

# William & Mary Bill of Rights Journal

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Volume 16 (2007-2008)  
Issue 1 *Symposium: The Last Word? The  
Constitutional Implications of Presidential  
Signing Statements*

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Article 18

October 2007

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Emily Reuter

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### Repository Citation

Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 Wm. & Mary Bill Rts. J. 315 (2007), <https://scholarship.law.wm.edu/wmborj/vol16/iss1/18>

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## SECOND CLASS CITIZEN SOLDIERS: A PROPOSAL FOR GREATER FIRST AMENDMENT PROTECTIONS FOR AMERICA'S MILITARY PERSONNEL

Emily Reuter\*

“Are [the generals] free to speak? How come every time a general retires he starts trashing the president’s war policy, but doesn’t say a word until he retires? In other words, do we have to wait for retirement to hear what these guys think?”<sup>1</sup>

MSNBC’s *Hardball* host Chris Matthews posed these questions to House Majority Leader John Boehner in a September 2006 discussion on whether the United States had sufficient troops on the ground in Iraq to control growing civil violence.<sup>2</sup> Matthews’s query, raised as a challenge to the Bush administration’s willingness to incorporate military advice into Iraq military strategy, highlighted one of the effects of free speech restrictions on members of the military.

Regulations restricting the free speech of active duty military members, both inside and outside the line of duty, are not new. Congress adopted the Uniform Code of Military Justice (UCMJ) in its modern form in 1950.<sup>3</sup> The UCMJ governs all active duty military members, reservists, and, in certain circumstances, retired members.<sup>4</sup> Several UCMJ articles either directly limit free speech or serve as a means to enforce organizational policies that limit free speech.<sup>5</sup>

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\* J.D., William & Mary Law School, 2008. I would like to thank Professor Judy Youngman, U.S. Coast Guard Academy, for her support, both with this article and throughout my career. Author is a Lieutenant in the U.S. Coast Guard. The views expressed herein are those of the author and are not to be construed as official or reflecting the views of the Commandant or of the U.S. Coast Guard.

<sup>1</sup> *Hardball with Chris Matthews* (MSNBC television broadcast Sept. 27, 2006), transcript available at <http://www.msnbc.msn.com/id/15045586>.

<sup>2</sup> *Id.*

<sup>3</sup> Pub. L. No. 506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C.A. §§ 801–940 (West Supp. 2007)); see also DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 40 (6th ed. 2004).

<sup>4</sup> *MANUAL FOR COURTS-MARTIAL: UNITED STATES*, Rule 202 (2005 ed.). Under the purview of “military,” the UCMJ applies to members of the Army, Navy, Marines, Air Force, and the Coast Guard. The Coast Guard, under the Department of Homeland Security rather than the Department of Defense, is defined as a military service by law in 14 U.S.C.A. § 1 (West Supp. 2007).

<sup>5</sup> Uniform Code of Military Justice [hereinafter UCMJ] art. 88, 10 U.S.C. § 888 (Supp. II 2002) (“Contempt toward officials”); UCMJ art. 92, 10 U.S.C. § 892 (2000) (“Failure to obey order or regulation”); UCMJ art. 133, 10 U.S.C. § 933 (2000) (“Conduct unbecoming an officer and a gentleman”); UCMJ art. 134, 10 U.S.C. § 934 (2000) (“General article,” which includes service-discrediting conduct).

These restrictions traditionally go unnoticed during times of relative peace but receive more scrutiny during conflicts. The last flurry of challenges to restrictive military speech policies occurred during the Vietnam War.<sup>6</sup> As the Iraq War grows increasingly unpopular, a repeat of Vietnam-era military free speech debate threatens. The subject flared when a group of highly distinguished retired generals criticized the Bush administration's handling of the conflict in 2003.<sup>7</sup> Former ground commanders in Iraq and even active duty military members, speaking on the condition of anonymity, publicly challenged former Secretary of Defense Donald Rumsfeld's ability to successfully lead the military and questioned administration strategy.<sup>8</sup>

The debate over free speech in the military is also highlighted by public scrutiny of other military-specific First Amendment restrictions. Focus on the highly contentious "Don't Ask, Don't Tell" policy on homosexuality catapulted the name of Navy Petty Officer 1st Class Rhonda Davis into national headlines when she was discharged from the Navy for wearing her uniform to a same-sex marriage support rally and announcing on a radio interview that she was gay.<sup>9</sup> Christian groups, especially evangelical Christians, are also pressuring the military to ease restrictions on the content of prayers given at military functions.<sup>10</sup> These arguments are countered with concerns over the separation of church and state and the freedom not to worship.<sup>11</sup>

The military response to charges of First Amendment violations is consistent. Defenders argue that the UCMJ and military policies implemented under it exist "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and

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<sup>6</sup> John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 304 (1998).

<sup>7</sup> Jim Rutenberg, *Ex-Generals Defend Their Blunt Comments*, N.Y. TIMES, Apr. 2, 2003, at B1. Retired generals continue to criticize war strategy, oftentimes in groups. Fred Kaplan, *Challenging the Generals*, N.Y. TIMES MAG., Aug. 26, 2007, at 34, 37.

<sup>8</sup> David S. Cloud & Eric Schmitt, *More Retired Generals Call for Rumsfeld's Resignation*, N.Y. TIMES, Apr. 14, 2006, at A1.

<sup>9</sup> Davis was discharged after ten years of exemplary service. Vince Little, *Ex-AFN Host Is Discharged from Navy for "Don't Ask, Don't Tell" Violation*, STARS & STRIPES, July 31, 2006, available at <http://www.estripes.com/article.asp?section=104&article=38075&archive=true>.

<sup>10</sup> Alan Cooperman, *Fasting Chaplain Declares Victory*, WASH. POST, Jan. 10, 2006, at A13 (describing the efforts of evangelical naval chaplain Lieutenant Gordon Klingenschmitt to get the Bush administration to sign an executive order allowing military chaplains to pray "in the name of Jesus").

<sup>11</sup> Press Release, Americans United for Separation of Church and State, Americans United Warns Military Officials Not to Promote Graham Evangelistic Rally (Aug. 8, 2005), available at <http://www.au.org/site/PageServer?pagename=press> (follow "2005" press archive hyperlink, then follow "August" hyperlink, then follow hyperlink with article's name) (urging the military not to promote a seminar hosted by the Billy Graham Evangelistic Association on "Serving God and Country" because it favors one religion over another and is an unconstitutional governmental promotion of religion).

thereby to strengthen the national security of the United States.”<sup>12</sup> When service-members seek relief in the federal court system, the courts overwhelmingly defer to the military’s judgment.<sup>13</sup> The Supreme Court labeled the military a special community.<sup>14</sup> The judiciary is reluctant to determine whether a military policy violates the First Amendment because the issue ultimately requires an analysis of whether the policy itself is so vital to military operations that it justifies the restraint on First Amendment freedoms—something the courts consider themselves unqualified to do.<sup>15</sup> Courts are quick to point out that the Constitution specifically gives control of the military to the President as the Commander in Chief<sup>16</sup> and grants Congress oversight responsibility for maintenance and regulation of the military.<sup>17</sup> As a result, rather than examine the claims under the traditional First Amendment framework, the courts essentially analyze First Amendment complaints made against the military with a rational basis test and uphold the military regulations.<sup>18</sup>

This Note argues that although deference may be constitutionally given to the military by the courts, Congress and military leaders have an obligation to protect the First Amendment rights of servicemembers. Deference is not the equivalent of a blank check for the military to make policies that suppress First Amendment rights—specifically that of free speech—for convenient organizational control. Military judges, who have the specialized military knowledge that federal courts lack, should perform traditional First Amendment analysis within the military justice context when faced with cases involving free speech. Federal courts, though they may not be competent to review the substantive merits of a military court’s decision, should review appealed cases to ensure the use of appropriate legal analysis. Moreover, as the defender of a free democratic society, the military should place more emphasis on protecting the First Amendment rights of its members. The military can provide such protection by carefully scrutinizing policies that restrict First Amendment freedoms and by making the punishment for violating a policy that restricts what is normally a First Amendment freedom an administrative rather than criminal consequence under the UCMJ.

Part I of this Note provides a brief history of the purpose and creation of the modern UCMJ, a discussion of the UCMJ articles used to limit speech, examples of

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<sup>12</sup> MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, Part I(3) (describing the nature and purpose of military law).

<sup>13</sup> See, e.g., Kalyani Robbins, *Framers’ Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 OR. L. REV. 767, 775 (1999) (reciting a paragraph’s worth of Constitutional challenges made against military policy where the Supreme Court gave deference to the military’s judgment).

<sup>14</sup> *Parker v. Levy*, 417 U.S. 733, 744 (1974).

<sup>15</sup> MARCIA. HAMILTON, *GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW* 169 (2005).

<sup>16</sup> U.S. CONST. art. II, § 2.

<sup>17</sup> *Id.* art. I, § 8, cl. 12–14.

<sup>18</sup> Robbins, *supra* note 13, at 769–70.

military organizational policies that restrict speech, and an examination of the cultural impact of those regulations. Part II establishes the general principles recognizing constitutional rights of troops, describes traditional judicial First Amendment analysis, and contrasts civilian First Amendment analysis with judicial treatment of servicemembers' First Amendment claims. Part III proposes recommendations that Congress and the military should implement to better protect the First Amendment rights of service personnel. Part III also includes a discussion of the benefits of proactively protecting speech rights for the military and Congress.

