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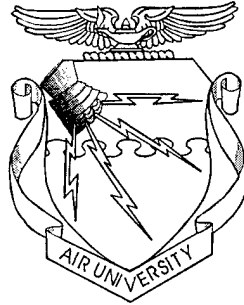
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AIR COMMAND AND STAFF COLLEGE  
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# **Punitive Discharge with Retirement Pay**

**Windfall for the Accused or  
Justice for All?**

**CHRISTOPHER C. LOZO**  
Major, USAF

Air Command and Staff College  
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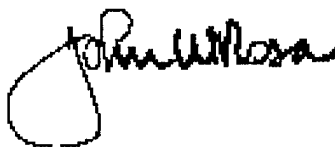
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## **Foreword**

It is my great pleasure to present another of the *Wright Flyer Papers* series. In this series, Air Command and Staff College (ACSC) recognizes and publishes the "best of the best" student research projects from the prior academic year. The ACSC research program encourages our students to move beyond the school's core curriculum in their own professional development and in "advancing aerospace power." The series title reflects our desire to perpetuate the pioneering spirit embodied in earlier generations of airmen. Projects selected for publication combine solid research, innovative thought, and lucid presentation in exploring war at the operational level. With this broad perspective, the *Wright Flyer Papers* engage an eclectic range of doctrinal, technological, organizational, and operational questions. Some of these studies provide new solutions to familiar problems. Others encourage us to leave the familiar behind in pursuing new possibilities. By making these research studies available in the *Wright Flyer Papers*, ACSC hopes to encourage critical examination of the findings and to stimulate further research in these areas.

A handwritten signature in black ink, appearing to read "John W. Rosa". The signature is written in a cursive style with a large, stylized initial "J" that loops around the first part of the name.

John W. Rosa, Col, USAF  
Commandant

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## ***Preface***

In 1994 I was a defense counsel in the case of *United States v. Sumrall*. Sumrall was a prior-enlisted captain with 21 years of service in the United States Air Force (USAF). The offenses that he pleaded guilty to were serious, and he was sentenced to confinement and a punitive discharge. Due to the nature of the offenses he committed, many would say neither punishment was inappropriate. However, as a result of the punitive discharge, he forfeited his retirement pay—at that time, almost \$750,000. The judge did not sentence him to forfeit his retirement pay and neither did the convening authority. Rather, the forfeiture was termed a “collateral consequence” of the punitive discharge and outside the control of the military justice system. Captain Sumrall had an unemployed wife and six children, ranging in age from near college to a toddler. It was not easy explaining collateral consequences to that family.

Captain Sumrall appealed the loss of his retirement pay. Judge Sullivan, acting chief judge at the time, wrote the opinion for the court. He said the statutes that caused Captain Sumrall to lose his retirement pay were outside the control of the military justice system, and that his punishment was legal in the eyes of the law. However, he also published an appendix to the opinion that called for the adoption of a new punishment that would permit the punitive discharge of a retirement-eligible member without incurring the loss of retirement pay.

Each year the USAF prosecutes approximately 35 retirement-eligible members; 15 of them eventually receive a punitive discharge at trial. While the overall numbers are not significant, the people behind those numbers are. During my tenure as a trial and defense counsel, I have prosecuted or defended four of those individuals. The military justice system owes it to its members to ensure that justice is done in all cases. Each military member facing a court-martial deserves to be punished for the offenses committed. Sometimes, a punitive discharge with loss of retirement pay is the entirely appropriate result at trial. Sometimes it is not. This paper is the result of my belief

that the determination of whether members ought to forfeit their retirement pay should be left to the wise discretion of the sentencing authority and the convening authority, not to vague notions of collateral consequences.

I acknowledge the assistance of my research advisor, Maj John Reese, a Civil War historian by trade. I appreciate the support of Capt Kirk Obear, one of my former colleagues at Scott Air Force Base, Illinois. Also at Scott I thank Majors Glenn Farrar and Jose Mata and Lt Comdr Chris Pendleton who endured numerous discussions on military justice. Finally, I gratefully acknowledge my wife, Nancy, who has endured interminable discussions.

## ***Abstract***

When retirement-eligible military members are court-martialed for any offense and are punitively discharged, by operation of law they forfeit retirement pay—an amount sometimes more than one million dollars. This forfeiture is a collateral consequence of receiving a punitive discharge—it is not a specific punishment imposed by the court-martial sentencing authority or by the convening authority who approved the court-martial's action. In some cases the loss of retirement pay is appropriate and reasonable; in other cases it is harsh and inappropriately severe. My thesis is that the court-martial members and the convening authority, not the operation of law, should deprive a member of retirement pay. This paper explores the implications of a new punishment, Punitive Discharge with Retirement Pay (PD&R).

The PD&R would be a new punishment authorized at the trial of a retirement-eligible military member. The court members would be instructed that if they sentence the accused to a PD&R, the accused would be punitively discharged from service with the loss of all military benefits except retirement pay. The members would also be instructed that they are free to adjudge a traditional punitive discharge that carries with it the loss of retirement pay. Thus, the sentence adjudged would directly take into account whether the accused should be required to forfeit retirement pay as an aspect of the punishment, rather than leaving the determination to the collateral operation of law.

It is my contention that the adoption of the PD&R as a punishment option would be consistent with the maintenance and preservation of good order and discipline in the armed forces, as well as serve the ends of justice. I analyze both the current military justice system and the current retirement system and what impact the PD&R would have on both systems if adopted. I use the notion of maintenance and preservation of good order and discipline in the armed forces as the litmus test of acceptability of the PD&R. In other words, if the PD&R had either a positive or neutral effect on good order and discipline and a positive

or neutral effect on military retirement, it should be adopted.

I conclude that the PD&R would have a beneficial effect on the maintenance and preservation of good order and discipline and a neutral effect on military retirement. Because the PD&R would enhance good order and discipline, I also conclude that it should be adopted. I note that the military retirement system is a statutory system and would require congressional legislation to enact the PD&R, and the changes to the *Manual for Courts-Martial United States* would require an executive order to implement.

The proper administration of military justice requires a delicate balance between the needs of good order and discipline and the needs and rights of the accused. The PD&R discharge would enable the system to make finer distinctions in the sentencing process, thus enhancing justice and fairness in the armed forces.

## **Punitive Discharge with Retirement Pay**

### **Windfall for the Accused or Justice for All?**

*Ius est ars boni et aequi (Justice is the art of the good and the fair).*

—Legal Maxim

When retirement-eligible military members are court-martialed for any offense and are punitively discharged, by operation of law they forfeit retirement pay—an amount sometimes more than one million dollars. This forfeiture is a collateral consequence of receiving a punitive discharge—it is not a specific punishment imposed by the court-martial sentencing authority or by the convening authority who approved the court-martial's action. In some cases the loss of retirement pay is appropriate and reasonable; in other cases it is harsh and inappropriately severe. My thesis is that the court-martial members and the convening authority, not the operation of law, should deprive a member of retirement pay. This paper explores the implications of one such proposal to grant the court-martial and the convening authority the power to determine whether a particular member ought to forfeit retirement pay.

In *United States v. Sumrall*,<sup>1</sup> the Court of Appeals for the Armed Forces (CAAF) considered the appeal of a retirement-eligible United States Air Force (USAF) captain who was dismissed and forfeited retirement pay. The court considered whether the automatic forfeiture was cruel and unusual, whether it constituted an excessive fine, and whether it violated the due process clause of the US Constitution.<sup>2</sup> Judge Sullivan, writing for the court, denied relief stating that forfeiture of retirement pay, albeit a severe punishment, was not an unconstitutional punishment.<sup>3</sup> However, in an appendix to the opinion, Judge Sullivan published a dissenting opinion he had written for another case. "I respectfully dissent from the law I must apply in this case, and I hope my dissent will call attention

to what I perceive as a flaw in our system of justice and suggest a remedy to this flaw."<sup>4</sup>

The other case concerned an Operation Desert Storm veteran with 15 years' experience who was being separated under the Voluntary Separation Incentive, Special Separation Bonus (VSI/SSB) programs<sup>5</sup> and was to receive separation pay of \$200,000+. However, prior to his separation, he used marijuana at a party and later tested positive in a random urinalysis. He was court-martialed and sentenced to confinement for two months, forfeiture of \$700 pay per month for two months, reduction to E-3, and a bad conduct discharge. This discharge carried with it the automatic loss of \$200,000 in separation pay.<sup>6</sup>

Judge Sullivan wrote, "I doubt there is any jurisdiction in America outside of the military where a first-time offender, who takes several puffs of a marijuana cigarette, is punished by 60 days in jail and a fine of over \$200,000."<sup>7</sup> The judge noted that there are only five general punishments available in a military court-martial: death (in rare cases), confinement, loss of rank, monetary loss (fine or forfeiture of pay), and punitive discharge from the service. Judge Sullivan suggested that a new option be added to the list of possible punishments that a court-martial may consider—a discharge with no loss of retirement benefits.<sup>8</sup> In this paper, I refer to the new punishment as a Punitive Discharge with Retirement Pay (PD&R).

Judge Sullivan's proposal requires two changes to the present system. The first would modify the Uniform Code of Military Justice (UCMJ) to provide for a new punishment—Punitive Discharge with Retirement Pay.<sup>9</sup> A second change would have to be made to the military retirement system, creating a separate class of retirees, payment-only. This type of retirement would permit an individual with a punitive discharge to receive retirement pay, but would prevent that person from ever being recalled to active duty or receiving the military benefits associated with retirement.<sup>10</sup>

I analyze those two changes to the system and consider the implications they have for the administration of justice in the military. I discuss the present military justice system and explain the various checks and balances already in place. Then I examine the current nature of retirement

in the military. It is important to have a solid understanding of the purpose and effect of military retirement before considering a proposal that could fundamentally alter the nature of military retirement. I also examine the effects on the military justice and retirement systems if the PD&R were implemented and make a recommendation concerning this very important proposal.

### **Is There a Problem?**

The current military justice system is a complicated and interrelated system of administrative, nonjudicial, and judicial dispositions of misconduct by military members.<sup>11</sup> I explore the present military justice system using the hypothetical case of Lieutenant Colonel Hardwick.<sup>12</sup> In 1996 Colonel Hardwick had served 22 honorable years in the USAF. During his career, he had served in Operation Urgent Fury in Panama and in Operation Desert Storm in the Persian Gulf, where he received the Distinguished Flying Cross. He has a family (a wife and two children—the older child is a sophomore in college and the younger is a senior in high school actively looking at colleges).

