Contemptuous Speech Against the President

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During the Clinton Administration, a number of military officers have been disciplined for making disrespectful comments about President Clinton. Early in the Clinton presidency an Air Force General was fined, reprimanded, and forced into early retirement for referring to the President as "'gay-loving,' 'womanizing,' 'draft-dodging,' and 'pot-smoking,'" during an Air Force banquet speech.[1] Three years later, another Air Force general was reprimanded for telling an inappropriate joke about President Clinton during a speech at an Air Force base in Texas.[2] More recently, two Marine Corps officers were administratively punished for published letters to newspapers that were disrespectful to the President,[3] and military officials warned the remainder of the Armed Forces against engaging in similar misconduct.[4]

President Clinton is not the only chief executive to have been the object of public criticism by individual members of the Armed Forces. Indeed, the President stands in good company. History shows that members of the military have been prosecuted for openly criticizing Presidents Lincoln, Wilson, Coolidge, Roosevelt, Truman, and Johnson. In the early 1970s, Army officials considered, but declined, criminal action against an officer for exhibiting a bumper sticker that read "Impeach Nixon."[5]

The current prohibition against contemptuous speech directed against the President is contained in Article 88 of the Uniform Code of Military Justice (UCMJ). From its earliest days, this military prohibition has been a mechanism to ensure the foundational cornerstone of our Republic that military power is subordinate to the authority of our civilian leadership.[6] Additionally, like other punitive articles that criminalized disrespect and insubordination to military superiors,[7] this provision of military law serves to enhance discipline and to protect the hierarchical system of rank within the military.[8]

Historical Background

The punitive article prohibiting contemptuous speech is rooted in the British Articles of War of 1765, which were mod-

1. John Lancaster, *General Who Mocked Clinton Set To Retire, Punishment Follows Remarks At Banquet*, WASH. POST, June 19, 1993, at A1.

2. Bryant Johnson & Jim Wolffe, *Air Force General Reprimanded For Joke*, NAVY TIMES, Sept. 9, 1996, at 11.

3. Rowan Scarborough, *Major Gets Punished For Criticizing President*, WASH. TIMES, Dec. 7, 1998, at 1 (noting that a reserve major who was transferred to non-drill reserve status received a letter of caution for calling the President "a 'lying draft dodger' and 'moral coward' and an active duty Marine major received a letter of caution for referring to the President as an 'adulterous liar' . . . .").

4. *See id.*; *see also Comtemptuous Words*, WASH. POST, Oct. 22, 1998, at 24 ("The Military brass is now warning servicemen and women to stop demeaning their commander in chief in public comments.").

5. Eugene R. Fidell, *Free Speech v. Article 88*, U.S. NAVAL INSTITUTE PROCEEDINGS, Dec. 1998, at 2. Courts have upheld the authority of an installation commander to forbid civilians from displaying bumper stickers that embarrass or disparage the commander in chief. Ethredge v. Hall, 795 F. Supp. 1152 (M.D. Ga. 1992), *aff'd* 56 F.3d 1324 (11th Cir. 1995).

6. EDGAR S. DUDLEY, MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL 343 (3rd ed. 1910) (discussing that Article 19 of the Articles of War "intended to enforce respect for the governing authorities of the United States, and of the State in which any officer or soldier is stationed"); 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, 1715 (1968) (noting that in 1912 Brigadier General Enoch H. Crowder, the Judge Advocate General of the Army, testified before Congress that the article was "'intended to be expressive of the principle of the subordination of the military authority to the civil.'"); Fidell, *supra* note 5, at 2 (Violations of the article "erode civilian control of the military . . . ."); *see* ROBERT SHERRILL, MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC 182 (1970) ("In the early days of our new nation the rationale behind Article 88 was an imminent fear . . . that the generals might pull a coup."). *But cf.* 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, 1197 (1986) ("Fear of punishment under the Article will discourage certain thoughts and repress speech, thus resulting in a threat to stable government.").

7. *See, e.g.*, UCMJ art. 89 (West 1998) (disrespect toward a superior commissioned officer); *id.* art. 91 (insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer).

8. United States v. Howe, 37 C.M.R. 429, 437 (1967) ("The evil which Article 88 . . . 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."); Fidell, *supra* note 5, at 2 (Article 88 violations "also threaten the hierarchical system *within* the military. Compliance with Article 88 is a baseline measure of obedience and loyalty; officers who violate it set a poor example." (emphasis in original)); Kester, *supra* note 6, at 1734 ("An extra prop to the Army's already formidable system of internal discipline . . . .").

ified and applied to the Continental Army during the Revolutionary War.[9] The British Code had "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.'"[10] British military law also provided punishment for "any officer or soldier who should 'behave himself with [c]ontempt or [d]isrespect towards the [g]eneral, or other Commander in Chief of Our Forces, or shall speak [w]ords tending to his [h]urt or [d]ishonour.'"[11]

The Articles of War, originally adopted by the United States in 1775, punished "any officer or soldier who behaved himself with 'contempt or disrespect towards the general or generals, or commanders in chief of the continental forces, or shall speak false words, tending to his or their hurt or dishonor.'"[12] In 1776, with the creation of "The United States of America," the article was modified to subject to court-martial "any officer or soldier who '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' . . . ."[13] Further prohibited was behavior that exhibited "contempt or disrespect towards the general, or other commander-in-chief of the forces of the United States, or speak words tending to his hurt or dishonor."[14] With the exception of an 1806 revision specifically enumerating the President and Vice President as prohibited objects of disrespect, this provision of military law remained substantially unchanged until the enactment of the UCMJ's Article 88 in 1950 when the article was made applicable to officers only.[15] Significantly, Article 88 was made applicable to the sea services, who had no comparable punitive provision and instead had prosecuted such misconduct as conduct unbecoming an officer and gentleman or under the general article.[16]

Historically, approximately 115 prosecutions under Article 88's predecessors have been identified, the majority of which occurred during the Civil War and the two World Wars.[17] During the Civil War, at least twenty-two Union courts-martial

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9. *Howe*, 37 C.M.R. at 434; COLONEL WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 565 (2d ed. 1920).

10. *Howe*, 37 C.M.R. at 434 (citation omitted). The First English article of war specifically prohibiting speech hostile to the king appeared in 1513 during the reign of Henry VIII. Kester, *supra* note 6, at 1702. The provision punishing disrespectful language against the Monarchy was eventually removed from British military law in 1955. *Id.* at 1708.

11. *Howe*, 37 C.M.R. at 434.

12. *Id.* (citation omitted).

13. *Id.*; The 1776 military provision was taken from the British Code by a committee that included, among others, Thomas Jefferson and John Adams. *See* Detlev F. Vagts, *Free Speech In the Armed Forces*, 57 COLUM. L. REV. 187 (1957), *reprinted in* (Bicent. Issue) MIL. L. REV. 541, 546 (1975).

14. *Howe*, 37 C.M.R. at 434-5; Kester, *supra* note 6, at 1709-10.

