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POLITICAL SPEECH IN THE ARMED FORCES: SHOUTING FIRE IN A CROWDED CYBERSPACE?

ELLIOTT HUGHES*

“Your voices: for your voices I have fought;
Watch’d for your voices; for your voices bear
Of wounds two dozen odd; battles thrice six
I have seen, and heard of; for your voices have
Done many things, some less, some more: your voices:
Indeed, I would be consul.”¹

Caius Martius Coriolanus

ABSTRACT

A staple of the American version of democracy is civilian control of the military: we are uncomfortable with politicization of the Armed Forces, and military and other federal laws restrict the political expression of servicemembers (“SMs”) in the Armed Forces, whether they are active-duty members or National Guard or Reserves serving on active duty.² These restrictions, while well-intentioned to prevent actual or apparent political partisanship or bias within the military, have the undesired effect of deterring SMs from otherwise healthy political expression. With the advent of the internet and proliferation of social media use, questions regarding SM status and identification with the military complicate the political participation of citizen-soldiers. The presence of over-reaching restrictions on political expression and lack of clear guidance dictating what political expression SMs can and cannot make in online forums have several effects. First, this framework of acceptable political discourse contributes to a breakdown of the ‘citizen-soldier’ ideal that is peculiar to the American conception of military service in a democracy. Second, this framework tends to deprive SMs of their personal and political autonomy in a manner that tends to reduce them to a position of vassalage. Third, this reinforces the ‘tyranny of majority opinion’ that John Stuart Mill presciently warned of at a time when militaries were professionalizing.³

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1. WILLIAM SHAKESPEARE, THE TRAGEDY OF CORIOLANUS, act 2, sc. 3, lines 126–31.

2. The Department of Defense has strict rules that define and distinguish between “partisan political activity and “nonpartisan political activity.” See U.S. DEP’T. OF DEF. DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES (Feb. 19, 2008) [hereinafter DOD DIR. 1344.10], available at <http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/134410p.pdf>.

3. See JOHN STUART MILL, ON LIBERTY (Elizabeth Rapaport ed., Hackett Publishing Co. 1978)

Lastly, this framework contributes to the isolation of the military from general society by removing military voices from the ‘marketplace of ideas,’ thereby depriving the public discourse of a crucial segment of the American population. While partisan political expression in online forums is a relatively new phenomenon, it is merely an extension of every citizen’s right to engage in public debate, and to the extent that SMs are prohibited or deterred from political expression through legal restrictions rather than professional and ethical norms, their right to exercise the duties of citizenship is infringed, to their detriment and that of the body politic.

INTRODUCTION

The tradition of civilian control over the military has long been a permanent fixture of American society. Although today all smart generals know that civilian leaders are the final decision-makers, this outcome was not clear from the beginning. When the “Newburgh Conspiracy” erupted at the time the American Revolution was drawing to a close, mutinous sentiment pervaded the underpaid officer corps in the Continental Army, and several members advocated a takeover of the Continental Congress that had failed to pay them for their service.⁴ George Washington found it necessary to intervene and convinced the disquieted officers that they must have faith in Congress and pledge allegiance to their elected leaders.⁵ The societal norm of civilian control over military affairs has thereafter been steadily reinforced since the early days of the American republic when the extent of governmental control of military affairs was not yet settled.⁶ This

(1859).

4. Even though General Cornwallis had surrendered at Yorktown in October 1781, there was much to be done to secure the fledgling American state because British troops remained in New York. The issue of back pay and pensions for continental troops led some officers to pen anonymous letters calling for a meeting to address their grievances, and to either disengage from British troops and march out west to ‘mock’ the Congress, or to march on Philadelphia and seize control of the government. Washington, when he received word of the letters, addressed the gathering of 500 officers and persuaded them to condemn the letters and pledge their faith to Congress. For the fuller story of the events of the Newburgh Conspiracy, see Francis P. Sempa, *The Newburgh Conspiracy*, AMERICAN DIPLOMACY (Nov. 2010), http://www.unc.edu/depts/diplomat/item/2010/0912/comm/sempa_newburgh.html (last visited Sept. 20, 2018).

5. On March 15, 1783 when Washington addressed the officers, he commended their bravery, appealed to their patriotism, promised to persuade Congress to meet their just demands, and pleaded with them to refrain from opening “the flood gates of civil discord” and deluging “our rising empire in blood.” Do not take any action, he said, that “will lessen the dignity and sully the glory you have hitherto maintained.” *Id.*

6. Although the extent of civilian control over the military was not definitively settled when the American Revolution concluded, as former Chief Justice Warren noted in his 1962 speech at the New York University Law Center, the dangers posed by military usurpation were “uppermost in the minds of the Founding Fathers when they drafted the Constitution, and distrust of a standing army was expressed by many. Recognition of the danger from Indians and foreign nations caused them to authorize a national armed force begrudgingly.” Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 183 (1962). Additionally, the Chief Justice referred to such a practice in the

paper seeks to explore this long-standing practice and the restrictions that have been placed upon SM political expression. I will begin with a brief overview of speech and political expressions within the American military from the 1950's onward, beginning with the watershed moment when the Uniform Code of Military Justice came into effect, displacing the divergent codes and enforcement mechanisms used by the different military branches to maintain good order and discipline. Next, I will cover the responses from Congress and military leadership to the political speech and activities of SMs, including traditional forms of political expression but focusing on political expression in online forums and social media. Useful comparisons will be made to recent jurisprudence regarding civilian employee speech, especially with respect to questions about employee status and official duty speech. After covering these areas, I will focus on the larger philosophical implications of restrictions on SM expression, both for the individual autonomy of citizen-soldiers and for the marketplace of ideas that requires input from all corners of society to function effectively.

I. A BRIEF HISTORY OF AMERICAN MILITARY SPEECH

The dynamics of the Roman army of Coriolanus' era are not so different from the American military that we are familiar with in our modern age.⁷ Shortly before Coriolanus' time, Rome had transformed from a monarchy into a republic and the leadership of the country rested upon two consuls with the power to nullify the other's decision.⁸ The tension between the military and civilian leadership of Rome was exemplified by Coriolanus' own transformation from military hero to aspiring consul. This same tension is overtly felt in American society when former generals run for political office or excessively populate the executive cabinet.⁹ Roman senators and the common plebs feared that

United States and Canada by noting that “[b]oth nations have a long tradition based upon Anglo-Saxon jurisprudence which has consistently subordinated the military to the civilian in Government.” *Id.*

7. Although separated by millennia, the social dynamics of Rome's professional army is now mirrored in some respects by the all-volunteer force that now exists in America since the end of the draft in 1973. With the end of conscription, officers and even enlisted soldiers increasingly see themselves as members of the 'profession of arms.' Such a professional ethos has become commonplace, particularly within the United States Army, amongst military doctrine and training regimens. The Army attempted to capture this outlook in U.S. ARMY, *The Profession of Arms*, https://www.army.mil/e2/rv5_downloads/info/references/profession_of_arms_white_paper_Dec2010.pdf (Dec. 8, 2010).

8. GARY FORSYTHE, *A CRITICAL HISTORY OF EARLY ROME: FROM PREHISTORY TO THE FIRST PUNIC WAR*, (2006).

9. The concern over senior military officials holding high political offices is present in the current American administration. See Phillip Carter & Loren DeJonge Schulman, *Trump Is Surrounding Himself with Generals. That's Dangerous*, WASH. POST, (Nov. 30, 2016)

Coriolanus would too harshly dismiss the concerns of the people whose basic needs were not being met, and that due to his martial nature, Coriolanus was not fit to govern in a complex society.¹⁰ Similar fears as to the extent of military influence over the political process have animated the actions of military reformers and the U.S. Congress to legally limit the political expression which members of the American military may undertake without repercussions.¹¹ To that end, Congress and the Department of Defense have enacted administrative regulations that codify legal restrictions on SM speech.¹²

Prior to the enactment of the first version of the Uniform Code of Military Justice (“UCMJ”) in 1950, each of the different branches of service had their own penal code that was enforced to maintain order and discipline.¹³ Although the unification of the military’s penal code presented an opportunity for military law to expressly prohibit political expression, the restrictions on expression within the UCMJ were, and continue to be, limited to insubordinate speech and other speech that works to the prejudice of good order and discipline in the Armed Forces, without any explicit reference to political expression.¹⁴ The case law surrounding military speech law remains relatively sparse, perhaps exactly

https://www.washingtonpost.com/opinions/trump-is-surrounding-himself-with-generals-thats-dangerous/2016/11/30/e6a0a972-b190-11e6-840f-e3ebab6bdd3_story.html?utm_term=.97be94fc9e5. The author would like to emphasize that no political stance is taken in this paper with regards to appointments made by the current administration. It can be argued that the relatively recent phenomenon of multiple military officers populating the Executive Cabinet can be traced in part to the advent of America’s first professional military to be maintained in peacetime, a situation that obtained in the mid-1990’s following the end of the Cold War.

