* note 3, at 113 (citing REVISED STATUTES, *supra* note 5, § 1276) (emphasis in original); *see also Tyler*, 105 U.S. at 245 ("[T]he compensation is continued at a reduced rate, and the connection is continued, with a retirement from active duty only.").

be part of the military.[7] Current statutory authorities,[8] service regulations,[9] and case law[10] also make this point no longer subject to dispute.

It was not until 1885, however, that Congress established a retirement system for enlisted personnel.[11] The legislation applied to enlisted members of the Army and Marine Corps.[12] Few officers and enlisted men were actually on the retired list. Initially the Army retired list was limited to 300; by 1895 retired officers and enlisted men numbered only 1562.[13] In 1907, Congress extended the retirement system to sailors, providing that

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7. House, *supra* note 3, at 114 ("Congress also provided in specific and unequivocal terms as far back as 1878 that personnel on the retired list constituted a part of the Army of the United States. This provision is consistently repeated in subsequent Acts of Congress dealing with the organization and compensation of the armed forces."); *see also Tyler*, 105 U.S. at 245 (officers on the retired list "are part of the army "), 246 ("We are of opinion that retired officers are in the military service of the government . . . ."); THE MILITARY LAWS OF THE UNITED STATES 1915, pt. 1, sec. 331(a), at 665 (5th ed. 1917) (Regular Army includes officers on the retired list) (citing Act of June 3, 1916, sec. 2, 39 Stat. 166) [hereinafter MILITARY LAWS]; JAG Bull., Aug. 1942, at 152 ("A retired Army officer is an officer of the United States . . . ."); BREVET COLONEL W. WINTHROP, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY 433 (1880) ("[a]n officer on the retired list, being as much a part of the army as an officer on the active list") ("retired officers of the army, though relieved in general from active military service, were nevertheless, as a part of the army"). The Army's statutory requirement to maintain retired lists is contained at 10 U.S.C. § 3966. The Air Force's statutory requirement is contained in 10 U.S.C. § 8966.

8. 10 U.S.C.A. § 3075(b)(3) (West 1998 & 2001 Supp.) ("The Regular Army includes . . . the retired officers . . . of the Regular Army."); *see also id.* § 8075(b)(3) (Retired officers of the Regular Air Force are considered to be part of the Regular Air Force.).

9. *See, e.g.*, U.S. DEP'T OF ARMY, REG. NO. 600-8-24, OFFICER TRANSFERS AND DISCHARGES para. 6.8(a) (21 July 1995) [hereinafter AR 600-8-24] ("An RA Officer placed on the retired list continues to be an officer of the U.S. Army.").

10. McCarty v. McCarty, 453 U.S. 210, 221 (1981) ("The retired officer remains a member of the Army . . . ."); Loeh v. United States, 53 Fed. Cl. 2, 5 (2002) ("A retired officer therefore remains a member of the armed forces . . . .").

11. House, *supra* note 3, at 113 n.21 (citing Act of Feb. 14, 1885, ch. 67, 23 Stat. 305).

12. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 87 n.27 (1920 ed.) ("By the Act of Feb. 14, 1885, enlisted men of the army and marine corps were made eligible to retirement after thirty years' service."). In 1890, Congress amended the 1885 Act to provide for "double time in computing the thirty years" necessary for retirement, for service during the Civil War; however, the Act still only provided for the retirement of enlisted men of the Army and Marine Corps. MILITARY LAWS, *supra* note 7, at 271 (citing Act of Sept. 30, 1890, 26 Stat. 504). However, service in the Navy was credited toward the thirty years for soldiers and marines. *Id.*

13. Joseph W. Bishop, *Court-Martial Jurisdiction over Military-Civilian Hybrids: Retired Regulars, Reservists, and Discharged Prisoners*, 112 U. PA. L. REV. 317, 332 n.70 (1964).

enlisted men of the Army, Marine Corps, *and Navy,* who had completed thirty years of service, could be placed on the retired list and receive seventy-five percent of their pay and allowances.[14] Soldiers on the retired list were long considered to be part of the Regular Army.[15] Currently, retired enlisted members of all the regular components are considered to be members of that component.[16]

Military retirees fall into two general categories: those retired for disabilities and those retired for length of service. Service members may be granted a disability retirement on either a permanent or temporary basis.[17] A service member who is unfit to perform his duties because of a permanent disability, which was not caused by the service member's intentional misconduct or willful neglect or while absent without authority, may be retired on that basis if the individual has at least twenty years of service or is at least thirty-percent disabled.[18] If an eligible service member's disability is not permanent, the service member may be placed on the Temporary Disability Retired List (TDRL) and receive retired pay.[19]

A Regular Army (RA) officer or reserve commissioned officer,[20] warrant officer,[21] or soldier[22] with at least twenty years of service, may request to retire and receive retired pay.[23] Unique to the Department of the Navy, enlisted Marines and sailors with less than thirty years of service are not retired, but instead are transferred to the Fleet Marine Corps Reserve or Fleet Reserve, respectively, receiving "retainer" rather than retired pay.[24] Upon the completion of thirty years of service, these service members are

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14. MILITARY LAWS, *supra* note 7, pt. 1, sec. 1038, at 382 (citing Act of Mar. 2, 1907, 34 Stat. 1217) (emphasis added).

15. *Id.* at 665 (citing Act of June 3, 1916, sec. 2, 39 Stat. 166); *see also* MAJOR GENERAL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 47 (3d ed., rev. 1915) (The Regular Army includes "the officers and enlisted men on the retired list . . . .").

16. 10 U.S.C.A. §§ 3075(b)(3) (West 1998 & 2001 Supp.) (retired enlisted personnel part of the Army), 8075 (retired enlisted personnel of the Regular Air Force are part of the Regular Air Force).

17. *Id.* §§ 1201-1202, 1204-1205, 1210; *see also* DEFENSE FINANCE & ACCOUNTING SERVICE, CLEVELAND CENTER PAM., PREPARING FOR YOUR MILITARY RETIREMENT 2-3, para. 2(C)(3) (June 2000) [hereinafter DFAS-CL 1352.2 PH] ("disability retirement may be temporary or permanent"); United States v. Stevenson, 53 M.J. 257, 258 (2000) ("two basic types of disability retirement—permanent and temporary").

18. 10 U.S.C.A. § 1201. To be eligible for retirement based on at least a thirty-percent disability, the service member must also have at least eight years of service, and the disability be proximately caused by the performance of active duty, or was incurred in the line of duty. *Id.* § 1201(b)(3)(B).

placed in a retired status.[25] The majority of service members must retire after thirty years of military service.[26]

As members of the armed forces, military retirees enjoy a number of

19. *Id.* § 1202; *see also* HANDBOOK FOR RETIRED SOLDIERS AND FAMILY MEMBERS para. 3-1(a)(3) (2 June 1999) [hereinafter HANDBOOK FOR RETIRED SOLDIERS] ("The TDRL is for officers, warrant officers, and enlisted soldiers who are retired for disabilities which may or may not be permanent."), *available at* http://www.odcsper.army.mil; 2001 RETIRED MILITARY ALMANAC 16 (24th ed. 2001) ("If the disability is not permanent, the member is placed on the Temporary Disability Retired List (TDRL) and is subject to physical examination no less than once every 18 months."). A service member may remain on the TDRL for a maximum of five years. DFAS-CL 1352.2-PH, *supra* note 17, at 2-3, para. 2(C)(3) ("resolved within a five-year period"); HANDBOOK FOR RETIRED SOLDIERS, *supra*, para. 3-1(b). After five years, the service member must be retired for permanent disability, returned to duty or separated from the military. 2001 RETIRED MILITARY ALMANAC, *supra*, at 16.

20. 10 U.S.C.A. § 3911 ("regular or reserve commissioned officer of the Army"); *see also* AR 600-8-24, *supra* note 9, para. 6.14(c) ("An RA or USAR commissioned officer with 20 years AFS (of which 10 years is active commissioned service) . . . may on his or her request and the approval of the Secretary of the Army be retired . . . ."); *see* 10 U.S.C.A. §§ 6323(a)(1) (Navy or Marine Corps officer), 8911 (Air Force officer). Through 31 December 2001, the ten years' active commissioned service requirement may be reduced to an eight-year requirement. *Id.* §§ 3911(b) (Army), 6323(a)(2) (Navy and Marine Corps), 8911(b) (Air Force).

21. 10 U.S.C.A. § 1293 ("The Secretary concerned may, upon the warrant officer's request, retire a warrant officer of any armed force under his jurisdiction who has at least 20 years of active service . . . ."); *see also* AR 600-8-24, *supra* note 9, para. 6.14(c)(2) ("Any warrant officer with 20 years AFS may upon his or her request and the approval of the Secretary of the Army be retired . . . .").

22. *Id.* § 3914 ("[A]n enlisted member of the Army who has more than 20, but less than 30, years of service . . . may, upon his request, be retired."); *see also id.* § 8914 (Air Force); U.S. DEP'T OF ARMY, REG. 635-200, ENLISTED PERSONNEL para. 12-4(a) (1 Nov. 2000).

23. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 12 ("Generally, regular and Reserve commissioned officers, warrant officers, and enlisted members may retire after completing 20 or more years of active service."); *see also* McCarty v. McCarty, 453 U.S. 210, 211 (1981) ("A regular or reserve commissioned officer of the United States Army who retires after 20 years is entitled to retired pay.") (citing 10 U.S.C. §§ 3911, 3929); U.S. DEP'T OF AIR FORCE, INSTR. 36-3203, SERVICE RETIREMENTS 8, para. 2.1 (30 Apr. 2001) [hereinafter AFI 36-3203] ("Members are eligible to retire if they have at least 20 years of total active federal military service (TAFMS).") Retired reserve soldiers, with twenty years of qualifying military service, are entitled to retired pay upon reaching the age of sixty. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 1-1(b); *see also* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 6, 40-41. The current twenty-year retirement system for the active components is the culmination of various legislative efforts between 1915 and 1948. GENERAL ACCOUNTING OFF., MILITARY RETIREMENT: POSSIBLE CHANGES MERIT FURTHER EVALUATION, REP. NO. GAO/NSAID-97-17, at 21 (Nov. 1996) [hereinafter GAO/NSAID-97-17].

privileges,[27] including a limited right to wear their uniforms,[28] greater First Amendment freedoms,[29] exchange and commissary rights,[30] burial benefits,[31] enjoy limited use of their military titles for commercial purposes,[32] and may be referred to by their rank.[33] Further, as members of the armed forces they bear certain responsibilities. They remain subject to court-martial jurisdiction,[34] labor under various employment restrictions,[35] and may be recalled to active duty either voluntarily or involuntarily.[36] However, a retired officer not recalled to active duty is ineligible to command.[37]

Currently, it is the policy of the Department of Defense that "military retirees shall be ordered to active duty (as needed) to fill personnel shortages due to mobilization or other emergencies . . . ."[38] Military retirees are grouped into three categories: (1) "[n]on disability military retirees under age 60 who have been retired less than 5 years;" (2) "[n]on disability military retirees under age 60 who have been retired 5 years or more;" and (3) all other military retirees including those retired for disability.[39] As a matter of policy, category three retirees are normally assigned only to civilian jobs in the event of mobilization, but "[a]ge or disability alone may not be the sole basis for excluding a retiree from active service during mobiliza-

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24. 10 U.S.C.A. §§ 6330(b), (c)(1); *see also* DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1). In contrast, Army and Air Force personnel with more than twenty, but less than thirty, years of service "are all classified as retired." *Id.* Retired Regular Army soldiers in this category become part of the Retired Reserve. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-4 (b)(3). Significantly for purposes of military jurisdiction over retirees, "Article 2, UCMJ, makes no distinction between retired pay and retainer pay." United States v. Morris, 54 M.J. 898, 899 (N-M. Ct. Crim. App. 2001).

25. DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1); *see also* 10 U.S.C.A. § 6331.

26. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 12 ("Ordinarily, members may serve a maximum of 30 years prior to mandatory retirement."); *see also* 10 U.S.C.A. §§ 634 (Regular component Colonels and Navy Captains must retire at 30 years of active commissioned service if not selected for promotion), 1305 (Regular Army Warrant Officer), 633 (Regular Army Lieutenant Colonels and commanders not selected for promotion must retire at twenty-eight years), 1251 (most Regular Army officers must retire by age sixty-two), 1263 (Warrant Officers must retire by age sixty-two); *cf. id.* §§ 3917 (A Regular Army enlisted soldiers with thirty years of service "shall be retired upon his request."), 6326 (enlisted members of the Regular Navy or Marine Corps with thirty years of service who apply for retirement "shall be retired by the President").

27. *See generally* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19.

28. U.S. DEP'T OF ARMY, REG. 670-1, WEAR AND APPEARANCE OF ARMY UNIFORMS AND INSIGNIA para. 29.3 (1 July 2002) (retirees may wear their uniforms during certain ceremonial occasions and parades); *see also* 10 U.S.C.A. § 772(c) ("A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade."); 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72 ("In general, the uniform may be worn for ceremonies or at official functions when the dignity of the occasion and good taste would dictate the propriety of the uniform.").

tion."[40] Theoretically, only death cuts off the military's ability to recall its retired members to active duty and/or to subject them to court-martial jurisdiction.[41]

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29. U.S. DEP'T OF ARMY, REG. 360-5, PUBLIC INFORMATION para. 4.2(c)(3) (31 May 1989) ("Manuscripts or speeches by retired Army personnel . . . are not required to be submitted for clearance."); *see also* U.S. DEP'T OF DEFENSE, DIR. 5230.9, CLEARANCE OF DOD INFORMATION FOR PUBLIC RELEASE para. 4.7 (9 Apr. 1996) ("Retired personnel . . . *may* use the review services to ensure that the information intended for public release does not compromise national security.") (emphasis added); HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 4-8 (except for civilian federal employees and material containing classified information, "[r]etirees are not required to submit writings and public statements on military subjects to the Department of the Army for official clearance"); 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 85 ("There is no requirement that requires retired military personnel to submit copies of articles or speeches to the DoD or applicable branch of service for clearance."); *cf.* Captain Walter R. Thomas, USN, *And Another Thing I'll Say After I Retire*, MIL. REV., June 1973, at 74 (noting the "admittedly, tedious and trivial administrative obstacles which discourage these officers from writing controversial articles while they are on active duty," but arguing that "active duty officers should be as prolific writers on military matters as retired officers").

The relaxation of restrictions on retired service members who wish to express their opinion on a controversial topic publicly may prove significant. To illustrate, Marine LTC William Corson wrote a book critical of U.S. policy in Vietnam, entitled *The Betrayal*, while on active duty, but scheduled for publication after his retirement in 1968. J.Y. Smith, *William R. Corson, 74, Author and Retired Marine Officer, Dies*, WASH. POST., July 19, 2000, at B7. The Marine Corps delayed his retirement and initiated steps to convene a court-martial based on Corson's alleged failure to follow a Marine regulation requiring "officers on active duty to submit statements on public policy to review before making them public." *Id.* Eventually, the public controversy surrounding Corson's potential court-martial drew attention to his book, causing the Marines to forego the court-martial. *Id.* Instead, Corson received a reprimand and was permitted to retire. Elaine Woo, *Col. William Corson; Critic of U.S. Policy in Vietnam War*, L.A. TIMES (July 22, 2000), http://ebird.dtic.mil/Jul2000/s20000724col.htm.

Similarly, Army officials have used occasional threats of disciplinary action to restrict controversial publications. As Majors, George Patton and Dwight Eisenhower wrote articles for *Infantry Journal* advocating changes in the use of armor. After Eisenhower challenged existing infantry doctrine and suggested that the standard infantry division be reorganized to add a tank company, "[h]e was summoned before the chief of infantry and told the facts of life." PETER LYON, EISENHOWER: PORTRAIT OF THE HERO 56-57 (1974). As Eisenhower recalled: "I was told that my ideas were not only wrong but dangerous and that henceforth I would keep them to myself. Particularly, I was not to publish anything incompatible with solid infantry doctrine. If I did, I would be hauled before a court-martial." *Id.* at 56. The authors are aware of at least one modern instance when an Army official made similar threats of criminal action against an active duty officer prompted by disagreement over the content of a pending publication.

Military retirees are neither civilians nor divorced from the military. They are viewed as "an experienced and tested wartime resource"[42] and a reservoir of expertise on military issues.[43] Advocating the retention of court-martial jurisdiction over officers on the retired rolls, President Woodrow Wilson articulated his view of their status and the role retirees played within the military. Wilson posited that they were "regarded and governed at all times as an effective reserve of skilled and experienced

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30. U.S. DEP'T OF ARMY, REG. 60-20, ARMY AND AIR FORCE EXCHANGE SERVICE OPERATING POLICIES para. 2-9(a)(8) (15 Dec. 1992) (retired personnel and their dependents are authorized patrons). Retirees and their family members may also use morale, welfare, and recreation (MWR) facilities; and receive an identification card that permits them to use medical, commissary, exchange, and theater facilities. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, paras. 2-6(a), 2-8(a).

31. Retired members of the armed forces, their spouses, and children are eligible for burial in Arlington National Cemetery. U.S. DEP'T OF ARMY, REG. 290-5, ARMY NATIONAL CEMETERIES para. 2-4 (19 Mar. 1976); *see also* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 177 ("Military retirees, their spouses, and minor children may be buried in national cemeteries, including Arlington National Cemetery."). Subject to availability, retired members are entitled to burial honors. U.S. DEP'T OF ARMY, REG. 600-25, SALUTES, HONORS, AND VISITS OF COURTESY para. 6-17 (1 Sept. 1983).

32. U.S. DEP'T OF DEFENSE, REG. 5500.7-R, JOINT ETHICS REGULATION para. 2-304 (30 Aug. 1993) (C4, 16 Aug. 1998) ("Retired military members . . . not on active duty, may use military titles in connection with commercial enterprises, provided they clearly indicate their retired . . . status. However, any use of military titles is prohibited if it in any way casts discredit on DoD or gives the appearance of sponsorship, sanction, endorsement, or approval by DoD. In addition, in overseas areas, commanders may further restrict the use of titles by retired military members . . . ."); *see also* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para.3-7(a) (may use "military titles . . . in connection with commercial enterprises" if use does not discredit the Army or imply Army endorsement).

33. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 73 ("Retirees should be addressed, in writing and orally, by their retired military rank."); *see, e.g.*, Ben Barber, *State Awaits Word on Ross Successor*, WASH. TIMES, Jan. 5, 2001, at A11 (Secretary of State Colin Powell "has asked that he not be addressed as 'general' inside the [State Department] building."). Retirees may use their military titles in a social context. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-7(a).

34. UCMJ art. 2(a)(4)-(6) (2002).

35. Retirees may accept employment with a foreign government only after receiving the approval of the retiree's Service Secretary and the Secretary of State. 37 U.S.C.A. § 908 (West 2001). Army regulations provide that any retiree "who accepts Civil employment with a foreign government without the approval specified . . . is subject to having retired pay withheld in an amount equal to the amount received from the foreign government . . . in addition to any other penalty that may be imposed under law or regulation." U.S. DEP'T OF ARMY, REG. NO. 600-291, FOREIGN GOVERNMENT EMPLOYMENT para. 11 (1 July 1978) (citing *Department Of Defense Military Pay and Allowance Committee*, Comp. Gen. B-178538, Oct. 13, 1977); *accord* DFAS-CL 1352.2 PH, *supra* note 17, at 2-8, para. 2(F). Title 18 U.S.C. § 207 restricts retired officers in their business dealings with the federal government.

officers and a potential source of military strength . . . ."[44] They constituted a part of the Army, "members of the Military establishment distinguished

36. 10 U.S.C.A. § 688 (West 1998 & 2001 Supp.) (retired members of the regular components, certain members of the Retired Reserve, and members of the Fleet Reserve or Fleet Marine Corps Reserve); *see also* U.S. DEP'T OF ARMY, REG. 601-10, MANAGEMENT AND MOBILIZATION OF RETIRED SOLDIERS OF THE ARMY para. 1.5 (30 Nov. 1994) (Regular Army retired soldiers and reserve retired soldiers with at least twenty years of active service may be recalled to active duty); AFI 36-3203, *supra* note 23, at 43, para. 4.9.1, and 100, para. A7.9. Retirees may volunteer for active duty or be involuntarily recalled during times of "war or national emergency declared by Congress, or when otherwise authorized by law." AR 601-10, *supra*, para. 1-5(b)-(c). Soldiers who fail to report once ordered to active duty "will be reported as deserters." *Id.* para. 4-11(d).

37. 10 U.S.C.A. § 750 ("A retired officer has no right to command except when on active duty."); U.S. DEP'T OF AIR FORCE, INSTR. 51-606, APPOINTMENT TO AND ASSUMPTION OF COMMAND para. 1.9 (1 Oct. 2000) ("A retired officer has no right to command except when on active duty (10 U.S.C. 750)."). The restriction on command has been longstanding. *See* Retired Officers, Op. OTJAG, Army (Oct. 28, 1913), *as digested in* Dig. Opns. JAG 1912-1917, at 308 (Retired Army officer not authorized to be placed in charge of a post that required him to exercise command over enlisted men and an officer of the Medical Corps) (citing 88-600, J.A.G., Oct. 28, 1913); EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 221 n.3 (1st ed. 1907) ("Retired officers . . . may be employed on active duty, other than the command of troops, in time of war (Act March 2, 1899) . . . ."); *cf.* Retirement, Op. JAGN, Navy (July 19, 1951), *as digested in* Dig. Opns. JAG 1951-1952, sec. 11.3, at 452 ("[A] retired [Naval] officer is not 'eligible for command at sea' except during time of war, and then only when detailed to command a squadron or single ship in accordance with the Act of May 22, 1917 . . . ."). For purposes of the Act, a "time of war" included only a declared war and was not triggered by the Korean Conflict. *Id.* (citing Op. JAGN, 1951/18, 19 July 1951).

38. U.S. DEP'T OF DEFENSE, DIR. 1352.1, MANAGEMENT AND MOBILIZATION OF REGULAR AND RESERVE RETIRED MILITARY MEMBERS para. 4 (Mar. 2, 1990) (citing 10 U.S.C. §§ 672, 688).

39. *Id.* encl. 2, para. E1.1.3.

40. *Id.* para. 6.1.5. Category III retirees may also be assigned to positions that reflect their critical skills and may volunteer for particular jobs. *Id.*

41. *Id.* para. 6.3.3 ("The Secretary of a Military Department may order any retired Regular member, retired Reserve member who has completed at least 20 years of active military service, or a member of the Fleet Reserve or Fleet Marine Corps Reserve to active duty without the member's consent at any time to perform duties deemed necessary to the interests of national defense in accordance with 10 U.S.C. § 683 . . . . This includes the authority to order a retired member who is subject to the Uniform Code of Military Justice (UCMJ) to active duty to facilitate the exercise of courts-martial under [10 U.S.C. § 302(a)]."); *see* 10 U.S.C.A. § 688 ("may be ordered to active duty . . . at any time"). *But cf.* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, at 3-6(c) ("Retired soldiers may be recalled up to age 64 for general officers, 62 for warrant officers, and 60 for all others.").

42. 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72; *see also* United States v. Hooper, 26 C.M.R. 417, 424 (C.M.A. 1958) ("regarded and governed at all times as an effective reserve of skilled and experienced officers and a potential source of military strength") (citing 53 CONG. REC. 12,844 (1916)) (statement of President Wilson).

by their long service, and, as such, examples of discipline to the officers and men in the active Army."[45] Wilson believed that these retirees "represent the spirit of the Military Establishment," are "exemplars of discipline, and have in their keeping the good name and good spirit of the entire Military Establishment before the world."[46]

Because of their special position and relationship with the military, Wilson believed that such retired personnel had been subject to military jurisdiction as a matter of necessity, "in order that the retired list might not become a source of tendencies which would weaken the discipline of the active land forces and impair that control over those forces which the Constitution vests in the President."[47] Further, Wilson advocated a uniform application of military jurisdiction to active duty personnel and those on the retired list, believing such application essential for the Army to be an effective and coherent force once called to war.[48]

III. The Historical Development of Court-Martial Jurisdiction over Retired Military Personnel

Although reported courts-martial of military retirees are relatively rare, jurisdiction over retired Army officers has long been a staple of military law.[49] Additionally, retired officers of the Navy have been subject to court-martial jurisdiction since at least 1857.[50] The initial 1861 legislation establishing a retired list for Army officers clearly provided they would be

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43. *See Hooper*, 26 C.M.R. at 425 ("They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency."). It is not unusual for senior retired service members to be called upon to give their advice of military matters. *See, e.g.*, Patrick J. Sloyan, *Military Lessons from Nazi Army*, LONG ISLAND NEWSDAY, June 13, 2001, at 18 ("A retired general advising Defense Secretary Donald Rumsfield on transforming the military yesterday recommended following in the footsteps of the Nazi army by changing the combat capability of only a small percentage of U.S. forces to achieve a dramatic improvement on future battlefields."); Patrick J. Sloyan, *Advisor: Military Needs Minorities*, LONG ISLAND NEWSDAY, June 14, 2001, at 3 ("A retired Navy admiral advising Defense Secretary Donald Rumsfield on overhauling the military called yesterday for an aggressive recruitment of Hispanic and African-American sergeants and officers to lead what he predicted will be a military dominated by minorities in the coming decades."); Thomas E. Ricks, *Rumsfeld on High Wire on Defense Reform*, WASH. POST, May 20, 2001, at A1 ("The criticism has focused on Rumsfeld's score of study groups, staffed by retired generals and admirals and other experts . . . .").