15. One legal commentator suggested that the Article was limited to officers "perhaps on the theory that only officers as leaders in the military could challenge the preeminence of civilian control." Aldrich, *supra* note 6, at 1208. A second commentator opined that the limitation reflects the reduced effect on morale and discipline if enlisted personnel violate the prohibition. Major Michael A. Brown, *Must The Soldier Be A Silent Member Of Our Society?*, 43 MIL. L. REV. 71, 101 (1969).

> [I]t is probable that the drafters of the Code realized that the detrimental effect upon morale and discipline because of an enlisted man's contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey.

Id. In 1956 the word "commissioned" was inserted before officer "for clarity." 10 U.S.C.A. § 888, at 407 (West 1998). Because Article 88 applies only to commissioned officers, legal commentators are split as to whether enlisted service members may be charged under other articles for contemptuous words. *Compare* CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW IN A NUTSHELL 85 (2d ed. 1996) ("[S]imilar conduct by enlisted personnel and warrant officers can be sanctioned under other Articles such as Article 134 (service-discrediting conduct), Article 89 (disrespect), and Article 91 (insubordination).") *with* Kester, *supra* note 6, at 1735 ("Of very questionable legality has been the Army's occasional resort to the general article to punish enlisted men, whom Congress in 1950 exempted from Article 88, for statements disrespectful of the President."); *id.* at 1735 n.239 (noting that military case law holds "that the general article cannot be used to avoid proving an essential element of a crime dealt with in a specific article of the UCMJ.") *and* Brown, *supra* at 102-3 (noting that unlike an officer, "the enlisted soldier enjoys the same rights as his civilian brethren with regard to using contemptuous words towards high-level civilian authority."") *and* ROBERT S. RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW 111 (1970) ("[I]f an enlisted man called the President an abusive name, it would probably amount to a deprivation of his constitutional free speech rights to punish him for it."). In 1962, an Army private was convicted of violating Article 134 after using obscene language with respect to President Kennedy. Kester, *supra* note 6, at 1735 n.239.

16. *Howe*, 37 C.M.R. at 435-6; Kester, *supra* note 6, at 1718 n.122 ("[T]he [UCMJ], unlike the Articles of War, applies to the Navy and Coast Guard, the individual codes of these services previously did not specifically enumerate such an offense."); *id.* at 1734 (noting that before 1951, the Navy prosecuted disrespectful or contemptuous words as conduct unbecoming or under the general article.). The Articles of War were applicable to Marine Corps personnel "when detached for service with the armies of the United States by order of the President." MANUAL FOR COURTS-MARTIAL, UNITED STATES ARMY 4 (1917) [hereinafter MCM, 1917].

17. Kester, *supra* note 6, at 1720-1 (stating that of the 115 identified courts-martial "all but a handful occurred during the Civil War, World War I, or World War II, or the year or two following each of those conflicts"). With the single exception of a Civil War general of volunteers who was acquitted of contemptuous speech against a state governor, however, no record exists of "any officer above the rank of major . . . ever tried under this prohibition." SHERRILL, *supra* note 6, 183; Kester, *supra* note 6, at 1723 & n.141.

were convened, but no records reflecting Confederate prosecutions have been discovered.[18] The vast majority of the Civil War-era cases occurred as a result of comments made against President Lincoln and his administration.[19] No prosecutions were initiated because of language directed solely at the Vice President, Congress, or at a state legislature.[20] A single court-martial resulting from language allegedly disrespectful to a state governor ended in an acquittal.[21]

Between the end of the Civil War and the beginning of World War I prosecutions for contemptuous and disrespectful speech were rare.[22] The court-martial pace picked up considerably after the United States entered the war. Between 1917 and 1921 at least fifty-two courts-martial were convened under the then 62d Article of War, the vast majority of which involved contemptuous words directed against President Wilson.[23] When America demobilized at the end of the war, prosecutions for violating this article became almost nonexistent.[24]

Similarly, as the United States approached and fought World War II with its largely conscript Army, the number of courts-martial for contemptuous speech rose exponentially. Between 1941 and the end of hostilities in 1945, thirty-one officers and soldiers were prosecuted.[25] With the exception of a single case involving words directed against the Governor of the Panama Canal Zone, all courts-martial from that era concerned statements against the President.[26] After the war, only three pre-UCMJ prosecutions occurred under this article, all of which occurred in 1948 and involved soldiers performing occupation duty.[27]

Since the UCMJ was enacted in 1950 only a single known court-martial has occurred pursuant to Article 88.[28] In *United States v. Howe*, an Army Lieutenant was convicted for carrying a sign during an antiwar demonstration that read "Let's Have More Than A Choice Between Petty Ignorant Facists In 1968" on one side and "End Johnson's Facist Aggression In Viet Nam" on the other side.[29] Lieutenant Howe did not participate in organizing the demonstration, but merely joined it after it began.[30] During the half-hour demonstration, Howe was off-duty, in civilian clothes, and no one at the demonstration knew of his military affiliation.[31] Howe came to the Army's attention only because a gas station attendant, who Howe had asked for directions, spotted the lieutenant's sign and an Army sticker on his vehicle and subsequently notified the local military police.[32]

The opinion of the United States Court of Military Appeals (COMA) in *Howe* is not only significant because it is the only

18. Kester, *supra* note 6, at 1721 & n.138. The Confederate Articles of War were virtually identical to the Union articles. *Id.* at n.138.

19. WINTHROP, *supra* note 9, at 565.

20. *Id.* at 565-6 ("No instance has been found of a trial upon a charge of disrespectful words used against Congress alone of the Vice-President alone, although in some examples the language complained of has included Congress *with* the President.").

21. *Id.* at 566. This particular court-martial involved Brigadier General Paine "who accused the Governor of Kentucky and all his supporters of being 'rebels.'" Kester, *supra* note 6, at 1723 & n.141. A World War I case involving a state governor ended in a dismissal of the charge. *Id.* at 1727. The soldier insulted the governor of Arkansas, but was stationed in Louisiana at the time. *Id.* (*citing* De Camp, CM 11488 (1918)).

22. Kester, *supra* note 6, at 1724 ("[T]he article prohibiting contemptuous language lay virtually dormant . . . ."). Between 1889 and 1917, four courts-martial were convened with only three resulting in convictions. The acquittal involved a lieutenant who stated that President "Cleveland's cabinet showed the kind of man he was and that Secretary of War Endicott was about as fit for his job as an office boy." *Id.* At the time, contemptuous words against the Secretary of War was not prohibited. *Id.* at 1724 n.164.

23. *Id.* at 1724.

24. *Id.* For the next twenty years only one court-martial involving a violation of Article 62 was convened. In 1925 a private was convicted after stating "that President Coolidge 'may be all right as an individual, but as an institution he is a disgrace to the whole God damned country.'" *Id.* (court-martial citation omitted).

25. *Id.* at 1729. In comparison to the World War I prosecutions, however, this provision of military law was used with far less frequency. *Id.*

26. *Id.* at 1731. The Canal Zone case resulted in an acquittal. *Id.* at 1731 n.216.

