Recent Proposals to Change the Traditional Military Retirement System to Mirror the Federal Service Retirement: Eroding Discipline and Civil-Military Relations Through Potentially Unlawful and Certainly Questionable Acts

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RECENT PROPOSALS TO CHANGE THE TRADITIONAL MILITARY RETIREMENT SYSTEM TO MIRROR THE FEDERAL SERVICE RETIREMENT: ERODING DISCIPLINE AND CIVIL-MILITARY RELATIONS THROUGH POTENTIALLY UNLAWFUL AND CERTAINLY QUESTIONABLE ACTS

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In a time of budget tightening and sequestration debates, it should be unsurprising that there are proposals to significantly overhaul the military retirement system in the name of "reform." The last four years has seen increasingly contentious debates in the U.S. Congress on the size and scope of federal expenditures, including the U.S. Department of Defense’s personnel costs. On August 2, 2011, the President of the United States signed into law the Budget Control Act of 2011.¹ That law creates uncertainty to the future Department of Defense budgets, including military pay and benefits, as well as the military pension system. It enables the President to preserve military personnel programs, but at the expense of other defense programs.²

Military veterans have received pension allotments from the government since the nation’s founding.³ Since the mid-1960s there have been efforts to alter the military retirement system, with varying degrees of congressional and public support, or public apathy.⁴ None of the proposals take into consideration the effect of changing the current pension system on military discipline, a critical component of national security. This Article explores the potential immediate and

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3. See, e.g., Act of Mar. 3, 1865, ch. 84, 13 Stat. 499 (Civil War); Act of May 13, 1846, ch. 16, 9 Stat. 9 (Mexican War); Act of Apr. 24, 1816, ch. 68, 3 Stat. 296 (War of 1812); Act of Mar. 23, 1792, ch. 11, 1 Stat. 243 (Revolutionary War); Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 (Revolutionary War).
secondary effects of retirement reform on military discipline, in a manner which has not, to the author's knowledge, been accomplished before. Although historic examples are interspersed throughout this Article, it is helpful to provide context to the most recent and radical of the proposed alterations to the current retirement system.

On January 15, 1969, Secretary of Defense Clark Clifford reported to Congress that the traditional military retirement system had become cumbersome on the economy. Clifford posited that most military retirees were not "true retirees" because of their relative youth in comparison to the nation's workforce. He proposed a two tiered retirement system where a retired veteran would collect "a supplement to the retiree's second career earnings, and later an income adequate for full retirement at the normal age for retiring from the work force." He did not call for an abandonment of the government's obligation to ensure a defined pension. Instead, he concluded, "[T]o this end, the retirement system should pay the individual one amount between retirement from military service and the normal retirement age, and a higher amount when he reaches that age." Clifford's plan gained no adherents in the Congress, and indeed, Clifford's successor, Melvin Laird, found the proposal an immoral action to impose on a generation of service-members who had served in the Korean and Southeast Asian conflicts. For reasons discussed below, the most recent proposals could easily be categorized in Laird's response as well.

Since Laird's tenure, individual members of Congress have, in differing degrees ranging from deferred retirement to the establishment of 401(k) programs, called for changes, but in all cases without considering how their proposals would affect the military discipline aspect of national security. In 2006, 2008, and 2010, the Congressional Research Service ("CRS") also noted that advocates of reform to the traditional twenty year military retirement describe the retirement program as "unsustainable." Ultimately, these proposals have gained little traction; perhaps, as a realization of what former Secre-

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6. Id.


tary of Defense Caspar Weinberger urged existed as a connection between benefits and veterans treatment and military readiness. 9

Part I of this Article presents the most recent proposal, articulated in 2011 by the Defense Business Board ("DBB"), and analyzes its inherent shortcomings. 10 Part II provides an interlocking broad view analysis as to why the conversion of retirements in a 401(k) model could prove disastrous to discipline. 11 This is an important issue because there will invariably exist a nexus between the questionable legality of such a conversion, and the trust of long-serving service-members in the military establishment. This interlocking analysis addresses: (1) the potential for erosion of the civil-military relationship, (2) the relationship between the Takings Clause 12 of the Fifth Amendment and military retirements, (3) the principle of detrimental reliance, and (4) the inapplicability of case law to support the radical alteration scheme for military retirements posed by the DBB. The analysis also addresses the legal impediment of unlawful orders to the proposed scheme. Part III of this Article analyzes two potential direct impacts that would likely undermine discipline through weakening the Uniform Code of Military Justice ("UCMJ"). 13 It must be remembered that military retirements are not true retirements. The receipt of military retirements is the instrument in which the government may recall its veterans to active service in time of national emergency, or for the individualized purpose of bringing a criminal to justice.

I. THE DEFENSE BUSINESS BOARD PROPOSAL OF 2011

In 2011, a Department of Defense study group, the Defense Business Board ("DBB"), called for a conversion of the military retirement system into a 401(k) type retirement mirroring the federal workforce. 14 The premise of the DBB proposal was based on a claim of unsustainability in the costs of military retirements without referencing whether Congress might seek to increase tax revenues or reallo-

10. See discussion infra Part I.
11. See discussion infra Part II.
12. U.S. CONST. amend. V.
13. See discussion infra Part III.
cate resources, thereby making the program sustainable. Nor did the DBB's methodology appear to have considered the legal implications of their proposal. The DBB claimed that the current system of retirements is unfair because it excludes individuals who serve for less than twenty years, but this is a relatively new or invented concern. A century of judicial precedent has never held the current retirement system to be unfair. The DBB's proposed change, then, was truly based on an economic model and not on morality or fairness. Indeed, that their proposal did not "grandfather" current serving members, provides tangential falsity to the DBB's stated concerns of fairness.

What set the DBB's proposal apart from most of the other calls for reform was its push for immediate implementation. There was no true "grandfathering" of current forces to the twenty year retirement. During this period, Congress convened a committee of twelve members, consisting of six Republicans and six Democrats. This committee essentially met without full transparency as to how it intended to arrive at its conclusions. The committee may have considered the DBB's proposal and adopted it in some form as its own. Although that committee failed to produce any consensus, Congress might as yet adopt the DBB's proposal or some other variant of it. If it does so, Congress will, in turn, be required to vote on the draft legislation without the ability of individual legislators to offer amendments. This Article does not address the wisdom of the legislative methods employed as a result of the so-called "debt compromise," but it does point out three areas of concern for military readiness, and more pointedly, military discipline. The premise of this part of the Article is that a 401(k) program, as envisioned by the DBB, based on mandatory contributions to the Thrift Savings Program ("TSP") would be an unlawful policy, and the implementation of such a policy will irreparably weaken military discipline.

