OKLAHOMA CITY UNIVERSITY LAW REVIEW

VOLUME 47 Spring 2023 NUMBER 2

Note

Freedom of Expression in the Military Context: A Guide to Modern Service

Jordan Kimball[[1]](#footnote-1)\*

**I. Introduction**

A soldier approaches the gate of her duty station. As she sips her coffee and waits for her turn to give her morning pleasantries to the gate guards, she glances over to the pride flag draped across her dashboard. The soldier frantically bunches the cloth together and shovels it into her center console just in time to scan her identification card. She sighs a breath of relief; another close one. Ghosts of military past flood her mind. Thoughts of “Don’t Ask, Don’t Tell”[[2]](#footnote-2) creep up. She tells herself, “it’s a new Army,” as she ventures across post to complete her voluntary service.

America’s treasured freedom of expression has been at odds with careers in military service since 1791.[[3]](#footnote-3) This Note explores First Amendment rights in the military context, focusing primarily on the freedom of expression.[[4]](#footnote-4) The motivation for this Note came to the Author at a monthly battle assembly during Army extremism training. The topic of the training was limitations on the organizations and groups that soldiers can and cannot associate with in and out of uniform, and the atmosphere in the room was unquestionably tense. Distressed by the conversation, a high-ranking, nearly retired, noncommissioned officer stood up and asked, “How is this legal? I have rights under the First Amendment!” The conversation was brief but turned to limitations on expression. The takeaway from this experience was that while this notion of limitations of expression imposed on servicemembers may be obvious to some, for other servicemembers it is nuanced, and can be complex and frustrating.

First, this Note begins with a general overview of freedom of expression, including the arguments for why people think free speech should be protected. Second, this Note discusses the nuances of the regulatory restrictions on servicemembers’ freedom of expression. This section discusses the sources of First Amendment limitations in the military and transitions to the regulations themselves, followed by the justifications, enforceability, and the process of challenging the regulations. Third, this Note discusses freedom of expression in the context of the modern military. With a new administration comes new rules and regulations for servicemembers. This section focuses on the deference that is shown by civilian courts to the military process and concludes with how Congress may address servicemembers’ frustrations. Comments on individual branches will be specific to the Army due to the Author’s personal knowledge of that branch.

**II. Freedom of Expression: The Life of a Civilian**

The First Amendment to the United States Constitution states: “Congress shall make no law . . . abridging the freedom of speech, or of the press.”[[5]](#footnote-5) In discussing the protections afforded by the First Amendment, the United States Supreme Court has declared:

The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. [] All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.[[6]](#footnote-6)

 Because First Amendment violations require government action or interference, restrictions from individuals or private employers that are not state actors are not barred by the Constitution.[[7]](#footnote-7) Case law establishes that even “expressive conduct”[[8]](#footnote-8) is covered by the First Amendment as “[t]he First Amendment prohibits governments from abridging free speech.”[[9]](#footnote-9) First Amendment analyses are nuanced. “[T]he initial inquiry is whether the speech or conduct affected by the government action comes within the ambit of the First Amendment.”[[10]](#footnote-10)

There are two forms of speech regulation: content-based and content-neutral. “[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest . . . and restrictions based on viewpoint are prohibited.”[[11]](#footnote-11) There are some instances in which the content of speech is not protected, however; “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem,”[[12]](#footnote-12) namely when the speech involves incitement, obscenity, child pornography, fighting words, hostile audiences, and libel.[[13]](#footnote-13) Content-neutral restrictions are referred to as “time, place, or manner” restrictions and the government may reasonably implement such restrictions if: 1) the restriction is content-neutral, 2) the government has a significant or substantial government interest, 3) the restriction is narrowly tailored to further the government interest (but does not need to be the least restrictive means), and 4) the government leaves open ample alternative channels of communication.[[14]](#footnote-14) Specific words and phrases may be categorized as conduct and limited as such—for instance, threats of violence.[[15]](#footnote-15)

Regulations on speech face a unique challenge. “[P]rior restraints” on speech are “the most serious and the least tolerable infringement on First Amendment rights.”[[16]](#footnote-16) Prior restraints are “orders *forbidding* certain communications” that are issued before the communications occur.[[17]](#footnote-17) Courts have “reaffirm[ed] that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact.”[[18]](#footnote-18)

Government employers often impose content-neutral restrictions. Not to mention the modern trend of employers scrolling through prospective employees’ social media to determine whether the candidate’s use of expression will align with the values of the organization. “Although restrictions on speech in nonpublic fora are not subject to strict scrutiny, ‘the Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints.’”[[19]](#footnote-19) Courts have held that government restrictions “must still be reasonable and ‘not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.’”[[20]](#footnote-20)

When a government employee challenges their employer’s action under the First Amendment, the court first considers “whether the expressions in question were made by the speaker ‘as a citizen upon matters of public concern.’”[[21]](#footnote-21) These problems generally lead the court to “arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”[[22]](#footnote-22) The Supreme Court has held “[t]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.”[[23]](#footnote-23) And that “a public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment.”[[24]](#footnote-24) Further, “the State’s interests as an employer in regulating the speech of its employees ‘differ significantly from those it possesses in connection with the regulation of the speech of the citizenry in general.’”[[25]](#footnote-25) Civilians have redress when a negative action is taken towards them by their State employer:

To [state] a claim for First Amendment retaliation, a plaintiff must show: ‘(1) he [or she] engaged in conduct protected under the First Amendment; (2) the defendant took some retaliatory action sufficient to deter a person of ordinary firmness in plaintiff’s position from speaking again; and (3) a causal link between the exercise of a constitutional right and the adverse action taken against him [or her].’[[26]](#footnote-26)

Because these cases involve a federal question, they can be brought in federal district court through the filing of a complaint.[[27]](#footnote-27) A plaintiff may be entitled to damages for workplace retaliation based on their exercise of freedom of expression.

Despite protections given by the First Amendment, limitations on expression are common in government workplaces. So, one may ask, what makes the military such a cause for concern? As described in the sections below, restrictions on freedom of expression come from various sources and are not subject to the same restrictions imposed on other government employees. The military is tasked with addressing these issues from within, and as a result, challenges to regulations limiting freedom of expression and any punishments for alleged violations thereof are generally not fruitful. Additionally, the structure of the military is distinctly different from the civilian workplace. When a servicemember signs the dotted line, the government effectively owns them for the duration of their contract. Anyone who has had a civilian career can intuitively draw the differences between the workplace environments. One of the more notable nuances that drives concern in this area is retirement. Civilian retirement accrues throughout an individual’s career through their payment into social security.[[28]](#footnote-28) General civilian retirement, excluding specific retirements available to public service workers like teachers, firefighters, police officers, etc., follows a person throughout their lives, continually accruing through job and even career changes. Military retirement does not follow this model. Military retirement is based on time in service in the military alone and may be impacted only by actions or occurrences throughout military service.

