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COURT-MARTIAL JURISDICTION OVER MILITARY-CIVILIAN HYBRIDS: RETIRED REGULARS, RESERVISTS, AND DISCHARGED PRISONERS

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One of the numerous constitutional questions about which the Constitution itself tells us very little is the extent to which persons who are not soldiers or sailors on active duty may be subjected to trial by court-martial. Clause 14 of article 1, section 8, says that Congress may "make Rules for the Government and Regulation of the land and naval Forces;" clause 18 adds that Congress may "make all Laws which shall be necessary and proper" to that end. The fifth amendment exempts from its requirement of grand jury indictment "cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger." The rest is silence.

But if the Constitution itself is laconic, or even cryptic, the Supreme Court has in recent years told us a good deal more. Since 1955 the Court has held, without qualifying hedges or ambiguities, that Congress cannot constitutionally authorize a court-martial to try in time of peace, for any offense, any person who is a "civilian." In *United States ex rel. Toth v. Quarles*,¹ it held that a court-martial

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¹ 350 U.S. 11 (1955). The case held unconstitutional application of Article 3(a) of the Uniform Code of Military Justice, 10 U.S.C. 803(a) (1958), to an honorably discharged soldier who had not retained or reacquired any connection with the military. It should be observed that article 3(a) jurisdiction was thrust upon the army over the strong objection of its Judge Advocate General, who correctly foresaw the Supreme Court's attitude. See *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of the Senate Committee on Armed Services*, 81st Cong., 1st Sess. 256-57 (1949).

Hereinafter citations to the Uniform Code of Military Justice will be made solely by article number. Its complete provisions are set forth in 10 U.S.C. §§ 801-940 (1958).

cannot try a discharged soldier, who has wholly severed his connection with the armed forces, for an offense committed while he was subject to military jurisdiction. The line of cases starting with *Reid v. Covert*² held that a court-martial cannot in peacetime try civilians, whether employees or dependents of military personnel, who accompany or serve with the armed forces overseas, for any offense whatsoever, whether capital or noncapital. But it is a commonplace of constitutional law that whenever one question is settled, another springs up to take its place. It is now clear that civilians cannot in peacetime be court-martialed; but who is a civilian, and how does a court tell one when it sees him? Among the people whom Congress, by Article 2 of the Uniform Code of Military Justice, has purported to subject to military jurisdiction, are several categories whose proper classification may puzzle the courts. They are certainly not obvious members of the armed forces, as are soldiers on active duty; on the other hand they are not "full-fledged" civilians. Three of these categories—retired regulars, certain reservists, and military prisoners with executed dishonorable or bad-conduct discharges—present the problem of classification³ in acute form. It may be that the questions raised by them and their trespasses cannot be answered simply by reading the opinions (majority, plurality, and concurring) in *Toth*, *Covert*, *et al.*, and then, with the wisdom thereby acquired, examining the individual to see whether, on balance, he resembles a civilian more than he does a soldier. Does he always wear a fedora, or may he on occasion wear the cap, garrison? Is his underwear purchased from Macy's or the Quartermaster? Is his pay check, if any, signed by the Finance Officer? These tests may be significant, but they do not, somehow, seem decisive. Perhaps there are other relevant factors, such as the offense charged and the punishment inflicted, for these, too, may be essentially civilian or essentially military. In short, examination should be made of the necessities and nature of the present military

² 354 U.S. 1 (1957). Following *Covert* were: *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960). See generally Girard, *The Constitution and Court-Martial of Civilians Accompanying the Armed Forces—A Preliminary Analysis*, 13 STAN. L. REV. 461 (1961). These cases held unconstitutional article 2(11) of the Uniform Code.

³ Article 2(1) covers, *inter alia*, reservists ordered to active duty who have failed to enter upon such duty; 2(4), retired regulars entitled to receive pay; 2(6), members of the Navy's Fleet and Marine Corps Reserves; and 2(7), dishonorably discharged prisoners in military custody. Other groups might, in theory, raise the question, but the military authorities have not attempted to try them, and are not likely to do so. These include reservists on inactive duty training, article 2(3), retired reservists receiving hospitalization from the armed forces, article 2(5), and certain civilian employees of the Government when assigned to and serving with the armed forces, article 2(8).

establishment, and of the long history of military jurisdiction over persons and offenses not purely military.

I. HISTORICAL VIEW OF COURT-MARTIAL JURISDICTION

The common law, and the Anglo-American polity in general, have for some centuries been marked by a peculiar, but very natural, ambivalence toward the military. On the one hand, a standing army is a standing menace to republican institutions and civil freedom. English and American statesmen of the seventeenth and eighteenth centuries had not far to look in time or space to find examples of that proposition.

[T]he liberties of Rome proved the final victim to her military triumphs, and . . . the liberties of Europe, as far as they ever existed, have, with few exceptions, been the price of her military establishments. A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision. On the smallest scale, it has its inconveniences. On an extensive scale, its consequences may be fatal. On any scale, it is an object of laudable circumspection and precaution.⁴

On the other hand, there undoubtedly were (and are) times when the presence of large, well-trained, well-equipped, and well-disciplined armed forces is intensely comforting.

The disciplined armies always kept on foot on the continent of Europe, though they bear a malignant aspect to liberty and economy, have, notwithstanding, been productive of the signal advantage of rendering sudden conquests impracticable, and of preventing that rapid desolation, which used to mark the progress of war, prior to their introduction.⁵

The dilemma is most acute when the military asserts some degree of control over civilians, specifically when military tribunals exercise criminal jurisdiction over persons who are not soldiers. It is self-evident that such jurisdiction, however necessary it may sometimes seem, is *pro tanto* a supersession of, and an encroachment upon, civilian government, without (in the circumstances here considered) the excuse of war or other emergency. In addition, the major purpose of military justice has always been deterrence.⁶ It has traditionally

⁴ THE FEDERALIST No. 41 (Madison).

⁵ THE FEDERALIST No. 8 (Hamilton).

⁶ See, e.g., the testimony of Colonel Frederick Bernays Wiener, who won *Covert* and other cases cited in note 2 *supra*, and who may be described as the contemporary equivalent of Colonel Winthrop as an expert on military law and its history, in *Hear-*

placed primary emphasis on the swift and severe suppression of license and insubordination. The pious doctrine that it is better that ninety-nine guilty men go free than that one innocent be convicted is not easily squared with the demands of military discipline. If a soldier who runs away is shot, in Voltaire's expressive phrase, "*pour encourager les autres*," the heartening effect is sadly diminished if ninety-nine out of a hundred deserters get away. The result of this difference in objectives and approach, as seen by Mr. Justice Black, a frequent and articulate spokesman for those who are opposed to any expansion of military jurisdiction, is that "traditionally, military justice has been a rough form of justice, emphasizing summary procedures, speedy convictions and stern penalties" ⁷ Therefore, he concludes, "military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." ⁸ This jaundiced view of courts-martial is, of course, of some antiquity,⁹ and until comparatively recent times was pretty well supported by the facts.¹⁰ Justice Black's strictures seem somewhat excessive, as he himself recognized, in the light of the present-day Uniform Code of Military Justice. In theory, the Uniform Code confers on the accused in a court-martial most of the important constitutional rights, other than the grand and petit juries, which he would have in a civilian criminal court.¹¹ In practice, as

ings on S. 857 Before a Subcommittee of the Senate Committee on Armed Services, 81st Cong., 1st Sess. 140 (1949). Colonel Wiener reiterated these views in 1962. See *Hearings on Constitutional Rights of Military Personnel Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 87th Cong., 2d Sess. 777 (1962). These hearings, which are a mine of information on the policies and practices of the three services (though the mineral content of the ore is rather low), are hereinafter referred to as *Hearings on Constitutional Rights of Military Personnel*.

⁷ *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 35-36 (1955). Macaulay's rhetoric is even better:

The machinery by which courts of law ascertain the guilt or innocence of an accused citizen, is too slow and too intricate to be applied to an accused soldier. For, of all the maladies incident to the body politic, military insubordination is that which requires the most prompt and drastic remedies. . . . For the general safety, therefore, a summary jurisdiction of terrible extent must, in camps, be entrusted to rude tribunals composed of men of the sword.

3 MACAULAY, *HISTORY OF ENGLAND* 35 (1874 ed.).

⁸ *United States ex rel. Toth v. Quarles*, *supra* note 7, at 17.

⁹ See, e.g., 1 BLACKSTONE, *COMMENTARIES* *413.

¹⁰ E.g., *Keyes v. United States*, 109 U.S. 336 (1883); *Beets v. Hunter*, 75 F. Supp. 825 (D. Kan. 1948), *rev'd*, 180 F.2d 101 (10th Cir.), *cert. denied*, 339 U.S. 963 (1950); *Shapiro v. United States*, 69 F. Supp. 205 (Ct. Cl. 1947); see Mullally, *Military Justice: The Uniform Code in Action*, 53 COLUM. L. REV. 1 n.4 (1953).

¹¹ The Code prohibits coerced confessions (art. 31), double jeopardy (art. 44), and cruel or unusual punishments (art. 55); it gives the accused the right to be apprised of the charges against him (art. 30(b)), to be represented by counsel of his choice (art. 38), and to compulsory process to obtain witnesses (art. 46). The principal

interpreted and enforced by the boards of review and the Court of Military Appeals, the Uniform Code may give him more assurance of a fair trial than he would have in many civilian courts.¹² But the extent to which Congress or the Court of Military Appeals can change the basic motivation and approach of military courts is questionable. For example, although article 37 of the Uniform Code probably does as much as Congress can do to eliminate command influence from military justice, the total eradication of such pressure is in all likelihood impossible.¹³ Moreover, congressional devotion to due process has not always stood up when Congressmen were alarmed by what they regarded as a military emergency,¹⁴ and it is by no means inconceivable that some future Congress will see fit to relax the safeguards which now attend court-martial proceedings under the Uniform Code.¹⁵ If that happened, it is unclear to what extent the Bill of Rights would give procedural protection to an accused, civilian or military, who was lawfully subjected to the jurisdiction of a court-martial.¹⁶

The common law viewed military justice with such profound suspicion that the lawful jurisdiction of courts-martial in peacetime and in domestic territory, even over soldiers themselves and for purely military offenses, dates from comparatively modern times.

The common law of England knew nothing of courts-martial, and made no distinction, in time of peace, between a soldier and any other subject; nor could the government then [1685] venture to ask even the most loyal parliament for a mutiny bill. A soldier, therefore, by knocking down his colonel, incurred only the ordinary penalties of assault and

exception is the right to be admitted to bail, which would not usually be of much practical use to a soldier. See *United States ex rel. Watkins v. Vissering*, 184 F. Supp. 529 (E.D. Va. 1960); WINTHROP, *MILITARY LAW AND PRECEDENTS* 114 (2d ed. 1920) [hereinafter cited as WINTHROP]. In general, it seems to be the policy of the military authorities to limit pretrial confinement to the sort of case in which a civil court would be likely to deny bail or set it at a prohibitive figure. See *Hearings on Constitutional Rights of Military Personnel* 847; cf. *United States v. Gray*, 6 U.S.C.M.A. 615, 20 C.M.R. 331 (1956).

¹² See *United States v. Clay*, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951); Wiener, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 266, 302 (1958).

¹³ For a list of horrible examples, see *Hearings on Constitutional Rights of Military Personnel* 780-81. Each of these convictions was affirmed by the board of review and reversed by the Court of Military Appeals. There may well be similar cases which never got to the Court of Military Appeals and others in which the command influence existed but could not be shown.

¹⁴ See, e.g., Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945).

¹⁵ See *Reid v. Covert*, 354 U.S. 1, 37 (1957).

¹⁶ *Ibid.*; see Wiener, *Courts-Martial and the Bill of Rights: The Original Practice* (pts. 1-2), 72 HARV. L. REV. 1, 266 (1958); Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293 (1957); Bishop, *Civilian Judges and Military Justice: Collateral Review of Court-Martial Convictions*, 61 COLUM. L. REV. 40, 55-57 (1961).

battery, and, by refusing to obey orders, by sleeping on guard, or by deserting his colours, incurred no legal penalty at all.¹⁷

In 1689, Parliament passed the original Mutiny Act¹⁸—an instructive example of the schizoid motivations which are still at work. The legislators were urged to action by the concatenation of an imminent war on the continent, a serious mutiny of one regiment at home, and the existence of other regiments which might not have completely transferred their loyalty from James II to William of Orange. At the same time, they were counseled to caution by recent and disagreeable memories of Cromwell's Major Generals and James II's standing army. The act starts with an emphatic declaration that "the raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against Law."¹⁹ But,

it is judged necessary by Their Majestyes and this present Parliament That dureing this time of Danger severall of the Forces which are now on foote should be continued and others raised for the Safety of the Kingdome for the Common Defence of the Protestant Religion and for the reduceing of Ireland.²⁰

The preamble continues:

And whereas noe Man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the Judgement of his Peeres, and according to the Knowne and Established Laws of this Realme. Yet, neverthesse, it being requisite for retaineing such Forces as are or shall be raised dureing this Exigence of Affaires in their Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or stirr up Sedition, or shall desert Their Majestyes Service be brought to a more Exemplary and speedy Punishment than the usuall Forms of Law will allow . . .²¹

However exigent the needs of the military situation may have been, the act gave courts-martial very limited jurisdiction. It applied only

¹⁷ 1 MACAULAY, HISTORY OF ENGLAND 231 (1874 ed.). The Tudor and Stuart monarchs made sporadic efforts, which at least had the excuse of necessity, to promulgate military codes as an exercise of the crown's prerogative, the last of these being the Articles of War of James II of 1688. With much less justification, they sometimes subjected civilians to the jurisdiction of military tribunals. But the latter practice was never legally sanctioned, was very much resented, and was finally declared unlawful in the Petition of Right, 1627, 3 Car. 1, c. 1; see WINTHROP 18-19, 46-47; FAIRMAN, THE LAW OF MARTIAL RULE 9 (2d ed. 1943).

¹⁸ Mutiny Act, 1689, 1 W. & M., c. 5.

¹⁹ Mutiny Act, 1689, 1 W. & M., c. 5, preamble.

²⁰ *Ibid.*

²¹ *Ibid.*

to soldiers, and indeed only to the regulars, since the Militia Forces were exempted. The only offenses triable were mutiny, sedition, and desertion.²² On the other hand, the procedural protections which the act accorded were somewhat primitive, even for that age. The court-martial could not be convened by an officer below the rank of colonel or have fewer than thirteen members, none below the rank of captain. The court had the authority to put witnesses under oath, although apparently it was not required to do so. In capital cases the court had to be sworn, and the votes of nine of the thirteen were necessary for the death sentence. It did confer on the accused one protection which is not found in the Uniform Code, and hopefully is not needed: "noe Proceedings, Tryall or Sentence of Death shall be had or given against any Offender, but betweene the hours of eight in the morning and one in the afternoone"²³—a reflection, probably sufficiently warranted, on the drinking habits of the King's officers.

Since then Anglo-American legislatures, and particularly the Congress of the United States, have steadily expanded the jurisdiction of courts-martial over both persons and offenses without encountering, until quite recently, any substantial judicial check. All of the American Articles of War, from those adopted by the Continental Congress in 1775 down to the Uniform Code, covered various types of civilians accompanying the armed forces in wartime or, after 1916, in peacetime outside the United States.²⁴ This jurisdiction never ran into serious trouble in the lower courts.²⁵

In the Civil War, Congress went further than it previously had gone, and indeed a good deal further than it has gone since.²⁶ The

²² It should, however, be noted that the first Mutiny Act did not limit the jurisdiction of the military, under the King's authority, to try and punish offenses committed by soldiers in places outside the jurisdiction of English civil courts. Later Articles of War have applied equally to soldiers at home and abroad. See WINTHROP 20.

²³ Mutiny Act, 1689, 1 W. & M., c. 5, § 10.

²⁴ See WINTHROP 97-107; Girard, *supra* note 2, at 482-88, 495.

²⁵ *E.g.*, United States *ex rel.* Mobley v. Handy, 176 F.2d 491 (5th Cir. 1949), *cert. denied*, 338 U.S. 904 (1949); Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *dismissed as moot sub nom.* Perlstein v. Hiatt, 328 U.S. 822 (1946); Hines v. Mikell, 259 Fed. 28 (4th Cir.), *cert. denied*, 250 U.S. 645 (1919); *Ex parte* Jochen, 257 Fed. 200 (S.D. Tex. 1919); *Ex parte* Falls, 251 Fed. 415 (D.N.J. 1918); *Ex parte* Gerlach, 247 Fed. 616 (S.D.N.Y. 1917); Grewe v. France, 75 F. Supp. 433 (E.D. Wis. 1948); *In re* Berue, 54 F. Supp. 252 (S.D. Ohio 1944); McCune v. Kilpatrick, 53 F. Supp. 80 (E.D. Va. 1943); *In re* Di Bartolo, 50 F. Supp. 929 (S.D. N.Y. 1943). All of these cases arose during World War I or II. Compare, however, *In re* Varney's Petition, 141 F. Supp. 190 (S.D. Cal. 1956), which involved the court-martial of a civilian employee in Japan after the Korean "police action."

²⁶ So did the President; there were, of course, many instances during and after the rebellion in which military tribunals tried civilians without explicit congressional authority. See Schaffter & Mathews, *The Powers of the President as Commander in Chief of the Army and Navy of the United States*, H.R. Doc. No. 443, 84th Cong.,

Congress of 1862, presumably acting on the premise that civilian due process was too good for the slippery and prehensile entrepreneurs who were then supplying the Army of the United States with decayed beef, shoddy pantaloons, and wornout muskets at extortionate prices, provided that civilian contractors for arms, munitions, and supplies should be "deemed and taken as a part of the land or naval forces . . . , for which . . . [they] shall contract to furnish said supplies" ²⁷ There seem to have been a fair number of courts-martial under this unique provision,²⁸ but the question of its constitutionality was apparently considered only once by a civilian court. Although that case, *Ex parte Henderson*,²⁹ was described by the plurality opinion in *Reid v. Covert*³⁰ as holding that the subjection of contractors to court-martial jurisdiction was "patently unconstitutional," this element of *Henderson* seems to have been dictum. The case was actually decided on the implausible ground that the word "contractor" in the Act of March 2, 1863,³¹ under which Henderson had been charged, was intended to cover only persons who were in fact members of the armed forces, such as "military storekeepers."

This same 1863 statute, however, inaugurated another variety of peacetime jurisdiction over civilians which proved to have more vitality. Aimed primarily at the military opposite numbers of dishonest contractors, it provided in substance that court-martial jurisdiction to try various frauds and larcenies against the United States should survive the accused's discharge or dismissal from the service, regardless of whether the offense could be tried in a civilian court. In slightly varying forms, it remained a fixture in the Articles of War and the Articles for the Government of the Navy³² for nearly ninety years. In 1950 it was replaced by article 3(a) of the Uniform Code,

2d Sess. 4-5 (1956); WINTHROP 828-30; cf. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863). But these were essentially exercises of the Commander in Chief's war powers—"martial rule" in the loyal states and "military government" in occupied parts of the Confederacy—and so do not pose the constitutional problem with which this Article is concerned.

²⁷ Act of July 17, 1862, ch. 200, § 16, 12 STAT. 594.

²⁸ See WINTHROP 98 n.83.

²⁹ 11 Fed. Cas. 1067 (No. 6349) (C.C.D. Ky. 1878). The *Henderson* case was not reported until 1878, but Colonel Winthrop says that it was decided in 1866, WINTHROP 106, and internal evidence in the opinion seems to confirm that it was written shortly after the end of the war. The opinion of the Court of Claims in *Hill v. United States*, 9 Ct. Cl. 178 (1873), apparently assumed, although it did not consider, the constitutionality of the provision.

³⁰ 354 U.S. 1, 20 (1957). Justice Black and his colleagues are not alone in treating *Henderson* as a holding on the constitutional point. See WINTHROP 106; Blair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power*, 50 GEO. L.J. 79, 83 (1961).

³¹ Ch. 67, 12 STAT. 696.