27. *Id.* at 1732. At least one of the courts-martial occurred in Korea; after which the accused unsuccessfully raised a "irresistible impulse" defense on appeal. Memorandum Opinions of The Judge Advocate General of the Army, 292 (1949-1950) [hereinafter MO-JAGA]. No Korean War-era prosecutions occurred. Kester, *supra* note 6, at 1732 ("[P]erhaps mainly because the [UCMJ], which confined its application to officers, took effect on May 31, 1951.").

28. Fidell, *supra* note 5, at 2; *see* JOSEPH W. BISHOP, JR., JUSTICE UNDER FIRE (1974) ("Howe is the only person to have been prosecuted under this article in more than twenty-five years.").

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

30. *Id.* at 433.

31. SHERRILL, *supra* note 6, at 178-9.

32. *Id.* at 179-80.

known prosecution under Article 88, but also because it is one of two published military appellate decisions addressing this area of military law.[33] Although records of other courts-martial under Article 88's predecessors exist and serve to provide some measure of guidance as to the parameters and meaning of the current article, the results and opinions of these earlier trials are not binding precedent,[34] and in many cases appear overly severe. Only the COMA's decision in *Howe* enjoys the full weight of binding legal authority.

Article 88

The current provision of military law criminalizing disrespectful criticism of the President, and other specified civilian officials and institutions, is contained in Article 88, UCMJ. That article provides:

> 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 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.

Generally, the law draws no distinction between language directed at the President in his official or private capacity,[35] and the truthfulness of the contemptuous comments is irrelevant as a matter of law.[36] The truth or falsity of the statement has been considered irrelevant because "the gist of the offense is the contemptuous character of the language and the malice with which it is used."[37] Also, the particular forum in which the words are rendered is not dispositive.[38] Further, it is generally not a defense that the accused did not intend his words to be contemptuous,[39] and to achieve a conviction the government does not even have to establish that anyone made privy to the contemptuous words knew of the accused's military status.[40]

As noted earlier, with the enactment of the UCMJ Congress limited application of the offense to commissioned officers, which by definition would exclude certain warrant officers, enlisted personnel, cadets, and midshipmen of the military academies. One large and significant body of individuals that are not beyond the reach of this provision is retirees, however. Article 2(a)(4) provides that the military has UCMJ jurisdiction over "[r]etired members of a regular component who are entitled to pay." Albeit only one known court-martial of a military retiree under Article 88 or its predecessors exists,[41] and courts-martial of retirees are rare and require special permission,[42] no legal prohibition exists precluding application of Article 88 to these members of our land and naval forces.[43]

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33. The second case discussed Article 88's predecessor, the 62d Article of War. United States v. Poli, 22 B.R. 151 (A.B.R. 1943).

34. *See* Kotev v. First Colony Life Ins. Co., 927 F. Supp. 1316, 1321 (C.D. Cal. 1996) (holding that one district court is not bound by the decision of another); *cf* Morris v. Siemens Components, Inc., 938 F. Supp. 277, 279 (D.N.J. 1996) ("[U]npublished state court opinions have no precedential value [in federal court] and are not controlling or binding in any way in the New Jersey State Courts as well."); Terrell v. Dura Mech. Components, 934 F. Supp. 874, 882 n.4 (N.D. Ohio 1996) ("An unpublished opinion of another jurisdiction is worth only what it weighs in reason."). Further, because the UCMJ has superceded the earlier Articles of War, pre-Code cases do not constitute binding precedent; such cases merely serve as interpretive guidance for the UCMJ. *See* United States v. Allbery, 44 M.J. 226, 228 (1996) (holding that *stare decisis* applies in the absence of a superceding statute). At least one legal commentator has criticized the military for its supposed propensity to follow pre-UCMJ charging practices. RIVKIN, *supra* note 15, at 100 (criticizing the military justice system's "approach to any statement traditionally punishable during the barbaric 'preconstitutional' days of World Wars I and II, when almost any critical remark could be punished as 'contemptuous' or 'disloyal'").

35. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, para. 12c (1998) [hereinafter MCM]; *see also* WINTHROP, *supra* note 9, at 566 ("It would not constitute a *defence* to a charge under this Article, to show that the person was spoken of . . . not in his official but in his individual capacity . . . ." (emphasis in original)).

36. *See* MCM, *supra* note 35, pt. IV, para. 12c ("The truth or falsity of the statements is immaterial."); *see also* WINTHROP, *supra* note 9, at 566 (not a defense); Vagts, *supra* note 13, at 547 (no defense).

37. MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 167, at 28-17 (1969) [hereinafter MCM, 1969]; *accord* MANUAL FOR COURTS-MARTIAL, UNITED STATES, para. 150, at 204 (1949) [hereinafter MCM, 1949].

38. *See* Aldrich, *supra* note 6, at 1219 ("Article 88 applies to contemptuous words "whether the audience is a squadron of military recruits or a classroom of civilian students . . . whether the words were spoken on-duty or off-duty, whether on a military installation or off."). The location where the words are uttered, however, should be a factor in determining whether the words were uttered in private or were part of a political discussion. *Cf.* MCM, *supra* note 35, pt. IV, para. 12c (recognizing limited exceptions for political discussions and private conversations).

39. United States v. Howe, 37 C.M.R. 429, 444 (1967). ("Neither the *Manual* nor the Code make 'intent' an element of the offense."); *see also* WINTHROP, *supra* note 9, at 566 ("[T]he mere fact that no disrespect was *intended* will not constitute a defense . . . ."). Winthrop notes, however, that the accused's intent may be an issue in two instances: (1) when the words are not contemptuous per se, but under the circumstances surrounding their use may make them so, and (2) during a political discussion when the accused does not intent his or her criticism of an official to be personally disrespectful. WINTHROP, *supra* note 9, at 566.

40. *See, e.g.*, United States v. Howe, 37 C.M.R. 429 (1967); *see also* Aldrich, *supra* note 6, at 1219 ("[U]nder Article 88 an officer is culpable . . . whether the audience is aware of the speaker's military association or not . . . ."). No one at the demonstration in which Howe used contemptuous words against President Johnson, and which formed the basis of his Article 88 charge, was even aware that he was in the Army. *See supra* notes 31-32 and accompanying text.

What Is "Contemptuous" Speech?

The *Manual for Courts-Martial* (*Manual*) explains that language violating Article 88 may be contemptuous per se or may become so by virtue of the circumstances in which it is rendered.[44] Unfortunately, the *Manual* provides only limited guidance in defining what constitutes "contemptuous words" and under what circumstances neutral verbiage may become contemptuous.

