No. 07-1397

In the Supreme Court of the United States

WALTER S. STEVENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a military retiree assigned to the temporary disabled retired list, is subject to trial by court-martial.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 66 M.J. 15. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 15a-42a) is reported at 65 M.J. 639. The order of the military judge (Pet. App. 43a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. The petition for a writ of certiorari was filed on May 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3), but jurisdiction does not lie under that provision.

STATEMENT

Following a general court-martial with officer and enlisted members, petitioner was convicted of rape, in

violation of Article 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920. He was sentenced to three years of confinement and a dishonorable discharge. The convening authority approved the sentence. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and the term of confinement but mitigated the nature of the discharge from a dishonorable discharge to a bad conduct discharge. Pet. App. 2a, 42a. On discretionary review, the United States Court of Appeals for the Armed Forces (CAAF) set aside the decision of the N-MCCA and remanded the case for consideration of several factual issues. *Id.* at 1a-14a.

1. In 1987, petitioner enlisted in the Navy and in 1991, he extended his enlistment. In March 1994, petitioner's enlistment expired but he was retained on active duty for medical processing. Following the decision of a Physical Evaluation Board, petitioner was discharged from the Navy and transferred to the Temporary Disabled Retired List (TDRL). He was awarded a 30% disability rating, entitling him to approximately $600 per month in military retirement pay. Petitioner was then evaluated by the Veterans' Administration (VA), which determined that he was 100% disabled. As a result, petitioner waived his right to continue receiving military retirement pay in order to receive greater compensation from the VA. Pet. App. 43a-45a. That election, however, did not remove petitioner from the TDRL. *Id.* at 20a. Moreover, petitioner retained the option of renouncing the VA disability compensation and obtaining military disability retired pay at any time. *Id.* at 24a.

2. In November 1997, the Naval Criminal Investigative Service (NCIS) determined that petitioner was a possible suspect in a November 1992 rape of a military

dependent. Pet. App. 20a. The rape occurred in on-base military housing in Honolulu, Hawaii, where the victim resided and where petitioner was on active duty. *Id.* at 19a-20a, 43a. Petitioner became a suspect in the crime when an NCIS investigator found a report noting that petitioner had been caught peeping into the bedroom of a different woman in military housing. *Id.* at 20a. The NCIS agent then determined that petitioner has the same blood type of the perpetrator of the rape, whose DNA had been recovered as part of a rape kit. *Id.* at 19a-21a.

At the time of the investigation, petitioner was on the TDRL and was being treated for diabetes at the VA hospital in Memphis, Tennessee. Pet. App. 3a. As part of that treatment, hospital personnel regularly drew blood for medical purposes. *Ibid.* The NCIS asked hospital personnel to draw an additional quantity of petitioner's blood for DNA testing the next time he reported for routine blood work. *Id.* at 3a-4a, 21a. Hospital personnel complied, drawing a vial of blood in addition to that required for medical purposes without advising petitioner of the purpose of the additional draw. *Id.* at 4a, 21a. The NCIS had DNA testing performed on that blood, and the testing revealed that petitioner was likely the person who committed the rape. *Id.* at 21a.

Under Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4), "[r]etired members of a regular component of the armed forces who are entitled to pay" are subject to the UCMJ and trial by court-martial. Accordingly, in December 1998, military authorities charged petitioner with a single specification alleging rape, in violation of Article 120 of the UCMJ. Pet. App. 2a, 21a.

3. Before trial, petitioner moved to dismiss the charge for lack of personal jurisdiction, arguing that he

is not subject to court martial. The military judge (MJ) denied the motion. Pet. App. 43a-48a. The MJ noted that Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4), subjects "[r]etired members of a regular component of the armed forces who are entitled to pay" to court-martial jurisdiction, and he reasoned that petitioner was "entitled to pay" at the time he was apprehended and charged, because petitioner was "a servicemember on the TDRL" who was "still 'entitled' to receive pay" even though he had elected to accept VA disability benefits in lieu of military disability retirement pay. Pet. App. 46a-47a. The MJ explained that, under petitioner's theory, "an accused could escape jurisdiction with the mere filing of a VA form," "wait for the charges to blow over," "and then revert back to the more lucrative retirement pay." *Ibid.* Petitioner took an interlocutory appeal of the MJ's ruling, and both the N-MCCA and the CAAF denied review. *Id.* at 49a-51a.

