



Military Jurisdiction over Retired Servicemembers

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Members of the United States Armed Forces are governed by a distinct criminal legal regime: the [military justice system](#). (They are also subject to civilian laws and courts.) The [purposes](#) of this system, in addition to pursuing justice, are “maintaining good order and discipline in the armed forces” and “promot[ing] efficiency and effectiveness in the military establishment . . . to strengthen the national security of the United States.”

The military justice system differs from its civilian counterparts in [several key ways](#), including (1) extensive military commander authority over legal process; (2) a criminal code—the Uniform Code of Military Justice (UCMJ)—that includes military-specific offenses in addition to those typically contained in civilian criminal codes; (3) specialized tribunals called courts-martial; and (4) abrogated constitutional rights (e.g., no right to grand jury indictment or jury trial). Given the military justice system’s distinctiveness, whether a person is subject to military jurisdiction can be of great consequence to both the individual and the military.

Unlike most civilian legal systems, in which geography or legal subject matter generally determines jurisdiction, the military justice system exercises global jurisdiction [based on an individual’s military status](#). Military retirees, for the most part, maintain a legal military status and are therefore subject to military law. (For information on military retirement, see CRS In Focus IF10483.) This Legal Sidebar outlines the statutory basis for military jurisdiction over retired servicemembers, how courts have addressed this issue, and potential considerations for Congress.

Statutory Authority

Under [Article I, Section 8, Clause 14](#) of the U.S. Constitution, “The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.” Congress exercised this authority to create the military justice system, including provisions extending military jurisdiction over servicemember retirees. (Congress has included military retirees under military jurisdiction since the [first military retired list](#) was promulgated in 1861.)

[Article 2](#) of the UCMJ subjects the following three categories of retired servicemembers to military law: (1) “Retired members of a regular component of the armed forces who are entitled to pay”; (2) “Retired

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members of a reserve component who are receiving hospitalization from an armed force”); and (3) “Members of the Fleet Reserve and Fleet Marine Corps Reserve.”

Regular component servicemembers are generally entitled to retirement pay after completing twenty years of active duty. They can also be entitled to retirement pay if they qualify for **disability retirement** before completing twenty years of service.

Reserve component servicemembers who complete twenty years of qualifying service are eligible for **military medical benefits** when they reach the age of sixty. These benefits include being able to receive care at military medical facilities.

Members of the Fleet Reserve and Fleet Marine Corps Reserve are former members of the regular or reserve components of the Navy or Marine Corps who have completed between twenty and thirty years of active duty and have had their requests to transfer to fleet reserve components granted. After completing thirty years of service, members of fleet reserves **are transferred** to either regular or reserve retired lists, depending on their status when they transferred to a fleet reserve. Fleet reserve members are included as “covered members” under the **statute** giving the Secretary of Defense authority to order “retired members” to active duty. **Courts** have described fleet reserve members as, “for all intents and purposes, retired” and as “recent retirees.”

Judicial Interpretations

The U.S. Supreme Court has long held that **Article I, Section 8, Clause 14** of the U.S. Constitution “**expressly entrust[s]**” Congress with crafting the military justice system and that federal civilian courts must accord Congress and the military great deference on military legal matters. Nevertheless, the Supreme Court has **stated** that any “expansion” of military jurisdiction “necessarily encroaches” on that of federal civilian courts “where persons on trial are surrounded with more constitutional safeguards than in military tribunals.” Congress’s **capacity** “to authorize trial by court-martial,” the Court explained, must therefore be “limit[ed] to the least possible power adequate to the end proposed.”

The Supreme Court has constrained military jurisdiction based “on **one factor**: the military status of the accused.” The **test** is “whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term ‘land and naval Forces,’” as used in the Constitution. The Court has relied on **two primary considerations** when determining military status: (1) the individual’s “connection with the military”; and (2) the military’s “power over” the person in question. Applying this test, the Supreme Court has held that the following categories of individuals may *not* be court-martialed: servicemembers’ **dependents**; **former servicemembers** “who had severed all relationship with the military”; and **civilian employees of the Armed Forces**. The Court did not defer to Congress in these rulings and overrode contrary legislation, notwithstanding Congress’s general authority in this area.