10. Frank Kermode, *Commentary on Coriolanus*, in *THE RIVERSIDE SHAKESPEARE 1442* (G. Blakemore Evans et al. eds., 1997).

11. American history contains many successful generals-turned-politicians: George Washington, Andrew Jackson, William Henry Harrison, Zachary Taylor, and in our modern time, Dwight Eisenhower have all exemplified this trend. See Steve Corbett & Michael Davidson, *The Role of the Military in Presidential Politics*, PARAMETERS (Winter 2009-10). But not all generals have met with political success. In the 1852 presidential election, General Winfield Scott was unable to parlay his successful military career into presidential success. *Id.* More recently, General Wesley Clark ran unsuccessfully for president in the 2004 presidential election. *Clark Withdrawal*, C-SPAN (Feb. 11, 2004), <https://www.c-span.org/video/?180544-1/clark-withdrawal>. During the election of 1832 when Sylvanus Thayer was the Superintendent of the U.S. Military Academy, he attempted to “inculcate political neutrality among cadets” and sought to severely reprimand a cadet for placing a hickory pole on the parade field in support of Andrew Jackson for the 1832 election. An amused President Jackson later reversed Thayer’s decision. *Id.* at 60.

12. See DOD DIR. 1344.10, *supra* note 2.

13. *Uniform Code of Military Justice*, http://www.loc.gov/tr/frd/Military_Law/UCMJ_1950.html, (last visited Nov. 12, 2018).

14. Uniform Code of Military Justice (UCMJ) art. 134 (1950).

because no penal article of the UCMJ directly penalizes speech itself outside of disrespectful speech made directly to the president, vice president, members of Congress and other senior officials, and insubordination to superior commissioned officers.¹⁵

Written restrictions on SM political expression are a product of very recent history, although several Supreme Court rulings have affirmed the ability of military leaders to restrict the ability of their subordinate personnel and civilians from engaging in certain kinds of partisan political activities. Restrictions on various kinds of SM speech, including political speech, find legitimacy in the Supreme Court's decision in *Parker v. Levy*, which declared that "This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."¹⁶ The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."¹⁷

Levy featured an Army doctor who refused to train Special Forces soldiers that were preparing to deploy to Vietnam, and while it did not explicitly deal with matters of political expression (although resistance to the war in Vietnam was a hotly-contested political issue), as Justice Douglas noted, *Levy* was "the first case that presents to us a question of what protection, if any, the First Amendment gives people in the Armed Services."¹⁸ The limits on political activity do not apply once citizens have left active or reserve military service, and retired generals and admirals have played increasingly common roles in advocating for partisan political candidates since 1992 when retired Marine General Paul Kelley endorsed George H.W. Bush for president, followed by an endorsement for Bill Clinton from retired Admiral William Crowe.¹⁹

The current professional ethic regarding political abstention is generally traceable to the post-Civil War era.²⁰ In our modern age, the

15. See *infra* notes 21 and 22 for the articles of the UCMJ that are used to prosecute speech that is prejudicial to good order and discipline in the Armed Forces.

16. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

17. *Id.* (citation omitted).

18. *Id.* at 768.

19. See David Evans, *Crowe Endorsement of Clinton Raises More Than Eyebrows*, CHI. TRIB. (Sept. 25, 1992), http://articles.chicagotribune.com/1992-09-25/news/9203270346_1_crowe-iranian-territorial-waters-clinton-campaign. Other prominent instances of retired SMs playing outsized roles in political advocacy include the Swift Boat Veterans for Truth group that levied criticisms of then-presidential candidate John Kerry in 2004. See Jodi Wilgoren, *Veterans Group Criticizes Kerry on His Record in Vietnam*, N.Y. TIMES (May 5, 2004), <http://www.nytimes.com/2004/05/us/veterans-group-citizens-kerry-on-his-record-in-vietnam.html>.

20. While he was in command of the Army for fourteen years following the Civil War, General William Tecumseh Sherman was adamant about keeping the military out of partisan politics. The

professional ethic of nonpartisanship has been further refined over time, but there is an added layer of legal compulsion since all members of the Armed Forces are governed by the UCMJ. The UCMJ is purely punitive and punishes different types of SM speech.²¹ The UCMJ does not explicitly prohibit SMs from making political endorsements or other political expressions; rather, the Department of Defense (“DoD”) and its subordinate branches issue regulations that control SM political expression, and when these regulations are violated, punishment attaches through violations of UCMJ articles that require compliance with lawful military orders.²² Therefore, in order to punish an SM for making a

Army “discourage[d] officers from taking an interest in politics,” and Sherman disliked Washington, D.C. politics to such an extent that he decided to relocate his command center and staff to St. Louis, Missouri for two years to be away from political influence. *See* Corbett & Davidson, *supra* note 11, at 60.

21. For example, Article 89: Disrespect towards superior commissioned officer (CO), “[a]ny person subject to this chapter who behaves with disrespect toward his superior commissioned officer shall be punished as a court-martial may direct.” UCMJ art. 89 (2016). Article 91: Disrespect towards superior commissioned officer:

Any warrant officer or enlisted member who (1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office; (2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or (3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct.

UCMJ art. 91.

Article 117: Provoking speech or gestures, “[a]ny person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct.” UCMJ art. 117. Article 133: Conduct Unbecoming an Officer and Gentleman, “[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.” UCMJ art. 133. Article 134: General article:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance 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.

UCMJ art. 134. Article 134 is a ‘catch-all’ used to punish disruptive unenumerated behavior that is prejudicial to good order and discipline. *Id.*

22. The prohibitions on political endorsement concern situations when SMs are in uniform or when their actions could imply official sponsorship. This also extends to situations in which they can be reasonably identified on their social media page as a member of the military, although in the latter case DOD Directive 1344.10 only requires that a disclaimer in the endorsement be included if the person can be reasonably identified as a member of the military, whereas the latter activity is completely proscribed. For cases of improper political speech that the military wishes to prosecute, it must do a roundabout prosecution that normally utilizes the following three articles. Article 90: Assaulting of willfully disobeying superior commissioned officer:

Any person subject to this chapter who—(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or (2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

UCMJ art. 90. For Article 91, see *supra* note 21. Article 92: Failure to obey order or regulation:

[a]ny person subject to this chapter who—(1) violates or fails to obey any lawful general

personal endorsement while in uniform at a candidate's rally, as Specialist Jesse Thorsen did in 2012 at a Ron Paul rally, military prosecutors are only able to make a case that an SM violated regulations.²³

Department of Defense Directive 1344.10 contains the current slate of regulations that govern partisan political conduct by SMs.²⁴ The purpose of the directive is to govern and restrict the extent to which members of the Armed Forces can participate in partisan politics, and its applicability extends to members of state National Guard units even when they are not on federal status.²⁵ Because of the importance of maintaining a politically neutral military that does not officially sanction one partisan faction over the other, and the imperative that citizens exercise their right to political speech to the greatest extent possible, Directive 1344.10 encourages "members of the Armed Forces . . . to carry out the obligations of citizenship" if such participation is 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."²⁶

Alongside this encouragement to participate in condoned political activities,²⁷ there is an extensive set of restrictions on SM political activity. A primary issue with these regulations is their vagueness when applied to online political expression, because restrictions on traditional political

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

UCMJ art. 92.