4. At trial, the MJ suppressed the vial of blood drawn by VA medical personnel for DNA testing. Pet. App. 4a. The N-MCCA affirmed. See *United States* v. *Stevenson*, 52 M.J. 504 (N-M. Ct. Crim. App. 1999). It held that Military Rule of Evidence 312(f), which authorizes the introduction at trial of "[e]vidence * * * obtained from an examination or intrusion conducted for a valid medical purpose," is inapplicable to retired members of the armed forces on the TDRL. 52 M.J. at 509-510.

The CAAF reversed and remanded. See *United States* v. *Stevenson*, 53 M.J. 257 (C.A.A.F. 2000). It explained that Military Rule of Evidence 312(f) applies to persons on the TDRL, because the "TDRL is a 'temporary' assignment, not a permanent separation from active duty"; persons on the TDRL are "required * * *

to undergo periodic physical examinations" to determine if they are fit for duty; and "even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances." *Id.* at 259-260. The CAAF then remanded for the MJ to consider whether the taking of the extra vial of blood was permissible under Military Rule of Evidence 312(f) and the Fourth Amendment. *Id.* at 260-261. Petitioner filed a petition for a writ of certiorari with this Court, and the Court denied the petition. See *Stevenson* v. *United States*, 532 U.S. 919 (2001).

In the meantime, NCIS agents obtained a warrant from a federal magistrate judge authorizing them to obtain an additional vial of petitioner's blood. The warrant was executed, and DNA analysis of that blood again revealed that petitioner is the likely perpetrator of the rape. Pet. App. 4a, 22a.

5. On remand, the MJ determined that the intrusion resulting from the extraction of the vial of blood for DNA testing was *de minimis* and that, since petitioner's blood was originally drawn for a valid medical purpose, Military Rule of Evidence 312(f) did not "limit the purposes to which the seized evidence may be put or used." Pet. App. 5a.

Petitioner was then tried by a general court-martial, convicted of rape, and sentenced to three years of imprisonment and a dishonorable discharge. Pet. App. 2a.

6. The N-MCCA affirmed the conviction. Pet. App. 15a-42a. As relevant here, it rejected petitioner's claim that the court-martial lacks jurisdiction over members of the TDRL, holding that persons on the TDRL are "entitled to pay" under Article 2(a)(4) of the UCMJ. *Id.* at 22a-25a. The court noted the Court of Military Ap-

peals (the predecessor to the CAAF) had previously held in *United States* v. *Bowie*, 34 C.M.R. 411, 411-412 (C.M.A. 1964), that a former active duty servicemember who was placed on the TDRL was subject to court-martial jurisdiction, and it held that the fact that petitioner had elected not to receive military disability pay did not warrant a different result. Pet. App. 23a-24a. As the court explained, "[a] plain reading of [Article 2(a)(4)] indicates the entitlement to receive retired pay, and not the actual receipt of that pay, is the condition precedent to exercising court-martial jurisdiction over a retiree." *Id.* at 24a. The court also observed that petitioner "has the option of renouncing the VA disability compensation" and again receiving military disability pay. *Ibid.* And the court noted that, if petitioner's contention were accepted, "a person could avoid court-martial jurisdiction simply by renouncing military disability retired pay in favor of VA disability compensation," while "retaining the option to return to his or her military disability retired pay entitlement." *Id.* at 24a-25a.

The N-MCCA rejected petitioner's other claims of error, including his claim that drawing the first vial of blood without his consent violated the Fourth Amendment, but it modified petitioner's discharge from a dishonorable discharge to a bad conduct discharge as a remedy for excessive post-trial delay. Pet. App. 25a-42a.

The CAAF granted discretionary review with respect to only two questions: (1) "whether NCIS and VA hospital personnel violated the Fourth Amendment by seizing [petitioner's] blood and searching it for DNA evidence without probable cause or a search warrant issued on probable cause" and (2) "if this court suppresses the evidence from the warrantless search and seizure," whether "the lower court err[ed] by failing to address or

suppress blood and DNA evidence gained by a search warrant issued on tainted evidence and material misrepresentations." Pet. App. 2a-3a. Although petitioner sought review of the N-MCCA's jurisdictional holding, Supp. to Pet. for Grant of Review 13-18 (Nov. 20, 2006), the CAAF declined to grant review on that basis.