**III. The Regulations**

*A. Sources of First Amendment Limitations in the Military*

Congress has the authority to regulate military personnel through Article I of the Constitution: “The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces.”[[29]](#footnote-29) The United States military is heavily based on congressional regulations, many of which govern the formation and structure of armed forces.

There were several attempts throughout early American history to establish a formal system for military law: first through the 69 Articles of War, and again during the Civil War.[[30]](#footnote-30) These guidelines governed until the next major development in establishing a formal legal system “occurred during World War I when a difference of opinion in how to amend the Articles of War created the basis for many of the revisions that appeared in the U.C.M.J.”[[31]](#footnote-31) The Uniform Code of Military Justice (U.C.M.J.) was adopted in 1951 and “provide[d] for a military legal system applied uniformly throughout the armed services.”[[32]](#footnote-32) The U.C.M.J. “serves as the controlling legal instrument for the armed services, and as such, it is in turn controlled only by the Constitution of the United States.”[[33]](#footnote-33) World War II brought another shift in military law, first through the Elston Act.[[34]](#footnote-34) The Elston Act “was essentially a stopgap measure that amended the Articles of War and provided for better representation and greater legal protections for military personnel.”[[35]](#footnote-35) Next, the U.C.M.J. became “the primary code of laws governing all military personnel for at least the next half-century.”[[36]](#footnote-36)

Evolution of the U.C.M.J. “included an expansion of the jurisdiction of courts-martial, an outline of the procedural structure of military justice, an extensive list of substantive criminal offenses, and even descriptions of a variety of civil actions.”[[37]](#footnote-37) The “extensive list of substantive criminal offenses” is detailed by Subchapter X titled “Punitive Articles,” which includes fifty-seven acts that are criminalized under the U.C.M.J.[[38]](#footnote-38) Significant amendments to the U.C.M.J. include the 1968 Military Justice Act, the Department of Defense Authorization Act of 1980, the Military Justice Act of 1983, and the Department of Defense Appropriations Act of 1990.[[39]](#footnote-39)

The Manual for Courts-Martial provides illustrative rules for military court procedure, mimicking the Federal Rules of Civil Procedure and the Federal Rules of Evidence by providing the Rules for Courts-Martial, the Military Rules of Evidence, and the U.C.M.J.[[40]](#footnote-40) Much like statutes and other regulations in civilian law, military law has governing rules and regulations that are issued by the Department of Defense called directives, instructions, and publications.[[41]](#footnote-41) These three categories of issuances each provide the necessary support for military law to function and evolve. Directives are “broad policy documents that initiate, govern, or regulate actions by the Department [of Defense] or its components.”[[42]](#footnote-42) While the Department itself often publishes directives, the individual branches of the armed forces also issue branch-specific publications to meet the needs of the branch of service. “Instructions implement the policy that is often contained in the directives,” which “may include prescribing the manner in which the service or the Department carries out the policy.”[[43]](#footnote-43) Publications are “the vehicle used to disseminate the instructions or administrative procedures necessary to implement the directive or instruction.”[[44]](#footnote-44) Each branch of service has their own “regulations governing military justice.”[[45]](#footnote-45) Regulations are passed through the three channels and are considered binding on military personnel.

Each branch of service has its own ways of disseminating the regulations to servicemembers, but no specific medium of communication is required. For the most part, there is no formal way to place servicemembers on notice of new regulations, nor is there any requirement to do so. Although the individual branches have made significant efforts to allow servicemembers freedom to exercise their First Amendment rights, the trend appears to be allowing more leniency in regulations regarding the exercise of religion while increasing constraints on other forms of expression.

*B. The Regulations*

Congressional regulations are more straightforward and do not necessarily, as they stand, present a significant issue for discussion in this Note. However, regulations imposed by executive agencies and individual branches are perhaps less straightforward because their governance appears to foster the most frustration among servicemembers.In *Parker v. Levy*—a landmark case on the issue of servicemembers’ freedom of expression—Justice Rehnquist wrote:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. 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.[[46]](#footnote-46)

A common principle in this discussion is that “First Amendment rights in the armed services are ‘not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.’”[[47]](#footnote-47) Further, “[m]ilitary speech issues essentially pose the question of whether, and to what degree, a military member’s free speech rights are outweighed by military interests.”[[48]](#footnote-48)

As with civilian speech, there are also categories of speech in the military context that are wholly unprotected. Military interests inherently outweigh such speech, and so the Department of Defense—and the individual branches—may “freely regulate[] and punish[] [unprotected speech] in appropriate cases.”[[49]](#footnote-49) Each type of unprotected speech in the civilian context has a military counterpart that is generally broadened by regulation or case law. For example, obscenity in the civilian context is material that deals with sex in a manner appealing to prurient interest,[[50]](#footnote-50) while in the military context, “indecent language under the UCMJ qualifies as obscenity, and therefore, is unprotected by the First Amendment.”[[51]](#footnote-51) Incitement in the civilian context is broadened in the military to include “dangerous speech,” which is speech that “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.”[[52]](#footnote-52) The military has undertaken the task of adding types of speech to the unprotected category. For example, “speech, which undermines the effectiveness of response to command, is unprotected by the First Amendment.”[[53]](#footnote-53) Courts have broadly interpreted this type of speech to include “distributing anti-war newsletters, denigrating the war effort to other military members, and using indecent language to address a subordinate.”[[54]](#footnote-54) In an even broader sweep, “courts have declined to extend First Amendment protections to speech or expressive conduct that either meets the elements of, or presents a clear and present danger of, violating” any Department of Defense or individual branch’s regulation.[[55]](#footnote-55)

