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Article 88, UCMJ: Leadership Challenge for the Officer Corps

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ON 12 FEBRUARY 1999, for the first time in our nation's history, an elected president was tried and acquitted by the Senate after being impeached by the House of Representatives. No fiction novelist could have penned a believable story based on this true-life saga, a meandering odyssey through the darkest mires of US national politics. For more than 380 days, the sex scandal and the impeachment for perjury and obstruction of justice it precipitated consumed the American public while intriguing, if not startling, much of the rest of the world. As the political battle raged on, there were signs that a few in the uniformed ranks might be marching to the sound of the guns. A number of articles and letters to the editor penned by US military officers began appearing in print. They referred to President Clinton variously as an "adulterous liar," "hypocrite-in-chief," and a "criminal," among other unflattering terms, and some—disputing his fitness to serve as commander-in-chief—called for his resignation or outright removal from office.[1]

Spurred by this harsh public criticism of the President from within the military, the Pentagon quietly issued memorandums reminding officers of Article 88, Uniform Code of Military Justice (UCMJ), and its obscure prohibition against using "contemptuous" words toward the president and other civilian officials.[2]

I will examine Article 88 not as a legal treatise, but primarily for its leadership challenge to the officer corps. The legislative history of Article 88 indicates that civilian control of the military was Congress's primary purpose in enacting it. This aim encompasses not only the vital relationship between professional military officers and the civilian society they must serve, but also the good order and discipline of the troops they must lead. Both elements stand at the heart of mission-ready, unified and highly competent Armed Forces whose primary purpose is to defend a freedom-loving democracy. I will discuss the origins and history of Article 88 and how—contrary to the apparent views of a few outspoken officers—adherence to it meshes seamlessly with Army Values.

Origins and History of Article 88

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.

— Article 88, UCMJ

The proscriptions of Article 88 descend from the Articles of War that governed the Royal Armies of 16th-century Britain.[3] First considered merely one of several unspecified forms of treason applicable to all British citizens, the earliest explicit prohibition against criticizing or insulting the sovereign became an Article of War in 1513.[4] King Henry VIII "was both vulnerable to rude remarks and easily incensed by them."[5] He thus declared it a crime for his troops—at pain of being drawn and quartered—to:

"Reyse or engendre murmures or gurges [grudges] ayenst the kynge or any persone of his hoste whereby might ensue murdre dyvysion discensyon sedicion exortacion sterynge or comocion."[6]

The British Articles of War, as they existed in 1776, were adopted almost in their entirety by the revolutionary Continental Congress as the "Articles and Rules for the Better Government of the Troops."[7] The Americans, in prohibiting soldiers' use of "traiterous or disrespectful words," duly substituted "the authority of the United States in Congress assembled" for the King and changed the penalty to dismissal for officers and court-martial for other soldiers.[8] Although some in postrevolutionary Congress questioned the necessity for such a restric-

tion, civilian officials at both state and federal levels, who "seemed at times to fear their own army as much as that of the British," welcomed its inclusion.[9] Fortunately for the new government, General George Washington had been personally committed to the supremacy of civilian authority over the military, a sentiment not necessarily shared by all of his officers.[10] As the articles were revised again in 1790, 1806 and 1916, the provision remained substantially in place; the terms "traiterous or disrespectful" changed to "contemptuous," and the president, vice president, Congress and state governors were specifically enumerated.[11]

In 1950, Congress superceded the separate articles governing two of its Armed Forces, the Army and Navy, by enacting the Uniform Code of Military Justice. The prohibition against contemptuous language survived intact as Article 88, and—for the first time—applied only to commissioned officers.[12] Article 88 remained essentially unchanged throughout subsequent revisions of the UCMJ in 1969, 1984, 1994 and 1995. The maximum punishment under today's Article 88 is dismissal, forfeiture of all pay and allowances and confinement for one year.[13]

