



VETERANS AND MILITARY LAW SECTION

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MESSAGE FROM THE CHAIR: HAIL AND FAREWELL by Alan Goldsmith, Veterans and Military Law Section Chair

I am delighted to begin my last chair's message by reporting that during the recent FBA Annual Meeting and Convention, the Veterans and Military Law Section was one of eight sections and divisions (out of 30) to receive a 2018-19 Section and Division Recognition Award for "outstanding leadership, innovative programming and exceptional contributions to the FBA." It has been a privilege to serve as Chair of the Section during this time. I want to thank the hard-working members of the Section's Executive Committee and Board of Directors, without whom we would not have attained this special recognition. I especially want to thank Section Vice-Chair and Incoming Chair Walter Kryptavich for his efforts. In his message as Incoming Chair that also appears in this edition of the newsletter, Walter lays out his exciting vision and plans for the Section during the upcoming year. But for now, I want to review some of the many accomplishments of the Section during the past year that resulted in our award.

The Section sponsored a two major continuing legal education (CLE) programs in the past year, both aimed at helping veterans in upgrading discharges and asserting claims before the Veterans Administration. The first



program, cosponsored with the Federal Career Service Division, took place in Puerto Rico in November and reached numerous attorneys and veterans service officers (VSO's) in that region and elsewhere. A similar program in March at the University of Montana Law School focused on assisting native American veterans, a significantly underserved population, and it also was a huge success with nearly 100 attorney and VSO participants. The Section funded the attendance of seven participants at the latter program, all VSO's, through \$150 scholarships.

Some of you will recall that the Section sponsored a very successful program at the 2018 FBA annual

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meeting in New York at which the Court of Appeals for the Armed Forces held an oral argument as part of its continuing “Project Outreach.” In June of this year, Chief Judge Robert Davis of the Court of Appeals for Veterans Claims, accepted an invitation generated by the Section and issued by the FBA to hold an oral argument at the 2020 FBA annual meeting in Charleston, SC. The organizers of the 2020 annual meeting have tentatively agreed with a local law school to host this event. Accordingly, the Section will once again leave a major footprint at an FBA annual meeting.

On two occasions in the past year, the Section broke new ground when it joined or submitted amicus curiae briefs in two cases pertaining to the entitlement of “Blue Water” Navy veterans to benefits administered by the Department of Veterans Affairs and the applicability of the VA’s regulation for the presumption of service connection to Agent Orange exposure. In the first case, *Procopio v. Wilkie*, the Section joined an amicus brief in support of the veterans and the Court of Appeals for the Federal Circuit later ruled in their favor. In a follow-on case, initiated after the VA imposed a stay of benefits arising out of *Procopio*, the Section submitted an amicus brief opposing the VA’s action.

In November, the Section once again co-sponsored, with the Judge Advocates Association (JAA) and the FCSD and Pentagon Chapter, the annual day-long Jobs for JAGs seminar. This seminar helped numerous retiring or separating judge advocates in obtaining civilian employment by giving them instruction on topics such as resume preparation, dressing for success and interviewing techniques. Information was also provided on various forms of civilian

legal employment such as law firm practice and government service. The Section has co-sponsored this seminar for many years and I was proud to continue this tradition.

This past April the Section took action on two Issues Agenda Nominations for the FBA’s Government Relations Committee. The Section first voted to endorse a nomination to oppose deregulation of the Forever GI Bill because many veterans are signing up and paying for courses at non-profit institutions, and then get little or no benefit from the course of instruction. Additionally, the Section favorably endorsed a nomination to amend the Bankruptcy Code by excluding veterans benefits from the Code’s definition of “current monthly income,” thus putting these benefits on the same footing as Social Security benefits. Thanks to the efforts of the FBA’s Government Relations Committee and Government Relations Counsel Bruce Moyer, Congress has already enacted the latter proposal into law.

