

Military Retiree Court-Martial Jurisdiction: Trials and Tribulations

Philip D. Cave* & Kevin M. Hagey**

I. INTRODUCTION

“Court-martial [insert name]!” There have been many calls from the public, politicians, and the media to court-martial some well-known military retirees. During the last three presidential election cycles, some [notable retirees](#) faced the court-martial call because of speeches and political endorsements they had made. Lieutenant General (LTG) Michael Flynn and Lieutenant Colonel (LtCol) Larry Brock [are recent examples](#). There are, of course, those lesser-knowns who have been prosecuted and convicted at court-martial. Since the 1950 enactment of the Uniform Code of Military Justice (UCMJ), more than 30 retirees [have been convicted](#) and sentenced at court-martial.

Congress has broad power to create a military justice system for the armed forces and subjects those of the “land or naval Forces” to court-martial. U.S. CONST. art. I, § 8, cl. 14; *In re Tarble’s Case*, 80 U.S. 397, 408 (1871). The person’s military status is jurisdictional. However, since *Solorio*, the offense charged need not be purely military, and there need be no connection between the crime and the services. *Solorio v. United States*, 483 U.S. 435 (1987). *Solorio* overturned *O’Callahan v. Parker*, a case where the Supreme Court had judicially created a “service-connection” test for jurisdiction. 395 U.S. 258, 274 (1969). Military retirees are part of the forces subject to court-martial, and military appellate courts have uniformly rejected retiree challenges to that jurisdiction. Now, litigation is again in federal court. The debate remains how far Congress may go in conferring court-martial jurisdiction, which “robs [the retiree] of constitutional protections[.]” And can restrictions of jurisdiction [undermine](#) the need for good order and discipline in the armed forces?

Almost all retirees serve their country honorably yet remain subject to court-martial for offenses committed even while retired for their life. For example, in 2020, over two million retirees [were subject to court-martial](#) until the day they died. Yet, the average life expectancy of

* Philip D. Cave is a retired Navy judge advocate with 42 years of military justice experience. He is a graduate of Case Western Reserve Univ. Law School (JD 1979) and The George Washington Univ. Law School (LLM 1988). He is a director (past President) of the National Institute of Military Justice and a partner in Cave & Freeburg, LLP.

**Kevin M. Hagey is a second-year law student, Georgetown Univ. Law School and has a BS in Economic Science from Washington State Univ. (2019). He will soon intern with Hogan Lovells, LLP, in New York City.

a person born in 2000 who will retire at age 67 is about 87 years. Moreover, like active-duty personnel, the retiree faces restraints on their speech and fewer protections than in a civilian prosecution and a lifetime of potential subjugation to the whims of a commander in chief.

Various UCMJ articles and regulations limit speech. For example, an officer may not be contemptuous toward the President. UCMJ art. 88, 10 U.S.C. § 888. Regulations [place limits on political speech and activity](#). Courts-martial are exempt from the Fifth Amendment right to indictment by grand jury. U.S. CONST. amend V. Since *Ramos v. Louisiana*, the military is now the only jurisdiction allowing a less than unanimous jury verdict for conviction, even in cases where the sentence could include years of confinement or death. *Ramos v. Louisiana*, 140 S. Ct. 1390, 206 L. Ed. 2d 583 (2021). The judge at court-martial still lacks adequate guarantees of judicial independence, similar to those of a federal district court judge. *See generally Weiss v. United States*, 510 U.S. 163 (1994); *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992), pet. denied *Graf v. United States*, 510 U.S. 1085 (1994). Unlawful command influence [may still taint](#) the fairness of a court-martial. UCMJ art. 37, 10 U.S.C. § 837.

Before proceeding, imagine that Retired Master Sergeant Toth conspired with his brother, Citizen Toth, and is caught stealing from the local supermarket. Master Sergeant Toth can be prosecuted in [both](#) civilian court and at court-martial. Our short essay will explain why that is so with some history of retiree court-martial jurisdiction, a review of current litigation in the federal courts, and conclude with some thoughts on change.

