AFBCMR

Early Age Retirement for 10 U.S.C. § 688a Service

We have reviewed the application for correction of military records filed by the applicant. We conclude the applicant is not eligible for early age retirement credit under 10 U.S.C. § 12731.

Factual Background: In 2002, Congress gave the service secretaries the authority to order retired officers with aviator expertise to active duty in order to "fill staff positions normally filled by aviators on active duty" under 10 U.S.C. §688a.[1] In 2006, 10 U.S.C. § 688a was amended so that it pertained to retired "members," and not simply aviators, and changed "staff positions normally filled by aviators" to positions that were either critical or which qualified as "high-demand, low-density" capabilities.[2]

On 28 January 2008, 10 USC § 12731 was amended by the National Defense Authorization Act for Fiscal Year 2008.[3] This amendment authorized a reduction in the eligibility age for the receipt of retired pay for certain service by members of the Ready Reserve. Although 10 U.S.C. §688 is listed as qualifying service under this provision, § 688a is not.

On 6 January 2009, the Secretary of the Air Force issued a memorandum, *Voluntary Recall Programs Implementation*, to address a critical shortage in experienced rated officers. With this memo, he directed that retired regular and Retired Reserve officers be recalled under 10 U.S.C. §688a, and all other (non-retired) Reserve officers be recalled under 10 USC § 12301(d). Those officers to be recalled were to be used in a "myriad of positions to include Intelligence, Surveillance, and Reconnaissance (UAS/RC-12), rated staff and other rated requirements."

At some point prior to 2009, the applicant was involuntarily removed from the Reserve Active Status List and transferred to the Retired Reserve after completing 28 years of commissioned service.[4] On 11 August 2009, Special Order AGA-182 was promulgated, explaining that the applicant "is voluntarily ordered to extended active duty in accordance with Title 10, U.S.C. § 688a for the period from 11 September 2009 to 10 September 2011." The applicant is described in the orders as "a retired officer." The orders further state that he will not be eligible for promotion during this tour in accordance with 10 U.S.C. § 641(4),[5] and that he will "revert to retired status on 11 September 2011." His address is listed as Saint Louis, Missouri, and his assignment was to the 618 Tanker Air lift Control Center at Scott Air Force Base, Illinois (about 35 miles away from his home).

On or about 23 October 2009, the applicant began contacting ARPC/DPPRB via e-mail in an effort to determine whether or not his orders qualified for the reduced retirement pay age

[1] P.L. 107-314, § 503 (Dec. 2, 2002).
[2] P.L. 109-364, § 621 (Oct. 17, 2006).
[3] P.L. 110-181, § 647 (Jan. 28, 2008).
[4] *See*, 10 U.S.C. §§ 14507, 14514 (lieutenant colonels not selected for promotion must be placed in the Retired Reserves after 28 years of commissioned service).
[5] 10 U.S.C. § 641(4) excludes "retired officers on active duty" from 10 U.S.C. Chapter 36, "Promotion, Separation, and Involuntary Retirement of Officers on the Active-Duty List."

provisions of 10 U.S.C. § 12731(f). On 29 January 2010, the chief of Retirement Branch B at ARPC wrote back to the applicant, indicating that the applicant's active-duty tour under 10 U.S.C. § 688a would qualify for the reduced retired pay age.

On 1 September 2011, the applicant's extended active duty tour was voluntarily extended from 10 September 2011 to 10 March 2012. Those orders note that the applicant "will revert to retired status on 11 March 2012."

On 21 October 2011, however, the same branch chief who had advised the applicant that his service qualified for early retirement pay credit issued a memorandum explaining that there had been initial confusion over whether § 688a was a subsection of 10 U.S.C. § 688 or an entirely separate statute. Concluding it was a separate statute, the memorandum stated that the January 2010 e-mail opinion was incorrect, and that the tour under 10 U.S.C. § 688a would *not* qualify for the reduced retired pay age.

