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Contemptuous Speech: Rethinking the Balance Between Good Order and Discipline and the Free Speech Rights of Retired Military Officers

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Abstract

The first of its kind to analyze free speech limitations of retired military members, this Article analyzes Article 88 of the Uniform Code of Military Justice, which prohibits officers from speaking contemptuously against the sitting President of the United States. Following the United States Supreme Court's decision to deny certiorari in *Larrabee v. United States*, the Court ensured that retired service members could still be court-martialed for crimes they commit during their retirement. Consequently, the Supreme Court has in effect extended military justice principles, including those limiting free speech, to retired military officers. In light of recent decisions by retired Generals and Admirals to issue particularly scathing criticisms of a sitting President, this paper questions whether the current legal regime balances good order and discipline against retired military officers' free speech rights in a manner that is legally or practically sound. After presenting theories of free speech, analyzing Article 88 of the Uniform Code of Military Justice, and reviewing particular statements in light of *Larrabee* and its predecessors, this Article presents legislative and judicial reforms which can, in the authors' opinions, better balance the freedom of retired military officers against the security interests of the United States Armed Forces.

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I. Introduction

On June 3, 2020, General (ret.) James Mattis addressed protesters who were physically dispersed from Lafayette Square to facilitate what he considered to be a photo opportunity by President Trump at St. John's Church in *The Atlantic*:

> I have watched this week's unfolding events, angry and appalled . . . . The protests are defined by tens of thousands of people of conscience who are insisting that we live up to our values—our values as people and our values as a nation. . . . When I joined the military, some 50 years ago, I swore an oath to support and defend the Constitution. Never did I dream that troops taking that same oath would be ordered under any circumstance to violate the Constitutional rights of their fellow citizens—much less to provide a bizarre photo op for the elected commander-in-chief, with military leadership standing alongside. . . . Donald Trump is the first president in my lifetime who does not try to unite the American people—does not even pretend to try. Instead he tries to divide us. We are witnessing the consequences of three years of this deliberate effort. We are witnessing the consequences of three years without mature leadership.[1]

Gen. (ret.) Mattis was not alone in his condemnation. An unprecedented number of retired Generals, Admirals, and other high-ranking military leaders have recently spoken out in public criticism of President Trump.[2] Given their position as leaders both on and off the battlefield, one would be forgiven for assuming that a retired officer could make such statements with impunity. However, following the Supreme Court's denial of certiorari in *Larrabee v. United States*,[3] which allowed a circuit court decision finding that retired service members could still be court-martialed for crimes that they commit during their retirement to stand,[4] it is clear

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[1] Jeffrey Goldberg, *James Mattis Denounces President Trump, Describes Him as a Threat to the Constitution*, THE ATLANTIC (June 3, 2020), https://www.theatlantic.com/politics/archive/2020/06/james-mattis-denounces-trump-protests-militarization/612640/ [https://perma.cc/Z4ZB-KNHF].

[2] *See* Veronica Stracqualursi, *The Prominent Former Military Leaders Who Have Criticized Trump's Actions Over Protests*, CNN (June 5, 2020, 6:17 PM), https://www.cnn.com/2020/06/05/politics/military-leaders-trump-floyd-protests/index.html [https://perma.cc/97VJ-SXPQ] (detailing public statements by former military leaders, including Marine Corps General (ret.) James Mattis and Air Force General (ret.) Richard Myers).

[3] 139 U.S. 1164 (2019).

[4] *See id.*; Patricia Kime, *Supreme Court: Retirees Can Be Court-Martialed for Crimes Committed After Service*, MILITARY.COM (Feb. 22, 2019), https://www.military.com/daily-news/2019/02/22/supreme-court-retirees-can-be-court-martialed-crimes-committed-after-service.html [https://perma.cc/CE46-SUGW] (arguing that, by the Supreme Court not accepting the case, "the court upheld the status quo: that military retirees are subject to the Uniform Code of Military Justice"). While denial of certiorari means at least four Justices deemed review unwarranted, at least one commentator suggests that a denial is, in effect, a policy choice. Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1229 (1979) (arguing that in

that Gen (ret.) Mattis is still potentially subject to criminal prosecution under the Uniform Code of Military Justice (UCMJ).[5] Unclear, though, is whether Gen (ret.) Mattis's statement constitutes a crime under the UCMJ in the first place. Gen (ret.) Mattis made these statements against the backdrop of Article 88 of the UCMJ, which provides in relevant part that:

> 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.[6]

The ambiguity behind what qualifies as "contemptuous speech" under Article 88 raises constitutional questions regarding the free speech rights of both active and retired military officers during a time of heightened partisan discourse and uncertainty regarding the role of the U.S. military.[7] This Article proceeds in four parts. Part II reviews speech theory generally and situates it in the context of service members. Part III interprets Article 88 of the UCMJ and reviews prohibited contemptuous speech jurisprudence in order to develop an understanding of the provision's scope under the current legal regime. Part IV reviews recent statements by retired Generals and Admirals and analyzes whether they should be considered contemptuous. Part V advocates for an exception to Article 88 of the UCMJ for retirees. The conclusion follows.

II. Free Speech Theory

To understand Article 88 of the UCMJ, this Article first examines the theoretical and constitutional bases for how free speech may be limited, both generally and in the specific context of service members. First Amendment freedoms are consistently circumscribed by time, place, and manner restrictions.[8] In the military context, national security interests frequently justify restrictions on free speech beyond what courts are willing to endorse in the civilian context.[9] These

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"significant number of cases" the denial of certiorari indicates that most of the "Justices were not strongly dissatisfied with the actions" of the lower court's ruling).

[5] *Uniform Code of Military Justice* (codified at 10 U.S.C. §§ 801–946(a)).

[6] UCMJ art. 88 (codified at 10 U.S.C. § 888 (2006)).

[7] *See, e.g.*, RONALD O'ROURKE, CONG. RSCH. SERV., R43838, RENEWED GREAT POWER COMPETITION: IMPLICATIONS FOR DEFENSE—ISSUES FOR CONGRESS (2021).

[8] *See U.S. v. O'Brien*, 391 U.S. 367 (1968); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260 (1988); *Dennis v. United States* 341 U.S. 494 (1951); *Konigsberg v. State Bar of California*, 366 U.S. 36, 50–51 (1961); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 895, 899–905, 916–18 (1963); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 967–68 (1987).

[9] *See* U.S. DEP'T OF DEF., INSTR. 1000.29 DOD CIVIL LIBERTIES PROGRAM, enclosure 1 ¶ 4.a (17 May. 2012) ("It is DoD policy to . . . protect the privacy and civil liberties of DoD employees,

national security concerns manifest through the frame of good order and discipline—a concept that relates to maintaining civilian superiority over the military in civil society and supporting good order among the ranks themselves.[10] Our interpretation of Article 88 is consequently informed by the theoretical foundations of the Court's First Amendment jurisprudence.

A. *Generalized Theories of Free Speech*

At its core, the purpose of the First Amendment is to effectuate a system of free expression in its various forms.[11] The Constitution as a whole protects two forms of freedoms: those freedoms which under no condition may be restricted by the government, and those freedoms which may be restricted by the government only when necessary.[12] Although speech has historically fallen into the latter category of freedoms, scholars have nonetheless given it a broad scope.[13] Alexander Meiklejohn theorized that "men are free to believe and to advocate or to disbelieve and to argue against, any creed."[14] The government itself prevents unnecessary infringement upon such rights by balancing its interests against the possible infringement resulting from the prospective government regulation.[15]

Consequently, restrictions on constitutional rights at large are typically subject to one of two forms of balancing: either balancing a right against an articulated state interest or striking a balance between two competing interests.[16] Government interests may be those necessary for a functioning government or the interests of the public at large.[17] As stated in *United States v. O'Brien*, a seminal case articulating the test for the justification of government regulations on the freedom of expression:

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members of the Military Services, and the public to the greatest extent possible, *consistent with its operational requirements*.") (emphasis added) [hereinafter DoDI 1000.29].

[10] S*ee, e.g.*, Press Release, Office of the Master Chief Petty Officer of the Navy, MCPON releases 'Zeroing in on Excellence' initiative (Nov. 14, 2012) https://www.militarynews.com/norfolk-navy-flagship/news/quarterdeck/mcpon-releases-zeroing-in-on-excellence-initiative/article_7b65078f-fef4-5fc1-8216-8d2e0f4ae8fd.html#:~:text=The%20'Zeroing%20in%20on%20Excellence,respective%20positions%2C%E2%80%9D%20said%20Stevens [https://perma.cc/DZN4-7WB2] ("[G]ood order and discipline is about establishing, sustaining and enforcing professional standards that set the condition for individual and unit success[.] . . . Anything that interferes with or detracts from those conditions is contrary to good order and discipline."). *But see generally* Colonel Jeremy S. Weber, The Disorderly, Undisciplined State of the 'Good Order and Discipline' Term (Feb. 16, 2016) (M.A. thesis, Air War College) (Defense Technical Information Center) (finding that there is not a clear, consistent definition of Good Order and Discipline).

[11] *See* U.S. CONST. amend. I; Emerson, *supra* note 8, at 878.

[12] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 2 (1948).

[13] *See id.*

[14] *See id.* at 1.

[15] *See id*. at 13; *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

[16] *See* Aleinikoff, *supra* note 8, at 946.

[17] *See id.* at 946–47.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental reaction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[18]

Scholars have articulated the balance between speech and government interests in relation to the concepts of security and good order.[19] Thomas Emerson famously stated that "[m]aintenance of law and order in a society, along with protection against external dangers, has traditionally constituted the chief purpose for which governments were instituted among men."[20] This function of the government at large can be narrowly analyzed in the context of the freedom of expression, but persists throughout the broad scope of other Congressional powers.[21] Emerson also argued that one of government's key duties was to exert control over the freedom of expression,[22] theorizing that a need for security against internal and external forces animated such limitations.[23] He further stated that "the state has not only the power but the obligation to control the conditions under which freedom of expression can function for the general welfare."[24] As ideas are expressed and communicated, the conflict between the freedom of that expression and other interests become more likely.[25]

Regarding freedom of speech, the main differentiation among viewpoints centers on how broad the doctrine should be and what should be considered to be protected.[26] The prevalent theories that have emerged hinge upon the categorization of the form of speech, the context of the speech, and the application of a balancing test to that speech.[27] Justice Harlan acknowledged the prevailing approach in determining whether a law burdening speech passed constitutional muster in *Konigsberg v. State Bar of California*:

> [G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First and the Fourteenth Amendment forbade Congress or States to pass, when they have

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[18] *O'Brien*, 391 U.S. at 377.
[19] *See* Emerson, *supra* note 8, at 931.
[20] *See id*. at 931.
[21] *See O'Brien*, 391 U.S. at 377.
[22] *See* Emerson, *supra* note 8, at 886.
[23] *See id.* at 931.
[24] *Id.* at 886.
[25] *See id.* at 920.
[26] *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS, AND INTERPRETATION, S. Doc. No. 103-6, at 1025–26, 1048–50.
[27] *See* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS, AND INTERPRETATION, *supra* note 26, at 1044–48; *Dennis v. United States* 341 U.S. 494, 508 (1951); *Konigsberg v. State Bar of California*, 366 U.S. 36, 50-51 (1961); *O'Brien*, 391 U.S. at 377; *Tinker*, 393 U.S. at 513; *Hazelwood*, 484 U.S. at 266–67; Emerson, *supra* note 8, at 909.