23. For his violations of existing regulations against politicking in uniform, Specialist Thorsen, a member of the Army Reserve, received a letter of reprimand in lieu of formal legal prosecution. See Leo Shane III, *Army Reservist Who Endorsed Ron Paul Receives Reprimand*, STARS AND STRIPES (Mar. 30, 2012), <https://www.stripes.com/army-reservist-who-endorsed-ron-paul-receives-reprimand-1.173096>.

24. See DOD DIR. 1344.10, *supra* note 2.

25. Directive 1344.10, § 2 states that the directive has a broad application covering:

The Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to collectively as the "DoD Components"). Paragraph 4.3. applies to members of the National Guard, even when in a non-Federal status. Other provisions apply to members of the National Guard while on active duty, which, for purposes of this Directive only, also includes full-time National Guard duty.

DOD DIR. 1344.10, *supra* note 2, para. 2.

26. DOD DIR. 1344.10, *supra* note 2, para. 4.

27. For instance, SMs are free to vote, write letters to the editor, and give money to candidates under certain circumstances, along with other expressions of political activity, so long as such actions cannot be perceived as representing the service in an official capacity.

expression are not so easily translated into the online realm.²⁸ This leaves the military in a lurch, an especially dangerous one since criminal sanctions apply to violations of these restrictions. Political advocacy and other forms of political expression are frowned upon by segments of the military, but the ‘citizen-soldier’ ideal is more than just a vestige of an earlier time.²⁹ The nebulous guidelines governing SM expression online chills their political participation, especially at a time when social media use in the military is growing and is often the only platform SMs have to communicate with the outside world. This further isolates the military from the population at large, which ultimately undermines the health of a democracy that depends on an all-volunteer fighting force.

The applicable test of whether or not speech made by military SMs falls outside constitutional protection is essentially the same test that is used for curtailment of civilian speech, namely, the “clear and present danger” test established in *Schenck v. United States*.³⁰ It was not clear exactly what kinds of political speech within the military could be constitutionally curtailed until 1967 when the Court of Military Appeals applied the “clear and present danger” test that was formulated in *Schenck* to an officer who was protesting the Vietnam War.³¹ In *United States v. Howe*, an off-duty Second Lieutenant attended an anti-war rally outside of Ft. Bliss, Texas in which he marched and held a sign stating “Let's have more than a choice between petty ignorant facists [sic] in 1968” on one side, and “End Johnson's fascist [sic] aggression in Viet Nam” on the other.³² Especially important to this decision was the fact that in *Howe*, the

28. SMs can display political bumper stickers on their privately-owned vehicles, DOD DIR. 1344.10, *supra* note 11, para. 4.1.1.8, but they are not allowed to display a large political sign, banner, or poster, *id.* para. 4.1.2.11. This leaves us with the conundrum of whether there is any appreciable difference between a Facebook ‘profile photo’ and ‘cover photo,’ one being smaller than the other.

29. See generally Kevin Toner, Officers Should Not Vote (2015) (unpublished manuscript, on file with the Command and General Staff College Foundation), available at <http://www.cgscfoundation.org/events/ethics-symposium/2015-ethics-symposium-archive/>; M.L. Cavanaugh, *I Fight for Your Right to Vote. But I Won't Do It Myself*, N.Y. TIMES (Oct. 19, 2016); <https://www.nytimes.com/2016/10/19/opinion/i-fight-for-your-right-to-vote-but-i-wont-do-it-myself.html>; Ronald Krebs, *The Citizen-Soldier Tradition in the United States: Has Its Demise Been Greatly Exaggerated?*, 36 ARMED FORCES & SOC. 153–74 (2009).

30. *Schenck v. United States*, 249 U.S. 47 (1919). The underlying rationale for the clear and present danger test is that the speech must present such a threat that immediate legal intervention is necessary. In the context of the Armed Forces, such politically-oriented speech that is prejudicial to good order and discipline can be said to present such an immediate danger of insubordination and chaos amongst military ranks to be subject to legal intervention.

31. The Court of Military Appeals was the predecessor of the Court of Appeals for the Armed Forces (“C.A.A.F.”). The CAAF is essentially the Supreme Court of the military justice system that presides over legal matters that rise through each of the different service branches, and their decisions are directly reviewable by the U.S. Supreme Court. Up until 1953, the Supreme Court largely abstained from intervening in the affairs of military courts martial. See *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 251–52 (1864); *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 82–83 (1857). In 1953, habeas corpus review of courts martial was established in *Burns v. Wilson*, 346 U.S. 137 (1953). *Id.* at 142.

32. *United States v. Howe*, 37 C.M.R. 429, 432 (1967).

officer in question was off-duty and not in military uniform, but was identified as an SM by a nearby military policeman.³³ There was no question that had Lieutenant Howe been a civilian, his speech would have been fully protected because it was political expression that did not carry with it the threat of physical violence or use of imminent force. In fact, the Supreme Court overturned the conviction of a civilian in *Watts v. United States* where a man at a political rally declared, “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.” because the Court viewed this speech as political hyperbole.³⁴ But the military court overseeing Howe’s case ultimately concluded that the freedom of speech may be permissibly curtailed in situations where such speech from SMs presents a clear and present danger to the discipline of the Armed Forces.³⁵

The same analysis in *Howe* can be easily transferred to the realm of internet speech. The remaining question is how much is required before an SM can be “reasonably identified” as a member of the military?³⁶ The absence of clearly established guidelines deters members of the military from actively participating in substantive political discussions in online forums, although there is a proliferation of politically-oriented social

33. *Id.* at 443. While the Court considered it important that Lieutenant Howe could be identified as a member of the Armed Forces, this factor is not necessarily an ‘element’ which the prosecution had to prove to convict him under the UCMJ. Rather, this factor played into the Court’s analysis of whether LT Howe had broken the regulations which curtailed his ability to politically protest. The Court cited Army Regulation 600–20 (Army Command Policy). Although the location of the cited section and its wording have changed, the substance is still currently in effect:

Participation in picket lines or any other public demonstrations, including those pertaining to civil rights, may imply Army sanction of the cause for which the demonstration is conducted. Such participation by members of the Army, not sanctioned by competent authority, is prohibited:

- a. During the hours they are required to be present for duty.
- b. When they are in uniform.
- c. When they are on a military reservation.
- d. When they are in a foreign country.
- e. When their activities constitute a breach of law and order.
- f. When violence is reasonably likely to result.

Id. at 440 n.15.

34. *Watts v. United States*, 394 U.S. 705, 706 (1969).

35. In taking judicial notice of the environment into which Lieutenant Howe decided to throw himself, the Court of Military Appeals wrote:

We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.

Howe, 37 C.M.R. at 437–38. This logic of expanded governmental powers to curtail speech during wartime is traceable to the logic that the Supreme Court applied in *Schenck*.

36. The court in *Howe* did not explicitly outline the standard for that would make a citizen reasonably identifiable as a member of the Armed Forces. Today, the prevalence of photo-heavy social media platforms such as Instagram and Facebook make it likely photographs of SMs in uniform will likely suffice when making this determination, though the standard is yet unclear.

media focused on military and veterans' issues.³⁷ This is not to say that SMs do not know that there are certain lines they cannot cross; for instance, denigrating their superior officers or the commander-in-chief in an online forum. In a recent example demonstrating the *Howe* analysis in the context of the internet, Marine Sergeant Gary Stein learned the hard way that SM political expression in online forums can provide the basis for punishment through a court-martial.³⁸ There is an important rationale for providing criminal and administrative punishments for SMs that act in open defiance of military and civilian leaders.³⁹ However, the largely untested waters of partisan political expression in online forums, an activity that is merely an extension of every citizen's right to advocate for their preferred elected leader, means that SMs cannot be sure to what extent they are allowed to advocate for or criticize candidates for public office, or critique their actions and policies while actually in office.