Two years earlier, he was looking forward to retirement and wanted to settle the family close to home. He accepted employment at Baxter Air Force Base as the chief of safety. One year later, things had begun to sour in the marriage, and there was a separation but no divorce. A short time later, a new airman was assigned to the safety office. A1C Mona Clapton was a recent graduate from technical school at the top of her class. She was very bright and hard working. These qualities quickly impressed Colonel Hardwick. As her supervisor, he spent much time teaching the airman about the safety office, and she quickly became an indispensable member. Colonel Hardwick began to rely on her more and more, and over time developed a romantic interest. Airman Clapton was flattered and returned Hardwick's affections. Their romance soon blossomed into a sexual relationship that lasted about three months and broke off when Airman Clapton found a boyfriend who worked in the supply squadron.

Some time later, Colonel Hardwick decided to submit his retirement papers. This application was approved. However, about 30 days before going on terminal leave, agents from the Office of Special Investigations (OSI) approached Hardwick. They advised that they suspected him of engaging in an adulterous relationship with Airman Clapton and also of fraternization. The agents told Colonel Hardwick that Clapton had bragged to her boyfriend that she had dated her boss, and that the boyfriend had reported the suspected affair. The agents also told Colonel Hardwick they had confronted Airman Clapton, and she had admitted to all the necessary details. Colonel Hardwick was in a state of shock. He thought if he cooperated, things would go easier on him. After being read his rights, he answered agents' questions and proceeded to type a 10-page, single-spaced memorandum explaining everything. He included in his statement the fact that he and his wife were separated, and that he was scheduled to retire in another month.

The OSI gave a copy of his confession, Airman Clapton's statement, and the friend's statement to Colonel Hardwick's commander, Colonel Gibson, the wing's operations group commander, and a copy to the base legal office. Both Colonel Gibson and the legal office felt the charges were serious, and the allegations went right to the heart of military discipline. The commander recommended a trial by court-martial. After the charges were referred to trial, Colonel Hardwick pleaded guilty and threw himself on the mercy of the court. After hearing all the evidence, the military judge sentenced Colonel Hardwick to be dismissed from the service and to receive a reprimand.

Colonel Hardwick learned that dismissal from the service meant that he was going to forfeit all his retirement pay—nearly \$2,500 per month after taxes. He was counting on this amount of money to put the children through college and to pay his wife alimony and child support for their son when they eventually got divorced. Over the course of his expected life span, Colonel Hardwick expected to earn more than \$1 million in retirement pay. Colonel Hardwick violated military standards and paid a very severe penalty.

## Analysis of Current Military Justice System

*Fiat justitia ruat coelum (Let justice be done though the heavens may fall).*

—Lucius Calpurnius Piso Caesonius (43 B.C.)

In this section, I describe and analyze the current military justice system. Generally speaking, the military justice system is divided into three categories: administrative, nonjudicial, and judicial.<sup>13</sup> Ordinarily, administrative sanctions carry the smallest adverse consequences, and judicial actions are the most serious. However, there is tremendous flexibility within and between the categories, and frequently administrative sanctions are more serious than nonjudicial or even judicial sanctions.<sup>14</sup>

Air Force policy is to resolve matters of misconduct at the lowest level possible consistent with the maintenance of good order and discipline.<sup>15</sup> In some cases, maintaining good order and discipline may require high-level resolution; that is, the matter be directly disposed of by a general court-martial.<sup>16</sup> Additionally, it is important to understand that the military justice system is a commander's program to maintain good order and discipline. The military justice system is unique in that military commanders, and not attorneys, decide which cases go to trial and which cases are disposed of through administrative or nonjudicial means.<sup>17</sup> The commander's authority is based on a combination of that commander's rank and position and is sometimes limited by the rank of the accused.<sup>18</sup> To illustrate these points, I return to the case of Colonel Hardwick and investigate the options available to the actors in this scenario as it unfolds.

After reviewing the OSI report and the statements of Colonel Hardwick and Airman Clapton, the operations group commander, Colonel Gibson, has to decide what action to take. In making his decision, he should consult with the base legal office for guidance.<sup>19</sup> Additionally, Colonel Hardwick's defense counsel will probably contact the commander and advocate for reduced punishment. Colonel Gibson should first consider whether administrative action is appropriate. Most forms of administrative action

(counseling, reprimands, administrative control) would have no effect whatsoever on Hardwick's rank or retirement pay, although they may affect his promotion and career opportunities.<sup>20</sup> Because Colonel Hardwick is already retirement eligible, he cannot be administratively discharged, the most serious action available in the administrative category.<sup>21</sup>

If, after reviewing the evidence against Hardwick, the commander believes administrative sanctions are inappropriate, he should next consider nonjudicial punishment or Article 15. While the UCMJ permits a colonel to impose nonjudicial punishment on a subordinate lieutenant colonel, virtually all service regulations administratively withhold the authority of commanders under the grade of O-7 to impose Article 15 punishment on officers of any rank. Therefore, if Colonel Gibson believes that an Article 15 is the most appropriate disposition, he will have to recommend it to the first general officer in the chain of command. If Hardwick were to receive an Article 15, he could be required to forfeit one-half of his base pay per month for two months and could be reprimanded.<sup>22</sup> Unlike enlisted personnel, officers cannot be reduced in rank as the result of an Article 15.<sup>23</sup> Additionally, the Article 15 could not prevent Colonel Hardwick from retiring from the service, although it might affect the grade at which he retires and consequently the amount of his retirement pay.<sup>24</sup>

If Colonel Gibson determines that neither administrative nor nonjudicial punishment is appropriate, he could recommend through the chain of command that Colonel Hardwick be tried by court-martial. Normally, officers are tried by general courts-martial, because only a general court-martial has the authority to both confine and punitively discharge an officer.<sup>25</sup> For enlisted members, a special court-martial is roughly equivalent to a misdemeanor trial, and a general court-martial is roughly equivalent to a felony trial.<sup>26</sup>

If Colonel Gibson recommends a general court-martial in this case, Colonel Hardwick's counsel can informally try to persuade the superior commanders in the chain of command to impose administrative or nonjudicial punishment instead. If those efforts are unsuccessful, Hardwick can try

to persuade the Article 32<sup>27</sup> investigating officer that a court-martial is inappropriately severe.<sup>28</sup> The investigating officer has no independent authority but only makes recommendations to the convening authority. Nonetheless, convening authorities are expected to consider carefully the investigating officer's input. Once the decision has been made to send the case to trial, Colonel Hardwick has several opportunities to preserve his retirement. First, he can request retirement in lieu of trial by court-martial.<sup>29</sup> This is a formal request to the secretary of the accused's service that he be retired without facing trial. While only the secretary of the Air Force can approve Colonel Hardwick's request, both the numbered air force commander and the major command (MAJCOM) commander can disapprove the request, without the request ever reaching the secretary.<sup>30</sup> Second, Colonel Hardwick can enter into a pretrial agreement (PTA) with the convening authority in which, in return for the accused's plea of guilty, the convening authority agrees to disapprove a punitive discharge if one is adjudged at trial.<sup>31</sup> If such a PTA were entered into, Colonel Hardwick could not be punitively discharged and hence would not have to forfeit all his retirement pay. However, such a PTA would not limit the secretary's authority to conduct a grade determination.

If Hardwick's efforts to avoid trial are rebuffed, he will have to proceed to trial. There, he can try to convince the sentencing authority (either a judge or court members) not to impose a punitive discharge as an element of his sentence. If the sentencing authority adjudges a punitive discharge as an element in Hardwick's sentence, then he can request clemency from the convening authority.<sup>32</sup> The clemency process gives Hardwick the right to present matters for the convening authority to consider, and the convening authority has the power to disapprove or mitigate the punishment the court-martial imposed. Therefore, even at this stage, Hardwick could still be allowed to retire.

Colonel Hardwick can appeal his sentence to the Air Force Court of Criminal Appeals (AFCCA).<sup>33</sup> If the AFCCA agrees that some error was made in the court-martial, it could vacate the sentence and require a retrial, or it could unilaterally impose a new sentence, perhaps one not in-

cluding a dismissal. After the AFCCA reviews his appeal, Colonel Hardwick could petition the CAAF to consider his appeal.<sup>34</sup> If the CAAF agrees to hear his appeal, and it finds error, it can vacate the sentence and return it to either AFCCA for further action or to the base for resentencing.<sup>35</sup> Also, if the CAAF hears an appeal, the accused has an opportunity to petition the US Supreme Court for a writ of certiorari.<sup>36</sup>

Finally, the secretary of the Air Force is required to execute all officer punitive discharges (dismissal).<sup>37</sup> Hardwick could appeal to the secretary to substitute a retirement in lieu of a punitive discharge, even at that late stage of the proceedings.<sup>38</sup>

To summarize, the current military justice system places great emphasis on process and procedural fairness at all stages of action. Many due process protections are in place for the retirement-eligible member accused of misconduct. The member's commander has numerous opportunities to resolve the matter without going to court. Additionally, even if the matter goes to court, the accused can offer to retire in lieu of trial or enter into a PTA with the convening authority to avoid a punitive discharge. Finally, if the member goes to trial and is given a punitive discharge, he can request clemency from the convening authority, appeal his sentence through the military appellate system, and even petition the secretary of the Air Force for clemency before he or she executes the dismissal. The imposition of a punitive discharge for a military accused is neither arbitrary nor capricious but rather the result of a complicated process that balances the needs of good order and discipline against the needs and rights of the accused.

### **The Military Retirement System: History and Analysis**

*Tempora mutantur, nos et mutamur in illis (Times change, and we change with them too).*

—Owen's Epigrammata, 1615

It is very important to understand the role the military retirement system plays in the military justice process, for it is the interaction of these systems that precludes a punitively discharged member from drawing retirement pay. Nothing in the law prohibits a punitively discharged member from receiving retirement pay.<sup>39</sup> Rather, it is the service secretary who denies punitively discharged members their retirement pay.

The military retirement system is not a traditional retirement system. Among some of the significant differences are military retirees remain subject to the UCMJ, and they may be involuntarily brought back on active duty at the direction of the service secretary in the event of a national mobilization.<sup>40</sup> The present retirement system is based on three sets of intertwined federal statutes, each of which covers a different aspect of military retirement.

The first set of statutes permits the secretary of the service to retire officers and enlisted members with more than 20 years of service.<sup>41</sup> The statutes require the officer to request retirement and states that upon such a request, the secretary may approve it. Of course, the secretary is not required to approve the request; mission needs may be such that it might not be in the best interest of the service to retire a particular member at a particular point.<sup>42</sup> Additionally, this set of statutes shows why military retirements do not vest as that term is commonly understood; the secretary retains the discretion to retire members, and the "right" to retire is not created until the service secretary approves an officer's request to retire.<sup>43</sup>

The second statute covers the secretary's authority to determine the grade in which a member retires.<sup>44</sup> The law provides that members shall be retired in the highest grade in which they served satisfactorily on active duty, as determined by the secretary of the military department concerned. The secretary's role in what are commonly called grade determinations is a little known but very important fact for members retiring in the wake of recent misconduct. Currently, the secretary conducts a grade determination when a member's records indicate that he may not have performed satisfactorily at his current grade. In other words, if a member receives an Article 15 and

puts in retirement paperwork shortly thereafter, a grade determination is required.<sup>45</sup> This action does not mean that the member's retirement grade will be reduced, but it must be considered.