To contextualize the potential ramifications of the DBB's proposed mandatory 401(k) contributions, as well as other 401(k) type

15. SPENCER ET AL., supra note 14.
16. See infra notes 36-49 and accompanying text.
18. See HENNING, supra note 4, at 17 ("DOD would make a proposal to the commission which can then add or delete provisions as it deems appropriate. It would then be forwarded to the President who can also make changes but must decide whether to forward the recommendations to Congress. If forwarded, Congress must approve or disapprove without any modifications.").
proposals, it is helpful to reflect on the nation's military history. A Saint Louis Reporter during a news conference on May 23, 1956 asked President Eisenhower whether persistent in-fighting about funding between the service-branches and Congress eroded military discipline. Broadening his answer beyond the question, Eisenhower responded, "the day that discipline disappears from our armed forces, we will have no forces, and we would be foolish to put a nickel in them." Eisenhower diligently worked to decrease defense budgets, but he understood that legislative manipulations had the potential to undermine the military's discipline, and this is as true today as it was in Eisenhower's time. Moreover, Eisenhower's determination to decrease the defense budget was predicated on an intelligent understanding of the nation's military culture and history. In the aftermath of the Civil War, congressional acts to decrease the Army's budget were targeted at pay and retirement with disastrous consequences to morale.

A decade prior to Eisenhower's pronouncement, during a War Department committee deliberation on whether to recommend implementing a proposed President's Advisory Commission on Universal Training, President Harry Truman addressed the initial session, stating:

The great republics of the past always passed out when their people became prosperous and fat and lazy and were not willing to assume the necessary responsibilities for that republic to continue. In other words, when the Romans and the Greeks, and some of the ancient Mesopotamian countries turned to mercenary defense forces, they ended. That is, when the people in their government ceased their military obligations because they would not do the necessary service to continue that government, they ended eventually in one way or another. That has been true of modern nations also.

Truman's view of the underlying reasons for the fall of Rome and Periclean Greece was oversimplified, but the point he articulated about a republican government's abandonment of its obligations and

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21. President Harry S. Truman, Remarks to the President's Advisory Commission on Universal Training (Dec. 20, 1946), available at http://www.presidency.ucsb.edu/ws/index.php?pid=12565. Joseph Davies, a former ambassador to the Soviet Union, was one of eleven citizens appointed to the President's Advisory Commission on Universal Training that was headed by Karl Compton, the president of the Massachusetts Institute of Technology. See id. (providing the members appointed to the commission in a note following the speech transcript).
promises to its military members leading to the decline of its military forces is credible. With the Chinese government publicly calling on the United States to reduce its defense expenditures, it is clear that this potential adversary will be strengthened by distrust within the United States military forces toward its political leadership.\textsuperscript{22} It is also clear that for the second time since World War II a potential nation-state adversary will have the ability to exploit a perceived American military weakness to coerce its neighbors.\textsuperscript{23}

In 1945, the leadership of the Communist Party of the United States ("CPUSA"), at the behest of the Soviet Union, attempted to stoke demobilization demonstrations in the Pacific and Europe; while at the same time, the CPUSA attempted to cause labor strikes at Western Union, the means by which the War Department notified soldiers of their release from active duty. The Soviet Union’s plan failed because Federal Bureau of Investigation ("FBI") agents discovered it, and even if the FBI had not discovered Soviet intentions to undermine the United States’ armed forces, Soviet military conduct in occupied Europe was so brutal that their efforts at coercion were unlikely to succeed.\textsuperscript{24} Ironically, based on the analysis below, the DBB, on behalf of the nation’s current and potential future adversaries, might have unwittingly succeeded where the Soviet Union and CPUSA failed two generations earlier.\textsuperscript{25}

Clearly, the nation continues to need a disciplined force. In 1992, future Secretary of Defense Les Aspin, then serving in Congress, ar-


\textsuperscript{25} See generally Ferrell, supra note 24, at 227-28; John Earl Haynes & Harvey Klehr, \textit{Early Cold War Spies} 23-66 (2006); Lee, supra note 24, at 555-71; Memorandum from J. Edgar Hoover, Dir. Fed. Bureau of Investigation, to President Harry S. Truman (Jan. 29, 1946) (on file with the Library of Congress); Memorandum from J. Edgar Hoover, Dir., Fed. Bureau of Investigation, to President Harry S. Truman (Jan. 18, 1946) (on file with the Library of Congress); Memorandum from Hoover to Truman (Jan. 11), supra note 24; Memorandum from Hoover to Truman (Jan. 9), supra note 24.
RECENT PROPOSALS TO CHANGE

argued, "[i]n the new world of present and future, we must contemplate an action that only the political right has previously considered: the possibility of conducting a preemptive attack to prevent countries from gaining nuclear arsenals." To ensure that the United States possessed a disciplined and visible deterrent, Aspin disfavored significant budget reductions, risky liberalization of Uniform Code of Military Justice jurisdiction, and unsettling economization of government obligations to service members. Aspin, like Weinberger, argued that for the purposes of morale and discipline, the government had to maintain its obligations to its service members. The same wisdom that Weinberger, Laird, and Aspin articulated—three Secretaries of Defense representing the political spectrum—remains pertinent to the treatment of the military today.

II. LEGAL IMPEDIMENTS TO ALTERING THE CURRENT RETIREMENT

It is a legal truism that service-members' pay is governed by statute and not by common law contract principles. This is despite the fact that in 1890, in United States v. Grimley, the United States Supreme Court determined that an enlistment is a contract between a soldier and the government. It is also true that in 1883, in United States v. Teller, the Court held that military pensions "are the bounties of the government, which congress has the right to give, withhold, distribute, or recall, at its discretion." However, the Court, in Teller, did not decide whether a veteran was entitled to a pension, but rather, whether Congress was empowered to terminate the receipt of "double pensions." While the veteran in Teller had served in the military, no promise of a double pension had been made while he was in the Army, and indeed, the veteran had served in the Mexican-American War, but only became entitled to a double pension in 1879. For reasons discussed below, the 1883 decision only addressed broad principles of

27. Id.
29. 137 U.S. 147 (1890).
31. 107 U.S. 64 (1883).
government immunity, and it did not implicate the Takings Clause or the theory of detrimental reliance.