II. RESPONSES FROM MILITARY AND CIVILIAN LEADERSHIP

As a response to the increasing relevance of online speech, the different branches of the service have issued various pronouncements that attempt to clarify what is deemed to be acceptable online speech and behavior and what falls outside of condoned conduct. Perhaps most importantly, in 2008, the DoD issued updated guidance that outlined acceptable online expression in very broad terms but did not actually contain any concrete examples or specific illustrations of what can be considered as worry-free expression that SMs can make online.⁴⁰ What appears to have happened with this issuance of additional guidance is that a new regime of regulations has been laid on top of the UCMJ, a code that does not exactly contain the clarity necessary to punish inappropriate online speech, and in doing so has only served to further confuse what is already a patchwork of regulations across the different branches and a messy interaction with the penal code.⁴¹

37. For instance, the Armed Forces Tea Party is a group on Facebook and an independent website that provides military SMs with the chance to connect with members of the Tea Party movement. See Armed Forces Tea Party, FACEBOOK, https://www.facebook.com/pg/ArmedForcesTeaParty/about/?ref=page_internal (last visited Nov. 11, 2018).

38. Brian Rooney, *Sgt. Gary Stein, Discharged for Obama Criticism, "Scared," Not Backing Down*, CBS NEWS (May 4, 2012, 10:11 AM), <https://www.cbsnews.com/news/sgt-gary-stein-discharged-for-obama-criticism-scared-not-backing-down/>.

39. Sgt. Gary Stein declared that "[a]s an active-duty Marine, I say, 'Screw Obama,' and I will not follow the orders from him - all orders from him." He also said he would "not salute President Obama," that "he's the economic enemy, the religious enemy, also, a domestic enemy." *Id.*

40. See DOD DIR. 1344.10, *supra* note 25.

41. See Michelle Borgnino, *Mutiny on the High C: How the Armed Forces Regulate and Criminalize Servicemember Speech Online*, 224 MIL. L. REV. 800 (2016) (arguing that DOD Directive 1344.10 further complicates an already convoluted system of prosecuting unacceptable online speech

Exemplifying the problem of this ‘patchwork’ approach to regulating online speech, the Army published a branch-specific directive regarding how SMs should conduct their speech online in All Army Activities message ALARACT 122/2015.⁴² One of the primary issues with this publication is that it does not actually address political speech made online by members of the Army. The focus of the publication is to clarify standards of online behavior in light of the Army’s continued fight against sexual harassment and sexual assault within its ranks and unfortunately it does nothing to further refine what constitutes acceptable online behavior.⁴³ To this day, the publications from the different branches of service detailing what is and is not acceptable online behavior mostly provide guidance for the official social media accounts that are maintained by members of different military commands and their public relations officers.⁴⁴

III. COMPARISONS TO CIVILIAN EMPLOYEE SPEECH

A comparison of SM speech to civilian employee speech is beneficial. Employers reasonably desire to control their employees’ speech to the extent that this control safeguards their business interests, and this desire affects several different aspects of employment. As an employer, the federal government has a legitimate interest in ensuring that its employees are discharging their duties, and when employee speech on a matter not of public concern interferes with productivity then it can be constitutionally curtailed.⁴⁵ The most direct civilian comparison to restrictions on military speech is The Hatch Act of 1939.⁴⁶ The Hatch Act was designed to maintain neutrality amongst the federal workforce and some state and

and that the UCMJ should be internally modified so improper online speech can be directly prosecuted).

42. C. Todd Lopez, *For Those Still Unsure, Army Defines ‘Online Misconduct,’* TRADOC NEWS CENTER (Aug. 4, 2015), <http://tradocnews.org/for-those-still-unsure-army-defines-online-misconduct/>.

43. In addition to the ALARACT’s focus on sexual assault and harassment, the message focuses on online bullying and other forms of hazing. This is part of the larger effort by the Army to maintain professional standards and a team-oriented climate that does not condone online misconduct. Unfortunately, noticeably absent from the Army’s attempt to sharpen its definition of misconduct is an updated guidance on what constitutes acceptable partisan political behavior.

44. See *Army Social Media*, ARMY.MIL, <http://www.army.mil/media/socialmedia/> (last visited Jan. 25, 2018); *Navy Social Media*, NAVY.MIL, <http://www.navy.mil/CommandDirectory.asp?id=0> (last visited Jan. 25, 2018); *Airforce Social Media*, AF.MIL, <http://www.af.mil/afsites/socialmediasites.aspx> (last visited Jan. 25, 2018); *Marine Corps Social Media*, MARINES.MIL, <http://www.marines.mil/News/SocialMedia.aspx> (last visited Jan. 25, 2018).

45. See *Connick v. Myers*, 461 U.S. 138, 146–57 (1983); see also *Hawkins v. Dep’t of Pub. Safety & Corr. Servs.*, 602 A.2d 712, 720 (Md. 1992).

46. The Hatch Act of 1939 was preceded by the Pendleton Civil Service Reform Act of 1883 in which Congress began to curtail the political activities of federal, and some state and local employees. See *An Act to Prevent Pernicious Political Activities* (“Hatch Act”), 5 U.S.C. § 7234 (2012); *Pendleton Civil Service Reform Act*, ch. 27, 22 Stat. 403 (1883) (amended 1978).

local officials who receive federal funds and might be tempted to use their position for partisan advocacy. It has so far survived all constitutional challenges.⁴⁷ After several attempts at piecemeal reform of the Hatch Act, Congress passed the Hatch Act Modernization Act in 2012 to ease the restrictions on federal workers. However, the Act still prohibits the use of “official authority or influence for the purpose of interfering with or affecting the result of an election,” “knowingly solicit[ing], accept[ing], or receiv[ing] a political contribution,” from certain persons, “run[nin]g for the nomination or as a candidate for election to a partisan political office,” or “solicit[ing] or discourag[ing] the participation in political activity of,” certain persons.⁴⁸ It should be noted that in the military context, attempts by high-ranking officers to deliver the votes of their subordinates to candidates for public office is not unheard-of, and the two Hatch Acts have been geared toward discouraging such attempts to swing civilian government employees in a partisan direction.⁴⁹

Alongside concerns regarding employee efficiency at work, and the potential for political speech to interfere with employee efficiency, employers are also concerned with the public’s perception of their business and how the speech of their employees impacts that perception. The public perception of the military as an apolitical organization is potentially the most important reason that the government can offer to restrict the political speech of SMs other than the efficiency with which they perform their jobs and any potential interference their political advocacy might have with their work.

One of the primary dividing lines when classifying speech for First Amendment purposes in the employment context is that between performance-based and expression-based speech. Most political speech from SMs is considered expressive speech, while voting and political rally attendance are considered speech through performance.⁵⁰ Within the

47. *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973) (holding that the Hatch Act does not prohibit government employee speech on political affairs but only prohibits employees from participating as partisan candidates, which is not a fundamental right). See also *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127 (1947) (holding that the Hatch Act does not violate the Tenth Amendment and the U.S. Civil Service Commission had authority to order withholding of federal highway funds if Oklahoma did not fire state government employee who was also chairman of partisan political party).

48. An Act to Prevent Pernicious Political Activities (“Hatch Act”), Pub. L. No. 112-230, 126 Stat. 1616 (codified as amended in scattered sections of 5 U.S.C.).

49. In *Greer v. Spock*, 424 U.S. 828, 842 (1976), the Supreme Court noted that in 1864, some Union officers had “sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864.” *Id.* at 842.

50. The right to association is essentially a performance-based form of speech, and courts have held that employees’ off-duty speech that interferes with their ability to perform their employment duties is subject to curtailment. See *Piscottano v. Murphy*, 511 F.3d 247, 252–53 (2d Cir. 2007) (holding that a corrections officer’s association with a motorcycle club with a long history of criminal activity undermined the correctional officer’s ability to perform his or her work in prison because of the presence of club members and rival club members in the prison).

military, Article 134 potentially encompasses both parts of this functional divide by prohibiting all misconduct, including speech, that operates “to the prejudice of good order and discipline” within the Armed Forces.⁵¹

In *United States v. Wilcox*, the Court of Appeals for the Armed Forces (“C.A.A.F.”) recently held that uttering racist statements and holding beliefs regarding racial inequality is not enough to establish criminal liability under Article 134 of the UCMJ, although it might run afoul of stated Department of Defense policy.⁵² The Court stressed that in order for a legally sufficient charge under Article 134 to result in a conviction, the speech or conduct must have a “reasonably direct and palpable effect on the military mission or military environment.”⁵³ The Court further stressed that it must be likely, rather than a mere possibility, that someone from the general public would view the SM’s statements and attribute them to the military.⁵⁴

In the context of expressive political speech, the C.A.A.F. and the Supreme Court have here presented contradictory views of what kind of speech constitutes a “clear and present danger” that operates to the prejudice of “good order and discipline” in the Armed Forces. In *United States v. Howe*, the C.A.A.F. upheld the conviction of an Army lieutenant for his political speech even though he was a reserve officer, rather than a professional officer, because “during the time he serve[d] on active duty he [was] . . . controlled by the provisions of military law” and although here the “military restrictions [fell] upon a reluctant ‘summer soldier . . . at another time, and differing circumstances, the ancient and wise provisions insuring civilian control of the military will restrict the ‘man on a white horse.’”⁵⁵ The rationale of preventing the future ‘man on a white horse’ seems to stand in direct contradiction to the previously-adhered to standard that speech can only be singled out for legal suppression if it presents a clear and present danger, as formulated by the *Schenck* decision.