> been found justified by subordinating valid government interests . . . .[28]

The common theme within the tests applied is the balancing of one's right to free speech against either a national security consideration or a cognizable government interest.[29] While, as Emerson theorizes, "no society can expect to achieve absolute security," the state must carefully consider the possible ramifications of full discussion, open to all.[30] As discussed previously, the government interests most prevalent in the limitation of free speech are those related to security and order.[31] These interests are afforded substantial weight in efforts to balance between individual liberty and governmental interests, particularly when they implicate national security.[32]

B. *First Amendment Rights of Service Members*

The rights afforded by the First Amendment are not absolute.[33] This is particularly true in the military context.[34] Even Chief Justice Earl Warren, who once admonished that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes,"[35] went on to note that:

> [I]t is indisputable that the tradition of our country, from the time of the revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that Courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.[36]

The Supreme Court applies similar deferential sentiments when it comes to First Amendment rights of military personnel.[37] The Court allows the military to implement its regulations largely outside the purview of judicial review because, "[t]he military constitutes a specialized community governed by a separate

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[28] *Konigsberg*, 366 U.S. at 50–51.
[29] *See Dennis*, 341 U.S. at 508; *Konigsberg*, 366 U.S. at 50–51; *O'Brien*, 391 US at 377; *Tinker*, 393 U.S. at 513; *Hazelwood*, 484 U.S. at 266–67.
[30] *See* Emerson, *supra* note 8, at 886–87.
[31] *See id.* at 931.
[32] *See id.* at 929; *O'Brien*, 391 U.S. at 377.
[33] 4C M.J. CONSTITUTIONAL LAW § 78 (2020) ("While the rights of freedom of speech and assembly are fundamental, they are not absolute and must be exercised in subordination to the general comfort and convenience and in consonance with peace, good order and the rights of others.").
[34] *See* DoDI 1000.29, *supra* note 9; Tatum H. Lytle, *A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests*, 59 FED. COMM. L.J. 563, 601 (2007) (describing how military personnel are "treated as a separate community subject to a different set of rules and regulation [for free speech] as compared to the civilian community").
[35] Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962).
[36] *Id.* at 187.
[37] *See* Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("[W]e have found no case where this Court has assumed to revise duty orders as to one lawfully in the service.").

discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters."[38]

This sentiment, known as the Doctrine of Military Necessity, states that "while the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[39] The Court has even concluded that "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[40] Thus, there is a strong presumption that military necessity or the military's interests in governing its unique "separate society" tend to override or outweigh the speech rights ordinarily held by individuals.[41]

A core military principle, the implementation of which is critical to operational success within the profession of arms, is the concept of good order and discipline.[42] The achievement of good order and discipline inherently involves restrictions and rules,[43] and the rights of service members themselves are often constrained to further the attainment of these virtues.[44] The following subsections analyze how policies designed to attain good order and discipline must frequently be balanced against constitutional protections for speech, expression, and assembly. As will be evident, the balance between the freedoms guaranteed by the First Amendment and the necessary maintenance of good order and discipline informs the nature of every U.S. service member's rights of speech, expression, and assembly.

1. Freedom of Speech

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[38] *Id.*
[39] Parker v. Levy, 417 U.S. 733, 758 (1974).
[40] *Id*.
[41] *See* Elizabeth Beaumont, *Rights of Military Personnel*, FIRST AMENDMENT ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/1131/rights-of-military-personnel [https://perma.cc/4EQV-DDYG].
[42] *See* Weber, *supra* note 10, at 1.
[43] *See* UCMJ art. 134 (codified at 10 U.S.C. § 934 (1970)) ("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, 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.").
[44] *See e.g.*, U.S. DEPT. OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (Feb. 24, 2008) (noting that members on active duty may not participate in partisan activities such as soliciting or engaging in partisan fundraiser activities, serving as the sponsor of a partisan club, or speaking before a partisan gathering. In addition, all military members, including National Guard and Reserve forces, are prohibited from wearing military uniforms at political campaign events).

As previously described, UCMJ Article 88 prohibits contemptuous speech toward public officials.[45] However, the ban on contemptuous speech was not new to military law when it was adopted as a part of the UCMJ in 1950; its precursors are older than the Bill of Rights, the Constitution, and the republic itself.[46] Because Article 88 aims to prevent officers from meddling in politics, its restrictions fall squarely within the ambit of policies promoting good order and discipline of the armed forces.[47] Moreover, it seeks to avoid the impairment of discipline and the promotion of insubordination by an officer of the military service through the use of contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.[48] Finally, as some have argued, this restriction ensures respect for civilian control of the military, a core tenant of good order and discipline.[49]

A handful of cases analyzing speech restrictions on service members are helpful in understanding how such regulations are justified in military contexts other than Article 88. In *Parker v. Levy*, a physician and Army Captain was charged with "wrongfully and dishonorably" making "intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful" statements in criticizing the military involvement in the Vietnam War to enlisted personnel who were patients or under his supervision.[50] The Supreme Court reiterated the Doctrine of Military Necessity, noting that the military is "a specialized society separate from civilian society" and "military law . . . is a jurisprudence which exists separate and apart from the laws which govern in our federal judicial establishment."[51] With this in mind, the Court concluded that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [the military] shall be governed."[52]

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[45] *See* UCMJ art. 88 (codified at 10 U.S.C. § 888 (1970)). Moreover, Article 134 punishes, among other things, "all disorders and neglects to the prejudice of good order and discipline in the armed forces," and thus, could be applied to enlisted military personnel who use contemptuous speech. *See* UCMJ art. 134 (codified at 10 U.S.C. § 934 (1970)).

[46] *See* United States v. Howe, 17 U.S.C.M.A. 165 (1967) ("The British Articles of War of 1765, in force at the beginning of our Revolutionary War, provided for the court-martial of any officer or soldier who presumed to use traitorous or disrespectful words against 'the Sacred Person of his Majesty, or any of the Royal Family'; and of any officer or soldier who should 'behave himself with Contempt or Disrespect towards the General, or other Commander in Chief of Our Forces, or shall speak Words tending to his Hurt or Dishonour'").

[47] *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, 1753 (1968); Rod Powers, *UCMJ Article 88 – Contempt Toward Officials*, BALANCE CAREERS (Dec. 28, 2018), https://www.thebalancecareers.com/punitive-articles-of-the-ucmj-3356854 [https://perma.cc/D9JN-LQ68].

[48] *See Howe*, 17 U.S.C.M.A. at 173.

[49] *See, e.g.*, Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW 1 (1999).

[50] Parker v. Levy, 417 U.S. 733, 758 (1974).

[51] Bill Kenworthy, *Military Speech*, FREEDOM FORUM INSTITUTE (Feb. 2020), https://www.freedomforuminstitute.org/first-amendment-center/topics/freedom-of-speech-2/personal-public-expression-overview/military-speech/ [https://perma.cc/ZL7Z-TM2D].

[52] *Id.*

These limitations stem from the seminar clear-and-present danger test from *Schenck v. U.S.*, where the Supreme Court held:

> [T]he question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.[53]

The deployment of the Military Necessity Doctrine in cases involving service members' First Amendment rights, however, has drawn criticism from scholars. These critics have argued that, rather than sweeping deference, there ought to be a stronger adherence to foundational free speech principles; that is, stricter judicial scrutiny of government regulation.[54] Indeed, many believe that given developments in contemporary society and jurisprudence, speech regulations should be analyzed with a greater eye towards protecting service members' rights.[55] This is particularly so considering the Court's *per curiam* opinion in *Brandenburg v. Ohio*, which clarified *Schenck*'s clear and present danger test, finding that "advocacy of the use of force or of law violation" is not guaranteed First Amendment protection if "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[56]

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[53] Schenck v. United States, 249 U.S. 47, 52 (1919).

[54] *See generally* C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other Special Contexts*, 56 U. CIN. L. REV. 779 (1987) (arguing for a methodology of weighed judicial interest-balancing with a preference or presumption in favor of First Amendment expression); Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971) (identifying that military First Amendment cases are on the rise and there seems to be room for broader protection); Linda Sugin, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855 (1987) (arguing only service personnel in combat during war should be treated as members of a separate community, service personnel not in combat deserve protection by the federal judiciary when their constitutional rights are violated); 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) (proposing recommendations that Congress and the military should implement to better protect the First Amendment rights of service personnel); Kenneth Lasson, *Religious Liberty in the Military: The First Amendment Under "Friendly Fire"*, 9 J. L. RELIG. 471 (1992) (analyzing the extent to which religious liberty can be restricted in the military given First Amendment considerations).

[55] *See, e.g.*, Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957); Donald N. Zillman, *Free Speech and Military Command*, UTAH L. REV. 423 (1977); Edward J. Imwinkelried & Donald N. Zillman. *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech within the Military Community*, 54 TEX. L. REV. 42 (1975); Davidson, *supra* note 49, at 6; Ronald N. Boyce, *Freedom of Speech and the Military*, 1968 UTAH L. REV. 240, 254–64 (1968).

[56] Brandenburg v. Ohio, 395 U.S. 444, 447 (1992).

2. Freedom of Expression

Service members are also subject to limits on their freedom of expression.[57] For example, the Department of Defense (DoD), like any other government agency, encourages military members to register to vote.[58] However, as a matter of long-standing policy, service members and federal employees acting in their official capacity may not engage in activities that associate the DoD with any partisan political campaign or election, candidate, cause, or issue. DoD Directive 1344.10 ("1344.10") outlines restrictions on military expression motivated by the need to balance service members' First Amendment rights to freely engage in political activities with the military's institutional interest in remaining apolitical.[59] 1344.10 provides in relevant part that:

> It is DOD policy to encourage members of the Armed Forces. . . (including members on active duty, members of the Reserve Components not on active duty, members of the National Guard even when in a non-Federal status, and retired members) to carry out the obligations of citizenship. In keeping with the traditional concept that members on active duty should not engage in *partisan political activity*, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply. . .[60]

1344.10 describes various activities in which a service member may or may not engage,[61] and, "may be reasonably viewed as directly or indirectly associating the Department of Defense or the Department of Homeland Security (in the case of the Coast Guard) or any component of these Departments with a partisan political activity."[62] The directive also includes a catch-all provision to prohibit all activities that while "not expressly prohibited," are "contrary to the spirit and intent of this Directive." Nonetheless, this provision fails to provide specific parameters for determining what qualifies as "partisan political activity," beyond general directives prohibiting "supporting" partisan candidates.[63] Should a service member

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[57] *See* Lieutenant Colonel Jeremy S. Weber, *Political Speech, The Military, And The Age Of Viral Communication*, 69 A.F. L. REV. 91, 104–110 (2013) (discussing existing restrictions on service member's ability to engage in political expression).

[58] *See* Katie Lange, *Election Season Do's and Don'ts for DOD Personnel*, DOD NEWS (Aug. 24, 2020), https://www.army.mil/article/238579/election_season_dos_and_donts_for_dod_personnel [https://perma.cc/QTA2-SNNN].

[59] *See* U.S. DEP'T OF DEF., DIRECTIVE 1344.10 POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ¶ 4, (Feb. 24, 2008) https://www.marines.mil/Portals/1/Docs/134410p%5B1%5D.pdf [https://perma.cc/YWU6-G2HZ] [hereinafter DoD Directive 1344.10]. Note that DoD Directives are regulatory texts promulgated by the DoD.

[60] *Id.* (emphasis added)

[61] *See id.* ¶¶ 4–4.6.4.

[62] *Id.* ¶ 4.1.5.

[63] It is interesting to note that DoD Directive 1344.10 was published on February 19, 2008. Congress passed The Plain Writing Act of 2010 requiring federal agencies to write "clear Government

find themselves facing a court-martial, it would be the judge's or panel members' duty to determine if the service member engaged in prohibited partisan political activity, likely using the limited definition in 1344.10.

That said, Air Force Instructions, the United States Air Force's regulations, clarify that regulations affecting freedom of expression will receive strict scrutiny, even in the military context. [64] For example, in the context of religious expression, these instructions state that all religious waivers to wear religious apparel must be granted unless the government has a compelling interest and the policy sought to be waived is the least restrictive means of furthering that compelling interest.[65] The Supreme Court, however, held the military's interest in maintaining a cohesive, homogeneous community outweighs an individual's right to wear clothing that represents one's religious observance.[66] This area of law represents a somewhat rare example of Supreme Court jurisprudence where strict scrutiny has consistently been found to be satisfied. For example, in *Goldman v. Weinberger*, the Court held that the Air Force could prohibit an Orthodox Jewish person from wearing a yarmulke in order to maintain uniformity in its dress code.[67] Rather than evaluating the Air Force's claim that uniform appearance is essential to its functioning, the Court accepted the military's premise on its face.[68] Although the military has since elected to change its policy regarding religious uniform accommodations, the Court remains poised to uphold similar regulations under the *Goldman* precedent.