³² Article of War 60, ch. 5, 12 Stat. 696 (1863); Article of War 94, ch. 227, 41 Stat. 805 (1920); Article of War 94, ch. 625, § 237, 62 Stat. 640 (1948); Article for the Government of the Navy 14, ch. 10, 12 Stat. 696 (1863).

which, until it was partially paralyzed by *Toth*, preserved court-martial jurisdiction over any crime committed before the offender was released from subjection to military law—so long as it was punishable by confinement of five years or more, the Code's statute of limitations had not run, and the accused could not be tried in an American civilian court. Courts-martial under this Civil War statute and its successors were by no means rare, and the inferior federal courts almost always upheld their constitutionality.³³ But most of the courts saw the issue as whether such scoundrels ought to be punished, without focusing on the question whether appropriate punishment might not have been inflicted with equal efficiency and more constitutionality by a civilian tribunal. The solitary exception to the pre-*Toth* judicial tolerance of courts-martial of these civilians was *United States ex rel. Flannery v. Commanding General*.³⁴ Aside from the fact that it was reversed by stipulation of the parties,³⁵ the opinion in *Flannery* is less persuasive than it might have been. The decision rested mainly on the technical ground that the sole basis for sustaining the constitutionality of the act was the fifth amendment's exception of "cases arising in the land or naval forces" and that the word "case" as employed therein meant not "event" but "prosecution"—an argument which had been rejected three-quarters of a century before as "certainly a very finely drawn distinction."³⁶

The gradual extension of military jurisdiction over civilians was paralleled by an extension of jurisdiction over offenses of an essentially civilian nature. Earlier articles, like the original Mutiny Act, proceeded on the assumption that the business of a court-martial was to try crimes martial—desertion, mutiny, cowardice, insubordination, and the like—which were unknown to the common law and not cognizable in its courts. In many instances, of course, the soldier who committed an ordinary misdemeanor or felony simultaneously committed some breach of military discipline. Thus, when Sergeant Mason, detailed to guard the assassin of President Garfield, attempted to avenge his Commander in Chief by shooting the prisoner, he was constitutionally tried and sentenced by a court-martial—not for at-

³³ *In re Bogart*, 3 Fed. Cas. 796 (No. 1596) (C.C.D. Cal. 1873); *Kronberg v. Hale*, 180 F.2d 128 (9th Cir. 1950); *Marino v. Hildreth*, 61 F. Supp. 667 (E.D.N.Y. 1945); *Terry v. United States*, 2 F. Supp. 962 (W.D. Wash. 1933); *Ex parte Joly*, 290 Fed. 858 (S.D.N.Y. 1922).

³⁴ 69 F. Supp. 661 (S.D.N.Y. 1946).

³⁵ Order No. 20235, *United States ex rel. Flannery v. Commanding General*, 2d Cir., April 18, 1946.

³⁶ *In re Bogart*, 3 Fed. Cas. 796, 799 (No. 1596) (C.C.D. Cal. 1873). The majority of the Supreme Court sensibly avoided this sterile logomachy in the *Toth* case. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 n.5 (1955). Justice Reed's dissent is heavily entangled in it. *Id.* at 37-42.

tempted murder, but for disobeying orders.³⁷ In time of war and outside the United States, inability to punish those military felons who managed to perpetrate outrages having no specifically military character presented serious problems. In the Mexican War, General Scott, apparently in the capacity of military governor of occupied territory, created military commissions with jurisdiction over anyone, soldier or civilian, charged with "assassination, murder, poisoning, rape," and a long list of other offenses, including most of the usual civilian crimes. The list also included a few others, not so usual, such as the "wanton desecration of churches" and "interruption of religious ceremonies," which conveys a suggestion that the protestant zeal of some of his soldiers was plaguing General Scott at the time.³⁸

Not until the Civil War was in its third year, when Congress passed the first draft law, were courts-martial given jurisdiction to try soldiers for civilian crimes, and then only in time of war, insurrection, or rebellion, and only for major felonies—murder, assault and battery with intent to kill, manslaughter, mayhem, wounding with intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny.³⁹ These offenses, if not distinctively military, were at least among those most likely to be committed by the military, and had a direct and plain relation to military discipline; their swift and severe repression was obviously as much in the Army's interest as in that of the civilian population.

It is a matter well known that the march even of an army not hostile, is often accompanied with acts of violence and pillage by straggling parties of soldiers, which the most rigid discipline is hardly able to prevent. The offenses mentioned are those of most common occurrence, and the swift and summary justice of a military court was deemed necessary to restrain their commission.⁴⁰

³⁷ *Ex parte* Mason, 105 U.S. 696 (1881). Mason was convicted under the then-effective Article of War 66, which denounced "disorders and neglects . . . to the prejudice of good order and military discipline" Similarly, theft could be punished under that general article if the victim was a fellow soldier or the Army itself. See DIG. OP. ARMY J.A.G. 44 (3d ed. 1868). Generally speaking, the question of whether an offense against a civilian affected military discipline was left to the discretion of the military authorities. See WINTHROP 75. Prior to the Civil War, at least, those authorities seem to have been reluctant to try a soldier for an essentially civilian crime unless it had a genuine and substantial connection with military discipline. See *Hearings on Constitutional Rights of Military Personnel* 785.

³⁸ See WINTHROP 832.

³⁹ Act of March 3, 1863, ch. 75, § 30, 12 Stat. 736. The section concluded by providing that "the punishments for such offenses shall never be less than those inflicted by the laws of the state, territory, or district in which they may have been committed." Still limited to time of war, insurrection, or rebellion, it appeared with minor changes in its wording in Articles of War of 1874, Act of June 22, 1874, ch. 5, art. 58, REV. STAT. § 1342 (1875).

⁴⁰ *Coleman v. Tennessee*, 97 U.S. 509, 513 (1878).

The Articles of War of 1916,⁴¹ followed by those of 1920,⁴² introduced the concept of peacetime jurisdiction over ordinary felonies committed by soldiers, but even those articles withheld from court-martial jurisdiction the trial of the capital crimes of murder or rape committed within the United States.⁴³ Court-martial jurisdiction over members of the armed services was not made total, by the addition of power to try murder and rape committed in the United States in peacetime, until the enactment of the Uniform Code in 1950.

The Supreme Court's recent contraction of court-martial jurisdiction over civilian persons, summarized at the beginning of this Article, has not yet generated any corresponding inclination in the lower courts to apply similar constitutional reasoning to military jurisdiction over basically civilian offenses.⁴⁴ The argument presented in the few cases which have raised the issue⁴⁵ has not been that the power to "make Rules for the Government and Regulation of the land and naval Forces," in the light of the "necessary and proper" clause, imports no more than power to punish those military offenses which cannot adequately be dealt with by the civilian courts—although the historical evidence suggests that is what the founding fathers probably had in mind, or at least that it was the military jurisdiction with which they were familiar.⁴⁶ Rather, these unimaginative briefs have been cast in well-worn terms: the fifth amendment's exception from the grand jury requirement of capital or infamous crimes "arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger" means that capital cases, at least, can be tried by court-martial only "in time of war or public danger." The trouble with this textual argument is, of course, that the Supreme Court long ago held that the final clause limiting the exception applies only to the

⁴¹ Ch. 418, § 1342, 39 Stat. 650-70. These articles were largely the work of the then Judge Advocate General of the Army, Major General Enoch H. Crowder. But even General Crowder could see no excuse for a military trial of a capital offense, in peacetime and in the United States. See *Hearings on Constitutional Rights of Military Personnel* 778. The American Legion takes the position that the Code ought to be amended to deprive the military of such jurisdiction in capital cases and to give civilian courts priority of jurisdiction over "peacetime offenses of a civil nature" committed within the United States. *Id.* at 425, 456.

⁴² Ch. 227, 41 Stat. 787.

⁴³ *Cf. Lee v. Madigan*, 358 U.S. 228 (1959), holding that June 10, 1949, though the country was still technically at war with Germany and Japan, was "time of peace," and that a court-martial could not try a soldier for a murder committed on that date. Actually, Lee was a military convict, a former soldier with an executed dishonorable discharge, but the Court's construction of "time of peace" made his status irrelevant. See text accompanying note 49 *infra*.

⁴⁴ It may be difficult to disentangle such offenses from the breaches of military discipline which are implicit in most of them.

⁴⁵ See cases cited note 48 *infra*.

⁴⁶ See Duke & Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 VAND. L. REV. 435, 441 (1960).

militia⁴⁷—and so the inferior courts have held in all the recent cases in which the argument has been made.⁴⁸ The Supreme Court has not had to reconsider this construction of the fifth amendment or the more fundamental question of the scope of Congress' power in this context. But it is worth noting that, in strictly construing old Article of War 92, which forbade courts-martial for rape or murder in domestic territory "in time of peace," to prohibit such trial when the state of war was purely technical, the Court used language and cited cases, such as *Toth* and *Covert*, which suggest strongly that the result might have been the same even if the Congress of 1920, like that of 1950, had unambiguously authorized such trials.⁴⁹ Moreover, some of the language employed by Mr. Justice Black in *Toth* suggests that he, at least, thinks that much of the justification for trials by military tribunals rests on their professional expertise concerning the specialized problems of purely military crimes.⁵⁰ But more recently, he (and Justice Douglas) concurred in Justice Clark's opinion in *Kinsella v. United States ex rel. Singleton*,⁵¹ in which it is flatly stated that "the power to 'make Rules for the Government and Regulation of the land and naval Forces' bears no limitation as to offenses."⁵² Neither does it seem to bear, according to the majority, any limitation as to punish-

⁴⁷ *Johnson v. Sayre*, 158 U.S. 109, 115 (1895); *Ex parte Mason*, 105 U.S. 696, 701 (1881).

⁴⁸ *Owens v. Markley*, 289 F.2d 751 (7th Cir. 1961); *Burns v. Taylor*, 274 F.2d 141 (10th Cir. 1959), cert. denied, 364 U.S. 837 (1960); *Jennings v. Markley*, 186 F. Supp. 611 (S.D. Ind. 1960); *United States v. Schafer*, 13 U.S.C.M.A. 83, 32 C.M.R. 83 (1962); *United States v. Kemp*, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962).

⁴⁹ *Lee v. Madigan*, 358 U.S. 228 (1959). In *Thompson v. Willingham*, 217 F. Supp. 901 (M.D. Pa. 1962), the attack of the petitioner (who was his own lawyer) on a court-martial's jurisdiction to try him for murder in time of peace seems to have been predicated on a careless reading of *Lee v. Madigan*, *supra*, as a decision under the Uniform Code rather than on the constitutional question. At any rate, the court assumed the constitutionality of the jurisdiction.

⁵⁰ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955): "It is true that military personnel because of their training and experience may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc." See also Black and Douglas, JJ., concurring in *Trop v. Dulles*, 356 U.S. 86, 104 (1958) ("military courts may try soldiers and punish them for military offenses"). The converse was stated by Mr. Justice Douglas in *Lee v. Madigan*, *supra* note 49: "Civil courts were, indeed, thought to be better qualified than military tribunals to try nonmilitary offenses." *Id.* at 234. These remarks, of course, were made in contexts in which the question of the constitutionality of court-martial jurisdiction over particular offenses (murder in *Toth* and *Lee*, desertion in *Trop*) was not in issue. But they do throw some light on the Black-Douglas conception of the *raison d'être* of a court-martial. Colonel Wiener, though he thought it "the part of wisdom to restrict the military jurisdiction to occasions that affect military discipline," could see no constitutional limitation on the power of courts-martial to try soldiers for such offenses under the general article. *Hearings on Constitutional Rights of Military Personnel* 785-86.

⁵¹ 361 U.S. 234 (1960).

⁵² *Id.* at 246.

ment. In *Reid v. Covert*,⁵³ Justices Frankfurter and Harlan, concurring in the result, would go no further than to say courts-martial could not try civilians for capital crimes.⁵⁴ They maintained that position in *Kinsella v. United States ex rel. Singleton*; ⁵⁵ their view in effect was that it might be "necessary and proper" for the regulation of the land and naval forces that Congress give to the military power to jail accompanying civilians, but not that there be committed to courts-martial power to invoke the "awesome finality" of hanging them. The rest of the Court could see no such distinction.

The Court's indifference, when considering the constitutionality of trial by court-martial, to the nature either of the offense or of the punishment to be inflicted is a corollary of the majority's preoccupation with the status of the accused. The basic proposition that congressional power to authorize trial by court-martial is to be limited to "the least possible power adequate to the end proposed" ⁵⁶ is seen as requiring its restriction to the smallest possible number of persons. Once it is established that the accused is a "member or part of the armed forces," a court-martial can apparently be authorized to try him for any offense, presumably including a violation of the antitrust laws, and can be given the power to inflict upon him any punishment, military or civilian. The "status" theme runs through all the cases denying jurisdiction over civilians; its most forthright and uncompromising formulation is probably that of Justice Clark (a recent catechumen, for he had dissented in *Reid v. Covert*) in the *Singleton* case: "The test for jurisdiction . . . is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' " ⁵⁷ And again, "If civilian dependents are included in the term 'land and naval Forces' at all, they are subject to the full power granted the Congress therein to create capital as well as noncapital offenses." ⁵⁸ Justice Black deduces much the same conclusion from the text of the Constitution: "The Constitution does not say that Congress can regulate 'the land and naval Forces and all other persons whose regulation might have some relationship to maintenance of the land and naval Forces.' " ⁵⁹ The beautiful simplicity of this technique of exegesis is

⁵³ 354 U.S. 1 (1957).

⁵⁴ *Id.* at 41.

⁵⁵ 361 U.S. at 249 (dissenting opinion).

⁵⁶ *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 230-31 (1821), quoted in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1955).

⁵⁷ 361 U.S. at 240-41, 246.

⁵⁸ *Id.* at 246.

⁵⁹ *Reid v. Covert*, 354 U.S. 1, 30 (1957). See also *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15 (1955).

reminiscent of the Justice's approach to other problems of constitutional law.⁶⁰

This single-minded concentration on status did not receive the approbation of all the Justices. Justices Frankfurter and Harlan in particular thought that the extent of Congress' power to regulate the land and naval forces could only be determined in the light of the "necessary and proper" clause. As the latter Justice phrased it in his dissent (in which Justice Frankfurter joined) in *Kinsella v. United States ex rel. Singleton*:⁶¹

I think that drawing a line of demarcation between those who are constitutionally subject to the Article I, § 8, cl. 14 power, and those who are not, defies definition in terms of military "status." I believe that the true issue on this aspect of all such cases concerns the closeness or remoteness of the relationship between the person affected and the military establishment.⁶²

The quoted sentences do not clearly suggest that factors other than the closeness of the relationship may be relevant; they can be read as proposing only a more flexible concept of "status," not much different from the ideas of Justices Whittaker and Stewart, who thought that because the relationship of a civilian employee to the military is closer than that of a civilian dependent, and the need to discipline him consequently greater, a court-martial could constitutionally try the former for any offense, and inflict any punishment upon him, but that it could not try the latter at all.⁶³ Even Justice Black's opinion for the plurality in *Reid v. Covert* displayed a cautious awareness that there are many degrees of relationship to the armed forces and that not everyone is clearly in or clearly out.

Even if it were possible, we need not attempt here to precisely define the boundary between "civilians" and members of the "land and naval Forces." We recognize that there might be circumstances where a person could be "in" the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform.⁶⁴

⁶⁰ See Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960); Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 741 (1963).

⁶¹ 361 U.S. at 257 (1960). See also *id.* at 261 n.2 (Mr. Justice Whittaker concurring).

⁶² *Id.* at 257.

⁶³ *Id.* at 264-65.

⁶⁴ 354 U.S. at 22-23. Justice Black's hedge may have been intended to dispel any implication that Congress could not constitutionally subject to court-martial a draftee not actually inducted, as Congress had done in World War I. Cf. *Selective Draft Law Cases*, 245 U.S. 366 (1918); see *Billings v. Truesdell*, 321 U.S. 542, 556 (1944);

Such a test means merely that whoever gets too close to the armed forces, whoever steps over the line separating those "in" from those "out," is subject to the totality of military jurisdiction; whoever remains on the other side of that line is wholly immune. If retired regulars, or reservists, or dishonorably discharged prisoners, are, on balance, "in" the land or naval forces, Congress can subject them to court-martial for any offense, military or civilian, and to any valid punishment, military or civilian. But Justices Harlan and Frankfurter did, after all, regard the nature of the offense—or, more precisely, the punishment—as crucial. "The view that we must hold that non-military personnel abroad are subject to peacetime court-martial jurisdiction either for all offenses, or for none at all, represents an inexorable approach to constitutional adjudication to which I cannot subscribe."⁶⁵

This, then, is the historical and constitutional context in which the lower courts must decide the amenability to court-martial jurisdiction of the categories of persons, neither simon-pure civilians nor uniformed military personnel on active duty, whom Congress has subjected to that jurisdiction.

II. COURT-MARTIAL JURISDICTION OVER RETIRED REGULARS

Article 2(4) of the Uniform Code subjects to the Code, and therefore to trial by court-martial, "retired personnel of a regular component of the armed forces who are entitled to receive pay."

The potential practical significance of the provision is great, perhaps greater than Congress could have supposed in 1951. It has been estimated, in the light of the huge size of the peacetime regular establishment, that there will be upwards of one million retired regulars, entitled to pay, in the not too distant future.⁶⁶ Quite aside from the possibility of other forms of punishment, forfeiture of retired pay

United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 23, 32 (1955) (Reed, Burton, and Minton, JJ., dissenting). He may also have had in mind the cases, distinguished by Justice Clark in *Guagliardo*, holding that such classification-defying specimens as the old Navy paymaster's clerks, who had no rank but wore uniforms, could constitutionally be tried by Navy courts. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 284-85 (1960); *Johnson v. Sayre*, 158 U.S. 109 (1895); *Ex parte Reed*, 100 U.S. 13 (1879).

⁶⁵ 361 U.S. at 256.

⁶⁶ See Blair, *op. cit.* *supra* note 30, at 81. The estimate seems plausible in the light of the retirement figures furnished by the three services to the Senate Subcommittee on Constitutional Rights in 1962. See *Hearings on Constitutional Rights of Military Personnel* 827-29, 889-92, 927. Extrapolation from these statistics requires a great deal of guesswork, for they cover only enlisted personnel in the fiscal years 1951-1961 and, moreover, do not distinguish between retired regulars, who are subject to the Code, and retired reservists, who are not. It is probable, however, that a large majority of retired enlisted men served in the regulars. As of June 30, 1962, there were more than 2,800,000 members of the armed services on active duty. See DEP'T DEFENSE ANN. REP. 376, 378 (1962).

pursuant to court-martial sentence would mean real disaster to most of these people.

The constitutionality of such jurisdiction has, at any rate, whatever solidity derives from long congressional acquiescence, for the amenability of retired regulars to court-martial, though unknown to the founding fathers, is as old as the retired list itself, which was also unknown to them.⁶⁷ The concept of retirement dates from 1861, a year in which the problem of debridement from the military corpus of physically and mentally decrepit officers presented itself forcibly to the attention of Congress.⁶⁸ For the next fifty-five years, although the jurisdiction remained on the books,⁶⁹ few subjects seem to have concerned Congress less than the constitutional rights of retired regulars—in large part, no doubt, because there were very few of them by modern standards,⁷⁰ still fewer who engaged in conduct sufficiently flagitious to call for criminal prosecution, and hardly any who were actually court-martialed. In 1912, in fact, Major General Enoch H. Crowder, then the Judge Advocate General of the Army and a believer in the expansion in all directions of the salutary effects of trial by court-martial, persuaded Congress to augment the general article by the addition of the clause "all conduct of a nature to bring discredit upon the military service," precisely because most of the peccadilloes of retired enlisted men might otherwise have to go unpunished, at least by the military.⁷¹ At that time, it will be recalled, the common,

⁶⁷ The Navy, however, in its brief in *United States v. Hooper*, in the Court of Military Appeals, conceded—in this respect agreeing with the General Counsel of the Department of Defense—that tradition was not in itself an adequate reason for the preservation of such jurisdiction. See Brief for Appellee, *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

⁶⁸ Act of August 3, 1861, ch. 42, 12 Stat. 287. The primeval congressional provisions for retirement distinguished between those who were "wholly retired" (with a year's pay) and who thereupon became pure civilians, not subject to the Articles of War, and those who were merely retired from active service, retaining both their entitlement to pay and their subjection to the Articles. See 29 OPS. ATT'Y GEN. 397, 401-02 (1912); WINTHROP 746-47. The unwarranted connection between pay status and subjection to the Articles of War is reflected in the present article 2(4) of the Uniform Code, which applies only to those retired military personnel who are on the payroll.

