

August 13, 2010

Military Personnel Wearing Uniforms in Civilian Court – The Judges Conundrum

Judge Daniel J. Hill¹, 6th Judicial District ², State of Oregon

QUESTION: Can or should someone in the active duty military or reserves wear their military uniform to civilian court?

SUMMARY:

Generally speaking, the promulgated military rules provide that for someone authorized to wear the uniform, that they may not wear the uniform where such may tend to bring discredit upon the Armed Forces or the uniform. That is a military rule though and outside the court's consideration, and the question boils down to whether there is a statutory right to wear the uniform, whether that right is current as someone who is on active duty at the time, and whether wearing the uniform violates ethics rules as an effort to sway the judge or jury, that being then the effect wearing the uniform will have on the proceeding.

For the Active Component (AC), someone in active duty³ essentially has status and a statutory right to wear the uniform, and then the question really becomes whether that creates a condition of an effort to sway the judge or jury that violates the ethics rules, and whether that condition is so persuasive to require the judge to not allow wearing of the uniform in court. Ordinarily you would allow the AC service member to appear in uniform.

For the Federal Reserve Component⁴ if they are not in a duty status then their right to wear the uniform is significantly more restricted, and unless they are in a duty status there would be no statutory right to wear the uniform in court. Similarly, some who has a right to wear the uniform by being an honorably discharged veteran of war or honorably retired retiree, while they have a right to wear the uniform, it is not a 'current' right based on a AD status. It would be more discretionary for the judge in either case to allow or not allow the wear of the uniform.⁵ If someone in the Federal Reserve Component was in a duty status⁶ then they would have the same right as someone in the Active Component.⁷

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² This opinion is not the opinion of the Oregon Judicial Department, the Oregon National Guard or the US Army and is merely an opinion of the author. The opinion was authored as a result of numerous inquiries from the trial bench about service members wearing the uniform in court.

³ Someone on Active Duty (AD) is subject to the Uniform Code of Military Justice (UCMJ) all the time, wherever they are.

⁴ The Federal Reserve Component would consist of Army, Navy, Air Force and Marines who when in duty status are federal Title 10 service members. The reference Reserve Component (RC) alone, includes them and also Title 32 National Guard, either Army National Guard (ARNG) or Air National Guard (ANG).

⁵ It is highly unlikely that a unit would provide orders for a RC service member to appear in court.

For the National Guard, each state gets to consider what its rule might be beyond the Military Rule. For Oregon, to wear the uniform in court without violating state law⁸, the Oregon National Guard (ONG) Service Member (SM) must get approval of their line commander with jurisdiction over them under the Oregon Code of Military Justice⁹. Assuming that they have not, then regardless of status, the court should be able to not allow the NG Service member to violate the law and require them to not wear the uniform. In theory a member of a state National Guard, if not in a duty status with their National Guard, would have no statutory right to wear the uniform outside the state in which they serve the National Guard. If so inclined to allow them to wear the uniform, then if they are not in a duty status then they have no current right to wear the uniform and if in a duty status then the same issue arises as someone in a duty status for attempting to sway judge or jury, and the effect on the proceeding.

If the individual has no status at all, the wearing the uniform is a criminal offense.¹⁰

The analysis appears to be essentially the same whether the individual in question is the defendant or a party in a civil proceeding, or a witness.

The balance of law appears to suggest that even if there is a statutory authorization to wear the uniform that there is no law requiring the court to allow the wear, and either way not allowing the wear is generally considered harmless error.

⁶ Generally, a duty status means a “drill” or ‘battle’ assembly, ‘individual duty training’ paid status, on orders status with or without pay for points only, Annual Training, or some other ‘pay’ status. The service member may or may not have written orders, and getting their representation under ‘oath’ subject to penalty of perjury, on the record, is advised.

⁷ While not analyzed herein, someone in the Coast Guard, though a Homeland Security organization (unless made part of the Department of Defense for wartime service), formerly part of the Department of Transportation, likely would have the same analysis as a AC or Federal RC.

⁸ 399.155 Unlawful wearing of uniform or insignia. No member of the organized militia shall wear, when on or off duty, any uniform or any device, strap, knot or insignia of any design or character used as a designation of grade, rank or office, such as are by law or regulation, duly promulgated, prescribed for the use of the organized militia, without the permission of the commanding officer. [1961 c.454 §75(3)]

⁹ A ‘commander’ is not the service member’s ‘supervisor’ except in limited situations. At no time can an Enlisted Service member (someone not an ‘officer’) approve the wear of the uniform under Oregon Statute. This statute is not subjective like the DoDI or service prohibition pertaining to wearing the uniform in a service discrediting manner, it is objective and if the Oregon National Guard (ONG) member does not have permission then they don’t have permission and it is a violation of statute.