## I. UNIFORM CODE OF MILITARY JUSTICE

### A. History

Nineteenth-century military codes were narrowly tailored to military-specific transgressions.<sup>19</sup> Original military law did not encompass the wide breadth of offenses, many of which overlap with civilian criminal offenses, that are included in the modern UCMJ.<sup>20</sup> The first major focus on reforming military law into a more comprehensive code that included criminal law occurred after World War I.<sup>21</sup> Army Brigadier General Samuel T. Ansell, the senior assistant in the office of the Judge Advocate General, led the reform movement.<sup>22</sup> Ansell theorized that legitimate military order could be preserved only if servicemembers were treated justly and believed that their superiors would administer discipline fairly.<sup>23</sup> He philosophized that military leaders could preserve their service's integrity by promoting morals in the troops through "appeal[ing] to . . . the sense of self-respect and the principles of citizenship upon which our patriotism rests."<sup>24</sup>

Army Major General Enoch H. Crowder, Judge Advocate General at the end of World War I,<sup>25</sup> vehemently contested Ansell's contention that "the soldier should retain his rights as a citizen when he [takes] up arms in the service of his country."<sup>26</sup> Crowder argued that "the real purpose of the court-martial is to enable commanders

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<sup>19</sup> WILLIAM T. GENEROUS, JR., *SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE* 167 (1973).

<sup>20</sup> *See id.*

<sup>21</sup> Fredric I. Lederer & Barbara Hundley Zelif, *Needed: An Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, in *EVOLVING MILITARY JUSTICE* 27, 31 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002).

<sup>22</sup> JOHN M. LINDLEY, "A SOLDIER IS ALSO A CITIZEN": THE CONTROVERSY OVER MILITARY JUSTICE, 1917-1920, at 2 (1990).

<sup>23</sup> *Id.* at 182.

<sup>24</sup> *Id.* at 182-83.

<sup>25</sup> *Id.* at 2.

<sup>26</sup> *Id.* at 211.

to insure discipline in their forces.”<sup>27</sup> The War Department, concurring with Crowder, believed courts-martial should be controlled by experts in soldiering and discipline, rather than legal professionals.<sup>28</sup> Without the support of the War Department, Congress did not embrace Ansell’s progressive ideas.<sup>29</sup>

Public criticism of the military justice system during World War II inspired renewed efforts to overhaul military law.<sup>30</sup> The philosophies behind Ansell’s and Crowder’s original debate again clashed, but reformers reached a compromise between command control concerns and traditional notions of justice.<sup>31</sup> Congress, incorporating many of Ansell’s ideas, approved the modern UCMJ in 1950.<sup>32</sup> Despite a much improved military justice system,<sup>33</sup> the present-day debate over protecting First Amendment rights of servicemembers echoes the original Ansell-Crowder question: should servicemembers be treated as citizens, with emphasis on protecting their constitutional rights within the military framework, or are they at the mercy of decisions a commander deems are the best way to preserve military discipline? Certainly, the answer is a balance between the two positions. The struggle is to find and uniformly enforce that balance.

### *B. UCMJ Articles*

There are four main articles in the modern UCMJ used to curtail free speech: Article 88, “Contempt toward officials”;<sup>34</sup> Article 92, “Failure to obey order or regulation”;<sup>35</sup> Article 133, “Conduct unbecoming an officer and a gentleman”;<sup>36</sup> and Article 134, “General article.”<sup>37</sup>

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<sup>27</sup> *Id.* at 165.

<sup>28</sup> *Id.* at 165–66.

<sup>29</sup> *Id.* at 175.

<sup>30</sup> GENEROUS, *supra* note 19, at 14–15. The large number of men in the military, including many who were drafted involuntarily, produced over two million court-martial convictions during World War II. Many of these convictions were considered “harsh and inconsistent,” and the personnel who ran them “were so often grossly inexperienced that results were frequently a shame and a sham.” *Id.* at 15.

<sup>31</sup> *Id.* at 50–51.

<sup>32</sup> LINDLEY, *supra* note 22, at 2.

<sup>33</sup> The modern UCMJ incorporated qualification requirements for presiding officials, as well as many of the procedural due process rights found in the civilian justice system, including protections against self-incrimination and access to civilian appellate review. Andrew S. Effron, *The Fiftieth Anniversary of the UCMJ: The Legacy of the 1948 Amendments*, in *EVOLVING MILITARY JUSTICE*, *supra* note 21, at 171–72. Subsequent Supreme Court rulings further extended civilian procedural due process rights to military members. *See infra* Part II-A.

<sup>34</sup> 10 U.S.C. § 888 (Supp. II 2002).

<sup>35</sup> 10 U.S.C. § 892 (2000).

<sup>36</sup> *Id.* § 933.

<sup>37</sup> *Id.* § 934.

Article 88<sup>38</sup> is the article most offensive to the First Amendment. Article 88 applies only to commissioned officers and includes comments made during off-duty hours as well as comments made while in uniform.<sup>39</sup> Article 88's application is so broad that even an expression of personal opinion by an officer to his spouse, while in their home, regarding, for example, his thoughts that the President made a poor decision in a specific military operation could lead to prosecution.<sup>40</sup> In academia, Article 88 is challenged as unconstitutionally vague, overly broad (statements made in an official and private capacity), and overly narrow (the Article applies only to commissioned officers).<sup>41</sup>

Only one officer has been convicted at general court-martial under Article 88.<sup>42</sup> The court in *United States v. Howe* found Army Lieutenant Henry Howe guilty of violating Article 88 when he participated in a peace rally.<sup>43</sup> Howe went to the rally while off-duty.<sup>44</sup> He wore civilian clothes and carried a sign that advocated withdrawal of troops from Vietnam and voting out President Johnson.<sup>45</sup> Howe was sentenced to hard labor for a year, required to forfeit all pay and allowances, and discharged from the Army.<sup>46</sup> In a similar recent case, Army Lieutenant Ehren Watada was charged, in part, with two counts of Article 88 for statements made in conjunction with his refusal to deploy to Iraq because he believed the war was illegal.<sup>47</sup> The Army

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<sup>38</sup> The statute reads:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

10 U.S.C. § 888 (Supp. II 2002).

<sup>39</sup> MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 12(c).

<sup>40</sup> See John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1737–38 (1968) (noting that although the Manual for Courts-Martial states that Article 88 should not be applied to criticism vocalized as part of a private political conversation, the exception can be applied only if the words used are “not personally contemptuous,” which is not the case in most discussions of political opinion).

<sup>41</sup> Richard W. Aldrich, Comment, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLAL. REV. 1189, 1198–1208 (1986); see also Kester, *supra* note 40, at 1697.

<sup>42</sup> Aldrich, *supra* note 41, at 1199.

<sup>43</sup> *United States v. Howe*, 37 C.M.R. 555 (A.B.R. 1966).

<sup>44</sup> *Id.* at 556.

<sup>45</sup> *Id.* at 556–57.

<sup>46</sup> Kester, *supra* note 40, at 1698–99.

<sup>47</sup> Mike Barber, *Watada Lawyer Sees Slim Hopes for Acquittal*, SEATTLE POST-INTELLIGENCER, July 11, 2006, at B2. The Army charged Watada with Article 88 for making the following statements to the media:

“I could never conceive of our leader betraying the trust we had in him.

ultimately decided not to prosecute Watada under Article 88<sup>48</sup> but did court-martial him for two counts of Article 133, "Conduct unbecoming an officer,"<sup>49</sup> for making critical comments about the Bush administration.<sup>50</sup> The court-martial ended in a mistrial when the military judge rejected a pre-trial agreement between the parties.<sup>51</sup> Watada was scheduled to be tried again in October 2007, but a federal judge blocked the trial pending a ruling on whether a second court-martial on the same charges would constitute double jeopardy.<sup>52</sup> If Watada is convicted, he will be the first officer to be criminally punished for exercising free speech since Lieutenant Howe.

Defenders of Article 88 argue that it is "a means of ensuring civilian control of the military and of assuring among military personnel a demeanor befitting the subordinate role which the military traditionally has occupied in our society."<sup>53</sup> However, Article 88 has been used traditionally for incidents of internal military insubordination, given that the President is at the top of the military chain of command.<sup>54</sup> These cases were not situations in which the member "actually posed a serious threat to civilian authorities."<sup>55</sup> Although full court-martial for violating

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... As I read about the level of deception the Bush administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such a time-honored tradition, knowing we waged war based on a misrepresentation and lies? It was a betrayal of the trust of the American people. . . . If the President can betray my trust, it's time for me to evaluate what he's telling me to do," or words to that effect.

...  
 . . . "I was shocked and at the same time ashamed that Bush had planned to invade Iraq before the 9/11 attacks. How could I wear this . . . uniform now knowing we invaded a country for a lie?", or words to that effect.

DD Form 458, Charge Sheet, redacted copy released July 5, 2006, <http://www.lewis.army.mil/pao1/media.htm>; see also News Release, U.S. Army I Corps & Fort Lewis, Charge Sheet Lists Charges and Specifications (July 5, 2006) (on file with the *William & Mary Bill of Rights Journal*).

<sup>48</sup> Don Kramer, *Watada to Face Court-Martial*, NW. GUARDIAN, Nov. 16, 2006, available at <http://www.nwguardian.com/news/story/6235232p-5444993c.html>.

<sup>49</sup> 10 U.S.C. § 933 (2000).

<sup>50</sup> Michael Gilbert, *Watada Faces Fewer Charges*, NEWS TRIB. (Tacoma, Wash.), Jan. 30, 2007, at B1.

<sup>51</sup> William Yardley, *Mistrial for Officer Who Refused to Go to Iraq*, N.Y. TIMES, Feb. 8, 2007, at A19.

<sup>52</sup> Hal Bernton, *Federal Judge Tells Military to Halt Watada Court-Martial*, SEATTLE TIMES, Oct. 6, 2007, at A1. For more information on the Watada case, see John Kifner & Timothy Egan, *Officer Faces Court-Martial for Refusing to Deploy to Iraq*, N.Y. TIMES, July 23, 2006, at A19.

<sup>53</sup> Kester, *supra* note 40, at 1765.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1765–66.