⁶⁹ "Since August 3, 1861, there have been in effect at all times, without interruption, statutes which expressly subject to military law and trial by Court-Martial retired officers of the regular components of the Armed Forces of the United States who are entitled to receive pay." *Hooper v. Hartman*, 163 F. Supp. 437, 442 (S.D. Cal. 1958). In 1872, Judge Advocate General Holt expressed the view that "an officer on the retired list, being as much a part of the Army as an officer on the active list, would be subject to trial by general court-martial independently of the provision, specifically so subjecting him, of section 1256, R.S." See DRG. OPS. ARMY J.A.G. 992 (1912).

⁷⁰ The Army's retired list was for many years limited to 300. Act of July 15, 1870, ch. 294, § 5, 16 Stat. 317; see *Runkle v. United States*, 122 U.S. 543, 549 (1887). By 1895 retired officers and enlisted men together aggregated only 1,562. See WINTHROP 87.

⁷¹ Officers, of course, were already chargeable with "conduct unbecoming an officer and a gentleman."

civilian variety of crime was not in peacetime within the reach of a court-martial, and, although the article already denounced conduct "to the prejudice of good order and military discipline,"⁷² the General freely conceded that "the act of a man on the retired list, away from the military post, cannot reasonably be said to affect military discipline."⁷³ It is difficult to see why the Army needed such jurisdiction if the conduct denounced had no effect on military discipline. Nevertheless, General Crowder got his amendment,⁷⁴ and the language still occupies a prominent position in the general article (article 134 of the Uniform Code), where it has caused far more grief to the active than the retired list.⁷⁵

In 1916, however, the problem of the court-martialing of retired officers received attention at both ends of Pennsylvania Avenue. When Congress in that year, as part of a comprehensive and badly needed reorganization of the military establishment, revised the Articles of War, a Senate rider eliminated this jurisdiction. Woodrow Wilson took the omission so seriously that he vetoed the entire bill,⁷⁶ including the appropriations, with the result that Congress restored the missing jurisdiction. That veto message⁷⁷ is probably the best, as it is certainly the most eloquent, statement of the case for subjecting retired officers to the military code. It seems to contain a measure of genuine Wilsonian rhetoric, though it was probably prepared by General Crowder, himself no contemptible rhetorician. The President started with the argument *quod semper*: officers on the retired list had always been subject to the Articles of War. They were declared by statute to be a part of the regular Army, were permitted to wear the uniform, were subject to recall by the President in time of war or national emergency, and were thus to be distinguished from "mere pensioners, from whom no further military service is expected." All these premises are still as true and have as much, or as little, relevance as in 1916. Warming to his work, he continued:

They are, therefore, members of the Army, officers of the United States, exemplars of discipline, and have in their keeping the good name and the good spirit of the entire Military Establishment before the world. Occupying such a

⁷² U.S. WAR DEP'T, *MANUAL FOR COURTS-MARTIAL* ¶ 446 (1917).

⁷³ See *Hearings on the Revisions of the Articles of War Before the House Committee on Military Affairs*, 62d Cong., 2d Sess. 83, 84-85 (1912).

⁷⁴ Articles of War of 1916, ch. 418, art. 96, 39 Stat. 666.

⁷⁵ See Hagan, *The General Article—Elemental Confusion*, *Military L. Rev.*, Oct. 1960, p. 63.

⁷⁶ H.R. 16460, 64th Cong., 2d Sess. (1916).

⁷⁷ 53 Cong. Rec. 12844-45 (1916). It is quoted *in extenso* in *United States v. Hooper*, 9 U.S.C.M.A. 637, 643-45, 26 C.M.R. 417, 423-25 (1958).

relation, their subjection to the rules and Articles of War and to trial by general court-martial have always been regarded as necessary, 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.⁷⁸

Here is obscure and ominous language: Is the reference to "tendencies" intended to suggest that without court-martial control the retired list may become a source of plots and conspiracies against the Government and the democratic order, a hotbed of dreamers of military *coups d'état* and hopeful men on horseback?⁷⁹ Such fears are not, of course, pure fantasy, as is convincingly demonstrated in the histories of the Weimar Republic, the Third, Fourth, and Fifth French Republics, and other polities too numerous to mention. But although our own history is not devoid of former generals (and an ex-admiral or so) who have rather easily been persuaded to see themselves as saviors of the country, in our case all of them who amounted to anything have attempted or accomplished the salvation by resigning from the military service and running for office in the usual way. Whatever danger there may be in electing to high office former military men is not likely to be alleviated by subjecting them to court-martial before they reach that office. True, article 88 of the Uniform Code, which subjects to punishment "any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present," would, if strictly applied, considerably inhibit the ordinary conduct of one afflicted with the itch for elective office.⁸⁰ But it has not in fact been so applied. For one thing, the article has not been construed to cover polemics which express contempt of the subject in his official capacity or of his official policies and conduct. Strong language may be employed so long as it is not directed *ad hominem*:

⁷⁸ *Id.* at 644, 26 C.M.R. at 424.

⁷⁹ Colonel Wiener, testifying before the Senate Subcommittee on Constitutional Rights, put it this way: "I think what he [Wilson] had basically in mind was some retired general popping off and saying he didn't like the President, the Commander in Chief's policies." *Hearings on Constitutional Rights of Military Personnel* 788.

⁸⁰ During the course of the Senate hearings on the Uniform Code the late Senator Kefauver purported to be somewhat alarmed by the thought that General Eisenhower, Admiral Nimitz, or other members of the retired list might be court-martialed for "calling public officials what they really are." See *Hearings on S. 87 Before a Subcommittee of the Senate Committee on the Armed Services*, 81st Cong., 1st Sess. 330 (1949). Senator Saltonstall did not view the prospect with similar alarm. At that time General Eisenhower was not known to be a Republican and was, indeed, regarded in some circles as a likely candidate for the Democratic nomination in 1952.

"Adverse criticism of one of the officials or groups named in the article, in the course of a political discussion, even though emphatically expressed, if not personally contemptuous, may not be charged as a violation of the article."⁸¹ Moreover, President Lincoln seems to have been the only beneficiary of whatever protection it affords.⁸² It has, of course, no application to an officer who has resigned from the service and would presumably be unconstitutional if it purported to do so. Even if the man of destiny thinks to attain his goals by inciting to riot in Oxford, Mississippi, or other violent means, and is reluctant (in case the putsch fails) to abandon his pension by resigning, it is doubtful that subjecting him to military jurisdiction adds anything to the civilian law's protection against subversion and sedition, except to the extent that it avoids local juries favorable to the brand of sedition involved. The history of those countries in which military subversion or sedition is a commonplace feature of the governmental process shows that the real danger comes from those officers who are very much in active service; the ex-general will not get very far unless he has the support of the officers who actually control the armed forces. If he has that support, he is not likely to be much deterred by the threat of being brought before a court-martial drawn from their ranks—a fact thoroughly appreciated, for example, by President DeGaulle.

President Wilson, had, however, other reasons, grounded not merely upon solicitude for the national welfare, but upon concern for the retired officers themselves. After adverting to "the wholesome and unifying effect of . . . subjection to a common discipline," he said:

I am persuaded that officers upon the retired list would themselves regard as an invidious and unpalatable discrimination which in effect excluded them from full membership in the profession to which they have devoted their lives, and of which by the laws of their country they are still members.⁸³

The syntax is execrable, but the meaning is clear and perhaps not altogether without psychological validity. The estimable old gentlemen who constitute the retired list undoubtedly cherish their military status, and some of them may feel (if they stop to think about it) that sub-

⁸¹ See U.S. DEP'T OF DEFENSE, *MANUAL FOR COURTS-MARTIAL* ¶167 (1951).

⁸² See WINTHROP 565-66. Quoting Colonel Wiener again, "I know there is one retired BG [Brigadier General] who always pops off, the committee knows about him. He will never be tried because there is some question as to whether he has got all his marbles, I don't mean he is committable, but he is a crackpot, so why bother with him?" *Hearings on Constitutional Rights of Military Personnel* 789.

⁸³ 53 Cong. Rec. 12844-45 (1916) quoted in *United States v. Hooper*, 9 U.S. C.M.A. 637, 644, 26 C.M.R. 417, 424 (1958).

jection to the military code, no less than the right to wear the uniform and print their rank upon their calling cards, is one of the essential distinctions between them and a civilian population to which they do not wish to be completely homologized. One is reminded of the famous episode in which Caesar scotched a mutiny in the Tenth Legion, by addressing the soldiers as "*Quirites*" (a term which is usually translated as "citizens," though its actual meaning seems more closely approximated by "voters"), a shocking expedient which instantly recalled them to their duty.⁸⁴ But it is probable that the comfort retired officers derive from subjection to military jurisdiction evaporates rather rapidly when that jurisdiction is actually invoked. It must be borne in mind that in the case of offenses which are not purely military, it represents an additional, rather than an exclusive, possibility of punishment. The jurisdiction of courts-martial over such offenses is of course concurrent with that of civilian courts,⁸⁵ and trial by court-martial is compatible with trial by a state court, and vice versa,⁸⁶ under the familiar principle that the prohibition against double jeopardy does not bar a second trial by a different sovereign.⁸⁷ President Wilson's psychology certainly lacks experimental verification, for those retired officers who have in recent years been court-martialed seem to have derived very little satisfaction from the experience; their challenges to the jurisdiction indicate strongly that they found it both invidious and unpalatable.

Wilson's final argument was a suggestion that it might actually be unconstitutional to relieve retired officers from amenability to the Articles of War:

So long as Congress sees fit to make the retired personnel a part of the Army of the United States, the constitutionality of the proposed exemption of such personnel from all liability under the Articles of War is a matter of

⁸⁴ 4 MOMMSEN, HISTORY OF ROME 527 (Dickson transl. 1871). See also SUTONIUS, THE LIVES OF THE TWELVE CAESARS 39 (Modern Library ed. 1931).

⁸⁵ E.g., *Caldwell v. Parker*, 252 U.S. 376 (1920); *Peek v. United States*, 321 F.2d 934 (9th Cir. 1963); *Kennedy v. Sanford*, 166 F.2d 568 (5th Cir.), cert. denied, 333 U.S. 864 (1948); *Thompson v. Willingham*, 217 F. Supp. 901 (M.D. Pa. 1962).

⁸⁶ Article 44(a) of the Uniform Code, which provides that "no person may, without his consent, be tried a second time for the same offense," is not construed to bar a court-martial after a state trial based on the same act. See U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 68d (1951). In practice, there is in all three services as a matter of policy a presumption (less strong in the Navy than in the Army or Air Force) against court-martial for an offense which has already been tried by a civilian court. See *Hearings on Constitutional Rights of Military Personnel* 874, 909, 961.

⁸⁷ *United States v. Lanza*, 260 U.S. 377 (1922); cf. *Grafton v. United States*, 206 U.S. 333 (1907). Of course, a state's own constitution or statute may treat as former jeopardy a trial by a court-martial or other tribunal operating under federal sovereignty. E.g., *State ex rel. Cobb v. Mills*, 82 Okla. Crim. 155, 163 P.2d 558 (1945).

serious doubt, leaving the President, as it does, without any means sanctioned by statute of exercising over the personnel thus exempted the power of command vested in him by the Constitution.⁸⁸

The argument, although interesting and original, does not carry complete conviction, for it goes far beyond the usual concept that "a law repugnant to the constitution is void"⁸⁹ and indeed seems to suggest that Congress is under a constitutional obligation to pass some laws. But it fails to say how that obligation is to be enforced—unless its import is that the President, as Commander in Chief and as a necessary corollary to his power of command, may subject to court-martial any member of the armed forces, with or without congressional sanction—a proposition which brings us all the way back to James II. It may be true that courts-martial "are in fact simply instrumentalities of the executive power, provided by Congress for the President as Commander-in-Chief, to aid him in properly commanding the army and navy and enforcing discipline therein,"⁹⁰ but this is far from saying that the Constitution permits the President, as well as Congress, "To make Rules for the Government and Regulation of the land and naval Forces," any more than he can "raise and support Armies" or "provide and maintain a Navy." Nor does it seem to be true, in the light of the recent Supreme Court decisions already discussed, that Congress can make a civilian a member of the land or naval forces, constitutionally subject to military jurisdiction, simply by so labelling him. In fact, about the only command which the President would have occasion to issue to a retired officer is an order, when authorized by statute, to return to active duty. The enforcement of such an order would hardly require comprehensive court-martial jurisdiction over an officer on the retired list, for the order would ipso facto restore him to active duty status and constitutionally subject him to the Articles of War, just as a draftee could constitutionally be made a member of the armed forces, triable by court-martial, from the moment he is ordered to report for induction, regardless of whether he actually shows up and takes the oath.⁹¹ In short, President Wilson's constitutional point need not be taken very seriously.

⁸⁸ 53 Cong. Rec. 12844-45 (1916) quoted in *United States v. Hooper*, 9 U.S.C. M.A. 637, 644, 26 C.M.R. 417, 424 (1958).

⁸⁹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 60 (1803).

⁹⁰ WINTHROP 49. (Emphasis deleted.) See also Morgan, *The Existing Court-Martial System and the Ansell Army Articles*, 29 YALE L.J. 52, 66 (1919).

⁹¹ See note 64 *supra*. Article 2(1) of the Uniform Code, though it no longer covers draftees before their actual induction, subjects to military jurisdiction "other persons lawfully called or ordered into, or to duty in or for training in, the armed forces, from the dates when they are required by the terms of the call or order to obey it." Cf. *In re La Plata's Petition*, 174 F. Supp. 884 (E.D. Mich. 1959).

Whatever the merits of his supporting arguments, Wilson's veto stuck, and Congress has not since visibly troubled itself with the problem. In the congressional hearings on the Uniform Code, the Judge Advocate General of the Army, although he discussed at some length and criticized acutely the proposed jurisdiction over reservists on inactive duty training and discharged soldiers, said nothing at all about retired personnel.⁹² 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."⁹³

This Congressional indifference is doubtless in large part attributable to the seeming unimportance of the question. Despite President Wilson's dark forebodings, the policy of the services had for many years been to leave to the civilian authorities retired officers who misbehaved themselves.

The Army's views on the matter seem to have solidified after the case of Major Kearney.⁹⁴ That officer, though he was undoubtedly retired and presumably in receipt of pay,⁹⁵ was not an "exemplar of discipline"; if his sins were not as scarlet they were at least of a rich wine red, for the Major was a souse. His active career contained several unfortunate episodes (including a court-martial which shortly preceded his retirement), and a life of leisure did nothing to change his notions of recreation. One night in San Francisco he was arrested on the complaint of a hotel clerk, apparently for being excessively drunk and having an unauthorized lady in his room. The civilian authorities, having arrested him, let him go and took no further measures. But the sensibilities of the military authorities were far more outraged, though the offense did not, I trust, bear a particularly military character. In almost no time the poor Major was hauled before a general court-martial, charged with violation of Article of War 95 (conduct unbecoming an officer and a gentleman) in that he was drunk and disorderly "to the disgrace of the military service." He was convicted and sentenced to be dismissed from the service. The

⁹² *Hearings on S. 857 and H.R. 4080 Before a Subcommittee of Senate Committee on Armed Services*, 81st Cong., 1st Sess. 256 (1949). See note 1 *supra*.

⁹³ H.R. REP. No. 491, 81st Cong., 1st Sess. 10 (1949); S. REP. No. 486, 81st Cong., 1st Sess. 7 (1949).

⁹⁴ 3 J.A.G.D. Board of Review 63 (1931).

⁹⁵ He had been retired under § 24b of the Reorganization Act of June 4, 1920, ch. 227, § 24b, 41 Stat. 773, which provided that all Army officers should be arranged in two classes: Class A, to be retained in the service, and Class B, not to be retained. A second board then determined whether a Class B officer's classification was due to his own "neglect, misconduct or avoidable habits." If so, he was discharged outright; if not, he was retired with pay. See *Rogers v. United States*, 270 U.S. 154 (1926); *United States ex rel. Creary v. Weeks*, 259 U.S. 336 (1922). Apparently the Class B board had been merciful to Major Kearney.

Board of Review, though it found with incomprehensible subtlety that the evidence supported only conviction of the lesser included offense of "conduct of a nature to bring discredit on the service" in violation of the 96th article, affirmed the sentence. The Judge Advocate General on the same day recommended confirmation, being "convinced . . . that the accused is an undesirable type, unfitted to be carried on the rolls of the Army." But the letter with which the Secretary of War transmitted the record to the President expressed other views. Though they appeared over the signature of the Honorable Patrick Jay Hurley, who held that post in Hoover's cabinet,⁹⁶ they are nonetheless cogent and deserving of quotation:

I . . . disagree entirely with the fundamental basis of the 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.⁹⁷ It has been the immutable custom of the service that officers when retired, unless some extraordinary 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 same police restrictions and jurisprudential processes as the ordinary civilian.

In the present instance the accused, an officer on the retired list, not in uniform or in any way connected with the military establishment, was drunk in his hotel room. [He was arrested, but] . . . he was not brought to trial by the civil authorities. The military authorities, however, then proceeded to apply the normal processes of the active service. This case would establish a precedent along such lines.

I believe it to be fraught with danger in many ways, and I, therefore, recommend that the proceedings be disapproved.

On December 30, 1931, President Hoover disapproved the entire proceedings, including the sentence. Since then, the Army has never (or hardly ever)⁹⁸ attempted to court-martial a retired officer or

⁹⁶ It is possible that the letter was the work of General Douglas MacArthur, then Chief of Staff. The language, if not the policy, is certainly in his style.

⁹⁷ Here, of course, the Secretary overstated his case, for there was nothing to prevent the local authorities from prosecuting Major Kearney, had they so desired. See note 86 *supra*.

⁹⁸ Colonel Wiener mentions a subsequent court-martial and dismissal of a retired Army officer for passing worthless checks. *Hearings on Constitutional Rights of Military Personnel* 788. The Colonel's memory is capacious and precise, but I have been unable to locate any further information on this case, the sentence in which may have been disapproved by higher authority.

enlisted man, and neither has the Air Force. Nothing in the intervening third of a century of hot and cold war has caused the Army to change its mind. Its views are still the same, as demonstrated by the following extract from the Report, approved by the Secretary, of its *Ad Hoc* Committee To Study the Uniform Code of Military Justice:

The armed forces have court-martial jurisdiction over retired members of a regular component who are entitled to draw pay Retired persons rarely have been tried by court-martial. However, as a result of their being subject to the Uniform Code of Military Justice, the Army is often asked to handle complaints, sometimes frivolous, that retired personnel are believed to have committed violations of the Code. The former attitude that members drew retired pay to keep themselves ready to return to active duty has been replaced by the concept that retired pay is a vested right accruing from honorable service for a prescribed time. Thus one of the main rationalizations for continuation of court-martial jurisdiction largely has evaporated.

Retired members of the armed forces are merged with the general civilian population of the United States. They should be subject to the same laws as their neighbors with the same obligations and the same freedom of action. Courts-martial jurisdiction imposes an obligation to abide by a different set of laws.

Good order and discipline in the armed forces are not benefited by continuing jurisdiction over retired members unless they are on active duty. . . . The Committee considers jurisdiction over retired members unnecessary and recommends amendment to Article 2, Uniform Code of Military Justice, to eliminate that jurisdiction.⁹⁹

But there is no evidence that the Army's views are shared by the Department of Defense, which has yet to sponsor the proposed amendment. The Navy's ideas, indeed, are plainly opposed, for at least twice in recent years it has court-martialed retired officers.

In its legal essentials the first of these cases, that of Admiral Hooper,¹⁰⁰ does not differ greatly from Major Kearney's. The Admiral, who had retired in 1948 after an honorable and even distinguished career in the Regular Navy, resided in California, where he engaged in various acts of sodomy, some of them with enlisted members of the Marine Corps and Navy, in violation of both Sections

⁹⁹ COMMITTEE ON THE UNIFORM CODE OF MILITARY JUSTICE, GOOD ORDER AND DISCIPLINE IN THE ARMY, REPORT TO HONORABLE WILBER M. BRUCKER, SECRETARY OF THE ARMY 175 (1960).

¹⁰⁰ *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958).