To fully understand the relationship between military retirements, the twin aspects of rights and reliance, and discipline, it is important to note the military's subordination to the civil government, and how alterations in the retirement structure may damage this relationship.

A. Erosion of the Civil Military Construct

Since the 2003 invasion of Iraq, a number of writers have cited to a growing rift in civil-military relations. For instance, in 2007 Bush administration attorney John Yoo and United States Coast Guard Judge Advocate Glenn Sulmasy posited in a *UCLA Law Review Article* that the actions of senior military officers assigned to the four Judge Advocate General's Departments put the constitutional hierarchy of the civilian government ascendant over the military at risk. Their thesis was attacked by several of the sources they cited to, and one source countered that the danger to the relationship was in the administration's discounting of international law constraints. Retired Major General Charles Dunlap, one of the leading scholars in military law with extensive operational countered that Yoo's scholarship on executive branch authority is what endangered the civil-military construct because it advocated flexibility in the law which simply did not exist. Indeed, one of the proposals that Yoo and Sulmasy concocted in their thesis was that the executive branch could punish officers who testified to Congress against an administration's policy.

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35. U.S. Const. amend. V.
37. See John Yoo & Glenn Sulmasy, *Challenges to Civil Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. Rev. 1815 (2007).
38. See, e.g., Richard H. Kohn, *Comment on Professor John Yoo, Administration of War*, 58 Duke L.J. 2313 (2009). It is notable that Yoo considered Kohn one of the foremost scholars in the field of civil-military relations; see also Charlie Savage, *Takeover, the Return of the Imperial Presidency and the Subversion of American Democracy* (2007); Victor Hanson, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. Tex. L. Rev. 617 (2009).
yet they failed to cite to a single statute or even cognizable legal theory that would give the executive branch this authority. Moreover, in a general sense, the United States Supreme Court, in its 1946 decision of United States v. Lovett, roundly rejected Yoo's and Sulmasy's idea of a military expressly without any flexibility bound to the executive branch. Admittedly, Lovett had nothing to do with the military, but the Court in that decision determined the concept of restricting executive branch employees had to both serve a legitimate (and not fanciful) purpose and not be a bill of attainder. For instance, a legitimate purpose might include the withholding of monies in response to a taking of a bribe. In short, had Yoo's and Sulmasy's theory been adopted as national defense policy it would undermine the public's trust in the military.

Agreeing with General Dunlap's approach to civil-military relations, it is clear that one of the more worrisome threats to civil-military relations is an executive branch attempt to issue or enforce an unlawful order. Certainly, Congress does not order the military to do anything, but its power of the purse creates parameters for all policies and regulations, and certainly this has an effect on morale. Congress may, of course, legislate on and order individual service-members to testify about military benefits. Congress may also leave the responsibility of defining future retirement benefits to the executive branch.

If service-members believe that the government had promised a twenty-year military retirement, and that retirement in its full current form were taken away without any grandfathering of currently serving personnel, then a clear distrust of Congress within the ranks would lead to the erosion of civil-military relations. More detrimental, however, to the civil-military construct would be a statutory invalidation of a perceived right, and it may well be the case that a sizeable number of current service-members believe that retirements are a right. It is unclear whether the federal judiciary would consider the current military retirement as a property interest—in essence, a right—but there is no clear law on this point. The statutes governing military retirements do not state that the government may take away unvested retirements for non-criminal or non-fitness related reasons, or through a statutorily mandated reduction in force. Indeed, the law governing the computation of retired pay makes no mention that

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40. 328 U.S. 303 (1946).
41. See United States v. Lovett, 328 U.S. 303, 315 (1946).
42. See 10 U.S.C. §§ 1461-1463 (2012) (establishing the Department of Defense Military Retirement Fund, and providing for what the assets of the fund and payments from the fund should be). Statutorily, the Secretary of the Treasury administers the Department of Defense Military Retirement Fund, which disburses military retirements.
retirement payments are at risk, instead making the optimistic comment that when a service-member is entitled to more than one calculation formula, they are entitled to pay under the more favorable calculation.\footnote{10 U.S.C. § 1401(b).}

The plain statutory language governing retirements is simple. A military member who serves twenty years of active duty is entitled to a retirement based on fifty percent of his or her pay of the final three years of service.\footnote{The Military Retirement System, MILITARY.COM, http://www.military.com/benefits/military-pay/the-military-retirement-system.html (last visited Dec. 12, 2012).} Service-members who serve longer are entitled to escalated retirement payments. Unlike civil service employees, retired commissioned officers and enlisted personnel are subject to be recalled to active duty.\footnote{See, e.g., Barker v. Kansas, 503 U.S. 594, 599 (1992). The Court, in determining that Kansas could not tax military retirements in a different manner than state employee retirements, recognized military retirees unquestionably remain in the service and are subject to restrictions and recall; in these respects they are different from other retirees. Barker, 503 U.S. at 605.}

It is true that a service-member who separates before twenty years of service is generally entitled to no retirement, absent medical retirements.\footnote{See generally 10 U.S.C. subpt. A, pt. II.} It is also true that a service-member who is court-martialed and punitively discharged from the military loses his or her retirement as a result of the punitive discharge.\footnote{McCarty v. McCarty, 453 U.S. 210, 222 (1981), superseded by statute, Uniformed Services Former Spouses Protection Act, Pub. L. No. 97-252, 96 Stat. 718 (1982), as recognized in Barker, 503 U.S. at 602; Loeh v. United States, 73 Fed. Cl. 327, 329 (2006).} But it has never been established whether honorably serving service-members, who meet military standards as a class, can be divested of the twenty year retirement. It is notable that in neither the Defense Business Board ("DBB") or the Congressional Research Service ("CRS") reports has this, or any other issue of law, been addressed.