II. FROM 1775 TO 1950

The Second Continental Congress adopted the British Articles of War for the governance of the Continental Army in 1775. The rules and procedures [remained the same for many years](#). The first Articles [did not provide court-martial jurisdiction over a retiree](#). Since 1789, Congress has had the power to “Make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST, art. I, § 8, cl. 14. Yet, it was not until 1861 that a retiree could face court-martial. In 1776, the Continental Congress adopted Articles of War which subjected active soldiers receiving pay to the jurisdiction of courts-martial. 1776 Articles of War, reprinted in WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920). The legislative intent is clear that payment alone for military service could expose a regular Army officer to court-martial jurisdiction, and by extension, retirees. Thus, the receipt of payment is a common thread

justifying court-martial jurisdiction. Over time, it has also been emphasized that the need for good order and discipline justifies retiree jurisdiction because they are subject to recall to active service.

The United States has given pensions to officers who served in a conflict [since 1778](#) and to soldiers since 1818. Act of March 18th, 1818, 15th Congress, Session 1 Ch. 19, 3 Stat. 410, 410-11. Each act [gave the pensions for service alone](#) as a reward for services rendered. In these early laws, there was no provision for soldiers receiving pensions to be subject to military orders. There was never any attempt to court-martial a pensioner under these laws. Today's retirement system [is complex](#), but a retiree receives a monthly check at its core along with varying service obligations.

Enlistment changes a person's status from "citizen" to soldier, and once put on, the uniform cannot easily be put off." *In re Grimley*, 137 U.S. 147, 152 (1890). In 1861, President Lincoln signed the first statute creating an Army and Marine Corps retirement system that subjected the retiree to continued military jurisdiction and court-martial. Act of August 3, 1861, ch. 42, 12 Stat. 287; *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322, 329 (D.D.C. 2020). Thus, the retiree moved from being an active-duty member but not a free citizen.

It is suggested from dicta that the Supreme Court in *Tyler* would have found retired officers subject to court-martial jurisdiction under the 1861 statute. *United States v. Tyler*, 105 U.S. 244 (1881). The court accepted that Congress had subjected retirees to court-martial, but nothing in the opinion demonstrates that the court was ruling on the statute's constitutionality. In *Tyler*, the Supreme Court found that military officers retired from active service are statutorily part of the army. Accordingly, they may wear the uniform, have their names on the military register, be subject to the Articles of War and trial by court-martial, and be dismissed from service. *Runkle v. United States*, 19 Ct. Cl. 396, 414 (1884), rev'd, 122 U.S. 543 (1887). The Court concluded that retired officers were "in the military service of the government." *Id.* at 245. In 1896 the Court of Appeals for the District of Columbia (CADC) explicitly found court-martial jurisdiction over an officer retired from active duty. *Closson v. U.S. ex rel. Armes*, 7 App. D.C. 460 (D.C. Cir. 1896).

III. MOVING FORWARD: 1950 TO 2016

The UCMJ was revolutionary when, in 1950, President Truman signed it into law. Act of May S, 1950, 64 Stat. 107; 10 U.S.C. § 801-946. The enactment began an evolution of military justice focused almost entirely on disciplinary offenses to a system encompassing prosecutions for a broad swath of common-law crimes. UCMJ art. 134, 10 U.S.C. § 934 allows for the assimilation of noncapital state and federal crimes not already listed in the UCMJ's punitive articles. "At common law, court-martial jurisdiction extended only to regular soldiers (excluding even the militia forces) and only for the offenses of mutiny, sedition, and desertion." See *Mutiny Act of 1689*, 1 Wm. & Mary, chs. 2, 5, 7. Not so now. See *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322, 329 (D.D.C. 2020); *Larrabee v. Braithwaite*, 502 F. Supp. 3d 322 (D.D.C. 2020), appeal pending, *Larrabee v. Del Toro*, No. 21-5012 (D.C. Cir.). So who is a retired service member?