While courts have not necessarily been consistent in their approaches to military speech issues, it is fairly clear that regulation of protected speech does not receive the strict scrutiny that is applied to civilians.[[56]](#footnote-56) There is still consideration placed on whether the regulation of expression is content-based or content-neutral—however, “[e]ven when speech is protected, military commanders may restrict that speech in certain circumstances.”[[57]](#footnote-57) Content-neutral restrictions are exceedingly arbitrary, with some courts requiring the military to “strike a balance between military needs and First Amendments rights, and a military commander’s decision will be upheld unless it amounts to an abuse of discretion,”[[58]](#footnote-58) while others apply what appears to be a blend of intermediate and rational basis scrutiny, requiring the military to identify a “‘legitimate’ or ‘substantial’ government interest.”[[59]](#footnote-59)

Some instances of regulation of unprotected speech can be seen in the U.C.M.J., which acts as a uniform source of regulations that apply to every branch of service. Article 88 of the U.C.M.J. states:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.[[60]](#footnote-60)

Despite the “[a]ny commissioned officer” language in the regulation, branches apply this Article to enlisted personnel. Several military units understand this Article to include statements made about the qualifying personnel regardless of the medium of the statements, to include punishing troops for their comments on social media. This regulation is contrary to case law that applies to civilians as “statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.”[[61]](#footnote-61) One may conceivably draw a connection between this regulation and the trending phrase regarding a fellow named Brandon, which servicemembers have unquestionably been reprimanded for posting. Article 117 States that “[a]ny person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-marital may direct.”[[62]](#footnote-62) Article 134 states:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.[[63]](#footnote-63)

A common thread through these Articles is broad or vague language. Namely, “contemptuous words” in Article 88, “reproachful words or gestures” in Article 117, and “conduct of a nature to bring discredit” in Article 134. In the civilian context, these Articles would be subject to scrutiny based on overbreadth, where the court would rely on precedent that a regulation is unconstitutional when the overbreadth is real and substantial, “judged in relation to the [regulation’s] plainly legitimate sweep.”[[64]](#footnote-64) These Articles are important not only because they serve as the basis for regulations of speech, but because they also serve as the basis of enforcement of all regulations promulgated by individual branches, as well as the punishments for violations thereof.

There are several executive regulations passed down to the individual branches of service through memorandums. In fact, a worthwhile discussion on these regulations would be best served by a separate note. For efficiency’s sake, this Note will present a single yet impactful regulation: the Secretary of Defense’s *Public Display or Depiction of Flags in the Department of Defense*. In 2020, the Secretary of Defense issued a memorandum which stated that “[i]n addition to the American flag, Service members and civilian employees are authorized to display or depict representational flags that promote unity and esprit de corps” in “all Department of Defense work places, common access areas, and public areas.”[[65]](#footnote-65) In doing so, the memorandum set forth a regulation preventing servicemembers from displaying any flags not on the nine-item list. This regulation was allegedly geared towards ridding military installations of the Confederate flag, but also banned all other flags (Pride, Black Lives Matter, Gadsden, etc.). This regulation was controversial and led to—at least in some units of the Army—an hour-long class by an officer in the Judge Advocate’s Corps on the breadth of the regulation.

Branch-specific regulations are common, though they all sing to the same tune of adhering to the justifications below. To highlight a few, Army Information Paper “Speaking in Your Personal Capacity” demonstrates one of many regulations on freedom of expression maintained by the Army and serves as a prior-restraint-type regulation. “When speaking in [their] personal capacity, [a soldier] may endorse [a] non-Federal entity. . . . [O]nly if neither [the soldier], nor the non-Federal entity, have associated [the solder’s] title, duty position, or Army organization with [their] speech or presentation.”[[66]](#footnote-66) The regulation also claims soldiers “should NOT wear [their] military uniform when making a speech or presentation in [their] personal capacity.”[[67]](#footnote-67) The “speech or presentation” here has been extended to include political rallies, and commanders have determined in their individual capacity that attending any kind of protest in uniform is a violation, generally citing to Army Regulation 670-1, *Wear and Appearance of Army Uniforms and Insignia*, and DoDI 1334.1, *Wearing of the Uniform*.[[68]](#footnote-68) While there is express guidance on political activities soldiers can participate in, commanders rely on Army Regulation 600-20 B-4 to regulate conduct:

Some activities not expressly prohibited may be contrary to the spirit and intent of this regulation. Any activity may be reasonably viewed directly or indirectly associating DoD or DA with a partisan political activity or is otherwise contrary to the spirit and intention of this regulation or DoDD 1344.10 will be avoided.[[69]](#footnote-69)

Otherwise, the Army’s “Records Management Directorate” website is helpful in guiding soldiers through any possible confusion by stating that “[t]he Department of the Army and OAA are working to protect freedom of speech for all Service Members, employees, and the public to the greatest extent possible, while achieving mission requirements.”[[70]](#footnote-70) The Army has developed mandatory “Extremism Training” as a way to address regulations of freedom of expression.

*C. Regulation Justifications*

First, as established above, restrictions of freedoms on government property are not only common but widely accepted. For instance, airports, post offices, and courtrooms have required standards of “conduct” that unquestionably limit freedom of expression. For example, from what a person says to how they dress, airports are amongst the strictest venues for limitations on expression. Courts have consistently held that “it cannot fairly be said that an airport terminal has a principal purpose promoting ‘the free exchange of ideas.’ To the contrary, . . . Port Authority management considers the purpose of the terminals to be the facilitation of passenger air travel, not the promotion of expression.”[[71]](#footnote-71)

The regulations on freedom of expression in the military context go a step further. As established above, regulations that restrict speech that “interferes with or prevents the orderlyaccomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops” are wholly valid.[[72]](#footnote-72) Content-neutral regulations often meet their burden if there is a legitimate and identifiable government interest, which may include “mission, loyalty, good order, discipline, morale, obedience, unity, uniformity, unit cohesion, commitment, esprit de corps, and civilian supremacy.”[[73]](#footnote-73) Even the most notable regulations like “Don’t Ask, Don’t Tell,” rely on avoiding “unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.”[[74]](#footnote-74) U.C.M.J. Article 134 regulates conduct (to include expressive conduct) that is “prejud[icial] [to] good order and discipline” or which tends to be discrediting to the military service.[[75]](#footnote-75)

The *Public Display or Depiction of Flags in the Department of Defense* memorandum set out a relatively unique justification for the regulation: “[a]ccomplishing [the Department of Defense] mission depends on our most important resource—our Service members and civilian employees. Supporting our people requires mutual respect, responsibility, and accountability.”[[76]](#footnote-76) At face value, the justifications here are progressive and likely in the best interest of cultivating some of those traditional notions of loyalty, morality, and unity—particularly since, again, the regulation was allegedly aimed at the use and damaging impact of the Confederate flag. However, the flipside to this best-interest approach is that this memorandum placed yet another restriction on servicemembers’ freedom of expression through an entirely new set of justifications, broadening the scope of the regulations once again.