Regardless of the potential impact upon service readiness, a great deal

51. For the full text of Article 134 see *supra* note 21. Article 134 has been described as a ‘catch-all’ that covers conduct which would otherwise go unpunished but is detrimental to order and discipline in the military.

52. “Appellant’s online profiles show that Appellant held beliefs that are both disturbing and inconsistent with Department of Defense policies regarding racial equality and other matters, that alone is insufficient under the facts of this case to impose criminal sanctions under Article 134, UCMJ.” *United States v. Wilcox*, 66 M.J. 442, 446 (C.A.A.F. 2008).

53. *Id.* at 450.

54. The court held:

The mere possibility, assumed by the CCA and unsupported by the record, that a Servicemember or member of the public might stumble Appellant’s expression of his beliefs, believe he was in the military, and attribute his views to the military is so tenuous and speculative as to be legally insufficient to support . . . the charged violation of Article 134.

Id. at 451.

55. *United States v. Howe*, 37 C.M.R. 429, 439 (1967).

of SM expression has been categorically subjected to government control by the controversial Supreme Court decision in *Garcetti v. Ceballos*.⁵⁶ In *Garcetti*, the Court held that “[w]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”⁵⁷

In many ways, the *Garcetti* decision can be viewed as merely an extension of the earlier Supreme Court ruling in *Pickering v. Board of Education* which established the Pickering balancing test to determine whether or not public employee speech is protected by the First Amendment.⁵⁸ The problem with the holding in *Garcetti* is that even if an issue falls within those disputes that are part of a broader public debate, if the employee’s speech on the issue is made pursuant to the employee’s official duties, then that speech can be constitutionally restrained by the employee’s supervisors. In this case, whatever expression an SM makes as part of their official military duties is subject to regulation and restriction by their supervisors within the DOD. Justices Stevens, Souter and Breyer dissented along divergent rationales, disagreeing with each other in addition to disagreeing with the majority. But all dissenting justices agreed that a categorical withdrawal of First Amendment protection for public employees speaking pursuant to their official duties is not the correct approach.⁵⁹

The same concerns that the dissent in *Garcetti* expressed about a *per se* rule which removes First Amendment protections from official duty speech are present in the military context. But in their *Garcetti* dissents, Justices Souter and Breyer did not raise concerns at the prospect of SM speech being curtailed; rather, they would have further tipped the scale in the employer’s favor in cases involving government employees. Justice Souter would have held that “private and public interest in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy,” so that even if employee speech occurs “in the course of their duties,” they should have

56. *Garcetti v. Ceballos*, 547 U.S. 410 (2006)

57. *Id.* at 421. For further discussion on the discord over the *Garcetti* decision, see, e.g., Martha McCarthy & Suzanne Eckes, *Silence in The Hallways: The Impact of Garcetti v. Ceballos on Public School Educators*, 17 B.U. PUB. INT. L.J. 209 (2008); Jessica Reed, *From Pickering to Ceballos: The Demise of the Public Employee Free Speech Doctrine*, 11 N.Y. CITY L. REV. 95 (2007); Elizabeth Dale, *Employee Speech & Management Rights: A Counterintuitive Reading of Garcetti v. Ceballos*, 29 BERKELEY J. EMP. & LAB. L. 174 (2008).

58. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (“The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”).

59. *Garcetti*, 547 U.S. at 426–50.

First Amendment protection.⁶⁰ However, he would have applied a modified *Pickering* standard to every case of public employee speech, and would have the government prevail unless the employee (1) spoke on a matter of unusual importance, and (2) satisfied high standards of responsibility in the way that they spoke.⁶¹ Justice Breyer agreed with this modified approach, but remained concerned that there are “far too many issues of public concern, even if defined as ‘matters of unusual importance,’” for Justice Souter’s test to effectively safeguard the legitimate administrative and efficiency needs of public employers.⁶² This is because, in his view, matters of unusual importance “are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public’s health, safety, and the environment.”⁶³

Members of the military are uniquely suited to comment upon military affairs, an area of America’s political discourse that is usually the subject of contentious debate. Owing to their unique (and when compared to the general population, miniscule) position in American society,⁶⁴ members of the military are perhaps best suited to discuss the use of the American military in an informed and educated manner. Nevertheless, the disentanglement of their military and civilian roles can prove especially problematic, since it is difficult to determine exactly where the official SM duties end and their speech as a private citizen begins. Once an SM enters active duty, they endure a permanent change of status and it is not clear exactly when they cease being soldiers for military purposes and don their civilian hats:

Enlistment is a contract; but it is one of those contracts which changes the status By enlistment the citizen becomes a soldier. His relations to the state and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged. He cannot of his own volition throw off the garments he has once put on, nor can he, the state not objecting, renounce his relations and destroy his status. . . .⁶⁵

The issue of when to consider SM speech as “official duty speech” under *Garcetti* is not simply limited to the problem of their permanent

60. *Id.* at 429.

61. *Id.* at 435.

62. *Id.* at 448.

63. *Id.*

64. George Reynolds & Amanda Shendruk, *Demographics of the U.S. Military*, COUNCIL ON FOREIGN RELATIONS (Apr. 24, 2018), <https://www.cfr.org/article/demographics-us-military>.

65. *In re Grimley*, 137 U.S. 147, 152 (1890).

status as a military member, whether in an active duty or reserve capacity, but it also extends to speech that SMs make about military affairs. Should we construe a soldier's comments on Army policies as being part of their official duty speech since they are the subject matter expert and all-the-while on active duty status? Do the writings of a sailor regarding official Navy policy also carry the same presumption of being official duty speech if they are written on an online blog?⁶⁶ When SMs deploy abroad, they are always on duty and face the added problem that using government computers is often the only way that they can communicate with friends and family members back home, thus the potential for their speech to fall within their official duties is even greater.⁶⁷

The question of status is a pervasive and important one since the status of an SM is the crucial determinant in deciding whether a military tribunal has jurisdiction over that person. Regulations like DoD 1344.10⁶⁸ explicitly incorporate and exclude certain SMs, and other military regulations apply only to active duty SMs and members of the National Guard that are serving on active duty status, excluding Guard members that remain under the control of their state governor. The Supreme Court has ruled on both sides of the status question and ultimately holds today that regardless of whether an SM commits a crime off-base, and even if their crime has absolutely no connection to their federal service, military courts still have jurisdiction over the SM because of their military status.⁶⁹

66. The application of the "official duty speech" test is particularly important in the area of blogging which has proliferated since web publishing tools were made either free or nearly so exceedingly cheap to non-journalists in the mid-1990's. Military-related blogs to which military professionals regularly contribute are numerous and include both officially-sponsored online platforms such as The Army Times and many privately-run entities, leading to questions of when exactly an SM's written content would fall under their official duty speech and thus be censorable. The Army Times is Congressionally-sponsored and has an office with established independent from political oversight (Office of the Ombudsman) and is intended as a publication to increase service morale. *See, e.g., Top 60 Military Websites & Blogs for Military Professionals & Veterans, available at https://blog.feedspot.com/military_blogs/* (last visited Jan. 25, 2018).