Close Encounters with Article 88

The modern Article 88 was last reported at Courts-Martial over 33 years ago, when Second Lieutenant Henry Howe was charged with using contemptuous words against the president and conduct unbecoming an officer (Article 133).[14] On 6 November 1965, Howe, dressed in civilian clothes and during off-duty hours, left Fort Bliss, Texas, and went to nearby El Paso to participate in a peaceful demonstration against the war in Vietnam. Howe walked in a line with about 12 other protesters, all carrying various signs such as "LET'S GET OUR BOYS OUT OF VIET NAM," "PEACE IN VIET NAM" and "WOULD JESUS CARRY A DRAFT CARD?"[15] Howe's sign read on one side, "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1969." The reverse side declared, "END JOHNSON'S FACIST AGRESSION IN VIET NAM."[16] (Howe was apparently not much of a speller). Unfortunately for the lieutenant, he was recognized by a military policeman assigned to help local police control the crowd of approximately 500 to 1,500 spectators, of whom perhaps only a handful might have been fellow service members. Howe was convicted and sentenced to dismissal, forfeiture of all pay and allowances and confinement at hard labor for two years.[17]

The case garnered some criticism at the time as an unduly harsh punishment for a rather mild act of political dissent by a junior officer. As one writer observed in 1971, "the president today, although commander in chief, is much more importantly a political figure, and at certain times a very controversial one."[18] The defense had argued to the Board of Review that Howe's conviction constituted an impermissible infringement of his First Amendment

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right to free speech. The board acknowledged that "the military courts . . . have the same responsibility as do the federal courts to protect a person from a violation of his constitutional rights."[19] Nevertheless, the opinion held that "the right of free speech in the military is subject to reasonable limitations based on military necessity."[20] Recognizing that Article I of the Constitution conferred upon Congress the power "to make rules for the Government and Regulation of the land and naval Forces," it declined to second-guess Congress's determination that "military necessity" outweighed the narrow infringement of Howe's free speech rights imposed by Article 88.

In defining this "military necessity," the board identified a number of overriding government interests served by both Articles 88 and 133: the preservation of the subordinate-superior relationship between the military and civil authority; maintaining the Army's "bedrock" of good order and discipline; and upholding the behavior expected of a military officer, whose status "carries with it correlative duties, responsibilities, and standards of conduct peculiar to that status."[21] On appeal, the Court of Military Appeals affirmed the conviction, citing both "a clear and present danger to discipline within our armed services" and "the ancient and wise provision . . . insuring civilian control of the military."[22]

In truth, the Howe opinion—which emphasized the public nature of the officer's insults toward the president—was a gross improvement over the application of Article 88 in previous courts-martial. Given the previous standards for application, "it is remarkable that in nearly two centuries, only about a hundred officers and enlisted men have been court-martialed for using such language, most of

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them in the Civil War and World War I, and a few in World War II."[23] In many of these cases, however, Article 88 was used to punish purely private conduct. During the Civil War, a soldier was charged unsuccessfully after his private letter to a family member had declared that if "Old Abe" were reelected, "the country is lost."[24] Similarly, a post-World War I private was tried and convicted after being overheard telling a friend that President Calvin Coolidge "may be all right as an individual, but as an institution he is a disgrace."[25] Fortunately, by the World War II era, courts-martial had begun refusing to convict soldiers for statements made during private discussions, and prosecutors began declining to charge them, an approach now supported in the Explanation to Article 88.[26]

As for properly characterizing the offending language as "contemptuous" in nature, pre-Howe prosecutions under Article 88-equivalents enjoyed a more credible track record. During the Civil War, officers and soldiers were prosecuted for calling President Abraham Lincoln a "loafer," a "thief," and a "damned tyrant."[27] During the World War I period, a number of soldiers were charged for denouncing President Woodrow Wilson as a "grafter," "the laughing stock of Germany," a "fool" and for otherwise describing him via "soldierly obscenities."[28]

During World War II, one sergeant was convicted for submitting a signed statement to a lieutenant declar-

Civil-Military Conflict at the Pentagon? Let's Hope So....

by J. Michael Brower

Believing that top civilians and US armed forces leaders should work together on every issue is naive and dangerous. Only the most insistently blind can fail to notice the daily civil-military friction throughout the Department of Defense (DOD). However, a democratic government lacking such friction is first cousin to tyranny.