44. *Hooper*, 26 C.M.R. at 424 (citing 53 CONG. REC. 12,844).

45. *Id.*

46. *Id.*

47. *Id.*

"subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles."[51] Further, as early as 1881, the Supreme Court noted that Army officers retired from active service were "subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court-martial, for any breach of those rules . . . ."[52]

Military jurisdiction over enlisted retirees has not existed as long as jurisdiction over retired officers and has varied by service. Retired enlisted soldiers have historically been considered part of the Army and subject to

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48. *Id.* Specifically, President Wilson stated:

> The purpose of the Articles of War in times of peace is to bring about a uniformity in the application of military discipline which will make the entire organization coherent and effective, and to engender a spirit or cooperation and proper subordination to authority which will in time of war instantly make the entire Army a unit in its purpose of self-sacrifice and devotion to duty in the national defense. These purposes can not be accomplished if the retired officers, still a part of the Military Establishment, still relied upon to perform important duties, are excluded, upon retirement, from the wholesome and unifying effect of this subjection to a common discipline.

Id.

49. The Act of August 3, 1861, which established the retired list for Army and Marine Corps officers, also stated that such officers were "subject to the rules and articles of war, and to trial by general court-martial for any breach of the said articles.'" 12 Stat. 290, *quoted in* House, *supra* note 3, at 113 (emphasis deleted). *See also* United States v. Tyler, 105 U.S. 244, 246 (1881) ("subject to the rules and articles of war, and may be tried . . . by a military court-martial"); JAG Bull., Aug. 1942, at 156 ("retired officers are at all times subject to the rules and articles of war, and to disciplinary action for any breach thereof"); DUDLEY, *supra* note 37, at 220 (Retired officers "unless 'wholly' retired, . . . though not in active service are subject to discipline as other officers and may be tried and sentenced by court-martial for any breach of the rules and articles of war."); WINTHROP, *supra* note 7, at 433 ("[a]n officer on retired list . . . subject to trial by general court-martial").

50. Commander E.T. Kenny, *Uniform Code, Art. 2—Persons Subject to the Code*, JAG J. 12, Aug. 1950, at 13 ("We know that retired regular officers have been expressly subject to naval jurisdiction since 1857 (34 U.S.C. 389)."); *cf.* White v. Treibly, 19 Fed. 2d 712, 713 (D.C. Cir. 1927) (Retired officers of the Navy "shall be subject to the rules and articles for the government of the Navy and to trial by general court-martial."). In 1916 a retired naval officer, William H. Morin, was subjected to court-martial and dismissed from the service. 1 COMPILATION OF COURT-MARTIAL ORDERS, U.S. DEP'T OF NAVY, 1916-1927, at 53 (1940).

51. House, *supra* note 3, at 113 (citing 12 Stat. at 290) (emphasis deleted).

52. *Tyler*, 105 U.S. at 246.

military jurisdiction.[53] Indeed, military jurisdiction over Army enlisted retirees appears to have been exercised since at least 1896.[54] Further, since at least 1895, the *Manual for Courts-Martial* (*MCM*) clearly provided that military jurisdiction extended to both retired Army officers and enlisted personnel.[55] The exercise of military jurisdiction over retired enlisted soldiers was not pursuant to specific statutory authority; rather, it "was asserted more indirectly under the general rubric of membership in the Regular Army."[56]

In contrast, military jurisdiction was not exercised against Navy enlisted men on the retired list until the enactment of the UCMJ in 1951.[57] In *Murphy v. United States*,[58] the Court of Claims held that enlisted soldiers on the retired list were not part of the Army for purposes of a specific pay-increase Act.[59] In dicta, the court conceded that, by statute, retired soldiers were considered to be part of the Army, but the court expressed confusion as to their actual status, noting that retired soldiers were not "a part of the organization of the Army, subject to military duty as enlisted men on the active list."[60] The court questioned how retired soldiers could

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53. Retirement, Op. OTJAG, Army (1912), *as digested in* Dig. Ops. JAG 1912, sec. II B.1, at 1001 ("retired enlisted men are not formally discharged from the service at the date of retirement"), sec. II B.5, at 1002 ("a retired soldier is part of the Army"), sec. II F.3, at 1003 ("An enlisted man on the retired list is subject to trial by court-martial (C. 21089, Feb. 11, 1907) and to dishonorable discharge by sentence if such be adjudged."); *see also* LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED 7 (1942) ("Retired enlisted men of the Regular Army are subject to military law.").

54. *Retirement*, Dig. Ops. JAG 1912, sec. II B.3a, at 1001 ("Held that a retired enlisted man may be tried for not paying his debts. C.2716, Nov. 2, 1896.").

55. FIRST LIEUTENANT ARTHUR MURRAY, MANUAL FOR COURTS-MARTIAL 12 n.2 (1895) (court-martial jurisdiction extends to "retired officers and soldiers"); *see also* A MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 4(a) note (1920) (persons subject to the Articles of War include "the officers and enlisted men of the retired list"); A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 3 note (1916) (members of the Regular Army subject to military jurisdiction includes "officers and enlisted men on the retired list"); A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW, UNITED STATES 14 n.2 (rev. ed. 1901) [hereinafter 1901 MCM]; A MANUAL FOR COURTS-MARTIAL AND OF PROCEDURE UNDER MILITARY LAW, UNITED STATES 13 n.2 (2d ed. 1898).

56. Pearson v. Bloss, 28 M.J. 376, 379 n.4 (C.M.A. 1989).

57. Kenny, *supra* note 50, at 14. However, sailors with more than twenty years of service who were transferred to the Fleet Reserve were still subject to military jurisdiction. *Id.* (Article 2(6) was "an unqualified incorporation of existing law."); *see* United States v. Fenno, 167 F.2d 593 (2d Cir. 1948).

58. 38 Ct. Cl. 511 (1903), *aff'd*, 39 Ct. Cl. 178 (1904).

59. *Id.* at 178, 183-84.

60. *Id.* at 180.

be considered part of the Regular Army if not subject to military duty.[61] Further, the court refused to concede that retired soldiers were subject to court-martial jurisdiction and characterized a soldier's retired pay as compensation "not for services to be rendered in the future, but for services which he had faithfully rendered prior to his retirement."[62]

In 1909, relying on the Court of Claims' decision in *Murphy*, the Navy posited "that a retired enlisted man is not amenable to trial by court-martial for violation of the laws and regulations governing the Navy."[63] In 1922, the Navy again took the same position, opining that retired men of the Navy were not subject to military jurisdiction, except when called to active duty during times of war or national emergency.[64] The Navy based its opinion on two grounds. First, naval courts-martial were courts of limited jurisdiction and had no legal authority to proceed except when "specially empowered by statute to do so."[65] Second, the Navy was unable to locate any statutory authority that "either directly or indirectly provides that retired enlisted men are subject to the rules and articles of the government of the Navy or that they are amenable to trial by a naval court-martial."[66] Because Congress had specifically provided that retired officers of the Navy were subject to military jurisdiction, the Navy concluded that the absence of specific legislation addressing retired Navy enlisted men meant that Congress did not intend that they be subject to military jurisdiction.[67] The Navy continued to adopt this legal position until 1951, when the UCMJ went into effect.[68]

The UCMJ was the first legislation that expressly included retired personnel in the punitive articles as being subject to military law.[69] Since Army retirees were statutorily included as a component of the Regular Army, and because the Articles of War applied to all members of the Regular Army, a specific statutory provision extending military jurisdiction to Army personnel on the retired list was viewed as unnecessary.[70] The Army

61. *Id.* at 180-81.

62. *Id.* at 182.

63. C.M.O.9, 1922, at 11 (citing File No. 7657-57, 27 Aug. 1909).

64. *Id.* at 12 (File No. 7657-1387, J.A.G., 29 July 1922).

65. *Id.* at 11.

66. *Id.*

67. *Id.* at 12.

68. Kenny, *supra* note 50, at 14 ("As recently as a year ago [1949], the Judge Advocate General affirmed this opinion."); *see also* C.M.O.6, 1951, at 178, 179-80 ("Retired enlisted men of the Regular Navy under current provisions of law are not subject to court-martial jurisdiction. After 31 May 1951, however, all such retired personnel of a Regular component who are entitled to receive pay will be subject to court-martial jurisdiction.").

considered its enlisted retirees to be subject to military jurisdiction. The Navy, however, did not take the same position. Accordingly, the specific language of Article 2, UCMJ, resolved the jurisdictional issue of retired Navy enlisted personnel, clearly extending military jurisdiction to them.

Currently, Article 2, UCMJ, provides for jurisdiction over three classes of military retirees: (1) "Retired members of a regular component of the armed forces who are entitled to pay;" (2) "Retired members of a reserve component who are receiving hospitalization from an armed force;" and (3) "Members of the Fleet Reserve and Fleet Marine Corps Reserve."[71] Jurisdiction over retirees of a regular component is triggered by *entitlement* to retired pay, rather than its actual receipt.[72] Included within Article 2(4)'s ambit are service members retired for either a permanent or temporary disability.[73] In contrast, retired reservists are only subject to military jurisdiction when receiving hospitalization from the military, regardless of their entitlement to retired pay.[74] Finally, members of the Fleet Reserve and Fleet Marine Corps Reserve are subject to military

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69. House, *supra* note 3, at 112-13 ("The first American Articles of War contained no specific reference to retired personnel, nor did the changes in the Articles of War enacted in 1806, 1874, 1916, 1920, or 1948."). Specific mention of retired personnel may be found in the various *Manuals for Courts-Martial*. *See, e.g.*, 1901 MCM, *supra* note 55, at 14 n.2 (court-martial jurisdiction extends to "retired officers and soldiers").

70. House, *supra* note 3, at 114.

71. UCMJ art. 2(a)(4)-(6) (2002).

72. *Id.* art. 2(a)(4) ("who are *entitled* to pay") (emphasis added); *see also* United States v. Bowie, 34 C.M.R. 808, 811 (A.F.B.R. 1964), *aff'd*, 34 C.M.R. 411 (C.M.A. 1964); JAMES SNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 127 (1953) ("The jurisdiction of the Uniform Code in such cases is continuous and remains uninterrupted so long as the retired regulars retain the right to receive pay. A retired regular who elects to receive other statutory benefits in lieu of retired pay is still a person legally entitled to receive such pay and his election does not remove him from the continuing jurisdiction of the Uniform Code.").

73. United States v. Stevenson, 53 M.J. 257, 259 (2000).

74. UCMJ art. 2(a)(5); *see also* SNEDEKER, *supra* note 72, at 128 ("Reservists, after retirement, are not, by virtue of such retirement, subject to the Uniform Code, whether or not they are entitled to receive pay."); ROBINSON O. EVERETT, MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES 19 (1956) ("A retired reservist . . . is not within military jurisdiction, despite receipt of retirement benefits, unless he is being hospitalized in a military hospital."). One legal commentator noted that the exercise of military jurisdiction over retired reservists has historically been "comatose." Bishop, *supra* note 13, at 359.

jurisdiction simply by virtue of their status as such.[75] One peculiarity of retiree courts-martial is that enlisted retirees may not be reduced in rank.[76]

A. Officers

The earliest reported case involving the court-martial of a retired officer was that of Army Major Benjamin P. Runkle. In 1870, Major Runkle retired from the Army, but in 1872 he was tried before a general court-martial, ordered to convene by President Grant, for misconduct occurring both before and after his retirement stemming from his actions as a dispersing officer.[77] Runkle was convicted and was sentenced to be "cashiered," to pay a fine, and to be confined for four years.[78] Reflecting a unanimous recommendation by the members based upon Runkle's war service, good character, and war wounds, the Secretary of War wrote on the record of trial that President Grant had remitted all of the sentence except the cashiering.[79] Four and a half years later, President Hayes reviewed the case, found the evidence insufficient, disapproved the conviction and sentence, and ordered the revocation of the War Department directive removing Runkle from the retired list.[80] After Runkle sued for longevity pay, the government counterclaimed for the back pay that had previously been ordered by President Hayes to be paid Runkle and for the retired pay Runkle had received after being returned to the retired list.[81]

The Court of Claims denied Runkle's claim for longevity pay and the government's counterclaim for return of his retired pay, but did grant the

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75. UCMJ art. 2(a)(6) ("Members of the Fleet Reserve and Fleet Marine Corps Reserve"); *see* United States v. Morris, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001) ("We find the provisions of Articles 2 and 3, UCMJ, standing alone, to be sufficient to establish jurisdiction in this case.").

76. *Morris*, 54 M.J. at 904 ("error to impose a reduction to pay grade E-1 in this case"); *see also* United States v. Sloan, 35 M.J. 4, 11-12 (C.M.A. 1992); United States v. Allen, 33 M.J. 209, 216 (C.M.A. 1991). An enlisted retiree may not be reduced in grade or rate by either a "court-martial or by operation of Article 58a, UCMJ." *Sloan*, 35 M.J. at 11.

77. Runkle v. United States, 19 Ct. Cl. 396, 398 (1884), *rev'd on other grounds*, 122 U.S. 543 (1887). The misconduct involved allegations of embezzlement and misappropriation of government funds. *Id.* at 400. Runkle was also charged with conduct unbecoming based on the same misconduct. *Id.*

78. *Id.* at 398-99. If Runkle did not pay the fine, he was to be confined until he did so, but not longer than eight years. *Id.* at 399.

79. *Id.* at 406.

80. *Id.* at 399-400.

81. *Id.* at 396.

government's counterclaim for return of the back pay.[82] Further, in its opinion the court made a number of salient points affecting retired officers: (1) the President as Commander in Chief is authorized to convene a court-martial;[83] (2) a court-martial is a case "arising in the land or naval forces" for Fifth Amendment purposes;[84] (3) retirees are subject to military jurisdiction for "non-military" offenses;[85] and (4) a court-martial retains jurisdiction over offenses committed after retirement.[86] The Supreme Court reversed the Court of Claims, holding that Runkle's dismissal was a nullity, but only because President Grant had never approved Runkle's sentence.[87]

Not long thereafter, Lieutenant General John M. Schofield, acting Secretary of War and commander of the Army, ordered the arrest and "confinement on charges" of retired Army Captain Armes after the retiree sent "an offensive letter" to the General.[88] The letter accused Schofield of "the manufacture of false testimony and various attempts to ruin and disgrace him (Armes), and demand[ed] an apology before [Schofield's] retirement."[89] Armes was charged with "'conduct to the prejudice of good order and military discipline,' and . . . of 'conduct unbecoming an officer and gentleman' . . . ."[90] Although Captain Armes's ultimate fate is unreported, the U.S. Court of Appeals for the District of Columbia upheld Schofield's orders, noting that as an Army officer on the retired list, Captain Armes was "subject as such to trial by court-martial for violation of the articles of war, and the charges against him being for offenses against those articles[,] . . . his arrest to answer those charges was right and proper."[91]

The oldest reported court-martial of a retired Naval officer dates from 1916. In that case, Boatswain William H. Morin was convicted of disobeying a lawful order of the Secretary of the Navy and three specifications of conduct unbecoming an officer and gentleman predicated on his failure to

82. *Id.* at 395.
83. *Id.* at 409.
84. *Id.* at 411.
85. *Id.* at 412.
86. *Id.* at 413-14.
87. 122 U.S. at 560-61.
88. Closson v. Armes, 7 App. D.C. 460 (D.C. 1896), *discussed in* United States v. Hooper, 26 C.M.R. 417, 422 (1958).
89. *Id.* at 461.
90. *Id.*
91. *Id.*

pay certain debts. Despite his retired status and the fact that he held the Medal of Honor, Morin was dismissed from the naval service.[92]

The next reported case did not occur until 1931. In *United States v. Kearney*,[93] a retired Army Major[94] was convicted of one specification of conduct unbecoming an officer and gentleman by being drunk and disorderly in violation of the 95th Article of War (A.W.), and was sentenced to be dismissed from the service.[95] At about 0300, 10 August 1931, the manager of the Bernita Hotel in San Francisco was awakened by a woman's scream. Investigating the disturbance, she encountered a screaming woman—"a common woman, the kind not tolerated in that hotel"—who had just departed the accused's room and claimed she had been choked.[96] After ordering the hysterical woman from the hotel, the manager entered the accused's room, found him "not to be normal or in possession of his faculties," and summoned the city police, who removed Kearney from the premises.[97] An arresting officer testified that the accused was drunk, staggered, and had alcohol on his breath, but otherwise caused no disturbance in their presence.[98] No evidence was presented that anyone at the hotel ever saw the accused in a uniform, "but some of the hotel guests knew him to be an officer."[99]

In its opinion, the Army Board of Review found insufficient evidence to support the allegation that Major Kearney was disorderly[100] and further

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92. 1 COMPILATION OF COURT-MARTIAL ORDERS, U.S. DEP'T OF NAVY, 1916-1927, at 53 (1940).

93. 3 B.R. 63 (1931).

94. Kearney had retired under a retirement board system that placed Army officers into two categories. Class A officers were retained on active duty. Class B officers were required to undergo a second review. If the Class B status was due to "'neglect, misconduct or avoidable habits' . . . he was discharged outright; if not he was retired with pay." Bishop, *supra* note 13, at 338 n.95. "Apparently, the Class B board had been merciful to Major Kearney." *Id.*

95. *Kearney*, 3 B.R. at 63.

96. *Id*. at 64. Upon cross-examination, the manager professed some uncertainty as to her recollection of events. *Id.* at 64-65.

97. *Id.* at 65. "[A]lthough she observed him very closely she was unable to determine whether his condition was one of drunkenness or illness." *Id.* Further, the manager admitted that she neither saw the accused take a drink nor have alcohol in his immediate possession. *Id.*

98. *Id.* There was conflicting testimony between the officer, who stated that Kearney had to be assisted out of the hotel, and the manager, who testified that Kearney "could walk all right." *Id*. at 65-66.

99. *Id.* at 66.

100. *Id*. at 73-74.

found that under the circumstances a charge of drunk to the disgrace of the service in violation of A.W. 95 could not be sustained; however, the court held that the evidence of the accused's drunkenness did support a conviction for conduct of a nature to bring discredit upon the military service, in violation of A.W. 96.[101] Further, the court opined that any member of the Army, active duty or on the retired list, who is voluntarily intoxicated, is subject to court-martial under A.W. 96 for such conduct regardless of when or where the misconduct occurs.[102] Finally, the court upheld a conviction under A.W. 96 and recommended that the President consider commuting the sentence of dismissal.[103]

The Judge Advocate General (TJAG) concurred with the opinion of the court, but recommended that Kearney be dismissed from the Army. Given the circumstances surrounding Major Kearney's earlier convictions, the TJAG considered the accused "an undesirable type, unfitted to be carried on the rolls of the Army."[104] The Secretary of War, however, forwarded a letter of transmittal along with the record of trial to President

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101. *Id.* at 74-75.

102. *Id.* at 75.

103. *Id.* at 75-76. Dismissal was mandatory upon a conviction of A.W. 95, but not so for a conviction under A.W. 96. *Id.* at 77. The record indicated, however, that the accused had prior convictions from a 1931 court-martial while on active duty for four specifications of drunkenness in violation of A.W. 96. *Id.* at 75-77.

104. *Id.* at 78. The TJAG reiterated the facts of the four offenses for which Kearney had been convicted in his earlier court-martial. First, the accused had been drunk in the presence of a junior officer and civilians at a "social 'penny ante'" poker game in which no alcohol had been served. *Id.* at 77. Second, Kearney was intoxicated while accompanying two ladies to a Girl Scout camp. *Id.* Third, he accompanied two other couples to a mountain cabin, where he became intoxicated

> and immediately proceeded to take liberties with the ladies and to make remarks to which they objected. On one occasion he urinated just out of sight, but within hearing of the ladies. Finally, he went to sleep and when [a civilian], in packing up preparatory to leaving, took a blanket covering Kearney, he noticed that his pants were unbuttoned, and his private parts exposed.

Id. On the ride home, Kearney's continuous derogatory remarks concerning the ladies resulted in a fistfight between the accused and one of the male passengers. *Id.* at 78. Fourth, after the journey home continued, the party stopped for water, where the accused used "profane and obscene language in the presence of [a Reverend], his wife and another civilian." *Id.*

Hoover, objecting to the entire proceedings. The Secretary's letter stated, in part:

> I . . . disagree entirely with the fundamental basis of this trial. To my mind, it establishes one of the most dangerous precedents that has confronted the Army in its many years of jurisprudence. It, in effect, extends the general court-martial system to retired officers to practically the same extent that it does to active officers and to the practical exclusion of the civil police powers. It has been the immutable custom of the service that officers when retired, unless some extra-ordinary circumstances were involved linking them to the military establishment or involving them in conduct inimical to the welfare of the nation, would be subject only to the police restrictions and jurisprudential processes as the ordinary civilian.[105]

Apparently persuaded by the Secretary's impassioned letter, President Hoover disapproved the entire proceedings.[106]

Less than a decade later another retired Army Major found himself standing trial before a court-martial. In *United States v. Casseday*,[107] the accused, who had retired after thirty years of service, was charged with thirty-six specifications of A.W. 95 (Conduct Unbecoming an Officer and Gentleman), ten specifications of A.W. 96 (General Article), and two specifications of A.W. 94 (Frauds Against the Government).[108] He was found guilty of all but six specifications of Charge I (A.W. 95) and one specification of Charge II (A.W. 96) and sentenced to dismissal and four years' confinement.[109] Casseday's misconduct involved embezzlement and misapplication of government funds, false swearing, soliciting and obtaining loans from government contractors, obtaining loans under false pretenses, mail fraud, dishonorable failure to pay debts, the majority of the misconduct occurring while Casseday was still on active duty.[110] Casse-

105. *Id.* at 79.

106. *Id.* at 80. President Hoover's succinct statement, dated 30 December 1931, states: "In the foregoing case of Major Harvey C. Kearney, U.S. Army, Retired, the entire proceedings, including the sentence, are disapproved." *Id.*

107. 10 B.R. 297 (1940).

108. *Id.* at 297-315.

109. *Id.* at 316. The accused was found guilty, by exception and substitution, of several specifications. The Reviewing Authority approved the guilty finding of a single specification of A.W. 95 under Charge I. *Id.*

110. *Id.* at 317, 322, 326.

day's retired status was not the subject of any further legal discussion, other than a matter for consideration in sentencing. The Board of Review affirmed the findings and sentence, and the TJAG merely recommended a reduction in the period of confinement to reflect the circumstances surrounding the offenses, Casseday's prior service, "and the severity of the punishment involved in the sentence to dismissal."[111]

In *Chambers v. Russell*,[112] a retired Navy Lieutenant Commander, who had completed thirty years of active service, was arrested by military authorities and charged under the UCMJ with sodomy, attempts, and conduct unbecoming an officer and gentleman.[113] All charged misconduct occurred while Chambers was still on active duty,[114] involved acts with active duty enlisted men,[115] and the misconduct was also "cognizable and . . . triable in the appropriate civil courts."[116] Chambers brought writs of habeas corpus and prohibition in federal district court, challenging the Navy's authority to court-martial him, after retirement, for misconduct occurring before he had been placed on the retired list.[117] The court easily determined that as an officer on the retired rolls receiving pay, Chambers was subject to military jurisdiction pursuant to Article 2(4), UCMJ. The unsympathetic judge posited:

> It is apparent to this court that an officer of the United States in a retired military status may reasonably be expected to maintain the essential dignity befitting his rank and status, the qualifications and standards of his rank, and hold himself ready and fit for recall to active duty, in so far as he is subject to an involuntary return to service in the event of war or national emergency. The interest of the Navy in policing its retired members is a legitimate one, since their commissions are not expired, but are merely dormant, pending call.
>
> Where a retired officer has manifested his unfitness for a return to full time military service, and has failed to maintain proper qualifications in conformity with military ethics and standards,

111. *Id.* at 341, 343.
112. 192 F. Supp. 425 (N.D. Cal. 1961).
113. *Id.* at 426 (citing UCMJ Articles 125, 80, and 133).
114. *Id.*
115. Bishop, *supra* note 13, at 343.
116. *Russell*, 192 F. Supp. at 427.
117. *Id.* at 426-27.

> it is not unreasonable to assume that the Navy may choose to terminate his status.[118]

In a more controversial court-martial, a retired Navy Rear Admiral was convicted and dismissed from the service for misconduct occurring long after he had retired. In *United States v. Hooper*,[119] the accused was convicted, more than seven years after his retirement, of violating Articles 125, 133, and 134, UCMJ.[120] The convictions were based on allegations of homosexual conduct that occurred at an off-post, private residence,[121] but which included enlisted personnel from the Navy and Marine Corps.[122] Hooper's misconduct violated California law, but the State look no legal action.[123] The court-martial was conducted without Admiral Hooper having been recalled to active duty, a point that formed a basis for Hooper's subsequent appeal.[124]

The United States Court of Military Appeals (COMA) rejected Hooper's contention that a retiree had to be recalled to active duty before military jurisdiction could attach,[125] posited that a retired officer was part of the "land or naval forces" for purposes of the Fifth Amendment,[126] and rejected the contention that retired officers were "mere pensioners."[127] Significantly, the COMA addressed the nature of the charges in light of the

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118. *Id.* at 428.