*D. Enforceability of the Limitations*

So, what makes these regulations enforceable against servicemembers? Article 92 of the U.C.M.J. states that:

[a]ny person subject to this chapter who – (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.[[77]](#footnote-77)

To join the military, one must first complete certain processes through a recruiter, then schedule a date to go to the Military Entrance Processing Station (MEPS) to complete a medical evaluation, complete the required documents, then swear in. Some of the required documents include:

DD Form 4, “Enlistment/Reenlistment Document – Armed Forces of the United States”; DD Form 93, “Record of Emergency Data”; DD Form 368, “Request for Conditional Release.” DD Form 369, “Police Record Check”; DD Form 370, “Request for Reference”; DD Form 372, “Request for Verification of Birth”; DD Form 1966, “Record of Military Processing – Armed Forces of the United States”; DD Form 2005, “Privacy Act Statement – Health Care Records”; DD Form 2807-1, “Report of Medical History”; DD Form 2807-2, “Medical Prescreen of Report of Medical History”; and DD Form 2808, “Report of Medical Examination.”[[78]](#footnote-78)

Situated on page 3, part C, paragraph 9, of DD Form 4, Enlistment/Reenlistment Document – Armed Forces of the United States is the following:

I understand that many laws, regulations, and military customs will govern my conduct and require me to do things under this agreement that a civilian does not have to do. I also understand that various laws, some of which are listed in this agreement, directly affect this enlistment/reenlistment agreement . . . I understand that I cannot change these laws but that Congress may change these laws, or pass new laws, at any time that may affect this agreement, and that I will be subject to those laws and any changes they make to this agreement.[[79]](#footnote-79)

This section goes on to assert:

I further understand that:

a. My enlistment/reenlistment agreement is more than an employment agreement. It effects a change in status from civilian to military member of the Armed Forces. As a member of the Armed forces of the United States, I will be:

(1) Required to obey all lawful orders and perform all assigned duties.

(2) Subject to separation during or at the end of my enlistment. If my behavior fails to meet acceptable military standards, I may be discharged and given a certificatefor less than honorable service, which may hurt my future job opportunities and my claim for veteran’s benefits.

(3) Subject to the military justice system, which means, among other things, that I may be tried by military courts-martial.

(4) Required upon order to serve in combat or other hazardous situations.

(5) Entitled to receive pay, allowances, and other benefits as provided by law and regulation.

b. Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document.[[80]](#footnote-80)

 Yet another unique part of military service as a career is the MEPS process which is nearly an entire day completing medical evaluations and signing pre-filled forms at the state MEPS location. Completing the forms listed above is the last stage of MEPS and comes immediately before taking the oath of enlistment. To the average person reading this Note, it may seem that the terms of the enlistment/reenlistment contract are clear—signing up to serve means one understands that “many laws, regulations, and military customs will govern [their] conduct and require [them] to do things under this agreement that a civilian does not have to do.”[[81]](#footnote-81) Although not expressly stated, the Department of Defense appears to rely on this language to establish that signing DD Form 4 means understanding that “many laws, regulations, and military customs will govern [their] conduct and [prevent them from doing things]. . . that a civilian [is allowed] to do.”[[82]](#footnote-82)

*E. Challenging the Regulations*

Challenging a limit on the freedom of expression is generally done retroactively. This means that the issue is rarely presented until a servicemember has been disciplined for a violation of the regulation. As expected, military law is enforced and interpreted through military courts until a decision is appealed. The military court is quite different from civilian courts:

At the military equivalent of the trial level court is the court-martial, which is convened by the commanding officer. Although not strictly speaking a judicial body it does handle the vast majority of criminal cases in the military justice system. There are three types of court-martial: the summary court-martial for minor violations of the UCMJ, the special court-martial for handling more serious crimes, and the general court-martial for the most serious crimes, including those punishable by death.[[83]](#footnote-83)

The military system does mimic the civilian system through the structure of its appellate courts. For example, there is “the Court of Criminal Appeals (CCA) for each of the services, the United States Court of Appeals for the Armed Forces (USCAAF), and at the third level, the Supreme Court of the United States, which can review the decisions of the lower courts.”[[84]](#footnote-84) The authority of military courts is clearly established:

When a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights. He also submits himself to the administration of justice by military tribunals whose power extends to fines and forfeitures, to the deprivation of rank and pay, to imprisonment, and even punishment by death.[[85]](#footnote-85)

In Article II courts:

The proceedings of these military tribunals can not be reviewed in the civil courts. No writ of error will lie to bring up the rulings of a court-martial. Even in the trial of a capital offense the various steps by which the end is reached can not be made the subject of judicial review. The only tribunal that can pass upon alleged errors and mistakes is the commanding officer, charged with that responsibility, who, in cases like the present, must be the commander-in-chief, that is to say, the President. When the record of a court-martial comes into a civil court in a collateral way, the only questions which can be considered may be reduced to these three: First, was the court-martial legally constituted; second, did it have jurisdiction of the case; third, was the sentence duly approved and authorized by law.[[86]](#footnote-86)

Most violations of the U.C.M.J. and the rules and regulations passed down through the three channels of publication are addressed by commanding officers at the lowest level.

Administrative sanctions are issued through “counselings, comments on performance reports, and the like when the otherwise protected speech calls into question his/her judgment; willingness to support the constitution and obey lawful orders and regulations; and ability to faithfully discharge duties.”[[87]](#footnote-87) In a regulation regarding extremist organizations and activities, the army regulation states:

Enforcement of this policy is a responsibility of command, is vitally important to unit cohesion and morale, and is essential to the Army’s ability to accomplish its mission. It is the commander’s responsibility to maintain good order and discipline in the unit. Every commander has the inherent authority to take appropriate actions to accomplish this goal.[[88]](#footnote-88)