Article 88 is unusual, the article is frequently cited for non-judicial punishment,<sup>56</sup> and its mere existence chills officers' free speech.<sup>57</sup>

Article 92, "Failure to obey order or regulation," is not a direct prohibition of speech but covers any situation where a servicemember knowingly violates a lawful general order.<sup>58</sup> Article 92 states that "[a] general order or regulation is lawful unless it is contrary to the Constitution . . . or for some other reason is beyond the authority of the official issuing it."<sup>59</sup> Orders to perform military duties or acts are presumed lawful.<sup>60</sup> However, these definitions indicate that courts, should consider whether military orders or promulgated policies suppressing free speech are lawful. The UCMJ qualifies that an "order may not, without such a valid military purpose, interfere with private rights or personal affairs."<sup>61</sup> However, the generic justification of "maintaining good order and discipline" that is accepted by the federal courts is also readily accepted with little challenge by military courts.<sup>62</sup> The focus of the

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<sup>56</sup> *Id.* at 1765. Non-judicial punishment (NJP) is an administrative discipline option available to commanding officers by the UCMJ. UCMJ art. 15, 10 U.S.C. § 815 (Supp. II 2002). Members charged with "minor" infractions of the UCMJ are afforded an administrative hearing. *Id.* § 815(e). If the commanding officer determines the member committed the offenses charged, he can award punishments that include forfeiture of pay, restriction to the military unit, and a reduction in rank. *Id.* § 815(b). The commanding officer may also dismiss the charges without prejudice. *Id.* § 815(d). Punishment awarded at NJP does not preclude the member from being court-martialed at a later date for the same offenses. *Id.* § 815(f).

<sup>57</sup> Discipline through the encouragement of non-dissent in the military's culture is reinforced by Article 88's threat of criminal sanction. Often, opinions not in complete conformity with command perspective are considered insubordinate or unprofessional. The strength of this discipline was reflected in the jury selection for the Watada court-martial. Several potential jurors, all military officers, voiced opinions that it was "odd" that an officer would question an order because it is an officer's duty to support military leadership; they also said that they did not believe there was any justifiable reason for missing a deployment. Adam Lynn, *Watada Case Draws Crowds*, NEWS TRIB. (Tacoma, Wash.), Feb. 6, 2007, at A1; see Yardley, *supra* note 51.

<sup>58</sup> The text of the statute reads:

Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

10 U.S.C. § 892 (2000).

<sup>59</sup> MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 16(c)(1)(C).

<sup>60</sup> *Id.* at ¶ 14(c)(2)(a)(I).

<sup>61</sup> *Id.* at ¶ 14(c)(2)(a)(iii).

<sup>62</sup> See, e.g., *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991) (noting that military courts follow the Supreme Court's grant of extreme deference to military necessity when examining the First Amendment rights of servicemembers).

military adjudicators is that the accused violated an order; scrutiny of whether the order or regulation's restriction of free speech is actually constitutional is lost.

A similar problem lies with the general article of the UCMJ, Article 134.<sup>63</sup> Article 134 is considered the catch-all charge because it includes "all conduct of a nature to bring discredit upon the armed forces."<sup>64</sup> Akin to Article 134, but constrained to officers and officers in training, is Article 133, "Conduct unbecoming an officer and a gentleman."<sup>65</sup> Article 133 reads, "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."<sup>66</sup> The doctrine of preemption prohibits Articles 134 and 133 from being used when one of the elements of the enumerated UCMJ offenses cannot be proven.<sup>67</sup> However, the articles are still effective tools for prosecuting speech or conduct not specifically prohibited under Articles 88 or 92 but that a local military command feels is inappropriate and thus "discrediting."

### C. Organizational Policies

In addition to its legal framework, the military also curtails free speech rights with certain organizational policies. The limitation of political speech, which is buttressed by Article 88, is one of the more prominent examples. Department of Defense (DOD) Directive 1344.10 includes a laundry list of prohibited political speech, including participating in partisan political campaigns, soliciting votes or doing research for a partisan organization, and participating "in any radio, television, or other program or group discussion as an advocate . . . of a partisan political party, candidate, or cause."<sup>68</sup> The regulations allow for a member to "express a personal

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<sup>63</sup> Article 134 states:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

10 U.S.C. § 934 (2000).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* § 933. The article clarifies that "[a]s used in this article, 'gentleman' includes both male and female commissioned officers, cadets, and midshipmen." MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 59(c)(1).

<sup>66</sup> 10 U.S.C. § 933.

<sup>67</sup> MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 60(c)(5)(a).

<sup>68</sup> Dep't of Defense Directive 1344.10, Political Activities by the Armed Forces on Active Duty 10 (Aug. 2, 2004). The U.S. Coast Guard has nearly identical regulations in UNITED STATES COAST GUARD PERSONNEL MANUAL, COMDTINST M1000.6A, Ch. 16.C (2005).

opinion on political candidates and issues,"<sup>69</sup> but such expressions cannot include "contemptuous words against the officeholders" prohibited by UCMJ Article 88.<sup>70</sup> This caveat pressures military members to express only those personal political views that support incumbent politicians.<sup>71</sup>

The military organizational structure also allows commanders to issue orders at the local level.<sup>72</sup> These orders can restrict speech as a convenient means to address local discipline concerns, even in a preemptive manner.<sup>73</sup> *Ethredge v. Hail* provides an example of a specific order that curtailed free speech on an individual base by prohibiting bumper stickers or similar expressions that "embarrass or disparage the Commander in Chief."<sup>74</sup> The plaintiff who brought the First Amendment suit was a civilian employee on the base,<sup>75</sup> but the court's reaction exemplifies the deference given to military orders. The court determined that the order was justified by the need to protect "military order and morale," because there had been an anonymous threat to break the plaintiff's truck windows due to the bumper sticker.<sup>76</sup> Commentators noted that the threat used to justify the order was illegal, and in upholding the military's order, the court was unusually willing to bow to a "heckler's veto" and disfavor the speech right.<sup>77</sup> The ability of local commanders to restrict expression for disciplinary control minimizes First Amendment freedoms because it permits speech regulation as a disciplinary tool and encourages the overly broad speech restrictions without consideration of the constitutional implications.

#### D. Effect on Military Culture

Despite such a generous delegation of regulations of personal freedoms to the military, Congress and the courts do not require a safety mechanism to protect against intentional or unwitting abuse of that delegation. The overreaching control of free speech is juxtaposed against the expectation that servicemembers should still fully engage and interact in civilian society. Military members retain their citizenship status—in fact, for some security clearances, they must revoke all other

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<sup>69</sup> Dep't of Defense Directive 1344.10, *supra* note 68, at 9.

<sup>70</sup> *Id.* at 11.

<sup>71</sup> Aldrich, *supra* note 41, at 1210.

<sup>72</sup> *See, e.g.*, 10 U.S.C. § 164 (2000) (granting combatant commanders the authority to delegate responsibilities to subordinate commands as necessary).

<sup>73</sup> *See, e.g.*, Greer v. Spock, 424 U.S. 828 (1976). The Court declared that "[t]here is nothing in the Constitution that disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command" in a case in which base regulations prohibiting partisan political speech and requiring prior approval to distribute literature were challenged. *Id.* at 840.

<sup>74</sup> 56 F.3d 1324, 1325 (11th Cir. 1995).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 1325, 1328.

<sup>77</sup> Carr, *supra* note 6, at 343.

citizenships held.<sup>78</sup> Outside enumerated limitations on political participation, military members can still vote and when off-duty they are expected to live and interact in civilian society.<sup>79</sup> Their pledge to subjugate certain rights in order to serve is done with great trust. The modern UCMJ gave servicemembers many of the constitutional protections afforded their civilian counterparts, but the Code still allows commanders at the unit level to use their discretion in applying the rules or developing policy.<sup>80</sup> All too often, this policy is a result of what the commander judges is the most effective means of achieving a perceived military need rather than an evaluation of rights protection versus the military goal.<sup>81</sup> Certainly there are situations, such as combat, that preclude commanders from making a measured analysis, but failure to perform this analysis is unjustified when dealing with free speech rights in non-urgent contexts.

One of the more disturbing examples of free speech curtailment by a local commander occurred in 1990 when the Marine Corps reassigned Sergeant Christine Hilinski from her position, reduced her salary, and gave her a negative performance report because of her testimony as a defense witness at a court-martial.<sup>82</sup> She

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<sup>78</sup> Exec. Order No. 12,968, 60 Fed. Reg. 40,245 § 3.1(b) (Aug. 2, 1995) (“[E]ligibility for access to classified information shall be granted only to employees who are United States citizens. . . .”); *see, e.g.*, Memorandum from the Sec’y of the Navy, Dep’t of the Navy personnel security program, SECNAVINST 5510.30A, G.8–G.9 (Mar. 10, 1999) (explaining that dual citizenship is an indication of a preference for a foreign country that could render the individual susceptible to sharing information or making other decisions that are harmful to the United States).

<sup>79</sup> Most military bases do not have adequate housing on base to host all members assigned to the command. Members receive a basic allowance for housing (BAH) to compensate for the increased cost of living off base. Information is distributed on how to adapt to a new community, and volunteering in the civilian community is encouraged. *See, e.g.*, UNITED STATES COAST GUARD, MEDALS AND AWARDS MANUAL, COMDTINST M1650.25C, 5-11 to -13 (2002) (describing the qualifications for Military Outstanding Volunteer Service Medal, which is awarded for exemplary volunteer involvement with the civilian community); Air Force Crossroads, Relocation, <http://www.afcrossroads.com/relocation/military.cfm> (last visited Aug. 28, 2007) (providing links to information on moving allowances, communities around military communities, and off-base housing real estate); Office of the Sec’y of Defense, Military Compensation, <http://www.defenselink.mil/militarypay/pay/bah/index.html> (last visited Aug. 28, 2007) (describing when members are entitled to BAH and providing links to BAH pay tables).

<sup>80</sup> *See* MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at Rule 5, 404–07 (discussing commanders’ options in the disposition or dismissal of charges).

<sup>81</sup> *See* Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME LAW. 396, 409–10 (1976) (noting, in a discussion of Vietnam-era military speech restrictions, that “many commanders may abuse [their] authority and . . . overreact to servicemen’s expression of unpopular views” out of a “fear[] of criticism”).