Starting last Fall, Section Vice Chair Walter Kropotavich worked hard to set up a co-sponsorship with the Young Lawyers Division (YLD) on a program pertaining to summer law clerks working for the federal government. Those efforts bore fruit when the Section co-sponsored a happy hour for these individuals in July. This innovative action represented a significant outreach to get law students involved in the FBA and, hopefully, in the Section. In the coming year, I look forward to working with Walter and the FBA to ensure that this becomes an annual event.

The foregoing are just the more significant areas in which the Section has been involved during the past year. But they don’t happen by

themselves—they happen only because of the participation of Section members such as yourself. In order to ensure future success, the Section needs your participation. Our committees—Veterans Affairs, Military Justice, Communications, CLE and Membership all need new members. If you are interested, contact Walter (walterklaw@tutanota.com) or myself (aeg4451@aol.com). Additionally, urge those of your colleagues who are FBA members and have an interest in the various areas of practice covered by the Section’s work to join the Section—they won’t regret it!

Once again, it has been an honor to lead the Section during the past year. As I transition into my new role as immediate past president, I look forward to helping Walter and the rest of our Board work towards an even more successful year in 2019-20.

Alan Goldsmith
Chair of Veterans and Military Law
Section of the Federal Bar Association
PLEASE JOIN the Veteran’s and Military
Law Section at: www.fedbar.org/Veterans

Incoming Chair's Message

Walter Kroptavich, 2019-2020

Thank you to all those in the Veterans and Military Law Section for your support in the last few years. I am excited to be your incoming chair. This year I hope to accomplish two main goals while continuing co-sponsorship of events and advocacy of veteran issues as we have done as a section in the past – strategizing our section's continuing legal education (CLE) program and building relationships with other organizations within the FBA.

First, as you may not know, the FBA sets requirements for sections, including putting on at least one CLE program each year. Our section does not have a strategic CLE plan. The result is that we have a feast or famine model with CLEs whereas some years we struggle to meet FBA requirements and other years we exceed it with three or more CLE events in the year. We as a section need to get out of the feast or famine model and establish a strategic plan to make CLE planning

more routine and sustainable for the future.

Second, when I attended the leadership training offered by FBA, I found out that not only are the sections not really known by the chapters. For example, chapters said they did not know what the sections did. Also, sections and divisions were finding common legal issues that affect several sections and yet rarely communicate with each other to schedule multiple section CLE events or coordinate advocacy efforts within the FBA. As a smaller section, we are not as well-known as the bigger FBA sections such as litigation. This year we need to start networking with these sections and chapters more to expand our reach and in doing so, our CLE and advocacy opportunities that will attract more members to our section.

Third, I would like to recognize our Past National President and Past Chair of the Veteran and Military Law Section Robert (Bob) DeSousa who

earned The Earl W. Kintner Award for Distinguished Service at this year's FBA annual meeting. He is a tireless FBA supporter and has served in numerous positions in his time in the Federal Bar Association.

Finally, I would like to mention that I have an open-door policy for receiving suggestions and ideas. If you have an idea that will improve the section for the future or meet either of the goals I laid out, please e-mail me at walterklaw@tutanota.com.

We are also always looking for future leaders of the section who desire to drive the direction of the section. Please contact me if you are interested in joining the leadership team. It can be brought before the Board and discussed.

It is an honor to be your Chair for the Section this year. Looking forward to a great year.

Report from the Veterans Affairs Committee

by Carol Scott, VMLS

Congress having been in recess for a lengthy period in August and September, there was little activity on the Hill. However, HVAC and SVAC are gearing up for some hearings. The biggest news from SVAC is the retirement of Sen. Johnny Isakson of Georgia as Chairman of the Committee for reasons of health. The position will be filled for the time being by Sen. Jerry Moran, of Kansas. Sen. Isakson has served as Chairman of the Committee for three terms – something of a record. His has been a service of dedication to our veterans. His hallmark has been his ability and his determination to work across the aisle on every piece of legislation. He will be missed by the veterans, the VSOs and the Federal Bar Veterans & Military Law Section.