119. 26 C.M.R. 417 (C.M.A. 1958).

120. *Id.* at 419. The Article 133 charge alleged that the accused "publicly associate[d] with persons known to be sexual deviates, to the disgrace of the armed forces." *Id.* at 426-27. Proof of the charge included testimony that such persons were homosexuals. *Id.* Other than the principals involved, the association apparently was only observed by government agents and an unidentified "female." *Id.* at 427.

121. Hooper v. United States, 326 F.2d 982, 983-84 (Ct. Cl. 1964).

122. Bishop, *supra* note 13, at 340. The Navy obtained evidence for the court-martial, in part, by using the services of at least "four agents of the Office of Naval Intelligence, two of them commissioned officers, [who] established a stakeout on the roof of a neighboring house, whence they could observe, with the aid of binoculars, the goings on in the Admiral's bedroom." *Id.* at 341 n.101.

123. *Id.* at 340-41.

124. *Hooper*, 326 F.2d at 984.

125. *Hooper*, 26 C.M.R. at 421.

126. *Id.* at 422. The pertinent portion of the Fifth Amendment states, "No person shall be held to answer for a[n] . . . infamous crime, unless on a presentation or indictment of a Grand Jury, *except in cases arising in the land or naval forces* . . . ." U.S. CONST. amend. 5 (emphasis added).

127. *Hooper*, 26 C.M.R. at 425 ("The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies.").

fact that Hooper was not on active duty at the time of the challenged conduct, but quickly disposed of the issue in a few sentences. The COMA stated:

> Left for determination is the applicability of the Articles herein involved to one in a retired status. Certainly conduct unbecoming an officer and gentleman—the same subject of Charge II—and conduct of a nature to bring discredit upon the armed forces—the subject of Charge II—are offenses which do not depend upon the individual's duty status. Sodomy, the subject of Charge I, is an offense involving moral turpitude, and without doubt applies to all subject to military law without regard to the individual's duty status.[128]

Ultimately the COMA held that the court-martial possessed jurisdiction over the accused.[129] In January 1961, President Kennedy approved Hooper's conviction and sentence, and the Admiral's retirement pay was terminated.[130]

Hooper brought suit before the United States Court of Claims, challenging the termination of his retired pay and arguing that Article 2(4), UCMJ, was unconstitutional. The plaintiff's legal attack was "premised solely on the contention that court-martial jurisdiction is strictly limited to those persons who bear such a proximate relationship to the Armed Forces and their functions as to be reasonably treated as 'in' the Armed Forces."[131] The court believed that the critical inquiry was whether a retired officer was part of the land and naval forces. If so, then Article 2(4) would fall under Congress's authority, contained in Article I, section 8 of the Constitution, "[t]o make Rules for the Government and regulation of the land and naval Forces."[132] Although retaining "certain doubts," the court held that the court-martial's jurisdiction over Hooper was "constitutionally valid."[133] The court reasoned that the retired admiral was part of the land or naval forces because he retained a "direct connection" to the military through his retired pay: "because the salary he received was not solely recompense for past services, but a means devised by Congress to

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128. *Id.*

129. *Id.* A defective post-trial review by the Staff Judge Advocate, however, required that the record of trial be returned to another reviewing authority. *Id.* at 428.

130. Hooper v. United States, 326 F.2d 982, 984 (Ct. Cl. 1964).

131. *Id.*

132. U.S. CONST. art. I, § 8, *quoted in Hooper*, 326 F.2d at 986.

133. *Hooper*, 326 F.2d at 987.

assure his availability and preparedness in future contingencies."[134] Although recognizing the validity of Article 2(4) and Congress's power to enact such a provision, the court nevertheless expressed its concern with the exercise of such power in a case like Hooper's.[135]

A more recent and highly publicized court-martial of a retired officer involved Major General David Hale. In February 1998, shortly after coming under investigation for sexual misconduct, Hale retired.[136] On 9 December 1998, after a lengthy investigation, the Army charged General Hale with two specifications of obstruction of justice, six specifications of making false official statements, and nine specifications of conduct unbecoming an officer and gentleman.[137] As part of a plea bargain, General Hale pled guilty to seven specifications of conduct unbecoming an officer and gentleman and one specification of making a false official statement.[138] The military judge sentenced General Hale to be reprimanded, forfeit $1000 per month for twelve months, and to a fine of $10,000.[139] Once court-martialed, General Hale became only the second Army general

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134. *Id.*

135. *Id.* ("We add that we are concerned in this case only with the power of Congress to provide that a retired officer can be dismissed from the service by a court-martial for offenses against the Uniform Code of Military Justice.").

136. Rowan Scarborough, *General Allowed to Retire Despite Probe*, WASH. TIMES, Mar. 27, 1998, at A1; *see also* Jane McHugh, *Hale Hit with 17 Charges of Improper Conduct*, ARMY TIMES, Dec. 21, 1998, at 6. The Army investigation was precipitated by the complaint of the wife of one of General Hale's former subordinate officers, who alleged that Hale forced her into a sexual relationship with him in 1997. *Id.*

137. McHugh, *supra* note 136, at 6.

138. Rene Sanchez, *Retired General to Plead Guilty*, WASH. POST, Mar. 17, 1999, at A1, A15. The eight instances of misconduct included making a false statement to the Department of Defense's Deputy Inspector General, having an improper relationship with a woman not his wife while married, having improper relationships with the wives of three subordinate officers, lying to a subordinate officer about his relationship with that officer's wife, failing to comply with a duty to inform his superior of his intended leave address, and "[w]illfully failing to comply with his duty to explain candidly to the inspector general . . . the true nature of a personal relationship." Jane McHugh, *Slap on Wrist*, ARMY TIMES, Mar. 29, 1999, at 12.

139. McHugh, *supra* note 138, at 12. Hale's defense attorney pointed out that the accused "admitted only to consensual affairs with the wives of officers under his command." Sanchez, *supra* note 138, at A15. Major General Hale was later administratively reduced in rank to Brigadier General. *Adulterous General Demoted in Retirement*, ATLANTA J. CONST., Sept. 3, 1999, at A6.

officer prosecuted under the UCMJ and the first Army retired general officer ever to be tried by court-martial.[140]

B. Enlisted Personnel

As noted earlier, in contrast to the Army, the Navy did not consider its enlisted members on the retired list to be subject to military jurisdiction before the enactment of the UCMJ. However, the Navy distinguished between sailors on the retired list and those sailors who had been transferred to the Fleet Reserve after serving more than twenty years on active duty. The latter remained subject to military law.[141] Even with the authority to exercise jurisdiction over its enlisted retirees, Army courts-martial were exceedingly rare, as were Navy courts-martial of the semi-retired members of the Fleet Reserve. Indeed, the authors were able to locate only a handful of cases.

An 1896 Opinion from the Judge Advocate General opined that a retired soldier could be court-martialed for not paying his debts,[142] but the ultimate disposition of the soldier's fate is not reported. In 1918, the Army court-martialed a retired musician, employed as a shoe repairman, for contemptuous speech directed against President Wilson and the Government, and for pro-German comments. The errant former soldier is reported to have stated, in part, that the President "and the government [were] subservient to capitalists and 'fools to think they can make a soldier out of a man in three months and an officer in six.'"[143] The trial resulted in an acquittal.[144]

In *United States v. Fenno*,[145] a sailor with twenty-five years of active service had been transferred to the Fleet Reserve following World War II, only to be recalled to active duty two years later to face a court-martial.[146]

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140. Sanchez, *supra* note 138, at A15; Bradley Graham, *Retired General Faces Misconduct Charges*, WASH. POST, Dec. 11, 1998, at A2. In 1952, Major General Robert Grow was found guilty of "dereliction of duty and security infractions, reprimanded and suspended from command for six months." Sanchez, *supra* note 138, at A15.

141. *See, e.g.*, United States v. Fenno, 167 F.2d 593 (2d Cir. 1948).

142. Retirement, Op. OTJAG, Army (1912), *as digested in* Dig. Ops. JAG 1912, sec. II B.3a, at 1001 (citing C.2716, Nov. 2, 1896).

143. John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 31 HARV. L. REV. 1697, 1727 (1968) (citing United States v. Salvagno, CM 113926 (1918)).

144. *Id.*

145. 167 F.2d 593 (2d Cir. 1948).

Fenno stole government property while employed as a civilian worker at the U.S. Naval Submarine Base, New London, Connecticut.[147] After Fenno was convicted in federal district court and placed on probation, the Navy recalled Fenno to active duty to stand trial by court-martial for charges directly related to the theft for which he had been convicted in federal court.[148] After his court-martial conviction, Fenno filed a petition for a writ of habeas corpus, the dismissal of which was reviewed on appeal by the U.S. Court of Appeals for the Second Circuit.[149]

The federal appellate court affirmed. In its opinion the court held that as a member of the Fleet Reserve, Fenno could be recalled to active duty solely for purposes of standing trial before a court-martial[150] and was subject to military jurisdiction at the time he engaged in the thievery.[151] Further, the court held that Fleet Reservists were members of the naval forces for Fifth Amendment purposes[152] and that military jurisdiction over Fenno was not defeated merely because another court of competent jurisdiction had exercised its jurisdiction over Fenno and placed him on probation.[153]

Several courts-martial of retired enlisted personnel have been reported under the UCMJ. The first such case involved an Air Force Staff Sergeant on the Temporary Disability Retired List (TDRL). In *United States v. Bowie*,[154] the accused challenged his conviction for "making and uttering four worthless checks with intent to defraud, in violation of Article 123a," in part, by arguing that he was not subject to military jurisdiction.[155] The Air Force Court of Military Review held that a service member on the TDRL was subject to military jurisdiction, pursuant to Article 2(4), UCMJ.[156] Significantly, the court posited that jurisdiction was not defeated by the mere fact that the accused was not receiving retired pay, so long as he was entitled to it.[157] Further, the Air Force appellate court characterized a TDRL retiree as being no different, for jurisdictional purposes,

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146. *Id.* Chief Motor Machinists Mate Fenno was originally transferred to the Fleet Reserve in 1939 after twenty years of service, but was recalled to active duty in 1940. *Id.*

147. *Id.*

148. *Id.* at 593-94 ("tried by a general court-martial on charges of bribery and conduct prejudicial to good order and discipline").

149. *Id.* at 594. The district court decision is reported at CMO 11-1947, at 373-87.

150. *Fenno*, 167 F.2d at 594.

151. *Id.* at 594-95.

152. *Id.* at 595.

153. *Id.* at 595-96.

154. 34 C.M.R. 808 (A.F.C.M.R. 1964), *aff'd*, 34 C.M.R. 411 (C.M.A. 1964).

155. 34 C.M.R. at 810.

156. *Id.* at 812.

than any other service member retired for age or length of service.[158] In a slightly more abbreviated discussion of the status of TDRL retirees, the U.S. Court of Military Appeals affirmed, confirming that the UCMJ did not distinguish between disability and nondisability retirees for jurisdictional purposes.[159]

In the first nondisability retiree case, *United States v. Overton*,[160] the accused challenged the authority of the Navy to court-martial him pursuant to Article 2(a)(6), UCMJ. After twenty-two years in the Marine Corps, Gunnery Sergeant Overton transferred to the Fleet Marine Corps Reserve and received "retainer pay" while in that status.[161] While working as a civilian employee of the Navy in the Philippines, Overton was apprehended while in his car, which contained merchandise stolen from a Navy Exchange.[162] After the Secretary of the Navy approved bringing Overton to trial, his case was referred to a general court-martial.[163]

At trial, the accused had unsuccessfully challenged military jurisdiction over him, arguing that although a member of the Fleet Marine Corps Reserve drawing retainer pay, he had done nothing "to keep his military status current."[164] On appeal, Overton posited that Article 2(a)(6) was an unconstitutional exercise of congressional power.[165] The COMA quickly disposed of his argument, noting that Congress's grant of jurisdiction over members of the Fleet Marine Corps Reserve was "neither novel nor arbitrary," and further stated that "[t]his type of exercise of court-martial jurisdiction has been continually recognized as constitutional."[166] Further, the

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157. *Id.* at 811. Bowie was "receiv[ing] compensation from the Veteran's Administration in lieu of retired pay from the Air Force . . . ." *Id.*

158. *Id.* (adopting a legal opinion of The Judge Advocate General of the Air Force). The court also viewed Bowie's status as being no different than the status of Rear Admiral Hooper, a nondisability retiree. *Id.* (citing United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958)).

159. *Bowie*, 34 C.M.R. at 412.

160. 24 M.J. 309 (C.M.A. 1987).

161. *Id.* at 310. "Enlisted Navy and Marine Corps members with less than 30 years service are transferred to the Fleet Reserve/Fleet Marine Corps Reserve and their pay is referred to as 'retainer pay.'" DFAS-CL 1352.2 PH, *supra* note 17, para. 2(C)(1).

162. *Overton*, 24 M.J. at 310. The stolen goods were believed to be destined for sale on the black market. *Id.*

163. *Id.*

164. *Id.* Overton pointed out that he had not attended drills or training, had not been recalled to active duty, and had not taken any correspondence courses. *Id.*

165. *Id.* at 311.

166. *Id.* (citations omitted).

COMA held that the offenses themselves were properly tried by a court-martial under either the *O'Callahan* or *Solorio* standards.[167]

In *Pearson v. Bloss*,[168] the Air Force court-martialed a retired Master Sergeant for misconduct occurring both before and after his retirement. The charges all related to the theft of military property.[169] Rejecting Pearson's jurisdictional challenge based largely on pre-UCMJ cases that discussed whether retired enlisted men were members of the military, the court held that the clear language of Article 2(4) subjects retired enlisted members of a regular component who receive retired pay to military jurisdiction.[170] Further, relying on its earlier decision in *Overton*, the COMA upheld the constitutionality of Article 2(a)(4) as it applied to the accused.[171] As one legal commentator opined, this decision made it clear that the COMA saw "no constitutional impediment to the exercise of UCMJ jurisdiction over retirees, whether they be officer or enlisted."[172]

In *United States v. Allen*,[173] a retired Navy Radioman Senior Chief was convicted of several espionage-related offenses.[174] He was sentenced to eight years' confinement and to pay a $10,000 fine, but not to any form of punitive discharge, reduction in rank, or loss of pay.[175] Pursuant to Arti-

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167. *Id.* at 312 (citing O'Callahan v. Parker, 395 U.S. 258 (1969) (service connection required); Solorio v. United States, 107 S. Ct. 2924 (1987) (military status standard)).

168. 28 M.J. 376 (C.M.A. 1989).

169. The Air Force preferred charges

> alleging two offenses of conspiracy to commit larceny; three offenses of conspiracy to dispose of military property without authority; four offenses of unauthorized disposition of military property; four offenses of larceny of military property; and one offense of concealing stolen military property, in violation of Articles 81, 108, 121, and 134, UCMJ . . . respectively.

Id. at 377.

170. *Id.* at 378-79 ("While the original exercise of court-martial jurisdiction over retired regulars of the Army may have been expressly restricted to officers, that situation clearly changed in 1950 with the introduction of the broad, yet more direct, language of Article 2(4).").

171. *Id.* at 379-80. As a member of the Regular Air Force with more than twenty, but less than thirty, years of active service, the accused had been transferred to the Air Force Reserve and the Retired Reserve. *Id.* at 379-80 & n.5. Overton's status was comparable to that of Pearson's for jurisdictional purposes. *Id.* at 379.

172. Major Gary J. Holland, *Criminal Law Notes: Courts-Martial Jurisdiction over Enlisted Retirees?—Yes, but a Qualified Yes in the Army!*, ARMY LAW., Oct. 1989, at 31.

173. 28 M.J. 610 (N.M.C.M.R. 1989), *on appeal after remand*, 31 M.J. 572 (N.M.C.M.R. 1990), *aff'd*, 33 M.J. 209 (C.M.A. 1991).

cle 58a, the Navy administratively reduced Allen to the lowest enlisted pay grade.[176] Further, all charged misconduct had occurred while Allen was in a retired status, working overseas as a civilian employee of the Navy, and the Navy had not recalled him to active duty for the court-martial.[177]

With respect to issues pertinent to this article, the COMA rejected Allen's argument that "because he was not paid the full pay and allowances of a senior chief petty officer while confined awaiting trial, he has suffered pretrial punishment in violation of Article 13 . . . ."[178] The court determined that Allen's pay entitlements were statutorily determined and that as a retiree who had not been recalled to active duty for court-martial, Allen was only entitled to retired pay. Accordingly, because Allen was entitled only to retired pay while in pretrial confinement, he was not subjected to pretrial punishment violative of Article 13.[179]

Allen also challenged his reduction in rate pursuant to Article 58a. Significantly, the COMA agreed with Allen and held that because he "was tried as a retired member, he could not be reduced for these offenses by the court-martial or by operation of Article 58a."[180] The COMA based its decision on three factors: (1) the conclusion of an academic that forfeiture of pay and reduction in grade was not required to satisfy military interests in court-martial of retirees and reservists;[181] (2) consistency "with the long-standing proposition that a transfer of a servicemember to the retired list is conclusive in all aspects as to grade and rate of pay based on . . . years of service;"[182] and (3) a Comptroller General opinion holding that a mem-

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174. A Navy court-martial convicted Allen of

> seven specifications of disobeying a general order involving security regulations in violation of Article 92[,] . . . two specifications alleging espionage activity in violation of Article 106a[,] . . . and one specification of violating the federal espionage statute of 18 U.S.C. § 793(d) alleged under Clause 3 of Article 134 . . . .

Id. at 611.

175. *Id.*

176. *Allen*, 33 M.J. at 210 & n.2.

177. *Allen*, 28 M.J. at 611 n.1; 31 M.J. at 582. Allen was employed "as a civilian reproduction clerk at the Naval Telecommunications Command Center, Naval Base, Subic Bay, Republic of the Philippines (NTCC)." *Allen*, 31 M.J. at 582.

178. *Allen*, 33 M.J. at 214.

179. *Id.* at 215.

180. *Id.* at 216.

181. *Id.* (citing Bishop, *supra* note 13, at 356-57).

182. *Id.* (citing 10 U.S.C. § 6332).

ber of the Fleet Reserve who, while on active duty, was reduced in rating as the result of court-martial action, should be paid at his higher rating once returned to an inactive status.[183]

While on appeal before the Navy-Marine Court of Military Review (NMCMR), Allen asserted that his convictions for disobeying security regulations, in violation of Article 92, should be dismissed "because as a retired member of the regular Navy he is not subject to the orders of an active duty flag officer."[184] Focusing on Allen's susceptibility to military jurisdiction as a retired member of the regular Navy, the NMCMR found no merit to Allen's argument.[185] The COMA did not review this issue on appeal.

A Coast Guardsman, who alleged that he should have been placed on the TDRL rather than retained on active duty, challenged the exercise of military jurisdiction over him after being convicted of the wrongful use of cocaine. In *United States v. Rogers*,[186] the accused argued that he had been placed on the TDRL by the Chief, Office of Personnel and Training, but that someone without authority had modified the effective date of his retirement so that he was not properly on active duty at the time of his court-martial.[187] The court rejected the argument, adopting the government's position "that a member remains on active duty subject to jurisdiction for trial by Court-Martial absent delivery of a discharge certificate."[188] Alternatively, the court pointed out that the military would have retained jurisdiction over Rogers as a retiree pursuant to Article 2, UCMJ.[189]

In *United States v. Sloan*,[190] a retired Army Sergeant Major pled guilty to charges of carnal knowledge and committing indecent acts with a child (his daughter). The misconduct occurred while Sloan was still on active duty.[191] The accused challenged the Army's jurisdiction, arguing that the convening authority lacked the authority to refer his case to court-

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183. *Id.* (citing *Pay-Retainer-Effect of Active Duty Pay Reduction Etc., by Court-Martial Sentence*, 20 Comp. Gen. 76, 78 (1940)).

184. *Allen*, 31 M.J. at 636.

185. *Id.* at 636-37.

186. 30 M.J. 824 (C.G.C.M.R 1990).

187. *Id.* at 827-28.

188. *Id.* at 828 (citations omitted).

189. *Id.*

190. 35 M.J. 4 (C.M.A. 1992).

191. *Id.* at 5. Charges were preferred against Sloan a month before his retirement, but efforts to revoke Sloan's retirement were unsuccessful. *Id.*

martial absent the approval of Headquarters, Department of the Army, and the Secretary of the Army. Sloan argued that by "Army regulation and policy, 'Army retirees have an additional protection not afforded the retirees from the other services,'" and that authority had been withdrawn to the Secretarial level to dispose of cases involving retirees.[192] The COMA rejected Sloan's position, reasoning that (1) the applicable regulation became effective after Sloan's court-martial; (2) even if the regulation merely codified existing Army policy, there was no evidence that the proper authority had withdrawn court-martial authority; (3) policy did not rise to the level of law; (4) the accused could not assert the regulatory constraints against the Army unless the regulation was promulgated to protect his rights, which it was not; and (5) the policy's language was "by its own terms hortatory, rather than mandatory."[193] Clearly, the COMA saw no safe harbor for a retired accused in the Army's regulation and policy restricting the exercise of military jurisdiction over this class of service members.

In *Sands v. Colby,*[194] a retired Army Sergeant Major employed by the United States in Saudi Arabia was ordered to active duty to stand trial for allegedly murdering his wife in their government quarters.[195] Before taking action, the United States negotiated the jurisdiction issue with Saudi officials.[196] Denying the accused's petition for a writ of mandamus on jurisdictional and speedy trial grounds, the ACMR merely reiterated the well-established law in this area; holding, in relevant part, that because Sands was a retired member of the Regular Army receiving pay, he was subject to court-martial jurisdiction, and the Army was authorized to recall him to active duty to stand trial.[197]

A more recent case was that of *United States v. Stevenson*.[198] In that case a Navy Corpsman on the TDRL, charged with rape, successfully suppressed at trial DNA evidence obtained from blood taken from him while a patient at a Veterans Administration hospital. After an unsuccessful appeal to the Navy-Marine Court of Criminal Appeals, the government filed an Article 67(a)(2) certification of the issue with the Court of Appeals for the Armed Forces (CAAF).[199] Reversing the lower court, the CAAF

192. *Id.* at 7.
193. *Id.* at 8-9.
194. 35 M.J. 620 (A.C.M.R. 1992).
195. *Id.* at 620-21.
196. *Id.* at 620.
197. *Id.* at 621.
198. 53 M.J. 257 (2000).

held that Military Rule of Evidence 312(f)[200] applies to retirees on the TDRL, paving the way for the admission of the DNA evidence. Explaining the status of such a retiree, the CAAF characterized the TDRL as "a 'temporary' assignment, not a permanent separation from active duty," and "underscore[d] the continuing military status of a member on the TDRL, even if the member is not then performing regular duties."[201] Further, the court noted that even if a service member on the TDRL is eventually determined to be unfit for active duty and retired, disability retirees still retain their military status and remain subject to recall.[202]

The most recent published case discussing military jurisdiction over retirees is *United States v. Morris*,[203] which involved the prosecution of a Marine noncommissioned officer (NCO) who had been transferred to the Fleet Marine Corps Reserve upon the completion of twenty years of active duty. Nearly three years after Morris's transfer to the Fleet Marine Corps Reserve, the Secretary of the Navy approved a Marine Corps request to recall the accused to active duty for court-martial.[204] Eventually, Staff Ser-

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199. *Id.*

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> Nothing in this rule [dealing with admissibility of evidence obtained from "body views and intrusions"] shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be to preserve the health of a servicemember. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

Id. at 259.

201. *Id.*

202. *Id.* at 260.

203. 54 M.J. 898 (N-M. Ct. Crim. App. 2001). On 12 July 2002, the Navy-Marine Court of Criminal Appeals issued an opinion addressing court-martial jurisdiction over a retired first class petty officer, but subsequently vacated its decision on 29 August 2002. In *United States v. Huey*, 2002 CCA LEXIS 156 (N-M. Ct. Crim. App. July 12, 2002), the retired petty officer, who had been a Navy civilian employee in Okinawa at the time of the charged misconduct, challenged his convictions for rape, forcible sodomy, and indecent assault, arguing in part that the exercise of court-martial jurisdiction violated his rights under the Due Process Clause of the Fifth Amendment. *Id.* at *2-4. Rejecting Huey's assertion that because the likelihood of being recalled to active duty was so remote that he was effectively in a civilian status, the court dismissed Huey's factual position as neither persuasive nor dispositive and reiterated a court-martial's "power to try a person receiving retired pay." *Id.* at *4. However, the court subsequently vacated its opinion, and the advance sheet was withdrawn from publication. Huey v. United States, 2002 WL 1575234 (N-M. Ct. Crim. App. Aug. 29, 2002).

geant Morris pled guilty to sexual misconduct involving his juvenile daughter.[205]

On appeal, Morris challenged military jurisdiction over him, arguing in part that the omission of his reserve obligation termination date on his Certificate of Release or Discharge from Active Duty (DD Form 214) meant that he could not be recalled for court-martial.[206] The court summarily rejected the defense position that the omission on Morris's DD Form 214 had any impact on his susceptibility to military jurisdiction.[207] The court posited that Articles 2 and 3, UCMJ, were sufficient by themselves to establish military jurisdiction.[208] Finally, the court held that Rule for Courts-Martial 204(b)(1), which requires that "[a] member of a reserve component must be on active duty prior to arraignment at a general . . . court-martial,"[209] did not apply to retirees and members of the Fleet Reserve or Fleet Marine Corps Reserve.[210]

IV. The Pension Question

The characterization of military retired pay as either "property" or as "reduced pay for reduced services" has been an issue relevant to military divorce proceedings,[211] and as this article addresses, remains an issue with respect to the continued extension of military jurisdiction over retired

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204. *Morris*, 54 M.J. at 899.