Upon receiving the news that ARPC no longer believed his service qualified for early receipt of retired pay, the applicant contacted U.S. Representative John M. Shimkus. SAF/LL replied in a memorandum dated 16 December 2011, explaining that HQ ARPC/JA had reviewed the applicant's request and concluded that service pursuant to 10 U.S.C. § 688a did not qualify for early retirement credit. The memorandum reiterated that there had been earlier confusion over whether § 688a was a subsection of § 688 or its own statute, and that § 688a does not qualify for credit, since it is not one of the specifically enumerated qualifying U.S. Code sections. The memorandum points out that, "to read 10 U.S.C. § 688a as qualifying service would effectively mean any active service performed for any reason during a time or war or national emergency would qualify, and this does not appear to be the intent of the law." Rep. Shimkus provided the applicant a copy of this memorandum on 16 December 2011.

About the same time, on 5 December 2011, the issue was raised in the Senate during debate over the defense authorization bill.[6] During a short colloquy, Sen. Herbert H. Kohl said, "10 U.S.C. §101(a)(13)(B) defines contingency operation to include § 688 relating to the ordering of retired members to Active Duty but does not include § 688a …. I filed an amendment to resolve this inconsistency by including mobilizations under § 688a to qualify for earlier receipt of Reserve retired pay under 10 U.S.C. § 12731(f)." Sen. Kohl then offered to withdraw the amendment if he could get clarification that service under 10 U.S.C. § 688a qualified for early retirement. Sen. Carl M. Levin, chairman of the Senate Committee on Armed Services, replied, "I agree that the authorities allowing for earlier receipt of Reserve retired pay should apply to members of the Retired Reserve called to Active Duty in support of a contingency operation to the same extent is applies to other members of the reserves." The matter was then dropped, and Sen. Kohl's amendment was withdrawn.

Case Analysis: The applicant makes two main arguments ("Case I" and "Case II"): first, he asserts he was improperly ordered to active duty under 10 U.S.C. § 688a instead of 10 U.S.C. § 12301(d); secondly, regardless of what provision he was ordered to active duty under, the Air Force induced him to volunteer for extended active duty by promising early receipt of retirement pay. We do not agree with either proposition.

[6] 157 Cong. Rec. S8179 (Dec. 5, 2011).

To support his first main argument, the applicant asserts there is a fundamental, statutory distinction between Airmen who are "retired" and those who are in the Retired Reserves. The difference between the two groups is that the members of the former are receiving retired pay, while those in the latter are waiting until they are eligible for retired pay (*i.e.*, old enough to begin receiving it). The crux of the applicant's argument is that Congress has used the terms "retired" and "Retired Reserve" in different places, and therefore the two terms must have distinct meanings. Since the applicant was in the Retired Reserves and not yet receiving retirement pay, he argues that he was not "retired," and therefore not eligible to be recalled to active duty under 10 U.S.C. § 688a, which pertains to the recall of "retired members." This argument is without merit.

There are three categories of Reserves in each branch of the service: the Ready Reserve, the Standby Reserve, and the Retired Reserve.[7] Each reservist is assigned to one of those three categories.[8] The Retired Reserve consists of reservists who "are or have been retired" under 10 U.S.C. §§ 3911, 6323 or 8911,[9] or 14 U.S.C. §291.[10] The Retired Reserves also consists of reservists "who have been transferred to the Retired Reserve, retain their status as Reserves, and are otherwise qualified."[11] Thus, the first group includes reservists that are officers who have voluntarily retired after completing 20 years of service, 10 of which has been active service as a commissioned officer. These officers are eligible for retirement pay immediately upon retirement.[12] They are also automatically transferred to the Retired Reserve regardless of their age at the time.[13] The second group includes all other reservists (officer and enlisted) who have transferred to the Retired Reserve, voluntarily or otherwise. Reservists may voluntarily apply for transfer to the Retired Reserve in various situations, such as when they have accumulated enough service to earn retirement pay (but are too young to actually start drawing it).[14] In this case, the applicant was removed – by operation of law – from the Reserve Active-Status List after completing 28 years of commissioned service.[15] He was then automatically transferred to the Retired Reserve effective 1 June 2006 by ARPC. Thus, the Retired Reserve consists of reservists who have met minimum service/point requirements for retirement. Those who have been retired under particular provisions receive retirement pay, while others are waiting until they are old enough to receive their pay. Those members of the Retired Reserve who are not yet