A hearing was held on Monday, September 9th in the House Visitors Center Room 210 on the House side. It was “Members’ Day,” an opportunity for members of Congress to appear before the Committee and discuss the veterans in their districts. Members from Missouri and West Virginia gave lengthy statements about the serious issues arising in VA medical centers in Their districts and the lack of

supervision over them by VA. Chairman Mark Takano assured them that there would be hearings scheduled to address the failures. It should be noted that the VA IG and civil authorities have already weighed in on the case of the alcoholic pathologist in West Virginia who escaped discipline for many years, leading to the deaths of several veterans.

Senate bill 785 has been reintroduced and the House is now working on a companion bill. This is a bill that addresses mental health care and treatment in VHA and has a number of features requiring a more holistic approach to mental health and requiring active recruitment of mental health personnel. Remarks for the record were submitted when it was originally the subject of a hearing in the Senate, which will be carried over to the current bill.

The House is considering a number of bills regarding women veterans. Taken together they encompass everything from health care to transition from active duty to the establishment of a separate Women Veterans Department within VA. September 19th will see hearings before the Oversight & Investigations Subcommittee on VA’s overpayments and Debt Collection Practices and on the

same day the Disability and Memorial Affairs Subcommittee will address contract C&P exams. This is a hearing about ten years or more overdue, as QTC, the primary contractor, is enjoying a billion-dollar contract, which has morphed from a pilot project covering 17 Regional Offices more than ten years ago. It was to be reviewed by Congress after the first year and was not. It is still sole-sourced as it was then to a company owned by Secretary Principi less shortly before he was appointed.

During the Federal Bar Association board meeting during the Annual Convention, all of the sitting judges of the CAVC were approved for honorary membership in the Federal Bar Association. During the coming year we will be working with the leadership of the organization to pave the way for honorary membership for CAVC and USCAAF as a policy matter. We hope to have it completed by the convention in Charleston in 2020. It should have been done years ago, as between the two Art. I appellate courts the lives and fortunes of hundreds of men and women who serve this country are affected.

*United States v. Begani*¹ – Military Jurisdiction Over Retirees is Unconstitutional, Or Is It?

by Stephen C. Newman²

Court-martial jurisdiction over retirees is a hot topic. From the Army's abortive attempt to prosecute retired Major General Grazioplene,³ to the Court of Appeals for the Armed Forces (C.A.A.F.) decision in *Dinger*,⁴ to the Supreme Court's denial of certiorari in *Larabee*,⁵ attempts to prosecute retirees for offenses which occurred both before and after retirement have twice broken into CAAFLog's fabled "top ten military justice stories of the year" recently.⁶ The issue was seemingly settled when the Supreme Court denied certiorari to *Larabee*—retirees receiving pay remained subject to military jurisdiction, and hence prosecution by military authorities, under UCMJ Article 2(a).⁷ But undaunted in the face of these rulings, not to mention their own precedent, a panel of the Navy and Marine Corps Court of Criminal Appeals recently stood up and said "hold my beer."

In 2017, after 24 years of service, Chief Petty Officer (CPO) Stephen Begani retired from the U.S. Navy and accepted transfer to the Fleet Reserve.⁸ Chief Petty Officer Begani remained overseas following his retirement, working on a military installation in a civilian capacity.⁹ During this period, he began chatting with a person he believed to be an underage dependent.¹⁰ When he arrived at what he believed to be her parents' on-base quarters for a presumptive liaison, he found that his intended was actually an agent of the Naval Criminal Investigative Service.¹¹

As a member of the Fleet Reserve, CPO Begani was a person subject to court-martial jurisdiction under Article 2(a)(6) of the Uniform Code of Military Justice (UCMJ).¹² Charges were preferred, and he waived his right to an investigation under Article 32, UCMJ.¹³