There are some immediately apparent distinguishing features of the federal civil service Thrift Savings Program ("TSP") which the DBB proposal appeared to lack. In the federal civil service, TSP is voluntary in the sense that there is no required percentage of income that civilian employees are forced to contribute, and these investments are not insured against loss.\footnote{See generally 5 U.S.C. § 8472 (2012) (describing the governance of the Federal Thrift Saving Program); I.R.C. §§ 401-409a (2012) (providing information regarding the laws governing 401(k) type plans).} The DBB's proposed solution is a mandated 16.5% contribution, based off a member's salary, but with the deferred tax implications accruing to the member.\footnote{SPENCER ET AL., supra note 14, at 22.}
B. Military Retirements, Property Interests, and the Takings Clause

There is a basis for considering military retirements, including those not yet earned, as a property interest that the government could not take away from current honorably serving service members. It is likely that the overwhelming majority of service-members, who have served for over ten years, have done so in the belief that the government would continue the twenty year retirement. Setting aside the question of reliance, it is important to acknowledge what service-members voluntarily forgo during their service.

Decided in 1974, the United States Supreme Court in Johnson v. Robison\textsuperscript{50} articulated a non-exclusive list of what makes uniformed service different than other employment.\textsuperscript{51} The Robison case arose from a challenge of a conscientious objector who had performed alternative employment but had been denied veterans benefits.\textsuperscript{52} In addition to determining the statutory jurisdiction of federal courts so as not to preclude review of constitutional challenges raised under the various veterans acts raised, the Court articulated that it was permissible for Congress to create a class of beneficiaries of veterans, even though the creation might have the appearance of religious discrimination.\textsuperscript{53} Most conscientious objectors (including those who performed alternative civilian service) opposed military service on the basis of faith, so it was clear that a colorable prima facie Equal Protection argument could be made for conscientious objectors. The Court found the creation of a class of beneficiaries acceptable because the Act "compensate[s] for the disruption that military service causes to civilian lives."\textsuperscript{54} The Court went on to further note that service-members "suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty."\textsuperscript{55}

The Robison decision is only a starting point for describing the relinquishment of ordinary rights. Service-members voluntarily agree to temporarily divest themselves of the almost unlimited right of free speech\textsuperscript{56} enumerated in the First Amendment.\textsuperscript{57} Service-members

\textsuperscript{50.} 415 U.S. 361 (1974).
\textsuperscript{52.} Robison, 415 U.S. at 363-66.
\textsuperscript{53.} Id. at 373-74, 384-85.
\textsuperscript{54.} Id. at 377-78.
\textsuperscript{55.} Id. at 379.
\textsuperscript{56.} U.S. Const. amend. I.
\textsuperscript{57.} See, e.g., Brown v. Glines, 444 U.S. 348, 358 (1980) (upholding the requirement to seek permission before circulating petitions); Parker v. Levy, 417 U.S. 733, 761-62
may not participate in political demonstrations except under specified conditions.\textsuperscript{58} Indeed, the Court in \textit{Greer v. Spock}\textsuperscript{59} recognized that the need to insulate the military from political affiliation could result in excluding political organizations from installations.\textsuperscript{60} Even the religious rights of service-members may be narrowed for legitimate military needs.\textsuperscript{61} Criticism of the executive branch, or individuals in government, is not unfettered for individuals subject to the Uniform Code of Military Justice ("UCMJ").\textsuperscript{62} In \textit{Priest v. Secretary of the Navy},\textsuperscript{63} the Court of Appeals for the District of Columbia upheld the court-martial conviction of a sailor who, in part, publicly disparaged individual members of Congress and Federal Bureau of Investigations Director, J. Edgar Hoover.\textsuperscript{64} Unlike their federal civil service counterparts, service-members are not permitted to unionize, and while the reasons for this prohibition are obvious, this prohibition is another example that the right of assembly is voluntarily divested upon joining the military.\textsuperscript{65}

In 1975, the Court decided \textit{Schlesinger v. Councilman}\textsuperscript{66} and held, "to ensure that they always are capable of performing their mission promptly and reliably, the military services must insist upon a respect for duty and a discipline without counterpart in civilian life."\textsuperscript{67} Thus, whether stemming from the continual need for a cohesive force, or in the enforcement of the military's disciplinary system, there are fewer of the clear rights in the military that a civilian would expect. It is impossible to put a fiscal value on the voluntary divestment of the full array of individual rights that a service-member would have if the ser-

\begin{itemize}
\item \textsuperscript{58} Culver v. Sec'y of the Air Force, 559 F.2d 622, 630 (D.C. Cir. 1977).
\item \textsuperscript{59} 424 U.S. 828 (1976).
\item \textsuperscript{60} Greer v. Spock, 424 U.S. 828, 843-45 (1976) (Powell, J., concurring).
\item \textsuperscript{61} See, e.g., Goldberg v. Weinberger, 475 U.S. 503 (1986). In \textit{Goldberg}, the Court accepted the Air Force's argument that the wearing of a yarmulke, a religious accoutrement, while in uniform could be prohibited for a compelling military interest such as uniformity. \textit{Goldberg}, 475 U.S. at 509-10. However, later Congress passed legislation undermining the decision. 10 U.S.C. § 774 (2012).
\item \textsuperscript{62} See, e.g., Sec'y of the Navy v. Avrech, 418 U.S. 676 (1974).
\item \textsuperscript{63} 570 F.2d 1013 (D.C. Cir. 1977).
\item \textsuperscript{64} Priest v. Sec'y of the Navy, 570 F.2d 1013, 1015-19 (D.C. Cir. 1977); see also United States v. Priest, 46 C.M.R. 368 (N.C.M.R. 1971). In \textit{Priest}, the sailor published a newsletter that derided Secretary of Defense Melvin Laird, Federal Bureau of Investigations Director J. Edgar Hoover, and compared House Armed Services Chair, Congressman Mendel Rivers to "a pig pissing and shitting on the country." See, e.g., \textit{James LeWes, Protest and Survive: Underground GI Newspapers During the Vietnam War} 51-82 (2003); see also \textit{The Law: Priest's Progress}, Time, May 11, 1970.
\item \textsuperscript{65} 10 U.S.C. § 976 (2012).
\item \textsuperscript{66} 420 U.S. 738 (1975).
\item \textsuperscript{67} Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); see also Curry v. Sec'y of the Army, 595 F.2d 873, 880 (D.C. Cir. 1979).
\end{itemize}
vice-member were to return to civilian life, but it is certainly legitimate to consider this voluntary divestment of rights in light of whether service-members possess a property interest in a traditional twenty year retirement. On the other hand, these rights are quantifiable in value as the federal courts have routinely considered challenges by service-members against regulations to exceed the statutory thresholds of damages required for judicial review.