¹⁰ 162.365 Criminal impersonation. (1) A person commits the crime of criminal impersonation if with intent to obtain a benefit, to injure or defraud another or to facilitate an unlawful activity, the person does an act in the assumed character of: (a) A public servant; or (b) An active member or veteran of the Armed Forces of the United States. (2) It is no defense to a prosecution for criminal impersonation that: (a) The office, position or title that the person pretended to hold did not in fact exist; or (b) The unit of government that the person pretended to represent did not in fact exist. (3)(a) Criminal impersonation is a Class A misdemeanor. (b) Notwithstanding paragraph (a) of this subsection, criminal impersonation is a Class C felony if the public servant impersonated is a Peace officer, judge or justice of the peace. [1971 c.743 §211; 1993 c.243 §1; 1997 c.395 §2; 2003 c.577 §12; 2007 c.510 §1]

DISCUSSION AND ANALYSIS:

Status of the Service Member – Can they lawfully wear the uniform in the first place?

A service member on Active Duty¹¹ is generally entitled and even encouraged by regulation and policy to properly wear the uniform¹² in public except where prohibited¹³. Reservists of the Armed Forces¹⁴, or the National Guard¹⁵ are more limited to when they may properly wear the uniform unless they are in a duty status by orders¹⁶. Title 10 USC Section 772 describes the underlying basis by which someone not on active duty may wear a military uniform, including someone who is retired, or served honorably in war.¹⁷ If they have a statutory right to wear the uniform then this likely must be given significant weight.¹⁸ AFI 36-2903, chapter 6, speaks to the wear of uniforms by Air Force Reservists and Air National Guard, and if the Airman is on active duty then they generally have the right to wear the uniform subject to the AFI stated prohibitions (and presumably the DoDI prohibition) and

¹¹ Active Duty includes for this discussion both Title 10 federal authority for full time service members and members of the reserves in Active Guard Reserve (AGR) status.

¹² Generally speaking, for the purposes of this memorandum, the wear of the uniform in court is limited to service and dress uniforms and not battle fatigues, such as the Battle Dress Uniform, now replaced with the Army Combat Uniform for the Army, and fatigue like uniforms of the other services. See, AR 670-2, para 30-2, 30-3, 30-4.

¹³ See, Naval regulation 61001, Chapter 6, Section 10.

¹⁴ Reserves of the Army, Air Force, Navy and Marines, are part time service members, and Title 10 federal status when in a duty status.

¹⁵ Members of the National Guard are Title 32, State Status, subject to their state code, not federal authority, and include the Army National Guard and the Air National Guard.

¹⁶ Duty status in the reserves tends to mean that the service member is in a drilling status (the customary two days per month but is served in periods of 4 hours, each period called a MUTA and can be more than 1, and usually eight or less at a given time), or an 'order' status providing either for 'pay' or for 'points' for retirement. Typically, for other than travel orders, a service member may not be in actual possession of a physical written order reflecting status, and the representation of status must be generally accepted.

¹⁷ Sec. 772. When wearing by persons not on active duty authorized

- (a) A member of the Army National Guard or the Air National Guard may wear the uniform prescribed for the Army National Guard or the Air National Guard, as the case may be.
- (b) A member of the Naval Militia may wear the uniform prescribed for the Naval Militia.
- (c) A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade.
- (d) A person who is discharged honorably or under honorable conditions from the Army, Navy, Air Force, or Marine Corps may wear his uniform while going from the place of discharge to his home, within three months after his discharge.
- (e) A person not on active duty who served honorably in time of war in the Army, Navy, Air Force, or Marine Corps may bear the title, and, when authorized by regulations prescribed by the President, wear the uniform, of the highest grade held by him during that war.

... .”
¹⁸ See, Johnson v. Com., 449 S.E.2d 819, 19 Va.App. 163 (Va. App., 1994) (“It is fundamental to our jurisprudence that a defendant “certainly may not be punished for exercising a protected statutory or constitutional right.” United States v. Goodwin, 457 U.S. 368, 372, 102 S.Ct. 2485, 2488, 73 L.Ed.2d 74 (1982). See also Battle v. Commonwealth, 12 Va.App. 624, 628-29, 406 S.E.2d 195, 197 (1991).).

generally other military connected events.¹⁹ Naval regulation 61001, Chapter 6, Section 10 of the uniform regulation applies to reservists, and allows wear on active duty, active duty for training, travel, and on special occasions where such is appropriate. For the Army and Army National Guard AR 670-1, Chapter 30 discusses wear of the uniform by the reserves, and really describes authorization in a duty status, and social functions and events of a military character²⁰.

The Ethical Considerations.

Arguably, appearing in court as a defendant²¹, in military uniform must most certainly present the serious possibility of being service discrediting, compromise the dignity of the uniform, and be in violation of Department of Defense and particular service or National Guard regulations or policies as further discussed herein. That said, whether it is service discrediting is not up to the Judge. However, even if it does or does not, the wearing the uniform in court as may violate the Oregon Rules of Professional Conduct, Rule 3.5 by seeking to influence Judge or Jury, and an attorney who condones such activity impliedly has breached that rule²². There is an unspoken statement being made by someone in full dress uniform with a full ‘rack’ of awards, and whether it is statutorily authorized or not, a court must consider its impact.