After referral, he entered into a pretrial agreement, pleaded guilty, and was sentenced to 18-months confinement and a bad-conduct discharge.¹⁴

What made him subject to prosecution was not that he was "retired," but rather that he was a member of the "Fleet Reserve," an organizational structure unique to the Navy and Marine Corps for enlisted members who have more than 20, but less than 30, years of active service.¹⁵ These organizations are intended to provide a ready source of trained military personnel in case of national emergency.¹⁶ Upon reaching 30 years of service, persons like Chief Begani transfer from the Fleet (or Fleet Marine Corps) Reserve to the retired list.¹⁷ Officers do not transfer to a fleet reserve organizational structure, instead moving directly to the retired list.¹⁸ These distinctions are critically important in the context of this decision. They relate primarily to status, and represent the biggest flaw in the Navy-Marine Corps panel opinion.

Generally speaking, there are three categories of fully qualified retirees in the Navy and Marine Corps: (1) Fleet Reserve retirees; (2) Regular retirees; and (3) Reserve retirees.¹⁹ All three are similar in many ways, and the Navy-Marine Corps panel does an effective job of identifying how they are alike.²⁰ But there are some significant distinctions. One of them is pay. As the *Begani* court itself acknowledges, there are distinct categories of pay which apply to each category of "retiree."²¹

Reserve retirees, for example, receive "retired pay," but not in the sense of their active duty counterparts—it is different. Not only is reserve retirement pay calculated differently, they generally don't begin to receive their retired pay until the age of 60.²² Reserve retirees

have served their country honorably for twenty or more years. Many are just as efficient and well trained in the military arts as their active duty counterparts. Most begin their career on active duty before transferring to the reserves. Frequently they have deployed as often as (sometimes more often than) their active duty counterparts. But even in view of these similarities, the fact that they receive only a fraction of the pay accorded to their active duty colleagues, and that they typically don't draw this pay until after achieving the age of 60, distinguishes them from regular retirees. These distinctions make their "retired pay" much more like a pension than that accorded their active duty equivalents.²³

Regular retirees, on the other hand, also receive "retired pay," but in a different context. Regular retired pay is reduced pay for reduced services.²⁴ More than sixty years ago the Court of Military Appeals (C.A.A.F.'s predecessor court) found in *United States v. Hooper* that:

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.²⁵

So regular retirees don't just receive "retired pay," they receive a reduced salary. In this way, retirement from active duty reflects not a loss in status, but rather a change in status. Military retirees receive compensation, albeit at

a reduced rate, but not reduced to the degree experienced by their reserve contemporaries. The fact that regular retired pay is higher; is more like a reduced salary than a pension; and that regular retirees begin receiving their pay immediately upon retirement rather than having to wait until the age of 60; clearly distinguishes regular retirees from reserve retirees.

Finally, there are the members of the Fleet Reserve. As noted above, these are enlisted members with more than 20 but less than 30 years of active service. They are, in fact, more like regular retirees than reserve retirees, yet they remain distinct. Fleet Reserve members don't immediately receive "retired pay" per se, but instead receive "retainer pay."²⁶ They continue in this status until reaching 30 years, whereupon they transfer from the Fleet Reserve to the Retired List. They then begin to receive "retired pay" as described above.²⁷ While similar to "retired pay," according to Congress "retainer pay" is not the same thing:

Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled, when not on active duty, to *retainer pay* computed under section 8333 of this title.²⁸

Not only is it called something different, retainer pay is calculated under separate statutory authority. This is easily distinguished from a retired officer who, "...is entitled to *retired pay*,"²⁹ and an "enlisted member of the Regular Navy or the Regular Marine Corps who applies for retirement after completing 30 or more years of active service" who also is, "...entitled to *retired pay*."³⁰ They simply cannot be the same thing. But Congress further distinguished between these constituencies in 10 U.S.C. §12731:

(a) Except as provided in subsection (c), a person is entitled, upon application, to *retired pay* computed under section 12739 of this title, if the person—