Finally, the third statute defines the legal status of retired members, including the secretary's power to order a retiree to active duty (*US Code*, title 10, sec. 688a), and the duties of a member called to active duty (*US Code*, title 10, sec. 688c).<sup>46</sup>

Apart from the statutes directly pertaining to the military retirement system, other federal statutes affect the receipt of military retirement pay. The most important of these provides that any federal retiree (military or civilian) shall forfeit retirement pay if convicted of one or more of an enumerated list of crimes. The offenses, which trigger this provision, include treason, rebellion, insurrection, aiding the enemy, espionage, as well as perjury and subornation of perjury regarding the same.<sup>47</sup>

In addition to understanding the mechanics of how military retirement works, it is important to understand the philosophy underlying the payment of retirement pay to military retirees. This philosophy is particularly important because the appeal of adopting the PD&R discharge could well depend on which theory of retirement one adopts. The origins of military retirement began during the Civil War. Before that time, there was no provision to retire members of the military, and consequently there were individuals serving who were not fit to perform their duties.<sup>48</sup> Military retirement was initiated as a force-shaping tool.<sup>49</sup> One of the most important issues to address with respect to military retirement is to consider the very nature of a military retirement. There are two schools of thought on the nature of a military retirement, and they both affect the appropriateness of adopting the PD&R.

The first school of thought is that military retirement is diminished pay for diminished services. This school contends that military retirees are still performing current services to the military (presumably maintaining themselves in a state of readiness to be recalled to active duty if required). However, if military pay is reduced compensation for reduced services, the logical implication is that

there can be no justification for paying retirement pay to an individual who is punitively discharged and is thus incapable of performing any services or being recalled to active duty.

The US Supreme Court first addressed this issue in the case of *United States v. Tyler*,<sup>50</sup> which was a suit brought by retirees to have their pay raised by the same amount paid to members of the active service. When Tyler and others retired, military pay was extremely low, and retirement pay was even lower. In the 1880s, Congress passed a pay raise for all service members, raising their pay by a factor of three or four or more. When the retirees learned they were not to receive this pay increase, they sued the government claiming they were also members of the service and hence entitled to the pay raise. The Court granted their petition and noted in famous language: "It is impossible to hold that men who are by statute declared to be 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 from the service in disgrace, are still *not* in the military service" (emphasis in original).<sup>51</sup>

In later cases, the courts relied upon the theory that military retirees were part of the force to deny them benefits. In *Costello v. United States*, Congress decoupled retirement pay raises from those for active duty pay raises (the issue presented in *Tyler*). Costello sued under the grounds decided in *Tyler*. The Court ruled against Costello, stating that because retired members are indeed providing current services, Congress is free to change their pay and benefits as it sees fit.

The second school of thought contends that despite language to the contrary, the reality is that military retirement is deferred compensation for services previously rendered, as in a traditional retirement. If one adopts this view, there is much less controversy in paying punitively

discharged members retirement pay, because retirement pay is not based on the retiree providing current services.

Despite much lip service to the contrary, Congress has explicitly and implicitly changed the nature of a military retirement to such an extent that it is virtually impossible to argue that it is anything other than deferred compensation. The chipping away came after the landmark case *McCarty v. McCarty*,<sup>52</sup> which concerned a military member who was seeking a divorce in California, a community property state. The wife of a service member claimed that a portion of his future military retirement pay was community property and subject to division by the court. The husband argued that his retirement would not be deferred compensation but would be current compensation; diminished compensation for diminished services. Under the laws of community property, current income is not divisible, but deferred compensation is. The Supreme Court considered both arguments and rejected both.<sup>53</sup> Instead, it based its decision on the carefully crafted congressional scheme of retirement, and held that no state court has jurisdiction to meddle with such a carefully crafted congressional scheme.<sup>54</sup> The Court was concerned that if retirement pay were subject to division by a state divorce court, military recruiting and retention could be adversely affected. Thus, without deciding whether retirement pay was deferred compensation or current compensation, the Court held for the husband.<sup>55</sup> Congress reacted swiftly and passed the Uniformed Services Former Spouse Protection Act (USFSPA),<sup>56</sup> which explicitly permitted state divorce courts to divide retirement pay. This statute cannot be squared with the notion that military retirement is current compensation; the obvious fact is that individuals are receiving military retirement pay who never served a day in service, are not subject to the UCMJ, and are not eligible to be recalled to active service. In many cases, these non-military spouses are receiving up to one-half of the retirement pay of the retired member.

In a more recent case, *Barker v. Kansas*,<sup>57</sup> the Court considered whether Kansas could tax the retirement pay of military members but not tax the retirement pay of retired state employees. At issue in that case is the principle that

permits a state to tax federal employees' compensation only if the taxation does not discriminate against employees based on the source of the compensation.<sup>58</sup> Kansas did not tax the retirement pay of state and local government retirees but taxed military retirees. Kansas argued that its tax was permissible, because the income of state and local government employees was deferred compensation, while the income of military retirees was current diminished compensation. Because the nature of the income was substantially different, Kansas argued that it could tax the income differently. The Court rejected the argument and held in favor of the military retirees. In reaching its decision, the Court noted that military retirees unquestionably remain in the service and are subject to restrictions and recall; and in these respects they differ from other retirees. However, the Court stated that Kansas may not treat military retirement pay as reduced pay for reduced services. It noted that a military retiree is entitled to a stated percentage of the pay level achieved at retirement, multiplied by the years of creditable service. In this respect,

Retired military pay bears some of the features of deferred compensation. The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. By taking into account years of service, the formula used to calculate retirement benefits leaves open the possibility of creating disparities among members of the same preretirement rank. Such disparities cannot be explained on the basis of "current pay for current services," since presumably retirees subject to these benefit differentials would be performing the same services.<sup>59</sup>

Additionally, Congress does not consider military retirement pay to be earned compensation, because it cannot be considered toward making a contribution in an Individual Retirement Account (IRA).<sup>60</sup> Finally, Congress decoupled the requirement that able-bodied retired members are eligible for recall to active duty. In 1997 Congress amended the retirement law to provide that Selective Early Retirement Board (SERB)<sup>61</sup> officers are not eligible for recall to active duty.<sup>62</sup> Clearly, the purpose behind the law was to prevent them from subverting the purpose behind the SERB retirement, but if those officers are ineligible for recall, what current services can they be providing?

In my view, military retirement pay is deferred compensation for previously rendered services. It can be divided upon divorce, paid to nonmilitary spouses incapable of providing current services; for tax purposes it must be treated like any other retirement, including IRAs, and finally, not all retirees are even eligible to be recalled to active duty. With that as background, there is no principled reason that military members punitively discharged should be ineligible from drawing retirement pay, notwithstanding their ineligibility to ever serve again.

### **The Sentencing Process: Tensions in the System**

*My object all sublime I shall achieve in time—To make the punishment fit the crime.*

—Sir William Schwenck Gilbert  
*The Mikado*, 1885

Having considered the military justice system and the military retirement system, it is time to take a closer look at the PD&R discharge, including the dynamic forces that caused Judge Sullivan to recommend this new option in the first place. As he recognized in his memorandum, the root cause is that current sentencing options do not permit sufficient flexibility to allow the sentencing authority to impose an appropriate sentence in all cases.<sup>63</sup> The military recognizes five purposes or principles of punishment.<sup>64</sup> The military judge instructs members serving as a court-martial on these before imposing punishment.<sup>65</sup> They are (1) rehabilitation of the wrongdoer, (2) punishment of the wrongdoer, (3) protection of society from the wrongdoer, (4) deterrence of the wrongdoer and those who know of his or her crimes from committing the same or similar offenses, and (5) preservation of good order and discipline in the military.

Currently, the range of punishments available in a military court-martial are as follows, listed in approximate order from least severe to most severe: no punishment, reprimand, restriction, reduction in grade (enlisted only), hard labor without confinement (enlisted only), forfeiture of pay (and allowances), fine, confinement, punitive dis-

charge, death, or any combination of the foregoing.<sup>66</sup> For the typical retirement-eligible accused, frequently an officer in the grade of O-5 or higher or an enlisted member E-7 or higher, some of the punishments might be inappropriate and may even be impermissible.<sup>67</sup>

Thus, while reduction in grade might seem a very appropriate punishment in the hypothetical case of Colonel Hardwick, it is not authorized.<sup>68</sup> Hard labor without confinement is also not authorized for officers.<sup>69</sup> Moreover, it is difficult to envision a court sentencing a senior noncommissioned officer (NCO) to perform hard labor without confinement. This punishment is typically given to lower-ranking enlisted members.

Forfeiture of pay and allowances would seem to be an effective punishment at first blush, but there are several technicalities that make it an ineffective punishment for the retirement-eligible accused. First, forfeitures only affect pay as it accrues.<sup>70</sup> Therefore, the convicted must remain on active duty in order to forfeit pay, leaving the military in the awkward position of retaining such members on active duty for the sole purpose of requiring them to forfeit pay. Second, the law only permits a maximum forfeiture of two-thirds pay if the member is not in confinement. Consequently, the only time forfeitures are a truly effective punishment is when the member is confined.<sup>71</sup>

A fine is a potential middle ground between too much punishment and too little punishment. A fine creates a debt immediately payable to the government of the United States.<sup>72</sup> Considering the case of Colonel Hardwick, if the expected future value of his retirement were to be \$1 million,<sup>73</sup> a fine of \$100,000 might well be considered eminently fair—only 10 percent of the expected value of his retirement.<sup>74</sup> However, Colonel Hardwick's retirement would be paid over the course of his lifetime, and the fine is a debt that becomes due immediately. Depending on Hardwick's financial situation, immediate payment of the debt might not be possible.<sup>75</sup> Because of the obvious implications of imposing a \$100,000 fine on a lieutenant colonel, this option, while viable does not resolve the matter of determining an appropriate punishment.<sup>76</sup>

One form of punishment authorized in virtually all proceedings is confinement.<sup>77</sup> However, while confinement may be authorized, it is not always appropriate. The primary purpose for confinement is the protection of society from the wrongdoer.<sup>78</sup> At the same time, some of the offenses that land retirement-eligible accused in court are not the type of offenses for which confinement is normally appropriate, especially when more senior members are accused. It is extremely unlikely that Colonel Hardwick would be sentenced to even a one-day confinement, although his offenses carry a maximum punishment of three years confinement.<sup>79</sup>

Two remaining punishments are sentences to no punishment and to receive a reprimand.<sup>80</sup> Sentences of no punishment are extremely rare and usually reserved for technical reasons.<sup>81</sup> Reprimands are sometimes given in conjunction with other punishments but rarely as a stand-alone punishment because they are generally viewed as being less punishment than is appropriate in most cases.