286 and 288a of the California Penal Code and Article 125 of the Uniform Code of Military Justice. California seems to have overlooked the Admiral's misconduct. Not so the Navy; indeed it was the Navy, by methods which, though they may not have violated the fourth amendment, added very little to the dignity of the service, which uncovered the evidence against him.¹⁰¹ On April 15, 1957, he was charged with violations of articles 125 (sodomy), 133 (conduct unbecoming an officer and gentleman), and 134 (conduct of a nature to bring discredit upon the armed forces) of the Uniform Code. On May 6 and 7 he was tried by general court-martial, convicted, and sentenced to be dismissed from the service and to total forfeiture of pay. The Navy's Board of Review affirmed, making short work of the accused's contention that he could not constitutionally be tried unless recalled to active duty,¹⁰² which could not have been done without his consent.¹⁰³

At this point, and before the Court of Military Appeals had acted,¹⁰⁴ Admiral Hooper attempted a flanking maneuver, petitioning a federal district court for injunctive relief and for the convening of a three-judge court to pass on the constitutionality of article 2(4).¹⁰⁵ That court denied relief, on the ground, *inter alia*, that the petitioner had not exhausted his military appellate remedies.¹⁰⁶ But the court's conclusions of law included a flat statement that article 2(4) "appears to be constitutional without doubt, to the extent that no substantial issue of its unconstitutionality is sufficiently presented as to require the convening" of a three-judge court.¹⁰⁷ The court of appeals, though it remarked that "very interesting questions lurk here," concluded that "the doctrine of exhaustion of remedies . . .

¹⁰¹ No less than four agents of the Office of Naval Intelligence, two of them commissioned officers, 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.

¹⁰² WC NCM 57-00988 (unpublished), Sept. 10, 1957. The Board, referring to the "time-honored jurisdiction of courts-martial to try retired regular personnel," ruled that Hooper's case was one arising in the naval forces within the meaning of that clause of the fifth amendment and that he was "still an officer of the Navy." It held further that his pay was in the nature of salary, rather than a pension for past services of which he could not constitutionally be deprived.

¹⁰³ "In time of war or national emergency declared by the President, the Secretary of the Navy may order any retired officer of the Regular Navy or the Regular Marine Corps to active duty at sea or on shore. At any other time the Secretary may order such a retired officer to active duty at sea or on shore only with his consent." 10 U.S.C. § 6481 (1958).

¹⁰⁴ Since the accused had flag rank, review by that court was mandatory under article 67(b) (1) of the Code.

¹⁰⁵ The Admiral had not been arrested or confined; hence the writ of habeas corpus was not available.

¹⁰⁶ *Hooper v. Hartman*, 163 F. Supp. 437, 441-42 (S.D. Cal. 1958).

¹⁰⁷ *Id.* at 442.

is implicit in the trial court's judgment" and that on this ground alone the dismissal should be affirmed.¹⁰⁸

Meanwhile the Court of Military Appeals had held unanimously that the exercise of jurisdiction under article 2(4) did not necessitate the retired officer's recall to active duty, and that article 2(4), as so construed, could constitutionally be applied to Hooper. As a matter of commonsense statutory construction, the first proposition is pretty clearly correct. As the court pointed out, article 2(1) subjects to the Code an officer called to duty in the armed forces: "It necessarily follows from this that if Article 2(4) requires the individual be recalled as a condition precedent to its effectiveness, its provisions are entirely unnecessary and could never be operative."¹⁰⁹ The second part of the holding is bottomed on a determination that a retired regular is a part of the land or naval forces:

Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. 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. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the military way of life, and who receives a salary to assure his availability, is a part of the land or naval forces.¹¹⁰

This part of the holding raises harder questions, which will presently be considered. Finally, the Court of Military Appeals held that all of the articles under which the accused was charged could be violated by one not on active duty.¹¹¹ On January 7, 1961, President Eisenhower, cleaning up the papers on his desk, approved the sentence and ordered it executed. Admiral Hooper's military remedies were

¹⁰⁸ 274 F.2d 429 (9th Cir. 1959); cf. *Gusik v. Schilder*, 340 U.S. 128 (1950). See note 116 *infra*.

¹⁰⁹ *United States v. Hooper*, 9 U.S.C.M.A. 637, 641, 26 C.M.R. 417, 421 (1958).

¹¹⁰ *Id.* at 645, 26 C.M.R. at 425.

¹¹¹ *Ibid.* The court reversed and returned the record for reference to a new reviewing authority on the ground, conceded by the Government, that the post-trial review by the convening authority's staff legal officer was defective in a number of respects, none of them relevant to the jurisdictional question. A fresh review again upheld the conviction, and this time a majority of the Court of Military Appeals held the review adequate. *United States v. Hooper*, 11 U.S.C.M.A. 128, 28 C.M.R. 352 (1960). The second opinion contains no further discussion of the jurisdictional question.

then clearly exhausted. In May, 1961, he sued for his pay in the Court of Claims, presumably on the ground that the court-martial could not constitutionally try him, and that its sentence was therefore a nullity. There has as yet been no decision in the case.¹¹²

The problems of Lieutenant Commander Chambers, the object of the Navy's second experiment with article 2(4), differed considerably in detail, if not in essence. He, too, had been placed on the retired list; he, too, was charged with acts of sodomy with enlisted men, in violation of articles 125 and 133, although 134 was omitted, probably as redundant. Unlike Admiral Hooper, he was charged with having committed the alleged acts while he was still on active duty, but this distinction seems of doubtful significance. Since these acts were, of course, violations of the laws of the states in which they were committed, and triable in their courts, article 3(a) could by its own terms have no application, even assuming it to be constitutional as to a serviceman whose active duty status is merely changed to retirement, as distinct from one who is wholly discharged like Toth.¹¹³ Since Chambers was not arrested or charged until after he had been relieved from active duty, he could not be tried under the rule, apparently still solidly in force, that once court-martial jurisdiction attaches it endures long enough to complete the proceeding, including appellate review, despite the termination of the accused's enlistment or other period of subjection to military law.¹¹⁴ The Navy's assertion of juris-

¹¹² There may be some question as to whether the Court of Claims (which does not have habeas corpus jurisdiction) has jurisdiction over a collateral attack on the sentence of a court-martial, in the light of article 76 of the Uniform Code, which purports to make court-martial sentences "binding upon all departments, courts, agencies, and officers of the United States." Cf. *Begalke v. United States*, 286 F.2d 606, 607-08 (Ct. Cl.), cert. denied, 364 U.S. 865 (1960). The Supreme Court in *Gusik v. Schilder*, 340 U.S. 128, 132-33 (1950), refused to construe that provision as a suspension of the writ of habeas corpus, but it might be regarded as validly precluding other, less basic forms of collateral attack. See Bishop, *Civilian Judges and Military Justice*, 61 COLUM. L. REV. 40, 49, 61 (1961).

¹¹³ In any case, article 3(a) presupposes that the accused's status of subjection to the Code has been terminated after the offense. If article 2(4) is constitutional, the retired officer's amenability to the Code continues without interruption; even if it is not constitutional, it might still be argued that article 3(a) at least is constitutional as to one who has not wholly severed his connection with the military.

The Court of Military Appeals and at least one district court have held that *Toth*, since it involved a pure civilian who had totally severed his connection with the military, does not prevent the application of article 3(a) to one who is on active duty at the time he is court-martialed, despite the existence of a civilian gap between the period of service in which the offense was committed and the period of service in which the court-martial proceedings were initiated. *United States v. Wheeler*, 10 U.S.C.M.A. 646, 28 C.M.R. 212 (1959); *United States v. Gallagher*, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957); cf. *Wheeler v. Reynolds*, 164 F. Supp. 951 (N.D. Fla. 1958); *United States v. Steidler*, 14 U.S.C.M.A. 108, 33 C.M.R. 320 (1963).

¹¹⁴ E.g., *Gorko v. Commanding Officer, Second Air Force*, 314 F.2d 858 (10th Cir. 1963); *Walker v. Morris*, 3 Am. Jurist 281 (Mass. 1830); *Barrett v. Hopkins*, 7 Fed. 312 (C.C.D. Kans. 1881); *United States v. Speller*, 8 U.S.C.M.A. 363, 24 C.M.R. 173 (1957); *United States v. Sippel*, 4 U.S.C.M.A. 50, 15 C.M.R. 50 (1954); see *Carter v. McClaughry*, 183 U.S. 365, 383 (1902); *Hironimus v. Durant*,

diction had, therefore, to be based solely on article 2(4). Chambers, unlike Hooper, had actually been arrested and confined pending trial; he petitioned for a writ of habeas corpus as well as a writ of prohibition. Both were denied.¹¹⁵ Although Chambers had not even waited for the trial, the district court chose not to rest upon the petitioner's failure to exhaust his military remedies.¹¹⁶ The court, describing the constitutionality of article 2(4) as the only question to be decided, rested its decision of constitutionality on somewhat peculiar reasoning. After concluding that "a retired officer entitled to receive pay is not so divorced from the military as to be considered a mere civilian," and is thus to be distinguished from Mr. Toth, Mrs. Covert, et al., and arguing that because they may be recalled to service, the Navy has a legitimate interest in policing its retired officers, the court said:

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, it is not unreasonable to assume that the Navy may choose to terminate his status. Undoubtedly, such may be done by Presidential Order. *Allen v. United States*, 1950, 91 F. Supp. 933, 117 Ct. Cl. 385.

168 F.2d 288, 293 (4th Cir.), *cert. denied*, 335 U.S. 818 (1948). The older courts, never having heard of *United States ex rel. Toth v. Quarles* and being much influenced by the consideration that horrendous military offenses, committed by heroes about to leave the service, could be punished by no one if not by a court-martial, would have apparently reached the same conclusion even if the accused had been discharged before charges were preferred. The Massachusetts court in *Walker* relied heavily (as did the Government and Justice Reed in *Toth*) on the case of Lord George Sackville. Lord George had been deprived by the King of his command and commission, immediately after the battle of Minden, for disobeying the orders of his superior officer. After his dismissal which, *mutatis mutandis*, presumably made him as full-fledged a civilian as Toth, he demanded a court-martial. The Crown, apparently sharing so early as 1760 the doubts of Justice Black *et al.*, referred the jurisdictional question to "the twelve judges" (from the courts of Kings Bench, Common Pleas, and Exchequer), who unanimously replied that they saw "no ground to doubt of the legality of the jurisdiction of a Court-Martial in those circumstances." 2 Eden's Ch. Rep. 371, 28 Eng. Rep. 940 (1760), quoted in *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 29, n.11 (1955) (dissenting opinion); Brief for the Respondent, *id.*, p. 25, n.10; TYTLER, *MILITARY LAW* 113-14 (2d ed. 1808). The court in *Walker*'s case attached no significance to the fact that Lord George had sought the trial, "for if the court-martial had no jurisdiction, it is very clear that the consent of the accused could not confer it." 3 Am. Jurist at 287.

¹¹⁵ *Chambers v. Russell*, 192 F. Supp. 425 (N.D. Cal. 1961).

¹¹⁶ It is not entirely clear whether such exhaustion is a condition precedent to relief when a petitioner in confinement attacks the court-martial's jurisdiction over his person. In 1951 an equally divided Supreme Court affirmed a decision that a soldier who had been convicted by a court-martial, and who had excellent grounds for disputing the court's jurisdiction, could not resort to habeas corpus until the mills of the military review procedure had completed their slow grinding. *United States ex rel. Giese v. Chamberlin*, 184 F.2d 404 (7th Cir. 1950), *aff'd per curiam*, 342 U.S. 845 (1951). But cf. *In re Yokoyama*, 170 F. Supp. 467 (S.D. Cal. 1959) (district court, without mentioning the *Giese* case, permitted a civilian employee to attack collaterally the constitutionality of article 2(11) without exhausting his military remedies); *Martin v. Young*, 134 F. Supp. 204, 209 (N.D. Cal. 1955).

Administrative action is, therefore, both available and proper. In accordance with notions of fairness, Congress has provided for a hearing upon dismissal to facilitate inquiry into the validity of the dismissal. 10 U.S.C. § 804.

We believe that court martial hearing for the purpose of discharging a retired member is also reasonably related to the Navy's legitimate interest, based upon its concern for discipline, in the fitness and qualifications of its retired officers. Therefore, we conclude that the Navy may proceed with the court martial herein for the purpose of imposing proper and necessary discipline. Whether or not the result of the court martial hearing will go beyond the imposition of reasonable military sanctions must remain to be seen.¹¹⁷

The opinion ignores the basic distinction between a court-martial, whose purpose is punishment, and an administrative separation which, in theory, is not punitive. It evidences an equal disregard or ignorance of the statutory and regulatory intricacies (some of which post-date *Allen*, which is cited by the court) which make nearly impossible the administrative separation of retired officers. But it does contain the germ of an interesting idea, that a court-martial may constitutionally exercise jurisdiction over such an officer for certain limited purposes, and it does serve to focus attention on the fundamental problem of why the Navy thought it necessary to resort to so drastic a measure. At any rate, however unsatisfactory, it seems to have been the last judicial consideration of the problem, for I can find no report of further proceedings before either a board of review, the Court of Military Appeals, or the civilian courts. Had Chambers been convicted and sentenced to dismissal, article 66(b) would have required reference to a board of review, and it is unlikely that the Court of Military Appeals would have denied review. Not all opinions of boards of review are reported; the reports of the opinions of the Court of Military Appeals are, however, reasonably complete. The Navy may have decided to drop the case, or it is conceivable, though perhaps unlikely, that the court-martial acquitted him, or sentenced him to some lesser punishment than dismissal or confinement.

Before considering the constitutional question and the validity of the holdings in the *Hooper* and *Chambers* cases, it may be interesting to speculate on the practical reasons for the Navy's policy. In favor of that policy there are some obvious considerations. The conduct of each retired officer directly affected enlisted men on active duty, and the civilian authorities seem to have taken no measures to repress that

¹¹⁷ 192 F. Supp. at 428.

conduct. There is no doubt that, to the extent that it was known that persons having naval rank and entitled to wear the uniform were engaged in such delinquencies, the naval service would be brought into disrepute. Neither Hooper nor Chambers was of advanced age; in their cases there really was as much force as there ever is in the argument that they were paid and retained on the rolls in part at least to keep them available for recall to active duty. Finally, if it be assumed that their elimination was desirable, there was practically no other way to accomplish it.

Until shortly after the Civil War, the President could remove any officer summarily, without cause. But one of the by-products of Congress' vendetta against Andrew Johnson was the so-called Tenure of Office Act of 1866, which *inter alia* purports to prohibit the peacetime dismissal of an officer of the armed forces by presidential action, except pursuant to sentence of a general court-martial.¹¹⁸ Although the constitutionality of such a congressional limitation on the power of the Commander in Chief has never been directly adjudicated by the Supreme Court, it may well be doubted.¹¹⁹ There are, of course, elaborate statutory and administrative provisions for the elimination of unfit military personnel on active duty.¹²⁰ Deliberately or not, nothing comparable exists in the case of those who are retired. Article 4 of the Uniform Code, cited by the court in *Chambers* to support the proposition that the petitioner could be removed by executive action, is not at all in point. It provides in essence that a commissioned officer, "dismissed by order of the President," may demand that the President convene a court-martial to try him on the charges on which he was dismissed.¹²¹ But the current version of the

¹¹⁸ Act of July 13, 1866, ch. 176, § 5, 14 Stat. 92; see *Wallace v. United States*, 257 U.S. 541, 545 (1922); *Blake v. United States*, 103 U.S. 227, 234-35 (1881); *Allen v. United States*, 91 F. Supp. 933, 935 (Ct. Cl. 1950); BURNS, *THE DEADLOCK OF DEMOCRACY* 74 (1963); Colby, *The Power of the President To Remove Officers of the Army*, 15 GEO. L.J. 168 (1927).

¹¹⁹ Cf. *Myers v. United States*, 272 U.S. 52 (1926) (holding unconstitutional a statute providing that postmasters could be removed only with the advice and consent of the Senate). Even Justice Brandeis, who dissented in *Myers*, recognized that there might be a stronger case for the President's power to dismiss Army and Navy officers: "We need not consider what power the President, being Commander in Chief, has over officers in the Army and the Navy." *Id.* at 241.

¹²⁰ See, e.g., 10 U.S.C. §§ 3781-86, 3791-96, 6384, 8781-86, 8791-96 (1958). The history of these statutes and regulations, and the administrative practice under them, were exhaustively described by the indefatigable Colonel Wiener in the course of the Senate hearings. See *Hearings on Constitutional Rights of Military Personnel* 736-73, 800-02. 10 U.S.C. § 1161(a) (1958).

¹²¹ The article seems to raise a problem similar to that of Lord Sackville's case: if the officer is validly dismissed, and therefore a civilian, how can his consent give the court-martial jurisdiction denied it by the Constitution? A possible solution is that the dismissal is conditional and ineffective until the court has reached a verdict; if no court is convened the dismissal is to be superseded by "a form of discharge authorized for administrative issue." The problem, though intriguing, seems largely academic, for there is only one modern instance of an officer's being dismissed by

pertinent part of the Tenure of Office Act,¹²² provides in substance that a commissioned officer cannot in peacetime be dismissed by order of the President. Unless the President had chosen to challenge the constitutionality of section 1161(a), Hooper and Chambers could not have been dismissed by executive action, and article 4 has nothing to do with their cases. Subsection (b) of the statute empowers the President at any time to "drop from the rolls" (including, of course, the payroll) of any of the armed forces an officer, active or retired, who is finally convicted of an offense by a civilian court and sentenced to confinement.¹²³ This was in fact the provision involved in the *Allen* case which the district court cited in the quoted extract from *Chambers*. The distinction between "dismissal" and "dropping from the rolls" is emphasized by the fact that officers in the latter category are not entitled to demand a court-martial, as the *Allen* case itself held, and as is now made explicit by subsection (d) of article 4 of the Code. Indeed, an officer who is dropped from the rolls thereby becomes a civilian who cannot be court-martialed without his consent and probably not even with it.¹²⁴

Not even this very limited exception to the general congressional failure to provide an administrative method of separating officers on the retired list was available to the Navy in *Hooper* and *Chambers*. Neither one had been convicted or sentenced to confinement by a civilian court. Both Congress and the Secretary of Defense appear to view with disfavor the dropping from the rolls of a retired officer, even if he has been so convicted and sentenced—precisely because it entails the forfeiture of pay which has been earned by prior honest and faithful service. Again, only the Navy had ever taken advantage of the provision; the Army and the Air Force, and even the Marines (although a part of the Navy), seem to have had no more interest in dropping from the rolls their retired officers, however sinful, than they had in court-martialing them. This inequality of treatment having come to the attention of Congress in 1958, that body took action whose net effect was to restore to the pay- and other rolls retired

the President and demanding a court-martial. President Wilson, in time of war, dismissed one Colonel Wallace, who thereupon asserted his right to court-martial under the predecessor of article 4, Act of March 3, 1865, ch. 79, § 12, 13 Stat. 489. The Supreme Court avoided the problem (which, since *Toth, Covert, et al.* were still far in the future, it might not have seen in any case) by holding that § 12 applied only to dismissals by the President alone, and that, since Colonel Wallace's successor in the complement of Quartermaster Colonels allowed by law had already been appointed and approved by the Senate, that action amounted to senatorial advice and consent. *Wallace v. United States*, 257 U.S. 541 (1922).

¹²² 10 U.S.C. § 1161(a) (1958).

¹²³ There appears to be no corresponding provision for enlisted men. Since subsection (a) of the statute places no restriction on their separation, the President's authority to discharge a retired enlisted man is presumably intact.

¹²⁴ *Ex parte Wilson*, 33 F.2d 214 (E.D. Va. 1929).

naval officers who had been dropped therefrom, pending the carrying out of the recommendation of the House and Senate committees that the Department of Defense prescribe a uniform policy for all three services.¹²⁵ That uniform policy¹²⁶ now proscribes the dropping from the rolls of retired officers, save only when deprivation of their pay is required by the Hiss Act.¹²⁷ The Hiss Act denies, *inter alia*, retired pay to former members of the armed forces convicted of sundry varieties of corruption, espionage, subversion, and related offenses, including refusal to testify about alleged Communist connections, and provides that those who are thus deprived of retired pay may be dropped from the rolls. But even that statute, though passed at a time when Congress was far from finicky about the rights of individuals guilty of such offenses, did not cut off retired pay, the right to which had accrued prior to its enactment, because of convictions prior to that date—apparently because Congress had doubts as to the constitutionality of cutting off such a “vested” right.¹²⁸ The Defense Department’s new directive described itself as “in furtherance of the Department of Defense view that retired pay is earned and should be withheld only under extremely limited circumstances.”