205. *Id.* at 898. Morris "plead guilty to carnal knowledge, sodomy, indecent acts, and indecent liberties . . . against his daughter, who was under the age of 16 at the time of the offenses." *Id.*

206. *Id.* at 899.

207. *Id.* Morris also argued that he had not received retainer pay and was not on active duty at the time of the court-martial, but the court found neither argument to be supported by the evidence. *Id.*

208. *Id.* at 900. Article 3(a) provides that

> a person who is in a status in which the person is subject to this chapter and who committed an offense against this chapter while formerly in a status in which the person was subject to this chapter is not relieved from amenability to the jurisdiction of this chapter for that offense by reason of a termination of that person's former status.

UCMJ art. 3(a) (2002). In short, Morris did not escape military jurisdiction for crimes committed on active duty merely by his transfer to the Fleet Marine Corps Reserve.

209. MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 204(b)(1) (2002) [hereinafter MCM].

210. *Morris*, 54 M.J. at 901.

members of the regular components.[212] For purposes of asset division in divorce proceedings, this issue has been largely resolved through the enactment of the Uniformed Services Former Spouses' Protection Act (USFSPA)[213] and the Supreme Court decision in *Barker v. Kansas*.[214] The modern treatment of military retired pay as something akin to a mere pension, however, calls into question one rationale justifying the exercise of court-martial jurisdiction over military retirees, that is, the characterization of military retired pay as reduced pay for reduced services.[215] This rationale for the exercise of court-martial jurisdiction over retired members of the regular components maintains that if a retiree is receiving military retired pay, albeit for reduced services, the retiree should be subject to the Uniform Code of Military Justice. In short, proponents maintain that a military retiree is not merely a pensioner, but is an integral—albeit dormant—member of the armed forces available to be recalled to active duty in times of war or national emergency. Retired pay is not like a civilian pension; it is more akin to a form of retainer pay. Recent changes to military retired pay statutes and the USFSPA, however, have undermined this rationale for the continued exercise of court-martial jurisdiction over military retirees.

A. Historic Treatment of Retired Pay

Before the Civil War, retired officers did not receive retired pay unless their retirement was attributable to disability.[216] In 1861, the first Army

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211. See Major Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 MIL. L. REV. 40 (2001), for a detailed study of the Uniformed Services Former Spouses' Protection Act and the current debate to amend it.

212. *See* 10 U.S.C.A. § 802(a)(4) (West 1998 and 2001 Supp.); *supra* note 72.

213. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447-1448, 1450-1451 (2000)).

214. 503 U.S. 594 (1992).

215. *See, e.g.*, Hooper v. United States, 326 F.2d 982, 987 (Ct. Cl. 1964). In *Hooper*, the court held the exercise of military jurisdiction over a retired naval officer to be constitutionally valid because Hooper was part of the land and naval forces of the United States. *Id.* (citing U.S. CONST. art. I, § 8). In reaching its conclusion, the court reasoned: "We say this because the salary [Hooper] received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies. He had a direct connection with the operation of the 'land and naval forces.'" *Id.*

216. *See* Marjorie Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228-29 (1977).

retired list was established for officers.[217] The characterization of military retired pay as "reduced pay for reduced services" can be traced to a post-Civil War case, *United States v. Tyler.*[218] Captain Richard W. Tyler entered the Army as an enlisted soldier in 1861, was appointed as a lieutenant in 1864, and retired in 1870 due to injuries. In 1880, Captain Tyler petitioned the U.S. Court of Claims to increase his retired pay based upon statutes that provided pay increases for longevity of military service. Tyler asserted that the applicable statutes made no distinction regarding pay increases for longevity between active duty officers and retired officers.[219] The Court of Claims held that the applicable pay statutes[220] allowing longevity pay for every five years of service did apply to retired officers because they "do not cease to be in service by the mere fact of being placed on the retired list and relieved from active duties."[221] Accordingly, the Court of Claims held that Captain Tyler was entitled to judgment in the amount of $1203.14 for additional longevity pay, including the approximately ten years of service as a retired officer.[222]

On appeal, the U.S. Supreme Court examined the applicable statutes and determined that there was a "manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service."[223] Officers wholly retiring from the service received a lump sum payment of one year's pay and allowances of the highest rank they held and their connection to the government was ended.[224]

The ultimate issue in *Tyler* was whether an officer retired from active service was "considered in the service within the meaning of sect[ion]

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217. *See* House, *supra* note 3, at 113 (citing Act of Aug. 3, 1861, 12 Stat. 289, 290, which applied to both officers of the Army and the Marine Corps).

218. 105 U.S. 244 (1881).

219. Tyler v. United States, 16 Ct. Cl. 223 (1880).

220. The government attorney unsympathetically characterized retirement pay as a "pure gratuity, and most of those who receive it have been practically forced out of their positions in the active service, because they are, as they have been formally declared to be, incompetent, and unable longer to perform duty." *Id.* at 235.

221. *Id.* at 234.

222. *Id.* at 238.

223. United States v. Tyler, 105 U.S. 244 (1881).

224. REVISED STATUTES, *supra* note 5, § 1275. Section 1275 of the Revised Statutes provides that "officers wholly retired from the service shall be entitled to receive upon their retirement one year's pay and allowances of the highest rank held by them, whether by staff or regimental commission, at the time of their retirement." *Id*., *quoted in Tyler*, 105 U.S at 245.

1262."[225] In reaching the conclusion that "retired officers are in the military service of the government," the Supreme Court was persuaded by statutes that permitted retired officers to wear the uniform[226] and to be assigned to duty at the Soldiers' Home,[227] detailed to serve as professors in any college,[228] listed as part of the organization of the Army,[229] and subject to the rules and articles of war.[230] Although the Supreme Court did not expressly characterize the retired pay received by an officer retired from active service as "reduced pay for reduced service," the Court did state that the "compensation [retired pay] is continued at a reduced rate, and the connection [with the government] is continued."[231]

Although the *Tyler* decision was a post-Civil War military pay case based upon an interpretation of then-applicable pay statutes, the military relied upon *Tyler* as support to extend military jurisdiction to military retirees. In a case of first impression, Rear Admiral Selden G. Hooper, a retired officer of the Regular Navy, challenged the exercise of court-martial authority by naval authorities against him for violations of the Uniform Code of Military Justice.[232] The authority to subject a retiree to court-martial derives from Article I, section 8 of the Constitution, which provides that "Congress shall have the power "[t]o make Rules for the Government and Regulation of the land and naval Forces."[233] The question in *Hooper* was whether the retired Admiral was part of the "land and naval forces"

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225. *Tyler*, 105 U.S. at 245. The Act of July 15, 1870, 16 Stat. 320, ch. 294, § 1262 (1870), provides, "There shall be allowed and paid to each commissioned officer below the rank of brigadier-general, including the chaplains, and others having assimilated rank or pay, ten per centum of their current yearly pay for each term of five years' service." *Id.*

226. *Tyler*, 105 U.S. at 245. Revised Statute § 1256 provides that the "officers retired from active service shall be entitled to wear the uniform of the rank on which they may be retired." REVISED STATUTES, *supra* note 5, § 1256.

227. *Tyler*, 105 U.S. at 245. Revised Statute § 1259 provides that "they may be assigned to duty at the Soldiers' Home." REVISED STATUTES, *supra* note 5, § 1259.

228. *Tyler*, 105 U.S. at 245. Revised Statute § 1260 provides that "they may be detailed to serve as professors in any college." REVISED STATUTES, *supra* note 5, § 1260.

229. *Tyler*, 105 U.S. at 245. Revised Statute § 1094, states "specifically by a catalogue of twenty-eight items, of what the army of the United States consists, and the twenty-seventh item of this enumeration is 'the officers of the army on the retired list.'" REVISED STATUTES, *supra* note 5, § 1094. Current statutes also provide that the Regular Army includes retired officers. 10 U.S.C.A. § 3075(b)(3) (West 1998 and 2001 Supp.); *see supra* note 8.

230. *Tyler*, 105 U.S. at 245.

231. *Id.*

232. United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958) (citing United States v. Tyler, 105 U.S. 244, 245-46 (1881)).

233. U.S. CONST. art. I, § 8.

and thus subject to court-martial jurisdiction for illegal acts committed after retirement. In resolving this question, the Court of Claims looked to Supreme Court precedent for support that a retiree is considered a part of the land and naval forces,[234] and as such, is subject to military jurisdiction. Relying upon *United States v. Tyler*,[235] the court decided that Admiral Hooper was a part of the land and naval forces, reasoning that

> the salary he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies. He had a direct connection with the operation of the "land and naval forces." Thus, he formed a part of the vital element of our national defense and it naturally follows that he should be subject to military discipline.[236]

In civil cases, the courts also treated military retired pay as "reduced pay for reduced services" rather than as a mere pension for past services rendered. In *Lemly v. United States*,[237] a Naval Reserve Officer challenged the denial of disability-retired pay by the Navy. In addressing its jurisdiction over claims for retirement pay matters, the Claims Court distinguished between a pension and retirement pay. A pension is "paid after the service has been performed without any regard to the actual performance of service as a gratuitous recognition of a moral or honorary obligation of the government."[238] As such, the government has no control over a person receiving a pension.[239] Conversely, retirement pay is a "continuation of active pay on a reduced basis" paid to "an officer [still] in the service of his country even though on the retired list."[240]

Over a decade later, in *Hostinsky v. United States*,[241] a retired officer of the Regular Navy sought to retain his military retired pay in addition to receiving pay from a temporary appointment as a fire and damage control superintendent with the Department of Commerce, despite a statute that

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234. *See* Hooper v. United States, 326 F.2d 982, 985, 987 (Ct. Cl. 1964).

235. 105 U.S. at 244.

236. *Hooper*, 326 F.2d at 987.

237. 109 Ct. Cl. 760, 763 (1948).

238. *Id*. at 762.

239. *Id.* ("When a person is pensioned 'off' by the government, that government no longer has any control over his services. He is actually all through serving the government and yet he receives his pension as long as he lives.").

240. *Id*. at 763.

241. 154 Ct. Cl. 443 (1961).

prohibited payment to any person holding two public offices simultaneously.[242] The court determined that the statute prohibited the retired officer from receiving compensation from both offices. Specifically, the court stated that an "officer in the Navy, though retired, is still an officer. He continues to draw pay as a retired officer; he draws it because he is still an officer. . . . He is still subject to naval discipline."[243]

Post-Vietnam era civil cases continued to treat military retired pay as "reduced pay for reduced services." In *Costello v. United States*,[244] the Ninth Circuit reaffirmed the holdings of *United States v. Tyler*[245] and *Lemly v. United States*.[246] In *Costello*, military retirees challenged the retroactive application of a statutory amendment that linked increases in retired pay to a cost of living index rather than to increases in the active duty pay scales. Plaintiffs asserted that military retired pay is deferred compensation for past services, which cannot be altered prospectively. The Ninth Circuit dismissed this position as contrary to the long established position stated in *Tyler* in 1881 that retired pay is "reduced pay for reduced services."[247] Furthermore, the Ninth Circuit distinguished retired pay from bonus payments made to soldiers in *United States v. Larionoff*.[248] In *Larionoff*, the Court stated that a variable re-enlistment bonus is not a pay raise earned as service is performed, but rather is a bonus payment earned when the soldier agrees to extend his active service. Retirement pay, on the other hand, "does not differ from active duty pay in its character as pay for continuing service."[249] Almost one hundred years after the decision in *Tyler*, the Supreme Court would again be confronted with the unre-

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242. The Act of July 31, 1894, 28 Stat. 162, 205, *as amended by* Act of May 31, 1924, 43 Stat. 245, 5 U.S.C. § 62, provides, in pertinent part, that: "No person who holds an office the salary or annual compensation attached to which amounts to the sum of two thousand five hundred dollars shall be appointed to or hold any other office to which compensation is attached unless specially heretofore or hereinafter specially authorized thereto by law." *Id.*

243. *Hostinsky*, 154 Ct. Cl. at 446.

244. 587 F.2d 424, 426 (1978), *cert. denied*, 442 U.S. 929 (1979).

245. 105 U.S. 244 (1881).

246. 109 Ct. Cl. 760 (1948). *See also* Berkey v. United States, 361 F.2d 983, 987 n.9 (Ct. Cl. 1966) (retired pay has generally not been considered a pension, grant, or gratuity, but as something the serviceman earns and has earned).

247. *Costello*, 587 F.2d. at 426.

248. 431 U.S. 864 (1977).

249. *Costello*, 587 F.2d at 427.

solved issue of whether military retired pay is "reduced pay for reduced services" in the seminal case of *McCarty v. McCarty.*[250]

B. Impact of *McCarty v. McCarty*

At the time of the *McCarty* decision in 1981, three basic forms of military retirement existed.[251] Today, an eligible officer may submit a voluntary retirement request after serving twenty years of military service to receive retired pay. Military retired pay is unlike a typical civilian pension in many respects. Unlike a civilian pension plan, a soldier does not make periodic contributions to fund his retirement plan, but is funded by the annual appropriations approved by Congress.[252] Further, military retired pay does not vest until the soldier has served at least twenty years of active service or is entitled to receive retired benefits for disability.[253] Upon the death of the military member, the retired pay terminates and does not pass to the heirs of the soldier.[254]

McCarty became a landmark decision concerning the treatment of military retired pay upon divorce. Before the *McCarty* decision, some state courts considered military retired pay as a marital asset subject to division upon divorce.[255] These state courts applied their respective state laws in determining the apportionment and division of retired military pay. Other states followed the "reduced pay for reduced compensation" charac-

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250. 453 U.S. 210 (1981).

251. The three basic types of military retirement are disability retirement, reserve retirement, and nondisability retirement. This article focuses on the treatment of nondisability retirement pay. At the time of the *McCarty* decision, voluntary nondisability retirement pay was governed by 10 U.S.C.A. § 3911 (West 1981).

252. Barker v. Kansas, 503 U.S. 594, 598 (1992).

253. 10 U.S.C.A. § 3911 (West 2001). To supplement military retired pay, Section 661 of the National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512, amended 37 U.S.C. § 211 to provide a Thrift Saving Plan for military personnel. Unlike military retired pay, tax deferred contributions and income that accrue to a military member's Thrift Savings Plan vest upon payment and its value can readily be determined.

254. If a retiree purchased the Survivor Benefit Plan (SBP) annuity, the beneficiary will receive periodic payments upon the death of the retiree. In 1972, Congress enacted the Survivor Benefit Plan (SBP), Pub. L. No. 92-425, 86 Stat. 706 (codified at 10 U.S.C.A. §§ 1447-1455 (West 1976)). Under the SBP, a retiree is automatically enrolled unless he affirmatively disenrolls from the plan with the consent of the spouse. 10 U.S.C.A. § 1448 (West 1998 and 2001 Supp.). The SBP is partially funded by the government, but does require contributions by the retiree.

terization and ruled that military retired pay was not marital property subject to dissolution upon divorce.[256]

Colonel McCarty, an Army physician, had served about eighteen years of active military service at the time he filed for divorce in California. In California, state community property laws provided that a state court must divide the community property and quasi-community property of the parties.[257] Community property consists of all property owned in common by husband and wife that was acquired during the marriage by means other than an inheritance or a gift to one spouse.[258] Quasi-community property is "all real or personal property, wherever situated heretofore or hereafter acquired . . . [by] either spouse while domiciled elsewhere which would have been community property if the spouse who acquired the property had been domiciled in California at the time of its acquisition."[259] Each spouse is deemed to contribute equally to the marital assets, and likewise, should share equally in the marital property upon divorce.[260]

McCarty listed his "military retirement benefits" as his separate property, whereupon his wife countered that such property was "quasi-community property" and thereby subject to division by the state court. The California Superior Court determined that military retired pension and

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255. *See, e.g.*, Chisnell v. Chisnell, 267 N.W.2d 155 (Mich. Ct. App. 1978), *cert. denied*, 442 U.S. 940 (1979) (a military pension treated as deferred compensation for services rendered before retirement and, as such, is considered a marital asset by virtue of the spouse's contribution to the marriage); *In re* Marriage of Coram, 408 N.E.2d 418 (Ill. App. Ct. 1978) (recognizing a marital property interest in military retirement benefits where the rights thereto were acquired during marriage whether the interest was vested or not and contributory or noncontributory).

256. *See In re* Marriage of Ellis, 538 P.2d 1347 (Colo. Ct. App. 1975); United States v. Williams, 370 A.2d 1134 (Md. 1977); Elmwood v. Elmwood, 244 S.E.2d 668 (N.C. 1978); Ables v. Ables, 540 S.W.2d 769 (Tex. Civ. App. 1976).

257. McCarty v. McCarty, 453 U.S. 210, 216 (1981) (citing CAL. CIV. CODE ANN. § 4800 (a) (1981)).

258. Hisquierdo v. Hisquierdo, 439 U.S. 572, 578 (1979) (citing CAL. CIV. CODE ANN. § 687 (1954)). Community property contrasts with separate property, which includes assets owned by a spouse before marriage or acquired separately by a spouse during marriage through gift. In community property states, ownership turns on the method and timing of acquisition, while the traditional view in common law states is that ownership depends on title. Under community property laws, property that is classified as separate property is not considered part of the martial estate and belongs to its owner upon dissolution of the marriage and is not apportioned. *Id.*

259. *McCarty*, 453 U.S. at 217 (citing CAL. CIV. CODE ANN. § 4803).

260. *Id.* at 216 (citing *Hisquierdo*, 439 U.S. at 577-78).

retirement benefits were subject to division as quasi-community property upon dissolution of marriage.[261]

On appeal to the Supreme Court, Colonel McCarty made two compelling arguments. He asserted that because "military retired pay in fact is current compensation for reduced, but currently rendered, services . . . [such] pay may not be treated as community property to the extent that it is earned after the dissolution of the marital community."[262] In support of this position, Colonel McCarty cited to *Tyler* and *Hooper.* Military retired pay should not be considered as part of the marital community, he argued, because it is not a pension, but rather future income earned by future reduced services. As such, military retired pay is earned after the dissolution of the marital community.[263] In dicta, the Court appeared to agree with Colonel McCarty's characterization of military retired pay; however, it did not decide the case upon this issue.[264] Instead, the Court focused on Colonel McCarty's second argument, that federal statutory law preempts the application of state community property law. Specifically, Colonel McCarty argued that the "application of community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation."[265]

After a detailed examination of federal retirement plans, the Court concluded that a conflict existed between the federal retirement scheme intended by Congress and state community property laws.[266] Congress intended the military retired system to provide for retirees and to meet the personnel management needs of the active military force, and to attract and retain personnel for the military.[267] To permit state community property laws to divide military retired pay "threatens grave harm to clear and sub-

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261. The California Court of Appeals affirmed, relying on *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974), *cert. denied*, 419 U.S. 825 (1974) (military retirement pay is properly subject to division as community property upon divorce).

262. *McCarty*, 453 U.S. at 221.

263. *Id.*

264. The Court cited factors that distinguish military retired pay from a typical pension, such as remaining a member of the Army, being subject to the Uniform Code of Military Justice, potential to forfeit all retired pay if engaged in certain activities, and being subject to recall to active duty. "These factors have led several courts, including this one, to conclude that military retired pay is reduced compensation for reduced current services." *Id.* at 221-22.

265. *Id.* at 223.

266. *Id*. at 232.

267. *Id.* at 232-33.

stantial federal interests."[268] The Court concluded that applying the state community property laws to military retired pay "sufficiently injure[s] the objectives of the federal program to require nonrecognition"[269] of the state community property laws. The Court determined that upon balancing the threatened objectives of the federal program involved to the state interests, federal preemption applied. It held that military retired pay was not subject to division upon divorce as community property.[270]

The Court did recognize that the "plight of an ex-spouse of a retired service member is often a serious one," deserving of congressional remedy.[271] Justice Blackmun stated:

> Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs.[272]

C. Impact of the Uniform Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408 (2000)

In 1982, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, in response to the *McCarty* decision.[273] The USFSPA permits state courts to treat disposable retired pay[274] as marital property when apportioning the marital estate between divorcing parties, and provides a method for enforcement of court orders through the Department of Defense.[275] The USFSPA does not provide to the former spouse an automatic entitlement of a portion of a member's pay, but does provide state courts the right to distribute military retired pay according to state marital law. Further, Congress placed some limits on the division of retired pay by state courts. States can only divide "disposable retired pay," not gross pay,[276] former spouses cannot assign their right to retired pay,[277] courts cannot order a member to retire to begin payment of retired pay to the former spouse,[278] and the maximum amount of retired pay payable is limited to fifty percent of disposable retired pay.[279]

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268. *Id.* at 232.
269. *Id.*
270. *Id.* at 236.
271. *Id.* at 235-36.
272. *Id.*

Although the enactment of the USFSPA was designed to create a fair and equitable process to divide military retired pay upon divorce, the USFSPA has required amendment several times to address various perceived inequities in its application.[280]

1. Impact of USFSPA

Although the USFSPA gives state domestic courts the authority to divide military retired pay upon divorce, the determination of a fair and equitable division of military retired pay is no easy task. Unlike a vested civilian retirement plan or 401(k) stock plan, the military retirement pension is noncontributory, payments terminate upon the death of the soldier, and accumulate no cash value. The amount of payments made to a military

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273. Department of Defense Authorization Act, 1983, Pub. L. No. 97-252, 96. Stat. 718, 730 (1982). The USFSPA was signed into law on 8 September 1982, and became effective 1 February 1983, applying retroactively to the date of the *McCarty* decision, 26 June 1981. 10 U.S.C. § 1408 (c)(1) (2000). It is evident from the legislative history that Congress intended to abrogate all effects of the *McCarty* decision and place state courts into a pre-*McCarty* position.

> The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisible. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.

S. REP. NO. 97-502 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1596, 1611. *See, e.g.*, Keen v. Keen, 378 N.W.2d 612, 614 (Ct. App. Mich. 1985) (the object of the USFSPA was to retroactively subject the disposition of military pensions in divorce actions to state law as it existed before that date); Koppenhaver v. Koppenhaver, 678 P.2d 1180 (N.M. App. 1984); Castiglioni v. Castiglioni, 471 A.2d 809 (N.J. Super. Ct. 1984); Menard v. Menard, 460 So. 2d 751 (La. App. 1984); Harrell v. Harrell, 684 S.W.2d 118 (Tex. App. 1984); Faught v. Faught, 312 S.E.2d 504 (N.C. App. 1984); Coates v. Coates, 650 S.W.2d 307, 311 (Mo. App. 1983); Smith v. Smith, 458 A.2d 711 (Del. Fam. Ct. 1983).

retiree will fluctuate based upon the number of years that the member sur-

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274. The definition of disposable retired pay has changed several times since the enactment of the USFSPA. Initially, disposable retired pay included gross nondisability retired pay less amounts which "are owed by that member to the United States," tax payments, SBP premiums, and offsets due to the receipt of Veteran's Administration disability benefits. Pub. L. No. 97-252, § 1002(a), 96 Stat. 730, 731. Since then, Congress has amended the definition several times. *See* Pub. L. No. 99-661, § 644, 100 Stat. 3887 (1986); Pub. L. No. 100-26, § 7(h)(1), 101 Stat. 273 (1987); Pub. L. No. 101-189, § 653(a)(5)(A), 103 Stat. 1462 (1989); Pub. L. No. 101-510, § 555(b)(1), 104 Stat. 1569 (1990); Pub. L. No. 104-193, § 362, 110 Stat. 2246 (1996). The current definition of disposable retired pay includes pre-tax gross retired pay less amounts that

> (A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;
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> (B) are deducted from the retired pay of such member as a result of forfeiture of retired pay ordered by a court-martial or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;
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> (C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or
>
> (D) are deducted because of an election under chapter 73 of this title [10 U.S.C. §§ 1431-1446] to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

10 U.S.C. § 1408(a)(4) (2000).

275. 10 U.S.C. § 1408(c)(1), (d)(1).

> After effective service of process on the Secretary concerned of a court order providing for the payment of child support or alimony or, with respect to a division of property, specifically providing for the payment of an amount of the disposable retired pay from a member to the spouse or a former spouse of the member, the Secretary shall make payments . . . from the disposable retired pay of the member to the spouse or former spouse.

Id. § 1408(d)(1).