Concededly, property interests are non-constitutional in nature, in the sense that the U.S. Constitution does not define what property is exactly. The Court in Board of Regents of State Colleges v. Roth held that in order to have a property interest, a person must have more than "abstract need," "desire," or "unilateral expectation of it." A person must have a legitimate expectation of the interest. In the absence of a court-martial or the administrative act of being "dropped from the rolls," there is a sincere, albeit, untested argument that significant changes to retirement laws, without grandfathering all existing service-members would, in essence, create an unlawful taking of the property interest, where the retirement is statutorily constructed. The Court hinted at such a construct in Goldberg v. Kelly, a welfare recipient case.

It is true that several federal judicial decisions considered the question of whether service-members possess a property interest in a military retirement; however, these courts considered this question only in the context of individual service-members, and not all service-members taken at one time. In each of these decisions, the service-member lost his retirement on the basis of administrative discharges, usually due to misconduct. On the other hand, one admittedly obscure 1975 opinion from the United States Court of Appeals for the District of Columbia Circuit does appear to support the contention that property interests of honorably serving service-members with less than twenty years of active duty does exist.

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68. See Cortright v. Resor, 447 F.2d 245 (2d Cir. 1971) (deciding that the Army could transfer a service-member whose speech undermined discipline, but that the value of the speech challenged was over $10,000 and therefore a justiciable matter). But see Yahr v. Resor, 431 F.2d 690 (4th Cir. 1970).
69. 408 U.S. 564 (1972).
71. Roth, 408 U.S. at 577.
Because the Defense Business Board’s ("DBB") methodology did not include a survey of the opinions of service-members, such as had been done during the repeal process of 10 U.S.C. § 654 (i.e., "Don't Ask, Don't Tell"), the government could not even anecdotally know whether service-members believed they were promised the twenty year retirement. Why the DBB used a limited methodology in light of the gravity of their study, in comparison to the voluminous surveys to gauge service readiness for the repeal of the statutory prohibition against openly homosexual service-members is suspect. Certainly modifications to retirements will have as great an impact, and in the author’s opinion, a far greater impact to military readiness than the repeal. The shortcomings in the DBB’s methodology could also easily apply to the related theory of detrimental reliance.

C. Detrimental Reliance

The theory of detrimental reliance relates to takings, but it is not expressly spelled out in the Fifth Amendment. In Heckler v. Community Health Services of Crawford County, Inc., the United States Supreme Court explained the government is liable for detrimental reliance if a plaintiff, or class of plaintiffs, relied on the government’s conduct, changed position for the worse, and reasonably claims estoppels because the misleading nature of the conduct was unknown and unexpected. It is true that the issue in the Heckler case involved the government’s recoupment of overpayments within the Medicare construct. Nonetheless, the theory of detrimental reliance has applicability to military law. As early as 1871, the Court held that the government was liable to compensate a citizen for the use of the citizen’s cargo vessels, even in the absence of a specific contract.

In United States v. Caltex, Inc., the Court determined that there was a difference between the government’s destruction of private property so that the property could not become an instrument of war for an enemy belligerent, and the government’s appropriation of private property. The Caltex case arose from the Army's destruction of

81. 344 U.S. 149 (1952).
oilfield and petroleum transfer facilities in the Philippines after the Japanese invasion of 1941.\textsuperscript{83} It could hardly be argued that the termination of retirement benefits of currently serving service-members amounts to a destruction of property. Perhaps the only argument that advocates of retirement reform could make would be an argument found in \textit{Totten v. United States},\textsuperscript{84} a decision arising from a claim to compensation for working as a spy for the Union. In late July 1861, President Abraham Lincoln entered into a personal agreement with an individual named William A. Lloyd for compensation of $200.00 per month.\textsuperscript{85} Lloyd travelled into the Confederacy and, at great personal risk, provided Lincoln intelligence on Confederate strength during the war.\textsuperscript{86} However, following Lincoln's death, the Union did not honor the agreement. The Court decided against granting Lloyd any rightful claim, but that was only because of a general law of war policy that enabled the government to withhold matters of secrecy from the public view.\textsuperscript{87}

D. Inapplicability of \textit{Schism v. United States}

It is likely that the Defense Business Board's ("DBB") proponents will look to judicial acquiescence in the alteration of veterans' health care. In \textit{Schism v. United States},\textsuperscript{88} the United States Court of Appeals for the Federal Circuit determined that the government may alter, or withdraw, from its pledge of lifetime military medical care for veterans in retirement status.\textsuperscript{89} The United States District Court for the District of Northern Florida, had determined that, in the absence of a statutory right, retirees did not have a contractual right to military health care.\textsuperscript{90} The issue arose as a result of the government

\begin{itemize}
\item \textsuperscript{83} Caltex, Inc., 344 U.S. at 150-51.
\item \textsuperscript{84} 92 U.S. 105 (1875).
\item \textsuperscript{85} \textit{Totten v. United States}, 92 U.S. 105, 105-06 (1875).
\item \textsuperscript{86} See \textit{Totten}, 92 U.S. at 105-06.
\item \textsuperscript{87} \textit{Id}. at 107. The Court specifically held:
\begin{quote}
It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated. On this principle, suits cannot be maintained which would require a disclosure of the confidences of the confessional, or those between husband and wife, or of communications by a client to his counsel for professional advice, or of a patient to his physician for a similar purpose. Much greater reason exists for the application of the principle to cases of contract for secret services with the government, as the existence of a contract of that kind is itself a fact not to be disclosed.
\end{quote}
\textit{Id}. Given this language, it would be difficult to see how a court could apply \textit{Totten} to the issue addressed herein.
\item \textsuperscript{88} 316 F.3d 1259 (Fed. Cir. 2002).
\item \textsuperscript{89} \textit{Schism v. United States}, 316 F.3d 1259, 1272 (Fed. Cir. 2002) (citing Lynch v. United States, 292 U.S. 571, 577 (1934)).
\item \textsuperscript{90} \textit{Schism v. United States}, 19 F. Supp. 2d 1287, 1295 (N.D. Fla. 1998).
\end{itemize}
transferring retirees from the Veterans Administration health care system into Medicare.\textsuperscript{91} Two plaintiffs sued the government.