The upshot is that the Navy, or the Army, or the Air Force, if it wishes to strip a retired officer of a rank and uniform on which he is reflecting no credit, in itself a reasonable enough objective, can do so only by bringing into action a jurisdictional weapon of far greater power than is necessary to the achievement of the limited objective. The general court-martial could inflict imprisonment; and it must, if it is to dismiss the officer, at the same time deprive him of his pension¹²⁹—in effect, assuming him to have a substantial life expectancy, a money penalty of monstrous proportions, having no rational relation to the gravity of the offense. The reasoning of the district court in the *Chambers* case, particularly the quaint notion that the “court-martial hearing” was really only a sort of administrative process for the implementation of the presidential power (which Congress has purported to abolish in peacetime) to separate a delinquent retired officer by executive action, may have been faulty. There is, however,

¹²⁵ 10 U.S.C. § 1161 (1958); see S. REP. NO. 2312, 85th Cong., 2d Sess. (1958); H.R. REP. NO. 2156, 85th Cong., 2d Sess. (1958).

¹²⁶ 32 C.F.R. §§ 70.801-03 (1960).

¹²⁷ 68 Stat. 1142 (1954), 5 U.S.C. §§ 2281-88 (1958).

¹²⁸ See *Hearings on Denying Civil Service and Other Federal Benefits to Certain Persons Before the House Committee on Post Office and Civil Service*, 83d Cong., 2d Sess. 2-10 (1954); McHughes, *The Hiss Act and Its Application to the Military*, *Military L. Rev.*, Oct. 1961, pp. 67, 69-70.

¹²⁹ “Upon ceasing to hold the office, the right to pay, being an emolument thereof and dependent thereon, likewise ceases.” *Hooper v. Hartman*, 163 F. Supp. 437, 441 (S.D. Cal. 1958), *aff’d*, 274 F.2d 429 (9th Cir. 1959).

undoubtedly a core of common sense in the somewhat elliptical suggestion, contained in the last quoted paragraph of the opinion, that while a court-martial might constitutionally have jurisdiction to impose a "reasonable" punishment, such as dismissal, a different question might be presented if it went further, as by sentencing the accused to confinement.

Whether Chambers' case will present that different question is unknown; Hooper's does not, unless it could be argued that forfeiture of retired pay (which, under the present law, is an inevitable corollary of dismissal) is a punishment which cannot constitutionally be inflicted. The validity of that argument is, however, very doubtful. In dictum some thirty years ago, the Supreme Court said that "pensions . . . and other privileges accorded to former members of the army and navy . . . are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress."¹³⁰ That view of a pension, or at least of one paid pursuant to a provision in force during the recipient's employment and which is morally, if not technically, a part of his contract of employment, was somewhat old-fashioned even when it was written.¹³¹ The Department of Defense policy, mentioned above, that

¹³⁰ *Lynch v. United States*, 292 U.S. 571, 576-77 (1934). The Court cited *United States v. Teller*, 107 U.S. 64 (1882), *Frisbie v. United States*, 157 U.S. 160 (1895), and *United States v. Cook*, 257 U.S. 523 (1922). Only *Teller* is in point on its facts; the other two are at best *dicta*. *Teller* held only that a wounded veteran of the Mexican War, who had been in receipt of a pension under a special act of Congress, could not, when that pension was superseded by a larger one under a general pension act which cut off all lesser pensions under previous special laws, claim a constitutional right to receive both pensions. Though the Court did state that "no pensioner has a vested legal right to his pension" and that "pensions are the bounties of the Government, which Congress has the right to give, withhold, distribute, or recall, at its discretion," 107 U.S. at 68, the pension involved was in fact in the nature of a gratuity, in the sense that Congress had not provided for it until after the pensioner had received his wounds; it could hardly have been regarded as one of the terms of his employment. *Lynch* itself held that benefits under War Risk Insurance, being bottomed on contract, could not constitutionally be reduced by Congress.

¹³¹ *Cf.*, e.g., *Roddy v. Valentine*, 268 N.Y. 228, 197 N.E. 260 (1935) (holding that a policeman, having satisfied the statutory conditions, acquired an irrevocable right to a public pension); see Note, 70 HARV. L. REV. 490 (1957); Note, 53 HARV. L. REV. 1375 (1940). The Court of Claims had held in 1893 that a retired naval officer was a "salaried officer of the United States" rather than a mere pensioner: "We cannot agree, that, because of his retirement . . . his 'pay' simply becomes a bounty in the nature of a pension. That 'pay,' in our opinion, is given partly for past service, partly for present liability to military discipline and possibility of detail to active and dangerous employment in case of emergency . . ." *Franklin v. United States*, 29 Ct. Cl. 6, 11 (1893). A few years later the same court said that retired pay was "but an honorary form of pension . . . [T]he pay of a retired officer is not compensation . . ." *Geddes v. United States*, 38 Ct. Cl. 428, 445 (1903). More recently, the Court of Claims has held that, for purposes of the Federal Employees Compensation Act, 39 Stat. 743 (1916), as amended, 5 U.S.C. § 757 (1958), retired pay is neither "salary, pay or remuneration . . . in return for services actually performed" nor a "pension." *Steelman v. United States*, 318 F.2d 733, 734 (Ct. Cl. 1963); *cf. Lemly v. United States*, 75 F. Supp. 248 (Ct. Cl. 1948). The court did not explain what retired pay could be if it was neither of these things.

retired pay is "earned," corresponds much more closely to present day concepts. Nevertheless, it could not be safely predicted that the Supreme Court would today hold that retired pay is a vested right of which the pensioner cannot constitutionally be deprived, particularly if the deprivation is pursuant to the sentence of a court, military or otherwise.¹³² The Court of Claims has held that a retired civil servant could not constitutionally, under the Hiss Act, be deprived of his annuity for having refused, on grounds of self-incrimination, to testify before a grand jury.¹³³ But the four judges who constituted the majority emphasized that the plaintiff's pension had been suspended without any sort of trial; two of them regarded the act, as applied, as a bill of attainder, and the other two thought it objectionable as a divestment, without due process, of a vested right. One who is deprived of retired pay pursuant to the sentence of a court-martial has certainly received a hearing, and probably due process as well.

Assuming that the President, certainly with and possibly without congressional sanction, may dismiss any officer, and assuming further that Congress can constitutionally provide for the termination of a retired officer's pension pursuant to some sort of adequate administrative or judicial process, the question is whether that process may take the form of a court-martial. Although strong views to the contrary have been expressed,¹³⁴ I incline to the view that it can.

For what it is worth, there is a good deal of precedent for such a view, though most of it is somewhat antique, and there is no such thing as a square holding by a federal appellate court. Colonel Winthrop, whose opinion that civilians could not constitutionally be court-martialed¹³⁵ was much relied upon by the Supreme Court, had not the smallest doubt about the retired list; he thought it "a fact . . . never admitting of question" that "retired officers are a part of the Army and so triable by court-martial" ¹³⁶ The Colonel relied

¹³² The Court recently held that Congress could constitutionally cut off the Social Security benefits of aliens deported for having been Communists, since the right to such benefits was not an "accrued property right." *Flemming v. Nestor*, 363 U.S. 603 (1960). The dissenters argued that the termination amounted to punishment without judicial trial. *Id.* at pp. 622, 640.

¹³³ *Steinberg v. United States*, 163 F. Supp. 590 (Ct. Cl. 1958).

¹³⁴ See Blair, *Court-Martial Jurisdiction Over Retired Regulars: An Unwarranted Extension of Military Power*, 50 Geo. L.J. 79 (1961). The title of the article sufficiently summarizes its conclusions. Actually, most of the author's arguments seem to be addressed to the unwisdom of the jurisdiction rather than to its constitutionality.

¹³⁵ *WINTHROP* 105.

¹³⁶ *Id.* at 87, n.27. The Blackstone of Military Law, as Mr. Justice Black likes to call him, had some reason to believe that a retired officer is still a part of the armed forces. When he himself attempted after his retirement to represent a claimant against the Government, the Court of Claims held that, since he was on the retired list, he was an "officer of the United States" within the meaning of one of the conflicts of interest statutes and thus barred from acting as an attorney in the case. *In re Winthrop*, 31 Ct. Cl. 35 (1895). The court had the courtesy not to cite Winthrop.

principally upon *United States v. Tyler*.¹³⁷ Although that case held only that an officer on the retired list, receiving pay, was within the scope of a statute raising the pay of "commissioned officers," the Court clearly took it as an uncontroverted fact that retired officers were subject to the Articles of War, and indeed used that premise to buttress its holding; a man could hardly be court-martialed and dismissed from a service he was not in. The Court's reasoning is an interesting contrast to that which it employed eighty years later: in effect, the Court said in 1881 that the fact that Congress has subjected a man to military trial without a jury demonstrates in itself that he is a part of the land and naval forces.¹³⁸ *Runkle v. United States*,¹³⁹ which appears to be the only decision of the Supreme Court actually involving the court-martial of a retired officer, furnishes no more solid authority on the constitutional question. In fact, the opinion does not even contain apposite dicta, for no one concerned, including the accused, seems to have questioned the court-martial's jurisdiction, and the Court held Major Runkle's dismissal invalid solely on the ground that it had not been duly approved by President Grant, who had improperly delegated his discretion to the Secretary of War. Since Grant had previously remitted all of the sentence except the cashiering, and President Hayes had issued an order revoking that too, the only issue was whether Runkle was entitled to his retired pay for the period between his allegedly invalid cashiering and its revocation. President Grant's administrative deficiencies and his clemency are regrettable, for the case seems to be the only one in which a court-martial did more than sentence a retired officer to dismissal, and so could have posed the constitutional issue beautifully.¹⁴⁰ A guess may be hazarded that the

¹³⁷ 105 U.S. 244 (1881).

¹³⁸ "It is impossible to hold that men who are by statute declared to be a part of the Army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are 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, and who may finally be dismissed on such trial from the service in disgrace, are still *not* in the military service." *Id.* at 246. The reference to assignment to "specified duties" is probably an allusion to the former practice of detailing retired officers as members of courts-martial. In *Kahn v. Anderson*, 255 U.S. 1, 6-7 (1921), the Court answered an argument that retired officers, not being officers "in the military service of the United States" as required by the Articles of War, were incompetent to sit as members of a court-martial, by saying that "as to the retired officers . . . it is not open to question in view of the ruling in *United States v. Tyler* . . . that such officers are officers in the military service of the United States." Article 25 of the Uniform Code now requires that members of a court-martial be on active duty.

¹³⁹ 122 U.S. 543 (1887).

¹⁴⁰ Runkle, who had been placed on the retired list in 1870, served as a disbursing agent of the Freedmen's Bureau both before and after his retirement. He was court-martialed in 1872, charged with offenses committed both before and after retirement. Since the alleged transgressions amounted to embezzlement of government moneys, those committed during his active service came under the Act of March 2, 1863, ch. 67, § 2, 12 Stat. 696, which provided that court-martial jurisdiction

Court of those days, having held that Captain Tyler was an officer of the United States because he was subject to court-martial, would have been quite as ready to hold that Major Runkle was subject to court-martial because he was an officer of the United States.

Closest to a decision on point, prior to the modern cases, seems to be *Closson v. Armes*.¹⁴¹ Captain George A. Armes, retired, wrote to Lieutenant General John M. Schofield, an elderly and apparently somewhat irascible Civil War hero who was then commanding the Army of the United States, a "letter of an offensive character." At least General Schofield found it offensive; deeming that "a grave act of military insubordination and violation of military discipline had been committed," he ordered Armes to be arrested and confined pending court-martial on charges of conduct to the prejudice of good order and military discipline and conduct unbecoming an officer and gentleman. Armes immediately sought habeas corpus. The court, deciding the only issue before it, held the arrest and confinement proper. Such a holding necessarily seems to import that the court-martial for which Armes was being held would have jurisdiction over him—but Armes' counsel had conceded that point. The case is simply another illustration of the fact that until comparatively recent times most courts and lawyers, military and civilian, though sometimes hostile to the exercise of military jurisdiction over persons who were obviously pure civilians,¹⁴² were not ready to question military jurisdiction over those who had some connection with the military. The evolution of constitutional law had simply not reached the point at which such an issue could be seriously raised. Whether it has yet reached that point remains to be seen. At any rate, there is no case prior to *Hooper* which squarely decides or considers the constitutionality of subjecting a retired officer to military jurisdiction.¹⁴³

to try such offenses should survive separation from the service. He would thus have been amenable to the military court's jurisdiction on these charges even if he had been a pure civilian. See text accompanying note 32 *supra*. He was convicted of violation of the 1863 statute and of conduct unbecoming an officer and gentleman and sentenced to dismissal, a substantial fine, and four to eight years confinement. In order to invalidate the conviction and sentence, the Court would have had to hold unconstitutional both the 1863 statute and the provision subjecting retired officers to military jurisdiction.

¹⁴¹ 7 App. D.C. 460 (1896).

¹⁴² Cf., e.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Henderson*, 11 Fed. Cas. 1067 (No. 6349) (C.C.D. Ky. 1878).

¹⁴³ Mention should also be made of *Taussig v. McNamara*, 219 F. Supp. 757 (D.D.C. 1963), in which a retired regular naval officer sought, *inter alia*, a declaratory judgment that article 2(4) was unconstitutional—apparently as part of a general, unsuccessful effort to remove statutory obstacles to representing would-be government contractors in their relations with the Navy. The court found no substantial constitutional issue, citing among others the *Armes*, *Hooper*, and *Chambers* cases. *Id.* at 759 n.3.

A question frequently posed was the status of a retired officer under various statutes dealing with conflict of interest, eligibility for civil office, and the like. *E.g.*,

The court in the *Armes* case did, however, stress one sound and significant point—Captain Armes' offense was certainly military. Indeed, if it was not a military crime, it was not a crime at all, and if it required punishment, only a court-martial could punish it. As the court said:

If there were occasion to conjecture what the purpose of Congress was in holding retired officers of the army to trial by court-martial for infractions of military law, and what the offences were which it was contemplated they might commit, no better illustration could be afforded of the subject than the offences here charged against the appellee. It would be difficult to conceive a case to which the statute would be more appropriate.¹⁴⁴

In 1896 courts-martial had no peacetime jurisdiction over civilian offenses as such.¹⁴⁵ If Captain Armes had beaten his wife or stolen General Schofield's watch, he could have been court-martialed only for the military aspects of those offenses; *i.e.*, to the extent that wife-beating or watch-stealing is conduct unbecoming an officer and a gentleman, or, after 1912, conduct of a nature to bring discredit upon the armed forces. For a distinctively military offense, or the distinctively military aspect of an ordinary offense, the appropriate punishment should likewise be distinctively military. Practically speaking, in the case of retired personnel, this means dismissal for an officer or dishonorable discharge for an enlisted man, which (former

Franklin v. United States, 29 Ct. Cl. 6 (1893) (holding that a retired naval officer was a "salaried officer of the United States" for the purpose of a statute which provided that delegates to an international conference should be paid unless they fell in that category); Geddes v. United States, 38 Ct. Cl. 428 (1903) (holding that a retired officer was not an "officer or employee of the Government" within the intent of a statute forbidding double compensation); 29 Ops. Att'y GEN. 397 (1912) (opinion that a retired officer was an "officer of the Government" for the purpose of a conflict of interest statute); 36 Ops. Att'y GEN. 388 (1930) (opining that a retired officer, being a "mere pensioner" who did not "practically belong to the Army," was "from civil life" within the meaning of a statutory requirement that two Commissioners of the District of Columbia meet that test); Reed v. Schon, 2 Cal. App. 55, 83 Pac. 77 (Dist. Ct. App. 1905) (holding that a retired officer was not a "person holding . . . lucrative office under the United States" within the meaning of a state constitutional provision barring such persons from state office); People v. Duane, 121 N.Y. 367, 24 N.E. 845 (1890) (holding that a retired officer did not hold "federal office" within the meaning of a state statute defining the qualifications of certain civil officers of the state); State v. De Gress, 53 Tex. 387 (1880) (holding that a retired officer held "lucrative office under authority of the United States" within the meaning of a city charter prohibiting such persons from being mayor). See also note 131, *supra*. Some of these opinions, like that of the Supreme Court in *Tyler*, take it for granted that retired officers are subject to military jurisdiction, but aside from the fact that they are impossible to reconcile with one another, their precedent value is nil, because all were concerned with the legislative intent behind various statutory phrases, and none dealt with the constitutional issue with which this Article is concerned.

¹⁴⁴ 7 App. D.C. 460, 471 (1896).

¹⁴⁵ See text accompanying notes 39-43 *supra*.

Secretary of Defense Wilson to the contrary) is a punishment that only a court-martial can lawfully inflict.¹⁴⁶ Such a punishment is, of course, beyond the power of a civilian court. It is also, in any case which is likely to arise, the only punishment which would seem to be required by the legitimate needs of the military, and thus sanctioned by the principle that the Constitution limits the jurisdiction of a court-martial to the "least possible power adequate to the end proposed."¹⁴⁷ In the usual case, including *Hooper* and *Chambers*, that interest appears to be limited to removing the officer from the service by stripping him of his rank, his right to wear the uniform, and other honorific incidents of his status as a member of a community which claims to have higher standards of honor than the general run of the population—and doing so by a form of separation which entails disgrace. It must be emphasized that dismissal and dishonorable discharge, notwithstanding that the injury which they inflict is largely to the feelings and reputation of the outcast, and even though they are not now usually accompanied by drums, sword-breaking, button-snipping, and the rest of the picturesque classical paraphernalia, are highly punitive measures. For this very reason they have traditionally been inflicted only by the judicial process of a court-martial.¹⁴⁸ If the offense is so flagitious as to require more severe punishment, that can be left to the civilian courts. If it is a violation of state law, as would ordinarily be the

¹⁴⁶ Secretary of Defense Wilson, presumably influenced by political rather than legal reasoning, purported to issue administrative dishonorable discharges to a small number of American soldiers who, having defected to the Chinese Communists after capture in the Korean War, could not be brought before a court-martial. The Secretary's action, which was taken over the objections of the Judge Advocate General of the Army, was clearly illegal, for it had always been ruled that only a court-martial could inflict such a punitive discharge. See Pasley, *Sentence First—Verdict Afterward: Dishonorable Discharge Without Trial by Court-Martial?*, 41 CORN. L.Q. 545 (1956). Its legality was never challenged, however, for when the turncoats returned to the United States, they were not so foolish as to subject themselves to the possibility of court-martial and prison by establishing the nullity of their discharges. Since Secretary Wilson had not pushed his impersonation of a one-man, *ex parte*, general court-martial to the point of sentencing them to retroactive forfeitures, they did sue for their pay up to the date of discharge. The Court of Claims, firmly ignoring a statute which entitled the plaintiffs to that pay while they were prisoners of war, no matter how reprehensible their conduct in that status, held that they had breached their contract of enlistment and voluntarily abandoned their status as soldiers. *Bell v. United States*, 181 F. Supp. 668 (Ct. Cl. 1960). Judge Madden's vigorous and cogent dissent pointed out that, under article 58 of the Uniform Code, not even a court-martial could have sentenced them to forfeit accrued pay. These pitiful wretches thus capped their disservices to the United States by being the occasion of a remarkable body of bad law.

¹⁴⁷ See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 23 (1950). (Emphasis deleted.)

¹⁴⁸ See Pasley, *supra* note 146, at 551-53; *United States v. Briscoe*, 13 U.S.C.M.A. 510, 33 C.M.R. 42 (1963). The economic disadvantages of a punitive discharge, via disenfranchisement to statutory veterans' benefits and the like, are not appreciably greater than those resulting from an administrative undesirable discharge. See *Hearings on S. 3906 Before the Senate Armed Services Committee*, 83d Cong., 2d Sess. 28-29 (1954).

case, no question of former jeopardy is presented.¹⁴⁹ If the offense is federal, there might be more difficult problems, for it is not clear that the same act could, for example, be tried in a federal court as a violation of the Mann Act and again before a court-martial as the military offense of conduct unbecoming an officer and gentleman, and/or conduct of a nature to bring discredit upon the armed forces.¹⁵⁰ But the Court of Military Appeals, at least, seems to regard the civilian and military components of a wrongful act as constituting distinct offenses, for it has held that a serviceman cannot be convicted under the general article of an act not specifically denounced elsewhere in the code, unless the members of the court have been instructed by the law officer that they must find the accused's conduct was in fact prejudicial to good order and military discipline or of a nature to bring discredit upon the armed forces,¹⁵¹ a finding which would not be very difficult to make in such cases as *Hooper* and *Chambers*.¹⁵² Of course, if the federal court actually convicts the offender and sentences him to confinement, he can be dropped from the rolls.¹⁵³ It is not easy to conceive of a retired officer's committing a purely military offense, not covered by any civilian penal provision, which could not be adequately punished by dismissal. Those who are not on active duty can hardly commit the usual serious military offenses—desertion, disobedience of orders, cowardice, and the like. If a retired officer did contrive to commit a grave military offense—if he were, for example, to conspire to create a mutiny, and if (which seems unlikely) his actions were not

¹⁴⁹ See text accompanying note 87 *supra*.