The final authorized punishment is a punitive discharge. There are actually three types of punitive discharges: bad conduct discharge, dishonorable discharge, and dismissal.<sup>82</sup> The bad conduct discharge and the dishonorable discharge are reserved for enlisted personnel. The dismissal is the only punitive discharge authorized for an officer.<sup>83</sup> Notwithstanding the attempted distinctions,<sup>84</sup> the legal effects of all three discharges are basically the same, and for the purposes of this paper, all three discharges equally terminate a member's right to receive retirement pay.<sup>85</sup> The difficulty court members face in adjudging an appropriate sentence is that while the punitive discharge can have harsh collateral consequences, it is the only means the members have to discharge a member from the service.<sup>86</sup> There are instances where court members may arrive at a point where the two punishments being actively considered are confinement or a discharge. They may believe that confinement is not appropriate, but a punitive discharge, at least in a general sense, is appropriate. However, whether the court members considering a punitive discharge realize that it is tantamount to the

member forfeiting retirement pay is a question the military courts are now in the process of trying to resolve.

At issue is the so-called collateral consequences rule.<sup>87</sup> Traditionally, the collateral consequences rule provided that only matters arising directly out of the imposition of a sentence could be considered in arguing for or against a particular punishment, or could be considered by the sentencing authority in imposing punishment.<sup>88</sup> For example, counsel could argue that confinement would take away the accused's liberty but could not argue that as a result of confinement the accused might lose a medical or other professional license. The purpose for the rule is to minimize or eliminate speculation from the sentencing process. We know that confinement will take away the accused's freedom; we do not know that confinement will cause the loss of a license. Such a loss is collateral to the sentence imposed.<sup>89</sup> Unfortunately, the collateral consequences rule has been invoked in courts-martial to prevent the accused from explaining to the court members that a punitive discharge could cost them retirement and retirement pay.<sup>90</sup>

In 1989 in the case of *United States v. Henderson*,<sup>91</sup> the court held for the first time that retirement-eligible accused could introduce evidence of loss of retired pay on the issue of whether they should be punitively discharged. The trial courts strictly construed *Henderson*, not allowing members who are not actually retirement eligible to present such evidence.<sup>92</sup> Recently in a trio of cases,<sup>93</sup> the CAAF loosened the collateral consequences rule, to permit members "perilously close" to retirement to put forth evidence concerning the potential loss of retired pay. The court did not specify how close to retirement "perilously close" was and requested that the services address this matter through a regulation or instruction.<sup>94</sup>

Therefore, under today's law, Colonel Hardwick could introduce evidence concerning his loss of retirement pay. While this permits the court members to unambiguously understand the consequences of giving Hardwick a punitive discharge, it is still insufficient. It does nothing to correct the real issue—giving the members a sentencing option less serious than a full punitive discharge but more

serious than a reprimand, possibly uncollectible fine, and/or inappropriate confinement.

Judge Sullivan's PD&R proposal would give court members an additional sentencing option; in no way would it eliminate the members' ability to impose a full punitive discharge if they deem it appropriate. The full range of sentencing options currently available would remain available, with one additional option. The PD&R would provide the sentencing authority with needed flexibility to make the fine distinctions often required to craft an appropriate sentence.

### **Good Order and Discipline and the PD&R**

*Discipline is the soul of an army. It makes small numbers formidable; procures success to the weak, and esteem to all.*

—George Washington, 1759

Now, having an understanding of the realities of the system, it is time to consider the impact the PD&R might have on the military justice system's ability to maintain and preserve good order and discipline. The maintenance of good order and discipline is both the foundation of the military and the foundation of the military justice system.<sup>95</sup> No change in the system would be acceptable if it had an adverse effect on good order and discipline. I address the PD&R's potential impact on good order and discipline by examining how it might affect the five principles of sentencing.

The PD&R discharge would probably enhance rehabilitation of the wrongdoer by providing greater flexibility to craft a sentence which appropriately punishes the member yet also leaves room for a meaningful opportunity for rehabilitation. It would eliminate concerns over a too limited menu of punishments for the military sentencing authority to draw from. Judge Sullivan's proposal would bridge the sometimes wide gap between authorized punishments that are too weak and those that are too harsh. However, it is somewhat inapposite to consider a punitive discharge as having a rehabilitative purpose; it does not. It is principally imposed as means of retribution and deterrence, two other principles of sentencing. "The punitive discharge was

designed to sever a servicemember from the military community and to put a mark upon him that would make it difficult for him to reenter the civilian society and economy. The punitive discharge thus had two effects by design: first, it punished by ejection from a familiar society and by imposing social and economic hardships; and second, it deterred others by its visible, swift, effective, and harsh character."<sup>96</sup>

Is the PD&R an effort to make the punitive discharge something it is not—a rehabilitative punishment? It depends upon your point of view. One could argue that the simple answer is yes; that allowing a punitively discharged member to draw retired pay significantly alters the effect of a punitive discharge. Recall though, that the forfeiture of retirement pay is a collateral consequence of a punitive discharge; it is not the purpose of a punitive discharge. Since the forfeiture of retirement pay is collateral to the punishment, elimination of a particular collateral consequence does not alter the essential nature of the punishment. The member would still receive a punitive discharge, and he or she would still be separated from the military with the attendant loss of all honors, privileges, and benefits commonly associated with military service, save a monthly retirement paycheck. The provisions of "Certain Bars to Benefits," *US Code*, title 38, sec. 5303, 1995, would remain in effect, terminating punitively discharged members' rights to any veteran's benefits.<sup>97</sup> Additionally, the social and economic hurdles commonly associated with a punitive discharge would remain in effect.<sup>98</sup> Thus, while the payment of retirement pay may mitigate the harshness of a punitive discharge, it does not fundamentally alter the nature of a punitive discharge.

The second principle of punishment is retribution or "punishment for punishment's sake," which is a legitimate purpose of punishment; a sanction for having done wrong, even when one's offense is victimless. This is society's way of balancing the books, and serving the punishment imposed is the wrongdoer's means of paying his debt to society.<sup>99</sup> As alluded to above, this principle of punishment is nearly the mirror image of rehabilitation, although most people would agree that the process of paying one's debt to

society may itself have rehabilitative benefits.<sup>100</sup> Whether the PD&R discharge would have an effect on this area largely depends on how wisely the sentencing authority uses the new flexibility of the PD&R discharge.

In other words, if a wrongdoer receives a punitive discharge with retirement pay when instead a traditional punitive discharge would be more appropriate, the retribution aspect of punishment will be diminished.<sup>101</sup> Conversely, punishments based on excess retribution could diminish respect for the military justice system. In the absence of the PD&R, retirement-eligible accused face both the stigma of a punitive discharge and the forfeiture of their retirement pay. Such a serious double whammy ought to be reserved for the worst offenders and not be a mere collateral consequence.<sup>102</sup> Viewed thusly, the PD&R could enhance the retribution power of punishment, by allowing for the stratification of punishments. Instead of having to impose a one-size-fits-all punitive discharge, the sentencing authority could pare and tailor an appropriate punishment, far enhancing the retributive character of the traditional punitive discharge.

The third sentencing principle, protection of society from the wrongdoer, is not really applicable to punitive discharges in general, if for no reason other than the very purpose of a punitive discharge is to send a military member back into society. This principle of punishment is normally accomplished through confinement.

The fourth principle of punishment combines two sides of the same coin, deterrence. One side of the coin is termed "specific deterrence," the notion that the punishment imposed will teach *this* wrongdoer a lesson and make *this* wrongdoer less likely to engage in future misconduct. On the other side of the coin is "general deterrence," the notion that punishment serves to teach everyone a lesson.<sup>103</sup> In other words, society's knowledge that wrongdoers are punished acts to deter others from committing the same or similar crimes.<sup>104</sup>

One may argue the PD&R would reduce the deterrent effect of the military justice system by potentially lowering the cost of engaging in misconduct. Just as military members pending promotion are under de facto probation (the

ease of red lining a promotion makes promotion-selected members particularly averse to misconduct),<sup>105</sup> so too should an approaching retirement induce an increased sense of aversion toward misconduct. There are several answers to this argument. First, the addition of the PD&R discharge as an authorized punishment is no guarantee that a wrongdoer will receive it. Traditional punitive discharges with the associated loss of retired pay would still be available to the sentencing authorities. Second, while draconian punishment may deter future misconduct,<sup>106</sup> such a concept is at odds with modern notions of fairness and justice. An even more interesting answer flows from examining the actual nature of deterrence. True deterrence is based on a combination of the likelihood of getting caught for a particular act of misconduct, weighted by the severity of the punishment the member is likely to receive.<sup>107</sup> Reducing deterrence to a mathematical formula leads to the observation that any mitigation in potential punishment could be offset through stricter enforcement, a distinct possibility if the PD&R proposal is implemented. Currently, there may be a hesitancy to bring retirement-eligible members to a court-martial specifically because of the distinct possibility that trial may result in forfeiting their retirement pay.<sup>108</sup> To the extent this is true, retirement-eligible members may actually benefit at the margin from the perceived harshness of the current system. If the system were modified such that a punitive discharge would not automatically result in forfeiture of retirement pay, commanders and convening authorities might actually send more retirement-eligible members to trial. Therefore, the actual effect the PD&R would have on deterrence is unknown, but the PD&R would not necessarily reduce deterrence in the military.