The CAAF then held, on the merits, that hospital personnel violated petitioner's Fourth Amendment rights in drawing the first vial of blood, and it remanded for the MJ to consider the admissibility of the second vial of blood, which was drawn after NCIS agents procured a search warrant. Pet. App. 6a-14a.

ARGUMENT

Petitioner contends (Pet. 9-17) that, as a disabled military retiree on the TDRL, he was not subject to the court-martial jurisdiction, because he was not "entitled to pay" under Article 2(a)(4) of the UCMJ and because subjecting him to court-martial jurisdiction would violate the Constitution. This Court lacks jurisdiction over those claims. Moreover, petitioner's claims arise in an interlocutory posture, and no court has ever passed on petitioner's constitutional claim. The decision below does not conflict with any decision of this Court or any other federal court of appeals, and, in any event, petitioner's claims lack merit. Further review is therefore unwarranted.

1. This Court's authority to review decisions of the CAAF is derived from 28 U.S.C. 1259. Petitioner asserts (Pet. 1) that this Court's jurisdiction rests on 28 U.S.C. 1259(3), which authorizes this Court to review "[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section

867(a)(3) of title 10."[1] That authority, however, is expressly qualified by 10 U.S.C. 867a(a), which states: "The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." That limitation on review is applicable here. While the CAAF granted a petition for review on petitioner's claims that his Fourth Amendment rights were violated when NCIS investigators obtained samples of his blood, Pet. App. 2a-3a, it refused to grant review of his claim that the court martial lacked jurisdiction, Pet. 7.[2] Because the CAAF denied review of petitioner's jurisdictional claim, this Court does not have jurisdiction to review it on petition for writ of certiorari under the express terms of Section 867a(a). That limitation makes perfect sense, because although petitioner seeks to have this Court review the decision of the CAAF, that court has never reviewed petitioner's jurisdictional claims.

Moreover, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Brotherhood of Loco-*

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[1] 10 U.S.C. 867(a)(3) states: "The Court of Appeals for the Armed Forces shall review the record in * * * all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."

[2] In an earlier appeal, the CAAF granted discretionary review of the question whether Military Rule of Evidence 312(f) is applicable to servicemembers on the TDRL, but it did not grant review of the separate question whether the UCMJ and the Constitution permit court-martial jurisdiction over members on the TDRL. See 53 M.J. at 257.

motive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007). That general practice, which enables the Court to examine any legal issues presented on a full trial record and prevents unnecessary trial delays, should be followed here. The court below remanded this case for a factual determination whether a search warrant whose execution resulted in obtaining crucial evidence in this case was predicated upon tainted information. Pet. App. 11a-12a. Resolution of that issue in petitioner's favor could result in the reversal of his conviction, thereby rendering the question presented by this petition moot. If petitioner does not prevail on the issue on remand, petitioner may then be able to present his contention to this Court in a petition for a writ of certiorari seeking review of a final judgement against him.[3] Accordingly, review by this Court would be premature at this juncture.

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[3] Petitioner correctly points out (Pet. 18) that this Court would only have jurisdiction on remand if the CAAF grants discretionary review of the question presented on remand. That fact does not counsel in favor of review in this case, however, because the CAAF *denied* review of the question presented. See pp. 6-7, *supra.* And even if the CAAF were to deny review later, petitioner may be able to present his jurisdictional claim to a federal court in an action for back pay, see, *e.g.*, *Augenblick* v. *United States*, 377 F.2d 586, 591-592 (Ct. Cl. 1967), rev'd on other grounds, 393 U.S. 348 (1969), or claim that he is entitled to collateral relief, even absent confinement, due to the continuing consequences of his punitive discharge, see *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, 994-996 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970).