<sup>82</sup> Tamar Lewin, *Marine Sues Navy over a Demotion*, N.Y. TIMES, Jan. 2, 1990, at A16.

testified under oath that a colleague who was accused of having an inappropriate homosexual relationship with a subordinate “did a fine job” as a drill instructor.<sup>83</sup> Hilinski also testified that she did not believe homosexual behavior was acceptable between seniors and subordinates in the Marine Corps.<sup>84</sup> As a direct result of her testimony, Hilinski’s unit fired her, stating that the command lost confidence in her ability to enforce the Marine Corps rules in her role as a drill instructor.<sup>85</sup> The unit also punitively reassigned another drill instructor who testified as a character witness for the accused at the same court-martial.<sup>86</sup> The Court of Military Appeals, upon review of the original court-martial, determined that the punitive actions of Hilinski’s command were unlawful.<sup>87</sup> However, the command’s actions so negatively impacted Hilinski’s career that she resigned nearly a year before the court issued its findings.<sup>88</sup>

Although the Court of Military Appeals later determined Hilinski’s command’s actions were an unlawful restriction on her free speech, no one in her command recognized that fact when the decision was made. Hilinski’s case is a classic example of how the military’s dismissal of constitutional rights in local command decisions can result in rights violations that also destroy a member’s career. In this case, the local command’s overreaching action was not overruled by a military court until after Hilinski left the service.<sup>89</sup> In an everyday context, the knowledge that commanders can take virtually any action that could stagnate careers based on speech, even speech given truthfully under oath in a courtroom, creates an environment of tight control. This kind of control leads many members to believe that they have even fewer free speech rights than are technically provided. The federal courts’ clear deference to military policies sends a signal to military members that efforts to assert their speech rights are futile.<sup>90</sup> Not all policy restrictions on free speech are necessarily made to restrict constitutional rights, but the general lack of review means servicemembers’ rights are perhaps the most vulnerable of any legal member of American society.<sup>91</sup>

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *United States v. Jameson*, 33 M.J. 669, 675–77 (N-M.C.M.R. 1991).

<sup>88</sup> Lewin, *supra* note 82. Hilinski did successfully petition the Navy for backpay and reinstatement of her good service record. News Release, ACLU, Marine Wins Back Pay, Reinstatement, (July 31, 1990), available at [http://www.skepticfiles.org/aclu/07\\_31\\_90.htm](http://www.skepticfiles.org/aclu/07_31_90.htm).

<sup>89</sup> Lewin, *supra* note 82.

<sup>90</sup> See Jonathan Lurie, *The Role of the Federal Judiciary in the Governance of the American Military: The United States Supreme Court and “Civil Rights and Supervision” over the Armed Forces*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 405, 406 (Richard H. Kohn ed., 1991) (“Part of the reason for the paucity of cases is that relatively few have been filed.”).

<sup>91</sup> Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 861 (1987).

## II. JUDICIAL TREATMENT OF FIRST AMENDMENT CLAIMS

### A. Constitutional Rights of Servicemembers

The Founding Fathers did not indicate what they believed was the appropriate balance between military necessity and the constitutional rights of servicemembers.<sup>92</sup> Jaded from interaction with the King's army, colonists were strongly anti-military, and it is likely that the Framers' efforts focused on justifying provisions for armed forces in the Constitution and not on the extent to which the Bill of Rights should extend to individual soldiers.<sup>93</sup> However, the suspicion of a strong military indicates that the Framers did not intend for the armed forces to have autonomy immune from review by the other bodies of government, especially in the realm of justice and criminal punishments.<sup>94</sup> This assertion is further strengthened when one considers that the early American armed forces depended on citizen soldiers who took to arms in the emerging nation's defense because they were citizens, fighting for the exact freedoms and rights limited by military membership in the modern armed forces.<sup>95</sup> Indeed, the proposition that American servicemembers forfeit the very freedoms they pledge their lives to protect is perversely ironic.

As the concept of a standing army developed, the courts gradually recognized that servicemembers *were* protected by the Constitution.<sup>96</sup> Initially reluctant to even review a military case,<sup>97</sup> the Supreme Court gradually upheld Fifth and Sixth Amendment due process rights for servicemembers in military trials.<sup>98</sup> In 1938, the Supreme Court ruled that military members were entitled to Sixth Amendment protections in *Johnson v. Zerbst*.<sup>99</sup> The *Zerbst* petitioners were members of the Marine Corps who were arrested for counterfeiting money.<sup>100</sup> They filed a habeas corpus petition alleging that the military's failure to afford them counsel in a criminal trial violated their Sixth Amendment rights.<sup>101</sup> The Court agreed and expanded its own purview "by holding that if at any point during litigation the

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<sup>92</sup> See Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 472 (1989).

<sup>93</sup> See *id.*

<sup>94</sup> See Robbins, *supra* note 13, at 786.

<sup>95</sup> See LINDLEY, *supra* note 22, at 1.

<sup>96</sup> See *Burns v. Wilson*, 346 U.S. 137 (1953).

<sup>97</sup> See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82–83 (1857) (declaring that court-martial verdicts could not be reviewed by federal courts unless the military court acted outside its jurisdiction).

<sup>98</sup> See, e.g., *Johnson v. Zerbst*, 304 U.S. 458 (1938).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 459–60.

<sup>101</sup> *Id.* at 459.

defendant was deprived of some basic constitutional right, jurisdiction was lost by the court which perpetrated the denial.”<sup>102</sup> *Zerbst* provided servicemembers a recourse for the denial of constitutional rights in trial.

A plurality decision in *Burns v. Wilson*<sup>103</sup> confirmed due process rights in the military.<sup>104</sup> The plurality noted that although civil courts did not have the technical expertise to decide the necessary balance between rights and discipline in the military, they did have “the limited function . . . to determine whether the military [courts] have given fair consideration to each of [the defendant’s] claims.”<sup>105</sup> This decision established the ability of civilian courts to review military cases for questions of law.

In the latter half of the twentieth century, the federal courts consistently held that many constitutional guarantees in the civilian justice system must be present in military trials.<sup>106</sup> Although the courts are less likely to mandate specific application of constitutional rights to individual members of the military, other procedural requirements in the civil justice system, such as the reading of UCMJ Article 31(b) rights (the military version of a *Miranda* warning) are also required in the military.<sup>107</sup> Despite laying this groundwork, the Court declined to extend this philosophy to the context of First Amendment rights.

### *B. Traditional First Amendment Analysis*

Outside of the military context, government actions that curtail speech typically receive the most judicial scrutiny.<sup>108</sup> Courts apply strict scrutiny review to laws that limit speech in public forums based on content, requiring the government to prove that there is a compelling government interest to justify the law.<sup>109</sup> Courts require that regulation of content-neutral speech in public forums “be narrowly tailored to further significant or substantial government interests, and alternative means of communication must be available.”<sup>110</sup> Safeguarding free speech is a dominant focus of the Supreme Court.<sup>111</sup>

Some speech is not protected by the First Amendment. Unprotected speech usually occurs when the speech does not qualify as fulfilling one of the three

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<sup>102</sup> GENEROUS, *supra* note 19, at 168.

<sup>103</sup> 346 U.S. 137 (1953).

<sup>104</sup> GENEROUS, *supra* note 19, at 174.

<sup>105</sup> *Burns*, 346 U.S. at 144.

<sup>106</sup> Lurie, *supra* note 90, at 417.

<sup>107</sup> *See id.* at 416–17.

<sup>108</sup> C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other “Special Contexts,”* 56 U. CIN. L. REV. 779, 781 (1988).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> DANIEL A. FARBER, *THE FIRST AMENDMENT* 13 (1998).

generally accepted functions of free speech: enlightenment, self-fulfillment, or the safety valve function.<sup>112</sup> “Unprotected” speech includes fighting words, instigation of violence, defamation and libel, obscenity, and, to a certain extent, commercial advertising.<sup>113</sup> The courts also allow additional restrictions on First Amendment speech in custodial institutions including public schools<sup>114</sup> and prisons<sup>115</sup> and for public employees.<sup>116</sup> Overall, even evaluating speech, the Court demands “special clarity and precision of regulation” to justify speech restrictions, imposes “[s]pecial procedural requirements,” and provides articulate and thorough First Amendment analysis to explain its decision.<sup>117</sup>

The glaring exception to the Court’s detailed First Amendment cases is its treatment of military free speech claims. Asserting the political question doctrine or a lack of expertise, the Court consistently refuses to engage in a First Amendment analysis of how and why speech is permissibly limited in the military.<sup>118</sup>

### *C. Evolution of Court Deference to the Military*

Judicial deference in military First Amendment cases stems from a long history of deference to the military in general. One of the earliest cases in which the Court defined its reluctance to interfere with the military was *Dynes v. Hoover*.<sup>119</sup> *Dynes* involved a member of the Navy who was imprisoned after being found guilty of attempted desertion at a general court-martial.<sup>120</sup> *Dynes* sued the federal marshal who incarcerated him for trespass and false imprisonment, arguing that “attempting to desert was in fact a totally different offense than [the charged crime of] actual

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<sup>112</sup> Aldrich, *supra* note 41, at 1192.

<sup>113</sup> FARBER, *supra* note 111, at 14.

<sup>114</sup> Compare *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that schools must prove that the expression they seek to regulate substantially threatens to interrupt school activities or interferes with the rights of others), with *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988) (allowing school-sponsored activities, such as a student newspaper, to be censored by the school “so long as [the administration’s] actions are reasonably related to legitimate pedagogical concerns”).

<sup>115</sup> Prisons are essentially subject to the *Hazelwood* test but as applied to virtually all speech within their walls. FARBER, *supra* note 111, at 190; see *Thornburgh v. Abbott*, 490 U.S. 401 (1989) (allowing federal prisons to censor the receipt of outside publications that were deemed a threat to prison security); *Procunier v. Martinez*, 416 U.S. 396 (1974) (limiting the prison’s ability to regulate speech by censoring letters written by inmates).

<sup>116</sup> See *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006) (holding that there is no First Amendment protection for employees who are disciplined for speech made pursuant to their official work duties).

<sup>117</sup> Dienes, *supra* note 108, at 781–82.

<sup>118</sup> See *Robbins*, *supra* note 13, at 788–95.

<sup>119</sup> 61 U.S. (20 How.) 65 (1857).