Of course, military judgment and its consequent understanding of good order and discipline are not static. For example, the policy of "Don't Ask Don't Tell," which initially "represented a compromise between those who wanted to end

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communication that the public can understand and use." *See* Plain Writing Act, 5 U.S.C. § 301 note § 3(2)(c) (2010); The DoD's Executive Services Directorate website states the DoD "is committed to writing new documents in plain language, using the Federal Plain Language Guidelines in accordance with the Office Management and Budget Memorandum M_11-15, 'Final Guidance on Implementing the Plain Writing Act of 2010.'" *DoD Plain Language*, DOD EXEC. SERVICES DIRECTORATE, https://www.esd.whs.mil/dd/plainlanguage/ [https://perma.cc/26MD-225A] (last visited Mar. 15, 2021). Memorandum M_11-15 defines plain writing as writing that, "avoids jargon, redundancy, *ambiguity*, and obscurity." OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB MEM. NO. M 11-15, FINAL GUIDANCE ON IMPLEMENTING THE PLAIN WRITING ACT OF 2010 (2011) (emphasis added). After enactment, a one-year deadline was given to all agencies to write all new or substantially revised documents in plain writing. *Id.* Coincidentally, DoD Directive 1344.10 does not appear to have been revised or re-written since 2008. Tom McCuin, *Political Activities In Uniform And The Short History Of A Non-Political Military*, CLEARANCEJOBS (Dec. 28, 2018), https://news.clearancejobs.com/2018/12/28/political-activities-in-uniform-and-the-short-history-of-a-non-political-military/ [https://perma.cc/L3VA-PRTF].

[64] *See* U.S. DEP'T OF AIR FORCE, INSTR. 36-2903, DRESS AND PERSONAL APPEARANCE OF AIR FORCE PERSONNEL ¶ A8.1.2.3.4. (Feb. 7, 2020), https://static.e-publishing.af.mil/production/1/af_a1/publication/afi36-2903/afi36-2903.pdf?fbclid=IwAR3kJwORadXlUNzh2gRaT9PqvwaI_s4kMMwUaqCErxF0ar5NQQMt6ZhN6_k [https://perma.cc/G6TE-Q8RX] [hereinafter AFI 36-2903].

[65] *See id.* at 141

[66] *See* Goldman v. Weinberger, 475 U.S. 503, 510 (1986).

[67] *See id.*

[68] *See id.* at 509.

the longstanding ban on gay[] [and lesbian individuals] serving in the U.S. military and those who felt having openly gay troops would hurt morale and cause problems within military ranks," was repealed in 2011 to afford protection to the expression of sexual orientation.[69] The military is currently confronting similar questions concerning the ban on transgender service and the criminalization of sodomy.[70] Thus, while strict scrutiny still applies, it does so in the realm of good order and discipline, a field where the court has held the military to possess both a compelling interest and wide latitude to conclude that particular regulations in fact support that goal. This realm, of course, is ever-changing.

3. Freedom of Assembly

Lastly, military members have clear guidance on their right to assembly and its limitations. Service members must not protest while in uniform, protest on military property, protest while on duty, protest outside the United States, protest via the use of disrespectful speech regarding one's command chain, or protest in situations that constitute a "breach of law and order" or where "violence is likely to result."[71]

The right to peaceable assembly on base may also be restricted by military commanders if the assembly is shown to be detrimental to loyalty, discipline, or

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[69] Sarah Pruitt, *Once Banned, Then Silenced: How Clinton's 'Don't Ask, Don't Tell' Policy Affected LGBT Military*, HISTORY.COM (Apr. 25, 2018), https://www.history.com/news/dont-ask-dont-tell-repeal-compromise [https://perma.cc/RNZ7-C7QE].

[70] *See* Katie Miller & Andrew Cray, *The Battles that Remain: Military Service and LGBT Equality*, Center for American Progress 5–6 (Sept. 20, 2013), https://cdn.americanprogress.org/wp-content/uploads/2013/09/LGBT military-11.pdf [https://perma.cc/Q2UZ-W94V] (highlighting the lack of rights of transgender service members and describing a 2003 Supreme Court decision that struck down sodomy laws against consenting homosexuals); Viet Tran, *Human Rights Campaign on Biden's Reversal of the Ban on Transgender Military Service*, HUMAN RIGHTS CAMPAIGN (Jan. 25, 2021), https://www.hrc.org/press-releases/human-rights-campaign-on-bidens-reversal-of-the-ban-on-transgender-military-service [https://perma.cc/NB9G-MBAR] (celebrating "the Biden administration's commitment to LGBTQ equality" by reversing the ban on transgender military service). On March 31, 2021, the DoD released its new policy on military service by transgender persons, as required by Exec. Order No. 14,004, 86 Fed. Reg. 7471 (Jan. 25, 2021) (entitled "Enabling All Qualified Americans To Serve Their Country in Uniform"). The new DoD policy consists of U.S. DEP'T OF DEF., INSTR. 1300.28 IN-SERVICE TRANSITION FOR TRANSGENDER SERVICE MEMBERS (Mar. 31, 2021), and U.S. DEP'T OF DEF., INSTR. 6130.03 VOL. 1, MEDICAL STANDARDS FOR MILITARY SERVICE: APPOINTMENT, ENLISTMENT, OR INDUCTION (Mar. 31, 2021). Both issuances became effective April 30, 2021. For the previous policy, see U.S. DEP'T OF DEF., DIR. 19-004 MILITARY SERVICE BY TRANSGENDER PERSONS AND PERSONS WITH GENDER DYSPHORIA (Mar. 12, 2019) [hereinafter DTM 19-004] (outlining the Trump-era policies on Transgender military service which effectively eliminated Trans individuals from openly serving in the Armed Forces).

[71] U.S. DEP'T OF DEF., INSTR. 1325.06 HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES (2009) https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132506p.pdf?ver=2019-07-01-101152-143 [https://perma.cc/S4WC-NZ2C].

morale.[72] In *Dash v. Commanding General*, several enlisted troops were denied the right to hold an open and public meeting on a South Carolina Army base for a free discussion of the Vietnam War.[73] The court held that installation commanders have the authority to deny service members under their command the right to hold public meetings on post.[74] The court cited evidence showing that during an impromptu open meeting discussing the issue, fights broke out, orders were disobeyed, and disciplinary control was lost.[75] In light of these findings, the court held that the commander's decision was reasonable.[76] Essentially, regulations limiting freedom of assembly can be viewed as another form of behavioral restriction that courts largely leave to the military for purposes of ensuring good order and discipline, protecting the image of the military, and maintaining separation between political and military activity.

The limitation of service members' First Amendment rights concerning freedom of speech, expression, and assembly all flow from the common goal of ensuring the good order and discipline of members of the Armed Forces. Thus, as a restriction on First Amendment rights, any interpretation of Art. 88 must be informed by the balance between the constitutional rights of service members and security interests, namely good order and discipline.

III. Contemptuous Speech

Article 88's ban on contemptuous speech is ambiguous based on the text alone. In some areas, the Manual for Courts Martial (MCM) fills in the UCMJ's gaps with elements and discussion, while in other areas it results in greater confusion and uncertainty as to the provision's reach.[77] Sparse case law arising under the statute means courts have had little occasion to define its contours. By examining the text, object and purpose, and legislative history and intent, this Part attempts to dispel vagueness and provide a workable definition of the statutory language for use in future applications.[78]

A. *Textual Analysis*

The text of Article 88 must be the starting point for its interpretation. It states:

> Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of

[72] *See* Kenworthy, *supra* note 51.
[73] *See* Dash v. Commanding General, 307 F. Supp. 849, 851 (D.S.C. 1969).
[74] *See id*. at 857.
[75] *See id*. at 851.
[76] *See id.* at 857.
[77] *See e.g.*, JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, pt. IV, ¶ 14(c) (2019) [hereinafter MCM] (explaining the definitions of some, but not all, words used in the elements of Art 88 charges).
[78] *See infra* Section III.D.

> 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.[79]

The statute provides that commissioned officers are subject to its requirements, thereby exempting noncommissioned officers and other enlisted personnel who comprise about eighty-two percent of active duty forces.[80] Its language, "shall," is mandatory, rather than permissive.[81] Only contemptuous words are covered, though Article 88 does not define the meaning of contemptuous. The MCM, the official guide to the conduct of courts martial for the U.S. military, is published by Executive Order and serves to expand upon the statutory law of the UCMJ. The MCM provides the following elements for proving a violation of Article 88:

> (1) That the accused was a commissioned officer of the United States Armed Forces;
> (2) That the accused used certain words against an official or legislature named in the article;
> (3) That by an act of the accused these words came to the knowledge of a person other than the accused; and
> (4) That the words were contemptuous, either in themselves or by virtue of the circumstances under which they were used.
> [Note: If the words were against a Governor or legislature, add the following element]
> (5) That the accused was then present in the State, Commonwealth, or possession of the Governor or legislature concerned.[82]

The MCM provides maximum punishment of dismissal, forfeiture of all pay and allowances, and confinement for one year.[83] Section C of this Part explains that the official or legislature against whom the words are used must be occupying one of the officers or be one of the legislatures named by Article 88 at the time of the offense.[84] Further, the words "Congress" and "legislature" do not include the

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[79] UCMJ art. 88 (codified at 10 U.S.C. § 888 (2016)).
[80] *See* LAWRENCE KAPP, CONG. RSCH. SERV., IF10684, DEFENSE PRIMER: MILITARY ENLISTED PERSONNEL (2019) https://fas.org/sgp/crs/natsec/IF10684.pdf [https://perma.cc/45RL-9C8H]. Note that the term "commissioned officer" includes a commissioned warrant officer in the grades of CW2 to CW5. 10 U.S.C. § 101(b)(2).
[81] *See* United States v. Massey, 27 M.J. 371, 374 (C.M.A. 1989) (distinguishing the "word 'may' which is permissive, rather than 'shall,' which is mandatory" when interpreting the text of the MCM).
[82] MCM, pt. IV, ¶¶ 14(b)(1)–(5).
[83] *Id*. ¶ 14(d).
[84] *See id*. ¶ 14(c).

particular members of those groups individually.[85] While the scope of covered service members and protected officials is relatively clear from the statutory language, the text itself does not specify whether the prohibition applies to retired service members or protects officials who have since left office at the time the speech occurs. Even more so, however, the actual speech prohibited is not apparent. No particular method of dissemination is given, so all recognized forms of speech can be presumed to apply. The only controlling language from the statute itself is "contemptuous words." Though it provides lengthy definitions of key terms and phrases in other areas,[86] the MCM fails to precisely define contemptuous.

Courts have had little opportunity to weigh in on the statutory language because only one modern Article 88 case, the *Howe* case,[87] has been litigated in court.[88] Article 88's predecessors, however, which have slightly differing text than the current Article, were prosecuted during the Civil War, World War I, and World War II.[89] Furthermore, the concept of banning contemptuous, mutinous, or flagrantly disrespectful speech toward state officials reaches back to at least seventeenth-century England.[90] However, these past applications simply provide historical context and are not binding on Article 88 in its current form.

With little court precedent to rely on, dictionary definitions are an initial reference.[91] Black's Law Dictionary defines contemptuous as "showing that one thinks someone or something deserves no respect; ostentatiously disdainful."[92] Popular definitions of the word define contemptuous as "manifesting, feeling, or expressing deep hatred or disapproval."[93] Its root word, contempt, is defined as "the act of despising; the state of mind of one who despises; lack of respect or reverence for something."[94] Furthermore, the Military Judges' Bench Book, a non-binding but prominent source of military law, defines contemptuous as "insulting, rude, and

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[85] *See id.* Note that individual members of Congress and other legislators are not part of a service member's chain of command, potentially illuminating congressional intent on the object and purpose of the statute. *See* discussion *infra* Section III.B.

[86] *See, e.g.*, MCM ¶ 91.c.(1)(3) (defining "discredit" as "to injure the reputation of… that which has a tendency to bring the service into disrepute or which tends to lower it in the public esteem").

[87] *See infra* Section III.B.

[88] *See* United States v. Howe, 37 C.M.R. 429, 439 (1967).

[89] *See* Kester, *supra* note 47, at 1720. Kester categorizes historical application into six main types: noisy drunks; habitual gripers and blowhards; private discussions; offhand remarks; enemy sympathizers; and political activists.

[90] *See* CLIFFORD WALTON, HISTORY OF THE BRITISH STANDING ARMY 822 (1894) (discussing the trial of Peter Teat and Peter Innes for the crime of speaking "traitorous words" against King James II).

[91] *See* Clark D. Cunningham et. al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1563 (1994) (stating that judges use dictionaries "to remind them of what they already know, to inform them of what they may not know … and to help them make distinctions" when interpreting the ordinary meaning of the text).

[92] *Contemptuous*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[93] *Contempt*, Merriam Webster Dictionary, (last visited Mar. 11, 2021), https://www.merriam-webster.com/dictionary/contemptuous [https://perma.cc/98BA-MX7A].