(4) is not entitled, under any other provision of law, to

retired pay from an armed force or *retainer pay* as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.³¹

"It is a basic canon of statutory construction that when 'construing a statute we are obliged to give effect, if possible, to every word Congress used.'"³² "We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'"³³ "Unless the text of a statute is ambiguous, the plain language will control unless it leads to an absurd result."³⁴ "Thus, '[a]s a first step in statutory construction, we are obligated to engage in a 'plain language' analysis of the relevant statute,' and to 'apply the common and ordinary understanding of the words in the statute.'"³⁵

Congress specifically chose to use the words "retired pay" and "retainer pay." They have to mean something. The fact that the words "retired pay" and "retainer pay" appear in the same section of the same statute, yet are calculated differently and under separate statutory authority, is ample evidence that they mean different things. Despite the fact that they may have similar effect, and even in view of the fact that reserve, active, and fleet reserve retirees have many things in common, and even acknowledging that retired pay and retainer pay are similar in many respects, because Congress chose to distinguish between these two terms, retired pay cannot be the same thing as retainer pay, neither of which is at all like reserve retired pay.

There are other differences between these three groups. Most notably, they are managed differently, and are subject to different recall requirements. These points are laid threadbare in Department of Defense Instruction (DoDi) 1352.01, which establishes departmental level policy for the management of regular and reserve retirees.³⁶ First, paragraph 3.1(a) clarifies that there are regular retirees, of which members of the Fleet Reserve are a component part. Meanwhile, paragraph 3.1(b), treats retired members of the reserve component differently. This again distinguishes between the two groups.

But more importantly, while the instruction makes clear that members in all three categories may be recalled to active duty, it identifies different statutory authorities and different criteria for the recall of these different constituencies.³⁷ In this regard, it appears much easier to recall a Fleet Reserve member or a reserve retiree, than it is to recall a regular retiree. Once again, the three categories are easily distinguishable. So it is clear—despite their similarities, there are many significant differences between these three groups of "retirees."

Yet the appellant's argument was premised on the fact that these three groups are "similarly situated." Arguing anecdotally, appellant submitted that if one were to pass a crowd of persons comprised of individuals from each constituent group, one would be hard pressed to identify who is whom. And this is correct, insofar as it goes. Certainly there are a number of similarities. But the mere existence of such similarities is not the test. "To be similarly situated for equal protection purposes, a challenger and his comparators must be prima facie identical in all relevant respects or directly comparable in all material respects."³⁸ This simply isn't true here, as there are many differences between these three groups related to their status.

And herein lies the critical flaw in the NMCCA decision—it is premised on their finding that regular retirees, reserve retirees, and members of the fleet reserve, are "similarly situated." Yet the statutory construct clearly distinguishes between "retired pay," "retainer pay," and "reserve retired pay." Furthermore, the regulatory construct established by the Department of Defense to manage these constituencies also distinguishes between them. Given the plain language of the statute, not to mention the regulatory application scheme, it is difficult to see how these three groups are "similarly situated in all relevant aspects or directly comparable in all respects" as the test requires.³⁹

But having concluded that they are similarly situated, it is an easy step to find an equal protection violation. After all, Article 2(a) subjects retired and fleet reserve members to court-martial

jurisdiction, whereas reserve retirees, who are “similarly situated” in the eyes of the court, are only subject to military jurisdiction when receiving medical treatment at a military medical facility.⁴⁰ They would instead be subjected to state or federal prosecution. The Court points out that this means the statute, on its face, treats these groups differently.⁴¹

And since one is subject to military jurisdiction and the other state or federal prosecution, it is likewise easy to conclude there is a “fundamental right” at stake.⁴² The Court correctly notes that military members have no right to a jury trial, or to be indicted by a grand jury.⁴³ This dictates a strict scrutiny analysis, shifting the burden to the United States to articulate a compelling governmental interest.⁴⁴ At oral argument appellate government counsel seemed well prepared to argue both rational basis and intermediate scrutiny, but was unable to articulate a compelling governmental reason for these distinctions under strict scrutiny. The result, according to this panel:

Articles 2(a)(4) and 2(a)(6) of the UCMJ violate the Due Process Clause’s guarantee of equal protection of the laws and are therefore unconstitutional.⁴⁵

This is an astonishing conclusion, given the clear and obvious differences between the three categories of service. Ignoring potential differences in training, readiness, and experience between an individual who served honorably for twenty years in the reserves and an individual who served honorably for twenty years on active duty, the mere fact that the statutory and regulatory scheme distinguishes between these three constituencies is a sufficient indictment of the Navy-Marine Corps Court panel opinion to warrant the attention of the Court of Appeals for the Armed Forces. One can only hope the Judge Advocate General of the U.S. Navy will certify the issue, especially in view of its multi-jurisdictional (that is cross-service) impact.

Editors note: On September 4, 2019 the United States moved the Navy-Marine Corps Court for *En Banc*

reconsideration. That motion was granted on October 1, 2019. The panel opinion discussed in this article has been withdrawn pending reconsideration by the *En Banc* court. Additionally, on September 30, 2019, the Air Force Court of Criminal Appeals issued an opinion in *United States V. Ballard*, ___ M.J. ___. No. 39440 (A.F. Ct. Crim. App. Sep. 30, 2019), rejecting a Constitutional challenge to court-martial jurisdiction over retired members.

Endnotes:

¹*United States v. Begani*, ___ M.J. ___, No. 201800082 (N.M. Ct. Crim. App. Jul 31, 2019)

²Currently Federal Public Defender, Northern District of Ohio; Colonel U.S. Marine Corps (Ret.). The views expressed in this article are mine alone. They do not reflect the official policy or position of the Administrative Office of the Courts, Defender Services, the Federal Public Defenders Office, the United States Marine Corps, The Department of the Navy, The Department of Defense, or the U.S. Government.

³See Todd South, *Retired Army 2-star arrested in Virginia on rape, incest charges that were dismissed by military judge* (Dec. 10, 2018) available at <https://www.armytimes.com/news/your-army/2018/12/10/retired-army-2-star-arrested-in-virginia-on-rape-incest-charges-that-were-dismissed-by-military-judge/>.

⁴*United States v. Dinger*, 77 M.J. 447 (C.A.A.F. 2018)(cert. denied) (holding that the government retained jurisdiction over a retired member of the U.S. Marine Corps pursuant to UCMJ art. 2(a)(4), 10 U.S.C. § 802(q)(4).

⁵See *United States v. Larrabee*, 77 M.J. 328 (C.A.A.F. 2018) cert. denied at *Larrabee v. United States*, 139 S. Ct. 1164 (2019).

⁶ It was the number six story in 2018 (<http://www.caaflog.com/2018/01/01/top-ten-military-justice-stories-of-2017-1-exercising-court-martial-jurisdiction-over-retired-members/>); and the number one story in 2017 (<http://www.caaflog.com/2019/01/02/top-ten-military-justice-stories-of-2018-6-caaf-holds-that-retired-members-can-receive-punitive-discharges/>).

⁷10 U.S.C.S. § 802, UCMJ Art. 2.

⁸*Begani*, supra note 1, slip opinion at 2.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.*

¹²10 U.S.C. § 802, UCMJ Art. 2.

¹³10 U.S.C. § 832, UCMJ Art. 32; *Begani supra* note 1, slip opinion at 2, 3.

¹⁴*Begani supra* note 1, slip opinion at 3.

¹⁵See 10 U.S.C. 802, UCMJ Art. 2(a)(6); see also 10 U.S.C. § 6326(a) and 6330.

¹⁶Naval Military Personnel Manual, Art. 1830-040 (Ch-38, 19 Dec 2011).

¹⁷10 U.S.C. § 6326(a), *supra* note 6.