<sup>120</sup> *Id.* at 77.



desertion . . . . Since the lesser charge did not appear to be within the specified articles of the Act to Govern the Navy, the court-martial had no jurisdiction in this case."<sup>121</sup>

The sailor's arguments were unpersuasive to the Supreme Court, which relied on Article I of the Constitution to validate Congress's power to create a military justice system unique from the civilian courts established under Article III.<sup>122</sup> The Court ruled that the decision of a general court-martial fell outside the jurisdiction of the federal courts for review unless the appellant could establish that the military court either did not have subject matter jurisdiction or, if it had jurisdiction, that the court's procedures failed to adhere to statutorily required protocol.<sup>123</sup> Despite articulating a clear test, many courts and commentators tended to omit the second part of the analysis, resulting in little relief for military appellants.<sup>124</sup>

The passage of the modern UCMJ provided servicemembers the right of civilian appellate review,<sup>125</sup> and subsequent cases established procedural due process rights for military members.<sup>126</sup> However, the Court continued its pattern of deference in *Burns v. Wilson*.<sup>127</sup> The Court in *Burns* issued four separate, somewhat cryptic opinions which recognized that servicemembers do have constitutional rights, including First Amendment protections.<sup>128</sup> However, the Justices noted that servicemembers' rights receive abridged protection based on military necessity.<sup>129</sup> The Court did not articulate when constitutional restrictions might be proper or how to review orders that abridge rights. Instead, the Court noted that Congress painstakingly developed a comprehensive military justice system and that federal courts should respect military judges' decisions.<sup>130</sup>

The Court established its explicit position of deference to the military in the realm of First Amendment rights during the Vietnam War when several military First Amendment free speech cases appeared before federal appellate courts and the Supreme Court.<sup>131</sup>

*Parker v. Levy*<sup>132</sup> was the Court's landmark decision for deference in the context of servicemembers' First Amendment rights.<sup>133</sup> Captain Levy, an Army physician, refused to train Special Forces aid men and publicly voiced his reservations about

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<sup>121</sup> Lurie, *supra* note 90, at 407.

<sup>122</sup> Lederer & Zelif, *supra* note 21, at 31.

<sup>123</sup> GENEROUS, *supra* note 19, at 165.

<sup>124</sup> *Id.* at 167.

<sup>125</sup> UCMJ art. 67, 10 U.S.C. § 867 (2000).

<sup>126</sup> See *supra* Part II-A.

<sup>127</sup> 346 U.S. 137 (1953); see *supra* notes 104–06 and accompanying text.

<sup>128</sup> Sugin, *supra* note 91, at 864 & n.62.

<sup>129</sup> *Id.* at 864.

<sup>130</sup> *Burns*, 346 U.S. at 140–42.

<sup>131</sup> See Sugin, *supra* note 91, at 865–71.

<sup>132</sup> 417 U.S. 733 (1974).

<sup>133</sup> Sugin, *supra* note 91, at 865.

the Vietnam War on base.<sup>134</sup> The Court upheld Captain Levy's court-martial conviction on charges of UCMJ Article 90, for "willfully disobeying superior commissioned officer," Article 133, for "Conduct unbecoming an officer and a gentleman," and Article 134, for acts prejudicial to good order and discipline, over the petitioner's free speech claim.<sup>135</sup>

Levy argued that Articles 133 and 134 violated the Due Process Clause by being unfairly vague and that they violated the First Amendment because they were overly broad.<sup>136</sup> The Court avoided traditional discussion of the First Amendment and instead deferred to Congress's approval of the UCMJ articles.<sup>137</sup> The Court noted the military's uniqueness from civilian society and determined that because of that difference, the standard of review for vagueness should be the same as it is for criminal codes in economic affairs.<sup>138</sup> Under the economic affairs standard, a regulation is void for vagueness only if the defendant could not reasonably determine that his actions were forbidden.<sup>139</sup>

Thus, *Parker* established a standard of review for vagueness and overbreadth challenges of military laws, albeit one that did not articulate an analytical framework to determine the constitutionality of laws and regulations challenged under the First Amendment.<sup>140</sup> Federal courts subsequently applied *Parker*'s logic that the military has the right to restrict constitutional rights, even with the most removed claims of military necessity, in cases that did not involve an overbreadth or vagueness challenge.<sup>141</sup>

Although controversy over First Amendment rights and the military quieted with the end of the Vietnam war,<sup>142</sup> the debate reemerged after the *Goldman v. Weinberger* decision in 1986.<sup>143</sup> Goldman was a Jewish Air Force captain who filed a Free Exercise complaint after the Air Force prohibited him from wearing a yarmulke because of a regulation prohibiting the wearing of headgear by members indoors.<sup>144</sup> Goldman wore the yarmulke for four years before he was specifically ordered to cease wearing it.<sup>145</sup> The specific order to stop wearing the yarmulke was given in response to the complaint of defense counsel at a court-martial where Goldman testified as a witness.<sup>146</sup> In a five to four decision, the Court upheld the

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<sup>134</sup> *Parker*, 417 U.S. at 735–37.

<sup>135</sup> *Id.* at 733–34.

<sup>136</sup> Sugin, *supra* note 91, at 866.

<sup>137</sup> *Id.*

<sup>138</sup> *Parker*, 417 U.S. at 756–57.

<sup>139</sup> *Id.* at 757.

<sup>140</sup> Sugin, *supra* note 91, at 867.

<sup>141</sup> *Id.* at 868; *see also* Bilello, *supra* note 92, at 486–87.

<sup>142</sup> Carr, *supra* note 6, at 304.

<sup>143</sup> 475 U.S. 503 (1986); HAMILTON, *supra* note 15, at 171.

<sup>144</sup> *Goldman*, 475 U.S. at 504–05.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 505.

Air Force regulation.<sup>147</sup> The majority did not address the constitutional claim and deferred, without First Amendment analysis, to the military's judgment in the need for uniformity.<sup>148</sup>

The *Goldman* decision solidified the standard that in military First Amendment cases, the Court gives only cursory treatment to "determin[ing] whether the military [courts] have given fair consideration to each of [the defendant's] claims" and emphasizes instead its generic reasoning of complete deference to the military.<sup>149</sup> As one academic observed after the *Goldman* decision:

[T]he Court has never explicitly defined the circumstances in which constriction of first amendment rights is proper, the permissible extent of the abridgment of constitutional rights, nor the governmental interest necessary to override the interest of the individual. . . . [W]hat began as a weak but substantive review has degenerated into virtually no review at all.<sup>150</sup>

If the Court upholds all military regulations that restrict free speech, do servicemembers really have First Amendment protections?<sup>151</sup> The Court's declaration that servicemembers have some First Amendment protections appears superficial given the Court's reluctance to perform any critical review of challenged military regulations or policies.<sup>152</sup> Without a clear standard of review that articulates exactly what servicemembers must prove to successfully establish a First Amendment claim, the Court discourages servicemembers from embarking on an almost certainly hopeless attempt to preserve their constitutional rights.<sup>153</sup> The Court's decisions raise the concern that "a majority of the Supreme Court has tacitly concluded that servicemembers lose the protections of the Bill of Rights for the duration of their military service."<sup>154</sup>

Servicemembers are especially unprotected, because they do not have the remedies for workplace injustices that civilians have. For example, military members who believe their constitutional rights were violated by their superior

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<sup>147</sup> *Id.* at 510.

<sup>148</sup> *Id.*

<sup>149</sup> *Burns v. Wilson*, 346 U.S. 137, 144 (1953).

<sup>150</sup> *Sugin*, *supra* note 91, at 864–65.

<sup>151</sup> *See* FARBER, *supra* note 111, at 192–93 (observing that the Court has never found a military regulation that it did not like).

<sup>152</sup> *Bilello*, *supra* note 92, at 467.

<sup>153</sup> *Id.*; *see also* *Parker v. Levy*, 417 U.S. 733, 787 (1974) (Stewart, J., dissenting) (discussing the inadequacy of the majority's deference to the military and the majority's failure to answer the real question of "whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them").

<sup>154</sup> *Bilello*, *supra* note 92, at 467.

officers cannot sue them for damages in civil court.<sup>155</sup> The Court forbade such suits because they are inappropriate in the context of unique military senior-subordinate relationships and the need for discipline.<sup>156</sup> The Court warned against civilian court interference “with the established relationship between enlisted military personnel and their superior officers”<sup>157</sup> and emphasized that the military has a system for bringing complaints against superiors.<sup>158</sup>

The Court glossed over the fact that the system for redress within the military is that a complaint must be given to a regular line officer before it is given to an officer exercising court-martial jurisdiction.<sup>159</sup> Keeping with precedent, the Court refused to examine whether the petitioner’s constitutional rights were violated or whether the Navy provided the proper means of redress.<sup>160</sup> The Court emphasized that the Constitution placed military justice oversight in the hands of Congress and that, as long as Congress did not establish a system of redress for constitutional rights violation complaints, the Court would not intervene out of respect for the separation of powers.<sup>161</sup>

### III. RECOMMENDATIONS FOR BETTER PROTECTION OF FIRST AMENDMENT RIGHTS IN THE MILITARY

#### A. *Recommendations for Change*

Frustratingly, while the courts wait for Congress to take the lead on prioritizing a rights-protection framework for military members, Congress tends to wait for a high publicity case before it shoulders that responsibility. Congress passed a law requiring an exemption for the wearing of religious headgear *after* the *Goldman* decision.<sup>162</sup> Shortly *after* a Naval Chaplain was found guilty at court-martial of disobeying an order by giving a prayer in uniform at a religious event outside the White House,<sup>163</sup> members of Congress tried to pass “a provision that would allow

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<sup>155</sup> See *Chappell v. Wallace*, 462 U.S. 296 (1983).

<sup>156</sup> *Id.* at 303–04.

<sup>157</sup> *Id.* at 300.

<sup>158</sup> *Id.* at 302–03 (citing UCMJ art. 138, 10 U.S.C. § 938 (2000) “Complaints of Wrongs”).