[94] *Contempt*, Merriam Webster Dictionary, (last visited Mar. 11, 2021), https://www.merriam-webster.com/dictionary/contempt [https://perma.cc/VFV7-GAN3].

disdainful conduct, or otherwise disrespectfully attributing to another a quality of meanness, disreputableness, or worthlessness."[95] Colonel Winthrop, an influential figure in the development of U.S. military law, offered examples of contemptuous speech, including abusive epithets, denunciatory or contumelious expressions, and intemperate or malevolent comments.[96] Each of the above descriptions invokes a personal aspect to the speech that is directed at more than just the target's professional performance or qualities. It also suggests that the speaker lacks reverence for the target in a permanent and serious way.

The MCM does attempt to expand upon the contours of the covered speech through explanations to Article 88,[97] but in doing so introduces greater ambiguity and conflicting methods for proving contemptuousness. For example, it notes that the truth or falsity of a statement is immaterial to a finding of contemptuousness.[98] Generally, it is also not an affirmative defense that the accused did not intend his or her words to be contemptuous.[99] Additionally, the government need not prove that anyone made privy to the contemptuous speech knew of the accused's military status.[100] Further, whether the words are used against the individual in an official or private capacity is also irrelevant.[101] However, the MCM also explains that "[i]f not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article."[102] Already, ambiguity emerges: how can the personal/private capacity distinction be immaterial if only "personally contemptuous" criticism of officials may be charged? It is difficult to imagine how adverse criticism can rise to the level of being contemptuous without being personal. The conflict is even more apparent in the case of contemptuous words against a group like Congress: how contemptuous words uttered against a group in general can ever be personally contemptuous to any of its individual members is confounding.[103]

The MCM draws another distinction in setting the boundaries of contemptuous language by noting that "expressions of opinion made in a purely

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[95] DEP'T OF THE ARMY, PAMPHLET 27-9 MILITARY JUDGES' BENCHBOOK ch. 3-15-3 (2020).
[96] *See* COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 566 (2d ed. 1920).
[97] *See* MCM, pt. IV, ¶ 14(c).
[98] *See id.*; *see also* U. S. Navy Office of the Judge Advocate General, TEACHING THE PRINCIPLES OF THE UNIFORM CODE OF MILITARY JUSTICE AND THE MANUAL FOR COURTS-MARTIAL 224 (1951) (explaining that truth or falsity is irrelevant because "the gist of the offense is the contemptuous character of the language and the malice with which it is used").
[99] *See* Davidson, *supra* note 49 (indicating the defense will fail even if the service member "did not intend the words to be personally contemptuous.").
[100] S*ee* Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just A Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1219 (1986) ("[U]nder Article 88 an officer is culpable . . . whether the audience is aware of the speaker's military association or not . . . .").
[101] *See* MCM, pt. IV, ¶ 14(c).
[102] *Id*.
[103] S*ee* Aldrich, *supra* note 100, at 1201.

private conversation should not ordinarily be charged."[104] This interpretation aligns with the third element's addition of a publicity component and appears to create a "purely private conversation" exception that could be interpreted to permit conversations with individual civilians or other similar-ranking service members when no other parties are present. The MCM language here, however, is permissive rather than mandatory: such cases "should not ordinarily" be brought. Thus, a service member would likely be unwise to engage in potentially contemptuous speech even in purely private conversations in reliance on this quasi-exception. On the other hand, "giving broad circulation to a written publication containing contemptuous words of this kind in the presence of military subordinates aggravates the offense."[105] Therefore, the degree of contemptuous speech's publicity is also a factor. Even sharing others' speech can be violative, if done in a sufficiently circulative manner.[106]

Speech in violation of Article 88 can either be contemptuous on its face or made contemptuous by virtue of the circumstances during which it is made.[107] This language suggests that the context of the words is key in determining contemptuousness. One scholar indicates that the contemptuous nature of the words is analyzed by "how the words are taken by those who see or hear them."[108] Adding to this challenge is the notion that the same words will be given different import by each individual listener. Under this impact-based analysis, the subjective intent of the speaker matters less than the words' effect on the listener. This contrasts with the alternative reading, as advanced by this Article, that it is the malicious intent motivating the speech which gives rise to liability. Whichever approach is preferred, the competing impact-based and intent-based approaches each serve the object and purpose of the statute: the former supports maintaining civilian superiority over the military in civil society, while the latter supports maintaining proper control over the ranks themselves. Together, they support good order and discipline.

B. *Object and Purpose*

In the case of ambiguity, extrinsic evidence of a statute's object and purpose can shed light on the meaning of the language used where the plain or ordinary meaning is not wholly instructive.[109] As Judge Learned Hand suggested: "Statutes always have some purpose of object to accomplish, whose sympathetic and

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[104] MCM, pt. IV, ¶ 14(c).
[105] *Id*.
[106] *See* United States v. Poli, 22 B.R. 151, 156 (1943) (convicting an Army Lieutenant for distributing leaflets that contained contemptuous speech against President Roosevelt even though the leaflets "were not coined by him but were copied from a newspaper").
[107] *See* MCM, pt. IV, ¶14(b)(4).
[108] Aldrich, *supra* note 100, at 1208.
[109] *See* R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-making*, 25 PEPP. L. REV. 37, 42 (1997) (discussing how certain judges focus on the purpose of the statute as "critical in the initial stage of determining the words' plain meaning.").

imaginative discovery is the surest guide to their meaning."[110] Identifying the "evil" that Article 88 seeks to remedy can further explain what speech is covered by the word contemptuous.

Article 88's main purpose is upholding good order and discipline, which it accomplishes by maintaining military subordination in democratic civil society. Its ban on contemptuous speech upholds good order and discipline within the ranks by suppressing insubordination and disciplinary concerns. Yet the ban also safeguards the civil nature of the democratic process by ensuring that the military and its members remain a self-defense force that simply executes, rather than controls, policy at the highest level.

The UCMJ, passed in 1950, represents a post-World War II movement of military law reform away from absolute commander control and toward a more balanced system more closely resembling the civilian legal arena.[111] In large part, the UCMJ attempts to strike a balance between respecting the rights of service members, such as the First Amendment right to speech, with the need for an effective national defense force unhampered by disciplinary issues and insubordination. In some instances, the balance struck by the UCMJ substantially expanded the constitutional liberties previously granted to service members, while in others, the special relationship between service members and the military justified limitations on individual rights. Essentially, the policy proposition is that the "specialized community" of the military does not lend itself to all forms of personal expression analogous to the civilian sector.[112] Article 88 demonstrates this proposition. Its addition to the code represents an underlying purpose to maintain good order and discipline at the cost of individual expression.[113]

Preventing military officers from speaking contemptuously of their superiors helps to preserve both their respect for those officials and their willingness to carry out directives handed down by them. One who speaks disparagingly of a President's foreign policy orders likely would not be trusted to carry out those orders with integrity.[114] Article 88's purpose of upholding military

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[110] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

[111] *See* Jeremy S. Weber, *The Curious Court-Martial of Henry Howe*, 55 TULSA L. REV. 109, 115 (2019) (citing Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953)).

[112] *See* Parker v. Levy, 417 U.S. 733 (1974); *supra* Section III.B.

[113] *See* United States v. Howe, 37 C.M.R. 429, 437 (1967) ("The evil which Article 88 of the Uniform Code, supra, seeks to avoid is the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States"). Maintaining good order and discipline is also considered a broader purpose of the punitive articles of the UCMJ in general. *See* UCMJ art. 134 (codified at 10 U.S.C. § 934 (2016)) ("[A]ll 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… shall be punished at the discretion of that court.").

[114] As one Senator explained: "I hate to see a fellow called out on Saturday night and say everything against his Government, and then on Monday morning he appears in uniform with a great smile on his face and squared-up shoulders." *A Bill to Unify, Consolidate, Revise, and Codify the Articles of*

discipline is further evidenced by its selection of individual officials protected against contemptuous speech. The President and Vice President, Congress as an institution, the Secretary of Defense, the Secretaries of the military departments, the Secretary of Homeland Security, and state governors are included.[115] Each of these individuals either is or could potentially be in the chain of command of a commissioned officer. The statute could have included other government officials such as cabinet members, or it could have simply included "(high) government officials" generally. Instead, Congress tailored the list of officials protected to include only those whose mission effectiveness could be affected by contemptuous dissention within the ranks. In fact, after much back and forth between the House and Senate during a legislative revision in 1914, the Senate version attempted to further refine the coverage to exclude governors and legislatures because they were not "directly in charge of the Army."[116] This supports interpreting Article 88's purpose as upholding order and discipline and limiting its application to instances where that purpose is served.

Military subordination to civilian control over government and political issues is also offered as a sub-purpose of good order and discipline in the context of Article 88. During the Mexican War, one commentator noted of a similar pre-UCMJ predecessor:

> [The Army] may also be called on to aid . . . in pursuing domestic tranquility. The most disastrous consequences might ensue, were it permitted to members of the army to speak disrespectfully, and contemptuously of their authorities. The military would thus create the very evils they were intended to remedy.[117]

Speaking at a 1912 hearing of the House of Representatives Committee on Military Affairs, Brigadier General Enoch H. Crowder, then the Judge Advocate General of the U.S. Army, noted that Article 62, the substantially similar pre-UCMJ predecessor to Article 88, "punishes acts of civil disrespect toward civil authorities, and is intended to be expressive of the principle of the subordination of the military authority to the civil."[118] One member of Congress pressed Crowder on the proposal's lack of differentiation between times of war and peace and suggested that the stated purposes of discipline and civilian supremacy made sense during

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War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services, 81st Cong. 332 (1949) (statement of Sen. Leverett Saltonstall).

[115] UCMJ art. 88 (codified at 10 U.S.C. § 888 (2016)).

[116] *See* 51 CONG. REC. 3213 (1914). The House failed to take action on the proposal.

[117] JOHN PAUL JONES O'BRIEN, A TREATISE ON AMERICAN MILITARY LAWS, AND THE PRACTICE OF COURTS MARTIAL 67 (1846).

[118] *See Being A Project for the Revision of The Articles of War: Hearing Before a House Comm. on Military Affairs on H.R. 23628*, 62d Cong. 55 (1912). General Crowder, in the same hearing, called the Articles of War at the time "archaic," yet still supported retaining the contemptuous speech provision and even recommended its expansion.

times of conflict, but seemed drastic during peacetime.[119] Crowder later reiterated the importance of military subordination at a 1916 hearing: "You know the purpose of this article is to require officers of the Army to live in proper subordination to the civil authorities and have a proper attitude of respect toward constituted civil authority."[120] In *Howe*, the only Article 88 case to be litigated in court, the Court cited Chief Justice Earl Warren's speech which aids in this understanding:

> A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people. Our War of the Revolution was, in good measure, fought as a protest against standing armies. Moreover, it was fought largely with a civilian army, the militia, and its great Commander-in-Chief was a civilian at heart.[121]

The service member in *Howe* was an Army second lieutenant who participated in a demonstration event against U.S. military involvement in Vietnam. Lieutenant Howe joined a group of college students in El Paso, Texas, near his duty station at Fort Bliss and held a cardboard sign that read: "LET'S HAVE MORE THAN A 'CHOICE' BETWEEN PETTY, IGNORANT FASCISTS [sic] in 1968" and "END JOHNSON'S FASCIST AGGRESSION [sic] IN VIETNAM."[122] The demonstration was described as peaceful and consisted of one to two dozen participants and between hundreds or up to two thousand onlookers.[123] Howe wore civilian clothes and was off-duty at the time.[124] Other participants did not note his military status.[125]

Three days after the protest, the Army brought UCMJ charges against Howe for using contemptuous words against the President and conduct unbecoming of an officer and a gentleman.[126] At trial, Howe pleaded not guilty and was convicted of both charges.[127] Howe appealed his Article 88 conviction to the Court of Military Appeals (CMA).[128] The CMA opinion discussed the long-standing tradition in Anglo-Saxon jurisprudence of military subordination and historical counterparts of Article 88 dating back to pre-independence.[129] The opinion suggested that Article 88 was designed to prevent "an entering wedge for incipient mutiny and sedition"

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[119] *See id*. at 56.
[120] *An Act to Amend Section 1342 and Chapter 6, Title XIV, of The Revised Statutes of The United States, and For Other Purposes: Hearing Before a Subcomm. of the H. Comm. on Military Affairs*, 64th Cong. 28 (1916) (Statement of Brigadier General Enoch H. Crowder).
[121] United States v. Howe, 37 C.M.R. 429, 439 (1967).
[122] *See id*. at 433.
[123] *See id*. at 432.
[124] *See* Aldrich, *supra* note 100, at 1199.
[125] *See Bliss Marcher Faces Charges*, EL PASO HERALD-POST, Nov. 10, 1965, at A6.
[126] *See Howe*, 37 C.M.R. at 432.
[127] *Id.* at 431. Howe was later "sentenced to dismissal, total forfeitures, and confinement at hard labor for two years," which was later reduced to one year. *Id*.
[128] *Id*.
[129] *See id*.

and was meant to safeguard the "tradition that has been bred into us" of civilian supremacy over the military.[130]

Howe also discussed the legislative purpose of maintaining good order and discipline.[131] Without making a determination of whether it constituted wartime, the court remarked that the ongoing conflict in Vietnam involved recruiting, drafting, and committing hundreds of thousands of military members to conflict.[132] The court was hesitant to allow such an operation to be hindered in any way by disciplinary issues such as contemptuous speech.[133] Once again, the military's need for good order and discipline significantly outweighed the service member's attempts to exercise his First Amendment freedoms.