276. *Id.* § 1408(a)(4), (c)(1).

277. *Id.* § 1408(c)(2).

278. *Id.* § 1408(c)(3).

279. *Id.* § 1408(e)(1).

vives after retirement. Although it is possible to estimate the "present cash value" of a military pension based upon actuarial tables, such figures are dependent upon the member fulfilling the assumptions of the actuary, i.e., living as long as the projected national average. The USFSPA does not provide a specific formula for state courts to follow regarding the division of disposable retired pay. Generally, the parties use state law formulas to divide the military pension.[281] Some states have adopted a "reserved jurisdiction approach," while others have adopted an "immediate offset" method to determine the division of the military pension.[282]

2. Post USFSPA Cases

The USFSPA clearly indicates Congress's intent to abrogate all the applications of the *McCarty* decision,[283] and thus recognized the "long-standing doctrine that family law matters are the special province of state courts."[284] Despite the USFSPA's treatment of military retired pay as "property," subsequent decisions by some federal courts indicate that the enactment of the USFSPA did not alter the *characterization* of military retired pay as "reduced pay for reduced services."[285] In *United States v.*

280. Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-252, 96 Stat. 730 (1982) (codified as amended at 10 U.S.C. §§ 1072, 1076, 1086, 1408, 1447-1448, 1450-1451). The most recent proposed amendment was introduced by Congressman Cass Ballenger during the 107th Congress, 2001. House Bill 1983 (H.R. 1983), the Uniformed Services Former Spouses Equity Act of 2001, seeks to amend 10 U.S.C. § 1408(c) to terminate military retired payments to a former spouse upon remarriage, calculate retired payments based upon the retiree's length of service and pay grade at the time of divorce, and impose a statute of limitations for seeking division of retired pay. The proposed amendment was not enacted.

281. *See* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 274, UNIFORMED SERVICES FORMER SPOUSES' PROTECTION ACT app. P (1 July 1995), *available at* http://www.jagcnet.army.mil.

282. The "reserved jurisdiction approach" provides that the spouse reserves a portion of the retiree's military pension as it is received, whereas the "immediate offset" generally requires the retiree to pay the spouse the calculated present cash value of the military pension based upon actuarial tables or provide other marital property of like value. *See In re* Marriage of Korper, 475 N.E. 2d 1333 (Ill. App. 1985).

283. *See* Explanatory Statement of the Com. of Conf. on Pub. L. No. 97-252, H.R. CONF. REP. NO. 97-749, at 166-68 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1570-73.

284. *See* Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); United States v. Yazell, 382 U.S. 341 (1966); *Ex parte* Burrus, 136 U.S. 586 (1890).

285. *See* Cornetta v. United States, 851 F.2d 1372, 1382 (Fed. Cir. 1988) (citing Hotinsky v. United States, 292 F.2d 508, 510 (Ct. Cl. 1961); United States v. Tafoya, 803 F.2d 140, 142 (5th Cir. 1986)).

Tafoya,[286] the defendant appealed from a court order withholding a portion of his military retirement pay to repay the government for services rendered by a public defender regarding a criminal tax charge. The Fifth Circuit Court of Appeals noted that by "some quirk of history, Tafoya's retirement pay is actually not 'retirement pay'; it is, instead 'current pay' designed in part to compensate Tafoya for his continuing readiness to return to duty should his country have need to call upon him."[287] In *Corneta v. United States*,[288] the U.S. Court of Appeals for the Federal Circuit likewise held, despite the enactment of the USFSPA six years earlier, that "[r]etired pay is reduced pay for reduced current services."[289] The Federal Circuit noted that because retired pay differs in significant respects from a typical pension or retirement plan,[290] military retired pay is reduced compensation for reduced services.[291]

Even bankruptcy courts have treated military retired pay as reduced compensation for future reduced services. In *In re Siverling*,[292] creditors objected to the debtor's claim that his military retirement pay was not property of the estate under 11 U.S.C. § 541(a)(6) (1988). This statute provides that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case."[293] However, "earnings from services performed by an individual debtor after the commencement of the case" are not property of the estate.[294] In citing *Tyler* and *McCarty*, the bankruptcy court determined that military retirement pay is "reduced compensation for reduced current services" and not part of the bankruptcy estate.[295]

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286. 803 F.2d 140, 142 (5th Cir. 1986).

287. *Id.* at 143.

288. 851 F.2d 1372 (Fed. Cir. 1988).

289. *Id.* at 1382 (citations omitted). *See* Loeh v. United States, 53 Fed. Cl. 2, 5 (2002) ("'Retirement' in the context of the military is something of a misnomer—retired pay, unlike a typical pension, is not simply compensation for past services, but also 'reduced compensation for reduced current services.'") (citation omitted).

290. Some of the distinguishing factors between a military retirement plan and a civilian pension include the retired officer remaining a member of the Army, remaining subject to the UCMJ, forfeiture of all or part of his retired pay if he engages in certain activities, and being subject to recall to active duty. *Cornetta*, 851 F.2d at 1382.

291. *Id*.

292. 72 B.R. 78 (Bankr. W.D. Mo. 1987).

293. 11 U.S.C. § 541(a)(6) (1988).

294. *Id.*

295. *In re Siverling*, 72 B.R. at 78-79.

D. Impact of *Barker*

While the *McCarty* decision may have created confusion among various state and federal courts over whether retired pay should be characterized as "reduced pay for reduced services," the Supreme Court clarified the issue in *Barker v. Kansas*.[296] In *Barker v. Kansas*, the Supreme Court examined a Kansas state income tax provision that taxed military retired pay but did not tax the retired pay of state and local government employees.[297] Three years earlier in *Davis v. Michigan Dep't of Treasury*, the Supreme Court had struck down a Michigan state income tax provision that taxed federal civil service retirees but not Michigan state and local government employees.[298] In *Barker*, over 14,000 military retirees taxed under Kansas's state income tax law from 1984 to 1989 sought declaratory relief that Kansas income tax discriminated against them in favor of state and local government retirees, in violation of 4 U.S.C. § 111[299] and the constitutional principles of intergovernmental tax immunity.[300]

Affirming the trial court's determination that Kansas's state tax law was constitutional, the Kansas Supreme Court distinguished the *Barker* case from the *Davis* case by finding that there are substantial differences between the two classes (military retirees and state and local government

296. 503 U.S. 594 (1992).

297. KAN. STAT. ANN. § 79-3201 et seq. (1989). Kansas statutes exempted federal civil service retirement system benefits from state tax as well as retired railroad employees. *See id.* §§ 79-32,117(c) (vii)-(viii) (Supp. 1990). However, the Kansas state lax laws did not exempt military retired pay, certain employees of the Central Intelligence Agency, officials serving in the National Oceanic and Atmospheric Association or the Pubic Health Service, and retired federal judges. *See Barker*, 503 U.S. at 596 n.1.

298. Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989). In *Davis*, a Michigan resident, who was a retired federal government employee, alleged that the Michigan statute that exempted state retirement benefits from state income tax discriminated against federal retirees in violation of 4 U.S.C. § 111. *See id.*

299. 4 U.S.C. § 111 provides,

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or commission.

4 U.S.C. § 111 (2000).

300. *Barker*, 503 U.S. at 301.

retirees) justifying the disparate tax treatment.[301] Comparing *Tyler* and *McCarty*, the Kansas Supreme Court concluded that the ultimate distinguishing factor between military retirees and state and local government retirees justifying a disparate taxation policy was that "military retirement pay is reduced current compensation for reduced current service."[302] The U.S. Supreme Court unanimously agreed in *Barker*[303] that military retired pay is *not* reduced pay for reduced services, but is deferred compensation.[304] The Court agreed military retirees differ in many respects from

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301. Barker v. Kansas, 815 P.2d 46 (Kan. 1991), *rev'd*, 503 U.S. 594 (1992). "The crucial issue in the case at bar [*Barker*] is whether the inconsistent taxation of federal military retirement benefits is 'directly related to, and justified by, significant differences' between federal military retirees and state and local government retirees." *Id*. at 52. The defendants (the State of Kansas, the Department of Revenue, and two state officials) averred that the plaintiffs (military retirees), differ significantly from state and local government retirees under the Kansas Income Tax Act [KAN. STAT. ANN. § 79-3201 et seq.] and hence, disparate tax treatment is permissible. Specifically, the State asserted that

> (1) federal military retirees remain members of the armed forces of the United States after they retire from active duty; they are retired from active duty only; (2) federal military retirees are subject to the Uniform Code of Military Justice (UCMJ) and may be court-martialed for offenses committed after retirement; (3) they are subject to restrictions on civilian employment after retirement; (4) federal military retirees are subject to involuntary recall; (5) federal military retirement benefits are not deferred compensation but current pay for continued readiness to return to duty; and (6) the federal military retirement system is noncontributory and funded by annual appropriations from Congress; thus, all benefits received by military retirees have never been subject to tax.

Id. at 52. The Kansas Supreme Court opined that military pensions are subject to state taxation because, *inter alia*, military retired pay is reduced pay for reduced current services that has never been taxed. In contrast, state and local government retirees are completely severed from employment and have no continuing connection with government employers, are not subject to government personnel procedures or disciplinary rules, and there are no restrictions on their post-retirement activities. State and local government employee retirement benefits are deferred compensation, not current pay that has been funded from contributions subject to taxation in the year in which the contributions were made. *Id.*

302. *Barker*, 815 P.2d at 58.

303. 503 U.S. 594 (1992).

304. *Id.* at 605 ("[The characterization of] military retirement benefits . . . as current compensation for reduced current services does not survive analysis . . . .").

state and local retirees, but these differences do not "justify the differential tax treatment" imposed by the Kansas Income Tax Act.[305]

In reaching the conclusion that military retired pay is not reduced pay for reduced services, the Supreme Court first examined the manner in which retired pay is calculated and paid. A military retiree's pay is calculated based on a percentage of base pay commensurate with the rank and creditable years of service calculated at the time of retirement.[306] If retirees of the same rank received reduced pay for reduced continuing service, their pay would be equal since they would be performing the same reduced service. However, such is not the case. Military retired pay is calculated "not on the basis of the continuing duties [the retiree] actually performs, but on the basis of years served on active duty and the rank attained prior to retirement."[307] Based on this formula, this creates disparities in retired pay received by members of the same retired rank that "cannot be explained on the basis of 'current pay for current services.'"[308] In this respect, "retired [military] pay bears some of the features of deferred compensation."[309]

Second, the Court distinguished the *Tyler* and *McCarty* opinions. In *Tyler*, the Court addressed the issue of whether an Army Captain, retired in 1870 due to war wounds, was entitled to the same increases in pay that Congress intended for active-duty officers.[310] In holding that certain retired officers were entitled to the increases in pay, the Court based its decision upon its analysis of the post-Civil War statutory provisions that applied to different types of retirees.[311] Those "retiring wholly and altogether from the service"[312] under Revised Statue Section 1275 were entitled to receive a one-time payment of one year's pay and allowances upon retirement. Their eligibility for any pay increase had been terminated because their connection to the service had been completely terminated.[313] Presumably, such retirees were not subject to the same post-retirement restrictions applicable to those retiring from active service.[314] These post-retirement restrictions led to the Court's conclusion that such officers are still in the military service.[315] The interpretation of the post-Civil War statutory provisions applicable to the "uniform treatment of active-duty officers and the one class of retired officers was crucial to the decision"[316] in

305. *Id.* at 599.
306. *Id.*; *see* 10 U.S.C. § 1409 (2000).
307. *Barker*, 503 U.S. at 599 (citing McCarty v. McCarty, 453 U.S. 210 (1981)).
308. *Id.*
309. *Id.*
310. Tyler v. United States, 105 U.S. 244, 245 (1982).

Tyler. Thus, *Tyler* "cannot be taken as establishing that retirement benefits are for all purposes the equivalent of current compensation for reduced current services."[317]

In *McCarty*, the Court did not determine that military retired pay is reduced pay for reduced services, but decided the case upon the federal preemption doctrine. The *McCarty* opinion held that "the application of [state] community property law conflicts with the federal military retirement scheme regardless of whether retired pay is defined as current or as deferred compensation."[318] The Court did not adopt "*Tyler*'s description of military retirement pay"[319] and reserved the question of whether retired pay is reduced pay for reduced services for another case.[320] In cautioning states' treatment of military retired pay, the Court stated in dicta that "the possibility that Congress intended military retired pay to be in part current compensation for those risks and restrictions suggests that States must tread with caution in this area, lest they disrupt the federal scheme."[321]

Finally, the *Barker* opinion examined whether congressional intent provided any support to the reduced pay argument. Immediately after the *McCarty* decision was issued, Congress enacted the USFSPA, which

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311. The applicable statutory provisions provided for two different kinds of retirement schemes, namely those officers "retiring from active service and [those officers] retiring wholly and altogether from the service." *Id.* Officers retired from active service received 75% of the pay of the rank upon which they were retired. *See id.* REVISED STATUTES, *supra* note 5, § 1276. Additionally, officers retired from active service were eligible to receive retired pay increases of 10% of their current yearly pay for every five years of retirement. *See* REVISED STATUTES, *supra* note 5, § 1262. Officers who were "incapable of performing the duties of [their] office" were wholly retired from the service and their connection with the U.S. Army was ended. *Id.* § 1245. Such officers were entitled to receive, in addition to the retired pay previously paid them, a one-time payment of one year's pay and allowances. *Tyler*, 105 U.S. at 245. As the Court stated, there was a "manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service." *Id.*

312. *Tyler*, 105 U.S. at 245.

313. *Barker*, 503 U.S. at 602.

314. Various statutory provisions at the time imposed post-retirement restrictions on those retiring from active service. *See supra* notes 224-29.

315. *Tyler*, 105 U.S. at 246.

316. *Barker*, 503 U.S. at 602.

317. *Id.*

318. McCarty v. McCarty, 453 U.S. 210, 223 (1981).

319. *Id.*

320. *Id.*

321. *Id.* at 224.

"negated *McCarty*'s holdings by giving the States the option of treating military retirement pay 'either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.'"[322] In reviewing the impact of the USFSPA on the reduced pay issue, the Court stated that "Congress clearly believed that payment to military retirees is in many respects not comparable to ordinary remuneration for current services."[323] The Court noted that it would be inconsistent to treat military retired pay as part of the marital estate under the USFSPA with "the notion that military retirement pay should be treated as indistinguishable from compensation for reduced current services."[324] The Court noted that Congress enacted other statutes that treat military retired pay as deferred compensation.[325]

The Supreme Court concluded that Kansas's characterization of military retired pay as current compensation for taxation purposes "does not survive analysis in light of the manner in which these benefits are calculated, our prior cases, or congressional intent as expressed in other provisions treating military retired pay."[326] At least for purposes of taxation, the *Barker* holding provides that military retired pay is not reduced pay for reduced services, but rather deferred compensation.

E. Conclusion: Receipt of Retired Pay Is a Questionable Justification for Court-Martial Jurisdiction

In *Hooper*, the military court reasoned that Admiral Hooper was subject to the court's jurisdiction, and was part of the land and naval forces, in part because the retired pay he received was not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies.[327] In short, Hooper was not a mere pensioner, but was still a member of the armed forces receiving a reduced

322. *Barker*, 503 U.S. at 603.

323. *Id.*

324. *Id.*

325. For federal individual retirement accounts, military retirement pay is considered "deferred compensation," which precludes it from consideration for making deductible contributions to an IRA. *See id.* at 604.

326. *Id.*

327. United States v. Hooper, 26 C.M.R. 417, 425 (C.M.A. 1958).

sum of military pay to reflect his reduced military duties. The reduced duties were primarily his continued availability for military service.

This historic justification for the extension of court-martial jurisdiction over military retirees based upon the characterization of military retired pay as "reduced pay for reduced services," however, is now of questionable validity. Further, the enactment of the USFSPA to abrogate the *McCarty* decision clearly reflects modern congressional intent that retired pay should be treated as a form of property divisible upon divorce according to state marital property laws. With the 1992 decision in *Barker v. Kansas*,[328] the Supreme Court has finally nullified any vestiges of the Civil War era decision of *United States v. Tyler* and its progeny that characterized retired pay as "reduced pay for reduced services." The 1992 decision of *Barker*, coupled with the USFSPA,[329] appears to have removed at least one legal pillar used to support continued jurisdiction over military retirees.

V. Additional Problem Areas with the Exercise of Court-Martial Jurisdiction over Retirees

A. Offenses

1. General

As a general statement of law, it is clear that anyone subject to the UCMJ—including retirees—may prefer charges against anyone else subject to the UCMJ—again, including retirees.[330] Retirees of any regular component who are entitled to pay, including members of the Fleet Reserve and Fleet Marine Corps Reserve entitled to retainer pay, are subject to military law and may be prosecuted for crimes committed either

328. 503 U.S. 594 (1992).

329. Another recent congressional enactment has chipped away at the limitations placed upon military retirees that have existed for many years. In October 1999, Congress enacted the National Defense Authorization Act for 2000, S. 106-1059, at 651 (1999). This legislation repealed the Dual Compensation Act, 5 U.S.C. § 5532(b) (1994), which had required retired regular officers in the federal civil service to forego a percentage of their military retired pay as a condition of federal employment. Military retirees who subsequently work for the federal civil service are now permitted to retain their full military retired pay.

330. UCMJ art. 30(a) (2002) ("Charges and specifications shall be signed by a person subject to this chapter . . . .").

while on active duty or while in a retired status.[331] Indeed, it appears that retirees may be prosecuted for any UCMJ offense committed while on active duty, subject only to the statute of limitations,[332] and for any offense committed in a retired status for which the retiree's duty status is immaterial.[333] In theory, nonjudicial punishment may even be imposed on retirees, subject to service restrictions and the exercise of such authority by an appropriate "commander."[334]

The duty status immaterial category of offenses subject to court-martial appears to be the only legal—as opposed to policy/discretionary—limitation on offenses for which a retiree may be court-martialed. Unfortunately, the parameters of this limitation are largely undefined. Existing case law suggests that jurisdiction extends to all conventional, nonmilitary types of crimes, such as sex crimes,[335] other crimes of "moral turpitude,"[336] homicide,[337] bad check offenses,[338] and property crimes.[339] National security violations also fall within the UCMJ's ambit.[340] It is equally clear, however, that this category of offenses is not limited to nonmilitary types of crimes, given that the failure to obey a general order or regulation, Article 92(1);[341] conduct unbecoming an officer and a gentleman, Article 133;[342] and conduct of a nature to bring discredit upon the armed forces, Article 134,[343] have served as the basis for charges against military personnel on the retired list for misconduct committed after their retirement. Albeit not as clear, some legal precedence exists to support the position that retirees may be prosecuted for violating the contemptuous speech prohibitions of Article 88.[344]

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331. TILLOTSON, *supra* note 53, at 6 ("Retired officers of the Regular Army are subject to military law and to trial by court-martial for offenses committed either before or after retirement . . . ."); U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE para. 5-2(b)(3) (6 Sept. 2002) [hereinafter AR 27-10] ("Retirees . . . may be tried by courts-martial for violations of the UCMJ that occurred while they were on active duty or, while in a retired status."); *see, e.g.*, Pearson v. Bloss, 28 M.J. 376 (C.M.A. 1989) ("offenses allegedly committed both before and after his separation from active duty"). *Compare* Sands v. Colby, 35 M.J. 620 (C.M.A. 1992) (murder committed while retired) *and Hooper*, 26 C.M.R. at 417 (all misconduct committed after retirement), *with* Chambers v. Russell, 192 F. Supp. 425, 426 (N.D. Cal. 1961) ("all of the acts are alleged to have occurred prior to . . . the effective date of petitioner's retirement from the United States Navy").

332. The statute of limitations is contained in Article 43, UCMJ.

333. *See Hooper*, 26 C.M.R. at 425 (noting that all charges were offenses that "do not depend upon the individual's duty status").

2. The Hooper *Exception*

Although the COMA's opinion in *Hooper* is devoid of guidance as to what offenses it was addressing, a retiree's duty status should be considered material for jurisdictional purposes in at least cases involving alleged violations of Article 89, Disrespect to a Superior Commissioned Officer, and Article 90(2), Willfully Disobeying a Superior Commissioned Officer. To illustrate, using the scenario discussed in the introductory paragraph, assume a retired Army Lieutenant Colonel works as a GS federal employee and that he is known throughout the organization to be a retired Lieutenant Colonel. His organizational chief is an active duty Army Colo-

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334. Article 15 of the UCMJ contains no specific prohibition against its application to retired personnel other than "such regulations as the President may prescribe, and under such additional regulations as may be prescribed by the Secretary concerned . . . ." UCMJ art. 15. Accordingly, Service regulations determine the applicability of this provision of the Code to retirees. *See* Court-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108 ("It is the opinion of the Judge Advocate General that retired personnel not on active duty are not subject to the jurisdiction of local commanders for the administration of disciplinary action pursuant to the provisions of UCMJ, Art. 15, *under current regulations*.") (emphasis added).

Other than stating the general amenability of retired personnel to the UCMJ, *Army Regulation 27-10, Military Justice*, makes only a single permissive reference to retired personnel in the Article 15 context. *See* AR 27-10, *supra* note 331, para. 5-2(b)(3) ("Retired members of a regular component of the Armed Forces who are entitled to pay are subject to the UCMJ." (citing UCMJ art. 2(a)(4)). The Army regulation permits "[application of] forfeitures imposed under Article 15 . . . against a soldier's retirement pay." *Id.* para. 3-19(b)(7)(b). Earlier opinions of the Judge Advocate General, however, opined that retirees, not on active duty, were not amenable to the Article 15 authority of local commanders under then existing regulations. Court-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108.

The Coast Guard's *Military Justice Manual* states that "[a] retiree may not be recalled to active duty solely for the imposition of NJP." U.S. DEP'T OF TRANSPORTATION, UNITED STATES COAST GUARD, COMDTINST M5810.1D, MILITARY JUSTICE MANUAL, sec. 1.A.4.g, at 1-4 (17 Aug. 2000) [hereinafter USCG MJM]. The Navy and the Air Force make no specific provision concerning imposing nonjudicial punishment over retirees. U.S. DEP'T OF NAVY, JAGINST 5800.7C, MANUAL OF THE JUDGE ADVOCATE GENERAL ch.1, pt. B (Nonjudicial Punishment) (3 Oct. 1990) (C3, 27 July 1998) [hereinafter JAGMAN]; U.S. DEP'T OF AIR FORCE, INSTR. 51-202, NONJUDICIAL PUNISHMENT (1 Oct. 1996). The *JAGMAN* serves as the Secretary of the Navy's, and The Judge Advocate General's, implementing and supplemental regulations for the UCMJ and *MCM*, respectively. JAGMAN, *supra*, sec. 0101. *Air Force Instruction 51-202* implements Article 15, UCMJ. AFI 51-202, *supra*, at 1.

335. United States v. Sloan, 35 M.J. 4 (C.M.A. 1992) (carnal knowledge and indecent acts with a child); *Hooper*, 26 C.M.R. at 425 (sodomy); *see* United States v. Stevenson, 53 M.J. 257 (2000) (rape; TDRL retiree).

nel; an active duty Army Captain and a retired Army NCO work within the same organization, but not directly for the retired officer. Can the retired officer be court-martialed for disrespect to the Colonel and conversely, can the Captain and retired NCO be court-martialed for disrespect to the retired Lieutenant Colonel? As absurd as it sounds, existing law appears to support such UCMJ action.

Article 89 reaches "[a]ny person subject to [the UCMJ] who behaves with disrespect toward his superior commissioned officer . . . ."[345] To achieve a conviction, a trial counsel must prove that the accused (1) did or

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336. Although addressing the specific crime of sodomy, the COMA appeared to include within the ambit of punishable offenses all "offense[s] involving moral turpitude . . . ." *Hooper*, 26 C.M.R. at 425. Military law has considered a wide range of offenses to fall within the category of crimes of moral turpitude. United States v. Hutchins, 19 C.M.R. 143, 145 (C.M.A. 1955) ("Larceny is indisputably an offense involving moral turpitude."); United States v. Wrenn, 36 M.J. 1188, 1193 (N.M.C.M.R. 1993) ("attempted larceny . . . larceny and wrongfully obtaining services through false pretenses"); United States v. Greene, 34 M.J. 713, 714 (A.C.M.R. 1992) (false swearing); United States v. Hayes, 15 M.J. 650, 651 (N.M.C.M.R. 1983) (adultery); United States v. Light, 36 C.M.R. 579, 584 (A.B.R. 1965) (crimes generally "involv[ing] a degree of moral turpitude" include: selling passes, wrongfully receiving money for transporting a civilian female in a government vehicle," cheating on an examination . . . [, and] receiving money for calling false numbers at a bingo game") (citations omitted)); United States v. Weaver, 1 M.J. 111, 115 (C.M.A. 1975) (burglary is "a crime involving moral turpitude" or one that affects witness credibility for impeachment purposes); *cf. Hutchins*, 19 C.M.R. at 145 ("The offense of 'fraudulently making and uttering bad checks' has been deemed to involve moral turpitude by some authorities."). *But cf. Light*, 36 C.M.R. at 584 (borrowing money by itself does not involve moral turpitude).

337. Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992) (murder; Article 118).