<sup>159</sup> *Id.* The military rank structure and focus on discipline inherently discourages complaints about a supervisor to another superior, especially when the complainant is a lower-ranked enlisted person. The control superiors have over promotion and disciplinary sanctions can discourage reports of misconduct, especially in an environment, such as a ship or otherwise deployed unit, where the complainant potentially faces months of close-quarters interaction with the very person about whom he or she is expressing concerns.

<sup>160</sup> See *id.* at 304.

<sup>161</sup> See *id.*

<sup>162</sup> HAMILTON, *supra* note 15, at 171.

<sup>163</sup> Alan Cooperman, *Navy Chaplain Guilty of Disobeying an Order*, WASH. POST, Sept. 15, 2006, at A3.

military chaplains to offer sectarian prayers at nondenominational military events.”<sup>164</sup> A reactionary Congress combined with a deferential judiciary does nothing to prevent speech violations or to improve the environment of restricted speech that permeates the military.

Despite harsh criticism for its deferential stance,<sup>165</sup> the Supreme Court is resolute in its deference to the military on First Amendment complaints of servicemembers. Congress, then, as the body to which the Constitution entrusts regulation of the military, should protect First Amendment rights within the military.<sup>166</sup> Rather than consider the protection of rights only in reaction to high profile cases, Congress should take a proactive approach and develop a framework for the protection of servicemembers’ constitutional rights.

There are three main actions Congress should take to define First Amendment rights for servicemembers and to promote First Amendment consciousness within the military: (1) promulgate guidelines to promote internal policing of expression-limiting policies within the military; (2) require military courts to do traditional First Amendment analysis, with adjustments for compelling military interest, when faced with a free speech claim; and (3) decriminalize the punishments for violation of expression-restricting policies. These changes would internally reduce over-reaching speech policies in the military, provide a legitimate framework for servicemembers to redress First Amendment violations, and avoid inflicting a criminal penalty on citizens exercising freedoms that, outside of the UCMJ, are considered legal rights.

### 1. Congressional Emphasis on Internal First Amendment Protection in the Military

To promote a greater emphasis on protecting the First Amendment rights within the military organization, Congress should mandate that military leaders consider the First Amendment as part of their decisionmaking rubric when initially formulating

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<sup>164</sup> Neela Banerjee, *Proposal on Military Chaplains and Prayer Holds Up Bill*, N.Y. TIMES, Sept. 19, 2006, at A19.

<sup>165</sup> For a representative criticism of the Court’s deference under the reasoning that it lacks military expertise, see Bilello, *supra* note 92, at 480 (noting that “[t]he federal courts are called upon daily to review . . . complex controversies [where] the extent of the court’s technical knowledge is no greater than that which can be obtained from . . . the litigants”). For a representative criticism of the Court’s continual refusal to articulate a clear standard of review for military-related First Amendment complaints, see *Goldman v. Weinberger*, 475 U.S. 503, 529–33 (1986) (O’Connor, J., dissenting) (arguing that the Court should “articulate and apply an appropriate standard . . . and should examine [the petitioner’s] claim in light of that standard”).

<sup>166</sup> The Constitution explicitly gives Congress the powers “To raise and support Armies,” “To provide and maintain a Navy,” and “To make Rules for the Government and Regulation of the land and naval Forces.” U.S. CONST. art. I, § 8, cl. 12–14.

policies and orders and when evaluating potential disciplinary infractions. Consideration of First Amendment rights when making policies or giving orders related to First Amendment issues merely requires commanders to consider the true reasons for the proposed expression-restricting policies. Unless the speech rises to the level of disrespect for the rank structure or some other articulated threat to unit effectiveness, commanders should allow the speech and exercise other leadership methods to manage the expression.<sup>167</sup> Free speech consciousness can be raised throughout military leadership through training programs.

The other internal check on overreaching speech restrictions occurs when a commander believes there is a disciplinary infraction. If the speech rises to the level of breaching military laws, then the member should be charged with the specific law, rather than hiding the content of the infringement under a general article or Article 92, "Failure to obey order or regulation."<sup>168</sup> The Watada trial again serves as an example. Lieutenant Watada's public statements, originally the basis of Article 88<sup>169</sup> charges, were incorporated into four counts of Article 133,<sup>170</sup> "Conduct unbecoming an officer and a gentleman."<sup>171</sup> Interestingly, prior to the mistrial, the military dropped two of the four counts to avoid a free-press fight with the journalists the court would have subpoenaed to prove Watada was the source of the statements.<sup>172</sup> As for the remaining charges, the military judge ruled that Watada could not present evidence as to why he believed he had the right to make his public statements.<sup>173</sup> The military can better ensure just adjudication, at least for officers, if improper speech is charged under Article 88, "Contempt towards officials," rather than under a general article.

If the expressive conduct that allegedly violates an order or a general article does not fall under Article 88, the military should still emphasize First Amendment considerations. When expressive acts are grouped into the disobedience of an order or a general article, the punitive proceedings focus on whether that order was technically disobeyed, rather than whether the order permissively prohibited speech in the first place.<sup>174</sup> By focusing solely on the technical violation of the order or

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<sup>167</sup> One method could include, simply, tolerance of the expression, especially if it is only tangentially related to the member's actual work environment.

<sup>168</sup> See UCMJ art. 133, 10 U.S.C. § 933 (2000) ("Conduct unbecoming an officer and a gentleman"); UCMJ art. 134, 10 U.S.C. § 934 (2000) ("General article," prohibiting service-discrediting conduct); UCMJ art. 92, 10 U.S.C. § 892 (2000).

<sup>169</sup> 10 U.S.C. § 888 (Supp. II 2002) ("Contempt toward officials").

<sup>170</sup> 10 U.S.C. § 933 (2000).

<sup>171</sup> Gilbert, *supra* note 50.

<sup>172</sup> See *supra* notes 47–52 and accompanying text.

<sup>173</sup> Gilbert, *supra* note 50.

<sup>174</sup> See, e.g., *United States v. Moore*, 58 M.J. 466 (C.A.A.F. 2003) (accused convicted under UCMJ Article 92, "Failure to obey order or regulation," for talking with civilian galley workers after commander ordered that military members not talk to the civilian help).

whether the action could be considered service-discrediting, unit commanders issuing non-judicial punishment forgo examining the lawfulness of the order. However, the law requires that military orders be consistent with the Constitution.<sup>175</sup> Thus, military officers adjudicating claims of an orders violation by a service-member's expressive conduct should first assess the constitutionality of the order and whether it was a permissible infringement of First Amendment rights and then—only if the order is legitimate—consider the technical violation.

Although the implementation of these internal First Amendment reviews will require a shift away from a traditional control mechanism and, for some commanders, from their leadership philosophies, the changes are relatively low-cost, high-yield cultural changes that will safeguard free speech rights. The emphasis of First Amendment considerations in non-judicial punishment disciplinary proceedings are particularly important because that is where the majority of charges for violations of the UCMJ are resolved.<sup>176</sup>

## 2. Implementation of Traditional First Amendment Analysis in Military Courts

To complement the internal focus on First Amendment rights in the military, Congress should direct the military justice system to review free speech complaints under a traditional strict scrutiny analysis. Implementing civilian free speech analysis would not be difficult for military judges because the Supreme Court has established a clear framework for the adjudication of free speech claims.<sup>177</sup> Naturally, free speech analysis done in a military context will be less deferential to the free speech advocate than traditional civilian analysis.<sup>178</sup> Due to the military's role in national defense and the discipline needed to execute that mission successfully, there are compelling government purposes that may trump First Amendment claims in a military context that normally would not prevail in a civilian context. For example, a member who criticizes a mission plan or objective in a combat-deployed unit while in the process of executing that plan or objective would likely not be protected even with a heightened standard of review.<sup>179</sup> This "military strict scrutiny" for First Amendment claims would require the military to prove that an order or policy is

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<sup>175</sup> MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 16(c)(1)(c).

<sup>176</sup> *See, e.g.*, UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, ANNUAL REPORT OF THE CODE COMMITTEE ON MILITARY JUSTICE SEC. 3 app. (2005), available at <http://www.armfor.uscourts.gov/annual/FY05AnnualReport.pdf>. The Army reported 45,299 cases of non-judicial punishment versus 1252 courts-martial for fiscal year 2005. *Id.*

<sup>177</sup> *See supra* Part II-B.

<sup>178</sup> The various tests for civilian speech tend to favor speech unless there is a narrowly tailored policy for a compelling governmental objective. *See Dienes, supra* note 108, at 782–85.

<sup>179</sup> *See Zillman & Imwinkelried, supra* note 81, at 405 (discussing the military's argument that members who protest or do not respond quickly to lawful orders in a combat zone result in an ineffective fighting force).

necessary to achieve a compelling purpose and that there is not a less restrictive alternative, but it would also allow exceptions for restrictions that have provable direct impact on military readiness.<sup>180</sup>

Requiring military courts to utilize the free speech analysis resolves many of the Supreme Court's concerns about civilian court review of military First Amendment challenges.<sup>181</sup> Military court judges are commissioned officers and are thus familiar with military operations.<sup>182</sup> There is no separation of powers or political question concern because the military would police itself at the bequest of Congress. Most importantly, requiring courts-martial to include traditional First Amendment analysis motivates the military judiciary to prioritize servicemembers' constitutional rights. Military courts will be forced to examine closely the underlying issues of why an order was disobeyed, whether that order was lawful to begin with, and whether "service discrediting" is being mistaken for uncomfortable, but not prohibited, service criticism.<sup>183</sup> The military justice system can do its own initial review of law through the United States Court of Appeals for the Armed Forces,<sup>184</sup> the civilian-staffed appellate court for the military.<sup>185</sup> Federal courts could still review an appeal of the military court's decision under a plain error or abuse of discretion standard.<sup>186</sup> The result would be a judicial check on military policy to ensure that First Amendment freedoms are preserved among the citizen soldiers of American society.