---

[7] 10 U.S.C. § 10141(a).
[8] *Id.*
[9] §3911 pertains to the retirement of regular or reserve Army officers with at least 20 years of service; § 6323 is for Navy and Marine Corps officers with at least 20 years of service, 10 of which has been active; § 8911 is for regular or reserve Air Force officers with at least 20 years of service, 10 of which has been active.
[10] 10 U.S.C. § 10154(1); 14 U.S.C. §291 pertains to the retirement of regular or reserve Coast Guard officers with at least 20 years of service, 10 of which has been active.
[11] 10 U.S.C. § 10154(2). Of note, this second provision originally pertained to reservists placed in the Retired Reserves "upon their request," but this language was removed by P.L. 107-107, § 517(a) (Dec. 23, 2001). Since the retirement statutes cited in § 10154(1) are all based upon officers' requests to retire, the § 10154(2) "upon their request" language was likely viewed as surplusage, potentially requiring two requests from the officer (one to retire, one to enter the retired reserve).
[12] 10 U.S.C. § 8929.
[13] *See, e.g.*, AFI 36-3203, *Service Retirements*, para. 8.4.1; AFI 36-3209, *Separation and Retirement Procedures for Air National Guard and Air Force Reserve Members*, para. 5.8.1.
[14] *See, e.g.*, AFI 36-3203, para. 8.4.2.1, AFI 36-3209, para. 5.8.2.1.
[15] 10 U.S.C. §14507.

receiving retired pay have been colloquially described as being "gray area retirees."[16] The term "gray area retiree" is not in the U.S. Code, however the term does appear in Army publications,[17] a current Air Force Instruction,[18] a superseded Air Force Instruction,[19] and periodically in proceedings before the service boards for correction of military records.[20] A more precise description of these members would be "members of the Retired Reserve not yet receiving retired pay."

The applicant argues these members of the Retired Reserve not yet receiving retired pay are not "retirees." His arguments are not persuasive.

First, he argues that 10 U.S.C. § 688 "clearly and unambiguously" states that "retired members are members already drawing retired pay." This is simply untrue. Section 688 neither makes reference to retired pay nor defines the term "retired members." The title of the section is "retired members: authority to order to active duty; duties," and § 688(a) gives the Secretary of Defense authority to order a member described in § 688(b) to active duty. Section 688(b) defines "covered members" for purposes of §688(a) as being: 1) retired regular members, 2) members in the Retired Reserve who were retired under particular time-in-service provisions such that they are receiving retired pay, and 3) members of the Fleet Reserve and Fleet Marine Corps Reserve.[21] Thus, § 688 does, in fact, only reach reservists drawing retirement pay (or Fleet Reserve retainer pay), but that does not mean § 688's coverage provision amounts to a definition of the term "retiree." For one thing, such a construction would be too narrow, as §688 omits disability retirements and early retirements which are types of military retirement. The construction would also be too broad, since it would include members of the Fleet Reserve, who are not retired.

Second, the applicant argues the early retirement credit under 10 U.S.C. § 12731(f) is inapplicable to retired members drawing retired pay – his position is essentially that retired members drawing retired pay do not need a reduced retirement age (because they are already drawing retirement). Although it's not entirely clear, the applicant also seems to be arguing that members recalled to active duty (actual "retirees" in his view) under 10 U.S.C. § 688 are not eligible for the early retirement credit. Such a reading would require one to ignore the plain language of the early-retirement statutory scheme.