¹⁸See, generally, 42 U.S.C. § 212.

¹⁹There are other sub-categories, including the medically retired or those retired for a physical disability. But for purposes of this analysis, these three generalized categories suffice. See, generally Dep’t of Def. Instr. 1352.01, Management of Regular and Reserve Retired Military Members (8 Dec. 2016) (hereafter “DoDI 1352.01”).

²⁰*Begani*, supra note 1, slip opinion at 5.

²¹*Id.*, slip opinion at 6.

²²*Id.*

²³See Zachary D. Spellman, *The NMCCA torpedoes Article 2; holds that court-martial jurisdiction over retirees is unconstitutional*, CAAFLog (Aug 6, 2019), <http://www.caaflog.com/2019/08/06/the-nmcca-torpedoes-article-2-holds-that-court-martial-jurisdiction-over-retirees-is-unconstitutional/>; see also Zachary D. Spellman, *The fundamental flaw in the NMCCA decision in Begani*, (Aug 8, 2019), <http://www.caaflog.com/2019/08/08/the-fundamental-flaw-in-the-nmccas-decision-in-begani/?hilite=%27begani%27>.

²⁴*McCarty v. McCarty*, 453 U.S. 210 at 222 (finding that “...the retired officer remains subject to recall to active duty by the Secretary of the Army “at any time”). See also *United States v. Tyler*, 105 U.S. 244 at 245 (finding that military retired pay is “compensation . . . continued at a reduced rate, and the connection is continued, with a retirement from active service only.”).

²⁵*United States v. Hooper*, 26 C.M.R.

417, 425 (U.S.C.M.A. 1958).

²⁶10 U.S.C. § 12731. It is fair to point out how similar these two types of pay are. The primary distinction seems to be in the readiness requirements imposed on Fleet Reserve members, and that there seem to be fewer hurdles to recall in case of national emergency over their regular retired counterparts. Logically this seems to explain why it is called “retainer” vice “retired” pay—they “retain” a status not held by their regular retired counterparts. But Congress established these two different statutory terms. Even in view of any similarities, this distinction must mean something.

²⁷*Begani, supra* note 1, slip opinion at 6.

²⁸10 U.S.C. § 8330 (a)(c)(1) (emphasis added).

²⁹10 U.S.C. § 6325(a)(2) (emphasis added).

³⁰10 U.S.C. § 6326 (emphasis added).

Remember that enlisted Sailors and Marines who retire with more than 20 but less than 30 years of serves don't go to the retired list but are instead transferred to the Fleet Reserve, or Fleet Marine Corps Reserve. They matriculate to the retired list after achieving 30 years of combined active and Fleet Reserve service. On the other hand, if an enlisted member remains on active duty for 30 or more years, they transfer immediately to the retired list.

³¹10 U.S.C. § 12731 (emphasis added).

³²*Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979).

³³*Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (citing *Walters v. Metropolitan Ed. Enterprises, Inc.*, 519 U. S. 202, 207 (1997)).

³⁴*United States v. Schell*, 72 M.J. 339, 343 (C.A.A.F. 2013)

³⁵*United States v. Phillips*, 70 M.J.

161, 165 (C.A.A.F. 2011) (internal citations omitted).

³⁶DoDI 1352.01. The mere fact that the title of the instruction distinguishes between two of the three constituent groups at issue should at least inform the analysis.

³⁷DoDI 1352.01 paragraph 3.1

³⁸*United States v. Green*, 654 F.3d 637, 640 (6th Cir. 2011).

³⁹*Green, supra* note 34 at 640.

⁴⁰*See* 10 U.S.C. 802, UCMJ Art. 2(a).

⁴¹*Begani, supra* note 1, slip opinion at 9.

⁴²*Id.*, slip opinion at 12.

⁴³*Id.*, slip opinion at 11.

⁴⁴*Id.*

⁴⁵*Id.*, slip opinion at 16.

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