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<sup>180</sup> See *Goldman v. Weinberger*, 475 U.S. 503, 525–26 (1986) (Blackmun, J., dissenting). In his dissent, Justice Blackmun declined to establish how much the traditional test for religious freedom should be modified in the military context. In his view, the Air Force's claim that the need for uniformity justified the prohibition of wearing yarmulkes indoors failed to meet a minimal standard of a justifiable reason for refusing First Amendment protections. *Id.*; see also *Parker v. Levy*, 417 U.S. 733, 772 (1974) (Douglas, J., dissenting) (observing that a public comment about a prominent public issue cannot plausibly be construed as a detriment to military discipline).

<sup>181</sup> See Robbins, *supra* note 13, at 788–95 (discussing the Court's reluctance to decide military issues due to concerns about technical knowledge and inappropriate interference with military affairs).

<sup>182</sup> Lederer & Zeliff, *supra* note 21, at 36.

<sup>183</sup> This action complements the military's own policing the overuse of Article 92 or the general articles.

<sup>184</sup> UCMJ art. 67, 10 U.S.C. § 867 (2000).

<sup>185</sup> The United States Court of Appeals for the Armed Forces is an Article I court consisting of five civilian judges appointed by the President, with the advice and consent of the Senate, for fifteen-year terms. THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 1 (2006), available at <http://www.armfor.uscourts.gov>.

<sup>186</sup> If the United States Court of Appeals for the Armed Forces hears a case, it may be appealed directly to the Supreme Court. If the military appellate court refuses to hear a case, the case may be heard by the Supreme Court only on a collateral matter, such as a writ of habeas corpus. 28 U.S.C. § 1259 (2000); see also *supra* notes 104–06 and accompanying text.



### 3. Decriminalizing the Violation of Speech Restrictive Policies

In recognition of the First Amendment sacrifices made by servicemembers, the military should manage violations of legitimate speech-restriction policies with administrative measures rather than criminal sanctions. Certain military functions that require speech restrictions can still be enumerated as criminal UCMJ violations with clear elements, such as Article 104, "Aiding the enemy,"<sup>187</sup> or Article 134, disloyal statements.<sup>188</sup> Institutional policies that are developed to instill discipline or protect morale, but do not rise to the level of affecting immediate military necessity,<sup>189</sup> should be handled under the UCMJ's non-judicial administrative remedies.<sup>190</sup> Administrative repercussions available to military commanders include forfeiture of pay, restriction to the military unit, and a reduction in rank.<sup>191</sup> The military administrative systems do afford options for discharges, including those other than honorable.<sup>192</sup> Thus, the administrative remedies offer proportional punishment without criminalizing what is normally a protected First Amendment right.

Removing the threat of criminal sanction for speech restrictions tangentially related to military discipline and morale demonstrates an appreciation for the First Amendment rights of servicemembers.<sup>193</sup> Decriminalizing conduct that is considered a fundamental freedom for all other Americans better aligns the UCMJ with

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<sup>187</sup> 10 U.S.C.A. § 904 (West Supp. 2007). This article includes any correspondence or communication with an enemy by a member of the armed forces, regardless of the "intent, content, and method of the communication." MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 28(c)(6)(a).

<sup>188</sup> 10 U.S.C. § 934 (2000) ("General article"). "Disloyal statements" is a sub-specification available under the general article that involves "attacking the war aims of the United States, or denouncing our form of government with the intent to promote disloyalty or disaffection among members of the armed services." MANUAL FOR COURTS-MARTIAL: UNITED STATES, *supra* note 4, at pt. IV, ¶ 72(c). The difference between this article and Article 88, besides its applicability to all servicemembers, is that the disloyal statements charge is for disloyalty "to the United States as a political entity and not merely to a department or other agency that is part of its administration." *Id.*

<sup>189</sup> These policies might include base restrictions on certain speech that a commander determines is directly affecting discipline but would not include speech that rises to a specific UCMJ violation, such as urging subordinates to disregard orders in a combat zone.

<sup>190</sup> For an explanation of the military's administrative discipline system, see *supra* note 56.

<sup>191</sup> UCMJ art. 15, 10 U.S.C. § 815 (Supp. II 2002).

<sup>192</sup> *Id.* The potential for a discharge without honor in the administrative system alleviates concerns that the lack of criminal sanctions will result in less motivation for troops' obedience. See Zillman & Imwinkelried, *supra* note 81, at 404.

<sup>193</sup> See, e.g., Goldman v. Weinberger, 475 U.S. 503, 530-31 (1986) (O'Connor, J., dissenting) (arguing that instead of striking down the military petitioner's First Amendment claim, the majority should have upheld "the special importance of defending our Nation without abandoning completely the freedoms that make it worth defending").

the underlying principles of the Constitution.<sup>194</sup> Such a delineation also furthers the clarification of what constitutes a compelling military need and reduces the vagueness currently surrounding the status of servicemembers' First Amendment rights.

### *B. Authority for Recommendations*

The Constitution does not indicate how Congress should incorporate the Bill of Rights into its regulation of the military,<sup>195</sup> but it does clearly grant Congress the authority "To make Rules for the Government and Regulation of land and naval Forces."<sup>196</sup> Historical evidence indicates that the Framers did not want the military to have more autonomy than other parts of the government.<sup>197</sup> The Declaration of Independence criticized King George for succumbing to the English military's will and allowing it to remain independent of civil power.<sup>198</sup> In fact, the Bill of Rights was composed, in part, to ensure protection from an overreaching military.<sup>199</sup>

The Supreme Court held that Congress's power to regulate the military is "broad and sweeping" in *United States v. O'Brien*.<sup>200</sup> In the context of due process rights in the military, the Court has viewed the UCMJ as Congress's constitutional exercise of military regulation and has not imposed judicial protections outside of the military systems already in place.<sup>201</sup> The Court explicitly stated that the judiciary should not interfere with military affairs unless Congress specifically invites the judiciary's involvement.<sup>202</sup> Thus, the Court established Congress as the appropriate branch to provide constitutional protections to servicemembers, including the delineation of when civilian courts can review military policies.

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<sup>194</sup> See *United States v. Stanley*, 483 U.S. 669, 708 (1987) (Brennan, J., concurring in part and dissenting in part) ("Soldiers ought not be asked to defend a Constitution indifferent to their essential human dignity.").

<sup>195</sup> Bilello, *supra* note 92, at 471.

<sup>196</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>197</sup> Robbins, *supra* note 13, at 787.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 788. Given that the Bill of Rights enumerates specific protections from the military, such as the protection from forceful quartering of troops and from seizure of private property for public use, it seems inconsistent to think that the Framers would allow the military to suspend, without clear forewarning in its regulations, the constitutional freedoms of its members. See U.S. CONST. amend. III–V.

<sup>200</sup> 391 U.S. 367, 377 (1968) (holding that prosecution under the Universal Military Training and Service Act for burning a selective service registration certificate did not violate petitioner's First Amendment rights).

<sup>201</sup> See, e.g., *United States v. Stanley*, 483 U.S. 669 (1987). In *Stanley*, the Court refused to afford a remedy to a former soldier suffering negative affects from LSD administered to him without his knowledge as part of an army experiment because there was no congressionally authorized recourse. *Id.* at 683.

<sup>202</sup> "[C]ongressionally uninvited intrusion into military affairs by the judiciary is inappropriate." *Id.*

Particular motivation exists for Congress to involve itself in correcting the seeming lack of First Amendment protection of troops given its initial hesitancy to approve Article 88.<sup>203</sup> The chairman of the New York County Lawyer's Association's Committee on Military Justice urged that the Senate should give special consideration to Article 88's restriction of speech to avoid inflicting "the political martyrdom of service personnel."<sup>204</sup> The Senate listened, debating whether such a restrictive article should be passed. Senator Kefauver noted that there was no reason "why Congress should be immune from criticism," and that "our greatest reservoir of men who may take part in public life, or should take part, would come from men who are officers, retired officers, or Reserve."<sup>205</sup> Senator Kefauver's statements were met with agreement, but members of the committee also expressed uneasiness about the possibility of a soldier criticizing the government on the weekend and then reporting for duty on Monday.<sup>206</sup> Ultimately, the Senate compromised by limiting Article 88's application to commissioned officers currently on active duty.<sup>207</sup> Given its constitutional authority and the Supreme Court's deference, Congress is the primary governmental body to affect change in the military.

### C. Policy Arguments for Change

#### 1. Congress

Besides a general public image concern that Congress does not itself value the constitutional rights of servicemembers,<sup>208</sup> Congress has a vested interest in promoting

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<sup>203</sup> Kester, *supra* note 40, at 1718–19. Although the House passed Article 88, 10 U.S.C. § 888 (Supp. II 2002), with little discussion, several senators discussed concern over the restriction of speech on the floor. The committee that reviewed the article tried to limit its chance of use by restricting its application to commissioned officers. Kester, *supra* note 40, at 1718–19.

<sup>204</sup> *Uniform Code of Military Justice: Hearings Before the Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. (1949), reprinted in INDEX AND LEGISLATIVE HISTORY: UNIFORM CODE OF MILITARY JUSTICE 209 (2000) [hereinafter *UCMJ Subcomm. Hearings*] (statement of Richard H. Wels, Chairman, New York County Lawyer's Association). Although Article 88's commentary says that it ordinarily should not be used to prosecute political conversation, the Article is not especially effective in protecting troops' political speech. See *supra* notes 38–41 and accompanying text.

<sup>205</sup> *UCMJ Subcomm. Hearings*, *supra* note 204, at 331–32 (statement of Sen. Kefauver, Member, S. Comm. on Armed Servs.).

<sup>206</sup> *Id.* at 332 (statement of Sen. Saltonstall, Member, S. Comm. on Armed Servs.).

<sup>207</sup> Kester, *supra* note 40, at 1718.

<sup>208</sup> Congress does not have the best track record of safeguarding traditional constitutional principles in a military context. Congress has:

delegate[d] the authority to define the factors leading to the death penalty in military capital cases to the President; . . . require[d] only males to register for the draft; [selectively] determine[d] whether and

a culture more accepting of alternative, and even dissenting, ideas within the rank structure.<sup>209</sup> Congress is obligated by the Constitution to provide oversight of the armed forces.<sup>210</sup> If the generals who provide information to Congress on the state of affairs are afraid to criticize military operations or presidential military directives because of Article 88 or for fear of other professional repercussions in a culture that stresses obedience, how can Congress get the information needed to provide meaningful oversight? The issue may seem relatively inconsequential during times of peace, but it looms ominously during times of war—especially a controversial war.<sup>211</sup> The necessity of open military communication is even more vital to the balance of powers when Congress and the President are from different political parties.