Seemingly a court could consider the wearing of the uniform as having no particular impact and not having any bearing on character.²³

The wearing of the uniform presents to the public the ‘trust’ given to that individual by the military service²⁴ and the presentation of awards, by ribbons and medals, while likely generally not understood well by the public, sets forth the service members history, their achievements²⁵, successes, and arguably their military character of themselves in the service of their Country.

¹⁹ AFI 36-2903, Table 6.1.

²⁰ AR 670-1, para 30-1, describes such social functions as “‘occasions of ceremony’ means occasions essentially of a military character, at which the uniform is more appropriate than civilian clothing. These functions include, but are not limited to: military balls, military parades, weddings, and military funerals; memorial services, meetings and conferences; or functions of associations formed for military purposes, of which the membership is composed largely or entirely of current or honorably discharged veterans of the Armed Forces or reserve components. Authority to wear the uniform includes wear while traveling to and from the ceremony or function, provided the travel in uniform can be completed on the day of the ceremony or function.”

²¹ Seemingly appearing in a civil case in uniform as a party likely has less tendency to be service discrediting, and someone appearing because of service connection more likely can appear in uniform.

²² This author argues that the more clearly service discrediting then the more clearly that the wearing of the uniform is an effort to sway the judge or jury and be in violation of the ethics rules.

²³ As was generally decided in State v. Graham, No. 32273-1-II (WA 4/4/2006) (WA, 2006). See Rule 404, character evidence.

²⁴ MCO P1020.34, Chapter 1, Section 1000 (3).

²⁵ See, AR 600-8-22.

To decide that that the wearing of the uniform does not seek to present by unspoken statement ‘character’ seems to ignore the stated intent of the uniform and awards as reflected by military regulation. If it is allowed as implicit character evidence then the character presented could be subject to attack, and that is the military character of the service member, something not likely relevant for the case, and so rebuttal of that unstated character is not relevant. Therefore, wearing of the uniform should not be considered ‘character’ evidence.

At the same time, however, uniform and awards generally goes hand in hand with credibility²⁶, and credibility can be attacked and by wearing the uniform the credibility presented by that uniform may be able to be attacked arguably only upon the service member taking the witness stand.²⁷ Arguably by making the decision to take the stand, the service member makes an unspoken statement by the awards he or she presents, and their service history.²⁸

Under the Oregon Code of Judicial Conduct, JR 2-109, a “judge shall maintain order and decorum in proceedings before the judge.” In deciding what to do the court must consider those matters pertaining to ‘status’ and then the impact on the proceeding that the uniform may present. If in doing so the judge the judge decides that the impact is improper then regardless of status the court should be able to enforce Rule 3.5 by ordering that the Service Member (SM) change into civilian clothing to be more appropriate²⁹. If so desired by the Judge, the Judge or staff could report apparent violations of State or Federal law, improper wear of the uniform, to the SM’s Commanding Officer³⁰ after when such is reasonably unlikely to allow either side to gain a tactical advantage, and would have a requirement to disclose to the parties such only if the communication ‘will or reasonably may influence the outcome of the proceeding’.³¹

²⁶ See, State v. Graham, No. 32273-1-II (WA 4/4/2006) (WA, 2006).

²⁷ Rule 608, 609, Oregon Rules of Evidence.

²⁸ If for instance a service member wore an award for which they are not authorized then such is a false statement for which an inquiry could conceivably be made under ORE 608 (2), though such may not be proved by extrinsic evidence.

²⁹ Essentially though, someone on AD should be given some deference to their statutory right to wear the uniform.

³⁰ For the Oregon National Guard, a report may be submitted to the Office of the State Judge Advocate, Oregon Military Department, Salem, Oregon, and after verification of the status of the service member, the JAG office will submit the report to the appropriate commander.

³¹ Given that the presence of an attorney representing a SM improperly wearing a uniform may implicate the mandatory reporting requirements of JR 2-104 as to a ‘violation of the rules of . . . professional conduct or law’, and that Rules 8.3 and 8.4 of the Oregon Rules of Professional Conduct, reporting of the conduct, especially if clearly intentional, could be required. Otherwise, the best course of conduct appears to be to determine the status of the SM, whether the SM was authorized by someone to wear their uniform, and if so, then who and their rank and capacity (whether they are a unit commander for instance), if a war veteran or retiree – whether they received a honorable discharge, whether they were advised by counsel to wear their uniform, their service branch (USMC, Army, USAF or US Navy), and unit and place of assignment or attachment, thereby determining whether the wear of the uniform is remotely authorized. Once status is generally determined, the court should be able to first determine if the wearing is statutorily authorized and if so give that more weight than wear that is not statutorily authorized, and then consider the impact on the proceeding that wearing the uniform may have. At such time the

Cases considering wear of the uniform - Bolstering of Character by the Wearing of the Uniform

In Johnson v. Com., 449 S.E.2d 819, 19 Va.App. 163 (Va. App., 1994), the appellate court found “that Johnson, who was on active duty in the Navy, had the right to wear his uniform at trial and that the trial court erred in denying him that right.”³²

In Martin v. State, No. 55A04-0603-CR-134 (Ind. App. 11/30/2006) (Ind. App., 2006), the defendant Martin was in the Army Reserve not on active duty or in any apparent duty status, and was disallowed by the court to wear his uniform after the deputy prosecutor, a reserve judge advocate objected saying it was improper. The court also gave an instruction pertaining to it being improper to wear the uniform in court, to which defendant failed to assert an objection³³.