The final justification for punishment in the military is to preserve good order and discipline.<sup>109</sup> Although this principle of sentencing is not defined by the military judge like the other principles, it most likely is based on a combination of the factors previously discussed, as well as some other considerations I would like to explore in more detail. One aspect of the preservation of good order and discipline is whether sentences adjudged engender respect

for the system. The military justice system is an integral part of the process for maintaining discipline in the armed forces, and it is essential that both those subject to it, and society as a whole, have confidence in its fairness and its procedures.<sup>110</sup> To this end, the law and its sanctions should apply equally to all members, regardless of rank, status, or longevity in service. As a general principle, that notion is laudable. However, even in the current military justice system, significant differences are built into the system. Officers cannot be reduced in rank nor be subjected to hard labor without confinement,<sup>111</sup> the military inexperience of junior members is frequently a matter in mitigation,<sup>112</sup> members with lengthy service undergo additional reviews before they are administratively discharged,<sup>113</sup> and there are instances where senior members are treated differently from junior members.<sup>114</sup> It is not an alien concept for members of the service to be treated differently.<sup>115</sup>

A close examination of the circumstances also reveals that the PD&R may not be the windfall benefit for retirement-eligible members that may be assumed at first blush, but rather a means to equalize punishments where the only differentiation between members is their time in service. Recall the situation of Lieutenant Colonel Hardwick. Now consider a captain (with five years in service) who engages in the same misconduct as Colonel Hardwick. Theoretically, the same offense was committed,<sup>116</sup> and the same punishment ought to be meted out in both cases. However, if both the captain and the lieutenant colonel receive ostensibly the same punishment, say a reprimand and a dismissal, the impact of the punishment is decidedly different on the two parties. The captain forfeits a rather tenuous future expectancy of retirement pay difficult to calculate and the lieutenant colonel forfeits an actuarially determinable sum of money approaching \$900,000. Clearly, this action is not the same punishment for the same offense. Additionally, to the extent one views Hardwick's rank to be a matter in aggravation, that is justifiable only if the amount of aggravation is worth the differential punishment (\$900,000). To the extent that the aggravating value of the rank of lieutenant colonel is \$900,000, then the sentencing authority is free to impose

the punishment of dismissal with loss of retirement pay. On the other hand, if the sentencing authority views the two cases to be roughly equivalent, the PD&R would now permit roughly equivalent punishment—dismissal for the captain and dismissal with retirement pay for the lieutenant colonel. Therefore, by providing the sentencing authority with a middle position, the system can be rendered fairer, even if only at the margin, by the adoption of the PD&R proposal. To the extent the system is viewed as being fairer, that perception will have a positive impact on the maintenance of good order and discipline.

A second area to explore is the effect of a punitive discharge and loss of retirement pay on innocent third parties. Innocent third parties are individuals who rely on the accused's retirement pay and were either victims of the crime that led to trial or who had no role at all in the misconduct. Currently, if a member commits a crime against his or her family and is punitively discharged as a result, the family would be entitled to transition compensation payments to offset the loss of the wrongdoer's income.<sup>117</sup> While a noble concept, the administration of the program in practice has some serious flaws. First, victims are only entitled to very limited benefits.<sup>118</sup> If the PD&R were implemented, family member victims could be in a better financial position vice the current transitional compensation scheme.<sup>119</sup> Second, if the spouse were to divorce the member,<sup>120</sup> the member's retirement pay would be subject to division by the divorce court as a marital asset, and the family victims would receive payments either for the life of the retiree or the spouse, if the Survivor's Benefit Plan were elected.<sup>121</sup> Third, if the family were to remain intact, then the accused would be able to provide them reasonable and adequate support through military retirement pay, and the family would not suffer victimhood twice.<sup>122</sup> Even more compelling is the circumstance when the wrongdoer's family had no part in the criminal behavior, yet they would be the ones to suffer most if the member were to forfeit retirement pay. Consider a case of a retirement-eligible member smoking marijuana. Clearly, that is inexcusable misconduct in this day and age, and the wrongdoer definitely deserves punishment. However,

should that punishment extend to the family? Because no family member was a direct victim of the misconduct, the family is ineligible for transition compensation payments.<sup>123</sup> Reconsider the hypothetical case of Colonel Hardwick and substitute marijuana abuse as the charge. His children may be unable to attend college, and his family's hopes and dreams will be forever altered. However, there are two compelling arguments against this concern. First, the prospect of the family losing everything because of a member's misconduct serves as a very powerful deterrent. It requires members to consider how their actions will hurt not only themselves but those close to them, and these considerations may well have a chilling effect on their propensity to engage in criminal behavior. Second, military benefits, including retirement pay, are not a form of substitute welfare. If a family becomes indigent as a result of the loss of a wrongdoer's pay, programs exist within our society to assist the family.<sup>124</sup> The Department of Defense should not have to fund in-kind welfare for unfortunate dependents.

Whenever there are two good but diametrically opposed arguments concerning an issue, the decision goes to the side that promises the greatest benefits for society as a whole. Because society has an interest in identifying and punishing wrongdoers, it wants innocent families to report misconduct. However, when the reporting of misconduct may cost the family money, the family will be less likely to report the misconduct. Society (and especially the military) has an interest in removing these financial barriers to reporting misconduct. In the hypothetical case of Colonel Hardwick, society (at least the USAF) would be better served if Mrs. Hardwick were to discover her husband's misconduct and report it to the authorities. However, to the extent there are incentives against her reporting it, she will be less likely to do so. While some of her considerations are beyond the scope of the Air Force's influence (her relationship with her husband and her desires to maintain the family unit), the Air Force can act to allay her financial concerns. This would be a win-win situation for both the Air Force and the family, and can be achieved (at least in part) by implementing the PD&R. The possibility of retain-

ing retirement pay in the event of a punitive discharge may encourage some families to report misconduct they otherwise would not. Although the transitional compensation statutes address some of these concerns, I have demonstrated that this proposal is more generous than the current program, lowering financial-based resistance to reporting misconduct. Additionally, the transition compensation statutes do not compensate individuals for reporting offenses unless they are the victims. The PD&R discharge will enable family members not personally victimized by the member's misconduct to report it on behalf of a third-party victim and still retain the possibility of not losing their financial security.

The PD&R should have a positive impact on good order and discipline and may even benefit law enforcement. The PD&R does not fundamentally alter the present military justice system, but it does create some incentives and eliminates some disincentives built into the current system. The enhanced flexibility it provides sentencing authorities should increase respect for the system and enhance the effect of the theoretical justifications for punishment. While it is difficult to predict accurately how a complex and dynamic system will respond to change, it seems that adoption of the PD&R will create a net benefit to the military justice system.

The final consideration in evaluating the appropriateness of the PD&R lies in determining what effect it will have on the nature and character of military retirement. While those considerations may not be as pressing as good order and discipline, military retirement is one of the military's most important programs.

### **The PD&R and the Military Retirement System**

*People in the West have acquired considerable skill in using, interpreting, and manipulating law. . . . Every conflict is solved according to the letter of the law and this is considered to be the ultimate solution. If one is right from a legal point of view, nothing more is required; nobody may mention that one could still not be entirely right, call for sacrifice, and selfless risk—this would simply sound absurd. Voluntary self-restraint*

*is almost unheard of; everybody strives toward further expansion to the extreme limit of the legal frames. . . . I have spent all my life under a Communist regime, and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is also less than worthy of man.*

—Alexander I. Solzhenitsyn

The last issue that remains to be addressed concerning the PD&R is to consider its impact upon the military retirement system. I examine three areas. First, its effect on the role of the service secretaries; second, its effect on recall of retirees and collateral military retirement benefits; and third (and perhaps most importantly), its impact on the pride and status of honorably retired military members.

As discussed in the earlier analysis of the military retirement system, service secretaries have the discretion to retire military members who have reached 20 years of service.<sup>125</sup> Although statutes give the secretary discretion whether or not to retire a member, in reality service regulations remove virtually all secretarial discretion over *whether* a person may be retired, but the secretary retains discretion to determine *when* a member may be retired.<sup>126</sup> If the PD&R is implemented, it would appear to withdraw from the secretary of the Air Force the decision to retire a military member. The question to be considered is whether this is such a significant issue that the PD&R ought not to be adopted. Presently, the secretary's discretion is merely the result of federal statutes granting that discretion; Congress retains complete power to modify those statutes. Because the PD&R would require congressional legislation to be implemented, it is only a minor matter to insert statutory language requiring a service secretary to approve the retirement of a member receiving a PD&R.<sup>127</sup> From a policy standpoint, implementing the PD&R should not have a significant impact on the role played by the service secretary. Currently, according to service regulations, the secretary must retire court-martialed members otherwise eligible for retirement (specifically, members whose approved sentences do not include a punitive discharge).<sup>128</sup> The adoption of the PD&R would merely create a punishment

whose effects do not extend to the forfeiture of retirement pay as a consequence.

The next matter to address is the legal status of a PD&R recipient. Admittedly, the PD&R would create an individual of hybrid status—a punitively discharged retiree. The legal nature of military retirement can be divided into two categories: benefits received as a retiree and obligations owed as a retiree. Normal military retirees are authorized a full range of benefits administered by the Veterans Administration (VA) and other government agencies; punitively discharged members are denied all or virtually all such benefits.<sup>129</sup> A bad conduct discharge adjudged by a special court-martial does not conclusively terminate all such benefits; government agencies make a case-by-case analysis.<sup>130</sup> All punitive discharges adjudged by a general court-martial are sufficient for a government agency to deny benefits without further inquiry.<sup>131</sup> But benefits that vest by virtue of prior honorable discharges (usually relevant to enlisted members or prior-enlisted officers) are not affected by a punitive discharge in the current enlistment.<sup>132</sup> Officers without a prior honorable discharge normally forfeit all veterans' benefits upon execution of a punitive discharge.<sup>133</sup> Although the forfeiture of veterans' benefits is a collateral consequence of a punitive discharge, it does not seem unreasonable to deny a punitively discharged member various government benefits usually associated with honorable service. Consequently, I would propose that the member discharged with a PD&R receive none of the government benefits associated with discharges or retirements under honorable conditions. The denial of such benefits and associated status accompanying the receipt of such benefits is consistent with the punitive nature of the PD&R characterization.<sup>134</sup> This denial includes forfeiture of medical care, base exchange and commissary privileges, forfeiture of a military identification card, loans administered by the VA, and termination of the right to be buried in a national cemetery, among others.<sup>135</sup> Basically, individuals receiving a PD&R discharge would still be punitively discharged from the service; their only connection with the military would be their monthly receipt of retirement pay. They should not be entitled to any

of the other honors and privileges associated with military retirement.

In addition to the benefits given to military retirees, there are also duties expected of them. Among others, military retirees remain subject to the UCMJ<sup>136</sup> and also to involuntary recall to active duty by order of their service secretary.<sup>137</sup> The recipients of a PD&R discharge should have their entire "social" connection to the military terminated. Members receiving a PD&R discharge should not be eligible for recall to active duty, nor should they remain subject to the UCMJ. Every attempt should be made to view the PD&R discharge as a punitive discharge in every respect save for the receipt of retired pay.

The final matter to address is the impact the PD&R discharge would have on the pride and status of existing (and future) honorably retired military members. On one hand, the obvious concern of honorably retired members is that members who were punitively discharged from the military should have forfeited their rights to anything from the military. They may believe that the military's rules are well known to one and all, and compliance with the basics of the criminal law are not too much to expect from officers and NCOs of the military. Simply put, those who violate military standards should not benefit from the military. Of course, all of the foregoing concerns are correct and without debate. The issue and the challenge are to accurately and fairly place an individual's misconduct along a spectrum from very minor to very serious and determine an appropriate penalty for that misconduct.