67. While SMs are deployed overseas, they often have access to computers, which run on the Non-Secure Internet Protocol (NIPR) and provide access to the same websites that can be visited from privately-owned computers. *See* Satellite Communications: Snap, <http://peoc3t.army.mil/wint/snap.php>. The online activity of SMs is nonetheless still subjected to the requirements to maintain operational security and SMs are asked to refrain from posting otherwise unobtainable information on open-source webpages, including their social media sites. *See also Operations Security, U.S. DEP'T OF DEF. EDUC. ACTIVITY, <http://www.dodea.edu/offices/safety/opsec.cfm>*.

68. *See* DOD DIR. 1344.10, *supra* note 2.

69. The decision in *Solorio v. United States* held that "the jurisdiction of a court-martial convened pursuant to the Uniform Code of Military Justice (U.C.M.J.) to try a matter involving a member of the Armed Forces" does not "depen[d] on the 'service connection' of the offense charged." 483 U.S. 435, 436 (1987). This overruled the earlier decision of the Court in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that the jurisdiction of a military tribunal was dependent on a nexus between the crime and the defendant's service in the military, and to try SMs in military tribunals for civilian offenses would deprive them of the benefits of a grand jury indictment and jury trial. *Id.* at 272-74. Prior to the holding in *O'Callahan*, a lengthy line of cases had established that SMs could be

Thus, regardless of whether an SM's crime is related to their military service, they are considered on official active duty status at all times and places for the purposes of the First Amendment.

IV. THE IMPACT UPON SERVICEMEMBER AUTONOMY AND THE TYRANNY OF MAJORITY OPINION

The restrictions on political speech and the absence of clear guidance on acceptable speech are stunting SM autonomy and political self-expression. This is a particularly dangerous trend since all SMs are drawn from the democratic society they work to safeguard, and if they fail to exercise their First Amendment rights, an entire segment of the American population is structurally disenfranchised from lending their voice to the larger political debate. This could only be an acceptable outcome if we are willing to accept that the highly attenuated connection between an overly-politicized military and the current restrictions against political activity by SMs justifies their marginalization.

Despite his copious writing on First Amendment issues, Oliver Wendell Holmes never directly addressed the issue of SM political expression, though it is likely that his jurisprudence would comprehend the elimination of SMs from the political sphere.⁷⁰ In his work *The Common Law*, individual rights are conceptualized not as mere casualties of war, but also as the proper subject of ongoing revision and contraction in the civilian context: “[t]he most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it.”⁷¹ It is thus difficult to square the jurisprudence of a man who, while treating the law as a mere instrument by which the dominant force in society maintains power, nonetheless upheld the idea that the Constitution can only tolerate restrictions on speech when there is an immediate danger threatened by such speech.

When Holmes detailed the ‘clear and present danger’ test in *Schenck*, he would likely not have imagined the test being used as a basis to thwart

tried by military tribunals. Nonetheless, the overruling of O’Callahan by Solorio upholds the idea that the concept of status is the key factor in determining when a military tribunal can punish an SM for their speech and conduct.

70. For the argument that Holmes’ view of free speech is best understood as grounded in an argument that truth consists of choices made by majorities or dominant forces in society in response to challenges to the status quo, and that Holmes’ constitutional commitment to free speech was a way to safeguard the conditions for collective self-determination see Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill’s and Justice Oliver Wendell Holmes’s Free Speech Defenses*, 22 YALE J. LAW & HUMANITIES 35 (2010).

71. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 42 (1918).

the possibility of an overly-politicized military. Rather, Holmes described the law as the rules laid down by the dominant majority group in society, and he seemed to support the disregard of individuality if it furthered the country's larger objectives. To that end, his view of humanity as a largely uninformed entity plunging forward through time echoes with military metaphors: we are like "private soldiers [that] have not been told the plan of campaign, or even that there is one, rather than some vaster unthinkable to which every predicate is an impertinence, has no bearing upon our conduct. We still shall fight."⁷²

There is a further and perhaps more troubling trend fostered by this lopsided framework of political expression governing military members which continues to enjoy great popularity amongst military officers and the military community at large: that of the completely apolitical military which chooses to forego its civic duties rather than exercise what is currently available. In recent years, several military officers have put forth arguments that members of the military should not vote but should remain completely neutral with regards to partisan politics.⁷³ This less-than-friendly attitude towards civic duty in the spirit of not seeming too overtly partisan contributes to what John Stuart Mill feared in *On Liberty*, namely that the oppressive norms of the majority would work to stifle the dissent of the minority: "The likings and dislikings of society, or of some powerful portion of it, are thus the main thing which has practically determined the rules laid down for general observance, under the penalties of law or opinion."⁷⁴

In the modern discourse of military thinkers, the accepted mantra of political neutrality has been touted as an ideal to which military members, especially military officers, should strive to uphold, and this ideological position has even perhaps become a fashionable one for SMs that want to justify their civic non-participation. One active-duty army officer wrote in an editorial during the 2016 presidential election: "I strongly believe that officers, like all citizens, should have the right to vote. But because military officers have a special responsibility to prevent politics from dividing our troops and separating us from society, it is all the more

72. Holmes, *Natural Law*, *supra* note 71, at 43. Much of Holmes's writing and personal outlook appear to have been heavily influenced by his experience fighting with the 6th Corps for the Union Army during the Civil War. When Franklin Roosevelt came to greet Holmes on the advent of his ninety-second birthday he asked him:

Justice, you are the greatest living American. For half the history of the Republic you have seen its greatest events and known its greatest men. What is your advice to me?" Holmes replied, "You are in a war, Mr. President. I was in a war, too. And in a war there is only one rule: Form your battalions and fight.

LIVA BAKER, *THE JUSTICE FROM BEACON HILL* (1991).

73. See Toner, *supra* note 29; Cavanaugh, *I Fight for Your Right*, *supra* note 29.

74. MILL, *supra* note 3, at 17.

important for us to choose not to exercise that right.”⁷⁵ On another popular privately-run military news site, another army officer acknowledged the powerful norms of apolitical behavior in military by writing that “[t]here is an unwritten code in our armed forces that those serving, especially officers, should not vote in U.S. elections.”⁷⁶

This viewpoint has been expressed in the *New York Times* and other mainstream media, and has also been written about and discussed in academic literature. As part of his Command and General Staff College thesis, Lieutenant Colonel Robert Toner authored a paper suggesting that there should be a professional norm of abstention from voting among the officer corps.⁷⁷

Military officers should not vote . . . This paper does not suggest a policy to restrict an officer’s right to vote. Rather, it suggests a *professional norm* that officers voluntarily abstain from voting in federal elections—elections for congress and the president. This treatment is limited to officers and federal elections because of the senior-subordinate relationships between military officers and elected and appointed political leaders.⁷⁸

In rather dire language and outlook, some military officers have also crafted dystopian works of fiction that predict a future American government dominated by a military regime that has overtaken the country. Dating from as far back as 1992 (perhaps coincidentally around the advent of retired generals and admirals sponsoring presidential candidates), these works attempt to describe the evident trends and conditions necessary for an eventual military takeover of the American government.⁷⁹ Such an unlikely eventuality seems difficult to grasp but it

75. See Cavanaugh, *I Fight for Your Right*, *supra* note 29.

76. Terron Sims, II, *If You’re in the Military and Don’t Vote, You’re Neglecting Your Duty*, TASK & PURPOSE, <http://taskandpurpose.com/dont-vote-youre-military-youre-neglecting-duty/> (last visited Jan. 11, 2018).

77. Lieutenant Colonel Kevin Toner suggests multiple reasons that as a professional norm (and not an official restriction or other imposed measure) officers should abstain from voting. Chief among these are (1) the role of the military officer as a neutral and not just non-partisan but ‘unpartisan’ figure is crucial to the public perception of officers as being blind to partisan consideration; (2) under ‘Agency Theory’ where the principal is the civilian leader and the military officer is the agent, the existence of a moral hazard through ‘shirking’ that could be practiced by military officers when the interests of the military and civilian leadership are at odds (shirking taken to mean quashing policies that run counter to military interests through slow-rolling such policies are burying them in a bureaucratic morass); and finally (3) officers should not pick their bosses since they would effectively be picking the principals for whom they will serve as agents. See Toner, *supra* note 29.