Although the quote is associated with regulations on expression through association with extremist organizations, the sentiment surrounding the powers and duties of commanders is applicable across the board with issues of freedom of expression. While the commanding officer position requires a college degree, there is no requirement that a commander must be affiliated with the Judge Advocates Corps or any other coordinating legal branch. Similarly, there is no minimum requirement for legal education for one to obtain the position. Commanders are certainly required to be knowledgeable in the U.C.M.J. and are often tasked with making discretionary decisions on that basis, however, the extent of a commander’s legal knowledge may be limited to the training they received to commission as an officer. This is particularly concerning to some since commanders have the discretion to “prohibit, restrict, and punish speech” when in violation of these regulations.[[89]](#footnote-89) While this lack of legal expertise may not necessarily be problematic with minor violations of the U.C.M.J., larger issues within the U.C.M.J. call into question servicemembers’ constitutional rights, notably issues involving the First Amendment. Namely, even if a servicemember successfully appeals to the commander for redress, they will have an exceedingly difficult time establishing that their expression does not interfere, in some conceivable way, with “mission, loyalty, good order, discipline, morale, obedience, unity, uniformity, unit cohesion, commitment, esprit de corps, [or] civilian supremacy.”[[90]](#footnote-90)

Undoubtedly errors are committed by courts-martial which a civil tribunal would regard as sufficient ground for a reversal for their judgments, if it were sitting as an appellate court. But there is always this radical difference between an appellate court sitting for the correction of errors and a civil court into which the record of a court-martial is collateral—in the former there is not a failure of justice; the appellate court may reverse a judgment or prescribe another or award a new trial; in the latter, the court must either give full effect to the sentence or pronounce it wholly void.[[91]](#footnote-91)

 If a servicemember feels that they have been either punished for their expression or their expression has been otherwise restrained and redress is not given, servicemembers may elect to write a “Congressional.” Congressionals are governed by U.C.M.J. Article 138:

Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.[[92]](#footnote-92)

As expected, however, the Congressional is a long, tedious process that rarely provides a true remedy. As established below, this is one instance of how deference to the military process prevails at all stages of raising a complaint regarding limits on freedom of expression.

**IV. Modern Service: You Get What You Sign Up For**

*A. Deference to the Military Process*

As seen in the judicial process described above in Section III, Subsection E, civilian courts leave constitutional application to military affairs issues to military courts until appeals take the issue to the Supreme Court.[[93]](#footnote-93) Civilian courts have consistently taken a hands-off approach to military affairs:

[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.[[94]](#footnote-94)

This hands-off approach is evident in several cases involving the constitutionality of military policies and procedures. For example, in *Orloff v. Willoughby*, the Supreme Court recognized:

We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.[[95]](#footnote-95)

This quote is one of many regarding how not only the judicial process, but also legislative and regulatory law, do not provide much help in counteracting this deference.

*B. How to Address the Problem*

It is clear from the history of military regulations that freedom of expression goes through phases, seemingly following the trends of society. It is also clear from the history that Article II courts steer clear from addressing military issues by giving extreme deference to the individual branches of the Department of Defense. As with any executive agency, however, Congress may enact a law addressing the issue of freedom of expression in the military context. The following are proposed laws that the Author of this Note thinks will be helpful.

*1. Department of Defense Evaluation System*

When an issue regarding freedom of expression is asserted, how should it be addressed? Perhaps a Department-of-Defense-wide evaluation system specifically for infringement on constitutional rights would be helpful. Like most statutory provisions, the evaluation system would include a multi-factor test that is evaluated at each level, from the initial complaint to the last appeal. A Department of Defense evaluation act would create standards that go alongside the U.C.M.J. in addressing constitutional challenges to the rules and regulations promulgated by the Department of Defense and individual branches. An act could establish a formal process at the Department of Defense level and may work alongside the agency to formulate a more uniform procedure for addressing constitutional issues. Alternatively, the individual branches could be tasked with formulating their own procedures. This might also be helpful to units in establishing that all possible means of addressing an issue were exhausted in case a servicemember elected to write a Congressional.

*2. Contractual Notice Prior to Service*

To reiterate, while it may be obvious to some, the limits on freedom of expression in the military context are not always intuitive. Servicemembers can observe other occupations and presume they will have limitations, but, as established above, limitations on military personnel are considerably stricter than limitations on civilian occupations. One way the Department of Defense may combat complaints on these limits in the military context is a firmer acknowledgment of the potential for these limitations. This acknowledgment may be easily incorporated as part of the various contractual documents that recruits sign before becoming servicemembers.

This is not to say that there is no attempt at notice from the Department of Defense. As established above in Section IV, Part D of this Note, servicemembers are given some notice of potential limitations as recruits in DD Form 4, page 3, section C, paragraph 9.[[96]](#footnote-96) One may argue, however, that not only does the language of the enlistment/reenlistment contract fail to give proper notice on potential limitations to constitutional rights, but the circumstances surrounding the reading and signing of DD Form 4 also take away some of the meaningful choice allotted to parties under contract law. To remedy this, Congress may—perhaps even alongside the Commander in Chief—draft a bill that requires the following changes to the required forms and process of enlistment/commissioning.

These proposed changes to DD Form 4 are slight, but meaningful in the spirit of notice. The following is an excerpt of the current language of DD Form 4, with the proposed changes emphasized in italics. Paragraph 9 would read as follows:

I understand that many laws, regulations, and military customs will govern my conduct and require me to do things under this agreement that a civilian does not have to do. *I also understand that the many laws, regulations, and military customs will also prohibit me from doing things that a civilian may otherwise do.* I also understand that various laws, some of which are listed in this agreement, directly affect this enlistment/reenlistment agreement . . . . I understand that I cannot change these laws but that Congress may change these laws, or pass new laws, at any time that may affect this agreement, and that I will be subject to those at any time that may affect this agreement.[[97]](#footnote-97)

The section would go on to assert:

I further understand that:

a. My enlistment/reenlistment agreement is more than an employment agreement. It effects a change in status from civilian to military member of the Armed Forces. As a member of the Armed forces of the United States, I will be:

(1) Required to obey all lawful orders and perform all assigned duties.

(2) Subject to separation during or at the end of my enlistment. If my behavior fails to meet acceptable military standards, I may be discharged and given a certificate for less than honorable service, which may hurt my future job opportunities and my claim for veteran’s benefits.

(3) Subject to the military justice system, which means, among other things, that I may be tried by military courts-martial.

*(4)* Subject to restraints on some of the constitutional guarantees, for which I will be sworn to protect.

*(5)* Required upon order to serve in combat or other hazardous situations.