There are three categories of a retiree, (1) those retired from active-duty (Regular Component), (2) those retired from the Reserves (Reserve Component) and who are receiving hospital care from the military, and (3) those transferred into the Navy or Marine Corps Fleet Reserve. UCMJ art. 2(a)(4)-(6), 10 U.S.C. § 802(a)(4)-(6). Retired Reserves [are not otherwise subject to court-martial](#).

Rear Admiral Selden Hooper was the first senior officer convicted at court-martial under the UCMJ for post-retirement off-base conduct. *Horbalý*, 476. The then Court of Military Appeals (CMA) affirmed the conviction and dismissal from service. Hooper argued unsuccessfully before the U. S. District Court and the Court of Federal Claims that exercising jurisdiction over him as a retiree was unconstitutional. *United States v. Hooper*, 26 C.M.R. 417, 421-25 (1958); *Hooper v. Hartman*, 163 F. Supp. 437 (S.D. Cal. 1958), *aff'd*, 274 F.2d 429 (9th Cir. 1959); *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964). The Court of Claims held that Admiral Hooper's retired pay was not just deferred compensation but was also a means of ensuring his continued availability for service. But the Court of Claims also expressed an open question on the constitutional efficacy of jurisdiction over retirees. Yet, having articulated its potential doubts, the claims court judges determined he was still subject to orders and jurisdiction. Hooper's arguments presage current claims of unconstitutionality: that a retiree does not have a "proximate relationship to the Armed Forces and their functions as to be reasonably treated as "in" the Armed Forces." He further argued that "his relationship to the Navy and its

functions, rendering him amenable to trial and sentence, was completely lacking in that he had been wholly retired for seven years, withdrawn from his command, and never recalled to active duty.” 326 F.2d at 986.

In 1957, the Supreme Court decided in *Reid v. Covert*, that a family member accompanying their active-duty spouse overseas was not in the land and naval Forces subject to a court-martial. 354 U.S. 1 (1957). The court reaffirmed Congress’s broad authority over military affairs, and despite the usual broad deference to Congress, reemphasized that legislation must still pass constitutional muster. While *Covert* might suggest that courts place less weight on pay, the receipt of payment remains an essential factor for courts in deciding the extent of courts-martial jurisdiction, despite *Barker v. Kansas*. 503 U.S. 594 (1992). Two years earlier, in *ex rel Toth*, the Supreme Court had agreed that termination of any obligation to serve and the lack of future pay severed the military relationship, making Toth a civilian. *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955). The continuing question is when, if ever, a retiree becomes a civilian. Some confusion is apparent.

In *McCarty v. McCarty*, the Supreme Court reaffirmed the basic principle, initially set out in *Tyler*, that a retired service member is still a member of the land and naval forces. *McCarty v. McCarty*, 453 U.S. 210 (1981) citing *Tyler* and *Hooper*. Therefore, the pay received is reduced compensation for the current service. The case is not helpful to those claiming the retiree is a civilian. *McCarty* was a divorce case where the wife wanted a share of the husband’s retired pay as—deferred pay—an asset earned for past service during their marriage. The Supreme Court held for the husband. *Barker v. Kansas* led to a different characterization of retired pay, explicitly that it was deferred compensation for past service for taxation purposes, as Congress intended. 503 U.S. at 605. In both *McCarty* and *Barker*, the court interpreted the meaning of the pay concerning different policies for incentives to join and stay in the military. Neither *McCarty* nor *Barker* erodes the concept that receiving retired payments can be the basis of court-martial jurisdiction regardless of the label applied to the reason for the payments. Lower courts have soundly rejected the erosion arguments. *See, e.g., Loeh v. United States*, 53 Fed. Cl. 2, fn. 5 (2002), *aff’d*. 55 F. App’x 937 (Fed. Cir. 2003). However, the Supreme Court has not been called upon to rule definitively on the constitutionality of that jurisdiction. Thus, there is good reason to believe the Supreme Court would defer to Congress on the regular retiree question.