338. United States v. Bowie, 34 C.M.R. 411 (1964) ("issuing bad checks"; TDRL retiree).

339. Pearson v. Bloss, 28 M.J. 376, 377 (C.M.A. 1989) (offenses related to theft of military property); United States v. Overton, 24 M.J. 309, 312 (C.M.A. 1987) (theft of goods from Navy Exchange).

340. United States v. Allen, 33 M.J. 209, 210 n.1 (C.M.A. 1991) (violating security regulations in violation of Article 92, violating federal espionage law (18 U.S.C. § 793(d)) assimilated by Article 134, and engaging in espionage in violation of Article 106a).

341. United States v. Allen, 31 M.J. 572, 636-37 (N.M.C.M.R. 1990) (security regulations), *aff'd on other grounds*, 33 M.J. 209 (C.M.A. 1991).

342. United States v. Hooper, 26 C.M.R. 417, 425 (C.M.A. 1958) (association with sexual deviants); *see also* Closson v. Armes, 7 App. D.C. 460 (D.C. 1896).

343. *Hooper*, 26 C.M.R. at 425.

344. *See* United States v. Salvagno, CM 113926 (1918); *supra* notes 143-45 and accompanying text; *see also* HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 4-7(b) (advising that Article 88 applies to "retired Regular army commissioned officers").

345. UCMJ art. 89 (2002).

said something concerning a commissioned officer; (2) that was directed at that officer; (3) who was "the superior commissioned officer of the accused;" (4) the accused knew of the officer's status; and (5) the conduct was disrespectful under the circumstances.[346] All potential accused—the retired officer, the active duty Captain, and the retired NCO—are subject to the UCMJ, and all three officers involved are "commissioned" officers.[347] The plain language of this punitive article contains no limitations on its application with respect to the duty status of the victim or accused.[348] Further, there is no requirement "that the 'superior commissioned officer' be in the execution of office at the time of the disrespectful behavior."[349] The pivotal legal question in this scenario is whether the Colonel vis-à-vis the retired LTC, and the retired LTC vis-a-vis the Captain and retired NCO, qualify as a superior commissioned officer.

The *MCM* notes that if, as here, "the accused and the victim are in the same armed force, the victim is a 'superior commissioned officer' of the accused when either superior in rank or command to the accused; however, the victim is not a 'superior commissioned officer' of the accused if the victim is inferior in command, even though superior in rank."[350] Clearly, a Colonel is superior in rank[351] to a Lieutenant Colonel, and a Lieutenant

346. MCM, *supra* note 209, pt. IV, ¶ 13(b).

347. Chambers v. Russell, 192 F. Supp. 425, 428 (N.D. Cal. 1961) ("commissions [of retired officers] are not expired, but are merely dormant, pending call"); *cf.* Hostinsky v. United States, 154 Ct. Cl. 434, 446 (1961) ("we think that an officer in the Navy, though retired, is still an officer").

348. *Cf.* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 72 ("Retirees . . . are entitled to the same respect and courtesy shown active duty members. Their status is similar in many ways to active duty members.").

349. MCM, *supra* note 209, pt. IV, ¶ 13(c)(1)(c).

350. *Id.* pt. IV, ¶ 13(c)(1)(a).

351. Rank merely refers to "the order of precedence among members of the armed forces." 10 U.S.C. § 101(b)(8) (2000). A service member's "grade" refers to the "step or degree, in a graduated scale of office or military rank, that is established and designated as a grade by law or regulation." *Id.* § 101(b)(7). Subject to certain time in grade restrictions, officers who retire do so in the highest grade held satisfactorily. AFI 36-3203, *supra* note 23, para. 7.2.1. For example, "lieutenant colonel" and "colonel" are grades. 10 U.S.C. §§ 633-634. The definitions of grade and rank in 10 U.S.C. § 101, however, came after the enactment of the UCMJ and "differ from usage of the same terms in the code and current and prior Manual provisions." MCM, *supra* note 209, R.C.M. 103 discussion, at II-3. Accordingly, for purposes of determining the application of the UCMJ to military retirees, as either victims or accused, "rank, as commonly and traditionally used, and grade refer to the current definition of 'grade.'" *Id.*

Colonel is superior in rank to a Captain and NCO. Accordingly, under a literal reading of the *MCM*, that element would be satisfied.

Reported case law has never addressed this punitive article in the retiree context, but cases dealing with military prisoners, subject to the UCMJ pursuant to Article 2(7), provide a close analogy. In *United States v. Hunt*,[352] the Air Force Board of Review held that Articles 89 and 90[353] applied to a civilian when a senior-subordinate relationship existed between the superior officer and the accused/civilian.[354] In this particular case, the superior-subordinate relationship arose by virtue of command because the officer, an Air Force Captain, actually possessed command authority over the civilian, a military prisoner confined in an Army disciplinary facility.[355] Further, the court also posited that when a punitive article begins with "Any person subject to this Code," that Congress intended that it apply to *anyone* subject to the UCMJ.[356] Both Articles 89 and 90 contain similar language, which would be indicative of congressional intent that they apply to retired members of the armed forces as defined in Articles 2(4), (5), and (6).

Arguably the factual basis for the court's application of Articles 89 and 90 to military prisoners is distinguishable when the punitive articles are applied to retirees. In support of its decision that the Air Force Captain was the prisoner's superior officer, the court noted that military jurisdiction over a "discharged general prisoner" for violations of Articles 89 and 90 was "no novel legal theory of law," pointing to specific *Manual* provisions providing that this class of civilians was subject to these articles and further pointing to a 1913 federal court decision upholding the application of Article 90(2)'s predecessor to a civilian.[357] In contrast, no such *Manual* provisions exist specifically linking retirees to Articles 89 and 90. However, there still remains the *Armes* decision, which albeit involving charges under what would now be Articles 133 and 134, suggests that the retired officer in that case could have been charged with an offense of disrespect to General Schofield, an active duty officer superior in rank,[358] given that

352. 22 C.M.R. 814 (A.F.B.R. 1956).

353. The definition of superior commission officer for purposes of Article 89 is identical for Article 90(2). MCM, *supra* note 209, pt. IV, ¶ 14(c)(1)(a)(i).

354. *Hunt*, 22 C.M.R. at 819.

355. *Id.* at 816, 819. Although the accused was formerly a member of the Air Force before his punitive discharge, the court analyzed the situation as if he were a member of a different component of the armed forces. *Id.* at 819.

356. *Id.* at 818 (emphasis added).

357. *Id.* at 819.

the basis of the charges was Armes's "direct personal insult to his commanding officer . . . ."[359]

In *United States v. Nelson*,[360] the COMA also upheld the conviction of a military prisoner, whose punitive discharge had been executed, for violating Article 90. Using language and reasoning that could easily be extended to retirees, the COMA noted that a military prisoner with an executed punitive discharge serving a period of confinement was not fully a civilian because he had not "severed all relationship with the military and its institutions."[361] His discharge from the military "is expressly conditioned by, and subject to," Article 2 of the UCMJ.[362] Although the accused no longer enjoyed "active membership in the armed forces" and he is "deprive[d] of the privileges and rights incident to such membership," this loss of privileges was "not necessarily determinative of amenability to the Uniform Code."[363]

Further, the COMA addressed the accused's argument that as a discharged prisoner, the accused was a civilian and no relationship of command or rank could exist between him and the confinement officer, a commissioned officer. The court stated that to be a "'superior commissioned officer' of the accused, the victim needed only to be 'superior in rank or command.'"[364] Focusing solely on the issue of command, the COMA opined that the term command merely meant the "authority to exercise control over the conduct and duties of another."[365] Congress knew that certain persons subject to Article 90 would be without military rank and "must have contemplated that all such persons would be liable for misconduct in violation of the Article, on the basis of superiority of command."[366] Otherwise, Congress would have limited application of Article 90 to those "persons who are actually and actively members of the armed forces," which it did not.[367] Accordingly, the COMA concluded "that a commissioned officer vested with the authority to direct and control the

358. *See supra* notes 88-91 and accompanying text.
359. Closson v. Armes, 7 App. D.C. 460, 477 (D.C. 1896).
360. 33 C.M.R. 305 (C.M.A. 1963).
361. *Id.* at 306.
362. *Id.*
363. *Id.*
364. *Id.* at 307.
365. *Id.*
366. *Id.*
367. *Id.*

conduct and duties of a person subject to the Code is the latter's 'superior commissioned officer' within the meaning of Article 90."[368]

The decisions in *Hunt* and *Nelson* combined clearly indicate that Articles 89 and 90 apply to retirees because they are subject to the Code and Congress did not intend that those not on active duty, such as retirees, be exempt from the reach of these two punitive articles. The COMA's conclusion in *Nelson* appears to directly support the applicability of Article 90 (and Article 89) to the scenario discussed above in which the retired LTC works for an active duty Colonel. Further, under this expansive reading of command authority for purposes of Article 90, if the retired LTC occupied a supervisory position over the active duty Captain and retired NCO—such as their Branch Chief—the retired officer would possess the requisite superior-subordinate relationship required by Articles 89 and 90.

3. Potential Defenses: Divestiture and Capacity

The military would not have jurisdiction over Article 89 and 90 offenses if they constitute the offenses referenced in *Hooper* in which the retirees' status is material. Does the fact that the retired LTC is not on active duty, that he is in affect in a "dormant"[369] status, effect court-martial jurisdiction? Albeit no case, legal treatise, or passage from the UCMJ's legislative history appear to support this proposition directly—and the decision in *Nelson* undercuts it—the authors posit that Articles 89 and 90(2) should fall within that category of offenses that falls outside the reach of military jurisdiction over retirees.

Absent statutory or regulatory changes limiting jurisdiction over retired personnel for violations of these two articles, two potential arguments—albeit uncertain ones—may be made to achieve this result: divestiture by analogy and capacity. Clearly Articles 89 and 90(2) are status offenses, at least with respect to the status of the victim. It is a defense that the accused was unaware of the victim's status as a superior commissioned officer.[370] Further, the divesture defense applies whereby "the victim through words or actions may have abandoned his status as a superior."[371] By analogy, military officer retirees could be treated like

368. *Id.* at 308.

369. Chambers v. Russell, 192 F. Supp. 425, 428 (N.D. Cal. 1961).

370. MCM, *supra* note 209, pt. IV, ¶¶ 13(c)(2) (art. 89), 14(c)(2)(e) (art. 90(2); *see also* DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE sec. 2-3(C), at 71 (4th ed. 1996) ("lack of knowledge of the victim's status is a defense").

those officers who have divested themselves of their protected status for purposes of these articles by virtue of their abandonment of active duty status. Protected status associated with superior rank may be lost by conduct falling short of misconduct.[372] Unfortunately, the obvious problem with this novel argument is that the divestiture doctrine has never been applied in this context.

Second, the status of the retiree may be deemed material or, alternatively, a separate defense may exist, if the retiree were acting in a *capacity* that overshadows or takes precedence over his status as a retired member of the armed forces at the time of the misconduct. For example, the fictitious retired Lieutenant Colonel in the scenario discussed earlier was acting in his capacity as a federal civilian employee at the time of the disrespect/disobedience. Although hardly a legal treatise, the Army's retirement handbook appears to contemplate the awkwardness of this type of situation and supports this concept of precedential capacity in at least the federal employee/retired military context. Specifically, the handbook counsels:

> In a military office, retired soldiers using military titles on the telephone could lead to confusion and unwitting misrepresentation, conveying the impression of active duty status. In any case, common sense is the guide when a retired soldier works for the Government. No reasonable retired officer would invite awkwardness when employed in a military office by insisting on being called by military title, if such title outranks the retired soldier's active duty chief. The retired soldier's use of his rightful title in government employment is guided by his acceptance of his *civilian status* and loyal conformance to the established channels of command. Local customs, practices, and conditions of employment are the primary influencing factors.[373]

In a similar vein, the Comptroller General has recognized a capacity distinction when military retirees are employed by the government. In a

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371. SCHLUETER, *supra* note 370, sec. 2-3(C), at 70; *see also* MCM, *supra* note 209, pt. IV, ¶ 13(c)(5) ("A superior commissioned officer whose conduct in relation to the accused under all the circumstances departs substantially from the required standards appropriate to that officer's rank or position under similar circumstances loses the protection of this article. That accused may not be convicted of being disrespectful to the officer who has so lost the entitlement to respect protected by Article 89.").

372. United States v. Noriega, 21 C.M.R. 322, 324 (C.M.A. 1956) (officer in "appearance and in conduct . . . was simply a bartender").

1936 opinion, the Comptroller General discussed the status of two Naval officers, retired for disability, but employed as civilian instructors at the United States Naval Academy.[374] The two retired officers sought to take advantage of legislation providing for retirement annuities to "*civilian members* of the teaching staffs at the United States Naval Academy and the Postgraduate School, United States Naval Academy."[375] The Comptroller General posited that retired officers were intended to be excluded from the legislation, reasoning in part that "[t]he retired officers so employed are employed *on a civilian status or in a civilian capacity*, but it is not clear that they are 'civilian members of the teaching staffs . . . .'"[376]

Unfortunately, military law appears to treat the capacity in which the superior officer was acting as largely irrelevant for purposes of at least Article 89.[377] The explanatory language of the *MCM* points out that it is "immaterial whether [the disrespectful conduct] refer to the superior as an officer or as a private individual."[378] Further, in *United States v. Montgomery*,[379] an Army Lieutenant was convicted of disrespect to an Army Major based on the Lieutenant's misconduct during a poker game. Without specifically addressing a capacity defense, the Board noted that the junior officer was entitled to a certain degree of familiarity necessitated by the casual circumstances, but his misconduct was not otherwise excused.[380]

In *United States v. Spirer*,[381] an Army doctor in the grade of First Lieutenant was convicted of using threatening and disrespectful language

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373. HANDBOOK FOR RETIRED SOLDIERS, *supra* note 19, para. 3-7(f) (emphasis added). *See* 2001 RETIRED MILITARY ALMANAC, *supra* note 19, at 73 ("Retirees who are employed as civil service employees should not use their retired grade in the performance of their civilian duties."). Of course the retiree enjoys no such "civilian status," but may be employed in a civilian capacity.

374. Retirement Annuities—Retired Naval Officers Appointed As Naval Academy Teachers—Act, January 16, 1936, 15 Comp. Gen. 1099 (1936).

375. *Id.* (citing Pub. L. No. 417, 49 Stat. 1092 (1936)) (emphasis added).

376. *Id.* at 1102 (emphasis added). In drawing the civilian versus civilian status/capacity distinction, the Comptroller General noted various legal authorities holding that a retired officer is not a civilian. *See id.*

377. "Term 'superior officer' applies, but is not limited, to every officer of a higher rank than accused. Therefore, it is no defense for accused to state he did not know the *capacity* in which officer was acting, or his *identity.* It is sufficient if he recognized the officer as a superior." CONRAD D. PHILOS, HANDBOOK OF COURT-MARTIAL LAW para. 168(7), at 382 (1951) (citing 10 E.T.O. 213; II Bull. JAG 340).

378. MCM, *supra* note 209, pt. IV, ¶ 13(c)(3).

379. 11 C.M.R. 308 (A.B.R. 1953).

380. *Id.* at 313.

381. 10 B.R. (E.T.O.) 207 (1944).

toward his superior officer, an Army Captain and the senior officer present at the unit. The Captain had ordered the accused to leave a tent functioning as a command post during a rainstorm and to return to the accused's aid station.[382] The accused replied, "Let me get a good look at your face, if you come to my aid station with a sore toe I will cut off your leg."[383] When the superior commander grabbed the accused and repeated the order, the accused responded that he wanted "to get a good look" at the officer's face because "I want to be sure and know you when you get to my aid station."[384] The accused conceded he recognized the superior officer by virtue of viewing Captain's bars on that officer's helmet, but could not see the officer's face.[385] Further, the accused defended his conduct by arguing that he was unaware of the Captain's "name or '*capacity.*'"[386] Upholding Spirer's conviction, the Army Board of Review held that "superior officer" meant either the accused's commander or any commissioned officer superior in rank, and that substantial evidence in the record supported the factual finding that the accused knew the Captain was, in fact, his superior officer at the time of Spirer's misconduct.[387]

The *Manual*'s explanatory language as well as the Boards' opinions in *Montgomery* and *Spirer* can—and should—be distinguished when military retirees are involved. First, both *Montgomery* and *Spire*r involved disrespect by one active duty officer to another, superior, active duty officer. Second, Article 89 was designed to punish misconduct that undermines lawful authority or otherwise interferes with the maintenance of discipline.[388] When the victim is a retiree, the threat to military discipline appears nonexistent. When the disrespect is committed by a retiree toward a superior active duty officer, the circumstances in which military discipline is threatened or the superior's authority undermined are limited and the magnitude of the threat is certainly reduced. In his 1912 testimony before a Congressional Committee about retirees and military law, Major General Enoch H. Crowder, the Army TJAG, conceded "that 'the act of a

382. *Id.* at 209.
383. *Id.*
384. *Id.*
385. *Id.* at 211.
386. *Id.* at 213.
387. *Id.*
388. United States v. Sorrells, 49 C.M.R. 44, 45 (A.C.M.R. 1974) ("'The gravamen of an Article 89 offense is not merely insult, but the undermining of lawful authority.'") (citation omitted); *see* SCHLUETER, *supra* note 370, at 68 ("Disrespect of the [superior-subordinate] relationship or disobedience of orders coming from a superior is considered a potential threat to military discipline.").

man on the retired list, away from the military post, cannot reasonably be said to affect military discipline.'"[389] Further, alternative—and more appropriate—disciplinary systems are available to deal with disrespectful federal employees in military offices where the disrespectful employee is a military retiree.[390]

4. The Constitutionality of Article 88's Application to Retired Personnel

An open question remains as to the legality of Article 88's application to retirees in the face of a First Amendment challenge. Whereas the law views the active duty service member as more soldier than citizen, with concomitant restrictions on First Amendment liberties,[391] the converse appears true for retirees.

Unfortunately, interpretive case law is sparse. The authors were able to locate only two references to the application of Article 88, or its predecessors, to a retired member of the armed forces. As discussed earlier, the sole court-martial resulted in an acquittal.[392] Although this court-martial of a retired Army enlisted man was prosecuted under Article 88's predecessor, it is of questionable precedential value because of its age, the lack of appellate review, and Article 88's current limitation on its prohibitions to officers.[393] The second case involved a retired Army Lieutenant Colonel who was charged under Article 62 (Article 88's predecessor) after making a speech "impugning the loyalty" of President Franklin D. Roosevelt,

389. Bishop, *supra* note 13, at 333 (citing *Hearings on the Revisions of the Articles of War Before the House Comm. on Military Affairs*, 62d Cong 83, 84-85 (1912)).

390. *See generally* ADMINISTRATIVE & CIVIL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, JA 210, LAW OF FEDERAL EMPLOYMENT ch. 4 (Sept. 2000) (discussing permissible forms of employee discipline).

391. United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) ("The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society.") (citing Parker v. Levy, 417 U.S. 733, 759 (1974)); *see* Able v. United States, 155 F.3d 628, 633 (2d Cir. 1998) ("In full recognition that within the military individual rights must of necessity be curtailed lest the military's mission be impaired, courts have applied less stringent standards to constitutional challenges to military rules, regulations and procedures than they have in the civilian context.").

392. *See supra* notes 143-44 and accompanying text.

but the Army eventually dismissed the charge before trial "because of possible publicity accruing to his views."[394]

Further, only two reported cases involving Article 88 or its predecessors have addressed First Amendment challenges, and both cases involved active duty soldiers during periods of armed conflict. The first case involved Army Private Hugh Callan,[395] who was convicted at a World War II court-martial of two specifications under A.W. 62 for (1) referring to President Roosevelt as "a dirty politician, whose only interest is gaining power as a politician and safeguarding the wealth of the Jews;" and (2) stating that "President Roosevelt and his capitalistic mongers are enslaving the world by their actions in Europe and Asia, by their system of exploiting."[396] Also, Callan was convicted of three specifications under A.W. 96 for making statements in support of Germany and Japan.[397] Callan's First Amendment arguments failed at his court-martial, "and the reviewing judge advocate was offended that such a claim should even be raised."[398]

Appealing his court-martial convictions, Callan argued, in part,[399] that he had merely "used respectful language in setting forth his criticisms of the President and of the United States and in expressing his views before enlisted men and officers of the United States Army."[400] The U.S. Court

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393. United States v. Howe, 37 C.M.R. 429, 436 (C.M.A. 1967) ("it applies to officers only"); *see also* Kester, *supra* note 143, at 1718 ("And the draftsman at the same time drastically reduced the likelihood of prosecutions under the article by limiting it so as to apply only to commissioned officers."). Because Congress elected to restrict Article 88's application to officers only, the presumption doctrine, MCM, *supra* note 209, pt. IV, ¶ 60(c)(5)(a), should preclude Article 134 from being applied to enlisted personnel for similar misconduct. *See* Kester, *supra* note 143, at 1735 ("of questionable legality has been the Army's occasional resort to the general article to punish enlisted men, whom Congress in 1950 exempted from article 88, for statements disrespectful of the President").

394. Kester, *supra* note 143, at 1733 n.225.

395. Sanford v. Callan, 148 F.2d 376 (5th Cir. 1945). Callan's case was the first one in which the First Amendment was raised as a defense. Kester, *supra* note 143, at 1731-32.

396. *Callan*, 148 F.2d at 376.

397. *Id.* at 376-77. The Ninety-Sixth Article of War—the General Article—punished "Disorders and Neglects to the Prejudice of Good Order and Military Discipline" and "Conduct of a Nature to Bring Discredit upon the Military Service." A MANUAL FOR COURTS-MARTIAL, U.S. ARMY 187-88 (1927).

398. Kester, *supra* note 143, at 1732 (citing Callan, CM 223248 (1942)).

399. Callan also unsuccessfully argued that the military was without jurisdiction because he had not taken an oath as part of his induction. *Callan*, 148 F.2d at 377. The court held that Callan waived his oath by voluntarily entering active duty with the Army. *Id.*

400. *Id*. at 377.

of Appeals for the Fifth Circuit made short shrift of that argument, and in a stinging rebuke, characterized his appellate brief as one "bristl[ing] with the idea that he should be permitted to denounce the Government and lend aid and comfort to the enemies of the Republic in time of war, and that such conduct is one of his freedoms."[401]

The only reported case addressing Article 88 since the UCMJ became effective, *United States v. Howe*,[402] involved an active duty officer during a period in which America's forces were engaged in combat operations in Vietnam. Army Second Lieutenant Henry Howe was convicted of violating Article 88 for carrying a cardboard sign during an antiwar demonstration that read on one side "'Let's Have More Than a Choice Between Petty, Ignorant, Fascists in 1968;' and on the other side . . . 'End Johnson's Fascist Aggression in Vietnam.'"[403] Howe had not helped to organize the demonstration, participated in it while off-duty and in civilian garb, and his military status was unknown to both demonstrators and spectators.[404] Notwithstanding Howe's limited protest participation and his unknown military status, his conviction was upheld against unsuccessful arguments that his conduct constituted a permissible political discussion,[405] that Article 88 was void for vagueness,[406] and that its application to him violated his First Amendment rights.[407]

Depending upon the specific circumstances, the success of a First Amendment challenge to Article 88 by a retired officer for inappropriate speech made after retirement during a period of relative peace remains uncertain. The standard by which a retiree's challenged statements would be measured, for First Amendment purposes, is contained within the clear and present danger doctrine.[408] This standard examines "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive

401. *Id.*

402. 37 C.M.R. 429 (C.M.A. 1967).

403. *Id.* at 432-33.

404. *Id*. at 433; ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 178-79 (1970). Howe was reported to military authorities by a gas station attendant who noticed Army decals on the car and the offending cardboard sign in the vehicle. SHERRILL, *supra*, at 179-80.

405. *Howe*, 37 C.M.R. at 444 (The COMA posited that the political discussion exception to Article 88 as envisioned in the *Manual* "cannot be equated to the contemporaneous language prohibited by this Article.").

406. *Id.* at 442-43.

407. *Id.* at 434-38.

408. *Id.* at 436; *see* Priest v. Sec'y of Navy, 570 F.2d 1013, 1017 (D.C. Cir. 1977).

evils that Congress has a right to prevent. It is a question of proximity and degree."[409] Within the military context, the government's burden is satisfied if the "the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops"[410] or presents a clear danger to civilian supremacy.[411] Whether the challenged speech is constitutionally unprotected is "measured by 'its tendency,' not its actual effect."[412]

In *Howe*, the COMA identified the substantive evils that Congress intended to protect through Article 88 as the "impairment of discipline and the promotion of insubordination by an officer of the military service . . . ."[413] Further, the COMA easily dispatched Howe's First Amendment challenge, noting that "hundreds of thousands" of service members were involved in combat operations in Vietnam as a prelude to the COMA's conclusion that "*in the present times and circumstances* such conduct by an officer constitutes a clear and present danger to discipline within our armed forces . . . ."[414]

While the suggestion that a coup sponsored or actively supported by military retirees is farcical,[415] senior officers from the retired community are becoming increasingly more vocal on both policy and political issues[416] and can have a profound impact on the political landscape of this country. For example, the endorsement of presidential candidate William Clinton in 1992 by retired Admiral William Crowe and other retired officers helped the Clinton campaign weather allegations that he had deliberately avoided military service during the Vietnam War.[417] Prominent

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409. *Howe*, 37 C.M.R. at 436 (citing Schenck v. United States, 248 U.S. 47 (1919)); *see also Priest*, 570 F.2d at 1017.