When describing offensive language under this provision of law, Colonel Winthrop, in his seminal work *Military Law and Precedents*, offered as examples: "abusive epithets, denunciatory or contumelious expressions, [and] intemperate or malevolent comments . . . ."[45] Subsequent *Manual* descriptions of the offense parroted Winthrop's description.[46] Additionally, although the legislative history is sparse on point, contemptuous words include at least "disrespectful" speech.[47] The Military Judges' *Benchbook* posits that contemptuous "means insulting, rude, disdainful or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness."[48]

Records of prior courts-martial suggest that this element of the offense has been easily satisfied. During the Civil War, convictions resulted for referring to President Lincoln as "a 'loafer,' a 'thief,' a 'damned tyrant,' and a 'damned black republican abolitionist.'"[49] However, convictions were obtained for considerably less offensive comments such as "'that Jeff Davis was as good a man as Abraham Lincoln,' and [for] criticizing Lincoln's policies toward the Negroes and then sarcastically calling him 'our worthy President.'"[50]

Similarly, World War I and II-era convictions ran the gambit of what was considered contemptuous and disrespectful. Not surprisingly, Army personnel suffered convictions for referring to President Wilson as "a 'grafter,' 'the laughing stock of Germany,'" and "a 'God damn fool.'"[51] Also, convictions occurred for referring to President Roosevelt as "a crooked, lying hypocrite," "the biggest gangster in the world next to Stalin," and "Deceiving Delano."[52] Officers and enlisted personnel were also convicted, however, for such innocuous comments as President Wilson is "either an anarchist or a socialist," "that there were men in Germany just as smart as [President Wilson]", and "Woodrow Wilson is no more a Christian than you fellows, as no Christian would go to war."[53]

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41. *See* Kester, *supra* note 6, at 1726 (stating that in 1918, a retired Army musician was charged, but acquitted, of "calling [President] Wilson and the government subservient to capitalists and 'fools to think they can make a soldier out of a man in three months and an officer in six'"). "This was the only case discovered in which a retired member of the was prosecuted for violation of the article." *Id.* at 1726 n.183. However, in 1942 charges were preferred, but withdrawn, against a retired lieutenant colonel for giving "a speech impugning the loyalty of President Roosevelt . . . ." *Id.* at 1733 (stating that they were withdrawn because of publicity concerns).

42. "[E]xtraordinary circumstances" must exist before a retired member of the Army may be subject to court-martial. U.S. DEP'T OF ARMY, REG. 27-10, LEGAL SERVICES: MILITARY JUSTICE, para. 5-2b(3) (24 June 1996). Before referral of charges, approval must be obtained from the Criminal Law Division, Office of The Judge Advocate General. *Id.*

43. Many retirees do not appear to be aware that they remain subject to the UCMJ, including Article 88. *See, e.g.*, Paul Richter, *Military Personnel Warned Not To Denigrate Clinton*, ATLANTA J.-CONSTITUTION, Oct. 20, 1998, at A4 (stating that a recently retired Army colonel and retired Army lieutenant colonel working in the White House wrote newspaper articles criticizing President Clinton); John R Baer, Letters to the Editor, *I Returned Clinton's Certificate*, ARMY TIMES, Oct. 12, 1998, at 36, 38.

44. MCM, *supra* note 35, pt. IV, para. 12b(4) ("That the words used were contemptuous, either in themselves or by virtue of the circumstances under which they were used."). One legal commentator suggests that the contemptuous nature of the words is measured by "how the words are taken by those who see or hear them." R. TEDLOW, UNITED STATES COURT OF MILITARY APPEALS DIG. 48 (Supp. 1971) (discussing *Howe*).

45. WINTHROP, *supra* note 9, at 566.

46. MCM, 1949, *supra* note 37, para. 150 ("[W]ords which are disrespectful or contemptuous in themselves, such as abusive epithets, denunciatory or contemptuous expressions, or intemperate or malevolent comments upon official or personal acts . . . ."); *see* MCM, 1917, *supra* note 16, para. 413, at 206; MCM, 1969, *supra* note 37, para. 167, at 28-16.

47. Aldrich, *supra* note 6, at 1198-9 ("One may infer that 'contemptuous encompasses at least the term 'disrespectful,' because a 1956 amendment to Article 88 struck the word from the statute for being redundant.'" (citing 10 U.S.C.A. § 888 explanatory notes (1969)).

48. DEP'T OF ARMY, PAM 27-9, MILITARY JUDGES' BENCHBOOK, para. 3-12-1(d) (30 Sept. 1996).

49. Kester, *supra* note 6, at 1722 (court-martial citations omitted).

50. *Id.*

51. *Id.* at 1724-5.

52. *Id.* at 1730-1. During World War II an Army lieutenant was convicted for referring to President Roosevelt as a "'son-of-a-bitch . . . .'" SHERRILL, *supra* note 6, at 183-4.

53. Kester, *supra* note 6, at 1725.

Potential Defenses

Political Discussion

Historically, certain forms of political discussions, although critical of the President, have been considered beyond the reach of military law.[54] To prosecute an officer or soldier for engaging in a purely political conversation was considered "inquisitorial and beneath the dignity of the [g]overnment."[55] This exception has not always been honored in practice, however.[56] Indeed, the political discussion defense has been interpreted so narrowly that commentators have questioned its very existence.[57]

The current *Manual* continues this limitation on Article 88's scope stating: "If 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."[58] Unfortunately, the *Manual* fails to define the parameters of a "political discussion."

Adding to this defense's lack of clarity is the language of the *Manual* itself. Commentators have pointed out a number of ambiguities. For example, the political discussion exception implies that it applies only to actions by the official in an official capacity, but how does a court distinguish between contemptuous words directed against an individual in his official versus personal capacity?[59] Frequently, the two capacities are inextricably intertwined. Additionally, can contemptuous speech *ever* be personally contemptuous of an elected body, that is, a legislature?[60]

The available legislative history is equally unenlightening. With respect to the latter question, Brigadier General Enoch Crowder, Judge Advocate General of the Army, testified before a congressional subcommittee in 1916 concerning revisions to the Articles of War, including what was to become Article 62. When asked what he considered inappropriate criticism of Congress, General Crowder opined that some criticism was acceptable but an officer could be subject to court-martial if he "should come out in the public press and characterize Congress as an incompetent body, or a body which is not patriotic."[61] Under Crowder's view, merely writing a letter to the editor of a newspaper expressing criticism of Congress' ability to govern could be enough to generate court-martial charges; a low threshold indeed.[62]

In the only known case of an Article 88 violation since the UCMJ was enacted, the accused unsuccessfully raised the political discussion defense. Unfortunately, the opinion of the court offers little in the way of clarification. In *United States v.*

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54. WINTHROP, *supra* note 9, at 566 ("Thus an adverse criticism of the Executive expressed in emphatic language in the heat of a political discussion, but not apparently intended to be personally disrespectful, should not in general be made the occasion of a charge under this Article."); LIEUTENANT COLONEL GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 376 (1898).

> [I]t has been held that adverse criticisms of the acts of the President, occurring in political discussions, and which, though characterized by intemperate language, were not apparently intended to be disrespectful to the President personally or to his office, or to excite animosity against him, were not in general to be regarded as properly exposing officers or soldiers to trial under this Article.