Under 10 U.S.C. § 12731(a), a person is entitled to retirement pay once he or she has both performed 20 years of satisfactory service and reached the applicable eligibility age in 10 U.S.C.

---

[16] *See, e.g., Defense Logistics: Space-Available Travel Challenges May be Exacerbated if Eligibility Expands*, Government Accountability Officer, GAO-12-924R, Sept. 10, 2010; *Tricare program for "gray area" reservists coming*, Air Force News Service, Dec. 17, 2009, http://www.af.mil/news/story.asp?id=123182843; Tom McAtee, *Looking at "Gray Area" Retirement*, Naval Reserve Association News, Feb. 2007, http://www.ausn.org/Portals/0/pdfs/magazine/february-2007/looking-at-gray-area-retirement.pdf.

[17] AR 135-156, *Reserve Component General Officer Personnel Management*, para. 4-4(a)(1); DA PAM 600-4, *Army Medical Department Officer Development and Career Management*, para. 6-2(c).

[18] AFI 34-272, *Air Force Club Program*, para. 1.6.1.5.

[19] AFI 36-3001, *Issuing and Controlling Identification (ID) Cards*, Nov. 1, 1996.

[20] *See, e.g.*, Board for Correction of Naval Records, docket no. 08364-06.

[21] Fleet Reserve and Fleet Marine Corps Reserve members are entitled to "retainer pay" while not on active duty. 10 U.S.C. § 6330(c). This status is independent of the Retired Reserve. *See, e.g.*, 10 U.S.C. § 6331.

§ 12731(f). 10 U.S.C. § 12731(f)(1) sets the age for entitlement of retired pay at 60. Under 10 U.S.C. § 12731(f)(2), however, that age may be reduced in 90-day increments to as low as 50. In order to be eligible for this reduced age, the member must both 1) be a member of the Ready Reserves,[22] and 2) serve on qualifying active duty or active service after 28 January 2008.[23] Qualifying *active duty* is defined as service on active duty pursuant to a call or order to active duty under a provision of law referred to in 10 U.S.C. § 101(a)(13)(B) or §12301(d), but not §12310. 10 U.S.C. § 101(a)(13)(B) is the definition of "contingency operations," and it lists nine service provisions that fall within that definition: service under 10 U.S.C. §§ 688, 12301(a), 12302, 12304, 12304a, 12305, 12406; 10 U.S.C. Chapter 15 (§§331-335); "or any other provision of law during a war or during a national emergency declared by the President or Congress."[24] 10 U.S.C. § 12301(d) permits service secretaries to order reservists to active duty with their consent. 10 U.S.C. § 12310 – which is expressly *excluded* from the definition of qualifying active duty – covers duties typically referred to "AGR duties" which involve "organizing, administering, instructing, or training the reserve components." Qualifying *active service* is defined as National Guard service under 32 U.S.C. § 502(f), but only "for purposes of responding to a national emergency declared by the President or supported by Federal funds."[25]

In brief, the foregoing permits retirement-age reduction based upon service performed in accordance with:

- 10 U.S.C. § 668: At any time, certain retired members ordered to active duty
- 10 U.S.C. § 12301(a): During a war or national emergency declared by Congress, or when authorized by law, a Reserve component unit (or member not assigned to a unit) ordered to active duty, without the member's consent
- 10 U.S.C. §1 2302: During a national emergency declared by the President, or when authorized by law, a Ready Reserve unit (or member not assigned to a unit), without the member's consent
- 10 U.S.C. § 12304: For a named operational mission, a Selected Reserve unit (or member not assigned to a unit) or essential Individual Ready Reserve member, without the member's consent
- 10 U.S.C. § 12304a: Pursuant to a Governor's request for assistance responding to a major disaster or emergency, a Reserve unit (or member not assigned to a unit), without the member's consent
- 10 U.S.C. § 12305: During "stop loss" orders
- 10 U.S.C. § 12406: During invasion of the U.S. or rebellion against the U.S. Government
- 10 U.S.C. Chapter 15: During insurrections in States

---

[22] It should be noted here that 10 U.S.C. § 12731 expressly applies to the Ready Reserve. Members of the Retired Reserve are not part of the Ready Reserve. This calls into question whether any retirees are eligible for reduced retirement age under 10 U.S.C. § 12731, although such a conclusion would require us to ignore the inclusion of 10 U.S.C. §688 in the types of qualifying service.