In State v. Graham, No. 32273-1-II (WA 4/4/2006) (WA, 2006), “Graham was charged in Kitsap County Superior Court with second degree assault of a child. On the first day of trial, Graham appeared dressed in his Navy uniform. The State asked the court to prohibit Graham from wearing the uniform during trial. The State stipulated that Graham could testify to his Navy background but argued that Graham's military service was irrelevant character evidence and that the uniform carried an undue aura of credibility. The trial court granted the State's motion but allowed Graham to wear his uniform for the remainder of the first day of trial.”

In addressing the appeal, the defendant asserted as to the uniform issue, “Under ER 404(a)(1), a criminal defendant may offer evidence of a pertinent trait of his character' to rebut the nature of the charged offense. {A} pertinent character trait is one that tends to make the existence of any material fact more or less probable than it would be without evidence of that trait.' State v. Eakins, 127 Wn.2d 490, 495-96, 902 P.2d 1236 (1995). In other words, the character trait must be relevant to the commission of the crime charged. See ER 401 (defining relevant evidence' as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'). Through the use of character evidence, the defendant generally seeks to

court may feel it appropriate to advise of its intent to consider reporting the wear of the uniform to proper command authority, if the court believes that there is a likely violation of State or Federal Military law.

³² “The Commonwealth argued, and the trial court ruled, that the uniform supplied an inference of good character. Certainly, military service is an honorable function. However, **we perceive no basis to hold that a military uniform affords an unrealistic suggestion of good character any more than do neat and clean attire and good grooming. It is inappropriate for a trial court to deny a courtroom participant the right to present himself in his best posture**”. Johnson v. Com., 449 S.E.2d 819, 19 Va.App. 163 (Va. App., 1994). Emphasis added by the author.

³³ It appears from the court's discussion that the instruction probably should not have been given and the defendant should have just changed into civilian clothes at an appropriate time without further comment.

have the jury conclude that one of such character would not have committed the crime charged." City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000) (quoting State v. Kelly, 102 Wn.2d 188, 195, 685 P.2d 564 (1984)),” and therefore “his conviction must be reversed because he has a right to present himself in the best posture possible, and this right includes the right to wear a military uniform since **{t}he community respects military service and the uniform appears professional looking and may increase the jury's assessment of the wearer's credibility.**” State v. Graham, No. 32273-1-II (WA 4/4/2006) (WA, 2006). In considering these matters the court came to really two conclusions: First, while “military service is an honorable function. . . . we perceive no basis to hold that a military uniform affords an unrealistic suggestion of good character any more than do neat and clean attire and good grooming. It is inappropriate for a trial court to deny a courtroom participant the right to present himself in his best posture.” Secondly, the court further held though that “We decline to hold here that a defendant has the right to wear his military uniform when he is criminally tried as a civilian.”³⁴ State v. Graham, No. 32273-1-II (WA 4/4/2006) (WA, 2006). Emphasis added by author.

In State v. Marquez, 193 P.3d 578, 2008 NMCA 133 (N.M. App., 2008), (in a case where the court denied a National Guard Soldier³⁵ to wear combat fatigues in court, and was upheld as essentially attempting to sway the jury) defendant was charged with driving while intoxicated, and apparently was not in uniform at the time of the stop. As trial was about to commence, with the jury standing by, “The judge then made the observation on the record that Defendant was wearing a camouflage military uniform in the courtroom. The State objected on the ground that Defendant's being in uniform was prejudicial. Defense counsel said that he told Defendant not to wear his uniform to court, but that Defendant was a member of the New Mexico National Guard and that his supervisor had instructed him to wear it.” State v. Marquez, 193 P.3d 578, 2008 NMCA 133 (N.M. App., 2008). In considering the uniform issue on appeal, “Defendant contends that appearing for trial in a camouflage military uniform against his own counsel's instructions was not exceptional, but was only a "routine" choice of attire. He argues that any prejudice caused by his clothing choice could have been accommodated through voir dire and curative instructions to the jury. We disagree. We share the metropolitan court's concerns that **Defendant's appearance in front of the jury in a military uniform "tends to pull on the heart strings of some members of the jury," and that "just the sight of somebody in a camouflage uniform in today's climate leads to something else [in the minds of the jurors, and may prevent the jury from] just simply hearing a case on its facts and coming to a jury decision on the merits.**” Trial courts are vested with "broad discretionary powers in supervising the selection of jurors," and these powers include the power to limit the extent of examination of potential jurors. State v. Fransua, 85 N.M. 173, 176, 510 P.2d 106, 109 (Ct.App.1973). We hold that the court in this case acted within its discretion in determining that **Defendant's appearance in uniform could unfairly prejudice the jury and that voir dire and instructions to the jury would be less effective methods of eliminating this prejudice than ordering Defendant to appear in**

³⁴ It appears that Graham was on Active Duty in the Navy.