## 2. Military

The military will also benefit from implementing heightened First Amendment protections among its ranks, although the immediate criticism of the proposed recommendations is that the military courts will grant their own commanders the same deference as the federal courts currently do.<sup>212</sup> There are also concerns that servicemembers who utilize speech will suffer institutional prejudice. Professional repercussions for officers who challenge traditional doctrine or propose change, even positive change if it is against a certain status quo, can result in failure to promote and even dismissal from the service.<sup>213</sup> The danger of such institutional

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when to accommodate those who invoke [the Free Exercise Clause] of the First Amendment; and . . . ban[ned] political speeches and the distribution of leaflets on military reservations.

Robbins, *supra* note 13, at 775.

<sup>209</sup> By using the word “dissenting” I do not imply that Congress should encourage military officers to act contrary to traditional rank structure; I merely mean to suggest that diverse opinions, even those contrary to the status quo, should be solicited by military leadership and Congress—preferably before final policy directives are promulgated. *See* Zillman & Imwinkelried, *supra* note 81, at 405–06 (discussing concerns that too much free expression in the military runs the risk of turning the armed forces into a political entity and threatens civilian control of the military).

<sup>210</sup> U.S. CONST. art. I, § 8, cl. 12–14.

<sup>211</sup> *See, e.g.*, Thomas E. Ricks & Ann Scott Tyson, *Abizaid Says Withdrawal Would Mean More Unrest*, WASH. POST, Nov. 16, 2006, at A22 (reporting several members of the Senate Armed Services Committee’s disappointment with General Abizaid’s testimony about Iraqi War strategy because they believed he was sticking too closely to the status quo).

<sup>212</sup> *See* Lederer & Zeff, *supra* note 21, at 28 (explaining the lack of judicial independence in the military justice system because military judges’ evaluations and promotions are written by senior officers assessing their rulings).

<sup>213</sup> *See* Kaplan, *supra* note 7, at 38. Kaplan details Army Colonel H. R. McMaster’s failure to promote to brigadier-general two years in a row, despite being commended by President Bush and General Petraeus for his innovative strategy when commanding a campaign on Tal Afar, Iraq and writing a book that the Army recommends its officers read.

backlash is the continued repression of speech in military culture.<sup>214</sup> However, the American military, as a protector of a free and democratic society, should also lead with the principles it protects. The military is considered by academics as a leader of society and is based on a citizen-soldier concept.<sup>215</sup> From the War of Independence onward, Americans have embraced the idea that the military and citizenship are closely connected because service is seen as an obligation of citizenship.<sup>216</sup> The modern UCMJ is based on many of General Ansell's original ideas about how the military functioned best and retained its legitimacy by incorporating the principles of citizenship.<sup>217</sup> The military's contentment to follow far behind the rest of society in the protection of First Amendment freedoms, even in light of military necessity, is contrary to its founding ideals.

The expectation of blind discipline and the "society apart" concept of the military developed before the institution of an all-volunteer force and are archaic leadership styles inconsistent with today's military.<sup>218</sup> In particular, the average military member today is more educated than the soldier of the past.<sup>219</sup> Most drastically, the percentage of enlisted personnel who reported having at least one year of college education rose from about thirty percent in 1985 to seventy-four percent in 1999.<sup>220</sup> Many of those members reported earning college credits through

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The book, ironically, studies the Vietnam War and "conclude[s] that the Joint Chiefs of Staff in the 1960s betrayed their professional obligations by failing to provide unvarnished military advice to President . . . Johnson." *Id.*; see also Carol Rosenberg, *Gitmo Defense Whiz Forced Out*, SEATTLE TIMES, Oct. 8, 2006, at A7. Lieutenant Commander Charles Swift, the Navy JAG assigned to defend Osama bin Laden's driver, was forced to retire after the Navy failed to promote him a second time. *Id.* Lieutenant Commander Swift won his client's case against the government. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>214</sup> Kaplan notes that the professional repercussions suffered by Army leaders who attempt to challenge policies or introduce alternative ideas result in other officers not attempting to improve strategy, particularly in relation to the Iraq War, out of fear of negative career consequences. Kaplan, *supra* note 7, at 38–39.

<sup>215</sup> See LINDLEY, *supra* note 22, at 1.

<sup>216</sup> *Id.* ("The fundamental premise underlying this image of the American citizen soldier is the idea that Washington and his many civilian successors in arms became soldiers . . . because they were citizens. For them citizenship included the obligation for national service.")

<sup>217</sup> *Id.* at 182–83.

<sup>218</sup> See Zillman & Imwinkelried, *supra* note 81, at 400.

<sup>219</sup> In 2000, 42.6 percent of officers had advanced degrees, compared to 25.3 percent in 1974. In 2000, 94.7 percent of enlisted personnel had at least a high school diploma, up from 79.8 percent in 1974. U.S. GEN. ACCOUNTING OFFICE, MILITARY PERSONNEL: ACTIVE DUTY BENEFITS REFLECT CHANGING DEMOGRAPHICS, BUT OPPORTUNITIES EXIST TO IMPROVE 30 (2002), available at <http://www.gao.gov/new.items/d02935.pdf>. Moreover, more people now join the military with the intent of using the job training and/or the G.I. Bill as a means to further their educational goals for post-military jobs. *America's Military Population*, POPULATION BULL., Dec. 2004, at 8.

<sup>220</sup> CONG. BUDGET OFFICE, EDUCATIONAL ATTAINMENT AND COMPENSATION OF

tuition assistance programs while on active duty.<sup>221</sup> These statistics indicate a population of subordinates who are actively engaging in learning and challenging their minds outside of their military jobs. Using an outdated management model focused on overly restrictive control of personal liberties is counterproductive, especially considering the intelligent and motivated nature of the modern enlistee.<sup>222</sup>

In contrast to its “society apart” label, the military is growing increasingly similar to civilian society.<sup>223</sup> The military is a large and diverse organization with training and pay scales that attempt to parallel civilian opportunities.<sup>224</sup> Officer training also focuses on civilian-developed leadership models.<sup>225</sup> As military management and culture shifts closer to civilian models, traditional overreaching First Amendment restrictions, especially at the local command level, will become a greater source of contention. In aggregate, the discontent and feeling of oppression caused by unnecessary restrictions on free speech arguably degrade military morale, cohesiveness, and effectiveness more than the dissenting or unique speech that is prohibited.

One wonders if discipline might actually be improved in a system that, when not prohibited by actual combat, explains orders. Especially with the greater mobilization of reservists who are civilian professionals, the civilian management models that officers study could be integrated into command frameworks. Perhaps the dynamic leadership methods encouraged by ending the use of speech prohibition as a control method would prevent situations such as the refusal of nineteen members in a reserve unit to drive a convoy in Iraq. The reservists refused the order because they believed their equipment was inadequate to protect against attacks.<sup>226</sup> The armed forces indisputably need personnel to unquestioningly follow orders in combat, but overall loyalty and cohesion may be increased, and situations such as the reservists’ refusal avoided, if members felt they were valued as citizen soldiers rather than expendable cogs in a military machine.

A troubling result of active duty senior military leadership not criticizing (or at least not giving honest assessments on the challenges of) current Iraqi War strategy is increasing disillusionment and frustration with senior leadership among junior

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ENLISTED PERSONNEL 4 (2004), available at <http://www.cbo.gov/showdoc.cfm?index=5108&sequence=1#pt2>.

<sup>221</sup> *Id.*

<sup>222</sup> See Dienes, *supra* note 108, at 816.

<sup>223</sup> Zillman & Imwinkelried, *supra* note 81, at 400.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* The federal military service academies incorporate leadership training into their curricula that includes civilian business management models. See, e.g., United States Coast Guard Academy Leadership Development Center, <http://www.uscga.edu/lcd/default/asp> (last visited Sept. 3, 2007).

<sup>226</sup> See Thomas E. Ricks, *Probe of Reservists Underway*, WASH. POST, Oct. 16, 2004, at A14.

officers.<sup>227</sup> Some junior officers are particularly disappointed with the perceived inability of senior officers to articulate downfalls with military strategy, including required troop strength, because they have more combat experience than senior leadership and are bearing the consequences of the generals' silence during the continual cycle of lengthy combat tours.<sup>228</sup> The military cannot, and should not, lower the level of expected discipline among its members, but it may be time to shift from a nearly entirely fear-based motivating structure to a more dynamic management philosophy.

### CONCLUSION

As a defender and leader of a free country, the military cannot retain legitimacy if it continues to arbitrarily suppress the speech rights of its members. The Constitution clearly grants Congress broad powers to regulate the military and provide oversight. In light of the Supreme Court's consistent refusal to analyze military First Amendment claims under the separation of powers and political question doctrines, Congress must fulfill its responsibilities to the members of the armed forces. By directing the military to include First Amendment considerations in policy development, emphasizing a modified traditional First Amendment review of First Amendment claims in the military justice system, and decriminalizing infractions of speech-restrictive military policies, Congress can ensure that the First Amendment rights of servicemembers are protected while they serve. These proposals align military practice with its founding ideals and ensure that the American citizens who sacrifice so much for their country will not also unduly sacrifice their rights.

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<sup>227</sup> Kaplan, *supra* note 7, at 36–37. For a bluntly critical assessment of current military leadership written by an active duty Army Lieutenant Colonel, see Paul Yingling, *A Failure in Generalship*, ARMED FORCES J., May 2007, available at <http://www.armedforcesjournal.com/2007/05/2635198/>.

<sup>228</sup> Kaplan, *supra* note 7, at 36. Junior officer discontent in the Army was reflected by forty-four percent of the officers from the West Point class of 2001 leaving the Army when their five-year term of obligated service ended in 2006—the highest loss rate experienced by the Army in thirty years. *Id.*