[23] 10 U.S.C. § 12731(f)(2)(A).

[24] 10 U.S.C. § 688a is not affected by any of the current national emergency declarations. See OpJAGAF 2012/10, 29 August 2012, *Reduced Eligibility Age for Reserve Retirement*, for discussion of the national emergency provision and §688a.

[25] 10 U.S.C. § 12731(f)(2)(B)(ii).

- 10 U.S.C. § 12301(d): At any time, a Reserve component member ordered to active duty with consent of the member
- 32 U.S.C. § 502(f): Call to active service for the National Guard (with or without the member's consent) for purposes of responding to a national emergency declared by the President or supported by Federal funds

Thus, the early retirement age provision pertains to four general categories of servicemembers: 1) those called up for involuntary service, 2) those called up in response to extraordinary events (insurrection, invasion, national emergencies, etc.), 3) certain retirees (10 U.S.C. § 688), and 4) certain volunteers (10 U.S.C. § 12301(d)). The one enumerated exclusion from the reduction of retirement age, 10 U.S.C. § 12310, relates to Reserve component members ordered to active duty under 10 U.S.C. § 12301(d) for "organizing, administering, recruiting, instructing, or training the Reserve components." As such, § 12310 encompasses a subset of members ordered to active duty (volunteers) under § 12301(d), carving out those involved in AGR duties of organizing/ administering/recruiting/instructing/training from the larger universe of Reserve members on voluntary active duty.

In sum, 10 U.S.C. § 12731(f) provides early-retirement opportunities to members called up under statutes cited in 10 U.S.C. § 101(a)(13)(B), one of which is 10 U.S.C. §688. Therefore, retirees called up to active duty under 10 U.S.C. § 688 may be eligible for early retirement if they meet the other critera in 10 U.S.C. § 12731(f). This is based on the plain reading of the Code, and the applicant's contrary reading is simply unsupported. The applicant makes a valid point when he suggests that a reduction in the retirement age doesn't seem to provide much of a benefit to a retiree already receiving retired pay. This may be the result of Congress simply incorporating the list of provisions in the definition of "contingency operation" in 10 U.S.C. § 101(a)(13)(B) rather than specifying the qualifying provisions within 10 U.S.C. § 12731 itself. Even if Congress has included a provision that confers little tangible benefit as qualifying for early age retirement credit, that does not mean other code sections now qualify as well, and it does not help the applicant's case. In any event, as evidenced by the Secretary of the Air Force's 6 January 2009 memorandum, the conscious decision was made to recall retired rated officers to active duty under 10 U.S.C. § 688a, and not 10 U.S.C. §12301(d) or any of the other provisions specifically listed in 10 U.S.C. § 101(a)(13)(B).

The applicant goes on to argue that because the term "retired" is used in certain cases and "Retired Reserve" is used in others, "retired" must mean something different than being in the Retired Reserve. The fundamental flaw with this argument is that officers who have received active-duty retirements and are receiving retired pay (*e.g.*, under 10 U.S.C. § 8911) are expressly included in the definition of the Retired Reserve.[26] Therefore, retirees drawing retired pay are in the Retired Reserve. Moreover, all other reservists transferred to the Retired Reserve, including the so-called "gray area" retirees who are awaiting eligibility for their retired pay, are in the Retired Reserve.[27] Congress has directly explained: "Members in the Retired Reserve are in a retired status."[28] Even a plain reading of the term "Retired Reserve" results in the conclusion