Id. See also MCM, 1917, *supra* note 16, para. 413, at 206; MCM, 1949, *supra* note 37, para. 150, at 203 (specifically included "the President or Congress"); MCM, 1969, *supra* note 37, para. 167, at 28-16 ("[A]dverse criticism of one of the officials or groups named in the article . . . .").

55. DAVIS, *supra* note 54, at 376. Winthrop attributes this opinion to General Holt, The Judge Advocate General of the Army. WINTHROP, *supra* note 9, at 566 n.66.

56. Kester, *supra* note 6, at 1722 (noting that during the Civil War "a private political discussion enjoyed no sanctity . . .") (citing two courts-martial only one of which resulted in a conviction); *id.* at 1730 ("As during World War I, however, some [WWII] commanders tried men under the article for casual remarks and statements made in private conversations and political discussions.").

57. Aldrich, *supra* note 6, at 1206 ("Article 88's exception for political discussions has been interpreted so that it appears in fact to exempt nothing."); *cf.* BISHOP, *supra* note 28, at 158. "[T]he Court of Military Appeals, though it as stated eloquently that servicemen are protected by the First Amendment, has in practice been very ready to find that their utterances are so dangerous as to be removed from that protection, at least where their speech was politically inspired." *Id.* (discussing *Howe*).

58. MCM, *supra* note 35, pt. IV, para. 12c.

59. *Cf.* Aldrich, *supra* note 6, at 1201 ("This statement is incongruous because Article 88 only applies to 'adverse criticism' if it *is* contemptuous, and it is difficult to imagine how contemptuous words against an *individual* could ever be anything but 'personally' contemptuous."); SHERRILL, *supra* note 6, at 189. In *Howe*, "the Court of Military Appeals decided to ignore Johnson the politician and treat him strictly as Johnson the Commander in Chief . . . ." *Id.*

60. Aldrich, *supra* note 6, at 1201 ("How contemptuous words levied against a group can ever be 'personally' contemptuous is equally perplexing.").

61. Kester, *supra* note 6, at 1717 (citing *Hearings Before a Subcomm. of the House Comm. on Military Affairs on an Act to Amend Section 1342 and Chapter 6, Title XIV, of the Revised Statutes*, 64th Cong. 1st Sess. 18 (1916)).

62. During World War I, a soldier was convicted of using contemptuous words against Congress merely because he stated that "the United States had no business to enter this war . . . ." Aldrich, *supra* note 6, at 1200 (citing Flentje, CM 114159 (1918), and noting that the legal commentator found this conviction to be shocking).

Howe, the accused argued that the antiwar demonstration in which he displayed his placard constituted a political discussion.[63] Assuming for purposes of its analysis that the demonstration constituted a political discussion, the COMA summarily rejected the defense argument, holding that the political discussion language contained in the *Manual* "cannot be equated to the contemptuous language prohibited by this Article."[64] As explained by one member of the board of review, "it was not the expression of Lieutenant Howe's political views that constituted his offense, but his public display of contempt for his Commander in Chief."[65]

In reaching its decision, the court in *Howe* relied, in part, on an Army Board of Review decision from World War II that had interpreted the 62d Article of War.[66] In *United States v. Poli*, an Army Lieutenant was convicted of using contemptuous and disrespectful words against President Roosevelt after distributing leaflets that referred to the President as "Deceiving Delano" and characterized various Presidential statements as "moronic dribble" and "oral garbage."[67] The accused argued that the statements in his leaflets were "merely political expressions" and that the "words 'Deceiving Delano' . . . were not coined by him but were copied from a newspaper and were merely employed as political terms by him, referring to the promises of the political party concerned which had not been fulfilled."[68] The board quickly dispatched Poli's political expression argument, holding that the language contained in the leaflets was "contemptuous and disrespectful per se."[69]

Taken together, these two cases indicate that the political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous. Further, unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous.

Private Conversations

To constitute a crime the contemptuous words must ordinarily have a public component to them.[70] As an element of an Article 88 offense, the *Manual* requires that the words "came to the knowledge of a person other than the accused."[71] No particular manner of dissemination is required; the words may be spoken, contained in a letter, displayed on a sign, or published in a book, newspaper, or leaflet.[72]

The *Manual* also provides, however, that "expressions of opinion made in a purely private conversation should not ordinarily be charged."[73] Indeed, in his treatise, Colonel Winthrop opined that investigating disrespectful language uttered during a private conversation as a potential violation of military law would be even more offensive than pursuing a criminal conviction for unintentionally disrespectful criticism of the President rendered during a political discussion.[74] Unfortunately, the *Manual*,[75] learned treatises, and reported case law provide no definitive standard for determining what constitutes a purely

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63. United States v. Howe, 37 C.M.R. 429, 443 (1967). Because he did not intend the contemptuous words used to be personally disrespectful, the accused argued that the law officer should have given the panel a political discussion defense instruction. *Id.*

64. *Id.* at 444.

65. Brown, *supra* note 15, at 102 (citing remarks made in a speech before the Brooklyn Bar Association by Lieutenant Colonel Jacob Hagopian). *But cf.* SHERRILL, *supra* note 6, at 189 ("[T]he Court of Military Appeals decided to ignore Johnson the politician and treat him strictly as Johnson the Commander-in-Chief, a military man and not the top politician in the country.")

66. *Id.* "Neither the legislative history of the [UCMJ] nor interpretation of comparable Articles of War lend themselves to any different interpretation." *Id.* (citing United States v. Poli, 22 B.R. 151 (1943)).

67. 22 B.R. 151 (1943).

68. *Id.* at 156. Poli testified that he had no intention of ridiculing the President in his private or official capacity and that the leaflets' contents were similar to newspaper articles and statements by various members of Congress. *Id.*

69. *Id.* at 161.

70. *See* Kester, *supra* note 6, at 1738 ("Implicit in the article has always been the idea that it deals exclusively with public utterances . . . .").

71. MCM, *supra* note 35, pt. IV, para. 12b(3).

72. WINTHROP, *supra* note 9, at 566 ("[M]ay be either spoken, or written, as in a letter, or published, as in a newspaper."); DUDLEY, *supra* note 6, at 343 ("[W]hether spoken in public, or published, or conveyed in a communication designed to be made publc . . . ."); *see* United States v. Howe, 37 C.M.R 429 (1967) (displayed on placard); United States v. Poli, 22 B.R. 151 (1943) (leaflets).

73. MCM, *supra* note 35, pt. IV, para. 12c.

74. WINTHROP, *supra* note 9, at 566 n.66 ("It would, ordinarily, be still more inquisitorial to look for the same in a private conversation."); *see* Kester, *supra* note 6, at 1737 ("The least defensible of all prosecutions under the article . . . .").

private conversation for purposes of this Article[76] and under what circumstances privately spoken or written words should generate punitive action.