When the civil-military conflict overheats, the media harp on the scandal and disruption that frequently result. Too much tension can lead to military ineffectiveness; too little can produce thinly veiled juntas. Still, in such a war we should wish for no armistice. Rather, we must hope for the continued cordial hostilities. Ironically, the person who seems to understand this best is President Bill Clinton.

When Worlds Collide

One of the nation's earliest civil-military conflicts occurred in 1783, during the "Newburgh Conspiracy." A group of overwrought military officers moved to overthrow civilian authority. Complaining mainly about the lack of pay for war services, generals and some members of Congress joined in. Author Richard H. Kohm says the incident was "the closest an American army has ever come to revolt or a *coup d'etat,* and it exposed the fragility of civil-military relations at the beginning of the republic."[1] Quick action by civilian leaders with fighting experience, especially George Washington, "prevented this revolution from [ending] as most others have by a subversion of that liberty it was intended to establish."[2]

Perhaps the best known conflict involved President Harry S. Truman and Korean War commander General Douglas MacArthur. After persistent, heated differences, Truman fired MacArthur. Was MacArthur insubordinate, or did he still view Truman in terms of their World War I military ranks? Truman had been a captain, MacArthur a brigadier general. According to author Daryl L. Bell-Greenstreet, "MacArthur did try to take [Truman] on. The result? MacArthur's head was torn off and handed back to him."[3] But the fight also cost Truman. His popularity fell, and he wisely refused to run for another term.

Recent Microcosms of Conflict

A constant seesaw between civilians and the military for dominance and parity is common throughout DOD. Less friction exists at the Office of the Secretary of Defense level and more within the services. Yet friction is and should be a primary feature of a healthy democracy.

The permanent bureaucracy exercises no real restraint on the military, but political appointees, military civilians and the media keep any conflict in the public eye. Doing so speaks volumes about civil-military tension. Take, for example, the stories about the dismissal of civilian Timothy G. Connolly, principal deputy assistant secretary of defense for Special Operations and Low Intensity Conflict. Connolly's land-mine oppositions prompted senior officers from the Joint Chiefs of Staff to demand his removal.

Columnist Mary McGrory spoke up for Connolly, asserting, "We pride ourselves on civilian control, [but] we really expect our presidents to salute the generals."[4] Columnist and ex-US Army colonel Harry Summers responded that it had been Secretary of Defense William Perry who fired Connolly, not the generals.[5]

ing President Franklin D. Roosevelt a "crooked, lying hypocrite," and a private was convicted for identifying Roosevelt as a "murderer and the 'biggest gangster in the world, next to Stalin.'"[29] Similarly, despite defense arguments that the word "contemptuous" presented too vague a standard, the board had no difficulty in finding that Howe's characterization of President Lyndon B. Johnson as a "petty, ignorant, fascist aggressor" patently and reasonably fit within the plain meaning of the statute. As it was throughout the history of Article 88, it is important to note, only the contemptuous quality of the statements, and not their "truth or falsity," is relevant.[30]

Article 88: The Leadership Dimension

The just-published FM 22-100, *Army Leadership,* lists the seven core values that all Army leaders must internalize and inculcate in their subordinates. The political scandal of the past year persistently raised public consciousness of one of those values—integrity.

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Those few officers who publicly criticized the president implied at least one other Army value—that of personal courage. Shouldn't officers stand up for that they see as right, regardless of how the American people viewed the matter in polls? Shouldn't the commander-in-chief of the military, at a minimum, uphold the exact same standards of morality and personal conduct demanded of the officers who work for him? Doesn't the concept of integrity impel an officer to "risk [his] commission, as our generals will not, to urge" a president's removal?[31]

The controversy over US Naval Academy instructor James F. Barry's article about the lack of morals at the academy is another example.[6] Barry was dismissed the day after his article appeared. Had it not been for the protests of the American Association of University Professors, Barry would have been "beetle juice." He was subsequently reinstated and was asked to recommend cures for the academy's ills.