[26] 10 U.S.C. §10154.
[27] *See, e.g.*, DoDI 1215.06, *Uniform Reserve, Training, and Retirement Categories*, para. 6.6.4.4 (Retired Reserve includes both members receiving and members too young to receive retirement pay).
[28] 10 U.S.C. § 10141(b).

that this branch of the reserves consists of *retirees*. Had Congress meant to define "retiree" and "retired" based on the receipt of retirement pay, we would expect to see a clear statement to that effect. Instead, Congress typically focuses on the question of entitlement to receive retired pay and not on whether a person is technically "retired" or not.[29] The applicant's own orders cite to 10 U.S.C. § 641(4), which explains that "retired officers on active duty" are not eligible for promotion. His orders also describe him as "a retired officer" and that he will "revert to retired status" at the completion of his tour. Incidentally, Congress has on at least one occasion explicitly described so-called "gray area" retirees in the U.S. Code as "retirees."[30] Even the colloquy between Senators Kohl and Levin about who should receive earlier retired pay involves Senator Kohl referring to "reserve retirees" and "retired members," while Senator Levin calls them "members of the Retired Reserve."[31] We are not inclined to impute the specific definition to the term "retired" that the applicant requests. Rather, we view all members of the Retired Reserve as being "retired," which is consistent with the U.S. Code provision: "Members in the Retired Reserve are in a retired status."[32]

Had the applicant been called to active duty under 10 U.S.C. § 688, he might have been eligible for reduced retirement age, but he was called to duty instead under 10 U.S.C. § 688a – a provision which is not included in the list of authorities referred to in 10 U.S.C. § 12731(f) (and by reference, 10 U.S.C. § 101(a)(13)(B)). These two sections are similar in certain regards, but different in others. 10 U.S.C. § 688 covers only certain members of the armed forces: retired regular members, members of the Retired Reserve who have received active retirements (*i.e.*, are receiving retirement pay), and members of the Fleet Reserve and Fleet Marine Corps Reserve. Recall service under this provision is limited to 12 months per 24-month period (although this limitation does not apply in time of war or national emergency) and does not require the member's consent. Moreover, the services are limited to having only 25 such officers on active duty at any given time, although this limit does not apply during times of war or national emergency.[33] 10 U.S.C. § 688a, on the other hand, applies to any retired member, with their explicit agreement, but only for high-demand, low-density or critical assignments. Service under this provision has no time limit, but the services are limited to having only 1,000 such members on active duty at any one time. The provision is also temporary – it lasted from 2 December 2002 to 31 December 2011. 10 U.S.C. § 688a has existed since 2002 – well before the 2008 amendments to 10 U.S.C. §12731, giving rise to the early-retirement scheme. There is a good reason why the applicant was called to active duty under 10 U.S.C. § 688a and not § 688, and that is the fact he was ineligible under § 688, since that provision only applies to members receiving retired pay and retired under specific authorities. 10 U.S.C. §688a, on the other hand, applies to all "retired members," regardless of what authority they retired under. As explained

---

[29] *See, e.g.,* 10 U.S.C. § 642(b) ("An officer who is retired under this chapter is entitled to retired pay …"); 10 U.S.C. § 1045(d)(1) ("…any member or former member entitled to retired or retainer pay…"); 10 U.S.C. § 1074(b)(1) ("…a member or former member of a uniformed service who is entitled to retired or retainer pay …"); 10 U.S.C. § 1315 ("A member of the armed forces retired under this chapter is entitled to retired pay …"); 10 U.S.C. § 2481 ("…members of the uniformed services entitled to retired pay …"); 10 U.S.C. §10145(d) ("…a member of the Retired Reserve entitled to retired pay…").

[30] *See,* 10 U.S.C. § 1063(c) ("Reserve retirees under age 60. A member or former member of a reserve component under 60 years of age who, but for age, would be eligible for retired pay …").

[31] 157 Cong. Rec. S8179, Dec. 5, 2011.

[32] 10 U.S.C. § 10141.