IV. MOVING ON TO NOW

LTG Flynn can face court-martial because he is a retired Regular Component officer. UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4). However, it is debatable that he should be prosecuted. Noted military law expert Eugene Fidell explains various legal niceties prevent a court-martial and argues that any creative lawyering would cause such a legal uproar that no one would be happy. Alternatively, LTC Daniel Maurer and LTC Yevgeny Vindman, Army judge advocates, [suggest](#) a “clever lawyer” can get a conviction for making Disloyal Statements, a specified offense. The Department of Justice and the appropriate United States Attorney should make any decision to prosecute LTG Flynn if he has violated federal laws. Retired Air Force Reserve Lieutenant Colonel Larry Brock gained attention when he illegally entered the U.S. Senate Chamber on January 6. Many wondered out loud about “when will he be court-martialed?” The answer is that he will not be. Retired Reserves like him [are not subject to court-martial jurisdiction](#) under Article 2, UCMJ, unless receiving military medical care [47].

These two examples illustrate a potential inconsistency in the treatment of retirees. If the receipt of pay is sufficient for jurisdiction, then Retired Reserves should also be subject to court-martial. But Retired Reserves have no further military obligation. Thus, if there is also a continuing obligation and liability for future recall to service, then the distinction makes sense. The potential inconsistency brings us to the current challenges to Fleet Reserve retiree jurisdiction.

V. NEW CHALLENGES TO JURISDICTION OVER FLEET RESERVE RETIREES.

Is it constitutional to subject members of the Navy or Marine Corps Fleet Reserve to court-martial when the obligation for recall to active service may be minimal (or at least infrequently required)? Congress has made Fleet Marine Corps Reserve members subject to court-martial, similar to Regular Component retirees. UCMJ art. 2(a)(6), 10 U.S.C. § 802(a)(6). This grant of jurisdiction is neither novel nor arbitrary. “Although some civilian and military leaders have expressed doubt concerning the wisdom of this judgment, [the CAAF] do[es] not.” *United States v. Overton*, 24 M.J. 309, 311 (C.M.A. 1987) *cert. denied*, 484 U.S. 976 (1987).

Sailors or Marines who serve at least 20 years of active duty can transfer to the Fleet Reserve (or request discharge, which severs their obligations and makes them a *Toth*-like civilian). Once on the Fleet Reserve list, retired pay begins. Additionally, there is an obligation

to report for active duty when ordered. These retirees “provide an available source of experienced former members [who can] be organized without further training to fill billets requiring experienced personnel in the first stages of mobilization during an emergency or in time of war [50].” A person in the Fleet Reserve who reaches 30 years active and Fleet Reserve time transfers onto the Regular or Reserve retired list. In 2021, 15,600 members in the Fleet Marine Corps Reserve [will be subject](#) to court-martial jurisdiction.

Fleet Marine Corps Retired Gunnery Sergeant Dinger was convicted at court-martial for sex offenses committed after his transfer to the Fleet Reserve and later on the active-duty retired list. *Larrabee v. Del Toro*, USCA Case #21-5012, Doc. No. 1919368, letter filed Oct. 25, 2021. Dinger challenged personal jurisdiction citing *Barker v. Kansas*. The military appellate courts rejected both the jurisdictional challenge and the argument that his sentence could not include a punitive discharge. For Dinger, the punitive discharge means a loss of his retired pay. A person sentenced to a [punitive discharge](#) loses all future pay and allowances.

“[T]he stigma of a punitive discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that [they] served honorably. A punitive discharge will affect an accused’s future with regard to [their] legal rights, economic opportunities, and social acceptability. In addition, a punitive discharge terminates the accused’s status and the benefits that flow from that status, including the possibility of becoming a military retiree and receiving retired pay and benefits.”