Historically, the private conversation defense has been construed narrowly. At least one Union soldier was charged–but later acquitted–based upon derogatory comments about President Lincoln contained in a personal letter.[77] During World War I, a letter written to a soldier's parents, that contained disrespectful language, was deemed a public statement because the soldier had submitted the letter to military censors, although he was required to do so.[78] A World War II-era Army officer was tried, but acquitted, for calling the President derogatory names during a conversation with civilian friends in their home.[79]

Although the defense remains largely undefined, in its most restrictive form, the defense appears to permit at least private conversations with civilians[80] and a conversation between two service members of equal rank[81] with no third party present.[82] Further, the law of privileges should apply to appropriate conversations even if the confidential communications are disrespectful.

Nevertheless, under some circumstances literally applying such a restrictive standard can lead to absurd results. Should it be appropriate for two officers of equal rank, who are friends of long-standing, to be permitted to engage in a private conversation on one day, but find themselves subject to court-martial the next day merely because one has been promoted sooner than the other? Under such circumstances, no violation of Article 88 should be found, suggesting that permissible private conversations should extend to conversations between service members of *relatively* equal rank, who possess some form of personal relationship.

Even if a conversation is considered private, not all such conversations are, or should be, beyond the Article's reach. Significantly, the language used in the *Manual* is permissive rather than mandatory. It only provides that private conversations "should not ordinarily" be charged; no absolute prohibition against charging exists.[83] In cases when no long-standing personal relationship between the conversing parties exists and/or the contemptuous words are unsolicited and unwelcome, prosecution may be appropriate.[84]

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75. Because the *Manual* provides both a political discussion defense and a private conversation defense, it should be safe to assume that a private conversation need not be limited to political discussions; otherwise the two terms would be redundant.

76. *See* Vagt, *supra* note 13, at 572 ("[T]he delineation between [private and public pronouncement] has not been clearly worked out . . . .").

77. Kester, *supra* note 6, at 1722.

78. *Id.* at 1726 (citing Coomba, CM 134107 (1919)).

79. *Id.* at 1730.

80. WINTHROP, *supra* note 9, at 566 ("In a case of spoken words, it will also be a material question whether they were uttered in a private conversation or in the presence of officers or enlisted men."); *see* Kester, *supra* note 6, at 1738 (stating that private letter to parents should not be prosecuted); Vagt, supra note 13, at 572 (stating that a conversation with "family and friends" should be considered private); *cf.* Kester, *supra* note 6, at 1722 (stating that a Civil War soldier who wrote personal letter that was critical of President Lincoln was acquitted); *id.* at 1726 (noting that the conviction of World War I-era soldier who wrote letter to his mother containing disrespectful language against the President was disapproved); *id.* at 1730 (noting that a World War II officer who made disrespectful remarks about the President while engaged in conversations with civilian friends in their home was acquitted).

81. Communicating the offensive words in the presence of military inferiors is merely an aggravating circumstance of the offense rather than serving to define it, further suggesting that there can be no private conversation among military members of different rank. Winthop, *supra* note 9, at 566 ("And any disrespect will be aggravated by being manifested before inferiors in rank in the service."); *see* MCM, 1969, *supra* note 37, para. 167, at 28-16 ("[T]he utterance of contemptuous words of this kind in the presence of military subordinates, would constitute an aggravation of the offense."); *cf.* Kester, *supra* note 6, at 1726 n.185 (noting that a World War I private was court-martialed for criticizing President in conversation with his non-commissioned officer).

82. The term "in the presence of officers or enlisted men" used by Winthrop suggests the presence of more than the two principals to the conversation. *See* Kester, *supra* note 6, at 1724. In 1925, a soldier was convicted when his conversation with a friend in which he criticized President Coolidge was overheard by a third party. *Id.* The language of the 1969 *Manual*, however, upon which Article 88 was based, does not limit purely private conversations to only two parties, suggesting that a conversation may still be private if conducted within a small group of service members of equal rank. MCM, 1969, *supra* note 37, para. 167, at 28-16; *cf.* Kester, *supra* note 6, at 1738 (stating that the Article should not extend to discussion among "a few barracks-mates . . .").

83. *See* Aldrich, *supra* note 6, at 1206 & n.110 ("[E]ven words spoken in a private context *could* be charged." (emphasis in original)).

84. *Cf.* United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) (affirming the conviction for communicating indecent language despite freedom of speech defense and stating: "The conduct of an officer may be unbecoming even when it is in private . . ."); United States v. Gill, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (holding that the First Amendment right to freedom of speech does not protect unwanted comments of a sexual nature from a charge of communicating indecent language even if communicated in a private setting). To the extent a conversation between only two people is considered a private conversation, some court-martial precedent appears to exist suggesting that contemptuous words uttered to strangers can violate this military prohibition. *See* MO-JAGA, *supra* note 27, at 296 (citing United States v. Ravins, JAGY CM 328976) (noting that a soldier convicted for "assert[ing] to a person . . . a stranger whose connections were unknown to him, sentiments to the effect that the President of the United States and all those supporting the government were murderers."); *cf.* Kester, *supra* note 6, at 1736 (stating that a World War II soldier convicted for shouting complaints about the President "to a passing sentry").

Further, private correspondence with members of Congress is not necessarily immune from prosecution. Title 10, United States Code, § 1034 provides: "No person may restrict a member of the armed forces in communicating with a Member of Congress. . . . " In enacting this statute, Congress sought to ensure that a service member could communicate with his Congressman or Senator "without sending [the] communication through official channels."[85] Further, the military courts have indicated that they will take corrective action when it appears the military justice system has been used to retaliate against a service member "for having exercised a right fully protected by statute; a right deeply rooted in the American concept of representative government."[86]

A distinction exists between misusing the military justice system to retaliate against a service member for writing his Congressman and punishing a service member for illegal activity conducted through the forum of a letter to a member of Congress.[87] Indeed, § 1034 specifically cautions that a service member's statutory right to contact his Congressman "does not apply to communication that is unlawful."[88] Whether the unlawful communication addressed by the statute includes contemptuous words has yet to be determined. At least in theory, however, if a service member were to communicate to a member of Congress about a protected official or legislative body using contemptuous words, and the member became offended at such verbiage and turned the correspondence over to military authorities, such communication could be pursued as violating Article 88.

Void For Vagueness

Generally, a statute is constitutionally infirm "when it fails to provide a person of ordinary intelligence with notice of its meaning and the conduct it prohibits."[89] Legislatures must provide guidelines sufficient to "prevent arbitrary and discriminatory enforcement."[90] The constitutional standards of review normally applicable in the civilian community are modified, and "substantial judicial deference is required," in the military context,[91] even when the challenged military restriction involves "a direct penalization of speech."[92]

Appealing his conviction, Howe argued unsuccessfully that Article 88 was void for vagueness. Seemingly conceding that the Article was no model of clarity,[93] the court nevertheless rejected the defense argument, reasoning that the word "contemptuous" is used in its ordinary sense in the *Manual* and satisfied constitutional requirements.[94]

The decision in *Howe* was reinforced by the subsequent Supreme Court opinion of *Parker v. Levy,*[95] in which the Court articulated a deferential standard for review of military punitive articles against constitutional vagueness challenges. In *Parker* the accused, an Army physician in the rank of captain, was con-

85. Brown v. Giles, 444 U.S. 348, 359 (1980); *accord* Secretary of Navy v. Huff, 444 U.S. 453, 458 (1980).

86. United States v. Schmidt, 36 C.M.R. 213, 216 (C.M.A. 1966) (ordering all charges dismissed). In his more strongly worded concurring opinion, Judge Ferguson stated:

> [W]hen [military justice] is perverted into an excuse for retaliating against a soldier for doing only that which Congress has expressly said it wishes him to be free to do, this Court would be remiss in its duty if it did not immediately condemn the effort to persecute him and stand as a shield between him and his superiors.