C. *Legislative Intent*

Examining the evolution of Article 88 and its deliberative process can aid in interpretation of ambiguous language.[134] Legislative history provides understanding of the meaning of the words to those who enacted it.[135]

Because Article 88, as currently written, was passed as part of the UCMJ in 1950, only that statute's legislative history is probative. Prohibitions against contemptuous, disrespectful, mutinous, or seditious speech by military personnel, however, have existed for centuries and predate even the founding of the United States.[136] Beginning in the fourteenth century, British law prohibited remarks that might provoke quarrels and the crime of treason covered acts of disobedience.[137] By the eighteenth century, insulting the monarch was no longer a civilian offense, but the first treatise published on British military law argued that:

> For since [soldiers] do break a Prince's Bread, and are maintained at his Charges, a far greater *Modesty* of Speech, may very justly be expected from them than others, and consequently… when they let loose their Tongues against the Government, they are most justly punished with much greater Severity, than other Men.[138]

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[130] *See id.* at 439.
[131] *See id.* at 437–40.
[132] *See id.* at 437.
[133] *See id.*
[134] *See* Victoria F. Nourse, *A Decision Theory of Statutory Interpretation: Legislative History by the Rule* 122 YALE L.J. 70, 72–73 (2012) (advancing the role of legislative history in statutory interpretation as "empirically sound" and "normatively appealing").
[135] *See id.* at 75.
[136] *See* Davidson, *supra* note 49, at 2–5.
[137] *See* Kester, *supra* note 47, at 1701 (citing ORDINANCES FOR WARRE &C. AT THE TREATE AND COUNCIL OF MAUNCE, reprinted in 2 F. GROSE, THE ANTIQUITIES OF ENGLAND AND WALES 34, 36 (new ed. 1783)).
[138] Kester, *supra* note 47, at 1706 (citing A. BRUCE, THE INSTITUTIONS OF MILITARY LAW, ANCIENT AND MODERN 270 (1717)).

> During the Revolutionary era, the United States military adopted Britain's own code of military conduct along with the British prohibition of contemptuous speech. A September 1776 resolution read:
>
> Whatsoever officer or soldier shall presume to use traitorous or disrespectful words against the authority of the United States in Congress assembled, or the legislature of any of the United States in which he may be quartered… shall suffer such punishment as shall be inflicted upon him by the sentence of a court-martial.[139]

An 1804 reenactment extended the list of covered entities to include state legislatures and governors.[140] The word contemptuous replaced the word traitorous in an 1806 revision, though essentially no records of the decision remain to explain the change.[141]

During its 1916 revision, General Crowder commented on what was then Article 62's application to different levels of critical speech.[142] While he considered some criticism to be acceptable, he suggested that an officer could be susceptible to court-martial if he or she "should come out in the public press and characterize Congress as an incompetent body, or a body which is not patriotic."[143] The general import was that the article was not intended to silence all dissent entirely, but the outer limits were not fully explained:

> Mr. Gordon: Anything in the nature of general criticism of any officer of the United States, from the President down, ought not to subject him to punishment. As a citizen he has the same right to criticize an officer of the Government that any other citizen has. Of course, I mean criticism in a legitimate way; of course, disrespect—
>
> Gen. Crowder (interposing): That is what this article punishes. It does not deal with criticism, but the use of disrespectful words against any of these people.[144]

At a hearing on the current version of Article 88 during the 1949 enactment of the UCMJ, the provision was deemed only applicable to commissioned officers,

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[139] 5 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, 789 (Worthington Chauncey Ford ed. 1906).
[140] *See* Kester, *supra* note 47, at 1711 (citing 13 ANNALS OF CONG. 882 (1804)).
[141] *See* Kester, *supra* note 47, at 1712 (citing Act of Apr. 10, 1806, ch. 20, 2 Stat. 359 (1806)).
[142] *See* Kester, *supra* note 47, at 1716–17 (citing *Hearings Before a Subcomm. Of the H. Comm. On Military Affairs on An Act to Amend Section 1342 and Chapter 6, Title XIV, of the Revised Statues*, 64th Cong. 28 (1916)).
[143] *See id.* at 1717; Davidson, *supra* note 49.
[144] *Id*.

a significant narrowing in scope.[145] A drafting member noted that the Article's predecessors had been "practically never enforced,[146]" while another member described how its enforcement occurred "only in extreme cases,"[147] particularly during periods of war. [148] At the same hearing, one senator expressed concern about possible enforcement of Article 88 against retired personnel, who in large part reintegrate into civilian lifestyle.[149] Without fully elucidating the Article's scope, the Senate closed deliberations upon reassurance that it would be used infrequently and with the hope that the issue would be more closely examined in the future.[150]

Some commentators have noted that the term contemptuous can be inferred to include at least the term "disrespectful." [151] Indeed, the word disrespectful currently appears in Article 89, "Disrespect Toward Superior Commissioned Officer," [152] so if mere disrespectful speech would suffice, the word contemptuous would not have been used. An alternative reading of the 1956 Amendment could view the removal of the word "disrespectful" as heightening the standard of language necessary to warrant prosecution.

D. *Defining Contemptuous Speech*

Considering the statutory text, MCM guidance, the object and purpose of the UCMJ, and the statute's legislative history, Article 88's ban on contemptuous speech against sitting United States Presidents as applied to retired officers can be simplified into a three-part test to determine whether Article 88 has been violated. First, as a threshold matter, when a retired officer uses personally disparaging and offensive language against a sitting United States President in a manner that

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[145] *See* Kester, *supra* note 47, at 1718 (citing *Bills To Unify, Consolidate, Revise, And Codify The Articles Of War, The Articles For The Government Of The Navy, And The Disciplinary Laws Of The Coast Guard, And To Enact And Establish A Uniform Code Of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Services*, 81st Cong. 332 (1949)).

[146] *See* Kester, *supra* note 47, at 1718 (citing *Bills To Unify, Consolidate, Revise, And Codify The Articles Of War, The Articles For The Government Of The Navy, And The Disciplinary Laws Of The Coast Guard, And To Enact And Establish A Uniform Code Of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Services*, 81st Cong. 332 (1949) (statement of Felix Larkin, Assistant Attorney General of the National Defense Establishment)).

[147] *See* Kester, *supra* note 47, at 1718 (citing *Bills To Unify, Consolidate, Revise, And Codify The Articles Of War, The Articles For The Government Of The Navy, And The Disciplinary Laws Of The Coast Guard, And To Enact And Establish A Uniform Code Of Military Justice: Hearing on S. 857 and H.R. 4080 Before a Subcomm. of the S. Comm. on Armed Services*, 81st Cong. 332 (1949) (statement of Professor Edmund M. Morgan, Jr.)).

[148] Kester, *supra* note 47, at 1700. Of the reported 115 general courts-martials, "all but a handful occurred during the Civil War, World War, or World War II, or the year or two following each of those conflicts." *Id.* at 1720–21. Kester argues, in part, how "the Army which fought in these three major conflicts was built largely of conscripts or those impelled by the threat of conscription," so soldiers would be more likely to "criticize government officials for their condition."). *See id.* at 1721.

[149] *See id*. at 1719. This concern, however, generated no legislative action to address the issue of Article 88's application to retirees.

[150] *See id.* at 1719–20.

[151] *See* Aldrich, *supra* note 100, at 1198–99.

[152] *See* UCMJ art. 89 (codified at 10 U.S.C. § 889 (2016)).

indicates severe and serious lack of respect or hatred, the retired officer violates Article 88. Second, the circumstances in which the words were used must threaten or have the likelihood of threatening military order or discourage military subordination to the civilian, namely the Commander-in-Chief. Third, the accused must have intended the words to come to the knowledge of third parties. Thus, communication that is purely private or confidential cannot be considered contemptuous. Once these three requirements have been satisfied, then the retired officer has violated Article 88.

IV. Applicability of Article 88 Free Speech Limitations to Retired Officers

Upon retirement from the armed forces, military officers maintain their status as veterans through benefits including pensions, healthcare, and other legal entitlements. At the same time, veterans are also encouraged to reintegrate into civilian life. Many pursue private employment and take advantage of transition programs. However, the legal ramifications of their former service follow them for the remainder of their lives: the UCMJ continues to apply to retired service members long after their retirement ceremony is over.[153] This continuing application, in combination with Article 88's burden on free speech, places statements by high-profile, retired Generals and Admirals directly in the spotlight for potential criminal prosecution.

A. *UCMJ Application to Retirees*

As previously discussed, Article 88 of the UCMJ applies to, "[a]ny commissioned officer."[154] However, the language of the article is ambiguous as to whether it only applies to active-duty commissioned officers. To resolve this ambiguity, Article 2(a)(4) of the UCMJ provides that the UCMJ applies and has jurisdiction over "retired members of a regular component who are entitled to pay."[155] Though it may seem clear that the UCMJ applies to retirees through a plain meaning reading of the statute, case law developed after the passage of the UCMJ in 1950 has cemented the foundation for regulation of the free speech rights of retirees today.[156]

The Supreme Court first tackled the issue of retirees being subject to court-martial jurisdiction before the passage of the UCMJ. In 1881, Capt. Richard W. Tyler retired from the United States Army after being wounded in battle.[157] Tyler

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[153] *See infra* Section IV.A.
[154] UCMJ art. 88 (codified at 10 U.S.C. § 888 (2016)).
[155] *See* UCMJ art. 2(a)(4) (codified at 10 U.S.C. § 802 (2016)).
[156] *See, e.g.* United States v. Begani, 79 M.J. 767, 791 (N.M. Ct. App. 2020) (Crisfield, J., dissenting) (disagreeing with the majority's treatment of retirees from active components in subjecting them to court-martial jurisdiction, thereby seemingly depriving them of their "constitutional rights to free speech"); United States v. Dinger, 76 M.J. 552, 556 (N-M. Ct. Crim. App. 2017) (holding retired service members may face court-martial and thereby be "subject to prosecution for acts or speech otherwise protected from civilian prosecution by the Constitution.")
[157] United States v. Tyler, 105 U.S. 244, 244 (1881).

was entitled to retirement pay under a congressional statute that paid officers by ten percent for every period of five years' service.[158] The Supreme Court held that a commissioned officer who is entitled to pay after retiring from service is nonetheless still subject to the "rules and articles of war, and to trial by general court-martial for any breach thereof."[159] The Court explained:

> There is, therefore, a manifest difference in the two kinds of retirement, namely, retiring from active service and retiring wholly and altogether from the service. In the latter case such reward or compensation as Congress thought proper to bestow, namely, one year's pay and allowance, in addition to what was previously allowed, is given at once, and the connection is ended. In the former case the compensation is continued at a reduced rate, and the connection is continued, with a retirement from active service only.[160]

The Court further explained that a retired commissioned officer may nonetheless "be a very useful officer" should he or she ever need to be recalled into active service.[161] In fact, an officer's retirement pay is generous because that officer may be called back to service.[162] Because of this potential recall, the Court found that an officer who receives retirement pay in connection with past service must be subject to court-martial jurisdiction for any violation he or she may commit.[163] In a sense, the Court concluded that retirement from the military does not sever the service obligation of the retiree and, further, does not sever the obligation of complying with the UCMJ.[164]

The application of the UCMJ to non–active duty service members was originally contentious. In 1955, roughly five years after Congress passed the UCMJ, the Supreme Court held in *United States ex rel. Toth v. Quarles* that Congress has no power to subject a discharged service member to trial by court-martial for offenses committed by him while in service, as doing so would deprive him of the constitutional safeguards protecting persons accused of a crime in federal court.[165] Considering the rights of veterans and the recent passage of the UCMJ,

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[158] *See id.*
[159] *Id.* at 245.
[160] *Id.*
[161] *Id.*
[162] *See id.*
[163] *See id.*
[164] *See id.* (applying the standards of the UCMJ because "[w]e are of opinion that retired officers are in the military service"); *see also* Brigadier General (Ret.) Frank O. House, *The Retired Officer: Status, Duties, and Responsibilities*, 26 A.F. L. REV. 111, 114 (1987) ("Congress also provided in specific and unequivocal terms as far back as 1878 that personnel on the retired list constituted a part of the Army of the United States.").
[165] Robert W. Toth was honorably discharged after serving in the United States Air Force in Korea. Five months after his discharge, Toth was arrested by military authorities on charges of murder and conspiracy to commit murder while an airman in Korea. Toth had "no relationship of any kind with

the Court strongly emphasized the need to restrict court-martial jurisdiction "to persons who are actually members or part of the armed forces."[166] As the Court noted, "expansion of court-martial jurisdiction . . . necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals."[167] Thus, the Court determined the UCMJ does not apply to former service members who have been *wholly separated* from the service.[168]

It is important to note that there is a distinction between those who are simply veterans of service and those who are retired. Veterans are wholly separated following the honorable completion of a certain service commitment,[169] whereas retirees are those who served at least twenty years and are thus afforded certain benefits, including retirement pay.[170] The "wholly separated" standard thus removes non-retirees from the UCMJ's purview while appearing to leave retirees within its reach.