Not all offenses warrant total separation from the military environment, just as some offenses fairly cry out for such separation. The PD&R is an option for sentencing authorities, just as sentencing authorities currently have the option not to adjudge a punitive discharge, and convening authorities have the option to disapprove a punitive discharge. The difference with the PD&R is that members with an approved punitive discharge will be receiving military retirement pay. The implementation of this new option will have to be accompanied with detailed explanation that the PD&R is intended only for those cases where fairness and justice dictate the compromise that is inherent in the

PD&R. If the PD&R is appropriately used, the entire military community should be comfortable with the enhanced fairness and justice it represents.

Additionally, there will be important distinctions between members with a traditional honorable retirement and a PD&R retirement. Traditional retirees are welcome on base to participate in the military community and take advantage of a full range of military benefits; PD&R retirees will not be welcome. While traditional retirees remain subject to military recall and PD&R retirees will not, the notion that military retirement pay is compensation for such readiness is not supportable under today's retirement scheme. Consequently, traditional retirees should merely view the possibility of recall as a patriotic duty and not a quid pro quo for receiving retirement pay. If the PD&R is properly implemented with clear distinctions between members honorably retired and those only drawing retirement pay, the pride and honor associated with military retirement should not be unduly diminished.<sup>138</sup>

The status of our military retirees is an important consideration in the decision to adopt the PD&R. However, there is a difference between being a retiree and merely drawing retirement pay. That distinction will have to be emphasized if the PD&R is to be successfully adopted. The other concerns discussed in this paper can be resolved through legislation; this will require education and commitment. The overall system will be the victor if we are able to improve the administration of military justice. No person gains at another's expense, and the status of military retirees is not improved by perpetuating injustices in the military justice system. Further, since military retirees are themselves subject to the UCMJ, they may ultimately benefit from the PD&R if one of them is unfortunate enough to be court-martialed.<sup>139</sup>

## Conclusion

*I abhor averages. I like the individual case. A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live.*

—Louis D. Brandeis

The proper administration of military justice requires a delicate balance between the needs of good order and discipline and the needs and rights of the accused. The PD&R discharge would enable the system to make finer distinctions in the sentencing process, enhancing justice and fairness in the armed forces. It would have a positive effect on the maintenance of good order and discipline and increase respect for the administration of military justice. It may also provide incentives for individuals to report offenses that they currently have little or no incentive for doing, something which would also enhance the readiness of the force. The PD&R is not inconsistent with the military retirement system in its present evolution. Consequently, I recommend the adoption of the PD&R. This will require congressional legislation to change the retirement system, and an executive order to change the *Manual for Courts-Martial*. This change is long overdue and easily implemented. The PD&R is not just for retirement-eligibles who engage in misconduct—it is for all members of the armed forces who believe in fairness and justice and the dignity of the individual.

#### Notes

1. *United States v. Sumrall*, 45 Military Justice (M.J.) 207, 1996.
2. *Ibid.*, 209-10.
3. *Ibid.*, 211.
4. *Ibid.*
5. Voluntary Separation Incentive/Special Separation Bonus (VSI/SSB). These programs were an effort to draw down the force and encourage military members to separate. One program paid members a monthly stipend based on the number of years of service; the other program paid members a lump-sum settlement. Members were free to select and participate in the program of their choice.
6. *United States v. Sumrall*, 211b.
7. *Ibid.*
8. *Ibid.*
9. "Uniform Code of Military Justice (UCMJ) Article 56, Maximum Limits," *US Code*, title 10, sec. 856, 1995.
10. Army, "Twenty Years or More: Regular or Reserve Commissioned Officers," *US Code*, title 10, sec. 3911, 1996; "Twenty to Thirty Years: Enlisted Members," *US Code*, title 10, sec. 3914, 1996; Air Force, "Twenty Years or More: Regular or Reserve Commissioned Officers," *US Code*, title 10, sec. 8911, 1996; "Twenty to Thirty Years: Enlisted Members," *US Code*, title 10, sec. 8914, 1996; Navy, "Officers: Twenty Years," *US Code*,

title 10, sec. 6323, 1996; and "Twenty to Thirty Years: Enlisted Members: Transfer to Fleet Reserve and Fleet," *US Code*, title 10, sec. 6330, 1996.

11. By military justice system, I am referring to the broad range of powers invested in commanders to deal with misconduct and not only to matters covered by the UCMJ. However, an understanding of commander authority outside the UCMJ is critical to understanding any proposed change to the UCMJ, because the entire system is delicately balanced. Changes must be evaluated with respect to their effect on the balance of the overall system.

12. This case history is fictional and is included only to elaborate the issues and concepts addressed in this paper. It is based on an amalgamation of real cases, all of which are in the public record.

13. David A. Schlueter, *Military Criminal Justice, Practice and Procedure*, 4th ed. (Charlottesville, Va.: Michie, 1996), sec.1-8, 40.

14. An administrative discharge is an administrative sanction that can be far more serious than an Article 15, "Commanding Officer's Nonjudicial Punishment," *US Code*, title 10, sec. 815, 1996, administered to a company-grade officer. An Article 15 can be more serious than a court-martial (Sgt Maj Eugene McKinney of the Army could have received more serious punishment through nonjudicial punishment than he received at his general court-martial).

15. "Initial Disposition," Rules for Court-Martial (R.C.M.) 306(b), in *Manual for Courts-Martial United States (M.C.M.)*, 1995 ed. (Washington, D.C.: Government Printing Office, 1995), pt. 2, 25.

16. First offender murderers go directly to trial.

17. Consider the following examples:

a. "UCMJ Article 30, Charges and Specifications," *US Code*, title 10, sec. 830, 1997 and "Preferral of Charges," R.C.M. 307(a). Commanders generally prefer charges, although technically, anyone subject to the UCMJ may legally prefer charges.

b. "UCMJ Article 22, Who May Convene General Courts-Martial (GCM)," *US Code*, title 10, sec. 822, 1996; "UCMJ Article 23, Who May Convene Special Courts-Martial (SPCM)," *US Code*, title 10, sec. 823, 1996; and "UCMJ Article 24, Who May Convene Summary Courts-Martial (SCM)," *US Code*, title 10, sec. 824, 1996. Only designated commanders may refer charges to a court-martial.

c. "Pretrial Agreements," R.C.M. 705, in *M.C.M.* Only the convening authority may conclude a pretrial agreement.

d. "Action by the Convening Authority," R.C.M. 1107, in *M.C.M.* Only the convening authority may take action on a case.

18. In addition to the statutory authorizations, each year a special order is published specifically designating by position the individuals authorized to convene various types of courts-martials. In the Air Force, general courts-martials may typically be ordered by numbered air force commanders and Air Force Material Command product center commanders. Wing commanders can typically order special courts-martials. Also, consider the rank restrictions associated with the ability to impose Article 15 (see UCMJ Article 15, *US Code*, title 10, sec. 815, in *M.C.M.*, pt. 5, and Air Force Instruction (AFI) 51-202, *Nonjudicial Punishment*, October 1996). For more detail, see UCMJ Article 22, *US Code*, title 10, sec. 822;

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UCMJ Article 23, *US Code*, title 10, sec. 823; and UCMJ Article 24, *US Code*, title 10, sec. 824.

19. AFI 51-201, *Administration of Military Justice*, October 1997, and AFI 51-202 require commanders to seek legal advice in considering judicial and nonjudicial dispositions.

20. AFI 51-201 and AFI 51-202. AFI 36-2907, *Unfavorable Information File*, May 1997. For example, an administrative reprimand may be placed in an Unfavorable Information File (UIF). A member's promotion selection Report on Individual Personnel or RIP indicates whether he has an active UIF, conveying a negative message to a promotion board. Additionally, commanders are explicitly authorized to annotate on the member's promotion record that he or she has either a reprimand or an Article 15 on record. AFI 36-2608, *Military Personnel Records System*, July 1996, par. 2.5 (Article 15), and par. 2.6 (Letter of Reprimand). Such annotations remain in the member's selection record until the next in-the-zone promotion.

21. AFI 36-3207, *Separating Commissioned Officers*, May 1997, table 2.2, note 12.

22. "Nonjudicial Punishment Procedure," in *M.C.M.*, pt. 5, par. 5b (1)(B), 1996 (Rev.).

23. *Ibid.*

24. "Commissioned Officers: General Rule, Exceptions," *US Code*, title 10, sec. 1370, 1997.

25. "Punishments," R.C.M. 1003(c)(2)(A)(ii), (iv) in *M.C.M.*, confinement and punitive discharge.

26. *Schlueter*, sec. 1-8, 40.

27. "UCMJ Article 32, Investigation," *US Code*, title 10, sec. 832, 1997. An Article 32 hearing is like a grand jury hearing, where an investigating officer makes a recommendation whether there is sufficient evidence to proceed to trial.

28. "Pretrial Investigation," R.C.M. 405(f)(11), (12) in *M.C.M.*, 1995 ed., and R.C.M. 405 (j)(2)(l).

29. R.C.M. 405(f)(11), (12) and R.C.M. 405 (j)(2)(l). A note that a resignation or discharge to avoid trial by court-martial terminates most military benefits. AFI 36-3203, *Service Retirements*, August 1994, chap. 2, table 2.2, rule 15. Requests for retirement in lieu of trial by court-martial are processed in accordance. Non-retirement eligible members may request administrative discharge in lieu of trial by court-martial. AFI 36-3208, *Administrative Separation of Airman*, October 1994, par. 1.18. Enlisted personnel can request a "chapter 4 discharge," named after the chapter of the regulation that authorizes it. Although a chapter 4 discharge may be characterized as honorable, general under honorable conditions, or under other than honorable conditions (UOTHC), virtually all such discharges are characterized as UOTHC. AFI 36-3207, par. 2.23, (38 C.F.R. 3.12(c)(3)). Officers have a similar option. If an officer believes that the referral of charges is imminent, he or she can submit a "Request for Resignation for the Good of the Service." Usually, an officer submits an unconditional resignation, but an officer may submit a conditional resignation. If the officer submits a conditional resignation, either

the wing commander or the MAJCOM commander is authorized to disapprove the request and return it to the officer.

30. AFI 36-3203, chap. 2, table 2.2, rule 15.

31. R.C.M. 705(b)(2)(E), in *M.C.M.*

32. "UCMJ Article 60, Action by the Convening Authority," *US Code*, title 10, sec. 860, 1997; "Matters Submitted by the Accused," R.C.M. 1105(b), in *M.C.M.*, submission of matters; R.C.M. 1107(b)(1), in *M.C.M.*, discretion; R.C.M. 1107(c), in *M.C.M.*, findings; and R.C.M. 1107(d), *M.C.M.*, 1995 ed., sentence.