Losing retired pay is also a loss to a spouse. Retirees can have a monthly deduction from their retired pay to fund a [survivor benefit plan](#) in favor of their spouse. The *Dinger* court suggested that the collateral effect on pay and benefits from a punitive discharge is a matter for the federal courts, not the military courts.

How the retired pay is classified may become the deciding factor for the Supreme Court. If the pay is current pay, that is an argument supporting continued jurisdiction. But the court may decide not to delve into the complex regulations for if, when, and how the retiree satisfies any continuing obligation to serve.

The Supreme Court characterized the pay in *Tyler*, in effect, continuation pay with concurrent amenability to future service. Citing *Tyler*, the Seventh Circuit Court of Appeals has

described retired pay as “more like wages” than a pension. *Haynes v. Miller*, 679 F.2d 718, 719 (7th Cir. 1982).

Fleet Marine Corps Reserve Retired Staff Sergeant Larrabee sexually assaulted a local Japanese national a few months after transferring into the Fleet Reserve. The victim was married to an active-duty service member stationed at Iwakuni, Japan. Brief in Opposition at 5, *Larrabee v. United States*, cert. denied, 139 S. Ct. 1164 (2019) (No. 18-306). Larrabee pled guilty at court-martial and was sentenced to eight years confinement and a punitive discharge. Again, the military appellate courts affirmed his conviction and sentence. The U.S. Supreme Court denied his petition for a writ of certiorari on direct appeal. *United States v. Larrabee*, No. 201700075 (N-M. Ct. Crim. App. Nov. 28, 2017) (unpub. Op.), aff’d 78 M.J. 107 (C.A.A.F. 2018) (summary disposition) cert. denied 1139 S. Ct. 1164, 203 L. Ed. 2d 196, 2019 U.S. LEXIS 1231. Larrabee then filed suit in the District Court for the District of Columbia, challenging the constitutionality of Article 2(a)(6). *Larrabee* argues he is not a member of the land and naval forces and that any obligations to serve are tenuous at best. The district court held the statute null and void because it was an unconstitutional use of Congress’s power.

The district court began with the “baseline principle” that court-martial jurisdiction must be “narrowly limited.” *Larrabee v. Braithwaite*, 502 F. Supp. at 327 (emphasis in original). The court relied on *Toth* and *Reid v. Covert* for this principle. The courts have recognized the deprivation of significant constitutional rights at court-martial. While acknowledging the two primary factors—receipt of pay and the obligation for recall—the court questions why that is sufficient and why jurisdiction is necessary for good order and discipline. The court rejects the consent to jurisdiction argument. Ultimately, the court gets to the nub of the issue: is it demonstrated that jurisdiction is necessary to maintain good order and discipline? The court finds no support in the congressional record relating to the need for jurisdiction and the effect on good order and discipline. And the parties had not submitted studies or surveys supporting the claim. An appeal is pending with the Circuit Court of Appeals for the District of Columbia, which heard oral argument in October 2021. *Larrabee v. Del Toro*, No. 21-5012 (C.A.D.C. Jan. 1, 2021).

Post argument, Larrabee has submitted a letter to the Court citing two Marine Corps administrative messages about the COVID-19 requirements that exempt Fleet Marine Corps

Reservists from vaccination. The Marine Corps messages are like the [Navy policy](#) excluding retirees from COVID vaccinations. Larrabee suggests the messages help prove that jurisdiction is not necessary for good order and discipline, and the likelihood of recall is minimal.