Id. at 217 (Ferguson, J., concurring).

87. *Cf.* Moore v. Schlesinger, 384 F. Supp. 163,166 (D. Col. 1974) (discussing a suit by an Air Force officer who alleged, in part, that he was relieved of his duties at the Air Force Academy in retaliation for letters he wrote to his congressman, which was dismissed after the plaintiff failed to prove an abuse of discretion).

88. 10 U.S.C.A. § 1034(a)(2) (West 1998).

89. United States v. Helmy, 951 F.2d 988, 993 (9th Cir. 1991) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982); *see* General Media Comm., Inc. v. Cohen, 131 F.3d 273, 286 (2d Cir. 1997); United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991) ("A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.").

90. Parker v. Levy, 417 U.S. 733, 752 (1973) (citation omitted); *see General Media*, 131 F.3d at 286 (holding that the government must "provide explicit standards for those who apply them.").

91. *General Media*, 131 F.3d at 286.

92. *Id.* at 287 (citing *Parker*, 417 U.S. at 756-7).

93. United States v. Howe, 37 C.M.R 429, 442 (1967) ("[W]e do not consider Article 88 so vague and uncertain on its face that it violates the due process clause of the Fifth Amendment.").

94. *Id.* at 443.

95. 417 U.S. 733 (1974).

victed of Articles 133 and 134 after making public statements to African-American enlisted men encouraging them to refuse orders to Vietnam and referring to Special Forces soldiers as "liars and thieves and killers of peasants and murderers of women and children."[96] On a writ of habeas corpus, Levy challenged the convictions on the basis that the punitive articles were void for vagueness.[97]

Due to the differences between the military and the civilian sector, the Court held that "the proper standard of review for a vagueness challenge to the articles of the UCMJ is the standard which applies to criminal statutes regulating economic affairs."[98] Looking at the conduct actually charged did the defendant "reasonably understand that his contemplated conduct [was] proscribed"?[99] In Levy's case, the Court determined that he did have "fair notice from the language of each article that the particular conduct which he engaged in was punishable."[100]

Applying the *Parker* standard, at least one legal commentator has posited that *Howe* was wrongly decided. In *Parker*, the void for vagueness challenge to Articles 133 and 134 failed "because the significant case history surrounding each lent concreteness to their amorphous terms."[101] In contrast, "Article 88 has no similar case history."[102] Looking at actual court-martial convictions, the commentator concluded that "[n]o cognizable definition of 'contemptuous' emerges under Article 88 from these past cases."[103]

Further, in *Howe* the COMA rejected the vagueness argument by explaining that "contemptuous" was "used in the ordinary sense," citing the dictionary definition of contemptuous in support of its position.[104] As pointed out by this commentator, however, the definition actually shed little light on the term's meaning.[105]

In *Parker*, the court did counter the vagueness argument, in part, by noting that military case law or other authorities had "at least partially narrow[ed] [the articles'] otherwise broad scope."[106] In contrast, the unreported courts-martial convictions for Article 88 and its predecessors have cut a wide swath of what may constitute impermissible expression. It is questionable whether these courts-martial–or even the decision to charge certain utterances as contemptuous–would be decided similarly today. Further, only two military appellate decisions exist that interpret Article 88 or the comparable Article of War, and neither provide meaningful limitations on the scope of the Article.

Nevertheless, in light of *Parker*'s deferential standard of review and the judicial deference traditionally afforded to the military in this area, Article 88 should still pass constitutional muster. Further, regardless of any academic arguments to the contrary, the COMA's decision in *Howe* stands as binding precedent for all military trial and intermediate appellate courts. It will remain binding until it is altered by the U.S. Court of Appeals for the Armed Forces, reversed by the Supreme Court, or legislatively changed by changed by Congress.[107]

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96. *Id.* at 736-7. Captain Levy was also convicted of Article 90 for refusing an order to conduct dermatology training for Special Forces aide men. *Id.* at 736.

97. *Id.* at 740-1, 752.

98. *Id.* at 756.

99. *Id.* at 757 (citations omitted); *see* United States v. Hoard, 12 M.J. 563, 567 (A.C.M.R. 1981) ("Did he have fair notice from the language that the particular conduct in which he engaged was punishable?"); Aldrich, *supra* note 6, at 1218 ("This less rigorous 'economic affairs' standard, while not clearly defined by the Court, seems to hold that a statute is unconstitutionally vague only if the defendant against whom it is applies could not reasonably have known that his particular conduct was within the proscription of the statute.")

100. *Id.* at 755.

101. Aldrich, *supra* note 6, at 1216 n.167.

102. *Id.* In contrast, Article 88's "terms remain unclarified because of erratic application and a muddled history of expansion and contraction." *Id.* at 1219.

103. *Id.* at 1200.

104. United States v. Howe, 37 C.M.R 429, 443 (1967) Generally, it is an acceptable legal practice for courts to rely on dictionary definitions of terms to determine their meaning. New Jersey Dept. of Envir. Protection v. Gloucester Env. Mgt. Serv., 800 F. Supp. 1210, 1215 (D.N.J. 1992) ("In order to determine the 'usual meanings' of a particular term, courts have approved the use of a recognized standard dictionary."). If reference to dictionary definitions of a challenged term fails to adequately clarify the term's meaning, however, a criminal statute may be struck down as void for vagueness. *See, e.g.*, United States v. Poindexter, 951 F.2d 369, 378 (D.C. Cir. 1991) ("'Vague terms do not suddenly become clear when they are defined by reference to other vague terms.'" (citation omitted)).

105. Aldrich, *supra* note 6, at 1199. The referenced definition defined contemptuous as "manifesting, feeling or expressing contempt or disdain," and further defined contempt as "the act of despising or the state of mind of one who despises . . . the condition of having no respect, concern, or regard for something . . . the state of being despised." *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 491 (1981)). Under this definition, the Article would be limited to instances when a service member exhibited *no* respect, but in prior courts-martial the military has applied a considerably more liberal standard of what constituted contemptuous words. *Id.* at 1199-1200 (citations omitted).

106. *Parker*, 417 U.S. at 752.