¹⁵⁰ See Kates, *Former Jeopardy—A Comparison of the Military and Civilian Right*, Military L. Rev., Jan. 1962, pp. 51, 65. Compare *Grafton v. United States*, 206 U.S. 333 (1907), with *In re Stubbs*, 133 Fed. 1012 (D. Wash. 1905). The *Stubbs* case held that a homicide, charged as "conduct to the prejudice of good order and military discipline," was a different offense from the same homicide, charged as murder, of which the soldier had been acquitted in a civilian court. In *Grafton* the Supreme Court decided that a soldier who had been acquitted by a court-martial of a violation of the general article, based on homicide, could not thereafter be tried by a Philippine civil court (also deriving its authority from the United States) for "assassination" in violation of the Philippines Penal Code. *Grafton*, however, seems to have been charged under the "all crimes not capital" clause of that article rather than with the specifically military offense of "conduct of a nature to bring discredit upon the military service."

¹⁵¹ *United States v. Grosso*, 7 U.S.C.M.A. 566, 23 C.M.R. 30 (1957) (mailing of a defamatory letter); *United States v. Gittens*, 8 U.S.C.M.A. 673, 25 C.M.R. 177 (1958) (assault on military policeman); *United States v. Lawrence*, 8 U.S.C.M.A. 732, 25 C.M.R. 236 (1958) (assault on civilian policeman). The "crimes and offenses not capital" denounced in the third clause of the article include only those which are violations of federal law. See U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 213c (1951).

¹⁵² The Court of Military Appeals recently held, in the case of a dishonorably discharged prisoner, that one need not be in active military service to engage in conduct to the prejudice of good order and military discipline. *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963).

¹⁵³ See text accompanying note 123 *supra*.

within the ambit of any of the anti-subversion statutes—the military might have a legitimate need to inflict a greater punishment, and consequently Congress might constitutionally empower them to do so.

In ordinary circumstances, however, it is probable that any such case which may confront the federal courts will involve no more than dismissal and its concomitant, forfeiture of pay. The latter, as above suggested, seems neither just nor necessary to the preservation of discipline in the armed forces. The pay of one on the retired list seems to be in reality compensation for past services and only to a relatively minor extent, if at all, a retainer to keep the recipient available for recall to active duty. Congress and the President can, after all, call anyone to active service without paying him a fee for standing by. But in the present state of the law—which is not, of course, immutable—there seems to be no way to dismiss or discharge a retired serviceman without at the same time cutting off his pension. Such a deprivation of earned pay, though it may not be unconstitutional,¹⁵⁴ seems an act of meanness above and beyond the call of economy on the part of a government which habitually thinks in eleven or twelve figures.

The preparation of form sheets for the Supreme Court and the accurate prediction of its holdings is a sport requiring a high degree of both expertise and luck. On balance, I think it more probable than not that the Court, applying its status tests, would be inclined to find that retired personnel have a sufficiently military flavor to be regarded for constitutional purposes as part of the land or naval forces. But it is possible that the gross and disproportionate hardship of the collateral economic sanction, though perhaps not in itself directly relevant, might be the factor which would make the case sufficiently hard to tip the Court, despite its earlier dicta, toward a holding that the retired serviceman is essentially a civilian who cannot be court-martialed for any offense or for any purpose. Such a holding might be averted by legislation—in my opinion, desirable in any case—which would permit the separation from the military community of retired servicemen who disgrace that community, without forfeiting the pensions earned by past honorable service. Even if such separation is an inherent power of the Commander-in-Chief, which Congress can neither restrict nor confer, legislation would be essential to permit separation without loss of pension rights, and desirable to avoid the rekindling of ancient constitutional strife between President and Congress. In the case of conduct so flagitious as to require the ignominy of a punitive separation, dismissal or dishonorable discharge

¹⁵⁴ See text accompanying note 128 *supra*.

should be inflicted only pursuant to the processes of military justice—again stripping the offender of his military status but leaving him his pension.

III. COURT-MARTIAL JURISDICTION OVER ASSORTED RESERVISTS

The commonplace arguments adduced to support court-martial jurisdiction over retired servicemen, whether veterans of the Spanish-American or the Korean War—that they may be recalled to save their country at any time, like Cincinnatus from the plow, and that the armed forces therefore have an interest in maintaining discipline and fitness among these potential reinforcements—seems rather more plausible when applied to reservists, who are in reality likely to be called to service in emergencies. But despite its declarations of the vital role of the reserves in the military establishment,¹⁵⁵ Congress evidently did not think that the maintenance of military discipline and efficiency among reservists (who number several millions of voters and whose lobbies are vigorous and vociferous) demanded broad court-martial jurisdiction. The only categories of reservists not actually on active duty who are covered by article 2 of the Uniform Code are those who have been ordered to such duty, whether or not they have actually reported;¹⁵⁶ reservists on inactive duty training¹⁵⁷ under orders, voluntarily accepted, which specify subjection to the code; retired members of a reserve component who are receiving hospitalization from one of the armed forces; and members of the Navy's Fleet and Marine Corps Reserve. In practice, none of these explicit provisions has so far posed any serious problem. The provision subjecting reservists to court-martial jurisdiction from the time of their call to active duty has statutory ancestry as old as the Constitution and is plainly constitutional. Similar jurisdiction was upheld long ago in

¹⁵⁵ *E.g.*, 10 U.S.C. § 262 (1958):

“The purpose of the reserve components is to provide trained units and qualified persons available for active duty in the armed forces, in time of war or national emergency and at such other times as the national security requires, to fill the needs of the armed forces whenever, during, and after the period needed to procure and train additional units and qualified persons to achieve the planned mobilization, more units and persons are needed than are in the regular components.

¹⁵⁶ In this respect reservists differ significantly from draftees, who are not subject to the Code until they have actually been inducted. See note 91 *supra*.

¹⁵⁷ The phrase refers to the reservist's attendance at periodic “drills,” usually one evening a week or one weekend a month, for which he may or may not be paid, as distinct from his annual two weeks of *active* duty for training. During the latter period he is as subject to court-martial jurisdiction as any other soldier on active duty, and if he commits a serious offense he can be retained in that status pending investigation and possible charges. See N.Y. Times, Aug. 3, 1963, p. 33, col. 2, for an instance in which this was done.

Houston v. Moore,¹⁵⁸ and in *Martin v. Mott*.¹⁵⁹ In the former case, Justice Story, who dissented from the holding that Houston could be tried only by a federal court-martial, had grave doubts as to whether such a court-martial (as distinct from the Pennsylvania court-martial which had convicted him) could constitutionally exercise jurisdiction "until the drafted troops are mustered and in the actual pay and service of the Union."¹⁶⁰ Story's doubts, however, found no echo in the federal courts when the Congress of 1917 provided for the court-martialing of conscripts who failed to report for induction; the convictions of such draft evaders were upheld whenever challenged.¹⁶¹ The military connection of a reservist seems closer than that of a contumacious conscript, who has never taken the oath or had anything at all to do with the armed forces beyond the receipt of an order to report for induction. But the section, however constitutional, is not often used. Moreover, the solitary case under the section¹⁶² raised no issue of constitutionality, for the petitioner's sole contention was that only subsection (3) of article 2, dealing with inactive duty training, provided for subjection to the Code of a reservist not on active duty—and then only when he had voluntarily accepted orders so specifying. The fatal objection to this argument was that article 2(1) put the petitioner on active duty, and thus subject to the Code, from the moment he was ordered to report.

The court-martialing under subsection (3) of a reservist on inactive duty training might present interesting constitutional problems, but no such case has yet arisen. This may at first blush occasion some surprise, for the statute on its face confers a wide-ranging jurisdiction; if appropriate orders were issued and "voluntarily" accepted,¹⁶³

¹⁵⁸ 18 U.S. (5 Wheat.) 1, 20 (1820): "It has already been admitted, that if Congress had pleased so to declare, a militiaman, called into the service of the United States, might have been held and considered as being constructively in that service, though not actually so; and might have been treated in like manner as if he had appeared at the place of rendezvous."

¹⁵⁹ 25 U.S. (12 Wheat.) 19 (1827).

¹⁶⁰ 18 U.S. (5 Wheat.) at 61.

¹⁶¹ United States *ex rel.* Bergdoll v. Drum, 107 F.2d 897 (2d Cir. 1939), *cert. denied*, 310 U.S. 648 (1940); United States v. McIntyre, 4 F.2d 823 (9th Cir. 1925); United States *ex rel.* Feld v. Bullard, 290 Fed. 704 (2d Cir.), *cert. denied*, 262 U.S. 760 (1923); Franke v. Murray, 248 Fed. 865 (8th Cir. 1918); see Billings v. Truesdell, 321 U.S. 542, 546-47 (1944).

¹⁶² Petition of LaPlata, 174 F. Supp. 884 (E.D. Mich. 1959). LaPlata's client, one Fisher, was a Marine Corps Ready Reservist who failed to comply with his statutory training obligations. As provided by the statute in such cases, he was forcibly reminded of that obligation by an order to report for 45 days of "additional active duty for training." 10 U.S.C. § 270(a), (b) (1958). Thereupon he was taken into custody by the Marine Corps Police, though it does not appear that any charges were actually filed against him.

¹⁶³ The Ready Reservist, at least, may not have much real choice about accepting them. If the inactive duty training required by the statute is to be performed pursuant

the citizen soldier snoozing his way through a Thursday evening course on the Theory and Practice of Quartermaster Stock Inventories or some such exciting branch of military learning, might, if the statute is taken at face value, be court-martialed for failing to pay attention. But, in fact, the services have made no effort to seize this apparent opportunity to expand their criminal jurisdiction. The reservist during the short period of his inactive duty drill has little opportunity to commit any serious offense, and still less to commit one which cannot be adequately dealt with by the civilian police.¹⁶⁴ More, the legislative history of the subsection plainly shows that Congress intended the jurisdiction to be confined to those reservists whose inactive duty training involved the use of equipment, such as aircraft, whose misuse might entail disastrous consequences.¹⁶⁵ The courts, therefore, notwithstanding the seeming latitude of the language, would probably not permit the subsection to be used in other circumstances. Finally, since the period of inactive duty training is usually only two or three hours and never longer than a weekend, the process of military justice would have to be initiated very rapidly, for the trainee's subjection to the Code ends with the training period.¹⁶⁶ For these reasons—plus, perhaps, doubts about constitutionality—there seems to be no instance of a court-martial of a reservist under article 2(3). Subdivision (5) of article 2, covering retired reservists who are receiving hospitalization from the armed forces, is equally comatose. The retired reservist, in sharp contrast to the retired regular, is thus practically immune from court-martial jurisdiction.¹⁶⁷ The jurisdiction conferred by article

to orders so specifying—as is the practice of the Navy—refusal to accept them might entail, as in the *LaPlata* case, an order to 45 days of active training, which would certainly subject him to the Code. See Wren, *Court-Martial Jurisdiction Over Naval Reservists*, 17 JAG J. 5, 6 (1963).

¹⁶⁴ Traffic offenses, which are, of course, the ordinary citizen's ordinary crime, would not normally be covered, for the reservist is not considered to be engaged in inactive duty training while driving to and from the drill. Cf. *O'Brien v. United States*, 192 F.2d 948 (8th Cir. 1951).

¹⁶⁵ "Subdivision 3, article 2, was objected to by Reserve associations on the ground that it would be used to subject Reserves to the code when they are engaged in all types of inactive duty training. Although the committee has made no change in this subdivision, it desires to express the view that military departments should issue orders subjecting Reserves to the code only when they are engaged in inactive duty training involving the use of dangerous or expensive equipment." S. REP. NO. 486, 81st Cong., 1st Sess. 4-5, 7 (1949); see H.R. REP. NO. 491, 81st Cong., 1st Sess. 4-5 (1949); 96 CONG. REC. 1356-57 (1949). The House committee report did not stress the limitation to "dangerous or expensive" equipment, and it is hard to see why the Senate, if it so construed the provision, did not insist on unambiguous language. The Senators may have been deterred by the near-impossibility of defining "dangerous or expensive."

¹⁶⁶ See note 157 *supra*; Wren, *supra* note 163, at 18.

¹⁶⁷ Prior to the Uniform Code, the Navy had jurisdiction over retired reservists, who were on the same retired list as the regulars. The Code standardized jurisdiction over such personnel by virtually abolishing it in all three services. See S. REP. NO. 486, 81st Cong., 1st Sess. 7 (1949); H.R. REP. NO. 491, 81st Cong., 1st Sess. 10

2(6) over members of the Fleet Reserve and the Fleet Marine Corps Reserve (categories peculiar to the Navy) is presumably at least as constitutional as that over retired regulars, to whom they bear a stronger generic resemblance than to ordinary reservists.¹⁶⁸ But this subsection also appears at the present time to be a moribund, if not dead, letter. Although article 2(6), like its predecessor,¹⁶⁹ in terms applies to Fleet Reservists as such, whether or not on active duty, the Navy seems for some reason to have supposed that recall to active duty was a prerequisite to the military trial of a Fleet Reservist.¹⁷⁰ Necessary or not, this practice was dealt a crippling, if not fatal, blow in *United States ex rel. Boscola v. Bledsoe* and its companion case, *United States ex rel. Smith v. Thomas*.¹⁷¹ In these cases, the Navy, probably motivated by considerations akin to those which led to the courts-martial of Hooper and Chambers, recalled a retired enlisted man and a Fleet Reservist to active duty for the sole purpose of court-martialing them for offenses committed after their active service had ended and for which, into the bargain, they had already been tried, convicted, and punished by a state court.¹⁷² The district court, re-

(1949). The District Court for the District of Columbia recently rejected an argument that such discrimination rendered unconstitutional the retained jurisdiction over retired regulars. *Taussig v. McNamara*, 219 F. Supp. 757 (D.D.C. 1963).

¹⁶⁸ They are composed of regular naval or marine enlisted men, who after 20 years or more of active service are transferred to the Fleet or Marine Corps Reserve until retired, and who receive a substantial percentage of the base pay of their grade as "retainer pay." See 10 U.S.C. § 6330-32 (1958). Their closest analogues in the other services are retired enlisted men who are also members of the Reserve. See *United States ex rel. Pasela v. Fenno*, 76 F. Supp. 203, 207 (D. Conn. 1947), *aff'd*, 167 F.2d 593 (2d Cir.), *cert. granted and thereafter dismissed by stipulation of counsel*, 335 U.S. 806 (1948) (upholding jurisdiction over a Fleet Reservist largely on the analogy of *United States v. Tyler*, 105 U.S. 244 (1881)); see text accompanying note 137 *supra*; 10 U.S.C. §§ 3914, 8914 (1958).

¹⁶⁹ The Naval Reserve Act of 1938 provided that members of the Fleet Reserve, like retired personnel, should "at all times be subject to the laws, regulations and orders for the government of the Navy." Ch. 690, § 6, 52 Stat. 1175.

¹⁷⁰ See *United States ex rel. Pasela v. Fenno*, 167 F.2d 593, 594 (2d Cir.), *cert. granted and thereafter dismissed by stipulation of counsel*, 335 U.S. 806 (1948); *Wren, supra* note 163, at 17; Everett, *Persons Who Can Be Tried by Court-Martial*, 5 J. PUB. L. 148, 149 n.12 (1956). The notion seems inconsistent with the reasoning by which the Court of Military Appeals reached the conclusion that a retired regular may be court-martialed under article 2(4) without having first been placed on active duty. *United States v. Hooper*, 9 U.S.C.M.A. 637, 641, 26 C.M.R. 417, 421 (1958); see text accompanying note 109 *supra*.

¹⁷¹ 152 F. Supp. 343 (W.D. Wash. 1956), *aff'd*, 245 F.2d 955 (9th Cir. 1957). *Boscola* was on the retired list; *Smith*, whose case was in all other respects similar, was a member of the Fleet Reserve. The two cases were decided on identical grounds.

¹⁷² *Boscola* and *Smith* did not endear the Navy to the American Legion, whose usual enthusiasm for a strong defense establishment does not extend to the court-martialing of veterans. The Legion's Special Committee on the Uniform Code of Military Justice and the United States Court of Military Appeals characterized them in terms described by the Committee itself as "temperate," but which may not have struck the Navy in that light: "As examples of immaturity (to be temperate in expression) and lack of independence of Naval legal advisers we cite the decision of the United States District Court . . . in the *Boscola* and *Smith* cases, wherein is demonstrated the exercise of illegal, capricious and arbitrary power at its worst." See *Hearings on Constitutional Rights of Military Personnel* 424.

leasing the petitioners from naval custody (neither had been actually brought to trial) on the ground that the kind of "duty" for which the statute in question¹⁷³ authorized recall was not intended by Congress to include standing trial, never reached the construction or the constitutionality of subsections (4) or (6) of article 2. There is an earlier, substantially conflicting, decision of the Second Circuit in *United States ex rel. Pasela v. Fenno*,¹⁷⁴ which upheld the recall and court-martial conviction of a Fleet Reservist for an offense committed after his release from active duty. But since its failure in *Boscola* and *Smith*, the Navy has made no effort to court-martial Fleet or Marine Corps Reservists. For one thing, the statutes under which Pasela, Boscola, and Smith were put on active duty are applicable only in time of war or national emergency. For another, the cumulative effect of the Supreme Court's grant of certiorari (subsequently dismissed by stipulation of counsel) in *Pasela*, the trend of its decisions in *Toth* and in other cases discussed at the beginning of this Article, and the *Boscola* decision itself may well have made the earlier precedent too rickety to bear the weight of a hard case. In the *Hooper* and *Chambers* cases, the naval authorities made no effort to order the accused to active duty, relying wholly on the direct grant of jurisdiction contained in article 2(4).¹⁷⁵ Whether the results thus far attained in the *Hooper* case will encourage the Navy to apply to Fleet Reservists under article 2(6) the arguments which succeeded with retired personnel under 2(4) is doubtful; there are, after all, other and less controversial ways of eliminating undesirables from the Reserve, if not from the retired list.

Thus, the several provisions of the Uniform Code which explicitly subject reservists not on active duty to court-martial, though broad enough to create a military jurisdiction of alarming extent over hundreds of thousands or millions of quasi-civilians—if the military were so inclined and if the courts took the statutory language literally—are not likely to present civilian judges with serious problems. The services, even the Navy, have small reason and less desire to stir up the American Legion, the Reserve Officers Association, and all the

¹⁷³ 10 U.S.C. § 6482 (1958).

¹⁷⁴ 167 F.2d 593 (2d Cir.), cert. granted and thereafter dismissed by stipulation of counsel, 335 U.S. 806 (1948). The court in *Boscola* distinguished *Pasela* on the strength of not very significant differences in the wording of the statute under which Pasela had been put on active duty, but its disagreement with the Second Circuit's reasoning is hardly concealed. 152 F. Supp. at 345-46.

¹⁷⁵ Admiral Hooper's counsel argued vigorously and unsuccessfully that the Admiral could not be tried unless he was on active duty at the time of the trial; they attributed the Navy's failure to recall him to *Boscola*. See Brief on Behalf of the Accused, pp. 9, 13, *United States v. Hooper*, 9 U.S.C.M.A. 637, 26 C.M.R. 417 (1958); text accompanying note 109 *supra*.

other hornets' nests, by using their scarce legal personnel to try offenses which in all save the rarest cases can be handled by a combination of civilian criminal justice and military administrative procedures.