Retired Navy Fleet Reserve Chief Petty Officer Begani lived and worked in Japan as a civilian contractor for the Marine Corps. He pled guilty at a court-martial to sex offenses committed shortly after transferring into the Fleet Reserve. The Navy-Marine Corps Court of Criminal Appeals (NMCCA), sitting en banc, voting 4 to 3, rejected his jurisdictional challenge. *United States v. Begani*, 79 M.J. 767 (N-M. Ct. Crim. App. 2020). However, the CAAF decided two issues: a denial of equal protection because retired “Reservists” were not subject to continued jurisdiction and should there be a service connection requirement. *United States v. Begani*, 80 M.J. 200 (C.A.A.F. 2020). The service-connection issue harks back to *O’Callahan*. The additional grant responded to the district court’s decision in *Larrabee*. Writing for himself and two other judges, Judge Maggs observed jurisdiction did not require a service connection. *Id.* at 282 (Maggs, J., concurring).

The specified issue on which the parties have submitted supplemental briefs is “whether fleet reservists have a sufficient current connection to the military for Congress to subject them to constant . . . jurisdiction.” This issue is not new. Appellant/Cross-Appellee (Appellant) acknowledges that our decision in *Overton* has already answered the question in the affirmative, holding that Congress constitutionally may subject members of the Fleet Reserve and Fleet Marine Corps Reserve to trial by court-martial. The *Overton* decision is consistent with the longstanding view that retirees are in the armed forces.

Part of Judge Maggs’s concurrence in *Begani* and *Larrabee* is based partly on what some might call an historia-originalist view. The “May 1783 furlough” debate on the court-martial of furloughed Continental soldiers happened before the Constitution was formally adopted before the Make Rules Clause was effective and before there was a President of the United States.

The Supreme Court recently denied Begani’s [petition](#) for a writ of certiorari. Begani essentially claimed that even though he receives retired pay, that is not enough for jurisdiction when,

He receives deferred compensation stemming from his prior active-duty service, but he holds no active rank; he has no commanding officer or subordinates; he lacks

the authority to issue binding orders; he has no obligation to follow orders; he performs no duties; he is under no requirement to maintain any level of physical (or other) readiness; and he participates in no regular military activities of any kind.

Petition for certiorari at 1, *Begani v. United States*, No. 21-335 (Aug. 30, 2021).

What can be read as his connection to the service test asserts that the connection is so minimal that it is unconstitutional to subject him to court-martial. He further argues that, despite systemic changes, “Serious concerns thus remain that courts-martial do not adequately protect the rights of those not on active duty.” *Ibid.* at 2 (citations omitted, emphasis in the original). Begani argues that *Barker* clarifies that retired pay is not current compensation but deferred compensation and insufficient to justify courts-martial jurisdiction. *Ibid.* at 9. Begani relies heavily on the court holding in *Larrabee*.

VI. YOU MIGHT ASK, “WHY COURT-MARTIAL JURISDICTION FOR LIFE?”

Congress has determined it necessary to have a pool of trained and experienced servicemembers to call upon in the event of war or a national emergency—retirees--so the continuing need for court-martial jurisdiction is good for order and discipline. However, in *Toth*, the Supreme Court determined that Congress should be limited to “the least possible power adequate to the end proposed.” *United States ex rel Toth v. Quarles*, 350 U.S. 11 (1955). Accordingly, there should be limits on Congress’s power to court-martial those who are effectively civilians.

The first question is whether a Fleet Reserve retiree is a “land and naval Forces” member. Retirees fall in a middle ground between the active force and civilians. Dinger seeks to make himself a *Toth*-like retiree. 350 U.S. at 23. Receiving pay and benefits is undoubtedly a factor in distinguishing *Dinger* from *Toth*. However, the court must also address Congress’s ambivalence in defining retired pay as either deferred pay or current pay; is it “continued compensation,” current pay, or deferred pay.

Referring to the obligations of the retiree adds further confusion. Begani, as a Fleet Reservist, must report when ordered for active duty, as does a member of the inactive Reserve Component. Yet, Under the UCMJ, reservists are not subject to court-martial unless on active or inactive duty for training. National Guard members are only subject to the UCMJ when in

“Federal service.” 10 U.S.C. § 802(a)(3)(A)(i) and § 802(a)(3)(A)(ii). Many Reservists [deployed to Iraq](#).