³⁵ There is no indication that Marquez as a part of the National Guard was on Active Duty.

civilian clothes.” State v. Marquez, 193 P.3d 578, 2008 NMCA 133 (N.M. App., 2008) (emphasis added by author).

In Galmore v. State, 467 N.E.2d 1173 (Ind., 1984), the court allowed the victim to testify in military uniform, objected to by defendant and considered on appeal. The court of appeals found that the victim was not in the military during the offense³⁶, had recently joined, and allowed it.³⁷

In Tague v. Molitor Motor Co., 139 Ill.App.3d 313, 487 N.E.2d 436 (Ill.App. 5 Dist., 1985), the court apparently had no problem with the plaintiff who was on active duty wearing his military uniform at civil trial.³⁸

In State v. Newman, 2004 WY 41 (Wyo. 4/19/2004), 2004 WY 41 (Wyo., 2004), decided on other facts, the judge in the trial court stated that “whether or not Mr. Newman was entitled to wear his uniform was an issue for the military, not the state district court.”

GENERAL MILITARY DISCUSSION:

For any branch of the Armed Forces³⁹, there are various different areas of law for which a service member (SM) must look to in determining whether they can wear their uniform to civilian court. For those not on Active Duty, Title 10, section 772 generally discusses when such is authorized subject to other regulations.⁴⁰ First, as a general matter, it

³⁶ The court did not reflect or apparently consider whether the victim was on Active Duty but since the court did not refer to the victim as a reservist this author generally believes that the victim probably was a active duty.

³⁷ “The record shows that the jury was clearly informed that the victim had joined the military six weeks prior to the date of the trial and that he was not in the service at the time the instant offenses occurred. It is well settled that the manner in which a trial is conducted is generally a matter within the discretion of the trial court. Whitacre v. State, (1980) Ind., 412 N.E.2d 1202; Brown v. State, (1971) 256 Ind. 444, 269 N.E.2d 377. Defendant has presented only his own conclusions as to the effect of the victim's appearance at trial in his military uniform. In other cases, we have found no error in the appearance of police officers in uniform, Brown v. State, 256 Ind. at 446, 269 N.E.2d at 378.” Galmore v. State, 467 N.E.2d 1173 (Ind., 1984).

³⁸ The decent addressed the uniform issue, somewhat collaterally in saying that “The plaintiff was dressed in his military uniform, as he had a perfect right to be since he was on active duty with the armed forces, and had just returned from participation in the then recent invasion of Grenada by the United States Armed Forces”

³⁹ Article 1, Section 8 of the US Constitution generally discusses the establishment and maintenance and or training of the active military and the Militia. For Oregon, Article X, Section 1 states: “The Legislative Assembly shall provide by law for the organization, maintenance and discipline of a state militia for the defense and protection of the State. [Constitution of 1859; Amendment proposed by H.J.R. 5, 1961, and adopted by the people Nov. 6, 1962]”

⁴⁰ Sec. 772. When wearing by persons not on active duty authorized

(a) A member of the Army National Guard or the Air National Guard may wear the uniform prescribed for the Army National Guard or the Air National Guard, as the case may be. (b) A member of the Naval Militia may wear the uniform prescribed for the Naval Militia. (c) A retired officer of the Army, Navy, Air Force, or Marine Corps may bear the title and wear the uniform of his retired grade. (d) A person who is discharged honorably or under honorable conditions from the Army, Navy, Air Force, or Marine Corps may wear his uniform while going from the place of discharge to his home, within three months after his discharge. (e) A person not on active duty who served honorably in time of war in the Army, Navy, Air Force, or Marine Corps may bear the title, and, when authorized by regulations prescribed by the President, wear the uniform, of the highest grade held by him

must be understood that there are Federal ‘Title 10’ military and State National Guard or ‘Title 32’ Army and Air Force personnel, who are under the control then of the Governor as the Commander in Chief of that State or Territory Militia⁴¹. Typically, Army and Air Force regulations also apply to the National Guard but not always. Moreover, for those in Title 10 status they are subject to the Uniform Code of Military Justice (UCMJ)⁴² and subject to disciplinary action by their commanding officers or even Courts-Martial⁴³. For those in Title 32 status they are subject to discipline under their State Military Code and each state and territory has its own version. Such members of the National Guard unless part of the Active Guard & Reserve (AGR) program and full time, are part time Citizen Soldiers who are not entitled to a annual salary⁴⁴, and therefore only earn pay and ‘benefits’ from time they are required to serve. Underlying their code though are the service regulations and policies published by the commanders of the State National Guard, or of the Active Duty (AD) military unit or command, Service Branch, or the Department of Defense.