At the time, both plaintiffs reenlisted with the determination to fulfill a twenty-year active duty military service, military recruiters used the promise of lifetime medical care to enable high retention rates.\textsuperscript{92} Although the named plaintiffs only numbered two retirees, hundreds of thousands of veterans could have easily fell into the same category. The district court noted that at the time both of the plaintiffs enlisted, which occurred prior to 1956, there was no governing statute regarding lifetime medical care.\textsuperscript{93} In the absence of a contractual obligation, the district court turned to the Fifth Amendment’s Takings Clause\textsuperscript{94} and determined “the enactment of a statute reducing benefits did not constitute a takings without compensation, where the benefits are non-contractual in nature.”\textsuperscript{95}

In the absence of recognizing the full range of rights voluntarily relinquished by volunteer service-members, the lower court’s decision is understandable. In \textit{Schism}, the Federal Circuit affirmed the lower court.\textsuperscript{96} The Federal Circuit applied the principle articulated in \textit{Bell v. United States}\textsuperscript{97} by the United States Supreme Court. In \textit{Bell}, three “turncoat prisoners of war,” sued the government for back-pay after their voluntary repatriation.\textsuperscript{98} However distasteful, the Court determined that the government was bound by the applicable statutes and obligated to pay the soldiers because there was no exemption from disbursing back-pay for “turncoat prisoners of war.”\textsuperscript{99} It is true that the Court, in \textit{Bell}, noted the broad principle that statutes, rather than common-law contract principles, define entitlement programs; however, it could be argued that even the “turncoat prisoners of war” relied on the government to fulfill its obligations.\textsuperscript{100}

\textsuperscript{91} See \textit{Schism}, 19 F. Supp. 2d at 1298.
\textsuperscript{92} See id. at 1288, 1294. The bulk of the lower court’s decision was spent analyzing the plaintiffs’ claims within the context of the “Little Tucker Act,” and not the Fifth Amendment. \textit{Id.} That act provides concurrent jurisdiction to the United States district courts and Federal Court of Claims for claims below $10,000. 28 U.S.C. § 1346 (2012).
\textsuperscript{93} \textit{Schism}, 19 F. Supp. 2d at 1291.
\textsuperscript{94} U.S. CONST. amend. V.
\textsuperscript{95} See \textit{Schism}, 316 F.3d at 1264.
\textsuperscript{96} 366 U.S. 393 (1961).
\textsuperscript{97} Bell v. United States, 366 U.S. 393, 394 (1961). The Court decided the \textit{Bell} case four months after President John F. Kennedy took office and one month before the Bay of Pigs invasion. \textit{Time} magazine reported that despite the victory in court, the three men were living below poverty levels and could not maintain employment. \textit{Back Pay for Turncoats}, \textit{Time}, June 2, 1961, at 20.
\textsuperscript{98} Bell, 366 U.S. at 402.
\textsuperscript{99} See id. at 401.
The Federal Circuit also turned to United States v. Larionoff,101 another Supreme Court opinion, for the principle that statutes govern all pay and entitlements, including "bonus pay," and not the promises of the military departments.102 In this case, the plaintiff Larionoff was not denied a reenlistment bonus, but rather, he was denied a greater reenlistment bonus than most other sailors were entitled to as a result of the Department of the Navy removing his specific occupational specialty from a list of critical positions.103 The government's brief to the Court argued that bonus pay was not generalized pay, and the Court appeared to accept this argument.104 Unlike the issues discussed in Larionoff and Schism, the current issue regarding pay and retirement is governed by statute.105

The Schism decision tracked with the Larionoff decision, in determining that military recruiters were not statutorily empowered to promise medical care for life. Additionally, because the Air Force, at the time of the reenlistments, practiced a space-available medical care system for retirees, there was ample evidence, at least to the majority of the judges on the Federal Circuit, that the military retirement system was not wholly open to all retirees.106 This fact pattern is hardly analogous to imposing retirement alterations on currently serving service-members.

E. UNLAWFUL ORDERS: THE MANDATORY TSP CONTRIBUTION PLAN BY ANALOGY

While it must be acknowledged that the federal courts have not been asked to determine whether the promise of a twenty-year retirement creates a property interest which Congress lacks the authority to dissolve, there is an equally troubling aspect to the Defense Business Board's ("DBB") proposal: the mandatory Thrift Savings Plan ("TSP") contribution scheme. It is questionable as to whether the United States government can force a service-member, any more than it can compel a civilian, to pay into a specific investment portfolio. If this were so, a commander, by analogy, could compel all personnel entering a stateside base to drive an American manufactured automo-

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102. Schism, 316 F.3d at 1272 (citing United States v. Larionoff, 431 U.S. 864, 869 (1977)).
103. Larionoff, 431 U.S. at 868.
104. See id. at 874 (distinguishing between general and bonus pay); Brief for the Petitioners at 19-26, United States v. Larionoff, 431 U.S. 864 (1977) (No. 76-413), 1977 WL 189370, at *19-26 (arguing bonus pay was a specific sum).
105. See Larionoff, 431 U.S. at 877 (describing pay and retirement governed by regulations); Schism, 316 F.3d at 1300 (stating Congress has not used its power to address the issue).
106. Schism, 316 F.3d at 1283-84.
bile. What if a service-member believed, for instance, that a private investment group such as the United Services Automobile Association ("USAA") or Prudential was more soundly managed than TSP? The service-member should be entitled to forgo the TSP contribution. Likewise, it is not outside of the realm of possibility that an individual service-member would be opposed to the composition of the TSP directorship, or the TSP's investment into corporations whose policies the service-member finds repugnant. It is clear that no government agency may force the service-member to invest personal monies into an essentially private corporation under such circumstances. It may be that the DBB, or for that matter the twelve member congressional committee, believes that Article I, Section 8, Clause 12 of the Constitution empowers Congress to extend this authority grant to include control over personal finances, including mandating payments into a specified 401(k). This belief would not likely be approved by the courts because it would run counter to a myriad of other laws and limits on government authority.