Simply put, the government’s argument in *Begani* is that a Sailor or Marine volunteers to be transferred to the Fleet Reserve in exchange for pay and benefits. The retiree and family [will receive medical](#) care through the uniformed services health care program. And have unrestricted access to military bases wherever situated to use the facilities. The Fleet Reserve retiree is subject to recall to active duty in exchange. There is a [readiness requirement](#) for a recall. The government discounts or ignores inconsistencies in the overall approach to retirees regardless of component.

Petitioners argue that there is no good reason to subject those in the Fleet Reserve pool to continued court-martial jurisdiction. Their connection to the military and obligations is tenuous at best. Larrabee [argues](#), “He receives pay in the form of his military pension but holds no active rank; he has no commanding officer or subordinates; he lacks the authority to issue binding orders; he has no obligation to follow orders; he performs no duties; and he participates in no regular military activities.” Whether jurisdiction should be for all crimes or only those with a service-connection is different. The Secretary of Defense [is authorized](#) to prescribe if, when, and how these retirees may be recalled to active duty. And, the Secretary of a Service may seek voluntary recall for certain high-demand, low-density assignments. 10 U.S.C. § 688. Moreover, those in the Fleet Reserve pool are likely to have retained sufficient skills and physical fitness to be of value if recalled.

Counsel for Larrabee made the point to the CADC during [oral argument](#), “nothing would stop the government from court-martialing, a 90-year-old Korean war veteran, who retired after being injured in the war, for shoplifting a newspaper from his local supermarket [78]?” Assume a person enlists at age 18 or an officer is commissioned at age 22, and they serve a minimum of 20 years of active duty, they are subject to court-martial for decades. Enlistment requirements, 10 U.S.C. § 505, commissioning, 10 U.S.C. § 531; Appointment of Commissioned and Warrant Officers in the Army. Army Regulation 601-100 (2006).

No matter how the Supreme Court resolves *Tyler* (compensation continued at a reduced rate), *McCarty* (retired pay is current compensation for service), and *Barker* (retired pay is deferred compensation for prior service), it seems likely that the court will defer to Congress.

Should the court do so, it will discount that the court-martial remains a system of “rough justice.” *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) citing *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *United States v. Denedo*, 556 U.S. 904, 918 (2009)

VII. CONCLUDING THOUGHTS.

Toth and *Reid* set bright lines. From *Toth*, a discharged soldier receives nothing and gives nothing, and any connection to the military was severed—not so the retiree. In *Reid*, the person never was in service and received no direct pay—not so the retiree. Fleet Reserve retirees receive both pay and have obligations to report for duty if called. That is a bright line. The courts may very well suggest that it does not matter if any have been recalled or ever will be called. Whether to recall is a policy decision by Congress and the armed forces, not a jurisdictional one. These personnel management considerations are ones best suited to deference to Congress’s “considerable experience and resources to” balance military personnel needs about which the courts are “ill-equipped.” *See, e.g.*, 453 U.S. 57; *Goldman v. Weinberger*, 475 U.S. 503 (1986). The Supreme Court has not directly opined on the constitutionality of subjecting retirees to life-long court-martial jurisdiction. Perhaps the answer is found in the Court of Claims in *Hooper*, “We believe the function of this Court is to uphold an act of Congress unless the same is clearly unconstitutional. In the case at bar, while we have certain doubts, we cannot say that the act is clearly unconstitutional.” *Hooper*, 326 F.2d at 986.

In 1916, President Woodrow Wilson vetoed the Army Appropriations Bill for FY 1917. He objected to Congress removing retirees from court-martial jurisdiction. HORBALY 474, *Hooper*, 26 CMR at 423-25 (1958). But, as Professor Vladek recently asked the Circuit Court of Appeals for the District of Columbia, why should a 70-year-old retiree be still subject to court-martial for an offense committed in the civilian community? *Larrabee v. Del Toro*, oral argument October 22, 2021.