33. "UCMJ Article 66, Review by Court of Criminal Appeals," *US Code*, title 10, sec. 866, 1997.

34. "UCMJ Article 67a, Review by the Supreme Court," *US Code*, title 10, sec. 867a, 1997.

35. "UCMJ Article 67(c), (d)," *US Code*, title 10, sec. 867(c), (d), 1997.

36. "UCMJ Article 67a," *US Code*, title 10, sec. 867a, and "Court of Appeals for the Armed Forces; Certiorari," *US Code*, title 28, sec. 1259, 1997. A writ of certiorari is a petition to the Supreme Court to exercise its discretion to hear the case on appeal.

37. "UCMJ Article 71(b), Execution of Sentence; Suspension of Sentence," *US Code*, title 10, sec. 871(b), 1997.

38. *Ibid.*

39. *United States v. Sumrall*, 211 and *US Code*, title 10, sec. 8911.

40. "Retired Members," *US Code*, title 10, sec. 688, 1996.

41. Army, *US Code*, title 10, sec. 3911 and *US Code*, title 10, sec. 3914; Navy UCMJ, *US Code*, title 10, sec. 6323 and *US Code*, title 10, sec. 6330; Air Force UCMJ, *US Code*, title 10, sec. 8911 and *US Code*, title 10, sec. 8914.

42. AFI 36-3203, chaps. 2 and 3.

43. AFI 36-3203, table 3.1.

44. *US Code*, title 10, sec. 1370.

45. AFI 36-3203, par. 7.5.

46. *US Code*, title 10, sec. 688(c). Members recalled to active duty may be assigned to such duties as the secretary considers necessary in the interest of national defense.

47. "Conviction of Certain Offenses," *US Code*, title 5, sec. 8312, 1996.

48. *US Code*, title 5, sec. 8312, 159. *Congressional Globe*, 37th Cong., 1st sess., 16, 1861. See remarks of Senator Grimes, "some of the commanders of regiments in the regular service are utterly incapacitated for the performance of their duty, and they ought to be retired upon some terms, and efficient men placed in their stead"; see remarks of Senator Wilson, "We have colonels, lieutenant colonels and majors in the Army, old men, worn out by exposure in the service, who cannot perform their duties; men who ought to be honorably retired, and receive the compensation provided for in this measure." *McCarty v. McCarty*, 453 U.S. 210, fn. 2, 69 L.ed.2d 589, 101 S.Ct. 2728, 1981.

49. *McCarty v. McCarty*, 210.

50. *Taylor v. United States*, 105 U.S. 244, 26 L.ed. 985, 1882.

51. *Taylor v. United States*, 244.

52. *McCarty v. McCarty*, 210.

53. *Ibid.*, 233.
54. *Ibid.*, 236.
55. *Ibid.*
56. "Payment of Retired or Retainer Pay in Compliance with Court Orders," *US Code*, title 10, sec. 1408, 1997.
57. *Barker v. Kansas*, 112 S.Ct. 1619, 1992.
58. *Ibid.*, 1623.
59. *Ibid.*
60. "Retirement Savings," *US Code*, title 26, sec. 219(f)(1), 1997.
61. Selective Early Retirement Board (SERB). A "SERB'd" officer is one who met such a board and was required to submit his retirement papers before he reached his "high year of tenure"; the point at which he must retire by operation of law.
62. *US Code*, title 10, sec. 688(d)(2).
63. *United States v. Sumrall*, 211B.
64. "Presentencing Procedure," R.C.M. 1001(g), 1969 rev.; and DA Pamphlet 27-9, *The Judge's Benchbook*, 1996, chap. 2, 64.
65. *Ibid.*
66. R.C.M. 1003(b).
67. Of course, this discussion is limited to those offenses like the one discussed in the hypothetical case of Colonel Hardwick; certain serious offenses require the full range of authorized punishments, notwithstanding the rank or position of the accused.
68. R.C.M. 1003(c)(2)(A)(i).
69. R.C.M. 1003(c)(2)(A)(i).
70. R.C.M. 1003(c)(2)(A)(iii).
71. A recent change to the UCMJ took away much of the previous discretion the sentencing authority had in balancing forfeitures and confinement. "UCMJ Article 58b; Sentences: Forfeiture of Pay and Allowances During Confinement," *US Code*, title 10, sec. 858b, 1997. Previously, confinement and forfeiture were totally separate punishments, and neither included the other (except that forfeitures without confinement were limited to two-thirds of base pay). Therefore, it was possible for a member to be confined for several years but not be required to forfeit pay. This would typically be the case where the sentencing authority was seeking to punish the accused but leave his family financially solvent. In some cases, convening authorities conditioned clemency or pretrial agreements on the accused establishing an allotment for his pay to go to the family. The new changes to the UCMJ eliminate this flexibility, and now provide that an accused who is sentenced to more than six months confinement, or any confinement coupled with a punitive discharge, automatically forfeits his pay within two weeks of the announcement of sentence. "UCMJ Article 57a, Deferment of Sentences," *US Code*, title 57, sec. 857a, 1997. In cases of severe financial hardship, the convening authority is permitted to authorize pay and allowances to be paid to the accused family, but such payments cannot exceed six months. "UCMJ Article 58b," *US Code*, title 10, sec. 858b.
72. R.C.M. 1003(b)(3). See also discussion associated with that provision.

73. If Colonel Hardwick is 45 years old and is expected to live to age 75, he will receive 360 monthly retirement payments. If his monthly retirement pay is \$3,000, he will receive \$1,080,000.00. Note that although this calculation does not take into account the effects of inflation (discounted net present value), it also does not take into account the cost of living allowance (COLA) retirees receive. The closer the COLA matches the inflation rate, the more accurate my calculation is. Exact figures of the value of retirement pay are not important; the point is that it is a significant amount of money.

74. See the discussion to R.C.M. 1003(b)(3): "A fine is not normally adjudged unless the member was unjustly enriched." Cases where the PD&R discharge would be most likely to be considered are cases where the accused was not unjustly enriched by misconduct.

75. The UCMJ permits the sentencing authority to impose contingent confinement along with a fine. See R.C.M. 1003(b)(3). In other words, Colonel Hardwick could be fined \$90,000, and if the fine is not paid, he could be imprisoned for a period not to exceed the maximum confinement authorized for the offense. However, such confinement is not automatic. First, such contingent confinement may not be imposed where the adjudged sentence did not include confinement or where the confinement portion of the sentence has already been completed. See cases collected at Schlueter, sec. 16-3(E), and "Execution of Sentences," R.C.M. 1113(d)(3), in *M.C.M.*, states that "confinement may not be executed for failure to pay a fine if the accused demonstrates that the accused has made good faith efforts to pay but cannot because of indigency, unless the authority considering imposition of confinement determines, after giving the accused notice and opportunity to be heard, that there is no other punishment adequate to meet the government's interest in adequate punishment." Of course, such imposition of punishment must first meet the first condition that the accused receives confinement as an initial element of the sentence. The procedural rules concerning fine enforcement highlight the real limitations of using fines as an alternative to confinement.

76. There are some serious limitations to the effectiveness of this alternative. Sentencing authorities are justifiably concerned about the "Brer Rabbit" defense "please don't throw me in the briar patch." In this defense wrongdoers specifically request heavy fines in lieu of a punitive discharge, knowing that they will be unable to pay the fines and will later attempt to discharge them in bankruptcy, thus avoiding both punitive discharge and fines. Additionally, arguing for a fine in lieu of punitive discharge usually reduces the entire sentencing exercise to a financial exercise, largely ignoring the principles of sentencing, and creating the appearance of the accused trying to "buy off" punishment. For obvious reasons, this strategy is not often pursued.

77. See generally *M.C.M.*, appendix 12, Maximum Punishment Table, 1995. Note that all UCMJ offenses carry confinement as an authorized punishment, ranging from a low of one-month (e.g., simple disorder, short absent without leave [AWOL]) to mandatory life, "UCMJ Article 118(1), Murder," *US Code*, title 43, sec. 118, 1995.

78. Wade & LaFave, *Criminal Law*, 2d ed., 1986, sec. 1.5(a)(2). "If the criminal is imprisoned, he cannot commit further crimes against society."

79. "Maximum Punishment Chart," in *M.C.M.*, appendix 12, A12-1.

80. R.C.M. 1003(b)(1), reprimand and "Sentence Determination," R.C.M. 1002, in *M.C.M.*, no punishment.

81. "Review by a Court of Criminal Appeals," R.C.M. 1203, in *M.C.M.* Usually, sentences of no punishment are reserved for situations when an accused sentence is overturned on appeal and the appellate court orders a rehearing on sentencing. Recall that the courts of criminal appeal have the authority to reassess sentence or order a rehearing on sentence. If the convening authority determines that a rehearing on sentence is impracticable, he or she can avoid the rehearing and approve a sentence to no punishment.

82. R.C.M. 1003(b)(9)(A), dismissal; R.C.M. 1003(b)(9)(B), dishonorable discharge; and R.C.M. 1003(b)(9)(C), bad conduct discharge.

83. R.C.M. 1003(b)(9)(A), in *M.C.M.*, R.C.M. 1003(b)(9)(B), in *M.C.M.*, and R.C.M. 1003(b)(9)(C), in *M.C.M.* Note that the only discharge cadets and officers may receive is a dismissal; the only discharge warrant officers may receive is a dishonorable discharge.

84. DA Pam. 27-9, chap. 2, 70. "A dishonorable discharge should be reserved for those who, in the opinion of the court, should be separated under conditions of dishonor after conviction of serious offenses of a civil or military nature warranting such severe punishment. A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct, even though such bad conduct may not include the commission of serious offenses of a military or civil nature."

85. "UCMJ Article 19, Jurisdiction of Special Courts-Martial (SPCM)," *US Code*, title 10, sec. 819, 1996; and "UCMJ Article 16, Courts-Martial Classified," title 10, sec. 816(2)(A), 1996. Note that in the case of an enlisted member at a SPCM, as few as two members could terminate entitlement to retirement pay.

86. R.C.M. 1003(b)(9), in *M.C.M.* A court-martial may not adjudge an administrative separation from the service. Punitive discharges are discharges which constitute punishment, whereas administrative discharges are not designed to punish a member. Administrative discharges are usually characterized (entry-level separations for individuals with less than 180 days in service are not characterized), and the type of characterization (honorable, general under honorable conditions, and under other than honorable conditions) may have certain collateral consequences to the member receiving them. See AFI 36-3208, *Administrative Separation of Airmen*, October 1994, par. 1.18, for more information on administrative discharge characterization.