The challenged Patient Protection and Affordable Health Care Act ("PPAHC") is perhaps the most favorable analogy to the DBB's proposal. The question of whether the Constitution grants Congress the authority to legislate individual citizens to purchase health care insurance became a hotly contested issue after the passage of the PPAHC. This Act required most Americans to purchase an insurance policy within specified coverage limits. Although in National Federation of Independent Business v. Sebelius, the United States Supreme Court upheld the PPAHC's individual mandate, the PPAHC mandated 401(k)-like contributions into a specific quasi-private account posed a different matter because the PPAHC enables residents to choose between a myriad of private plans.

While it is true that the Court has, since the New Deal, broadly construed congressional authority to regulate commerce, this authority has not been found to exist without bounds. Since 1995, the Court found that the Gun Free School Zone Act of 1990 and the Violence

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107. "To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12.
Against Women Act of 1994\textsuperscript{113} exceeded Congress’ authority to regulate commerce.\textsuperscript{114} Following the broad logic articulated in the Court’s decisions, it is unfathomable that a condition of military service could be lawfully predicated on mandatory investments. Even if the government were to contribute 16.5\% of a service-member’s pay towards a 401(k), the current state of the law governing such investments would constitute an unlawful favoritism toward one investment firm over all others.

III. EFFECTS OF CHANGE AT ANY TIME

This Article opened with the argument that alterations in the current system of military retirements that remove the government’s obligations to service-members could have a detrimental effect on military discipline. The questionable legality of the Defense Business Board’s (“DEB”) proposal and the undermining of civil-military relations, when viewed alongside of the prohibition against taking property, or the theory of detrimental reliance, provides further context for the potential to specifically undermine military discipline as described below.

A. INVALIDATION OF THE PUNITIVE DISCHARGE

Absent from any of the Defense Business Board’s (“DEB”) proposal was a cognizable legal theory in which the government could retain the monies paid into a 401(k) by the service-member. A 401(k) contribution is the contributor’s at the time of payment and is disbursed to the contributor on the achievement of a certain age. Indeed, the laws covering the Thrift Savings Plan (“TSP”) are highly protective of the recipients.\textsuperscript{115}

The Fifth Amendment prohibits the conversion of private property “for public use without just compensation.”\textsuperscript{116} There is a substantial difference between what the government can garnish from those plans and the termination of retirement benefits under the current system. Under the present disciplinary system, punitive discharges adjudged by courts-martial divest former service-members of a number of veteran’s benefits and retirement pay.\textsuperscript{117} The punitive dis-


\textsuperscript{116} U.S. Const. amend. V (emphasis added).

charge is unique to the military in its effect. For instance, a civil-service employee who has paid into the TSP program for five, fifteen, or twenty-five years does not lose his or her account because of a federal or state conviction. While it is true that a court-martial could adjudge a fine, a government seizure of a retirement account in most instances would be an unconstitutional taking because the service-member had contributed his or her monies. The government could also seek to recoup losses from fraud crimes, but before it could do so, it would have to initiate a seizure action through the federal courts.¹¹⁸ Due to the fact that military retirements are not contributed into, the punitive discharge statutes in the Uniform Code of Military Justice ("UCMJ"), and its predecessor Articles of War, do not violate the Takings Clause¹¹⁹ of the Fifth Amendment. If service-members were forced to contribute to their military retirements there would be a violation of the Takings Clause. Military retirements could no longer legally be taken under the UCMJ.

Minimizing the effect of the punitive discharge would be a significant departure from the expected discipline of the nation’s profession of arms. Dating to the Continental Army of 1775, the punitive discharge has been a mainstay of military discipline.¹²⁰ Even a service-member court-martialed after twenty years of military service may lose his or her retirement if the court-martial adjudges a punitive discharge. Under the DBB’s proposal, a colonel, for instance, who abuses his or her authority to a degree of criminality will risk losing very little, because the vested 401(k) will remain intact as the colonel’s property. Likewise, under the DBB’s proposal a court-martialed first-term service-member or new officer will retain the 401(k) investments, even when sentenced to a punitive discharge.¹²¹ If the DBB had a secondary intent on further civilianizing the military justice system, the proposal would successfully contribute to this goal.

The UCMJ has undergone significant reform since its inception in 1950 to mirror federal criminal law, but not to the extent of abandoning the reason for a separate system in the first place (i.e., to en-

¹¹⁸. See, e.g., United States v. Duncan, 816 F.2d 153 (4th Cir. 1987); Duncan v. Belcher, 813 F.2d 1335 (4th Cir. 1987).

¹¹⁹. U.S. Const. amend. V.

¹²⁰. See William Winthrop, Military Law and Precedents 405-08, 433 (2d ed. 1920).

¹²¹. Cf supra note 47 and accompanying text. Because the DBB proposal makes the 401(k) a form of personal property and there is no provision in the UCMJ enabling seizure or a taking of personal property, adoption of the DBB proposal would allow service-members to retain their investment even in the face of punitive discharge or court-martial. While a court-martial has the ability to fine a person, such fines are generally only applicable to financial crimes and may be further contested.
hance the national security of the United States).\textsuperscript{122} This is an important point. From the enactment of the UCMJ in 1950, to \textit{Solorio v. United States}\textsuperscript{123} in 1987, military professionals have decried the increasing civilianization of the military justice system.\textsuperscript{124} One need only look at a body of case law beginning in 1969 with \textit{O'Callahan v. Parker},\textsuperscript{125} which effectively divested the military of jurisdiction over thousands of service-members who committed offenses in the Continental United States, to \textit{Solorio}, which restored the full jurisdiction of the UCMJ to find that when judicial mistrust of Department of Defense leadership occurs, the military's disciplinary construct is placed at risk.\textsuperscript{126} This judicial distrust included upholding federal judicial intervention in determining the accuracy of claims of denial of conscientious objector status while a court-martial was pending.\textsuperscript{127} It also included divesting the military of jurisdiction over the offense of an officer distributing LSD off-base.\textsuperscript{128} How the breaking of a promise would translate from distrust amongst service-members to a judicial reaction is difficult to predict, but it is clear that significant litigation will follow any changes to the retirement system as the changes affect current serving service-members.