The route to reform—goes to the President through the DoD Joint Service Committee on Military Justice and to Congress. For example, why not terminate jurisdiction because of age—60 or 72? Retirees over 60 are the last category to be involuntarily recalled for a dire emergency and 72 is an age at which a person can claim Social Security Administration benefits. It also is reasonable to require a service-connection test for invoking jurisdiction for conduct committed after retirement. The *O’Callahan* and *Relford* factors are a practical guide. *Relford v.*

Commandant, 401 U.S. 355, 364-65 (1971). Another example is the 1998 M.C.M. amendments listing ‘service connection’ like criteria for a decision to prosecute a servicemember for adultery. See ¶99(c), M.C.M. at IV-145 (2019).

The President has the rulemaking authority in Article 36 to consider limitations on retiree prosecutions. UCMJ art. 36, 10 U.S.C. § 836. The President could set stringent criteria for a decision to court-martial a retiree. For example, the criteria might include prosecution only for offenses committed overseas, only for offenses where the United States Attorney or local prosecutor has declined prosecution or based on the age or the category of a retiree. DoD [already provides](#) useful sub-categories of retirees and their amenability to recall. For example, there are three categories of Regular retirees, (1) those under 60 and retired less than five years, (2) those under 60 who retired after more than five years, (3) and those over 60. Thus, the President could establish age 60 as the cut-off for exercising court-martial jurisdiction absent extraordinary circumstances. Those over 60 are least likely to be recalled, and their knowledge and experience are less current. The President can broaden an accused’s “rights” in a way not in conflict with a statute, says the CAAF. *See Billings v. Truesdell*, 321 U.S. 542 (1944). The President then can narrow the circumstances under which a court-martial would be appropriate.

Congress could amend and narrow or delimit retiree amenability to court-martial. For example, Congress might amend Article 2 that makes a retiree subject to court-martial when they receive orders to report for duty. *United States v. Guess*, 48 M.J. 69, 71 (C.A.A.F. 1998); *United States v. Lopez*, 35 M.J. 35, 39 (C.M.A. 1992) (Presidential authority to grant members of the armed forces rights more protective than those required by the Constitution.). Before then, the civilian authorities have jurisdiction. A provision could allow for administrative elimination from the military and loss of retired pay as an enforcement mechanism against retirees who committed serious crimes during retirement. Congress might establish an age limit just as the President could do. In addition, Congress might amend the Military Extraterritorial Jurisdiction Act (MEJA) for retirees outside the continental United States as the best vehicle to prosecute criminal conduct overseas. 18 U.S.C. § 3261, Military Extraterritorial Jurisdiction Act (MEJA). There already are federal crimes with extraterritorial reach as a basis for federal prosecution. *See, e.g.*, 18 U.S.C. § 2423, Extraterritorial Sexual Exploitation of Children; 18 U.S.C. § 1591 (Sex Trafficking of children or by force, fraud, or coercion); 18 U.S.C. § 3261-67 or 18 U.S.C. § 2423(e).

There are powerful arguments in favor of a change to retiree jurisdiction. Both the President and the Congress should take up and consider the arguments.

Unless Congress acts to limit court-martial jurisdiction over retirees, the appellate courts are unlikely to grant relief to challengers, even to those in the Fleet Reserve. That is not to say the Supreme Court cannot find the jurisdictional law unconstitutional. On the contrary, we know that since *Marbury v. Madison*, the power of the Supreme Court to reject Congress' unconstitutional acts is supreme. *Marbury v. Madison*, 5 U.S. 137 (1803). But we also know that the court gives great deference to Congress in national defense and military affairs, even when it may lead to "rough justice." *Ibid.* n. 80; *Middendorf v. Henry*, 425 U.S. 25, 43 (1975).