Finally, this case would present a poor vehicle to consider the question presented because no court below has ruled on petitioner's constitutional claim. When considering petitioner's jurisdictional argument, both the MJ and the N-MCCA confined their analyses to the question whether petitioner is "entitled to pay" under Article 2(a)(4) of the UCMJ, see Pet. App. 22a-25a (N-MCCA), 46a-48a (MJ), and the CAAF declined to review any portion of the jurisdictional claim. No court passed on the question whether the exercise of court-martial jurisdiction over persons on the TDRL violates Article I, Section 8, Clause 14 of the Constitution. This Court ordinarily does not address issues that were not passed upon by the courts below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

2. In any event, petitioner's claims lack merit.

a. First, the N-MCCA correctly rejected petitioner's claim (Pet. 15-17) that he was not a "[r]etired member[] of a regular component of the armed forces who [is] entitled to pay" under Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4). As the N-MCCA explained, under the plain language of Article 2(a)(4), "the entitlement to receive retired pay, and not the actual receipt of that pay, is the condition precedent to exercising court-martial jurisdiction over a retiree." Pet. App. 24a.

That interpretation of the phrase "entitled to pay" comports with the ordinary meaning of those words. As this Court has explained, "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit *for which a person qualifies*, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)

(emphasis added). Therefore, "the natural reading of the statute [employing the phrase "entitled to compensation"] supports the * * * conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor." *Ibid.* Moreover, to the extent there is any ambiguity in the phrase "entitled to pay" in the UCMJ, the military's interpretation of that phrase is entitled to substantial deference. See *Noyd* v. *Bond*, 395 U.S. 683, 694-696 (1969) (noting the need for "a substantial degree of civilian deference to military tribunals" due to the military courts' expertise in interpreting the UCMJ); *New* v. *Rumsfeld*, 350 F. Supp. 2d 80, 91 (D.D.C. 2004) (affording "substantial deference to the military courts in their application of military law"); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-760 (1975) (Court of Military Appeals (now the CAAF) has the primary responsibility for addressing matters relating to the administration of military justice).

There is no dispute that, as a member of the TDRL, petitioner "satisfies the prerequisites attached to the right" (*Cowart*, 505 U.S. at 477) to receive military disability retired pay. Moreover, as the N-MCCA observed in its decision (Pet. App. 24a-25a), petitioner's election to receive compensation from the VA and to waive his right to retired pay neither altered his temporary disability status as a member of the TDRL nor his right to receive military disability retired pay. The N-MCCA correctly reasoned that petitioner remained "entitled" to pay when he waived his military disability pay in lieu of VA benefits, because he retained the option of later

renouncing the VA benefits and again receiving military disability pay. Pet. App. 24a.[4]

The court observed that, under the governing regulations, a member of the TDRL who waives his or her military disability retirement pay in favor of VA disability compensation has the option of renouncing such compensation and returning to his or her prior entitlement to military disability retirement pay. Pet. App. 24a & n.9 (quoting 7B Dep't of Def. Fin. Mgmt. Reg., para. 120204 (Oct. 2000)). That is exactly what happened here. Although petitioner initially waived military disability pay in favor of VA benefits, when the VA discontinued his benefits after his court-martial, he invoked his entitlement to military disability pay and began receiving those benefits instead. Pet. 4 n.3. As the N-MCCA recognized, Congress surely could not have intended to permit a member of the TDRL to be able to exempt himself from court-martial jurisdiction at will by simply renouncing his entitlement to disability retired pay in favor of VA disability compensation while retaining the option to return to it at a later time. Pet. App. 24a-25a. Further review of petitioner's argument challenge to the the reach of the UCMJ is therefore unwarranted.

b. Petitioner is mistaken in contending (Pet. 9-14) that the exercise of court-martial jurisdiction over persons on the TDRL violates Article I, Section 8, Clause 14 of the Constitution, as supplemented by the Necessary and Proper Clause, Article I, Section 8, Clause 18. Like

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[4] Petitioner cites legislative history (Pet. 17) in an attempt to overcome the clear statutory text, but isolated statements in hearings cannot overcome clear statutory language. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). As petitioner acknowledges (Pet. 17), since its original passage, the statute has required not that a retiree actually receive pay, but that he be *entitled* to receive pay.

other military retirees, petitioner is "part of the armed forces," *Toth* v. *Quarles*, 350 U.S. 11, 15 (1955), and he is therefore subject to trial by court-martial.