410. United States v. Brown, 45 M.J. 389, 395 (1996); *see also* Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 306 (1998) ("It appears, therefore, that the military may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, espirit de corps, or civilian supremacy."). In *Howe*, the COMA stated that the substantive evil envisioned by Article 88 was the "impairment of discipline and the promotion of insubordination by an officer of the military service . . . ." *Howe*, 37 C.M.R. at 437.

411. *Brown*, 45 M.J. at 396-97; Carr, *supra* note 410, at 306.

412. United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994) (citing United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972)).

413. *Howe*, 37 C.M.R. at 437.

414. *Id.* at 437-38 (emphasis added).

415. The concern giving rise to Article 88's original predecessor was one of a military coup. SHERRILL, *supra* note 404, at 182 ("In the early days of our new nation the rationale behind Article 88 was an imminent fear . . . that the generals might pull a coup.").

retired military officers publicly endorsed President Bush during the last election.[418] This departure from the historic political neutrality of the military,[419] albeit by retired members of that community,[420] has proven controversial both within and outside the military.[421] Both defenders and critics of the endorsement of President Bush during the last presidential election passionately defend their respective positions.[422]

Historically, military retirees have not been totally absent from the political scene. Indeed, General Eisenhower was elected President after he retired from the Army,[423] retired Navy Captain John McCain is now a U.S. Senator,[424] and Army General Colin Powell was not the first retired officer to be appointed to a cabinet position.[425] However, when retirees invoke their military status, implicitly or explicitly, and then enter the political fray in that capacity, then the military as an institution should experience a significant measure of discomfort. Under such circumstances, the military retiree, normally more citizen than soldier, begins to take on more of the characteristics of his former military self.

Richard H. Kohn, the former chief of Air Force history for the USAF, articulated the concern best: "four-stars never really 'retire' but like

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416. Thomas E. Ricks, *"I Think We're Pretty Disgusted"; Challenging of Overseas Ballots Widens Divide Between Military, Democrats*, WASH. POST, Nov. 21, 2000, at A18 ("retired senior military officers have become more active in electoral politics"); *cf.* Ricks, *supra* note 43, at A1, A15 ("Retired generals often say in public what the active-duty leadership is thinking but can't utter."). Senior military officers have reportedly used retirees to influence both Congress and public opinion. Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, NAVAL WAR C. REV., Summer 2002, at 8, 16, 37 n.1.

417. Richard H. Kohn, *General Elections: The Brass Shouldn't Do Endorsements*, WASH. POST, Sept. 19, 2000, at A23 ("The change began in 1992, when retired Joint Chiefs Chairman William Crowe and a handful of other retired flag officers endorsed Bill Clinton, defusing his draft dodging as an issue."); *see also* Steven Lee Myers, *When the Military (Ret.) Marches to Its Own Drummer*, N.Y. TIMES (Oct. 1, 2000) ("In 1992, President Clinton eagerly accepted the support of Adm. William J. Crowe, . . . at a time when his campaign was dogged by questions over the steps he took to avoid the draft during the Vietnam War."), http://ebird.dtic.mil/Oct2000/e20001002when.htm; Rowan Scarborough, *Media Hit Endorsements for Bush by Ex-Military Officers*, WASH. TIMES, Oct. 4, 2000, at A1 ("In 1992, Mr. Clinton . . . organized the public endorsements of 21 retired admirals and generals, including Adm. William Crowe . . . .").

418. Franklin Margiotta, *Retired Military's Right to Speak Out*, WASH. TIMES, Oct. 22, 2000, at B4 (noting that "85 senior retired military officers publicly endorsed George W. Bush"); *see also* Thomas E. Ricks, *Bush's Brass Band Raises Some Questions*, WASH. POST, Sept. 22, 2000, at A23 (noting "[t]he endorsement of Texas Gov. George W. Bush for president by scores of former generals and admirals").

princes of the church, embody the core culture and collectively represent the military community as authoritatively as the active duty leadership."[426] What is not objectionable is that senior retired officers enter the political arena as vocal private citizens or even as candidates,[427] but such officers enter into the realm of objectionable behavior when they use their "mili-

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419. Kohn, *supra* note 416, at 27 ("Before the present generation, American military officers (since before the Civil War) had abstained as a group from party politics, studiously avoiding any partisanship of word or deed, activity, or affiliation."); Professor Don M. Snider, *West Point's Renewal of Officership and the Army Profession*, ASSEMBLY, July/Aug. 2001, at 65 ("Officers strictly observe the principle that the military is subject to civilian authority and do not involve themselves or their subordinates in domestic politics or policy beyond the exercise of the basic rights of citizenship."); LIEUTENANT COLONEL (RET.) KEITH E. BONN, ARMY OFFICER'S GUIDE 80 (48th ed. 1999) ("It is traditional, and also required by law, that soldiers avoid partisan politics. This is particularly important for officers."); *cf.* LYON, *supra* note 29, at 69 (noting that as a Major, "Eisenhower honored the tradition of the officer corps that required the army to stay out of politics, at least when on duty . . . [, and] felt that army officers should keep [their political] views bottled up except when they were alone together far from civilians, or at least from civilians they could not thoroughly trust"); ROBERT WOOSTER, THE MILITARY & UNITED STATES INDIAN POLICY 1865-1903, at 75 (1988) ("Influenced by [General William T.] Sherman's opposition to overt political involvement [during the post-Civil War period] except in cases of absolute necessity, most officers avoided public pronouncements regarding the presidency.").

The military's traditional political neutrality is a function of the bedrock principle that the military remain subservient to the civilian control of the country's elected civilian leadership. This "principle of civilian control is sacrosanct . . . ." JAMES H. TONER, TRUE FAITH AND ALLEGIANCE, THE BURDEN OF MILITARY ETHICS 36 (1995). *But cf.* Kohn, *supra* note 416, at 26 ("Reversing a century and a half of practice, the American officer corps has become partisan in political affiliation, and overwhelmingly Republican."); THOMAS E. RICKS, MAKING THE CORPS 279-83 (1997) (The modern officer corps is increasingly becoming more politically conservative and partisan; and more active at least with respect to voting.). The Army's regulatory restrictions on active duty soldiers are contained in U.S. DEP'T OF ARMY, REG. 600-20, COMMAND POLICY para. 5.3 & app. B 15 July 1999); *accord* U.S. DEP'T OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ON ACTIVE DUTY (15 June 1990) (C2, 17 Feb. 2000).

420. Tom Bowman, *Retired Military Officers at Odds over Propriety of Their Politics*, BALT. SUN, Sept. 22, 2000, at *1 ("The retired officers [who endorsed George W. Bush for President] contend that they are merely exercising their constitutional rights, but their support has led to concern that they are going against the tradition of a politically neutral officer corps providing professional advice to civilian leaders."), *available at* http://ebird.dtic.mil/Sep2000/s20000925odds.htm; Ricks, *supra* note 418, at A23 (asserting that some in the military "worry that [the endorsements of a presidential candidate] runs counter to the U.S. military tradition of refraining from public participation in elections"); Kohn, *supra* note 417, at A23 ("Before [the 1992 presidential] election, for over two centuries, professional soldiers occasionally sought high office or in retirement assailed some policy—almost always in areas where they could claim experience or expertise. But few ever tried to use the public's esteem to push a candidate.").

tary credentials as a platform for endorsement of candidates."[428] Further, such endorsements influence not only the American public, but active duty personnel as well.[429] As noted by retired Army General Wesley Clark:

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421. *See, e.g.*, Myers, *supra* note 417, at *1 ("[T]he recent announcement that a group of military veterans—including senior officers who until recently served under President Clinton—had endorsed Gov. George W. Bush is raising concerns inside and outside the Pentagon about the growing politicization of the ranks."); Ricks, *supra* note 418, at A23 ("The endorsement of Texas Gov. George W. Bush for President by scores of former generals and admirals earlier this week is raising some eyebrows inside the military community."); Elain M. Grossman, *Retired Military Brass Sharply Divided over Political Endorsements*, INSIDE THE PENTAGON, Sept. 21, 2000, at 1; Eliot A. Cohen, *Twilight of the Citizen-Soldier*, PARAMETERS, Summer 2001, at 28 (characterizing as part of a "worrisome trend," the "assertion of all rights of citizenship by professional soldiers, most notably in the open participation of recently retired general officers in electoral politics by endorsing presidential candidates").

422. *Compare* S. Jay Turnbull, *Generals out of Line*, WASH. POST, Oct. 11, 2000, at A30 ("Military custom and regulation forbid [active and retired] officers from taking part in political activities, including supporting one candidate or another."); Myers, *supra* note 417, at *2 ("'It casts a shadow back into the institution,' said Gen. Wesley K. Clark . . . .") ("'I really believe it is a disservice if senior military officers, even if retired, get drawn into the political process,' said Gen. John M. Shalikashvili . . . who has, however, advised the Gore campaign."); Vance Gordon, *Military Campaigner*, WASH. POST, Sept. 23, 2000, at A22 ("No one could object to Mr. Krulak's opinions, nor would they be much noted, but for his dressing them up in his general's suit; it is the use of his military title to amplify his political voice, not his partisanship, that insults his service."); Bowman, *supra* note 420, at *1 (Retired General George A. Joulwan "questions his former colleagues for jumping into the political fray."); Ricks, *supra* note 418, at A23 (citing E-mail from Marine Lt. Gen. Bernard E. Trainor, stating in part: "A senior officer should realize that by lending his name or title, he or she is being 'used' by a politician"); Kohn, *supra* note 417, at A23 ("a major step toward politicizing the American military"); *with* Margiotta, *supra* note 418, at B4 (retired Air Force Colonel argues: "retired officers never swore to give up First Amendment rights of speech"); Sean T. Cate, *Military Customs*, WASH. POST, Oct. 16, 2000, at A26 (No "'custom' or 'regulation' . . . prevents retired military personnel from taking part in political activities, including supporting a particular candidate" and "[p]articipation in the political process for active duty and retired military personnel of all ranks is vital to our democracy."); Philip Gold, *Politics and the Military*, WASH. TIMES, Oct. 6, 2000, at A19 ("'Veterans for Bush' is right to organize and act, despite all the legalistic guff about senior officers never 'really' retiring."); Bowman, *supra* note 420, at *2 (Military sociologist David Segal opined, "Once they're out of uniform, they're American citizens."); General (Ret.) Charles C. Krulak, *Veteran's Right to Endorse*, WASH. POST, Sept. 24, 2000, at B6 ("In fact, to suggest that, having officially taken off our uniforms for the last time, we somehow are not entitled to the same right to enjoy full and active participation in the selection of our elected officials as other citizens . . . is an insult to our service.") ("We cannot stand silently by. We cannot expose those still wearing the uniform to the perils of future wars and conflicts for which we are not fully trained, equipped and prepared. Our silence, not our voices, would do the greater harm.").

"You have junior people still in the service who value what these people say."[430]

Regardless, for purposes of this article, politically related or politically motivated remarks[431] by a retiree may pass beyond the point of institutional discomfort and enter the realm of criminal misconduct, even when subjected to the harsh light of First Amendment scrutiny. The increasingly active role that retired senior military officers are taking in partisan politics and/or policy disputes may provide the basis for an expanded application of Article 88 to a portion of the military largely untouched throughout history by its application. To illustrate, should a senior military officer publicly endorse a political candidate in his capacity as a retired military officer and while doing so, treat a sitting President, Vice President, or other

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423. Margiotta, *supra* note 418, at B4. However, "Gen. Dwight D. Eisenhower's political views were so opaque that both Democrats and Republicans courted him after he stepped down . . . ." Myers, *supra* note 417, at *1. Additionally, retired General Curtis LeMay and Admiral James Stockdale were vice presidential candidates. Margiotta, *supra* note 418, at B4.

424. Margiotta, *supra* note 418, at B4; *see* ROBERT TIMBERG, THE NIGHTINGALE'S SONG 298-99 (1995) (Navy Captain John McCain retired in 1981 with the intention of entering politics).

425. Steven Mufson, *An Army Background Is Not Unique at State*, WASH. POST, Dec. 19, 2000, at A37 (retired Army Generals George C. Marshall and Alexander Haig also served as Secretary of State).

426. Kohn, *supra* note 417, at A23; *see also* Ricks, *supra* note 418, at A23 (A retired Army Colonel opined: "A retired four-star general represents the institution that produced him—and by definition should remain apolitical."); Grossman, *supra* note 421, at 1 (A "retired senior military officer" stated: "'I think when you're a retired four-star and had the position that Chuck Krulak or Tony Zinni had, you're never truly retired,' . . . ."); *see* Myers, *supra* note 417, at *1-2 (Critics argue that "the endorsements gave the impression . . . that it was the military itself, not simply a handful of veterans, that supported Mr. Bush's candidacy.").

427. *See, e.g.*, Craig Timberg, *Retired General Eyes Warner's Senate Seat*, WASH. POST, July 19, 2001, at B4 (Retired Lieutenant General Claudia J. Kennedy considers running "as a Democratic challenger to U.S. Sen. John W. Warner (R) next year."). Eventually LTG Kennedy elected not to run against Senator Warner. Craig Timberg, *General Retreats from Senate Bid*, WASH POST, Sept. 26, 2001, at B4; *see also* Lori Montgomery, *Retired Admiral Enlists for Md. Race*, WASH. POST, June 28, 2002, at 1 (Retired Admiral Charles R. Larson enters Maryland's race for Lieutenant Governor).

428. Grossman, *supra* note 421, at 1 (citing Kohn and a "retired senior military leader").

429. *Id.* ("In the minds of some in the active-duty military or in the public, such an endorsement could convey an indication of the political leanings of those still leading the military, said this former officer and others. And, they said, it could put pressure on those still in uniform to side with one political camp or another.").

430. Myers, *supra* note 417, at *2.

protected person or entity with obvious contempt, then military jurisdiction might properly be invoked, if the facts are sufficiently egregious. Further, should that same officer publicly offer criticism in a contemptuous manner of a controversial presidential or congressional decision affecting the military, such as the use of military force or the implementation of a particular social policy, then again Article 88 may have legitimate application.

Key to Article 88's application would be the retiree's invocation of his military status, speech or other communication so contemptuous that the communication leaves the safe harbor of "political discussion," and the communication's tendency to prevent the military mission or clearly endanger the "loyalty, discipline, mission or morale of the troops."[432] At least with respect to the personage in the First Amendment calculus, a well-known and popular retired general or flag officer should be viewed as posing as great, if not greater, a threat than the junior officer in civilian garb in *Howe*, the seaman apprentice in *Priest v. Levy*,[433] or the dermatol-

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431. Article 88 contains a "political discussion" safe harbor. MCM, *supra* note 209, pt. IV, ¶ 12c ("If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a *political discussion*, even though emphatically expressed, may not be charged as a violation of the article."). The political discussion exception, however, is extremely narrow. Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 U.C.L.A. L. REV. 1189, 1206 (1986) ("Article 88's exception for political discussion has been interpreted so that it appears in fact to exempt nothing."); *see also* Lieutenant Colonel Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999, at 7 ("Taken together[, *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967), and *United States v. Poli*, 22 B.R. 151 (1943),] indicate that the political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous.") ("unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous"); *cf.* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE (1974) (The COMA, "though it has stated eloquently that servicemen are protected by the First Amendment, has in practice been very ready to find their utterances are so dangerous as to be removed from that protection, at least where their speech was politically inspired.") (discussing *Howe*).

432. United States v. Brown, 45 M.J. 389, 395 (1996); United States v. Hartwig, 39 M.J. 125, 130 (C.M.A. 1994); *Howe*, 37 C.M.R. at 437.

433. 570 F.2d 1013 (D.C. Cir. 1977). Rejecting a First Amendment challenge, the U.S. Court of Appeals for the District of Columbia upheld Priest's court-martial conviction of violating Article 134 for distributing a "Serviceman's Newsletter" to active duty personnel that called for resistance to the Vietnam War and encouraged desertion to Canada. *Id.* at 1014-15. The court applied the clear and present danger standard. *Id.* at 1017.

ogist in *Parker v. Levy*.[434] Although the scales of justice are more inclined to tip against the exercise of First Amendment rights during periods of actual or imminent hostilities,[435] the UCMJ retains viability when confronted with First Amendment challenges even when the country is at peace.[436]

B. Discretionary Exercise of Court-Martial Authority

Another area of uncertainty is the circumstances under which the military will exercise its discretion to subject a retiree to court-martial jurisdiction. Albeit all the Services have exercised this discretion sparingly, no uniform standard exists within the armed forces; and the various Service standards, although similar in some respects, are vague and provide no meaningful gauge by which to measure the appropriateness of the exercise of court-martial jurisdiction over a retiree.

Within the Army, prior approval must be obtained from the Criminal Law Division, Office of the Judge Advocate General, before the referral of charges, and requests to recall a retiree to active duty for court-martial must be approved by the Office of the Assistant Secretary of the Army (Manpower and Reserve Affairs).[437] Retirees need not be recalled to

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434. 417 U.S. 733 (1974). The Supreme Court rejected Captain Levy's First Amendment over breadth challenge. *Id.* at 761 ("His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."); *see also Brown*, 45 M.J. at 398 ("The importance of the United States' role in the Gulf War cannot be over-emphasized.").

435. *Priest*, 570 F.2d at 1018 (the context in which the statements are said determine whether they enjoy First Amendment protection). Priest, Levy, and Howe all engaged in misconduct during the Vietnam War. *Id.* at 1014 (in the pentagon); *Levy*, 417 U.S. at 735-36 (Levy made statements to military personnel at Fort Jackson, South Carolina.); *Howe*, 37 C.M.R. at 432 (Howe protested in El Paso, outside Fort Bliss, Texas.).

436. *See* Goldman v. Weinberger, 475 U.S. 503 (1986) (upholding Air Force regulation that prohibited wear of yarmulke; Goldman had been threatened with a court-martial if he failed to obey the regulation); *cf.* Cooper v. Marsh, 807 F.2d 988, 990 (Fed. Cir. 1986) (noting unsuccessful First Amendment challenge to fraternization charge at court-martial).

437. AR 27-10, *supra* note 331, para. 5-2(b)(3).

active duty, however, to court-martial them.[438] Further, before an Army retiree may be prosecuted under the UCMJ, Army policy requires the existence of "extraordinary circumstances."[439]

Unfortunately, the phrase "extraordinary circumstances" is undefined and has suffered from this shortcoming for almost half a century or longer.[440] Previously, such circumstances had to link retirees "to the military establishment or involving them in conduct inimical to the welfare of the nation."[441] Almost a decade ago, one Army legal commentator examined post-UCMJ retiree courts-martial and opined that jurisdiction was most likely to be exercised in two circumstances: when the misconduct (1) "excited direct military interests, involving offenses such as espionage against the United States or the larceny of property belonging to the federal government;" or (2) occurred overseas, particularly when the criminal jurisdiction of the United States did not reach the accused.[442]

Regulatory restrictions of the other Services for prosecuting retirees vary, but are similarly skeletal in the amount of guidance they provide as to the appropriateness of exercising military jurisdiction. Charges against Navy or Marine Corps retired personnel may not be referred to trial absent

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438. Lieutenant Colonel Warren Foote, *Courts-Martial of Military Retirees*, ARMY LAW., May 1992, at 55 n.8 ("Significantly, a retired soldier may be tried in his or her retired status without ever being ordered to active duty."); *see also* United States v. Morris, 54 M.J. 898, 900 (N-M. Ct. Crim. App. 2001); United States v. Hooper, 26 C.M.R. 417 (C.M.A. 1958), *as digested in* 8 Dig. Ops. JAG 1958-1959, sec. 45.8, at 77 ("Jurisdiction over retired members of a regular component of the armed forces who are entitled to pay attaches by virtue of UCMJ Art. 2, without the necessity of an order effecting return of such persons to active duty.").

439. AR 27-10, *supra* note 331, para. 5-2(b)(3). The authors were unable to locate any articulation of the extraordinary circumstances giving rise to the recent court-martial of Major General David Hale.

440. *See* United States v. Sloan, 35 M.J. 4, 9 (C.M.A. 1992) (noting that the term, as discussed in a 1957-1958 Army TJAG opinion, was "undefined") (citing Courts-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108). The same standard has existed since at least the 1930s. *See* United States v. Kearney, 3 B.R. 63, 79 (1931).

441. Courts-Martial, Op. OTJAG, Army (29 June 1956), *as digested in* 7 Dig. Ops. JAG 1957-1958, sec. 45.8, at 108; *see also Kearney*, 3 B.R. at 79 ("unless some extraordinary circumstances were involved linking [retired officers] to the military establishment or involving them in conduct inimical to the welfare of the nation") (citing a 1932 transmittal letter from the Secretary of War to President Hoover); Holland, *supra* note 172, at 31 (citing U.S. DEP'T OF ARMY, PAM. 27-174, LEGAL SERVICES: JURISDICTION para. 4-5 (25 Sept. 1986)).

442. Foote, *supra* note 438, at 57.

the permission of the Secretary of the Navy.[443] Further, retirees may not be recalled to active duty solely to stand trial, and Secretarial permission is required before the apprehension, arrest, or confinement of retired personnel.[444] Within the Coast Guard, charges against a retiree may not be referred for trial without the approval of the Chief Counsel.[445] Additionally, prior authorization must be obtained from the Chief Counsel before a retiree may be apprehended, arrested, or confined.[446]

The Air Force limits its jurisdiction over retirees to situations when "their conduct clearly links them with the military or is adverse to a significant military interest of the United States."[447] Unlike the other Services, which restrict the referral of charges, the Air Force imposes restrictions at the *preferral* stage. Charges may not be preferred without the approval of the Secretary of the Air Force unless the statute of limitations is about to run, and then approval must be obtained as quickly thereafter as possible.[448]

Although all the Services have articulated restrictions of some kind on the exercise of jurisdiction over retired personnel, these restrictions provide little, if any, meaningful protection to the retiree community. In

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443. JAGMAN, *supra* note 334, sec. 0123(a)(1) ("No case of a retired member of the regular component of the Navy or Marine Corps not on active duty but entitled to receive pay, a retired member of the Naval Reserve or Marine Corps Reserve not on active duty who is receiving hospitalization from an armed force, or a member of the Fleet Reserve or Fleet Marine Corps Reserve not on active duty will be referred for trial by court-martial without the prior authorization of the Secretary of the Navy.").

444. *Id.* sec. 0123(a)(1), (c).

445. USCG MJM, *supra* note 334, para. 3.B.3.a ("No case of a retiree amenable to jurisdiction under Article 2(a)(4) or (5), UCMJ will be referred to trial by court-martial without the prior authorization of the Chief Counsel.").

446. *Id.*

447. U.S. AIR FORCE, INSTR. 15-201, ADMINISTRATION OF MILITARY JUSTICE para. 2.9 (2 Nov. 1999) [hereinafter AFI 15-201]. An earlier policy directive stated that Air force retirees could not be prosecuted "unless the alleged misconduct is adverse to a significant military interest to the United States and [the Secretary of the Air Force] has approved starting a trial." U.S. AIR FORCE, POLICY DIR. 51-2, ADMINISTRATION OF MILITARY JUSTICE para. 15 (7 Sept. 1993). The more restrictive term "significant military interest" was not contained in the 1990 Air Force regulation on point, which required that "their conduct clearly links them with the military or is adverse to the United States." Foote, *supra* note 438, at 56 (citing U.S. AIR FORCE, REG. 111-1, MILITARY JUSTICE GUIDE para. 3-5 (9 Mar. 1990)). In 1961 the Air Force standard was slightly different: "conduct clearly links him to the military establishment or is inimical to the welfare of the United States." House, *supra* note 3, at 120.