Does the Civilian Rule?

Clinton is widely condemned for his lack of military experience. Critics myopically argue he would have a better understanding of national and international security affairs had he served. However, when past presidents have had military experience, they have been prone to micromanage operations because they *do* have an idea about the military.

President Lyndon B. Johnson and Defense Secretary Robert McNamara had military experience and insisted on telling admirals and generals how to do business—with disastrous results. Vietnam's Ho Chi Minh, an intellectual who had never been in the military, interfered little with details of General Vo Nguyen Giap's campaigns. The rest is history.

Although constantly belittled for lack of "control" over the military, Clinton has the generals, the press and the public totally buffaloed. In a smooth 1996 speech at George Washington University, Clinton stated the military was indispensable in bringing peace to Haiti and Bosnia. "[In the national interest,] we used the power of our example and, where necessary, the example of our power."[7] Clinton has rewritten the definition of "civilian control" with his deft employment of the military, turning military inexperience into a political asset.

James A. Nathan of *USA Today* warns that "the military's authority in foreign policy never has been higher," and "the military assumption that it has a special mission to instruct its ostensible constitutional superiors [is becoming] more deeply entren-ched."[8] But Clinton has turned this notion on its head, using the military as a foreign-policy tool. Perhaps this is the politician's idea of civilian control of the military. ***MR***

NOTES

1. Richard H. Kohm, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America*, 1783-1803 (out of print).
2. Ibid.
3. Daryl L. Bell-Greenstreet, "Clinton Has Abdicated in the Face of Military's Insubordination," *Arizona Republic*, 13 January 1995, B4.
4. Mary McGrory, "Clinton's Duty to Command the Pentagon," *The Washington Post*, 21 April 1996, C1.
5. Harry Summers, "Chain of Command at the Pentagon," *Washington Times*, 18 May 1996, D3.
6. James F. Barry, "Adrift in Annapolis: To Understand Why the Navy's Moral Compass is Broken, Start at the Naval Academy," *The Washington Post*, 31 March 1996, C1.
7. See Caleb Rossiter, "Promote Civilian Leadership," *Defense News*, 5-11 August 1996, 14; William J. Clinton, "American Security," speech at George Washington University, Washington, DC, 5 August 1996.
8. James A. Nathan, "The Military is Dominating US Foreign Policy," *The World Watcher*, May 1996, 21.

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Following that application, Army Values may seem to support the officers' impassioned outbursts. But there is another, more reasoned argument to be made that Army Values—like an ethical compass— point the officer corps in exactly the opposite direction through the fog of controversy that has recently gripped the country. In terms of these values—Loyalty, Duty, Respect, Selfless Service, Honor, Integrity, Personal Courage—Article 88 represents merely the baseline for the standard of conduct that Americans should rightly expect of its military officers.

Today, in the aftermath of the Cold War, our nation enjoys an extended period of peace as the only remaining military and economic superpower in the world. Yet recently the use of the phrase "culture war" has popularly described competing views of morality—absolutism versus relativism, liberalism versus conservatism—within American society. The Chief House Manager cast the impeachment hearings themselves in those terms, wondering "if, after this culture war is over that we are engaged in, an America will survive that will be worth fighting to defend."[32]

Yet, "[t]he 'culture war' trend of thinking seems at odds with the ethos of American military professionalism," a professionalism that resists being recruited into partisan politics regardless of the moral trappings.[33] The people of this country have traditionally been wary of a professional military that could, even unwittingly, opt to discard transcendent values in favor of taking sides in one ideological battle or another.