during that war. (f) While portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force. (g) An officer or resident of a veterans' home administered by the Department of Veterans Affairs may wear such uniform as the Secretary of the military department concerned may prescribe. (h) While attending a course of military instruction conducted by the Army, Navy, Air Force, or Marine Corps, a civilian may wear the uniform prescribed by that armed force if the wear of such uniform is specifically authorized under regulations prescribed by the Secretary of the military department concerned. (i) Under such regulations as the Secretary of the Air Force may prescribe, a citizen of a foreign country who graduates from an Air Force school may wear the appropriate aviation badges of the Air Force. (j) A person in any of the following categories may wear the uniform prescribed for that category: (1) Members of the Boy Scouts of America. (2) Members of any other organization designated by the Secretary of a military department.

-SOURCE- (Aug. 10, 1956, ch. 1041, 70A Stat. 35; Pub. L. 99-145, title XIII, Sec. 1301(a)(1), Nov. 8, 1985, 99 Stat. 735; Pub. L. 101-189, div. A, title XVI, Sec. 1621(a)(1), Nov. 29, 1989, 103 Stat. 1602; Pub. L. 104-201, div. A, title V, Sec. 551(b), Sept. 23, 1996, 110 Stat. 2525.)

⁴¹ For Oregon, Article X, Section 3, of the Oregon Constitution states: “The Governor, in his capacity as Commander-in-Chief of the military forces of the State, shall appoint and commission an Adjutant General. All other officers of the militia of the State shall be appointed and commissioned by the Governor upon the recommendation of the Adjutant General. [Constitution of 1859; Amendment proposed by H.J.R. 5, 1961, and adopted by the people Nov. 6, 1962]”

⁴² Title 10 United States Code (USC), Chapter 47, Section 801-940.

⁴³ Judge Advocates, the attorneys of each military service who provide legal support for that service, advise the commanders and do not have any executive or charging authority by virtue of their position as a Judge Advocate or JAG. In the military it is the commanders who make all decisions pertaining to charging a service member for an offense, whereas in the civilian justice system the District Attorney or State’s Attorney on behalf of the Attorney General, as an actor or decision maker in the executive branch makes charging decisions in conjunction with the Grand Jury process. See, Part V, Manual for Courts-Martial; Title 10, Section 815, Article 15 UCMJ; UCMJ, Title 10, Section 801, definition of ‘accuser’; Title 10, Section 822 (commanders convene courts-martial); 10 USC Section 806, Article 6, UCMJ, role of Judge Advocates.

⁴⁴ Article X, Section 4, of the Oregon Constitution describes the prohibition of holding two lucrative offices, with someone holding a other than full time position in the National Guard as a Traditional Citizen Soldier then not ‘lucrative’ and not violative of the Oregon Constitution. “Section 10 Lucrative offices; holding other offices forbidden. No person holding a lucrative office, or appointment under the United States, or under this State, shall be eligible to a seat in the Legislative Assembly; nor shall any person hold more than one lucrative office at the same time, except as in this Constition [sic] expressly permitted; Provided, that Officers in the Militia, to which there is attached no annual salary, and the Office of Post Master, where the compensation does not exceed One Hundred Dollars per annum, shall not be deemed lucrative.”

Typically, violations of Service Regulations or published policy by competent command authority can be punished under Article 92 of the UCMJ or similar code provisions in a State Military Code for violation of regulation, lawful order or dereliction of duty.

The Department of Defense (DoD) has discussed improper wear of the uniform in DoD Instruction (DoDI) 1334.1 dated 26 October 2005, states in part:

3. POLICY

It is DoD policy that:

3.1. The wearing of the uniform by members of the Armed Forces (including retired members and members of Reserve components) is prohibited under any of the following circumstances:

3.1.1. At any meeting or demonstration that is a function of, or sponsored by an organization, association, movement, group, or combination of persons that the Attorney General of the United States has designated, under Executive Order 10450 as amended (reference (c)), as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.

3.1.2. During or in connection with furthering political activities, private employment or commercial interests, when an inference of official sponsorship for the activity or interest may be drawn.

3.1.3. Except when authorized by the approval authorities in subparagraph 4.1.1., when participating in activities such as unofficial public speeches, interviews, picket lines, marches, rallies or any public demonstration, which may imply Service sanction of the cause for which the demonstration or activity is conducted.

3.1.4. When wearing of the uniform may tend to bring discredit upon the Armed Forces.

3.1.5. When specifically prohibited by regulations of the Department concerned.

In addressing this DoD requirement, each service develops their own regulations and policies. The US Navy restated this DoDI in its US Navy Uniform Regulations, Chapter 1, October 2006, Section 4, 1401 (3) (b) (1).