448. AFI 15-201, *supra* note 447, at 15, para. 2.9.

United States v. Sloan,[449] a retired Sergeant Major challenged the exercise of court-martial jurisdiction over him based upon an alleged violation of applicable Army regulation and policy.[450] The appeal caused the COMA to review the then-existing Army policy concerning the exercise of military jurisdiction of retirees and made a number of salient points. First, the COMA emphasized that a statement of policy, by itself, does not constitute a legal prohibition.[451] Next, the court noted that "even a *regulation*—which, as a general rule, often is said to bind the authority that promulgates it[,] . . . may be asserted by an accused only if it was prescribed to protect an accused's rights."[452] With respect to the language contained in the applicable Army regulation, which is identical to the language contained in the Army's current regulation, the COMA opined that it was not designed to protect the accused's rights, stating: "[h]ere it seems most likely that the policy was promulgated primarily for the purpose of assuring efficient allocation of prosecutorial resources by pursuing military-justice alternatives only when courts-martial—as opposed to some other remedy, such as civilian trial—is logically compelling."[453]

Similarly, in *United States v. Morris*,[454] the Navy-Marine Court of Criminal Appeals gratuitously addressed the effect of Naval Secretarial restrictions on the exercise of military jurisdiction over retirees. The court noted that the prohibition against "ordering a member of the Fleet Marine Corps Reserve to active duty solely for the purpose of exercising court-martial jurisdiction" was "not related to jurisdiction," characterizing the prohibition as an apparent "fiscal consideration."[455] Further, the court posited that the prohibition was "merely policy and was not promulgated for the benefit of the accused."[456]

It appears that existing Service constraints on the exercise of court-martial jurisdiction over retired members of the armed forces are merely unenforceable, policy-driven, self-imposed restrictions, which provide only uncertain protection to military retirees. Service regulations should clarify the circumstances under which jurisdiction will be exercised. Further, to serve as a check on the expansive reach of military jurisdiction over

449. 35 M.J. 4 (C.M.A. 1992).
450. *Id.* at 7.
451. *Id.* at 9 ("*policy* typically is not *law*").
452. *Id.* (citations omitted).
453. *Id.*
454. 54 M.J. 898 (N-M. Ct. Crim. App. 2001).
455. *Id.* at 902 n.5.
456. *Id.*

retirees, these currently edentulous service constraints should be rewritten to clarify their prophylactic nature and be cast as a withdrawal of authority over a class of cases[457] to ensure enforceability.

C. Military Jurisdiction over Contractors on the Battlefield

Clearly there will be circumstances when the exercise of court-martial jurisdiction over retirees is both necessary and appropriate. One such circumstance in which the retention of military jurisdiction appears not only appropriate, but necessary, is occasioned by the presence of contractors within a theater of operations during a period of actual hostilities that falls short of a declared war.[458] To the extent the Services clarify the circumstances under which military jurisdiction will be exercised over retirees, the contractor on the battlefield scenario stands out as an excellent candidate for a policy favoring military jurisdiction.

The American military has historically relied on contractors to support its wartime operations.[459] During the Vietnam War, U.S. civilian contractors employed approximately 9000 employees in Vietnam during 1969, at the height of the military contracting effort.[460] In Operation Desert Storm, 950 contractor employees were employed in the Persian Gulf area, including thirty-four contractor employees who accompanied our forces into Iraq.[461] More recently, the military has relied on contractor

457. Rule for Courts-Martial 401 provides that "[a] superior competent authority may withhold the authority of a subordinate to dispose of charges in . . . types of cases . . . ." MCM, *supra* note 209, R.C.M. 401. *See generally* United States v. Sloan, 35 M.J. 4, 7-8 (C.M.A. 1992).

458. Article 2(a)(10), UCMJ, extends military jurisdiction "[in] time of war, [to] persons serving with or accompanying an armed force in the field." UCMJ art. 2(a)(10) (2002). Application of this jurisdictional provision, however, is limited to times of a congressionally declared war. United States v. Averette, 41 C.M.R. 363, 365 (C.M.A. 1970).

459. Richard Hart Sinnreich, *Contracting Military Functions Raises Interesting Questions*, LAWTON CONST. (OKLA.), June 3, 2001, at 4 (Civilian teamsters were used for transportation during the Revolutionary War, the War of 1812, and the Mexican War; Union and Confederate forces relied "heavily on civilians for functions ranging from medical care to transportation"; and U.S. forces in Cuba during the Spanish American War were "heavily dependent on civilian contracting."); *see also* Joe A. Fortner & Ron Jaeckle, *Institutionalizing Contractors on the Battlefield*, ARMY LOGISTICIAN, Nov.-Dec. 1998, at 11 ("Contracting for services is not new; the Army has been doing it since the American Revolution.").

460. MAJOR GENERAL GEORGE S. PRUGH, VIETNAM STUDIES: LAW AT WAR: VIETNAM 1964-1973, at 88 (1991).

461. Major Susan S. Gibson, *Lack of Extraterritorial Jurisdiction over Civilians: A New Look at an Old Problem*, 148 MIL. L. REV. 114, 148 (1995).

support during numerous contingency operations,[462] including current operations in the Balkans[463] and South West Asia.[464] Presently, the trend appears to be one of increased reliance on civilian contractors.[465] Indeed, while speaking before an October 2000 meeting of the Association of the United States Army, General John Coburn, commanding general of the Army Material Command, posited that "[c]ontractors will be all over the

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462. Greg Schneider & Tom Ricks, *Profits in "Overused" Army*, WASH POST, Sept. 9, 2000, at A6 ("A long-time defense contractor, Brown & Root has deployed employees to Bosnia, Kosovo, Macedonia, Hungary, Albania, Croatia, Greece, Somalia, Zaire, Haiti, Southwest Asia and Italy to support Army contingency operations since 1992.").

463. Gregory Piatt, *GAO Report: Balkans Contracts Too Costly*, EUR. STARS & STRIPES, Nov. 14, 2000, at 4 (Since 1995 the military has paid about $2.2 billion "to Brown & Root, which feeds the troops, washes their uniforms, provides logistical support such as transportation, repairs buildings and has built base camps in Bosnia, Kosovo, Albania, Hungary and Macedonia."); *see also* Charles Moskos, *What Ails the All-Volunteer Force: An Institutional Perspective*, PARAMETERS, Summer 2001, at 35) ("When American troops first entered Kosovo in August 1999, they were lustily greeted by Brown & Root employees who had preceded them into the strife-ridden region.").

464. To illustrate, in 1999 the Army awarded a base support and combat support contract to support its operations at Camp Doha, Kuwait. ITT Fed. Serv. Int'l Corp., B-283307, 1999 U.S. Comp. Gen. LEXIS 196 (Nov. 3, 1999). The procurement required the contractor "[a]mong other things . . . to provide and maintain supplies and equipment for military exercises, and for contingency and combat operations, including heavy combat vehicles, tactical vehicles, and related armaments, ammunition, electronics and repair parts." *Id.* at *3.

465. Major General Norman E. Williams & Jon M. Schandelmeier, *Contractors on the Battlefield*, ARMY, Jan. 1999, at 33 ("There is a trend toward using more contractors for sustainment."); *see also* Earle Eldridge, *Civilians Put Expertise on the Front Line, Thousands Serve Their Country in War on Terror*, USA TODAY, Dec. 5, 2001, at B8 ("Reliance on civilians likely will grow, according to the Pentagon's most recent defense reviews."); *see* U.S. DEP'T OF ARMY, FIELD MANUAL 100-10-2, CONTRACTING SUPPORT ON THE BATTLEFIELD iv (4 Aug. 1999) [hereinafter FM 100-10-2] ("To bridge the gap before scheduled resources and CSS units arrive, or when other logistical support options do not provide the supplies and services needed, the Army is turning more frequently to contracting support to provide goods and services required."); Sinnreich, *supra* note 459, at 4 ("During the past fifteen years, commercial contractors increasingly have become essential to the performance of basic military functions . . . .") ("[T]he way things are going[, civilian contractors] will be even more ubiquitous in a future theater of war, if only to furnish the high technology expertise that the military services themselves are finding increasingly difficult to retain."); *cf.* Colonel Ralph H. Graves, *Seeking Defense Efficiency*, 8 ACQUISITION REV. 47, 48 (Winter 2001) ("[a]lthough the outsourcing effort will continue"). The current potential for outsourcing or contracting out positions previously held by military or federal civilian employees is enormous. "Through fiscal year 2000, DoD has reviewed or is currently reviewing for potential outsourcing 181,000 positions, twice as many as were reviewed in the previous 17 years. The department expects a total of 245,000 to be reviewed by 2005." *Id.* at 48.

battlefield of the future . . . ."[466] Significantly for purposes of this article, a great percentage of overseas contractor employees are retired military.[467]

One reason offered to justify the exercise of court-martial jurisdiction over retirees is the general failure of domestic jurisdiction to reach crimes committed overseas.[468] Most federal criminal statutes do not enjoy extra-territorial application.[469] Two relatively new pieces of legislation have expanded U.S. extraterritorial jurisdiction and apply to civilians accompanying the force.

First, the War Crimes Act of 1996[470] authorizes federal prosecution of any U.S. national or member of the U.S. armed forces who commits a war crime, or of any third country national who commits a war crime against a U.S. national or service member.[471] Clearly, the War Crimes Act reaches

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466. Ken Swarner, *Contractors Go to War*, Military.com (Nov. 26, 2000), *at* http://ebird.dtic.mil/Nov2000/s20001128contractors.htm. General Coburn stated further that "[t]hey have always been there, but there will be even greater numbers in the future." *Id.*

467. *See* Eldridge, *supra* note 465, at B8 ("many of them retired from the military"); Schneider & Ricks, *supra* note 462, at A6 ("As of this week, [Brown & Root] had 13,130 employees in the Balkans—about 90 percent of them local hires, the rest from the United States, often retired military."); Ron Laurenzo, *Private Firm Continues Unrivaled Army Support*, DEF. WK., May 10, 1999, at 5 ("typically, logistics providers such as Brown & Root and DynCorp employ former officers—often retired Army Colonels—to run their foreign operations"); *cf.* Sinnreich, *supra* note 459, at 4 ("even commercial support of more generic military functions such as installation security, maintenance, and supply services typically is highly professional and . . . relies heavily on former military personnel"); Ron Laurenzo, *When Contractors Work the Front Lines*, DEF. WK., Apr. 5, 1999, at 8 ("a majority of the contractors are ex-military people").

468. *See* Foote, *supra* note 438, at 57 ("[O]ffenses by retirees that occurred overseas were more likely to be referred to courts-martial. For example, the situs of both reported Navy cases was the Philippines, where domestic United States courts cannot exercise jurisdiction.") ("Army judge advocates considered the inability of American courts to assert jurisdiction under title 18 to try an accused for the alleged murder of an American citizen in Saudi Arabia when they determined whether extraordinary circumstances existed that warranted exercising UCMJ jurisdiction over a retired soldier.").

469. Major Tyler J. Harder, *Recent Developments in Jurisdiction: Is This the Dawn of the Year of Jurisdiction?*, ARMY LAW., Apr. 2001, at 12 ("most federal criminal statutes do not apply outside the territory of the United States or the special maritime and territorial jurisdiction of the United States") (listing examples of federal statutes that do enjoy extra-territorial application).

470. 18 U.S.C.A. § 2441 (West 2000).

471. *Id.* § 2441(a)-(b). The Act reaches former members of the armed forces who commit war crimes while on active duty, but who are subsequently discharged. War Crimes Act of 1996, *reprinted in* 1996 U.S.C.C.A.N. 2166, 2172 ("would allow for prosecution even after discharge").

misconduct committed by civilians accompanying U.S. forces overseas,[472] during both international and noninternational armed conflict.[473] War crimes are defined in terms of violations of certain provisions of the Geneva and Hague Conventions, and the "Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended . . . when the United States is a party . . . ."[474]

Second, the Military Extraterritorial Jurisdiction Act of 2000[475] extends federal criminal jurisdiction over misconduct committed outside the United States that would constitute a felony offense if committed "within the special maritime and territorial jurisdiction of the United States" to (1) persons "employed by or accompanying the Armed Forces outside the United States;" and (2) former members of the armed forces who committed the misconduct while subject to the UCMJ.[476] The Act has only limited application to retired members of the armed forces. Retired personnel, subject to the UCMJ, may not be subject to prosecution under this Act unless the "indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to [the UCMJ]."[477] Of significant note, the original Senate version of the bill would have also extended military jurisdiction to Department of Defense (DoD) employees and DoD contractor employees while serving with or accompanying U.S. forces overseas during a Secretary of Defense declared contingency operation.[478]

Even assuming the Department of Justice could surmount the problems associated with gathering evidence during or following a period of armed conflict[479] and would be willing to devote the necessary prosecutorial resources to pursue these cases, however, a jurisdictional gap

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472. *Id.* § 2441(c) ("[w]hoever, whether inside or outside the United States, commits a war crime").

473. *Id.* § 2441(c)(3).

474. *Id.* § 2441(c).

475. Pub. L. No. 106-523, 114 Stat. 2488 (codified at 18 U.S.C. §§ 3261-3267 (2000)).

476. 18 U.S.C. § 3261. For a discussion of the new Act, see Captain Glenn R. Schmitt, *The Military Extraterritorial Jurisdiction Act: The Continuing Problem of Criminal Jurisdiction over Civilians Accompanying the Armed Forces Abroad—Problem Solved?*, ARMY LAW., Dec. 2000, at 1.

477. 18 U.S.C. § 3261(d). If for some reason the retiree is no longer subject to the UCMJ, the Act would also apply. *Id.* § 3261(d)(1).

478. Lieutenant Colonel Michael J. Davidson & Commander Robert E. Korroch, *Extending Military Jurisdiction to American Contractors Overseas*, 35 PROCUREMENT LAW. 1, 18 (Summer 2000).

remains. Such a gap exists over the commission of military offenses committed by most civilians accompanying the force that may have an adverse impact on the success of military operations against a hostile force. To illustrate, in the event of actual hostilities, civilian contractors and DoD civilians performing essential duties in support of military operations may simply abandon their work sites or refuse to deliver goods and services.[480] Additionally, in future military operations contractor employees may be captured, interned with members of the U.S. armed forces, and then engage in misconduct that threatens both their own survival and that of their fellow prisoners. As a general rule, civilian contractors are not subject to military jurisdiction and present a disciplinary problem for commanders.[481]

A historical anecdote from World War II serves to highlight the importance of maintaining discipline in such environments and supports the retention of military jurisdiction over retired service members serving as contractors as a disciplinary tool for military commanders. Shortly after their successful attack on Pearl Harbor, Japanese forces turned their atten-

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479. For a discussion of the difficulties of prosecuting war crimes cases during a period of ongoing hostilities, see Gary D. Solis, SON THANG: AN AMERICAN WAR CRIME (1997).

480. *See* FM 100-10-2, *supra* note 465, at 3-8 ("commanders must understand that contractor personnel aren't soldiers; they might refuse to deliver goods or services to potentially dangerous areas, or might refuse to enter a hostile area regardless of mission criticality"); Eric A. Orsini & Lieutenant Colonel Gary T. Bublitz, *Risks on the Road Ahead . . . Contractors on the Battlefield*, ARMY RD&A, Nov.-Dec. 1998, at 10 ("The issue of concern is not whether large Defense contractors will continue to service the contract, but whether they will be able to keep their employees on the battlefield when and where they are needed."); Lou Marano, *Perils of Privatization: In a Crunch, Soldiers Can't Count on Civilian Help*, WASH. POST, May 27, 1997, at A15; *cf.* Williams & Schandelmeier, *supra* note 465, at 35 ("Contractor personnel may not be prepared for the emotional and physical hardships of a wartime environment."). In support of this concern, some commentators point to the DA civilian reaction to the increased hostilities in Korea following the tree-cutting incident in 1976, when North Korean soldiers attacked U.S. soldiers. Following the incident, U.S. forces raised the alert status, prompting "hundreds of requests for immediate transportation out of Korea from Department of Army (DA) civilians who had replaced military depot maintenance and supply workers." Orsini & Bublitz, *supra*, at 10.

481. Sinnreich, *supra* note 459, at 4 (civilian contractors "are not subject to military discipline," which normally is not a significant problem for commanders, but "in a shooting war, disciplinary relations get more complicated"); *see also* Gibson, *supra* note 461, at 114 ("military could not try civilians by military court-martial except during a declared war"). The Joint Chiefs of Staff opposed the 1999 draft guidelines from the Office of Management and Budget concerning military jobs that could be outsourced to contractors "because they want all combat support jobs to be filled by uniformed personnel who would be subject to military rules and discipline." Moskos, *supra* note 463, at 35.

tion to Wake Island, which was defended by an American force of Marines and sailors.[482] Also trapped on the island were about 1200 civilian contractor employees performing construction work.[483] At the battle's conclusion, 1146 civilian contractors were captured and held by the Japanese for the remainder of the war.[484] Significantly, although the Marines and contractors captured at Wake were subjected to virtually identical mistreatment, the mortality rate of the Marines was only 3-4%, whereas the mortality rate for the contractors rose to 16%.[485] Historian Gavan Daws in his book *Prisoners of the Japanese* attributes much of the Marines' survival success to their ability to maintain military discipline.[486]

In the absence of the extension of military jurisdiction to contractor employees, or a declaration of war, military commanders will find little within the military justice system to assist them in maintaining discipline over the U.S. civilian workforce. At least with respect to retirees among the civilian workforce, however, commanders retain one tool: the threat of a court-martial.

VI. Conclusion

Military jurisdiction over retired members of the armed forces enjoys a breadth of scope that is neither required nor appropriate in most circumstances. A literal reading of military law would subject members of the armed forces—both active duty and retired—to trial by court-martial for conduct that few would have envisioned as falling within the ambit of the

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482. Major M.R. Pierce, *The Race for Wake Island*, MIL. REV., May-June 2000, at 85. Eventually, fifty-eight Marines and eleven sailors were killed in action. *Id.* at 88.

483. LIEUTENANT COLONEL FRANK O. HOUGH ET AL., PEARL HARBOR TO GUADACANAL: HISTORY OF U.S. MARINE CORPS OPERATIONS IN WORLD WAR II, at 95 (1958). The civilian construction workers were employees of Contractors Pacific Naval Air Bases, "a group of heavy construction companies building bases for the United States Navy on strategic islands in the Pacific." GAVAN DAWS, PRISONERS OF THE JAPANESE 35 (1994).

484. E. BARTLETT KERR, SURRENDER & SURVIVAL: THE EXPERIENCES OF AMERICAN POWS IN THE PACIFIC 1941-1945, at 37 (1985). The Japanese retained 100 civilians on the island to construct an airbase, but later executed them in anticipation of an American invasion. Pierce, *supra* note 482, at 88.

485. DAWS, *supra* note 483, at 360.

486. *Id.* ("The marines were younger and fitter than the contractors; and as a disciplined tribe of POWs, marines were the ultimate.").

UCMJ.[487] The courtesies afforded to retired military officers may be mandated, rather than merely honorific, if military law is interpreted and applied literally.

One of the most emotional issues involved in determining the appropriate limitations on court-martial jurisdiction over military retirees is the threat that the exercise of such jurisdiction poses to retired pay. The military pension is widely viewed within the military and veteran's communities as an entitlement, sacrosanct and unforfeitable except in the most compelling of circumstances.[488] The military appellate courts have tacitly acknowledged the special importance of retirement benefits, permitting evidence during sentencing of the impact of a punitive discharge or dismissal on retirement benefits.[489] Indeed, the CAAF has characterized the effect of a punitive discharge on retirement benefits as a "crucial military concern" during sentencing,[490] requiring an appropriate instruction for those service members at or near the retirement eligibility point.[491] The threat posed to the pension of a retirement eligible, or near retirement eli-

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487. *See, e.g.*, Thomas E. Ricks, *More Than Rank Splits Army's Stars and Bars*, WASH. POST, Nov. 19, 2000, at A2 (Asked about references critical of President Clinton in his study, a recently retired Army officer responded: "'I know it raises eyebrows.' But, he added, 'I'm a civilian now' . . . .").

488. *Cf.* Bradley, *supra* note 11, at 41 ("To service members, military retired pay represents twenty or more years of patriotic, selfless service to their country. Military retired pay is what is owed to them in return for living a life where at a moment's notice they could be sent anywhere in the world, possibly in the line of hostile fire.").

489. United States v. Washington, 55 M.J. 441 (2001) (prejudicial error to exclude evidence of expected retirement pay when accused had over eighteen years of service and could retire during current enlistment); United States v. Luster, 55 M.J. 67 (2001) (prejudicial error when accused had eighteen years and three months of service and could retire during the current enlistment); United States v. Becker, 46 M.J. 141, 142 (1997) ("We hold that the military judge erred in refusing to admit defense mitigation evidence of the projected dollar amount of retirement income which appellant might be denied if a punitive discharge was adjudged."); *see also* United States v. Sumrall, 45 M.J. 207, 209 (1996) ("may present evidence of the potential dollar amount subject to loss").

490. United States v. Greaves, 46 M.J. 133, 139 (1997); *see also* United States v. Hall, 46 M.J. 145, 146 (1997) (officer dismissal; "the impact of an adjudged punishment on the benefits due an accused who is eligible to retire is often the single most important sentencing matter to that accused and the sentencing authority") (citation omitted).

491. U.S. DEP'T OF ARMY, PAM. NO. 27-9, MILITARY JUDGES' BENCHBOOK 66, para. 2-5-22 note (1 Apr. 2001) (citations omitted).

gible, service member and his family by a court-martial often invites partial or complete jury nullification.[492]

Congress should re-examine this area of military law[493] to articulate the rights and authority of military retirees, and to determine what, if any, limitations should be placed on military jurisdiction over them. Articles 88, 89, and 90(2) stand out as likely candidates for reform, and should be generally inapplicable to retirees (victim or accused) for post-retirement conduct. Another possible reform is to follow the current trend of treating military pay as a pension, rather than reduced pay for reduced services, and severely curtail the circumstances in which a retiree may forfeit retired pay, even if the accused retiree is ultimately dismissed or punitively discharged. Further, in addition to or in lieu of further clarification of the *Hooper* exception, a capacity defense should be available in retiree-related courts-martial, at least with respect to violations of these same punitive articles. To illustrate, a disrespect charge should not loom as a legal possibility when a retiree employed as a federal civilian employee confronts an active duty service member or when a zealous active duty judge advocate crosses legal swords in an adversarial environment with a retired judge advocate of superior rank.

With respect to Article 88, a retiree running for political office or employed as an academic, radio talk show host, or political commentator, should be able to engage openly in criticism of our political leaders and legislative bodies, using language that could be viewed as contemptuous, without fear of potentially subjecting himself to a military court-martial.

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492. Major Michael R. Smythers, *Equitable Acquittals: Prediction and Preparation Prevent Post-Panel Predicaments*, ARMY LAW., Apr. 1986, at 6 (noting that an accused with "a coveted retirement in the not too distant future" is a factor favoring an "equitable acquittal"); *cf.* GAO/NSAID-97-17, *supra* note 23, at 25 ("Two of our roundtable participants indicated that, even in the case of a serious breach of conduct, the decision to separate personnel not eligible for retirement is extremely difficult. They also said that many personnel with significant problems are kept until the 20-year point partly because of the implications of preretirement separation for their families.").

493. Historically, Congress has not spent a great deal of time considering court-martial jurisdiction over retired personnel. Bishop, *supra* note 13, at 332 (from 1861 through 1916 "few subjects seem to have concerned Congress less than the constitutional rights of retired regulars"), 338 (Since the Wilson administration, "Congress has not . . . visibly troubled itself with the problem. In the congressional hearings on the Uniform Code, the Judge Advocate General of the Army . . . said nothing at all about retired personnel. The House and Senate Committees disposed of the problem with the terse and unilluminating statement that 'paragraph (4) retains existing jurisdiction over retired personnel of a Regular component who are entitled to receive pay.'").

It is only when a retiree publicly speaks or writes in his military capacity, or engages in misconduct directly implicating his military status,[494] that Article 88 should be able to reach that individual. Absent this narrow exception, Article 88 should have no applicability to officers on the retired list.

Further, all the Services need to clarify the circumstances under which retirees may be subject to court-martial, and this standard should be a uniform one for the entire armed forces.[495] The authors posit that all serious misconduct committed while on active duty should be considered for possible UCMJ action, but the armed forces should defer to civil authorities for nonmilitary crimes unless those forums are unable or unwilling to assume jurisdiction. Retirement should not be viewed as a version of a get out of jail free card, but a service member, and his family, should not risk forfeiture of a hard earned military retirement[496] after enduring two or more decades of all the hardships associated with a military career, absent a compelling reason to do so.

Military jurisdiction should be exercised over retirees for post-retirement misconduct in the narrowest of circumstances, particularly given the modern day treatment of military retired pay as a mere pension. In addition to the narrow Article 88 scenario discussed above, offenses committed in an overseas theater of operations that directly impact on the success of American military operations or pose a direct threat to the safety or physical well-being of U.S. personnel or allied forces, during a period of *actual* hostilities, would also be appropriate for continued military jurisdiction. Additionally, when a military court-martial is the only forum available to bring a military retiree to justice for extremely serious misconduct—defined as offenses punishable by death—military jurisdiction may attach.[497] Finally, absent these limited exceptions, military jurisdiction should presumably not be applicable to military retirees unless the retiree's misconduct was of such an egregious nature that the retiree would be

494. To illustrate, should a retired senior military officer appear before a national audience in uniform and using his military title, speak contemptuously of the President, Congress, or one of the enumerated persons protected by Article 88, then the exercise of military jurisdiction would be appropriate.

495. In particular, either by modification to the *MCM* or by regulation, guidance should be provided to clarify the political and private conversation safe harbor exceptions to Article 88.

496. "A retired officer may also forfeit his retired pay if court-martialed." Loeh v. United States, 53 Fed. Cl. 2, 5 (2002).

497. *See, e.g.*, Sands v. Colby, 35 M.J. 620 (A.C.M.R. 1992).

unsuitable for continued military service even during periods of dire national emergency.[498]

498. In other words, were the armed forces scraping the bottom of the manpower barrel in a desperate attempt to put bodies in uniform because the nation's survival was imperiled, the misconduct of that retiree was so infamous, loathsome, or vile as to cause him to fall below this standard.