*(6)* Entitled to receive pay, allowances, and other benefits as provided by law and regulation.

b. Laws and regulations that govern military personnel may change without notice to me. Such changes may affect my status, pay, allowances, benefits, and responsibilities as a member of the Armed Forces REGARDLESS of the provisions of this enlistment/reenlistment document.[[98]](#footnote-98)

These proposed changes would be sufficient to put prospective servicemembers on notice and are broad enough to encompass the various restrictions that servicemembers face throughout their career. Importantly, these changes are so slight that they do not significantly change the original message of Paragraph 9.[[99]](#footnote-99)

As established above, enlistment documents are signed at the end of the MEPS process. What that means is an individual travels from home to a hotel the night before, wakes up early, and goes through nearly a full day of medical and mental evaluations, including but not limited to: height and weight measurements; hearing tests; vision tests; a blood draw and tests; urine tests; drug and alcohol tests; physical movements/exercises; a physical exam interview; and gender-specific physical examinations. After these steps are complete, the recruit is then permitted to go to the paperwork/signing stage of the process. Because several people usually complete MEPS at once, the paperwork stage is often rushed. This rushed process usually leads to a “point and sign” type of flow where the MEPS employee goes through the paperwork, verbally explains the gist of what the document says, and then the individual is expected to sign it and move on. While an individual can certainly look up the documents before attending MEPS to read over what they will be signing, the pressure of the environment, partnered with the exhaustion from the day, often leads to page 3, section C, paragraph 9 of DD Form 4 getting overlooked.[[100]](#footnote-100) To remedy this oversight, Congress could add a requirement that these documents be made available to servicemembers for reading before they go to MEPS.

Recruits meet with a recruiter several times and complete forms that are submitted before they are able to get a MEPS date, and there are usually several weeks to months between the time that a recruit first walks into the office to when they head to enlist or commission. A provision could also require recruiters of all branches, regardless of whether the recruit will be enlisting or commissioning, to send a copy of the amended DD Form 4 to the recruit at least a week prior to going to MEPS. The individual branches could establish a procedure for disseminating the document, be it in printed or digital form. The policy concerning the governance of the form would not change, and the recruit’s signature on DD Form 4 at MEPS would continue to be the sole indicator that they understood the terms of the form.

*3. Notice of New Limitations*

Perhaps the answer is not to address the problem after a First Amendment complaint has been raised, but instead to have a modified version of informal rulemaking solely within the Department of Defense or the individual branch—whichever is promulgating the regulation. An act could create an obligation for the Department of Defense and the individual branches to provide actual and reasonable notice to enlisted and commissioned personnel when promulgating a new rule or regulation that concerns any fundamental right protected by the Constitution.

Under the Administrative Procedure Act, “rule making relating to ‘a military . . . function of the United States,’[[101]](#footnote-101) and ‘rules of agency organization, procedure, or practice,’ are exempt from notice and comment requirements.”[[102]](#footnote-102) This type of notice would not follow our traditional notions of notice-and-comment, and in doing so it would still maintain the military and Department of Veterans Affairs exception to notice-and-comment under regulatory law.[[103]](#footnote-103) Courts have consistently held that “such rules, including delegations and reservations, can be effective regardless of publication in the Federal Register or the Code of Federal Regulations.”[[104]](#footnote-104) The Author of this Note does not disagree with these rulings. The notice portion would solely be for the purpose of notice and would not, in any way, provide servicemembers with means to absolve themselves of their contractual obligation upon notice of a new regulation. Likewise, this modified version would mimic informal rulemaking “notice,” but would leave out the required “comment” portion thereof. The comment portion is inherently unreasonable in the military context, contrary to regulatory law because of deference shown to the military regarding its own affairs.

Once again, the Department of Defense and individual branches could establish their own procedures for disseminating the notices, whether it be in paper or digital form. There are several modes of communication throughout each branch, so a system for disseminating information that significantly impacts the constitutional rights of servicemembers is not necessarily unreasonable. In addition to this notice that the individual branches could elect to do on their own, they could also implement a class on significant changes to constitutional rights each year as one of the many annual classes that each branch requires the units to conduct. For the sake of formality and the capacity to answer questions, a unit’s Judge Advocate’s Corps officer could be tasked with conducting the class (smaller units without a JAG officer on site could have a JAG officer from higher in their chain of command come to lead the class).

**V. Conclusion**

Freedom of expression and military service have been at odds since the beginning of American military history.[[105]](#footnote-105) The First Amendment is a staple in our traditional notions of liberty, which is why government intrusion into the right to freedom of expression is subject to such strict scrutiny in the civilian context. The military is subject to a lower level of scrutiny, giving the regulatory entities within the Department of Defense broader ability to regulate servicemembers’ freedom of expression.

The various sources of First Amendment limitations in the military provide several regulatory freedoms to entities charged with maintaining the armed forces. What is identified as protected speech in the civilian world is not assured as protected once someone signs the dotted line. Similarly, issues like over-broadness and vagueness are not as fatal to military regulations on freedom of expression as they are to traditional regulations on freedom of expression. While there are some concerns with the enforcement of restrictions on constitutional rights by individual commanders, it appears that the holy trinity of government branches believe those concerns are in the sole control of the individual branches. This broad enforcement discretion, as promulgated in pertinent part by the hands-off approach courts take when challenges to the regulations are made, should cause those considering military service to seriously consider whether service is right for them.

The modern military context presents issues unique to the age of advocacy. With a new administration comes new rules and regulations for servicemembers, some of which attempt to adhere to the social and political climate of the time. With these attempts at advocacy through the military, however, there is always a risk of creating a new level of damage—for instance, the limits on expression created through “Don’t Ask, Don’t Tell.” While the Author of this Note acknowledges that there is frustration with this system, and believes that there may be some ways to help mitigate that frustration, the inevitable conclusion of this Note is a bit of harsh advice: you get what you signed up for.

As it remains, as the soldier approaches the gate of her duty station and swiftly tucks away her pride flag, she is reminded that this is what she chose when she signed the dotted line. While freedom of expression has come a long way throughout military history—and even through her own time in service—the restraints imposed by the Department of Defense no longer come as a surprise. She reminds herself, “It’s a new Army,” as she ventures across post to complete her voluntary service.