[33] 10 U.S.C. § 690.

above, the applicant was removed from the active service list by operation of 10 U.S.C. § 14507 – a provision not listed in 10 U.S.C. § 688 – and then placed in the Retired Reserve.

Had Congress intended to include 10 U.S.C. § 688a as service entitling a member to early retirement eligibility, it certainly could have done so. Instead, the amendment that would have brought 10 U.S.C. § 688a under the umbrella of 10 U.S.C. §12731(f) was withdrawn and never enacted into law.[34] We do not see anything legally deficient in the applicant being recalled to active duty under 10 U.S.C. § 688a. We also find that service pursuant to 10 U.S.C. § 688a is not creditable toward a reduced retirement age.

The applicant's second main argument ("Case II") is that the Secretary of the Air Force entered into a contractual obligation with the applicant to grant him early retirement credit under 10 U.S.C. § 12731(f).[35] He assumes, for the sake of this argument, that 10 U.S.C. § 688a *is* a permissible ground for recalling him to active duty as a retiree.[36] His proposed remedy for this alleged transgression is for the Air Force to pay him a bonus under 37 U.S.C. § 329. We disagree.

Despite repeated references to "contractual obligations" to award him early retirement credit, the applicant has not produced a written contract or alleged an oral contract of any sort. We are unaware of any contract pertinent to this case. It appears the applicant is essentially arguing that he was induced to consent to recall to active duty under false pretenses (those pretenses being that he would receive early retirement credit for his service). This is really a claim of equitable estoppel: that the Government should be required to reimburse the applicant based upon the erroneous advice he received from a Government employee. The theory has a long history in American jurisprudence, and it cuts squarely against the applicant. The rule is that the Government cannot be bound by mistaken representations of its agents, unless "the representations were within the scope of the agent's authority."[37] The Supreme Court has refused to extend the doctrine to a situation where a payment would be required that has not been appropriated by Congress.[38] This is the case even when a person relies on erroneous advice given by a Government agent.[39] The upshot is that a Government agent cannot bind the Government to an agreement to pay funds which are not specifically authorized by law, and the

---

[34] The applicant points to *State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1116 (8th Cir. 1973) for the proposition that "sense of Congress" language "can be useful in resolving ambiguities in statutory construction. *State Highway Commission* deals with a House Report setting out the "sense of Congress" on a Federal Highway Act. The colloquy between Senators Kohl and Levin is not a "sense of Congress" by any stretch of the imagination – it is simply a short discussion between two senators. Although the discussion is illustrative in setting out Senator Kohl's and Senator Levin's understanding of the law, the fact Senator Kohl withdrew his amendment is open to various interpretations and cannot be imputed to Congress at large.

[35] The applicant phrases it thusly: "Reserve members were highly incentivized and encouraged to volunteer for and to complete recall tours of active duty by the highly attractive lure of a reduced retirement age and must be granted such by the SECAF as a matter of contractual obligation."

[36] Even though this position is entirely inconsistent with the foundation he bases his first main argument on, we will address the merits of this position.

[37] *See, e.g., Office of Personnel Management v. Richmond*, 496 U.S. 414, 420 (1990) (citing *The Floyd Acceptances*, 7 Wall. 666, 19 L.Ed. 169 (1869)).

[38] *Richmond*, 496 U.S. at 424.

[39] *Id.* at 429.

applicant in this case may not subvert the Appropriations Clause by virtue of receiving erroneous advice.