Army Regulation (AR) 670-1, dated 3 February 2005, applies to active and retired Army, Army National Guard of the United States (ARNGUS) and U.S. Army Reserve (USAR) personnel. The ARNGUS is made up of National Guard (NG) members not in

Federal Service⁴⁵, under the joint supervision of the National Guard Bureau, and not including directly the individual separate State National Guard. So ordinarily one can reasonably expect that a State National Guard has incorporated the current AD uniform regulation into their system.⁴⁶ The Militia of a state consists of more than merely the National Guard but not all would be subject to a state military code unless brought into the SDF.⁴⁷

Paragraph 1-10 of AR 670-01, states in part that:

j. Wearing Army uniforms is prohibited in the following situations:

- (1) In connection with the furtherance of any political or commercial interests, or when engaged in off-duty civilian employment.
- (2) When participating in public speeches, interviews, picket lines, marches, rallies, or public demonstrations, except as authorized by competent authority.
- (3) When attending any meeting or event that is a function of, or is sponsored by, an extremist organization.
- (4) When wearing the uniform would bring discredit upon the Army.
- (5) When specifically prohibited by Army regulations.

In the Oregon National Guard the State Adjutant General (TAG) has issued a policy letter that pertains to the wear of the uniform, incorporating AR 670-1 and Air Force Instruction (AFI) 36-2903⁴⁸, in the version dated 23 October 2006, and in doing so restates the policy in terms of the Oregon National Guard. AFI 36-2903, dated 2 August 2006, table 1.3,

⁴⁵ Title 10, Section 12401 & Section 12107 (concurrent membership in the State or Territory National Guard and the National Guard of the United States as a reserve force of the United States). 10 USC 10105 “The Army National Guard of the United States is the reserve component of the Army that consists of—

- (1) federally recognized units and organizations of the Army National Guard; and
- (2) members of the Army National Guard who are also Reserves of the Army.

⁴⁶ States also typically have a ‘State Defense Force’ (SDF) whereby under authority of the State Constitution, Legislature and the Governor as the Commander in Chief, a separate ‘militia’ exists generally as a reserve force to the National Guard but not Federally recognized. Such members of the SDF or whatever name a particular state gives to its own militia carry and hold military rank generally as authorized by their military department, that being a branch of the State Government under which the National Guard and The Adjutant General (TAG) supervises and manages the functions of running the State Militia and the National Guard for that State or Territory.

⁴⁷ Title 10, Sec. 311. Militia: composition and classes

- (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
- (b) The classes of the militia are - (1) the organized militia, which consists of the National Guard and the Naval Militia; and (2) the unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

-SOURCE- (Aug. 10, 1956, ch. 1041, 70A Stat. 14; Pub. L. 85-861, Sec. 1(7), Sept. 2, 1958, 72 Stat. 1439; Pub. L. 103-160, div. A, title V, Sec. 524(a), Nov. 30, 1993, 107 Stat. 1656.)

⁴⁸ “This instruction implements Department of Defense Instruction (DoDI) 1334.1, Wearing of the Uniform, 26 October 2005, Department of Defense Directive (DoDD) 1300.17, Accommodation of Religious Practices Within the Military Services, 3 February 1988; and Air Force Policy Directive 36-29, Military Standards. It applies to all active duty Air Force members, members of the United States Air Force Reserve (USAFR), and members of the Air National Guard (ANG).”

is the one service regulation known to directly discuss civilian court proceedings in saying in part that wearing the uniform is prohibited “participating in civilian court proceedings when the conviction would bring discredit--at the discretion of installation commander.”⁴⁹

The US Marine Corps (USMC) has established regulations that are similar and under MCO P1020.34, it states in part that:

1003. RESTRICTIONS ON WEARING UNIFORMS

1. Members of the Marine Corps and Marine Corps Reserve, including retired Marines, are prohibited from wearing the Marine Corps uniform while engaged in any of the following activities, functions or circumstances unless specifically authorized by the CMC (Public Affairs(PA)):

- a. Soliciting funds for any purpose from the public outside of a military base or establishment.
- b. Participating in any type of show or event which is commercially sponsored for advertising purposes, where it could be implied or construed that the Marine Corps "endorses" the product advertised.
- c. "Endorsing" commercial products in such ways as to involve the uniform, title, grade or rate, or in any way establish or imply their military affiliation with such products.
- d. Appearing or participating in any event in public that would compromise the dignity of the uniform.

Under the USMC regulation, violation of it is declared punitive and so can be charged under the UCMJ.⁵⁰

CONCLUSION:

Status. If a service member is active duty, the court should presume that they can wear their dress uniform in court, at the risk of their own personal violation of the military code. If the service member is a reservist, then unless they are in a ‘duty status’, or retiree or war veteran, then their wear of the uniform is more suspicious and less of their ‘duty’ and more of a ‘statement’. For those who are in a duty status, whether their commanding officer (not merely a supervisor but the commander who can give them an Article 15 (non-judicial punishment or NJP) authorized them knowing of the facts and circumstances of the wear can also impact on the intent of the wearer though it is really the unspoken statement being made in

⁴⁹ Of note, the AFI appears to not follow the DoDI instruction, specifically “3.1.4. When wearing of the uniform may tend to bring discredit upon the Armed Forces”, though the Oregon command policy incorporates this intent to broaden the possible prohibition.