1. \* Juris Doctor, Oklahoma City University School of Law, December 2022. Jordan would like to thank her faculty sponsor, Professor Jeremy Telman, for his support, guidance, and grace both in this project and in law school. She owes a great deal of gratitude to her family, her friends, Felix, and son Jr. for their unwavering love and support. Last, she would like to thank the leadership at the 486th Civil Affairs Battalion and Bravo Company, 2-379th for their sacrifices, mentorship, and their contributions to this project. [↑](#footnote-ref-1)
2. . 10 U.S.C. § 654. “Don’t Ask, Don’t Tell” was enacted in 1993 and mandated that “[a] member of the armed forces shall be separated from the armed forces . . . [if] the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts.” *Id.* at § 654(b)(1). Paragraph 15 of the introduction of the bill states, “[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.” *Id.* at § 654(a)(15). The “Don’t Ask, Don’t Tell” name came from the Act’s establishment that a servicemember must be separated if they “stated that he or she is homosexual or bisexual, or words to that effect.” *Id.* at § 654(b)(2). This subsection of the Act led members of the LGBTQIA+ community who joined or were already in the armed forces to lie about their status, but also created an environment where leadership would not be entitled to inquire about someone’s status. In its essence, the Act technically allowed servicemembers to be LBGTQIA+ and ended a long-standing prohibition. However, those servicemembers were still prohibited from engaging in homosexual acts and from being open about their status, whether it be through expressive conduct, such as sporting the Pride flag, or any kind of verbal acknowledgment. The Act was repealed December 18, 2010. [↑](#footnote-ref-2)
3. . *See* Adam Griffin, *First Amendment Originalism: The Original Law and a Theory of Legal Change as Applied to the Freedom of Speech and of the Press*, 17 First Amend. L. Rev. 91 (2018). [↑](#footnote-ref-3)
4. . U.S. Const. amend. I. [↑](#footnote-ref-4)
5. . U.S. Const. amend. I. [↑](#footnote-ref-5)
6. . Roth v. U.S., 354 U.S. 476, 484 (1957). [↑](#footnote-ref-6)
7. . One World One Family Now v. City of Miami Beach, 175 F.3d 1282, 1285 (11th Cir. 1999). [↑](#footnote-ref-7)
8. . Rubin v. Young, 373 F. Supp. 3d 1347, 1352 (N.D. Ga. 2019). [↑](#footnote-ref-8)
9. . Nat’l Ass’n for the Advancement of Colored People v. Hunt, 891 F.2d 1555, 1565 (11th Cir. 1990). [↑](#footnote-ref-9)
10. . *One World One Family Now*, 175 F.3d at 1285. [↑](#footnote-ref-10)
11. . Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469 (2009) (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 and Carey v. Brown, 447 U.S. 455, 463 (1980)). [↑](#footnote-ref-11)
12. . *Roth*, 354 U.S. at 485 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). [↑](#footnote-ref-12)
13. . *See generally*, Roth. [↑](#footnote-ref-13)
14. . *See* Ward v. Rock Against Racism, 491 U.S. 781, 789 (1989). [↑](#footnote-ref-14)
15. . *See* United States v. White, 810 F.3d 212 (4th Cir. 2016). [↑](#footnote-ref-15)
16. . Twitter, Inc. v. Sessions, 263 F. Supp. 3d 803, 809 (N.D. Cal. 2017) (quoting Neb. Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976)). [↑](#footnote-ref-16)
17. . Alexander v. U.S., 509 U.S. 544, 550 (1993) (referencing Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931)). [↑](#footnote-ref-17)
18. . *Neb. Press Ass’n*, 427 U.S. at 570 (1976). [↑](#footnote-ref-18)
19. . ISKCON Miami, Inc. v. Metro. Dade Cnty., 147 F.3d 1282, 1286 (11th Cir. 1998) (quoting United States v. Kokinda, 497 U.S. 720, 725 (1990)). [↑](#footnote-ref-19)
20. . *Id*. (quoting Int’l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992)). [↑](#footnote-ref-20)
21. . Garcetti v. Ceballos, 547 U.S. 410, 416 (2006) (citing Connick v. Myers, 461 U.S. 138, 146-47 (1983)). [↑](#footnote-ref-21)
22. . Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). [↑](#footnote-ref-22)
23. . *Id*.(citing Keyishian v. Bd. of Regents, 385 U.S. 589, 605-06 (1967)). [↑](#footnote-ref-23)
24. . *Connick*, 461 U.S. at 140 (citing *Pickering*, 391 U.S. 563). [↑](#footnote-ref-24)
25. . *Id*. [↑](#footnote-ref-25)
26. . Pinson v. U.S. Dep’t of Just., 514 F. Supp. 3d 232, 247 (D.D.C. 2021) (quoting Aref v. Lynch, 833 F.3d 242, 258 (D.C. Cir. 2016)). [↑](#footnote-ref-26)
27. . 28 U.S.C.A. § 1331. [↑](#footnote-ref-27)
28. . Elizabeth L. Meier & Cynthia C. Dittmar, *Varieties of Retirement Ages* 90(President’s Comm’n on Pension Pol’y, Staff Working Paper, 1980). [↑](#footnote-ref-28)
29. . U.S. Const. art. I, § 8, cl. 14. [↑](#footnote-ref-29)
30. . Steve Young, *Reporting for Duty: A Primer on Researching Military Law*, 48 L. Lbr. Lights 1 (Winter 2004). [↑](#footnote-ref-30)
31. . *Id*. at 1. [↑](#footnote-ref-31)
32. . *Id.* [↑](#footnote-ref-32)
33. . *Id*. [↑](#footnote-ref-33)
34. . *Id*. [↑](#footnote-ref-34)
35. . *Id*. at 3. [↑](#footnote-ref-35)
36. . *Id*. [↑](#footnote-ref-36)
37. . *Id.* at 3; *See* 10 U.S.C.A. Subtitle A, Pt. II, Ch. 47, References & Annot. (West, Westlaw through P.L. 117-262). [↑](#footnote-ref-37)