Even if we were to leave the legal principle of estoppel aside, the equitable evidence presented by the applicant is not particularly helpful to his cause. First, he points to DoDI 1215.07, *Service Credit for Reserve Retirement*, 18 November 2005. Paragraph 6.5.2.2 of this DoDI lists out the authorities qualifying for reduced eligibility age credit – 10 U.S.C. § 688 is listed, but 10 U.S.C. § 688a is not. The applicant also points to a PowerPoint presentation apparently given by HQ USAF/RES on 11 December 2008 (we do not know where the presentation came from, who gave it, or for what audience it was intended). Similar to the DoDI, this presentation also lists the applicable authorities for reduced eligibility age credit – 10 U.S.C. § 688a is not among them. The presentation also warns: "With a great benefit comes great responsibility … Reservists should ensure all active duty orders specify authorizing section of law, i.e., Auth: Title 10 U.S.C., Section 12301(d)." Notably, the applicant does not assert he saw either the DoDI or the PowerPoint presentation prior to volunteering to serve on active duty. Even if he had so asserted, neither document would have led him to believe that service under 10 U.S.C. § 688a would provide him the credit he is seeking.

We readily acknowledge that the laws governing the Reserve personnel system, along with the implementing regulations, are complex and scattered among numerous authorities. Nonetheless, if the applicant is going to allege he was deceived into coming on active duty, he needs to support that allegation with much greater evidence than by pointing to two documents that he may or may not have reviewed and which, in any event, do not support his position.

The applicant did attempt to clarify whether his service would count towards early retirement. In fact, he started attempting to clarify this shortly after coming on active duty. The conclusion that we draw from this is not that he was misled when he came on to active duty, but that he was unsure whether his service would qualify or not, and he was actively trying to figure that out. A more prudent approach would have been to make this determination *before* volunteering to perform active service under 10 U.S.C. § 688a. Had he been told prior to volunteering that he would receive early-retirement credit, he would have a stronger argument that he was misled. Instead, it appears he started his service without a good understanding of whether his time would qualify or not.

On 11 September 2009, the applicant started a two-year active-duty tour. On 29 January 2010, HQ ARPC did erroneously tell the applicant that service under 10 U.S.C. §688a qualified for early retirement credit. On 1 September 2011, the applicant's orders were amended to extend his tour by six months to 10 March 2012. On 21 October 2011, HQ ARPC corrected their earlier opinion. Based upon this timing, we would agree that the six-month extension was entered into while the applicant relied on incorrect information from HQ ARPC. In other words, his equitable argument for receiving credit for the six-month extension is far stronger than the argument for his original two-year orders. We have not been presented with any evidence that the applicant sought to curtail his orders once he was told he did not qualify for early age retirement credit, which undercuts his argument that he was only serving because he hoped to earn an early retirement.

The applicant goes to some length to justify his proposed remedy: an after-the-fact incentive bonus under 37 U.S.C. § 329. Although novel, 37 U.S.C. § 329 is not an available vehicle to authorize the remedy the applicant suggests. 37 U.S.C. § 329 authorizes incentive bonuses to be paid to retired members, former members and reservists who execute a written agreement to serve on active duty to alleviate the need for members in a high-demand, low-density or critical military capability. The bonus is limited to $50,000.[40] The problem with this proposal is that bonuses under 37 U.S.C. § 329 are contingent upon the execution of a written agreement as inducement for entering active duty. Needless to say, the applicant entered into no such agreement before serving on active duty. The written agreement is more than a mere formality, as it forms the basis for recoupment, should the member fail to complete the agreed-to service.[41] Above and beyond the requirement for a written agreement executed prior to the active-duty service, the law prohibits entering into any such agreement after 31 December 2010.[42] Because of this expiration date, the ability of the Secretary of Defense to enter into an agreement to pay a bonus or incentive under 37 U.S.C. § 329 has been foreclosed. In fact, 37 U.S.C. § 329 was unavailable in September 2011, when the applicant extended his orders under the mistaken understanding that service under 10 U.S.C. § 688a qualified for early retirement credit.

Conclusion: We do not agree with the applicant's analysis and conclusions. We conclude that he is not eligible for early age retirement credit under 10 U.S.C. § 12731.

OpJAGAF 2013/6 28 March 2013

[40] 37 U.S.C. §329(b).
[41] 37 U.S.C. §329(g), 37 U.S.C. §303a(e).
[42] 37 U.S.C. §329(j).