⁵⁰ Chapter 1 of these regulations is a punitive order. Violation of the specific prohibitions and requirements in chapter 1 by Marine Corps or Marine Corps Reserve personnel and those of other services who wear the Marine Corps uniform may result in prosecution under the Uniform Code of Military Justice (UCMJ).

the proceeding that the court will eventually look at. Members of the Oregon National Guard must have approval of their line commander to wear the uniform in court and without that they can be prohibited by the court from wearing the uniform. For the analysis argued herein, for other than active duty personnel or reserve personnel in a duty status who have a statutory authorization to wear the uniform, an ORNG member without authority from their commander, a retiree, war veteran, or reservist not in a duty status, has less position and it is more discretionary to deny them from wearing the uniform based on the impact on the proceeding as discussed next in 'ethics'. If they are a reservist it is unlikely under most circumstances that a reservist would be appearing in a duty status⁵¹. If upon inquiry the individual does not have the status of active duty, reservist, honorable retiree or honorably serving war veteran then they likely have no status at all and should not be wearing the uniform, and would likely be violating state law, a misdemeanor.

Ethics and the implied unspoken statement of the uniform. Assuming for the moment that the service member has a statutory authorization to wear the uniform then presumptively the court should allow its wear. If the service member is not on current active status (active duty or active status reserve), then if there is a statutory authorization otherwise the court should be considering the statement that the individual is trying to make, which more presumptively is to sway the court or jury. If the individual has no statutory authorization at all for the wear then the wear is improper, the unspoken statement made by the uniform improper, and presenting it to the court very likely an unstated intent to sway the court or jury. If the court sees wearing the uniform as reflect that intent or it has the effect of such, then Oregon Rule of Professional Responsibility 3.5 comes into play.

As further discussed herein, courts have taken various positions on the wear of the uniform, that it has little extra meaning, to accepting that it has but giving it no special weight, but as the USMC regulation states “[t]he uniform represents visual evidence of the authority and responsibility vested in the individual by the United States Government⁵²” and so some credence must be given to the underlying military unspoken statement being made by the uniform itself. As argued herein, the wearing of the uniform and awards is intended to reflect the military history of the service member and essentially projects their credibility. In presenting their ‘credibility’ the Judge has the right to control the decorum of the proceedings and insure that a party is not by their actions seeking to sway the court or a jury, and can opt to not allow a uniform to be worn in court, but if allowed to, then if they choose to testify their military history in particular as reflected by the awards that they wear (or don’t wear) may create fodder for questions pertaining to credibility.

It’s still a Military Thing. Finally, whether the wearing of the military uniform by service members in civilian court is a violation of military code is outside the scope of the court’s authority. Essentially the service member is taking a risk that the wearing of the

⁵¹ Generally, to be in a duty status means to be paid for it, and generally orders will not be issued for a reservist to attend court.

⁵² MCO P1020.34, Chapter 1, Section 1000 (3). “[t]he uniform represents visual evidence of the authority and responsibility vested in the individual by the United States Government.”

uniform is in violation of the military code for which they are subject. Depending on their military 'status' at the time they may be subject to receiving disciplinary action from their command, and connected to this is whether the Judge should report a perceived violation to the service members command. If a service member is in a proper duty status, the court can still consider whether to subsequently cause a report to be made to the service members commanding officer of the appearance in court in uniform. Whether wearing the uniform is service discrediting under the circumstances is very subjective and since the military justice system is controlled by the commanders, each commander will have a different position on whether there is a violation. If the Judge believes that the action may be such, then during the judicial inquiry to determine if the SM can lawfully wear the uniform (determine status), determines that under the circumstances that the wearing of the uniform, even if allowed by the court, would be service discrediting, the Judge or the Judge's staff may report the incident to the SM's commanding officer for their consideration and disposition, or to the Post or State Judge Advocate, generally after the proceeding is concluded and no further actions are being taken on the case so that neither side can gain an advantage from the results of such a report.

Generally, if an individual has statutory authority to wear the uniform in court then they may be allowed to wear the uniform and it may be improper if they individual is on active duty or in a duty status in the reserves to deny them their statutory right. Those not in a duty status, reservists or honorably retired or war veterans with an honorable discharge, have to a lesser extent the same statutory right, but it is concluded that it weighs less than those who are currently in a duty status. The court can under ORPR 3.5 find that the action of wearing the uniform is really intended to sway the court or jury and prohibit it but it is argued that this is a high burden for anyone in a current duty status. For those not in a current duty status, their own individual need to wear the uniform is less and it is much more clear that they would be seeking to make a statement more likely in contravention of Rule 3.5. For those in the ONG if they are wearing the uniform without permission of their commanding officer then such is a statutory offense punishable under the Oregon Military Code. In any case, if someone chooses to testify in uniform they place their credibility at issue, and their military uniform and awards make an unspoken statement as to that credibility that may be inquired upon under Rules 608 and 609.