Rather, "[t]he country deserves a genuinely professional military, a group that has professed in a sacred way to the calling of arms. The country needs professionals who take their oath seriously, who commit to the long haul, who place a high premium upon faith and loyalty, who take the bitter with the sweet, who trust in the country's constitutional design. The professional soldier will distrust the advice of moral zealots hot for certainties in this our world. He will turn away from the ideologues. He will be forever mindful that he is a professional soldier, not a moral philosopher, and that his chief preoccupation must always remain the nation's security."[34]

Of what value is loyalty except in relation to the society we are charged to serve? Commitment to and faith in the "constitutional design"—and the principle of civilian authority over the military—have no meaning unless we stand ready to dutifully accept the judgment of the people, either through the ballot or the representatives they have elected as leaders. Although a service member "will be (or should be) always a citizen . . . [s]o long as he serves, he will never be a civilian."[35] Duty, selfless service, and integrity simply combine in a very potent formula for military officers, one that demands more restrained public expression than would be acceptable if imposed on civilians. Violating the letter and spirit of Article 88 reflect an officer's lack of respect not only for the civilian leader who is the object of his insults, but also for the entire constitutional scheme in which Article 88 fits.

Partisanship versus Professionalism

Mr. Bullen, when I serve my country as a soldier I'm not going to serve her as a Democrat or a Republican. I'm going to serve her as an American. To my last breath.[36]

Allegations of personal misconduct aside, the temptation to violate Article 88 is minimal when the political views of the president appear to align closely with the prevailing views of most officers. The real test of our firm adherence to our values, however, comes when the opposite situation occurs. Unlike Howe, whose more liberal views motivated his insults to the president, today's officer corps is much more politically conservative than the civilian leadership it serves. Moreover, officers today are more likely to identify with a political party. In particular, "the junior officer corps, aside from its female and minority members, appears overwhelmingly to be hard-right Republican."[37] Among today's West Point cadets, "being Republican is becoming part of the definition of being a military officer."[38] I submit that party affiliation is immaterial to officers' professionalism so long as Army values—and not extraneous partisan beliefs—guide their conduct.

Against that backdrop, however, it is easy to see how officers violating Article 88 can negatively affect civil-military relations in this country and seriously damage society's view of the military. Some commentators interpreted the few controversial letters and columns attacking the president as signs that "a troubled military" had shifted its focus away from "its primary mission, which is to win wars."[39] More ominously, one commentator posited that

"[s]hould this president have to send our troops to war, for whatever reason, the situation we have here is a dangerous one. Clearly, at least some of the troops would find it unacceptable to follow this Commander-in-Chief."[40]

Lest we assume that these two assessments were knee-jerk reactions from liberal commentators, it is instructive to note that their authors hail from the conservative end of the political spectrum. If these observers were alarmed, then it is evident that the officers' attacks did not advance Secretary of Defense William S. Cohen's goal that all Americans—whether in uniform or not—feel a connection to the

military and an appreciation for "what the military does for the United States at a time [when] few people see dangers of war."[41] These officers seemed to miss the point that "in a democracy, public support is both a requirement and measure of military legitimacy."[42] Intemperate comments violating Article 88 not only call into question the offending officer's judgment and perspective but also tend to cast public doubt on the loyalty and duty ethic of the entire officer corps.

Officers who violate Article 88 also send a message to their soldiers. As the Howe board noted, even good soldiers—whether they agree with the officer's opinion or not—cannot help but view the superior who has publicly displayed contempt for the commander in chief in a new, unflattering light. That development has potentially disastrous consequences, for "Military discipline, in peace as well as in war, does more than expect obedience and respect—it demands both."[43] Even unintentionally, officers by their words and their example teach soldiers lessons in discipline, loyalty and respect every day.

Officers must themselves do what is right, teach what is right to their subordinates and encourage their peers and seniors to do what is right— "that is what we are training officers to do, what the Army needs them to do, and what the nation relies on them to do. On this all else depends."[44]

Publicly denouncing the moral fitness or competence of our civilian leaders tends to degrade—not enhance—command climate, and logically, mission accomplishment as well.