Indeed, it did not take long for the United States Court of Military Appeals (CMA) to apply this distinction. In 1958, the CMA held that court-martial jurisdiction applied to former commissioned officers on the retired list.[171] Echoing the rationale explained by the Supreme Court in 1881,[172] the CMA expressed the increasing need of officers on the retired list for national defense:

> The salaries [commissioned officers] receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health. Certainly, one who is authorized to wear the uniform of his country, to use the title of his grade, who is looked upon as a model of the military way of life, and who receives a salary to assure his availability, is a part of the land or naval forces.[173]

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the military" at the time of his arrest. *See* United States ex rel. Toth v. Quarles, 350 U.S. 11, 23 (1955).

[166] *See id.* at 15.

[167] *Id.*

[168] *See id.* at 22.

[169] *See* 38 U.S.C. § 101(2) (2020) ("The term 'veteran' means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.").

[170] *See Types of Retirement*, DEF. FIN. ACCT. SERV., https://www.dfas.mil/RetiredMilitary/plan/retirement-types/ [https://perma.cc/2698-Z8D9] (last visited Sept. 10, 2020). For regular retirement, the service member must complete at least 20 years of active service. *Id.* A reserve retirement requires the reservist to be at least 60 years of age and complete 20 years of active duty service. *Id*.

[171] *See* United States v. Hooper, 26 C.M.R. 417, 425 (U.S.C.M.A. 1958).

[172] *See* United States v. Tyler, 105 U.S. 244, 244 (1881).

[173] Hooper, 26 C.M.R. at 425.

According to this viewpoint, since retired officers continue to receive pay in exchange for their service in times of national emergencies, they are continually subject to the UCMJ.

Moreover, in 2017, the Navy-Marine Corps Court of Criminal Appeals held in *United States v. Dinger* that a retiree receiving pay is even subject to a punitive discharge under the UCMJ.[174] Gunnery Sergeant (ret.) Derek L. Dinger was charged and convicted of violations of UCMJ Articles 80, 120, 120c, and 134 for attempting to produce child pornography, wrongfully making an indecent visual recording, and receiving, viewing, and possessing child pornography.[175] On appeal, Dinger challenged the court-martial's jurisdiction over him and asserted that since he was a retiree when the acts were committed, he was no longer subject to the UCMJ.[176] The Court rejected Dinger's argument, citing longstanding precedent from *United States v. Tyler* that "those in a retired status remain 'members' of the land and Naval forces who may face court-martial."[177] Moreover, the Court noted that, although "military retirement benefits are to be considered deferred pay for past services" instead of "current compensation" to retirees "for reduced current services," this application is limited to tax purposes and does not eliminate court-martial jurisdiction over retirees.[178] Thus, a retiree receiving pay is still subject to punitive discharge through a court-martial for violations of the UCMJ committed following retirement.

Finally, bolstering this interpretation, the Supreme Court in 2019 denied certiorari from a retiree appealing his court-martial conviction.[179] Marine Staff Sergeant Steven M. Larrabee retired from active duty after twenty years of service.[180] Larrabee was then transferred to the Fleet Marine Corps Reserve, where he continued to receive retainer pay.[181] Larrabee was later arrested and court-martialed for sexually assaulting a bartender at one of the bars he managed.[182] Larrabee was charged and convicted for violating UCMJ Arts. 120 and 120a.[183] Among other challenges, Larrabee challenged the jurisdiction of a court-martial against him as a retired service member.[184] However, the Navy-Marine Corps Court of Criminal Appeals summarily rejected this challenge with a simple citation to its previous holding in *Dinger*.[185] The Supreme Court's subsequent denial of certiorari

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[174] *See* United States v. Dinger, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017).
[175] *Id.* at 553.
[176] *See id.*
[177] *See id.* at 557 (citing United States v. Tyler, 105 U.S. 244 (1881)).
[178] *See id.* at 556–57 (citing Barker v. Kansas, 503 U.S. 594, 605 (1992)).
[179] *See* United States v. Larrabee, No. 201700075, 2017 WL 5712245 (N-M. Ct. Crim. App. Nov. 28, 2017), *aff'd*, 78 M.J. 107 (C.A.A.F. 2018), *cert. denied*, 139 S. Ct. 1164 (2019) (mem.).
[180] *Id.* at *2–3.
[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *See id.* at *2.
[185] *See id.* at *4; United States v. Dinger, 76 M.J. 552, 557 (N-M. Ct. Crim. App. 2017) (holding that service members "in a retired status remain 'members' of the land and Naval forces who may face court-martial").

reaffirmed its longstanding precedent in *Tyler* that retirees are still subject to court-martial jurisdiction for UCMJ violations they commit even after retiring from active duty service.[186]

Though Larrabee failed to convince the Court to reverse its decision in *Tyler*, the Supreme Court's decision to deny certiorari in *Larrabee* caused a divergence of opinion among legal experts. For example, Professor Steve Vladeck has referred to the Supreme Court's reasoning for subjecting retirees to court-martial jurisdiction as "deeply anachronistic."[187] As Professor Vladeck explained, "[e]ven in a national emergency, a tiny percentage of retired service members would be realistically subject to involuntary recall."[188] He went on, saying that the reserve component has been supplementing the needs of the armed forces.[189] Retirees have not been recalled into active duty service because of the readily available pool from each branch's respective reserve component. As such, Professor Vladeck argues there is no need to continue to rely on retirees and subject them to court-martial jurisdiction well into retirement.[190]

On the other hand, Maj. Gen. (ret.) Charles J. Dunlap, former Deputy Judge Advocate General of the Air Force and Professor of the Practice of Law at Duke University School of Law, rebutted Professor Vladeck's position that retirees essentially are no longer needed in today's armed forces.[191] Professor Dunlap contends that retirees serve an important role as readily available service members who agree to be recalled into service should there be a need for their expertise.[192] As Professor Dunlap wrote, "it's quite possible to envision a future where America must be ready to use *all* available manpower, including specifically retired members of the armed forces *who have already experienced the rigors of military training.*"[193] Interestingly, Professor Dunlap noted that the statements made by General (ret.) Michael Hayden, General (ret.) Martin Dempsey, and Admiral (ret.) William McRaven criticizing President Donald Trump may be considered "professionally inappropriate."[194] However, Professor Dunlap stopped short of

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[186] *See* United States v. Tyler, 105 U.S. 244, 245 (1881); Brown v. Allen, 344 U.S. 443, 489–90 (1953) (finding denial of certiorari has no precedential value); United States v. Carver, 260 U.S. 482, 490 (1923) ("[D]enial of a writ of certiorari imports no expression of opinion upon the merits of the case.").
[187] *See* Steve Vladeck, *The Supreme Court and Military Jurisdiction Over Retired Servicemembers*, LAWFARE (Feb. 12, 2019, 7:00 AM), https://www.lawfareblog.com/supreme-court-and-military-jurisdiction-over-retired-servicemembers [https://perma.cc/C9EG-VALY].
[188] *See id.*
[189] *See id.*
[190] *See id.*
[191] *See* Charles Dunlap, *Should Retired Servicemembers Be Subject to Military Jurisdiction? A Retiree's Perspective*, LAWFARE (Feb. 16, 2019), https://sites.duke.edu/lawfire/2019/02/16/should-retired-servicemembers-be-subject-to-military-jurisdiction-a-retirees-perspective/ [https://perma.cc/TKK7-KV6H].
[192] *See id.*
[193] *Id.*
[194] *See id.*

commenting on the constitutionality of subjecting these high-ranking retirees to a criminal charge under UCMJ Art. 88.[195]

Regardless of whether a particular statement is considered contemptuous, both Professors Vladeck and Dunlap agree that, under current law, these retired generals and admirals are still subject to court-martial jurisdiction.[196] As it stands, these retirees must select their words delicately when engaging in their constitutional right of free speech against elected officials; a single statement could find them standing trial in a court-martial.

B. *Recent Statements by Retired Generals and Admirals and Application of Article 88 thereto*

Recent public statements by retired Generals and Admirals have included what may be considered contemptuous speech.[197] Such statements vary broadly in their relative positions within the understanding of contemptuous speech. While some statements made by General (ret.) Mattis and Admiral (ret.) McRaven are more likely within what would be considered 'contemptuous,' other statements are situated along the term's margins.[198] This section analyzes such statements using the previously developed definition of contemptuous speech, which consists of three parts: (1) personally disparaging and offensive language directed at a sitting President; (2) which affects or has the likelihood of affecting good order and discipline; and (3) which is not intended to be purely private.[199] While we focus on statements by these retired officers, numerous examples of such statements by other retired generals and admirals permeate the public discourse.[200]

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[195] *See id.*

[196] *See* Dunlap, *supra* note 191; Vladeck, *supra* note 187.

[197] *See* Victor Davis Hanson, *Not-So-Retired Military Leaders*, NAT'L REV. (June 7, 2020, 8:58 PM), https://www.nationalreview.com/2020/06/not-so-retiring-retired-military-leaders/ [https://perma.cc/L9XJ-H2UR] (discussing the contemptuous nature of recent former military leaders' comments against President Trump).

[198] *See id.*

[199] *See supra* Section III.D.

[200] *See* David Freed, *The First U.S. General to Call Trump a Bigot*, ATLANTIC (June 22, 2020) https://www.theatlantic.com/politics/archive/2020/06/ricardo-sanchez-general-racism-military-trump/613279/ [https://perma.cc/95DU-2X5N] ("'I believe the president is a racist,' [Ricardo Sanchez] told me. 'The statement has to be made.'"); Roey Hadar, *Retired Army Gen. Stanley McChrystal: President Donald Trump Immoral, Doesn't Tell the Truth,* ABC (Dec. 30, 2018, 9:20 AM) https://abcnews.go.com/Politics/retired-army-gen-stanley-mcchrystal-president-donald-trump/story?id=60065642 [https://perma.cc/J94D-SWCJ] ("I'm very tolerant of people who make mistakes because I make so many of them—and I've been around leaders who've made mistakes . . . but through all of them, I almost never saw people trying to get it wrong. And I almost never saw people who were openly disingenuous on things."); H.R. McMaster, *President Trump's Foreign Policy*, FOUND. FOR DEF. DEMOCRACIES (Oct. 10, 2019) https://www.fdd.org/wp-content/uploads/2019/10/Transcript_Instruments_of_American_Power_Oct2019.pdf [https://perma.cc/DLV4-RACW] ("Gratuitous insults don't really help. They're not productive . . ."); William H. McRaven, *Our Republic IS Under Attack From the President*, N.Y. TIMES (Oct. 17, 2019) https://www.nytimes.com/2019/10/17/opinion/trump-mcraven-syria-military.html; William H. McRaven, *Revoke My Security Clearance, Too, Mr. President*, WASH. POST (Aug. 16, 2018, 2:44 PM),

United States Marine General (ret.) James Mattis, also the former Secretary of the Department of Defense, has taken to the public stage with a multitude of statements casting President Donald Trump in a less than favorable light.[201] These statements vary from joking statements meant to elicit laughter to caustic statements intended as a reaction to President Trump's own insults towards Gen. (ret.) Mattis.[202]

First, Gen. (ret.) Mattis's statement responding to the President's alleged photo op amongst protests at Lafayette Square[203] is potentially contemptuous under Article 88.[204] Gen. (ret.) Mattis accused Trump of violating the Constitution for a "bizarre" photo op and referenced Trump's apparent lack of maturity.[205] While the words themselves were not necessarily obscene, they could be considered personally disparaging and offensive toward the President because they center on the issue of his character and ability, and because Mattis claimed he was "angry and appalled."[206] These words also have the potential to affect good order and discipline: service members who hear Mattis's statement may be made less likely to execute the President's orders if they believe Gen. (ret.) Mattis's words. Further, Gen. (ret.) Mattis's mention of "military leadership standing alongside" could inflame the issue of military subordination to civil authority, a key part of good order and discipline.[207] Lastly, the words—given as public remarks—were not part of a purely private conversation. Thus, this statement could potentially qualify for criminal prosecution under the UCMJ.