The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, and the Necessary and Proper Clause, U.S. Const. Art I, § 8, Cl. 18, supplements that provision. In the exercise of that authority, Congress has vested courts-martial with jurisdiction over "[r]etired members of a regular component of the armed forces who are entitled to pay." Art. 2(a)(4), U.C.M.J., 10 U.S.C. 802(a)(4). Although this Court has held that Congress cannot subject to court-martial jurisdiction civilian dependants, see *Reid* v. *Covert*, 354 U.S. 1, 19-23 (1957); *Kinsella* v. *Singleton*, 361 U.S. 234, 248 (1960), former members of the armed forces who have "severed all relationship with the military and its institutions," *Toth* v. *Quarles*, 350 U.S. at 14, 22-23, and civilian employees accompanying the armed forces overseas, see *McElroy* v. *Guagliardo*, 361 U.S. 281, 284-286 (1960); *Grisham* v. *Hagan*, 361 U.S. 278, 280 (1960), no similar prohibition limits the ability of Congress to subject military retirees to such jurisdiction.

Indeed, in *United States* v. *Tyler*, 105 U.S. 244, 245 (1881), this Court assumed that the exercise of court-martial jurisdiction over military retirees would be proper and specifically noted that "retired officers are in the military service of the government." This Court likewise recognized in *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981), that a "retired officer remains a member of the Army * * * and continues to be subject to the Uniform Code of Military Justice, see 10 U.S.C. § 802(4)." See also *Closson* v. *United States ex rel.*

Armes, 7 App. D.C. 460, 472 (App. D.C. 1896) ("It is very plain to us * * * that the appellee, as a retired officer of the army of the United States, was subject to arrest and detention by the military authorities to answer before a court-martial on the charges preferred against him."); William Winthrop, *Military Law and Precedents* 87 n.27 (1920 reprint) (noting that "retired officers are a part of the army and so triable by court-martial [is] a fact, indeed, never admitting of question" and collecting cases).

A military retiree continues to receive military pay, albeit at a reduced rate, not merely as a pension but as compensation for his continuing availability for recall to duty. See *Tyler*, 105 U.S. at 245. The former Court of Military Appeals (now the CAAF) made just this point in *United States* v. *Hooper*, 26 C.M.R. 417 (C.M.A. 1958), where it held that military retirees are subject to court-martial jurisdiction as part of "the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14. The court explained:

> Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health.

Hooper, 26 C.M.R. at 425; see also, *e.g.*, *Pearson* v. *Bloss*, 28 M.J. 376, 380 (C.M.A. 1989); *Hooper* v. *United*

States, 326 F.2d 982, 987 (Ct. Cl.), cert. denied, 377 U.S. 977 (1964); *Tyler* v. *United States*, 16 Ct. Cl. 223, 235-236 (Ct. Cl. 1880).

Petitioner maintains (Pet. 11-14) that such a justification is inapplicable to military retirees who, like himself, are not retired due to age or time in service but instead are retired for medical reasons and are therefore unlikely to be returned to active duty. That assumption is unwarranted, particularly with respect to persons on the TDRL, which is a list of those who are *temporarily* disabled. Indeed, in *United States* v. *Bowie*, 34 C.M.R. 411, 411-412 (C.M.A. 1964), the CAAF specifically rejected the argument that a retired servicemember on the TDRL is not subject to court-martial jurisdiction because it cannot reasonably be expected that he will be recalled to active duty.

In an earlier proceeding in this case, the CAAF explained the nature of the TDRL and further elaborated on the basis for its ruling in *Bowie*. See *United States* v. *Stevenson*, 53 M.J. at 258-260 (holding that Military Rule of Evidence 312(f) applies to persons on the TDRL). If a servicemember on active duty becomes disabled, and the Service Secretary determines that the disability "may be of a permanent nature" but the circumstances do not permit a final determination that the condition is, in fact, "permanent * * * and stable," the Secretary is required to place the member on the TDRL. 10 U.S.C. 1202. While on the TDRL, the member is required to submit to periodic physical examinations "to determine whether there has been a change in the disability for which he was temporarily retired." 10 U.S.C. 1210(a). In the event that a periodic examination leads to a determination that the member is "physically fit" to perform his or her duties, he or she may be re-

turned to active duty with his or her consent, retired if otherwise eligible for retirement, discharged, or transferred to the inactive reserves. 53 M.J. at 258.[5] After five years on the TDRL, if the Secretary determines that the person is still disabled and the disability is permanent, the person may be retired; if he is adjudged fit for duty, he "has the same options as when such a determination is the result of a periodic examination." 53 M.J. at 258-259.