The Supreme Court has not yet specifically ruled on the military status of retired servicemembers, though it has **apparently noted** that they remain part of the Armed Forces and subject to the UCMJ. Federal appellate courts (e.g., the **U.S. Court of Appeals for the District of Columbia** and **U.S. Court of Appeals for the Armed Forces [CAAF]**), however, have consistently held that military retirees possess a military status that makes them subject to military law. In finding such status, courts have highlighted several connections between retired servicemembers and the military: they can be recalled to active duty and, accordingly, serve as a potential source of supplementary personnel; they are entitled to receive special pay and other benefits from the military, which are viewed, at least in part, as retainer conferrals; and they have the right to wear their uniforms and be referred to according to their rank (in certain circumstances). The U.S. Court of Military Appeals (now **the CAAF**) articulated a widely adopted position in 1958 in *United States v. Hooper*:

[Those] 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.

Critiques of Military Retiree Jurisdiction

While courts have consistently affirmed military jurisdiction over retired servicemembers, some judges and scholars contest this exercise of military legal authority. Critics of this jurisdiction argue that the retiree-military connections noted by courts are too tenuous to engender legal military status. Retirees, for example, do not participate in military activities, are not subject to fitness standards, are not assigned to specific commands, lack authority to issue orders, and may not serve as panel members for courts-martial. These critics also contend that military jurisdiction over retired servicemembers, who are generally not involved in regular military operations, does little to further the unique purposes of military law—mainly, to promote good order and discipline in the ranks. Finally, some critics argue that military jurisdiction over retired servicemembers improperly, and dramatically, enlarges the number of individuals subject to the UCMJ. Millions of retired servicemembers can potentially have their constitutional rights attenuated and their retirement benefits revoked. According to the FY2021 demographics report published by the Department of Defense (DOD), there are roughly 2.1 million active duty and ready reserve servicemembers. In contrast, according to DOD’s FY2020 *Statistical Report on the Military Retirement System*, there are roughly two million military retirees receiving retired pay. This number may not include all individuals eligible for retired pay, which is the legal requirement for military jurisdiction.

In addition to those critics who believe that subjecting retired servicemembers to military jurisdiction is inappropriate, some argue that the current legal framework is overly expansive and should be narrowed. They assert that current statutes and service-department regulations governing when and how military retirees can be court-martialed are inadequately uniform and do not provide sufficient guidance. These critics think that Congress should further delineate, and curtail, military jurisdiction over retired servicemembers.

Other commentators support current law in this area. They contend that servicemember retirees’ military connections, and corresponding potential liabilities, are appropriate and “not a burden to be borne, but an honor and a privilege to be worn with pride.”

Congressional Considerations

Given the consistent court rulings on military jurisdiction over retired servicemembers upholding the current regime, it is likely that legal change in this area would only come about through congressional action. Over the years, there have been several proposals for amending the UCMJ and military jurisdiction over servicemember retirees. Some recommend repealing Articles 2(a)(4)–(6) to end this exercise of jurisdiction. Others assert that Congress should restrict military jurisdiction over retirees by enacting laws requiring courts to consider “the nature, military or civilian, of the offense involved and the punishment to be inflicted,” and to extend jurisdiction only when the alleged offense and potential punishment sufficiently uphold the purposes of military law.

Congress could also, some argue, provide for military jurisdiction over retirees in the limited circumstances “when a military court-martial is the only forum available to bring a military retiree to justice for extremely serious misconduct” and when “the retiree’s misconduct was of such an egregious

nature that the retiree would be unsuitable for continued military service even during periods of dire national emergency.” Additional [recommendations](#) endorse legislation that would make certain UCMJ punitive articles inapplicable to retirees, such as Articles [88](#), [89](#), and [90\(2\)](#), which criminalize, respectively, contempt toward officials; disrespecting or assaulting a superior commissioned officer; and willfully disobeying a superior commissioned officer during peacetime.

Finally, [some commentators](#) favor current law and the discretion it affords the military. They recommend making no changes to military jurisdiction over retired servicemembers.

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