Next, during his keynote speech at the Al Smith Memorial Foundation Dinner on October 17, 2019, Gen. (ret.) Mattis made two statements that may qualify as contemptuous speech.[208] The first statement seems meant to elicit laughter by the attendees:

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https://www.washingtonpost.com/opinions/revoke-my-security-clearance-too-mr-president/2018/08/16/8b149b02-a178-11e8-93e3-24d1703d2a7a_story.html [https://perma.cc/ZC42-DCUE]; Maegan Vazquez, *Michael Hayden Says He, Too, Would Be Honored if Trump Revoked His Security Clearance*, CNN (Aug. 19, 2018, 4:09 PM), https://www.cnn.com/2018/08/19/politics/intelligence-chiefs-michael-hayden-john-brennan-cnntv/index.html [https://perma.cc/MYL9-TXWD] ("And frankly, if [President Trump's] not revoking my clearance gave the impression that I somehow moved my commentary in a direction more acceptable to the White House, I would find that very disappointing and upsetting.").

[201] *See* Tom McElroy, *Most overrated? Mattis laughs off Trump barb at charity gala*, ASSOCIATED PRESS (Oct. 17, 2019), https://apnews.com/article/d5e1d90da93a40caa305642bb2ca3f0d [https://perma.cc/6TKQ-UA7H].

[202] *See id.*

[203] *See supra* text accompanying notes 169–170.

[204] *See* Hanson, *supra* note 197; *supra* Section III.D.

[205] *See* Goldberg, *supra* note 1.

[206] *See id.*

[207] *See* Goldberg, *supra* note 1, and accompanying text.

[208] *See* Tom McElroy, *Most overrated? Mattis laughs off Trump barb at charity gala*, ASSOCIATED PRESS (Oct. 17, 2019), https://apnews.com/article/d5e1d90da93a40caa305642bb2ca3f0d [https://perma.cc/5JBP-422H].

> "I am honored to be considered [the world's most overrated general] by Donald Trump because he also called Meryl Streep an overrated actress. So, I guess I'm the Meryl Streep of generals . . . And you do have to admit that between me and Meryl, at least we've had some victories."[209]

Is the statement deeply disparaging or personally offensive to the President? Due to the clear subtext of joking at President Trump's previous comments, probably not. The statement was delivered with both a smile and a jovial tone, and was met by laughter from the audience.[210] A listener would be unlikely to conclude that that this statement indicates a deep lack of reverence for the President himself or for the office. Because the MCM requires the language to be contemptuous in light of the circumstances in which it was used,[211] the statement likely does not rise to the required level of contempt. Neither the words nor the demeanor of their delivery was sufficient to satisfy the elements for an Article 88 violation.

Later in the same speech, Gen (ret.) Mattis made an additional statement that could be another example of what may be considered contemptuous speech. "I earned my spurs on the battlefield… and Donald Trump earned his spurs in a letter from a doctor."[212] These words were delivered with a stern and less jovial demeanor, despite still being met with laughter by the attendees.[213] This statement, referencing President Trump's exclusion from the Vietnam War draft by way of doctor's letter, was meant as a slight towards the President. These words convey to the audience that Gen. (ret.) Mattis's respect towards President Trump is diminished because the President had not served in the military, thus indicating a deep and personal lack of respect. The statement also has the potential to impact good order and discipline, as this reference to President Trump's avoidance of the draft and subsequent election as president could call into question the relationship between the military and civil society and could make service members less likely to respect the President. Still, Gen. (ret.) Mattis could contend that since the statement was met by audience laughter, the circumstances arguably did not support a conclusion that his statement was contemptuous.

As recent as January 6, 2021, Gen. (ret.) Mattis made potentially contemptuous statements against President Trump following the siege at the U.S. capitol, stating "[t]oday's violent assault on our Capital, an effort to subjugate American democracy by mob rule, was fomented by Trump."[214] These statements

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[209] *Id.*
[210] *See id.*
[211] *See* MCM, pt. IV, ¶14(b)(4).
[212] *See* McElroy, *supra* note 208.
[213] *See id.*; Guardian News, *'He earned his spurs from a doctor': Gen James Mattis mocks Donald Trump*, YOUTUBE (Oct. 18, 2019), https://www.youtube.com/watch?v=5JCdMxy9Z10 [https://perma.cc/534K-QDSM].
[214] *See* Hope Hodge Seck, *Former SecDef Jim Mattis Denounces Pro-Trump 'Violent Assault' on US Capitol*, MILITARY.COM (Jan. 6, 2021), https://www.military.com/daily-

were made mere hours after supporters of the President breached the doors of the Capitol and ransacked congressional offices.[215] Gen. (ret.) Mattis further accused President Trump of "destroy[ing] trust in our election" and "poison[ing] our respect for fellow citizens."[216] These comments are obscene and personally disparaging, as Gen. (ret.) Mattis named President Trump while painting him as a political insurgent bent on manipulating and destroying American democracy.[217] Further, these comments have the potential to disrupt good order and discipline in following the President's orders, particularly after President Trump ordered 1,100 National Guard troops to quash the siege at the U.S. capital.[218]

Admiral (ret.) William McRaven has also been a vocal critic of the President. In 2017, shortly after President Trump's inauguration, Adm. (ret.) McRaven called Trump's "attack" on the free press "the greatest threat to democracy in [his] lifetime."[219] This statement is not contemptuous because it personally disparages neither the President nor the office of the Commander in Chief, nor does it indicate a serious lack of reverence for the President in a personal capacity. Rather, it is a criticism of certain statements made by the President. As Gen. Crowder noted, mere criticism is not what Article 88 is intended to address.[220]

However, other statements by Adm. (ret.) McRaven are seemingly more contemptuous. In an op-ed for the *Washington Post*, Adm. (ret.) McRaven said it would be "an honor" to stand alongside those who have "spoken up against [President Trump's] presidency."[221] Later, in a February 2020 article, Adm. (ret.) McRaven wrote:

> "As Americans, we should be frightened—deeply afraid for the future of the nation. When good men and women can't speak the

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news/2021/01/06/former-secdef-jim-mattis-denounces-pro-trump-violent-assault-us-capitol.html [https://perma.cc/95KJ-DUU7].

[215] *See id.*

[216] *See id.* ("His use of the Presidency to destroy trust in our election and to poison our respect for fellow citizens has been enabled by pseudo political leaders whose names will live in infamy as profiles in cowardice . . . Our Constitution and our Republic will overcome this stain and We the People will come together again in our never-ending effort to form a more perfect Union, while Mr. Trump will deservedly be left a man without a country.").

[217] *See id.*

[218] *See* @PressSec45, TWITTER (Jan. 6, 2021, 3:36 PM), https://twitter.com/PressSec45/status/1346918582832168964 ("At President @realDonaldTrump's direction, the National Guard is on the way along with other federal protective services. We reiterate President Trump's call against violence and to remain peaceful.").

[219] Christopher Woody, *Former Navy Special Operations Commander: Trump Attacks on Media 'The Greatest Threat to Democracy in My Lifetime'*, BUS. INSIDER (Feb. 23, 2017), https://www.businessinsider.com/william-mcraven-trump-media-fake-news-threat-democracy-2017-2 [https://perma.cc/2WMS-2JNV].

[220] *See* MCM, pt. IV, ¶14(c).

[221] William H. McRaven, *Revoke My Security Clearance Too, Mr. President*, WASH. POST (Aug. 16, 2018), https://www.washingtonpost.com/opinions/revoke-my-security-clearance-too-mr-president/2018/08/16/8b149b02-a178-11e8-93e3-24d1703d2a7a_story.html [https://perma.cc/RNM5-HJYV].

> truth, when facts are inconvenient, when integrity and character no longer matter, when presidential ego and self-preservation are more important than national security—then there is nothing left to stop the triumph of evil."[222]

These statements likely constitute contemptuous speech under Article 88. Adm. (ret.) McRaven's statements, published for popular consumption, essentially cast the President as evil and egotistical to an enormous audience.[223] After all, these statements attack two of the most personal things about an individual: integrity and character. Though these statements may constitute contemptuous speech under Article 88, they would unquestionably be protected under the First Amendment as applied to ordinary civilians. As Justice Hugo Black eloquently expressed, "[i]t is a prized American privilege to speak one's mind, though not always with perfect good taste, on all public institutions."[224] Thus, due to Article 88's ever-looming presence, retired military officers face the reality of a lifetime censure of their First Amendment free speech rights.

V. Towards an Article 88 Retiree Exception

Article 88's purpose does not justify such a harsh restriction on the free speech rights of retired officers. The Supreme Court should revisit the issue it declined to address in *Larrabee* in order to strike the proper balance and afford retired officers fuller protection under the First Amendment.[225] Failing a judicial remedy, Congress should utilize its legislative power to amend Article 88 to explicitly carve out a retiree exception.[226] Exempting retired officers from Article 88's speech ban would preserve the article's purpose of maintaining good order and discipline while respecting the idea that retirees should be supported in their reintegration into civil society, inclusive of all constitutional protections.

A. *Judicial Remedy*

The Supreme Court wrongly denied certiorari with regards to Article 88. The Court's recent denial in *Larrabee* allows the blanket application of all UCMJ provisions to retirees. Relying on retirees' continued financial involvement with the military through their pensions, the Court forces a cruel decision on retired officers:

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[222] William H. McRaven, *If Good Men Like Joe McGuire Can't Speak the Truth, We Should Be Very Afraid*, WASH. POST (Feb. 21, 2020), https://www.washingtonpost.com/opinions/william-mcraven-if-good-men-like-joe-maguire-cant-speak-the-truth-we-should-be-deeply-afraid/2020/02/21/2068874c-5503-11ea-b119-4faabac6674f_story.html [https://perma.cc/79LY-3DV6].

[223] *See* Washington Post PR, *Nearly 88 Million People Visited The Washington Post Online in January 2020*, WASH. POST PR BLOG (Feb. 19, 2020, 4:00 EST), https://www.washingtonpost.com/pr/2020/02/19/nearly-88-million-people-visited-washington-post-online-january-2020/ [https://perma.cc/3R2A-4XTC].

[224] *See* Bridges v. California, 314 U.S. 252, 270 (1941).

[225] *See infra* Section V.A.

[226] *See infra* Section V.B.

a choice between either an entitlement or their constitutional guarantee of free speech. This sort of unjust condition on receiving entitlements has been condemned by the Court before. For example, in *Speiser v. Randall*, the Court suggested that once the government extends benefits or entitlements to a certain group, the government cannot condition receipt of those benefits on those individuals surrendering their constitutional rights to free speech, unless there are procedural safeguards in place against such an infringement.[227]

In *Speiser*, veterans who received certain tax exemptions were required to submit a non-subversion affirmation stating that they did not and would not advocate for the overthrow of the government.[228] The Court noted that to deny the benefit of the exemption to individuals who would like to engage in certain forms of speech is, in effect, a penalty based on the content of the speech.[229] Issuing a fine to individuals who engage in constitutionally protected speech without adequate procedural safeguards would be improper, and making receipt of a tangible benefit contingent on the forfeiture of one's constitutionally protected speech that precedes any appropriate due process is no different. The government argued that the special status of trust in society held for veterans, such as Speiser, justified the condition in the same way that public and elected officials were required to take oaths of loyalty.[230] Absent such a stipulation, the government argued that public safety would be endangered.[231] The Court disagreed, finding that "the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran."[232]

Speiser recognized the right to freedom of speech without unjust limitations in the particular context of veterans who wished to express criticism of their government.[233] The Court struck down the non-subversion provision based on the due process theory that the burden could not be placed on the beneficiary to submit the affirmation and prove compliance unless the state provides sufficient proof to justify the inhibition.[234] The underlying principle remains: entitlements cannot

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[227] *See* Speiser v. Randall, 357 U.S. 513, 518–21 (1958). Functionally, Art. 88 conditions retirement pay on curtailing otherwise legitimate free speech. While one could argue that a court-martial of an Article 88 violation by a retiree would be sufficient to satisfy due process, such a hypothetical court-martial is the process that is due for the purpose of determining whether the limitation of free speech was appropriate, not whether retirement pay should be conditional on such a limitation in the first place. This is to say nothing of the elevated importance of free speech when compared to property interests. *Id*. at 520–21 (noting that "the more important the rights at stake the more important must be the procedural safeguards surrounding those rights," and in particular how free speech rights are "rights which we value most highly and which are essential to the workings of a free society.").
[228] *Id*. at 515.
[229] *See id*. at 518.
[230] *See id*. at 527.
[231] *See id.*
[232] *Id*. at 528.
[233] *See id.*
[234] *See id*. at 529.

hinge upon the surrender of constitutional rights.[235] Like the tax beneficiaries in *Speiser*, Article 88 as currently read wrongly requires retirees—who are no longer active members of the armed forces and are encouraged to reintegrate into civil society—to give up a portion of their free speech in exchange for government entitlements.