The exercise of court-martial jurisdiction over members on the TDRL underscores the continuing military status of a member on the TDRL, even if the member is not then performing regular duties. Court-martial jurisdiction reflects the view that the TDRL is a "temporary" assignment, not a permanent separation from active duty. Congress expressly denominated status on the TDRL as "temporary" and specifically required members on the TDRL to undergo periodic physical examinations to determine whether each member is "physically fit to perform" military duties. 53 M.J. at 259 (internal quotation marks omitted). Persons on the TDRL, therefore, are members "of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14.

There is also no statutory basis for petitioner's unwarranted assumption (Pet. 14) that, in contrast to regular retirees, disabled retirees do not receive military retired pay as a retainer for future service but as a consequence of their inability to perform future service. Neither 10 U.S.C. 1201 or 1202 lends any support to that assertion. Indeed, insofar as 10 U.S.C. 1208 contem-

[5] In the event that the member does not consent to a proposed return to active duty, "his status on the temporary disability retired list and his disability retired pay shall be terminated as soon as practicable and the member shall be discharged." 10 U.S.C. 1211(c).

plates that members on the TDRL may return to active duty in the event of improvement in their physical condition, it can be inferred that the purpose of their compensation, pending such improvement, is to maintain them at a reduced rate pending a final disposition of their suitability for further military duty. And it is of no consequence for the purpose of determining petitioner's continuing military status and amenability to court-martial jurisdiction that, at the time of the court-martial proceedings, he was receiving benefits and compensation from the VA rather than military retired pay, because he remained subject to physical examination and other requirements and eligible to receive military pay. See pp. 10-12, *supra*.[6]

Petitioner observes (Pet. 12-13) that, under current Department of Defense mobilization policy, disabled retirees are unlikely to be recalled to duty. As explained, however, membership on the TDRL connotes only a "temporary" disability that would disqualify the member from such duty. Moreover, as the CAAF has noted, "even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances." *Stevenson*, 53 M.J. at 260. Petitioner concedes as much. Pet. 12.[7]

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[6] Petitioner contends (Pet. 11) that his placement on the permanent retired list in 1999 "terminated court-martial jurisdiction," but that is incorrect, because petitioner was on the TDRL in October 1998, when he was apprehended and charged, Pet. App. 47a, and because, in any event, military retirees are part of the armed forces. See pp. 12-13, *supra.*

[7] Contrary to petitioner's argument (Pet. 13), his military status is fundamentally different from that of a reservist who is awaiting recall

3. Petitioner suggests (Pet. 2) that review is warranted because of the burgeoning number of wounded and disabled members of the armed forces retired for disability as a consequence of the armed conflicts in Iraq and Afghanistan. In the first place, this case does not implicate the court-martial status of all disabled military retirees but only those who, like petitioner, are on the TDRL. Indeed, the N-MCCA specifically limited its analysis to persons on the TDRL. See Pet. App. 22a-25a. Moreover, the question presented by this case—whether members of the armed forces on the TDRL are properly subject to court-martial jurisdiction—rarely arises in the reported decisions of the military appellate courts, and petitioner has presented no evidence suggesting that the trial of military retirees within that category occurs with any frequency. Further review of petitioner's claims is therefore unwarranted.

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to active duty, a high school student who signs an enlistment contract under a delayed entry program but has not yet actually enlisted, or person drafted into the armed forces prior to induction. In the first place, in contrast to persons on the TDRL, none of these categories of individuals are entitled to receive pay from the armed forces even though not performing military duties. Moreover, while persons in these categories possess only a possible future affiliation with the armed forces, persons on the TDRL possess a continuing military status even if they are not performing regular military duties. See *Stevenson*, 53 M.J. at 259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2008