It may thus be concluded with reasonable assurance that reservists will not, and probably cannot, be court-martialed for offenses committed when they are not on active duty. There remains the problem under article 3(a) of the reservist who, while on active duty, commits an offense which is a serious violation of the Code (punishable by five years' confinement) and not triable by an American civilian court (either because it is purely military or because it was committed outside the territorial jurisdiction of any American court),¹⁷⁶ but who is not charged therewith before his separation from active duty. If he is honorably discharged and wholly separated from the service, he is, of course, constitutionally immune from military jurisdiction.¹⁷⁷ But suppose, as is likely to be the case, he is not discharged, but transferred to the Reserve?¹⁷⁸ Is he any more vulnerable than Toth? If he is, article 3(a) may still retain substantial life.

As a matter of fact, the original version of article 3(a) was intended to recall to active duty for disciplinary purposes reservists who had reverted to inactive status. The loud complaints of reserve groups led Congress to broaden the section's coverage of persons and to limit the offenses covered.¹⁷⁹ Congress was at the time, as the hearings and committee reports on the Uniform Code reveal, much exercised by the possibility, recently and graphically demonstrated, that under the existing Articles of War and Articles for the Government of the Navy, a soldier or sailor could commit a serious crime outside the jurisdiction of the civilian courts of the United States, conceal it until his release from service, and thereafter thumb his nose at the law. One such case was that of Captain Kathleen Nash Durant, who had stolen the crown jewels of Hesse and been brought to justice only because her terminal leave had not quite expired when the Army finally got the

¹⁷⁶ The Court of Military Appeals recently held, for example, that article 3(a) was inapplicable to larcenies of government property and forgeries of documents for the purpose of defrauding the Government, though committed in Japan, because it concluded that the sections of the Penal Code denouncing such felonies had extra-territorial application, and that the accused could thus have been tried in a federal district court. *United States v. Steidley*, 14 U.S.C.M.A. 108, 33 C.M.R. 320 (1963); cf. *Martin v. Young*, 134 F. Supp. 204 (N.D. Cal. 1955).

¹⁷⁷ *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955); see text accompanying note 1 *supra*.

¹⁷⁸ The ordinary draftee, after completing his active duty, is transferred to the Ready Reserve and thereafter to the Standby Reserve for the balance of his military obligation. 10 U.S.C. §§ 267-73 (1958); Note, 69 YALE L.J. 474 (1960).

¹⁷⁹ See *Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services*, 81st Cong., 1st Sess. 567, 617, 882-84 (1949); H. REP. No 491, 81st Cong., 1st Sess. 5 (1949).

goods on her.¹⁸⁰ Another was the *Hirshberg* case,¹⁸¹ in which the Supreme Court finally decided that, under the statutes antedating the Uniform Code, a sailor who had been honorably discharged could not, though he reenlisted the next day, be court-martialed for offenses (other than frauds on the United States) committed during the first enlistment—a point on which there had been much inconclusive debate, although the Army ever since 1862 and the Navy until 1932 had taken the position that such jurisdiction did not survive an honorable discharge.¹⁸² For this purpose, the courts saw no significant difference between an outright discharge and transfer to the inactive reserve.¹⁸³ Congress could, of course, have plugged the jurisdictional loophole by increasing the number of offenses over which the federal courts have extraterritorial jurisdiction; it elected instead to preserve court-martial jurisdiction over such serious offenses as were, under the existing laws, beyond the reach of the civilian courts.

Toth showed that choice to have been a constitutional blunder in the case of the serviceman who has "severed all relationship with the military and its institutions."¹⁸⁴ It has, however, since been held that article 3(a) is constitutional when applied to a discharged offender who renews his connection with the military and its institutions by signing up for another hitch, and who thus is subject to the Code both when he commits the offense and when the Military Police

¹⁸⁰ *Hironimus v. Durant*, 168 F.2d 288 (4th Cir.), *cert. denied*, 335 U.S. 818 (1948). The court held that although Captain Durant was required to perform no duty during her terminal leave, at the expiration of which she would automatically have been relieved from active duty, she was nonetheless on active duty until that expiration. She would have retained her commission, and thus have had some connection with the armed forces, until six months after the end of the emergency, but the court's holding made it unnecessary to consider whether she could have been recalled from inactive status in order to stand trial. 168 F.2d at 293-94. The accused's husband, Colonel Durant, whose romance blossomed from their common interest in the collection of historic gems, stayed in jail for the same reasons. *Durant v. Hiatt*, 81 F. Supp. 948 (N.D. Ga. 1948).

¹⁸¹ *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 (1949), *reversing United States ex rel. Hirshberg v. Malanaphy*, 168 F.2d 503 (2d Cir. 1948).

¹⁸² The problem is discussed, and the conflicting authorities collected, in the opinions in *United States ex rel. Hirshberg v. Malanaphy*, *supra* note 181, at 507-08, and *Hironimus v. Durant*, 168 F.2d 288, 293 (4th Cir. 1948), *cert. denied*, 335 U.S. 818 (1948). See generally 31 Ops. Att'y GEN. 521 (1919); Zeigler, *The Termination of Jurisdiction Over the Person and the Offense*, *Military L. Rev.*, Oct. 1960, pp. 139, 144. At least one district court and the Court of Military Appeals have recognized an exception to the general rule (also recognized before the enactment of the Uniform Code) in the case of a "short" discharge—*i.e.*, one conditioned upon immediate reenlistment or acceptance of a commission, so that there is no real interruption or civilian "hiatus" in the accused's status of subjection to the Code. *United States ex rel. Atkinson v. Kish*, 176 F. Supp. 820 (M.D. Pa. 1959); *United States v. Johnson*, 6 U.S.C.M.A. 320, 20 C.M.R. 36 (1955); *United States v. Solinsky*, 2 U.S.C.M.A. 153, 7 C.M.R. 29 (1953); *cf. United States v. Martin*, 10 U.S.C.M.A. 636, 28 C.M.R. 202 (1959).

¹⁸³ *United States ex rel. Viscardi v. MacDonald*, 265 Fed. 695 (E.D.N.Y. 1920); *United States ex rel. Santantonio v. Warden*, 265 Fed. 787 (E.D.N.Y. 1919); *United States v. Brown*, 12 U.S.C.M.A. 693, 31 C.M.R. 279 (1962).

¹⁸⁴ 350 U.S. at 14.

catch up with him—apparently without regard to the length of the civilian interlude between the two periods.¹⁸⁵ In *Atkinson v. Kish*,¹⁸⁶ the accused had been conditionally discharged for the purpose of allowing him to sign up for a fresh term of enlistment and so, under the “no hiatus” rule, was held to have remained subject to military jurisdiction without benefit of article 3(a), although the court did not rely on this ground alone. But in *United States v. Gallagher*,¹⁸⁷ the defendant’s term of enlistment had expired; like Hirshberg, he was free, and would have been well advised, to kiss the service a permanent goodbye. These cases involved regulars, whose habit it is to reenlist. Whether their reasoning can be extended to an inactive reservist—who retains only the minimum military status required by the statute, and who normally cannot be ordered to active duty without his consent, or for the sole purpose of being court-martialed—is very doubtful, despite the case of Airman Third Class Wheeler.¹⁸⁸

Wheeler, though not a lawyer, took pains to present the courts with a set of facts which might have been dreamed up by a Professor of Military Law. First, he committed a rather picturesque murder while on active duty in Germany, thoughtfully selecting a time when he was about to return to the United States for release from active duty. Having failed to mention the murder to his superiors, he was within a few days duly transferred to the inactive Reserve to complete his military obligation. He proceeded to find a civilian job and generally to assimilate himself as closely to a full-fledged civilian, on the model of Mr. Toth, as was possible without actually being discharged. But murder will out, and this one did. Some five months later, Wheeler, having been “contacted” and questioned by both the Air Force’s Office of Special Investigations and the civilian police of Pensacola, Florida, freely confessed to both of them. At this point legal problems began to bedevil the authorities, for it was plain that neither the federal nor the state courts could try Wheeler for a murder, committed in Wiesbaden and having no element of espionage, treason, or any other extraterritorial offense. The cooperative civilian police gained a breathing space for the lawyers by resorting to the device of arresting Wheeler for vagrancy and holding him for investigation. Article 3(a) was, of course, applicable in terms, for the offense was punishable by more than five years and triable by no American court—

¹⁸⁵ *United States ex rel. Atkinson v. Kish*, 176 F. Supp. 820 (M.D. Pa. 1959); *United States v. Gallagher*, 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957); cf. *United States v. Frayer*, 11 U.S.C.M.A. 600, 29 C.M.R. 416 (1960).

¹⁸⁶ 176 F. Supp. 820 (M.D. Pa. 1959).

¹⁸⁷ 7 U.S.C.M.A. 506, 22 C.M.R. 296 (1957).

¹⁸⁸ *Wheeler v. Reynolds*, 164 F. Supp. 951 (N.D. Fla. 1958); *United States v. Wheeler*, 10 U.S.C.M.A. 646, 28 C.M.R. 212 (1959).

but there stood the *Toth* decision. The Air Force lawyers seem to have preferred not to rest their whole case on the argument that Wheeler could be distinguished from *Toth* simply because he was still in the Reserve; like their colleagues in the Navy, they thought it better to put him on active duty before trying him. This raised more obstacles. In the first place, Wheeler could not be recalled to active duty without his consent except in time of war or national emergency;¹⁸⁹ in the second place, Air Force Regulations forbade a recall for the purpose of court-martial.¹⁹⁰ The Secretary of the Air Force and Wheeler cooperated to remove these difficulties. The Secretary consented to, and indeed ordered, Wheeler's "apprehension, return to military control and trial by court-martial,"¹⁹¹ and Wheeler obligingly applied for active duty. His motivation seems to have been intense fear of extradition and trial by a German court. Parenthetically, it may be remarked that his alarm was not only excessive, but also legally unsound, for it was in fact very doubtful that he could have been extradited under the applicable treaty with Germany.¹⁹² It is still more doubtful that Germany would have been considered "occupied" or "under the control of" the United States for the purpose of the statute which authorizes extradition to such territories.¹⁹³ At any rate, he volunteered for active duty, not merely willingly, but downright eagerly, for the solitary purpose of being tried by a court-martial.¹⁹⁴

Wheeler, like Hooper and Chambers, had both civilian and military courts pass upon his case. His enthusiasm for court-martial seems to have been dispelled by perusal of the actual charges against him—

¹⁸⁹ 10 U.S.C. §§ 672-73 (1958).

¹⁹⁰ 21 Fed. Reg. 5015 (1956).

¹⁹¹ Whether this action of the Secretary was sufficient to dissipate the effect of his own regulation and legitimize the orders putting Wheeler on active duty is debatable. Cf. *Service v. Dulles*, 354 U.S. 363 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The point was not considered in the subsequent attacks on the court-martial's jurisdiction, even by those judges who upheld that jurisdiction solely on the basis of Wheeler's return to active duty.

¹⁹² Extradition Treaty With Germany, July 12, 1930, 47 Stat. 1862, T.S. No. 836; cf. *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5 (1936) (holding that an American citizen was not covered by the similarly worded Franco-American extradition treaty).

¹⁹³ 18 U.S.C. § 3185 (1958); *In the Matter of Kraussman*, 130 F. Supp. 926 (D. Conn. 1955).

¹⁹⁴ [W]hile still in the Pensacola jail, petitioner [Wheeler] executed a form-application for extended active duty within the Air Force, after the officer who presented the same to him for signature, told him to read a statement therein to the effect that, upon his recall to active duty, he would be confronted immediately with court-martial charges, and explained such statement to him also. According to this officer, petitioner's desire to execute such application was so great that the officer restrained him from signing it until he was assured that petitioner was doing so entirely voluntarily.

164 F. Supp. at 953.

though the convening authority, possibly having in mind the Frankfurter-Harlan distinction in *Covert* and *Krueger*,¹⁹⁵ had directed that the case be treated as noncapital. He promptly sought habeas corpus, principally on the ground that his release from active duty had brought him within the shelter of *Toth*.¹⁹⁶ The court held otherwise, and did so without reference to the fact that Wheeler was on active duty at the time he was charged.

[B]y reason of his military obligation and reserve status, however inactive or limited it may be, for the military purposes intended by Congress to be served by the creation and maintenance of the present reserve components of the armed forces, petitioner, when released from active duty, was not a full-fledged civilian, nor in the same status as a discharged veteran but was an Airman Third Class of the Air Force Reserve.¹⁹⁷

So far as the Florida district court was concerned, the Air Force could have spared itself the elaborate maneuvers by which Wheeler was placed on active duty, for, since every reservist is ipso facto a part of the land or naval forces, article 3(a) could constitutionally subject him to military jurisdiction.

The Court of Military Appeals, though it reached the same result, was less clear. Only Judge Latimer followed the reasoning of the civilian court, stressing that since reservists are intimately connected with the military, likely to be called to the colors "almost at the scratch of the Presidential pen," their amenability to military justice (at least for crimes committed on active duty) is necessary "in order to maintain orderly and disciplined fighting forces and to keep them in good public repute Not only do unpunished criminals bring [the armed forces] . . . into disrepute and lower the prestige of the Nation, they impair morale and discipline in the services."¹⁹⁸ The trouble with this line of argument, of course, is that it simply side-steps the basic objection of the Supreme Court in *Toth*: the problem in each situation is not whether the criminal ought to be brought to trial, but whether that trial ought to be in a civilian court. From this standpoint, the difference between the inactive reservist who receives neither training nor pay, and whose military value is no greater than that of any other former soldier of his age, and the discharged veteran

¹⁹⁵ See text accompanying note 53 *supra*.

¹⁹⁶ He claimed also that his recall to active duty was void because involuntary and unauthorized by Air Force regulations. 164 F. Supp. at 954. The court's holding made it unnecessary to pass on either point.

¹⁹⁷ 164 F. Supp. at 955.

¹⁹⁸ 10 U.S.C.M.A. at 655-56, 28 C.M.R. at 221-22.

who is a potential draftee in time of emergency seems hardly great enough to justify a constitutional distinction. Nor is there much more force in the argument that the services ought to be able to purge their Reserves of murderers, rapists, thieves, and other felons. No doubt they should, but, as is not the case with retired personnel, they can easily take care of that by administrative discharges. It is true, as Judge Latimer pointed out, that they may "end up with a military record which can be clouded with nothing more than an administrative discharge."¹⁹⁹ That consideration seems a good deal less than overpowering. The inactive reservist, unlike the retired regular, is not likely to be identified by the public with the military service; he typically sports neither his rank nor his uniform, and certainly could not do so after an administrative discharge. An administrative undesirable discharge, furthermore, is not exactly a badge of honor; it is in reality a large black cloud on the recipient's military record, in practice nearly as damaging as a strictly punitive discharge. And, after all, Toth wound up with a perfectly good honorable discharge, suitable for framing.

The other members of the Court of Military Appeals, perhaps for some of the foregoing reasons, sought other grounds on which to base the decision. Their view was that article 3(a) was constitutional in the circumstances because Wheeler, despite a civilian hiatus of some five months, was on active duty when he was tried, a circumstance which had already been held sufficient to distinguish *Toth*. Chief Judge Quinn expressed no opinion "as to the continuation of court-martial jurisdiction under Article 3(a) of the Code over individuals relieved from active duty and transferred to a reserve component for completion of a military service obligation under the Universal Military Training Act."²⁰⁰ Judge Ferguson stated: "I completely disassociate myself from the conclusion of the principal opinion that . . . Article 3(a) may be constitutionally utilized as the basis for the exercise of jurisdiction over a member of the reserve forces not on active duty for an offense committed while he was on active duty."²⁰¹

One thing is clear. The next soldier who manages to conceal a serious crime, committed outside the jurisdiction of American civil courts, until he has been released from active duty and transferred to the inactive Reserve will present military lawyers with perplexing problems. He probably cannot be put on active service without his consent, and, if he is well advised, he will not simplify those problems by

¹⁹⁹ *Id.* at 656, 28 C.M.R. at 222.

²⁰⁰ *Id.* at 658, 28 C.M.R. 225.

²⁰¹ *Id.* at 659, 28 C.M.R. 225.

volunteering for active duty. Even if he does, it is not at all certain that a court of appeals or the Supreme Court would distinguish *Toth* for that reason. The reasoning of *Gallagher*, that the maintenance of discipline requires power to court-martial a soldier presently on active duty for a crime committed in a previous tour of duty, looks somewhat strained and artificial when the sole "duty" he is expected to perform during the second period is to play the leading role in a general court-martial, and the exclusive reason for his presence among the active land and naval Forces is the attempted legitimization of that court-martial.

If he cannot by force or persuasion be put on active service, the sailing is still less smooth. Judge Ferguson of the Court of Military Appeals is of the unequivocal opinion that article 3(a) cannot constitutionally be applied to one who has no more connection with the military than membership in the inactive Reserve. The views of Chief Judge Quinn and Judge Latimer's successor, Judge Kilday, are unknown. Even if both of them agree with Judge Latimer and the Florida district court, I greatly doubt that their reasoning would carry conviction to a federal appellate court—particularly the Supreme Court.

I come thus to the opinion that a reservist, as such, is immune from court-martial jurisdiction, and ought to be. If justice requires his punishment, he is, or can be made, triable in the civilian courts. If military efficiency requires his elimination from the service, that can be done by methods easier, less drastic, and less questionable from the constitutional standpoint than a court-martial.

IV. COURT-MARTIAL JURISDICTION OVER DISCHARGED PRISONERS IN MILITARY CUSTODY

There remains to be considered a rather populous class of quasi-civilians, by definition criminally inclined. These are prisoners serving court-martial sentences in disciplinary barracks and similar military jails, who are subjected to the Code by article 2(7).²⁰² No constitutional problem arises, of course, if the convict has not been sentenced to discharge, or if higher authority, hopeful of rehabilitation, has suspended the execution of the discharge. A soldier does not cease to be a soldier simply because he is deprived of his pay and liberty. But if a punitive discharge, pursuant to the court-martial's sentence, has been executed, the recipient undoubtedly takes on a certain resemblance to Mr. Toth. A discharge, though it be yellow in color, labelled

²⁰² The exact language of the subsection is "Persons in custody of the armed forces serving a sentence imposed by a court-martial."

"dishonorable" in large type, and bereft equally of fancy engraving, spread-eagles, and statutory benefits, is nonetheless a discharge. By itself, it terminates military jurisdiction just as efficaciously as an honorable discharge.²⁰³

But the execution of a punitive discharge does not necessarily "wholly sever" the convict's relationship with the armed forces, for he may retain an intimate connection with the military through its penal system. Though he has neither rank nor pay, he is fed and clothed by the service; he is subject to its disciplinary regulations, which typically prescribe a certain amount of military training; and he is under the orders of the resident staff and faculty, who are military personnel. If he is a civilian, he is assuredly a peculiar variety of that species.

Congress has certainly never regarded the military prisoner as a full-fledged civilian; court-martial jurisdiction over him is as old as the military prison system itself, which dates from 1873.²⁰⁴ It has survived every subsequent revision of the military penal code, including the Uniform Code itself. The only significant change has been a return to the original policy of limiting military jurisdiction to those who are confined not only pursuant to sentence of a court-martial but also in a military prison.²⁰⁵

The courts have been afforded plenty of opportunities to consider the validity of these provisions, for the persons thus subjected to military law are by definition full of criminal propensities. Moreover, even in the pre-*Toth* era, military convicts were aware that their discharges put them on a somewhat different footing from ordinary members of the armed forces. Though Winthrop thought a discharged soldier a civilian, constitutionally exempt from court-martial,²⁰⁶ nineteenth century courts made short work of the constitutional argument, for it

²⁰³ See U.S. DEP'T OF DEFENSE, MANUAL FOR COURTS-MARTIAL ¶ 11, at 14 (1951); Zeigler, *The Termination of Jurisdiction Over the Person and the Offense*, Military L. Rev., Oct. 1960, pp. 139, 144. For this purpose there is no distinction between the dishonorable discharge and the theoretically slightly less punitive bad-conduct discharge. Cf. *United States v. Nelson*, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963).

²⁰⁴ Act of March 3, 1873, ch. 249, § 1, 17 Stat. 582. During the Civil War the Army managed to get along with an ill-assorted collection of penological tools which included short-term confinement in regimental stockades or guardhouses, capital punishment, a rich variety of picturesque corporal punishments (*e.g.*, shaving the offender's head, causing him to wear a barrel or derogatory placard), most of which would today be regarded as unusual, if not cruel, remission to the civil authorities, and punitive discharges (which frequently failed to prevent reenlistment under another name). See H.R. EXEC. DOC. NO. 61, 41st Cong., 2d Sess. 1-3 (1870); WINTHROP 437-42.