78. *Id.*

79. The first of these, Charles R. Dunlap, Jr., *The Origins of the American Military Coup of 2012*, PARAMETERS, (Winter 2010-11), posits that such a possible future development might come about because of the military diversion to civilian uses, a monolithic unification of the Armed Forces under a single command, and the increasing insularity of the military community. The second work by

has nonetheless been batted about to an increasing extent on internet blogs and other political websites with various authors guessing at what would be necessary for a military coup to occur.⁸⁰ To the extent that members of the Armed Forces identify with certain candidates or factions, recent research from the Harvard University Institute of Politics strongly suggests that the majority of military-age youths already in the military, or considering joining the military, support Republican candidates, and that a majority of that same demographic that have already joined are Hispanic.⁸¹ The legal regulation of political expression in an already quasi-homogenous segment of society is especially concerning because it reinforces existing cultural mores and political thinking.

Because of the military's hierarchical structure and culture, it is particularly susceptible to the oppression by majority opinion that Mill warned about. Every large group tends to adopt certain broad characteristics that come to define the group's organizational culture, and the military is the host of a culture based upon necessary conformity.⁸² This culture of conformity is further reinforced by legal norms, military law being "that of obedience"⁸³ which, out of operational need, runs contrary to the liberty model that Mill formulated. While the speech that SMs are allowed to use is constrained by the values of efficiency, security, and political neutrality, the liberty model of free speech holds that humans must be able to speak freely if they are to achieve self-realization, because "[h]uman nature is not a machine to be built after a model, and set to do

Matthew Cavanaugh, *The Origins of the American Military Coup of 2037*, MODERN WAR INSTITUTE AT WEST POINT (Nov. 28, 2017), <https://mwi.usma.edu/origins-american-military-coup-2037/>, reimagines the first work and places the origins of the coup within the erosion of the nonpartisan ethic in the officer corps and the open partisan political affiliation of officers.

80. Luke Foster Middup, *Thinking the Unthinkable: Could There Be a Military Coup in the U.S.?*, THE CONVERSATION (Sept. 7, 2017), <https://theconversation.com/thinking-the-unthinkable-could-there-be-a-military-coup-in-the-us-82403>. For further works in the popular press that discuss the increasingly disturbing trend of military exceptionalism, see Masha Gessen, *John Kelly and the Language of the Military Coup*, NEW YORKER (Oct. 20, 2017), <https://www.newyorker.com/news/news-desk/john-kelly-and-the-language-of-the-military-coup>.

81. Paul Bedard, *The Few: Republicans Join Military 2-to-1 over Democrats*, WASH. EXAMINER (Dec. 15, 2015), <http://www.washingtonexaminer.com/the-few-republicans-join-military-2-to-1-over-democrats/article/2578367>. For the Harvard University Institute of Politics data on this issue, see Survey of Young Americans' Attitudes Toward Politics and Public Service (Dec. 10, 2015), http://www.iop.harvard.edu/sites/default/files_new/pictures/151208_Harvard%20IOP%20Fall%202015%20Report.pdf.

82. The military is a "specialized society separate from civilian society." Parker v. Levy, 417 U.S. 733, 743 (1974). Scholarly depictions of military free speech affirm:

[A] military organization is not constructed along democratic lines and military activities cannot be governed by democratic procedures. Military institutions are necessarily far more authoritarian; military decisions cannot be made by vote of the interested participants. . . .

[T]he existence of the two systems [military and civilian does not] mean that constitutional safeguards, including the First Amendment, have no application at all within the military sphere. It only means that the rules must be somewhat different.

T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 57 (1970).

83. *In re Grimley*, 137 U.S. 147, 153 (1890).

exactly the work prescribed for it, but a tree, which requires to grow and develop itself on all sides.”⁸⁴ To that end, Mill treated speech as more than a means to facilitate the accomplishment of certain goals but as a critical component of self-rule, the foundation of democratic government.

In the military context, the combination of legal restrictions and the extra-legal expression of cultural norms that govern the political lives of SMs further separates them from the society on whose behalf they conduct the business of war. This disenfranchisement seems to reflect the idea that soldiers are vassals of the state that should not have the personal and political autonomy of full-fledged members of a democracy. Not only are members of the military prohibited from making explicit endorsements when a member of the public might be able to infer that the SM’s speech implies official endorsement, but the current environment encourages excess caution when espousing less-than-popular political or social views.

One recent instance of an SM espousing unpopular views occurred in September 2017 when Spenser Rapone, a Second Lieutenant and graduate of the United States Military Academy, posted a photo of himself on his Instagram account with the message “Communism will win” inside of his cadet service cap and another of him in uniform wearing a Che Guevara shirt underneath his service dress.⁸⁵ Lieutenant Rapone also posted a message criticizing the Secretary of Defense.⁸⁶ The photos that Lieutenant Rapone posted online arguably do not run afoul of the UCMJ, unlike his comments demeaning the current Secretary of Defense.⁸⁷ But what is more

84. MILL, *supra* note 3, at 107.

85. Meghann Myers, *West Point Responds to Tweet of Cadet with Che Guevara Tee under Uniform*, ARMY TIMES (Sept. 26, 2017), <https://www.armytimes.com/news/your-army/2017/09/26/west-point-responds-to-tweets-of-cadet-with-che-guevara-tee-under-uniform/>; Meghann Myers, *Former West Point Cadet in Che Guevara Shirt Is an Afghanistan Combat Veteran*, ARMY TIMES (Sept. 29, 2017), <https://www.armytimes.com/news/your-army/2017/09/29/former-west-point-cadet-in-che-guevara-shirt-is-an-afghanistan-combat-veteran-and-other-rumors-clarified/>. The photos that Second Lieutenant Rapone posted were inflammatory enough to draw a response from the Superintendent of the United States Military Academy. See Letter from the Office of the Superintendent of the United States Military Academy (Oct. 11, 2017), available at <http://www.usma.edu/news/Shared%20Documents/Superintendent%27s%20Letter%20to%20Graduates%20Regarding%202nd%20Lt.%20Rapone.pdf>. In response to the Superintendent’s letter, a retired United States Military Academy professor issued a letter condemning the overall deterioration of the once-great culture of discipline and honor at the academy, highlighted by the recent scandal over Rapone’s photos. See *Exclusive: Former West Point Professor’s Letter Exposes Corruption, Cheating and Failing Standards*, AMERICAN MILITARY NEWS (Oct. 11, 2017), <https://americanmilitarynews.com/2017/10/exclusive-former-west-point-professors-letter-exposes-corruption-cheating-and-failing-standards-full-letter/>.

86. Lieutenant Rapone violated Article 88 through his comments. Because Article 88 prohibits uniformed officers from using speech that demeans the commander-in-chief, vice-president, secretary of defense, and other senior officials, Rapone is subject to criminal violations of the UCMJ for his statements against Secretary of Defense James Mattis.

87. Article 88: Contempt toward officials:

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

concerning is the outpouring of condemnation from current and retired members of the military as well as members of Congress.⁸⁸ The lockstep criticism of Lieutenant Rapone's unpopular minority views creates the inference that the expectation from members of the military is that they be of one opinion and do not dissent from the status quo.

Perhaps in an ideal world, the military's hierarchical culture and vibrant professional norms would carry the day and enforce an ethic of political non-partisanship without the need for regulations that govern SM political expression. But as currently written, and when enforced in our increasingly digitized world, restrictions on political expression trammel the personal autonomy and individual conscience that members of a democracy should otherwise be able to exercise, regardless of their status or class. This stifling of political expression from the segment of American society charged with maintaining our freedoms and fighting our wars leads to certain structural deficiencies in our political discourse that will likely be compounded over time.

V. ABSENT VOICES FROM THE MARKETPLACE OF IDEAS

The theory of the marketplace of ideas, which attempts to illustrate the role of free speech within a complex society such as ours, underpins what has been described as the "truth-seeking function" of the First Amendment.⁸⁹ Justice Holmes, in a consequentialist vein, wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market," a hypothesis which is "the theory of our Constitution."⁹⁰ Although it might be disconcerting to see retired generals handing down endorsements to political candidates during election cycles, the contributions that current SMs make to political discourse provide a viewpoint that they are uniquely qualified to share.⁹¹ Such a marked absence creates a structural deficiency that cannot be easily overcome, especially in a culture as it currently exists in the United States where the

Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.

UCMJ art 88.