The letter and spirit of Article 88 present a leadership challenge to the officer corps upon which the legitimacy of the military as an American institution depends. The harm caused by an officer's failure to use good judgment is much greater than the mere sting of a colorful insult. Officers who violate Article 88 do more than risk their commissions: they risk diminishing the hard-earned prestige of the officer corps in the eyes of a civilian society that may come to view it as no less partisan than elected politicians. Such conduct betrays Army values—to include the crucial commitment to support and defend the Constitution—rather than champions them. Officers who lack such self-discipline cannot help but erode discipline within their own units, a discipline that is based on respect for the individual as well as the rule of law. Most ominously, the aggregate effect may be to corrode our ability to fight and win our nation's wars and serve its vital interests. That loss is too great a price to pay for the license to insult the president. ***MR***

NOTES

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2. Steven Lee Myers, "Military Warns soldiers of Failure to Hail Chief," *The New York Times* (21 October 1998), 22.
3. John G. Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," *Harvard Law Review*, Vol. 81:1697 (1968).
4. Kester, 1701.
5. Joseph W. Bishop Jr., Justice Under Fire: *A Study of Military Law* (New York: Charterhouse, 1974), 157.
6. Kester, 1709, quoting F. Maitland, *The Constitutional History of England* (1911), 267.
7. Kester, 1709-1712.
8. Kester, 1710, citing Resolution of 20 September 1776, I American Congress 482, 5 Continental Congress 789.
9. Kester, 1713.
10. Ibid., 1713.
11. Ibid., 1711.
12. Other changes included the addition of the Secretary of Defense and the service secretaries. Kester, 1718.
13. *Manual for Courts-Martial (MCM) United States*, 1995 Edition, IV-17.
14. US v. Howe, CM 413739 (3 November 1966) (reconsideration denied, 17 USCMA 165, 37 CMR 429).
15. Edward F. Sherman, "The Military Courts and Servicemen's First Amendment Rights," *Hastings Law Journal*, Vol. 22, January 1971, 334.
16. Howe, 556-557.
17. Reduced to one year by action of the convening authority, Sherman, 335.
18. Sherman, 338.
19. Howe, 557, quoting Mr. Chief Justice Vinson, Burns v. Wilson, 346 US 137, 142 (1953).
20. Howe, 559.
21. Ibid.
22. US v. Howe, 17 USCMA 165, 173-174 (1967). Although it denied reconsideration of 2LT Howe's case, the court nevertheless issued an opinion supporting the decision of the board of review.
23. Bishop, 157.
24. Kennedy, G.O. 19, Department of Pennsylvania (1865) (acquitted), cited by Kester, 1722.
25. Trumbull, CM 166120 (1925), cited by Kester, 1724.
26. "[E]xpressions of opinion made in a purely private conversation should not ordinarily be charged." *MCM*, Paragraph 12(c).
27. Various cases as noted by Kester, 1722.
28. Various cases as noted by Kester, 1725.
29. Kester, 1730 and 1731.
30. *MCM*, Paragraph 12(c).
31. Marine Corps Reserve Major Daniel Rabil, from a guest column he wrote in the 9 November 1998 edition of *The Washington Times*, cited in Mitchell.
32. Representative Henry Hyde, Closing Argument to the Senate, 10 February 1999.
33. Thomas E .Ricks, *Making the Corps* (NewYork, Scribner, 1997), at 295.
34. COL Lloyd J. Matthews, US Army (Retired), "Resignation in Protest," *ARMY Magazine*, January 1990, 21.
35. Rear Admiral Henry E. Eccles, US Navy (Retired), *Military Power in a Free Society* (New Port, Rhode Island: *Naval War College Press*, 1979), 178, quoting Sir John Hackett.
36. Anton Myrer, Once an Eagle (Carlisle, Pennsylvania: *Army War College Foundation Press*, 1997). This was the response by protagonist Sam Damon when his Congressman, from whom he was seeking an appointment to West Point, inquired as to his partisan sympathies (Once an Eagle was first published in 1968). Quoted by Ricks, 282.
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40. Paul M. Weyrich, "Commander in Question," Conservative News Service Commentary, Free Congress Foundation (22 October 1998).
41. Robert Burns, "Cohen Boosts Military Service" Associated Press (28 January 1999).
42. Rudolph C. Barnes, *Military Legitimacy: Might and Right in the New Millennium* (Portland, Oregon: Frank Cass, 1996), 29.
43. US v. Howe, CM 413739 (3 November 1966), 557.
44. Cited by Matthews, 21.

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