This principle also arises in other contexts. For example, the State cannot condition Social Security benefits on a finding that the individual is not adequately disabled without first providing the individual with adequate administrative procedures that comport with due process.[236] While some may argue that national security interests and the special relationship between service members and the government warrant deference to Article 88, the argument should not be made with respect to retirees. Furthermore, the statute is poorly tailored to retirees because they are no longer involved in the service member-government relationship once retired.

Criticism of the legal situation that allows retired service members to be subjected to court-martial prosecution long after retirement goes well beyond just Article 88. Indeed, many argue that at the point of retirement or separation, UCMJ applicability should halt with respect to most or all of its hundred-plus provisions.[237] But to address the issue of contemptuous speech, the Supreme Court need not resolve the applicability of the UCMJ to retirees in its entirety. The Court could carve out a simple retiree exception to Article 88 alone. Because a denial of certiorari does not carry precedential weight in the way that an express ruling on the matter does, revisiting *Larrabee* would not contravene stare decisis. This is particularly so given that *Tyler* was decided prior to the passage of the UCMJ, over a century ago.[238] To accomplish this, the Court would have to decide to both revisit the *Larrabee* issue and receive a case and controversy on the topic of Article 88, an unlikely situation given past jurisprudence and the lack of prosecutions that might present the issue.

However unlikely though, recent developments in the *Larrabee* case may present the Court with an opportunity to make that decision. Following the denial of certiorari, Larrabee brought a collateral challenge to the court-martial jurisdiction. Holding that the exercise of jurisdiction in this instance was unconstitutional, Judge Richard J. Leon stated:

> Experience has clearly demonstrated the baseline proposition that court-martial jurisdiction *must* be narrowly limited. The Supreme

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[235] *See id.* at 518 ("It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional.") (citing Hannegan v. Esquire, Inc., 327 U.S. 146, 156 (1946); United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430–431 (1921) (Brandeis, J., dissenting)).
[236] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 348 (1976); Goldberg v. Kelly, 397 U.S. 254, 270–71 (1970).
[237] *See* Vladeck, *supra* note 187.
[238] United States v. Tyler, 105 U.S. 244, 244 (1881).

> Court itself has instructed time and time again that "the scope of the constitutional power of Congress to authorize trial by court-martial" must be "limit[ed] to 'the least possible power adequate to the end proposed." Indeed, trial by court-martial "was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."[239]

Although it held that the exercise of jurisdiction in this case was unconstitutional, the court stated that its ruling does not mean that "Congress could never authorize the court-martial of some military retirees, but merely that Congress has not shown on the current record why the exercise of such jurisdiction over all military retirees is necessary to good order and discipline."[240] While the court's ruling has no precedential effect on military courts,[241] some believe that this District Court decision will force the Supreme Court to revisit this doctrine.[242] Indeed, on January 22, 2021, the United States appealed the decision to the D.C. Circuit.[243] The denial of certiorari in *Larrabee* has created unforeseen consequences in extending free speech limitations to retirees. Given that the Court may have an opportunity to revisit this case, it would be prudent for it to strike down the application of the UCMJ to retirees altogether.

B. *Legislative Remedy*

While responsibility for interpreting Article 88 falls to the Supreme Court, the historical lack of prosecutions under the Article means that a case or controversy may be unlikely to reach the Court. Absent a judicial response, Congress should legislatively address the free speech concerns of retired military officers.

First, the litany of recent contemptuous statements by retired generals shows that enforcement is nearly nonexistent. Prosecutors simply are not interested in pursuing such matters. Having an outdated and unused article within the UCMJ actually undermines the given purpose of Article 88: maintaining good order and discipline. Lack of enforcement of certain aspects of the UCMJ diminishes respect for the military justice system as a whole and breeds uncertainty among both active

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[239] Larrabee v. Brathwaite, 2020 WL 6822706, at *3 (D.D.C. Nov. 20, 2020) (first quoting Toth v. Quarles, 350 U.S. 11, 23 (1955); then quoting Anderson v. Dunn, 19 U.S. 204, 230–31 (1821); and then quoting Reid v. Covert, 354 U.S. 1, 21 (1957)).

[240] *Larrabee*, 2020 WL 6822706, at *7.

[241] For example, it would not have any effect on the Court of Appeals for the Armed Forces, which originally upheld the application of the UCMJ to retirees. *See* United States v. Larrabee, 78 M.J. 107 (C.A.A.F. 2018).

[242] *See* Jeff Coyle, *Analysis:* Larrabee v. Brathwaite, CAAFLOG (Nov. 23, 2020), https://www.caaflog.org/home/analysis-larrabee-v-braithwait [https://perma.cc/7EKC-243F]; Jacob R. Weaver, *The Prosecution of Military Retirees Under the Uniform Code of Military Justice*, FEDERALIST SOC'Y BLOG (Feb. 4, 2021), https://fedsoc.org/commentary/fedsoc-blog/the-prosecution-of-military-retirees-under-the-uniform-code-of-military-justice [https://perma.cc/QX5Y-MAP2].

[243] Larrabee v. Harker, et al., No. 21-05012 (D.C. Cir. appealed Jan. 22, 2021).

and retired service members as to its general applicability. Consistent application of the UCMJ is key to its legitimacy.

The argument that retirees are still subject to "involuntary recall" by virtue of their receiving benefits (for example, retirement pay), although technically accurate, represents a highly uncommon and improbable scenario. With state and national guards, in addition to the reserve forces, standing ready to supply additional support in the event of emergencies or national security crises, the need to recall retired officers—many of whom are advanced in age—back into active service is exceedingly unlikely. By allowing Art. 88 of the UCMJ to continue to apply to these retired officers, the law imposes a chilling effect on their First Amendment speech rights that is not justified by the unlikely possibility that such speech would negatively affect mission accomplishment in the event that they were in fact recalled.

The risk that such statements by retired generals and admirals will be taken as representative of the military itself is real.[244] An even more concerning scenario that already exists, however, is the risk that, after dedicating twenty years of service to their country, retired officers surrender their constitutional rights for the rest of their lives. Because the U.S. military has for decades been an all-volunteer fighting force, it relies on recruiting individuals through their own choice.[245] The idea that one's free speech will be forever limited is sure to turn many otherwise talented and qualified individuals away from service at a time when the pool of qualified applicants is already severely diminished.[246] Exempting retired officers from Article 88 may have a positive impact on recruiting top quality officers to join the service.

Congress should pass a retiree exception to Article 88. Such an exception to allow retired officers, namely those who completed twenty years of service and thus receive retirement pay, to be exempt from Article 88 would not have a negative impact on Congress' purpose of maintaining good order and discipline. Under the

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[244] *See, e.g.*, Lt. Col. Daniel Maurer, *The Generals' Constitution*, JUSTSECURITY (June 9, 2020), https://www.justsecurity.org/70674/the-generals-constitution/ [https://perma.cc/4J7A-GWK4] ("[T]he public may take cues about military issues from senior leaders but often laypersons don't sufficiently distinguish between comments offered by retired flag officers and those currently in charge."); David Barno & Nora Bensahel, *How To Get Generals Out Of Politics*, WAR ON THE ROCKS (Sept. 6, 2016), https://warontherocks.com/2016/09/how-to-get-generals-out-of-politics/ [https://perma.cc/LR5E-HDPX] ("Retired senior military officers . . . have a special responsibility as highly visible symbols of the most respected institution in America, the U.S. military.").

[245] *See* George M. Reynolds, *How Representative Is the All-Volunteer U.S. Military?*, COUNCIL FOREIGN REL. (April 25, 2018, 8:00 AM), https://www.cfr.org/article/how-representative-all-volunteer-us-military [https://perma.cc/25Q4-ELGX].

[246] *See* Mark Perry, *The Recruitment Problem the Military Doesn't Want to Talk About*, AM. CONSERVATIVE (Aug. 15, 2018, 12:01 AM), https://www.theamericanconservative.com/articles/the-recruitment-problem-the-military-doesnt-want-to-talk-about/ [https://perma.cc/E75K-LJ9N] (discussing how 71% of candidates in the military's target pool for recruitment are "disqualified from the minute they enter a recruiting station" because of either obesity, criminal history, or failing to meet educational requirements).

current bifurcated regime that *Larrabee* allowed to continue, veteran officers who separate prior to a full twenty years of service are allowed to engage in contemptuous speech because they do not receive a pension, unlike retirees.[247] Although the benefit-receiving rationale for continuing to subject retirees to UCMJ jurisdiction may seem logical, the real-world distinction in the eyes of the public or even among the ranks is negligible. What difference is there between a contemptuous statement made by a veteran who served nineteen years and achieved the rank of Lieutenant Colonel and the same statement made by a retired officer of equal rank who served one additional year and thus qualifies for retirement pay?

Imagine two hypotheticals involving a contemptuous op-ed submitted to a veteran's local newspaper. In one, the veteran served nineteen years and so can publish the article without fear of prosecution. In the other, the veteran served twenty years, attained retirement status, and thus could face punishment by court-martial. A reader of the article is unlikely to attribute different meaning to the veterans' speech based on the one-year retirement difference, meaning whatever threat to good order that exists is equal between the two. The ability of the latter, but not the former, to be prosecuted highlights the uneven coverage of the retirement-based system. If good order and discipline were seriously threatened by such statements, the law would not formally distinguish between those who reached retirement status and those who separated beforehand, because listeners themselves do not make such a distinction. Retirees should not be effectively punished for their service by having their rights diminished. Congress should recognize this reality and legislatively address this issue to provide retirees with First Amendment protections equal to, rather than less than, those provided to society on the whole.

VI. Conclusion

Since the inception of an organized American military force, the law has prevented soldiers from speaking poorly of their leadership to some extent. In its current form, this restriction is found in Article 88 of the Uniform Code of Military Justice, which prohibits commissioned officers from speaking contemptuously of the President and certain other senior government officials. Article 88 exists against the backdrop of the United States' historical conception of free speech rights, which hinges largely on the ability of citizens to criticize the government as they see fit. Recognizing that service members do not leave their constitutional protections at the door upon the moment of enlistment or commissioning, the Uniform Code of Military Justice and other military regulations attempt to strike a balance between the need for an effective, disciplined national defense force and the importance of civil liberties enjoyed by military members and civilians alike. These restrictions are given deference and are justified by the unique relationship between country and soldier and the need to maintain good order and discipline within the ranks.

Though modern prosecutions under Article 88 are virtually nonexistent, recent statements by prominent retired generals have raised the issues of what

[247] *See Larrabee*, 2017 WL 5712245, at *2–3.

qualifies as contemptuous speech, who is covered by Article 88, and whether the law in its current form strikes the proper balance between military order and respect of constitutional rights. Following the Supreme Court's denial of certiorari in the *Larrabee* case, which allowed prosecutions of retired service members under the UCMJ to continue, many have criticized the UCMJ's continued application to retirees who otherwise essentially reintegrate into civilian society. Perhaps no article of the Code better illuminates this viewpoint than Article 88, which continues to limit a fundamentally important constitutional right well after a retiree's active service commitment ends. The Supreme Court and Congress should address this shortcoming by exempting retirees from Article 88's reach, thereby limiting applications to commissioned officers on active duty. Creating a retiree exception to Article 88's ban on contemptuous speech would not only hold true to the statute's purpose and intent: it would grant military retirees more robust and equitable access to the First Amendment freedoms they fought to protect.