38. . *Id.*; *See* 10 U.S.C.A. Subtitle A, Pt. II, Ch. 47, Subchapter X, References & Annot. (West, Westlaw through P.L. 117-262). [↑](#footnote-ref-38)
39. . Young, *supra* note 29. [↑](#footnote-ref-39)
40. . *Id*. [↑](#footnote-ref-40)
41. . *Id*. [↑](#footnote-ref-41)
42. . *Id*. at 4. [↑](#footnote-ref-42)
43. . *Id*. [↑](#footnote-ref-43)
44. . *Id*. [↑](#footnote-ref-44)
45. . *Id.* “These include Army Reg. No. 27-10, ‘Military Justice,’ Air Force Inst. 51-201, ‘Law-Administration of Military Justice,’ Navy JAGINST 5800.7, ‘Manual of the Judge Advocate General (JAGMAN),’ and COMDTINST M5810.1D, ‘Coast Guard Military Justice Manual.’” [↑](#footnote-ref-45)
46. . Parker v. Levy, 417 U.S. 733, 758 (1974). [↑](#footnote-ref-46)
47. . United States v. Zimmerman, 43 M.J. 782, 785 (A. Ct. Crim. App. 1996) (quoting United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972)). [↑](#footnote-ref-47)
48. . Op. of the J. Advoc. Gen. of the Air Force (OPJAGAF) 2013-3, *Free Speech* at2 (Mar. 20, 2013). [↑](#footnote-ref-48)
49. . *Id*. [↑](#footnote-ref-49)
50. . *Roth*, 354 U.S. 476. [↑](#footnote-ref-50)
51. . OPJAGAF 2013-3, *supra* note 47, at 3. [↑](#footnote-ref-51)
52. . *Id*. (quoting U.S. v. Wilcox, 66 M.J. 442, 448 (2008)). [↑](#footnote-ref-52)
53. . *Id*. [↑](#footnote-ref-53)
54. . *Id*. [↑](#footnote-ref-54)
55. . *Id*. [↑](#footnote-ref-55)
56. . OPJAGAF 2013-3, *supra* note 47, at 4. [↑](#footnote-ref-56)
57. . *Id*. [↑](#footnote-ref-57)
58. . *Id*. [↑](#footnote-ref-58)
59. . *Id*. (quoting Brown v. Glines, 444 U.S. 348, 354 (1980)). [↑](#footnote-ref-59)
60. . 10 U.S.C.A. § 888. [↑](#footnote-ref-60)
61. . *Pickering*, 391 U.S. at 574. [↑](#footnote-ref-61)
62. . 10 U.S.C.A. § 917. [↑](#footnote-ref-62)
63. . 10 U.S.C.A. § 934. [↑](#footnote-ref-63)
64. . Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). [↑](#footnote-ref-64)
65. . Mark T. Esper, U.S. Sec’y of Def., *Public Display or Depiction of Flags in the Department of Defense* (July 15, 2020). [↑](#footnote-ref-65)
66. . *Speaking in Your Personal Capacity*, U.S. Army, SAGC-EF (Jan. 12, 2010). [↑](#footnote-ref-66)
67. . *Id*. [↑](#footnote-ref-67)
68. . *Id*. [↑](#footnote-ref-68)
69. . U.S. Army,Army Regulation 600-20, B-4, *Political Activities not Expressly Permitted or Prohibited* (July 24, 2020). [↑](#footnote-ref-69)
70. . *Civil Liberties: The First Amendment*, U.S. Army Rec. Mgmt. Directorate & Army Declassification Directorate (Feb. 10, 2022), https://www.rmda.army.mil/civil-liberties/RMDA-CL-programs-first-amendment.html. [↑](#footnote-ref-70)
71. . *ISKCON Miami, Inc.*, 147 F.3d at 1286 (quoting Int’l Soc. for Krishna Consciousness, Inc., 505 U.S. at 682, quoting *Cornelius*, 473 U.S. at 800). [↑](#footnote-ref-71)
72. . OPJAGAF 2013-3, *supra* note 47, at 3. [↑](#footnote-ref-72)
73. . *Id.* at 4-5. [↑](#footnote-ref-73)
74. . 10 U.S.C. § 654. [↑](#footnote-ref-74)
75. . 10 U.S.C.A. § 934. [↑](#footnote-ref-75)
76. . Esper, *supra* note 64. [↑](#footnote-ref-76)
77. . 10 U.S.C.A. § 892. [↑](#footnote-ref-77)
78. . Dep’t of Def., *Instruction Number 1304.02* (Sept. 9, 2011), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130402p.pdf. [↑](#footnote-ref-78)
79. . Dep’t of Def., DD Form 4, *Enlistment/Reenlistment Document – Armed Forces of the United States* (May 2020), https://www.esd.whs.mil/portals/54/documents/dd/forms/dd/dd0004.pdf. [↑](#footnote-ref-79)
80. . *Id*. [↑](#footnote-ref-80)
81. . *Id*. [↑](#footnote-ref-81)
82. . *Id*. [↑](#footnote-ref-82)
83. . Young, *supra* note 29. [↑](#footnote-ref-83)
84. . *Id*. [↑](#footnote-ref-84)
85. . Swaim v. U.S., 28 Ct. Cl. 173, 217 (1893), *aff’d*, Swaim v. U.S., 165 U.S. 553 (1897). [↑](#footnote-ref-85)
86. . *Id*. [↑](#footnote-ref-86)
87. . OPJAGAF 2013-3, *supra* note 47, at 6. [↑](#footnote-ref-87)
88. . Army Regulation 600-20 4-12, *Extremist Organizations and Activities*, U.S. Army(July 24, 2020). [↑](#footnote-ref-88)
89. . OPJAGAF 2013-3, *supra* note 47, at 3. [↑](#footnote-ref-89)
90. . *Id.* at 4. [↑](#footnote-ref-90)
91. . *Swaim*, 28 Ct. Cl. at 217-18. [↑](#footnote-ref-91)
92. . 10 U.S.C. § 938. [↑](#footnote-ref-92)
93. . *See* *Swaim*, 28 Ct. Cl. 173. [↑](#footnote-ref-93)
94. . Gilligan v. Morgan, 413 U.S. 1, 10 (1973). [↑](#footnote-ref-94)
95. . Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953). [↑](#footnote-ref-95)
96. . DD Form 4, *supra* note 78. [↑](#footnote-ref-96)
97. . *Id.* [↑](#footnote-ref-97)
98. . *Id*. [↑](#footnote-ref-98)
99. . *See* *id*. [↑](#footnote-ref-99)
100. . *Id.* [↑](#footnote-ref-100)
101. . Nolan v. U.S., 44 Fed. Cl. 49, 55 (1999) (quoting 5 U.S.C. § 553(a)(1) (1988)). [↑](#footnote-ref-101)
102. . *Id.* (quoting 5 U.S.C. § 553(b)(3)(A)). [↑](#footnote-ref-102)
103. . *Id.* [↑](#footnote-ref-103)
104. . *Id.* [↑](#footnote-ref-104)
105. . *See* Adam Griffin, *First Amendment Originalism: The Original Law and a Theory of Legal Change as Applied to the Freedom of Speech and of the Press*, 17 First Amend. L. Rev. 91 (2018). [↑](#footnote-ref-105)