87. *United States v. Queisinberry*, 12 USCMA 609, 31 CMR 195, 198, 1962; and *United States v. Griffen*, 25 M.J. 423 (CMA), cert. denied 487 U.S. 1206, 108 S.Ct. 2849, 101 L.ed.2d 886, 1988.

88. *Ibid.*

89. *Ibid.*

90. *United States v. Henderson*, 29 M.J. 221 (CMA) 1989; *United States v. Sumrall*, 207; *United States v. Greaves*, 46 M.J. 133, 1997; and *United States v. Becker*, 46 M.J. 141, 1997.

91. *United States v. Henderson*, 221.

92. *United States v. Greaves*, 133; *United States v. Becker*, 141; and *United States v. Hall*, 46 M.J. 145 (1997).

93. *Ibid.*

94. *United States v. Greaves*, 139, note 1.

95. "Preamble," in *M.C.M.*, pt. 1, par. 3. The preamble to the *Manual for Courts-Martial* states that "the purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."

96. Capt Charles E. Lance, "A Criminal Punitive Discharge—An Effective Punishment?" *Army Military Law Review*, July 1978, V-79, 1 and 17.

97. "Certain Bars to Benefits," *US Code*, title 38, sec. 5303, 1995. As part of the statutory implementation process for the PD&R, a definition for the PD&R will have to be added to this statute defining the PD&R as a punitive discharge with the same effects on benefits as any other punitive discharge.

98. The sentencing instruction refers to the "ineradicable stigma" as associated with a punitive discharge. DA Pam. 27-9, 1996, chap. 2, 69.

99. Wade & LaFave, 1986, sec. 1.5(a)(6). "It is only fitting and just that one who has caused harm to others should himself suffer for it. Additionally, retributive punishment is needed to maintain respect for the law and to suppress acts of private vengeance."

100. *Ibid.*

101. Of course, this is nothing new, and the possibility of inappropriate punishments exists under today's system.

102. Compare this to the language in AFI 51-202, par. 5.4.2, for imposing the Article 15 punishment of both an unsuspended reduction in rank and forfeitures: "While not prohibited by law, commanders should impose an unsuspended reduction in grade, along with forfeiture of pay, only when the maximum exercise of Article 15 authority is warranted (e.g., repeat offender, most serious offenses, past rehabilitative efforts, or recalcitrant offender)."

103. "Men are not hanged for stealing horses, but that horses may not be stolen." —George Savile, Marquis of Halifax, "Of Punishment," in *Political Thoughts and Reflections*.

104. DA Pam. 27-9, 1996, chap. 2, 64; and Wade & LaFave, 1986, sec. 1.5(a)(4). The law review literature is very skeptical of the notion of general deterrence.

105. AFI 36-2501, *Officer Promotions and Selective Continuation*, June 1998, chap. 5, discusses the procedures for removing an officer or enlisted member from a promotion list (commonly called red lining).

106. Christoph Hinckeldey, *Criminal Justice through the Ages* (Federal Republic of Germany: Mittelalterliches Kriminalmuseum, 1981), 99-173. Is this true? Consider medieval times where virtually all felony crimes were punished by death, and trivial offenses resulted in extremely severe

punishment. None of these harsh punishments were particularly effective in reducing lawlessness.

107. Wade & LaFave, 1986, sec. 1.5(a)(4).

108. In other words, the possibility of members losing retirement pay may have a chilling effect on commanders' recommendations. Commanders may recommend nonjudicial punishment where they might otherwise have given stronger consideration to a court-martial.

109. DA Pam. 27-9, 1996, chap. 2, 64.

110. Consider the public debate surrounding the cases of 1st Lt Kelly Flinn, Sgt Maj Eugene McKinney, and others recently in the news.

111. R.C.M. 1003(c)(2)(A), in *M.C.M.*

112. DA Pam. 27-9, chap. 2, 71-72; and *United States v. Wheeler*, 17 C.M.A. 274, 38 C.M.R., 1967, 72 (Wheeler Factors).

113. AFI 36-3208, par. 6.35, requires lengthy service review for members who have been in the service for 16 years or longer. There is no similar provision for officers, because all officer discharges go to the secretary for action, whereas many enlisted discharges can normally be executed at much lower levels.

114. While the perceived inequities of punishment between senior members and junior members have been often criticized, much of the criticism is misplaced. Critics look to the differences in the nature of punishment (junior members receiving Article 15s or confinement; senior members receiving reprimands or fines), but miss the real point: whether the effect of the punishments is equivalent. A reprimand to an officer is frequently more severe than an Article 15 to an enlisted member, and a fine imposed on a member with significant assets can be more harsh than confinement imposed on an individual with no means. By considering the effects of the punishment, and not the mere nature of the punishment, one can better judge the actual justice of the system.

115. For example, there is a time-honored yet informal convention in the military that "rank has its privileges."

116. Is the lieutenant colonel's rank a matter in aggravation?

117. "Violent Crimes in Aid of Racketeering Activity," *US Code*, title 18, sec. 1959, 1997.

118. AFI 36-3024, *Transitional Compensation for Abused Dependents*, February 1998. Transitional compensation applies only when the military members are separated from the military for dependent abuse. Payments, equal to the amount the spouse would receive under Dependent Indemnity Compensation (DIC) (\$769.00 per month for spouse and \$200 per child per month), are paid for the lesser of 36 months or the member's remaining enlistment, but in all cases for not less than 12 months. Payments cease if the spouse either remarries or cohabits with the member.

119. The convening authority could suspend or mitigate elements of the sentence contingent upon the accused establishing an allotment to his or her family of a certain amount of money. To the extent that the amount of the allotment exceeded the amount available under the Transitional Compensation Statute, the family would be better off.

120. The requirement that the spouse receiving payments not cohabit with the military member either assumes or encourages a divorce.

121. In other words, a divorce settlement could give the spouse a property entitlement in the member's retirement pay, which could be subject to division. If the retirement is divided in the divorce, the spouse could collect the retirement pay until the member died, or if the member elected the Survivor's Benefit Plan, then the spouse would collect a portion of the retirement pay for life. Either of these alternatives would probably result in the spouse receiving more money than is currently provided for by the victim-witness statutes.

122. There may be little sympathy for a family that remains with an accused after he victimized one or more family members. However, it does happen, and the financial impact, even with the transitional compensation benefit, often results in the family being twice victimized.

123. AFI 36-3024 applies only when the family is a direct victim of the accused's misconduct.

124. For example, aid to families with dependent children, food stamps, and others.

125. Army, *US Code*, title 10, sec. 3911 and *US Code*, title 10, sec. 3914; Navy UCMJ, *US Code*, title 10, sec. 6323 and *US Code*, title 10, sec. 6330; Air Force UCMJ, *US Code*, title 10, sec. 8911 and *US Code*, title 10, sec. 8914.

126. AFI 36-3203, chaps. 2 and 3 (but see table 3.1—retirements short of 40 years are discretionary).

127. *Ibid.*; Army, *US Code*, title 10, sec. 3911 and *US Code*, title 10, sec. 3914.

128. AFI 36-3203, table 2.2, rule 17.

129. "Certain Bars to Benefits," *US Code*, title 38, sec. 5303, 1997; "Definitions," *US Code*, title 38, sec. 101(2), 1997; and "Character of Discharge," *Code of Federal Regulations (C.F.R.)*, title 38, sec. 3.12(a)(d)(iii), 1997.

130. 38 *C.F.R.* 3.12(a).

131. 38 *C.F.R.* 3.12(b).

132. See 38 *C.F.R.* 3.12 and DA Pam. 27-9, chap. 2, 70.

133. Unlike enlisted members who are discharged at the end of their enlistment (notwithstanding their simultaneous reenlistment, or even when they reenlist before an enlistment ends), officers are not discharged during their term of service. Consequently, officers do not obtain a discharge characterization until they leave service (except of course for officers with prior enlisted service).

134. To maintain consistency in the administration of benefits, the PD&R discharge ought to be characterized as either a "bad conduct discharge with retirement pay" or "dishonorable discharge with retirement pay" for enlisted personnel, and as a "dismissal with retirement pay" for officers. This will enable government agencies to continue to equate the dishonorable discharge with the dismissal for determining eligibility for benefits, and also to continue the current distinction between a bad conduct discharge adjudged at a SPCM and one adjudged at a GCM for determining benefits for certain enlisted members.

135. "Disposition on Discharge," *US Code*, title 10, sec. 771a, 1996; "Funeral Expenses," *US Code*, title 38, sec. 2302(a), 1997; "Persons Eligible for Interment in National Cemeteries," *US Code*, title 38, sec. 2402,

1997; "Deaths Entitling Survivors to Dependency and Indemnity Compensation," *US Code*, title 38, sec. 1310(b), 1997; "Basic Entitlement," *US Code*, title 38, sec. 3702(c), 1997; "Veteran; Disabled Veteran; Preference Eligible," *US Code*, title 5, sec. 2108(1), 1996. The list of benefits can go on almost forever. A brief sampling: Right to wear military uniform; Government funeral expense benefits; Burial in a National Cemetery; Dependent and Indemnity Compensation; VA Home Loans; and Civil Service Preference.

136. "UCMJ Article 2(a)(4), Persons Subject to this Chapter," *US Code*, title 10, sec. 802(a)(4), 1996.

137. "Retired Members," *US Code*, title 10, sec. 688, 1996.

138. The reality is that we are dealing with a very small population of individuals. Air Force statistics for the past three years are as follows:

1997: 5 retirement-eligible officers court-martialed, 2 received punitive discharges; 18 retirement-eligible enlisted members court-martialed, 6 received punitive discharges.

1996: 9 retirement-eligible officers court-martialed, 4 received punitive discharges; 25 retirement-eligible enlisted members court-martialed, 11 received punitive discharges.

1995: 6 retirement-eligible officers court-martialed, 2 received punitive discharges; 28 retirement-eligible enlisted members court-martialed, 11 received punitive discharges.

According to these statistics from the Air Force's military justice database, less than 20 retirement-eligible members are punitively discharged each year. However, the small numbers of retirement-eligible persons affected by punitive discharges does not trivialize the issue; fairness and justice are not measured in the aggregate, but one case at a time.

139. *United States v. Hooper*, 9 USCMA 637, 26 CMR 417 (1958). Hooper was a rear admiral who had been retired for nine years when he was recalled to active duty and court-martialed for homosexual acts. He was tried and sentenced to a dismissal, forfeiting his retirement pay. The companion case, *Hooper v. United States*, 326 F.2d 982 US Court of Claims (1964), established the proposition that a retired member who is punitively discharged from the service forfeits his retirement pay.

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