Freedom of Speech

The First Amendment to the United States Constitution prohibits Congress from making any law that abridges the freedom of speech. Of all the forms of speech protected by the First Amendment, the most prized form is political speech.[108] Because of the unique mission and needs of the Armed Forces, however, civilians enjoy a greater degree of constitutional protection of this right than do service members.[109] Accordingly, courts will subject military laws restricting speech to a more deferential constitutional review than comparable civilian laws would experience.[110] Additionally, where, as here, a statute is challenged that was enacted under Congress' "authority to raise and support armies and make rules and regulations for their governance," judicial deference to the military "is at its apogee."[111]

Surprisingly, only two accused raised freedom of speech as a defense during their courts-martial for disrespectful or contemptuous speech are known to have raised freedom of speech as a defense.[112] The first accused to raise the defense was Army Private Hugh Callan, who was court-martialed and convicted for stating: "The President of the United States is a dirty politician, whose only interest is gaining power as a politician and safeguarding the wealth of Jews . . . ."[113] His second conviction was premised on the comment that "President Roosevelt and his capitalistic mongers are enslaving the world by their actions in Europe and Asia, by their system of exploiting."[114]

Callan's freedom of speech defense was unsuccessful before the Army court. Indeed, "the reviewing judge advocate was offended that such a claim should even be raised."[115] Subsequently, Callan was ordered released after filing a writ of habeas corpus based on jurisdictional grounds, but this decision was reversed on appeal.[116] The United States Court of Appeals for the Fifth Circuit disdainfully noted Callan's freedom of speech argument,[117] but was not required to address it.

In *Howe*, the accused posited that Article 88 violated his First Amendment rights.[118] Reviewing the long history of this military prohibition–a prohibition "older than the Bill of Rights, older than the Constitution, and older than the Republic itself"[119]–Congress' repeated enactment of a substantially identical military prohibition since the American Revolution, and the application of the First Amendment to restrictions on the freedom of speech, the court rejected Howe's argument.[120] The COMA analyzed Howe's Article 88 conviction using the clear and present danger doctrine, which asks "whether the words used are used in such circumstances and are not [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."[121] That evil in the Article 88 context is the "impairment

107. United States v. Allbery, 44 M.J. 226, 228 (1996).

108. DAVID A. SCHLUETER, MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE 13-3(N)(3), at 471 (3rd ed. 1992) (citations omitted). Presumably, this societal value is reflected in the "political discussion" exception to Article 88. In contrast, several forms of speech receive no First Amendment protection. *Id.* (citing obscenity, fighting words, and defamation); *see Parker*, 417 U.S. at 759 (holding that in the military, speech that "undermine[s] the effectiveness of response to command" is not constitutionally protected) (citing *Priest*, 45 C.M.R. at 344).

109. *Parker*, 417 U.S. at 758 ("The 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.") United States v. Moore, 38 M.J. 490, 493 (C.M.A. 1994) ("The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society."); SCHLUETER, *supra* note 108, at 473 ("Members of the armed forces, by virtue of their status as public employees and the special needs of the military, do not enjoy the degree of protection that the First Amendment affords civilians."); *see* Blameuser v. Andrews, 630 F.2d 538, 542 (7th Cir. 1980) ("As an officer in the military, the plaintiff would be required to accept certain limitations on First Amendment rights he would enjoy as a civilian.").

110. General Media Comm. Inc. v. Cohen, 131 F.3d 273 (2d Cir. 1997).

111. *Id.* at 283 (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

112. Kester, *supra* note 6, at 1731-2.

113. Sanford v. Callan, 148 F.2d 376 (5th Cir.), *cert. dismissed*, 326 U.S. 679 (1945).

114. *Id.*

115. Kester, *supra* note 6, at 1732 & n.221 (citing *Callan*, CM 223248 (1942)).

116. *Callan*, 148 F.2d at 376.

117. "His brief bristles with his idea that he should be permitted to denounce the [g]overnment and lend aid and comfort to the enemies of the Republic in time of war, and that such conduct is one of his freedoms.") *Id.* at 377. The court-martial had also convicted Callan of uttering a number of disloyal statements. *Id*. at 376-7.

118. United States v. Howe, 37 C.M.R. 429, 434 (1967).

119. *Id.*

120. *Id.* at 434-8.

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."[122] Because the United States was engaged in combat operations in Vietnam at the time of Howe's use of contemptuous words against President Johnson, the court easily found "a clear and present danger to discipline within our Armed Forces . . . ."[123]

One question raised and left unanswered by the COMA's opinion in *Howe*, is whether the same clear and present danger to discipline would exist if Lieutenant Howe had used contemptuous words against the President when the country was enjoying a period of peace. To the extent earlier courts-martial and modern-day administrative sanctions against service members overly critical of President Clinton have any precedential value, as a matter of practice Article 88's application is not limited to periods of hostilities. Further, the realities of modern warfare, in which American military units may be required to deploy into combat at a moment's notice, and the plethora of service members who stand on the brink of harm's way in places like Kuwait, Bosnia, and Korea, counsel against such a narrow application of the law.

Conclusion

In the fictional movie classic *Seven Days in May*, senior members of the Armed Forces planned a military take-over of the government in response to unpopular policy decisions by the President. Although it is certainly inconceivable that America's military forces would ever realize the fears of some of our Founding Fathers and attempt a *coup*, contemptuous public pronouncements by disenchanted members of the military can disrupt the orderly functioning of government and undermine popular support for public policies that effect both national security and the governance and use of the Armed Forces. Article 88 serves as a mechanism for precluding such disruptive conduct by ensuring military subordination to civilian authority.

Article 88 also serves to enforce discipline within the military. The President is more than just another politician. He is the Commander-in-Chief, and as such, is entitled to no less protection under the UCMJ than the most junior officer or noncommissioned officer who suffers disrespect at the hands of an insubordinate private.[124] Indeed, by virtue of his superior position, the President is entitled to the highest degree of obeisance.

Despite its legitimate and laudable purpose, history has shown that Article 88 possesses the potential of being applied in an uneven and heavy-handed manner. The excesses of the past, ambiguous terms and paucity of modern interpretative case law, makes this concern a legitimate one for both service members and military practitioners. That only a single court-martial has occurred since the enactment of the UCMJ, however, indicates that modern practice is to prosecute Article 88 sparingly, addressing misconduct at the lowest appropriate level.

Albeit passing minimal constitutional requirements, Article 88 continues to retain an element of ambiguity. As one former active-duty military practitioner has recently noted: "Article 88 requires line-drawing. Subtle differences of language, tone, setting, and audience may put a case over the line."[125] Judge advocates need to beware of this punitive provision's history, criticism, limitations, and narrow exceptions, to intelligently advise their clients on where the line is, or needs to be, drawn.

121. *Id.* at 436 (citing Schenck v. United States, 249 U.S. 47 (1919)); *accord* United States v. Hartwig, 39 M.J. 125, 127 (C.M.A. 1994).

122. *Howe*, 37 C.M.R. at 437; *cf. Hartwig*, 39 M.J. at 128 ("In the military context, those 'substantive evils' are violations of the [UCMJ].")

123. *Id.* at 438.

124. *Cf.* UCMJ arts. 89, 91 (West 1998) (stating that disrespectful language is punishable).

125. Fidell, *supra* note 5, at 2.