88. See Jared Keller, *Marco Rubio's War On This Communist West Point Grad May Blow Up In His Face*, TASK & PURPOSE (Oct. 4, 2017), <http://taskandpurpose.com/communist-west-point-army-rubio/>.

89. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

90. *Abrams v. United States*, 250 U.S. 616, 630 (1919).

91. See Corbett & Davidson, *supra* note 11. In their work on the role of the military in presidential politics, Professors Corbett and Davidson expressed great concern over the use of political endorsements by retired generals. High-ranking officers who have left the service are no longer subject to the UCMJ and as such are free to make political statements without the fear of legal reprisal. However, the focus here is on active and reserve SMs who, but for regulation of their political expression, might participate in partisan politics to a greater degree.

highest court in the land has “recognized that the military is, by necessity, a specialized society separate from civilian society” and thus the two groups of people exist in essentially different social spheres.⁹²

To the extent that Holmes believed in the marketplace of ideas approach to the First Amendment, he was remarkably comfortable with restricting or even eliminating the voices of individual segments of society so long as it was a restriction performed for the greater good.⁹³ Restrictions on speech during wartime that would be patently unconstitutional during peacetime find ready justification in Holmes’ opinion in *Schenck*: “[I]n ordinary times” the leaflet involved urging men preparing for World War I to resist the draft, would have received constitutional protection, but “[w]hen 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.”⁹⁴ Holmes’ personal correspondence affirmed his support for this vast expansion of government power during wartime though he was troubled by the short-circuiting of debate presented by the Espionage and Sedition Acts.⁹⁵ This expansion of government powers to restrict speech during wartime was affirmed by a string of Supreme Court cases that came on the tail-end of WWI.⁹⁶ But here again, Holmes’ writing displays a kind of inherent contradiction that marks his other opinions as evolving and constantly responding to the times. Holmes’ view that humanity is largely on an experimental journey which veers from right to left in pursuit of the correct, happy medium seems to dictate that the value of free speech is not so much that it preserves the personal autonomy and liberties of the individual, but that free speech is really most beneficial to the primary decision-makers in power by allowing them to test ideas, question accepted dogma, and govern more effectively. In dissent in *Abrams v. United States*, Holmes

92. *Parker v. Levy*, 417 U.S. 733, 743 (1974).

93. See Holmes, *Natural Law*, *supra* note 71.

94. *Schenck v. United States*, 249 U.S. 47, 52 (1919). Later in his famous *Abrams* dissent, Holmes wrote:

The United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent. The power undoubtedly is greater in time of war than in time of peace because war opens dangers that do not exist at other times.

Abrams, v. 250 U.S. at 627.

95. In a personal letter to Harold J. Laski dated May 12, 1919, Holmes wrote:

I think the clauses under consideration not only were constitutional but were proper enough while the war was on. When people are putting out all their energies in battle I don’t think it unreasonable to say we won’t have obstacles intentionally put in the way of raising troops—by persuasion any more than by force. But in the main I am for aeration of all effervescing convictions—there is no way so quick for letting them get flat.

VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* (2012).

96. See *Abrams*, 250 U.S. at 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck*, 249 U.S. at 47.

wrote that “[p]ersecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”⁹⁷ But despite this logical aim of proscribing certain kinds of speech, he also argued alongside that proposition that “we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”⁹⁸

How do we reconcile Holmes’ near-dismissive attitude toward the pursuit of truth in a democratic society as being a constant experiment and his insistence that we remain vigilant against attempts to quash expression of minority opinion? Much of what was commonly accepted as providing substance for “natural rights” Holmes considered to be constructs of a larger well of cultural thought: “for legal purposes a right is only the hypostasis of a prophecy—the imagination of a substance supporting the fact that the public force will be brought to bear upon those who do things said to contravene it.”⁹⁹ To that end, what we one day think of as essential rights can be changed when the next generation conceives fundamental rights to encompass a different set of values, a key premise underlying his famous dissent in *Lochner v. New York*.¹⁰⁰

Holmes seemed to think that time would ultimately turn today’s orthodoxy into tomorrow’s heresy because our constitutional framework is just that: a framework to allow for experimentation within certain boundaries. To that end, he wrote in *Abrams* that, “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trades in ideas.”¹⁰¹ The answer to this inconsistency seems to lie in his belief that law is an expression of the dominant force in power, and as a constitutional democracy, our society has made the choice that decision-making power

97. *Abrams*, 250 U.S. at 630.

98. *Id.*

99. Holmes, *Natural Law*, *supra* note 71.

100. Justice Holmes noted:

The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post office, by every state or municipal institution which takes his money for purposes though to be desirable, whether he likes it or not. The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statistics.

Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). This conception of fundamental rights as a constantly shifting set of social that change when the dominant force in society perceives the change to be necessary is key to understanding how Holmes approaches restrictions of speech even on sensitive political issues.

101. *Abrams*, 250 U.S. at 630.

over military affairs ultimately resides in the populace that has placed decision-making authority in the Congress and the Executive branch in tandem. Both branches of the government have thus taken steps to restrict the ability of their subordinate military entities to influence and participate in the political process that ensures they maintain power, because to allow for a partisan-leaning military presents a clear and present danger to the current constitutional order.

When Holmes formulated the *Schenck* opinion and gifted to us the stubbornly persistent image of the man “falsely shouting fire”¹⁰² in a crowded theater, he neglected one critical aspect that renders his metaphor as deficient as it is long-lasting. The man falsely shouting fire has no legitimate, constitutional interest in the speech that he wishes to make, and thus, there is essentially no balancing that a court is able to do when it applies that analogy in the context of what speech constitutes a clear and present danger.¹⁰³ The SM who wishes to exercise the Constitutional right as an American citizen to critique, criticize, and choose elected leaders is not merely yelling fire into the crowded theater of cyberspace but exercising the very essence of what it means to be a citizen of a democracy.

CONCLUSION

While the current outer edges of permissible political speech available to SMs are very much open to debate, at least two external conditions are very likely to occur. First, given current social trends, the military as a distinct community is likely to become increasingly isolated from the society at large.¹⁰⁴ Second, the use of social media and other forms of online political engagement by members of the military is only likely to increase.¹⁰⁵ Because contradictions and inconsistencies persist in the way

102. *Schenck v. United States*, 249 U.S. 47, 51 (1919).

103. See HARRY KALVEN, JR., A WORTHY TRADITION (1988). Kalven criticized the *Schenck* test by noting that, “the man shouting ‘fire’ does not offer premises resembling those underlying radical political rhetoric—premises that constitute criticism of the government.” *Id.* The man shouting fire can claim no substantive right to make such an incitement because it provides no social utility.

104. For an intriguing analysis of the increasing separation between military and civilian society by one of the military’s leading commentators and critics, see Thomas Ricks, *The Widening Gap Between Military and Society*, THE ATLANTIC (July 1997), <https://www.theatlantic.com/magazine/archive/1997/07/the-widening-gap-between-military-and-society/306158/>.

105. See Michelle Borgnino, *Mutiny on the High C: How the Armed Forces Regulate and Criminalize Servicemember Speech Online*, 224 MIL. L. REV. 800 (2016).

[T]he average [junior-enlisted member] today does not remember a time when there was no Internet, no camera cell phone, and no text messaging. In that he/she is a ‘digital native.’ This means of communication is as natural to him/her as a letter home was to . . . previous generations. The status symbol today for the ‘wired generation’ is how many friends you have on your MySpace or Facebook page.

that courts treat the First Amendment rights of SMs, blurring the line between the clear and present danger to military order and discipline, and that which has an attenuated connection to an overtly political military, the migration of our political discourse to the digital world will compound the difficulty that we have in defining acceptable SM political expression.

If the UCMJ is used to constrain SM political expression online, and DoD regulations leave the boundaries of acceptable SM political expression open to interpretation, then this small but important group of citizens will continue to be marginalized in undertaking their civic responsibilities while in uniform. Would it not be better to allow civic engagement from SMs who are engaged in the work of the military rather than wait for them to serve twenty or thirty years and then hand down the endorsement of a presidential candidate?

Id. at 806–07 (alterations in original) (quoting *United States v. Wilcox*, 66 M.J. 442, 462 (C.A.A.F. 2008)).