²⁰⁵ Act of June 18, 1898, ch. 418, 30 Stat. 483-84, unlike the Act of 1873, was not in terms limited to those confined in military prisons, and neither were the corresponding provisions in the Articles of War of 1916, 1920, and 1948. See Act of Aug. 29, 1916, ch. 418, 39 Stat. 650-51; Act of June 4, 1920, ch. 227, 41 Stat. 787; Act of June 24, 1948, ch. 625, 62 Stat. 628.

²⁰⁶ WINTHROP 105-07.

seemed clear to them that military prisoners, discharge or no discharge, were far from having severed their connection with the Army.²⁰⁷ As one of them said, drawing a stirring picture of a gallant martial hoosegow:

The prison in question [the disciplinary barracks at Fort Leavenworth] was designed as a place of punishment for those persons only who, while in the military service of the government . . . are guilty of offenses "against the rules, regulations and laws for the government of the army of the United States." It is a part of our military establishment, as much as the guardhouse, with which our forts and military encampments are always provided. . . . There can be no doubt of the fact that the prison was thus placed in charge of army officers because it was regarded as a military institution, the same as a fort or an arsenal or a navy yard, and for the purpose of subjecting persons who might be confined therein to military law and to the same discipline that is enforced in the army.

[T]he discharge was issued in part execution of a sentence which directed that he should not only be dishonorably discharged, with the forfeiture of all pay and allowances, but that he should also be held and confined at hard labor for a given period in a military prison. A discharge executed under these circumstances and for such a purpose cannot be said to have had the effect of severing his connection with the army, and of freeing him forthwith from all the restraints of military law.²⁰⁸

The Supreme Court a few years later went out of its way to state that Captain Oberlin Carter, probably the all-time champion military litigant, "was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war."²⁰⁹ But the declaration was not much more than dictum, for Carter's hairsplitting argument—in substance, that when the court began its sentence by dismissing him he ceased *eo instante* to be an officer of the Army, so that the remaining clauses of the sentence were vainly addressed to an immune civilian—hardly required such a rebuttal. Aside from the common-sense rejoinder that all the com-

²⁰⁷ *Ex parte Wildman*, 29 Fed. Cas. 1232 (No. 17653a) (D. Kan. 1876); *In re Craig*, 70 Fed. 969 (C.C.D. Kan. 1895). The Attorney General came to the same conclusion. 16 OPS. ATT'Y GEN. 292 (1879).

²⁰⁸ *In re Craig*, 70 Fed. 969, 971 (C.C.D. Kan. 1895).

²⁰⁹ *Carter v. McClaghry*, 183 U.S. 365, 383 (1902). For an account of Captain Carter's long series of collateral attacks, extending over nearly forty years, on his court-martial conviction, see the separate opinion of Mr. Justice Frankfurter in *Burns v. Wilson*, 346 U.S. 844, 846 (1953).

ponents of the sentence were concurrent, Carter's offense had been committed while he was admittedly on active service, and the point could be disposed of on the authority of the well-settled principle that court-martial jurisdiction, having once validly attached, lasts until the process of military justice is completed. Not until 1921 did the Supreme Court squarely face the problem in *Kahn v. Anderson*,²¹⁰ a case in which dishonorably discharged prisoners in the disciplinary barracks were convicted by court-martial of murder committed while they were in that status. To be precise, it was not quite clear that the prisoners' dishonorable discharges had actually been executed before they committed the murder, but the Court assumed this to be the case. Proceeding on this assumption, it held unanimously that, "as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment."²¹¹ Some of Chief Justice White's language comes close to suggesting that he and his brethren in 1921 thought that Congress was constitutionally empowered to subject anyone at all to court-martial, the only question being one of interpretation of its intent:

[W]e observe that a further contention, that, conceding the accused to have been subject to military law, they could not be tried because Congress was without power so to provide consistently with the guarantees as to jury trial and presentment or indictment by grand jury, respectively secured by Art. I, § 8, [Art. III, § 2] of the Constitution, and Art. V [and Art. VI] of the Amendments [*sic*],—is also without foundation, since it directly denies the existence of a power in Congress exerted from the beginning, and disregards the numerous decisions of this court by which its exercise has been sustained²¹²

If this was really the basis of the opinion—remembering that none of the "numerous decisions" to which the Court referred had dealt with the court-martial of a pure civilian—it was, of course, destroyed by the Court's recent opinions in *Toth*, *Covert*, and the rest of the cases

²¹⁰ 255 U.S. 1 (1921).

²¹¹ 255 U.S. at 7-8. The Court cited and quoted from *Carter v. McClaughry*, 183 U.S. 365 (1902). It also held that, although the trial had taken place a few days after the Armistice, it was not precluded by the provision of article 92 of the 1916 Articles of War that "no person shall be tried by court-martial for murder or rape committed within the geographical limits of the states of the Union and the District of Columbia in time of peace." That phrase, the Court said, meant "peace in the complete sense, officially declared." 255 U.S. at 10. This part of the decision was virtually overruled by *Lee v. Madigan*, 358 U.S. 228 (1959). The Court in *Lee* observed the judicial amenities by labeling as "dictum" the phrase quoted from *Kahn v. Anderson*.

²¹² 255 U.S. at 8.

holding that Congress cannot constitutionally subject a civilian to military law in peacetime.

At the time, however, *Kahn* seemed to have disposed of the problem; the few courts in which the problem was raised dutifully and unquestioningly upheld military jurisdiction over discharged prisoners.²¹³ All this seeming certainty was, of course, rudely unsettled by *Toth*, which made it clear, first, that there were constitutional barriers to the proliferation of court-martial jurisdiction and, second, that one of those barriers was an effective separation from the military community, such as a discharge.²¹⁴ Hope woke again in the breasts of all the dishonorably discharged prisoners whose stay in jail had been lengthened by the addition of a new court-martial sentence for an offense committed while serving a prior sentence. The first such two-time loser to reach the federal courthouse was one John Lee. Lee, while serving twenty years in a disciplinary barracks for robbery and assault, pursuant to a court-martial sentence which also included an executed dishonorable discharge, conspired to commit murder, was duly convicted thereof by a general court-martial, and sentenced to death, commuted to life imprisonment. The Army, abandoning the idea of rehabilitation, designated Alcatraz as the place of confinement.²¹⁵ In 1956 the Army's Clemency Board, in an apparently empty act of grace, remitted the balance of the original sentence—whose validity Lee could not well contest²¹⁶—with the result that his continued sojourn in Alcatraz was supported only by the second sentence, inflicted after his discharge, and also at a time when the United States was only technically at war with Germany and Japan. His petition for habeas corpus attacked the validity of the conviction on both grounds. The Court of Appeals for the Ninth Circuit rejected both contentions, on the authority of *Kahn v. Anderson*. "Time of peace" meant peace officially declared; and as to the constitutional point, it could not see that *Toth* or the other civilian cases had changed the situation at all, for Lee's "relationship to the military . . . was close

²¹³ *McDonald v. Lee*, 217 F.2d 619 (5th Cir. 1954), *cert. granted and remanded with instructions to dismiss as moot*, 349 U.S. 948 (1955); *Mosher v. Hunter*, 143 F.2d 745 (10th Cir. 1944), *cert. denied*, 323 U.S. 800 (1945); *Mosher v. Hudspeth*, 123 F.2d 401 (10th Cir. 1941), *cert. denied*, 316 U.S. 670 (1942); *Steele v. Humphrey*, 80 F. Supp. 544 (M.D. Pa. 1948).

²¹⁴ The Supreme Court in *Toth* briefly summarized *Kahn*, without expressing approval or disapproval, though it did distinguish discharged prisoners from "civilian ex-soldiers who had severed all relationship with the military and its institutions." 350 U.S. at 14.

²¹⁵ Under article 58(a) "a sentence of confinement adjudged by a court-martial . . . may be carried into execution by confinement in any place of confinement under the control of any of the armed forces or in any penal or correctional institution under the control of the United States"

²¹⁶ *Cf. Lee v. Swope*, 225 F.2d 674 (9th Cir. 1955).

and continuing; in *Toth*, *Covert*, and *Krueger*, the relationship was non-existent.”²¹⁷ The Supreme Court reversed, but solely on the ground that June 10, 1949, was “time of peace” within the meaning of the prohibition in former Article of War 92. The majority thus never reached the constitutional issue, though it based its strict construction of the article on the general philosophy, exemplified by *Toth* and *Covert*, that military jurisdiction ought to be confined as narrowly as possible—a philosophy which Justice Black generously attributed to Congress (or at least to the Congress of 1920, for the Uniform Code permits courts-martial to try capital crimes in peacetime) as well as the Court. The dissenters, Justices Harlan and Clark, found no more merit in Lee’s second contention than in his first: “this contention is also squarely foreclosed by *Kahn v. Anderson* . . . and . . . nothing in [*Toth* or *Covert*] . . . impairs the authority of *Kahn* on this score.”²¹⁸

Lee v. Madigan,²¹⁹ if it did not directly help prisoners who had been tried and convicted after dishonorable discharge, at least was not written in tones calculated to discourage them, and others pressed forward to attack what seemed to be a weak spot in the prison walls. Roland Simcox, a dishonorably discharged military prisoner, had accumulated no less than three additional court-martial sentences before the Army gave up and shipped him to Alcatraz. The Court of Appeals for the Ninth Circuit refused to release him, on the strength of *Kahn v. Anderson* and its own opinion in *Lee v. Madigan*.²²⁰ But two of the three judges concurred “with some reluctance”; they were personally unable to reconcile the rationale of *Toth* with *Kahn v. Anderson* or their own holding, but they thought it better judicial etiquette to leave to the Supreme Court the overruling of the *Kahn* case. But that Court ignored the engraved invitation to grant certiorari. Simcox remained in Alcatraz.

The Court of Military Appeals, since the Supreme Court’s anti-climactic disposition of the *Simcox* case, has grappled with the question and come to the conclusion that article 2(7) is constitutional²²¹—although Judge Ferguson, like the concurring judges in the Ninth Circuit, would have had “grave doubts” if the Supreme Court had not chosen to leave *Kahn v. Anderson* standing.²²² The majority’s prin-

²¹⁷ *Lee v. Madigan*, 248 F.2d 783, 786 (9th Cir. 1957), *rev’d* 358 U.S. 228 (1959); *accord*, *Ragan v. Cox*, 320 F.2d 815 (10th Cir. 1963).

²¹⁸ 358 U.S. at 241.

²¹⁹ 358 U.S. 228 (1959).

²²⁰ *Simcox v. Madigan*, 298 F.2d 742 (9th Cir. 1962), *cert. denied*, 370 U.S. 964 (1962).

²²¹ *United States v. Nelson*, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963); *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963).

²²² 14 U.S.C.M.A. at 96, 33 C.M.R. at 308.

cial ground seems to have been that the dishonorable discharge of one who is thereafter to remain in military custody, though that discharge be executed, is incomplete and conditional only, until the recipient has actually returned to the civilian community. "A prisoner serving the confinement part of his sentence in a military prison is not in the position of *Toth*. He is not part of the civilian community and has not 'severed all relationship with the military and its institutions.' . . . The effect of his discharge is expressly conditioned by, and subject to, the provisions of Article 2(7) of the Uniform Code."²²³ The weakness of this piece of dialectic is that it could almost as easily have been applied to the effect of article 3(a) on honorably discharged soldiers—that Congress intended them to be given discharges conditioned on their having committed no crimes of the sort specified, and incomplete to the extent that the veteran was still "in" the service for the purposes of the article. Indeed, Justices Minton and Burton, citing *Kahn v. Anderson*, reasoned in exactly that fashion in *Toth*, without attracting support from their brethren.²²⁴

The Supreme Court is certain to have further opportunities to pass on the question, for many tenacious and durable litigants, prone to recurring court-martial trouble, are in a position to raise it.²²⁵ If and

²²³ *Id.* at 94, 33 C.M.R. at 306. The same argument, that Congress intended the discharged prisoner to continue "in" the service until his release from confinement, was elaborated in the Government's brief in *Lee*. See Brief for the Respondent, pp. 29-32, *Lee v. Madigan*, 358 U.S. 228 (1959). It finds a degree of support in the legislative history of some of the predecessors of article 2(7). "Furthermore, he should not be treated as absolutely discharged . . . [from] the service until his term of imprisonment has expired. Dishonorable discharge, being a part of the sentence, ought not to be held to take full effect until the expiration of his term of imprisonment, although the sentence would operate as a forfeiture of all pay and allowances." H.R. REP. NO. 224, 55th Cong., 2d Sess. 2 (1898).

²²⁴ "My trouble is that I don't think *Toth* was a full-fledged civilian. . . . He had a conditional discharge only." 350 U.S. at 44.

²²⁵ *E.g.*, Jack V. K. Ragan, another litigant of Olympic calibre. Ragan, who must hold some sort of record for recidivism, was court-martialed in 1944 and sentenced to dishonorable discharge and six years; the discharge was suspended, but the suspension was vacated when he escaped military confinement. After sundry vicissitudes (including several years in a state penitentiary) he was returned to the disciplinary barracks where he demonstrated his distaste for the military life by mutiny and assault with murderous intent. This time he got ten years and a ticket to Alcatraz. Ragan thereupon managed to inveigle the civilian courts (on the strength of a somewhat technical argument concerning the applicability of military versus civilian "good time" regulations) into ordering him returned to the disciplinary barracks. Having thereby, as the Court of Military Appeals subsequently held, succeeded in again subjecting himself to the Uniform Code, despite the interlude in the civilian atmosphere of Alcatraz, he used the opportunity to commit an assault and various lesser offenses, for which he was awarded another five years. His lively career in the courts, civil and military, is chronicled in *Ragan v. Commandant*, 290 F.2d 132 (10th Cir. 1961), *cert. granted and case remanded*, 369 U.S. 437 (1962); *Blackwell v. Edwards*, 303 F.2d 103 (9th Cir. 1962); *Ragan v. Cox*, 305 F.2d 58 (10th Cir. 1962); *Ragan v. Cox*, 320 F.2d 815 (10th Cir. 1963); *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963). In the penultimate case the Tenth Circuit concluded in habeas corpus proceedings that article 2(7) was constitutional, on the authority of *Kahn v. Anderson*. If past performance is any guide, Ragan will seek certiorari.

when the Court elects to tackle the problem again, it may, of course, simply decide that on balance the petitioner has, or has not, a sufficiently close connection with the military, a sufficient modicum of military status, to be distinguished from *Toth*. On the other hand, it may face the issue of whether or not the military authorities have any good reason for court-martialing discharged prisoners in their custody.

In contrast to retired regulars and reservists, the military in this case has good reason. The fact that the punitive discharge has been executed shows that the soldier is a hard case; but the fact that the Army has chosen not to abandon him to a federal penitentiary shows that he is not regarded as hopeless. Congress has authorized the armed forces to make efforts to salvage such problem soldiers. Prisoners in disciplinary barracks, including those with executed discharges, are organized into disciplinary companies and higher units and receive infantry training, with a view to "honorable restoration to duty or reenlistment"; if the discharge has been executed, the Secretary is empowered, upon the prisoner's written application, to reenlist him for the balance of his original term.²²⁶ Such rehabilitation legitimately necessitates subjection to military discipline; for such military offenses as a prisoner can commit—and he can commit a good many of them²²⁷—a court-martial is the best, and indeed the only, remedy. So long as the prisoner is regarded as a potential soldier, subject to military training and discipline for the purpose of military rehabilitation, the same reasons justify his subjection to military law as justified the creation of a military prison and his incarceration therein. While it is true that the prisoner whose discharge has been executed cannot, unlike his cellmate with a suspended discharge, be compelled to finish his term of enlistment, the advantages of such an opportunity to clear his record (and get out of jail) are so great that he is unlikely to refuse them. So long as the Army thinks it worthwhile to keep him in a disciplinary barracks and under correctional military training, it

²²⁶ See 10 U.S.C. §§ 3661-63, 8662-63 (1958); *Sunday v. Settle*, 211 F. Supp. 504, 505 (W.D. Mo. 1962); *United States v. Nelson*, 14 U.S.C.M.A. 93, 95, 33 C.M.R. 305, 307 (1963).

²²⁷ *Simcox v. Madigan*, 298 F.2d 742 (9th Cir.), *cert. denied*, 370 U.S. 964 (1962) (mutiny); *McDonald v. Lee*, 217 F.2d 619 (5th Cir. 1954), *cert. granted and remanded with instructions to dismiss as moot*, 349 U.S. 948 (1955) (disrespect toward and offering violence to superior commissioned officer); *In re Craig*, 70 Fed. 969 (C.C.D. Kan. 1895) (assaulting prison commandant); *Ex parte Wildman*, 29 Fed. Cas. 1232 (No. 17653a) (D. Kan. 1876) (mutiny); *United States v. Nelson*, 14 U.S.C.M.A. 93, 33 C.M.R. 305 (1963) (offering violence against a superior commissioned officer); *United States v. Ragan*, 14 U.S.C.M.A. 119, 33 C.M.R. 331 (1963) (assault on a military policeman, charged as conduct to the prejudice of good order and military discipline). On the other hand, the Judge Advocate General of the Army has ruled that a dishonorably discharged soldier in confinement could not be guilty of absence without leave or disobeying the orders of a noncommissioned officer. 6 Bull. J.A.G., March-April 1947, § 423(1), at 66; 5 Bull. J.A.G., April 1946, § 419(2), at 93.

has a legitimate reason to subject him to military discipline and law, and he in turn has a real and substantial connection with the service.

If his offense is essentially civilian—*e.g.*, murder, as in *Kahn* and *Lee*—and triable in the civil courts, a harder question is presented. It can hardly be argued here that the military need to try him because his conduct is of a nature to bring discredit upon the armed forces; in the first place, the crime normally takes place in the seclusion of the disciplinary barracks, out of the public eye; and in the second, he is not held out as an exemplar of military virtue. But his amenability to court-martial even for these offenses can be defended on most of the other grounds which are said to justify such jurisdiction in the case of soldiers on active duty. So long as the accused is susceptible of honorable restoration to duty, the military can plausibly claim an interest in him; and until he has been tried it cannot be known whether he has forfeited that chance and ought to be permanently remitted to civilian life, beginning with a civilian jail. A civilian court, if it convicts him, can only sentence him to civilian confinement. But it may be that the Supreme Court, if it grants certiorari in such a case and if it gets beyond a mechanical consideration of the prisoner's "status," will be led to the conclusion that the diminution of the armed forces' legitimate need which is effected by the combination of a civilian crime and a quasi-civilian criminal, means that that trial ought constitutionally to be held according to civilian due process. If he is acquitted, he will be returned to military control; if he is guilty, it is improbable that he would in any case have a bright military future.

Finally, even if the Court were to hold that a military prisoner with an executed dishonorable discharge could not constitutionally be court-martialed for an offense committed while in that status, there would abide, as with the Reservist, the question whether he might be tried for an offense committed *prior* thereto. What little authority exists is to the effect that he can—but on the ground that there has been no "hiatus" in his status of subjection to military law, a ground which assumes the constitutionality of article 2(7).²²⁸ If such continuing jurisdiction were to depend on article 3(a), the constitutionality of its application would presumably turn on factors essentially similar to those which have been discussed in connection with reservists.

V. CONCLUSION

It is apparent that Congress has created, and will doubtless continue to create, a whole menagerie of military-civilian hybrids whose "status" in relationship to the armed forces defies neat and logical

²²⁸ See Zeigler, *supra* note 182, at 179-80.

taxonomy. Their capricious creator has made some of them triable by court-martial, and others not, for reasons which range from antique traditional to modern political, and which likewise cannot be forced into an orderly, systematic pattern. The question when and whether persons who are not soldiers on active duty can constitutionally be subjected to the military version of due process is of prime practical importance to some such people now, and could easily become of overpowering interest to others. It goes, as the Supreme Court has repeatedly emphasized, to the roots of our polity. The courts, and the Court, can no doubt attempt to solve the problem by attempting more or less arbitrarily to decide at what point on the military-civilian spectrum a particular class shades into one community or the other. A more flexible, though probably more difficult, approach, perhaps better calculated to reconcile fairness to the man with the legitimate needs of the military establishment, might be to give more weight to the "necessary and proper" clause and to consider in each case not merely the military "status" of the individual, but also the nature, military or civilian, of the offense involved and the punishment to be inflicted.