\textbf{B. Other Effects}

Although not the primary focus of this Article, as a matter of national security, it is worthwhile to note that there is very little possibility that the government could lawfully tie the receipt of annuity payments from a 401(k) to an authority to recall retired service-members in times of national crisis. Former military members are subject to be recalled to active duty under a variety of circumstances.\textsuperscript{129} In \textit{Hennis v. Hemlick},\textsuperscript{130} the United States Court of Appeals for the Fourth Circuit determined that it would not interfere in the Army's recall of a retiree to active duty for the purposes of court-martialing

\begin{thebibliography}{99}

\bibitem{122} 10 U.S.C. §§ 801-946 (2012).
\bibitem{123} 483 U.S. 435 (1987).
\bibitem{125} 395 U.S. 258 (1969).
\bibitem{130} 666 F.3d 270 (4th Cir. 2012).
\end{thebibliography}
the retiree for murder. It is true that the Fourth Circuit predicated its decision on the principle that the military courts were firstly responsible for guarding the service-member's rights. Nonetheless, the federal courts will intervene when it is a clear matter that the military administratively has violated a service-member's rights.

The required regimentation of service-members extends to such personal matters as the weight and physical fitness of individuals, as well as other aspects necessary to ensure that the individual service-member may be ready to deploy into an operation. Because the 401(k) contribution becomes the property of the service-member, there is little financial disincentive to stop a service-member from, for instance, eating his or her way out of the military at the sixteen year point. Likewise, a service-member's deliberate avoidance of complying with other standards such as hygiene or grooming regulations could result in a discharge with full accrual of 401(k) benefits. These are but two examples of how the relationship between the 401(k) system and military discipline has not been considered.

Military retirements under the traditional twenty year program are predicated on the former service-member's agreement to be subject to recall. The imposition of a mandatory 401(k) program would eliminate part of the potential trained national defense, for the simple reason that the 401(k) will be the property of the military member. Indeed, it is not difficult to foresee, given the past history of recalls, that a number of "retired" service-members would refuse to return to active duty.

As already stated, the Defense Business Board's ("DBB") proposal of mandated contributions to a specific account is of questionable legality, and the DBB proposal's failure to grandfather in all serving service-members would likewise and in all probability be unlawful. It is not overly imaginative to urge that where an unlawful program is forced on service-members, the discipline of service-members will

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132. *Hennis*, 666 F.3d at 278.
133. See, e.g., Kanai v. McHugh, 638 F.3d 251 (4th Cir. 2011) (denying a conscientious objector applicant); Hanna v. Sec'y of the Army, 513 F.3d 4 (1st Cir. 2008) (denying a conscientious objector applicant).
136. 10 U.S.C. § 802 (providing that retired members of a regular component of the armed forces who are entitled to pay are subject to the UCMJ); see, e.g., *Hooper*, 9 C.M.A. at 640-45 (describing the extent of court-martial jurisdiction over retired officers in receipt of retirement pay).
likely erode. One need only look at the breakdown of the Abu Ghraib prison guards to draw a worthwhile analogy. The investigation conducted by Major General Antonio Taguba concluded that numerous incidents of misconduct and the failure to adhere to lesser regulations contributed to the breakdown in discipline. The DBB’s proposal not only dismisses the record and contributions of service-members with corporatist spin, but also proposes a legally dubious so-called “budgetary reform” that would, if adopted, have an exponentially deleterious effect on military discipline.

IV. CONCLUSION

In 1973, noted military strategist Bernard Brodie remarked that one of the military lessons that came from the conflict in Vietnam was in contemporary conflicts to distance the military from the public through the termination of conscription. The “All Volunteer Force” construct included an emphasis on military retirements and medical care for long-serving service-members, in exchange for their voluntary relinquishment of rights. The removal of a permanent governmental obligation to career service-members, who defend the nation, is another step in creating such a distance, because it removes the public’s obligations to the service-member. If this were all that the current retirement alteration schemes accomplished, it would be troubling enough.

On August 19, 2011, Secretary of Defense Leon Panetta stated that the military retirement system is secure in its present form for current service-members, but these assurances are sound only to the extent that Congress does not decide to adopt part or the entire Defense Business Board (“DBB”) proposal. In May, 2012, the Center for American Progress (“CAP”) released a proposal to “reform” the military retirement system along the similar lines as the DBB. Like the DBB, the CAP did not consider the effect of a conversion from the current retirement system on military discipline. This is why it re-

140. See Lawrence J. Korb et al., Ctr. For Am. Progress, Reforming Military Compensation: Addressing Runaway Costs Is a Personal Imperative (2012), available at http://www.americanprogress.org/wp-content/uploads/issues/2012/05/pdf/military_compensation.pdf. Korb is a military and national security affairs expert of considerable standing. However, his report does not consider the legal impediments to his proposed changes.
mains crucial to restate that the DBB's and similar proposals only considers economics and one sided views of equity, rather than national security, military discipline and civil-military relations, the rights of service-members, legal problems, or the morality of their respective proposals. This alone is troubling. But, if put into effect now, or in the future, there are significant implications. In a Washington Post editorial, professor and military scholar Andrew Bacevich criticized the DBB's proposal as immoral and created out of malice, or ignorance, and not reflecting the profession of arms.\textsuperscript{141} His arguments were sound, but even he neglected to consider the disciplinary implications to the DBB's proposal.

The degradation of military discipline is a national security matter. Creating a questionably unlawful retirement construct under the fictional guise of "reform" will certainly affect military readiness and discipline. The distrust of congressional leadership within the military is not simply a theoretical proposition. Failed congressional leadership on this issue would exacerbate the decline of both civil-military relations and discipline. At a time when the nation's ability to influence nascent democratic movements and reassure allies in the Pacific and Near East is under challenge, one might reasonably ask how a decline of military morale will empower America's challengers. This is particularly true when the loss of morale would occur as a result of a proposal which, if implemented, would be unconstitutional. This is more significant than a broken promise. Finally, even if all service-members were "grandfathered" into traditional twenty year retirement, a decline of military discipline by the weakening of court-martial sentences will occur if the DBB's proposal were implemented twenty years forward. If Congress desires the nation to maintain a reliable first rate military, it must not treat the military as merely an economic proposition where the bottom line governs in lieu of other equally important aspects.

\textsuperscript{141} Andrew Bacevich, \textit{The Army Isn't Like Corporate America. It's Retirement Shouldn't Be, Either}, \textit{WASH. POST}, Aug. 21, 2011, at B3.