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ACADEMIC FREEDOM IN THE “GUARDED” INSTITUTION

DOUGLAS B. McKECHNIE AND ERIC MERRIAM*

I. INTRODUCTION

With the recent conversation surrounding free speech on college campuses, one group of institutions is often forgotten—United States military service academies. Charged with graduating commissioned military officers, service academies play a unique role as both military training facilities and accredited higher education institutions. Faculty at service academies aspire, no less than faculty at civilian institutions, to provide an elite education for their students and produce superior, innovative scholarship. However, they face distinct challenges to their academic freedom. Whether through public pressure or explicit, systemic institutional policies that act as prior restraints, service academy faculty are confronted with public scrutiny and review of their scholarship prior to publication that can have a chilling effect on academic freedom. Indeed, for some service academy faculty, speech is constrained by the force of criminal law.¹

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¹ See, e.g., 10 U.S.C. 888, 933–34, discussed in Part IV, *infra*. Another issue we do not address here is to what extent these free speech restrictions on active duty military members limit student academic expression. While a professor posing the question, “Is the conflict in Syria legally authorized?” might not get the professor into difficulty, what about the cadet’s answer, “Yes, I think the President has dragged us into an illegal war?”

The fundamental issue is that in the service academy context, the service academies attempt to perform an educational function comparable to that of civilian institutions, but are restricted in the way in which they can accomplish that function. Free speech has long been considered an essential bedrock of the civilian educational enterprise. It is protected not only by the First Amendment but through employment arrangements such as tenure designed in large part to protect faculty from institutional and external pressure to avoid articulating controversial or unpopular ideas. The service academies' educational components are accredited by the same bodies that accredit civilian institutions of higher education, but the faculty seem constrained from delivering the same, robust educational product. For some, the departure from the civilian academic experience is not a problem—the service academies perform a different function with a different outcome. Indeed, service academies are not chartered solely to educate, but to produce military officer leaders. However, though we acknowledge the overall mission of the service academies is decidedly different from that of their civilian counterparts, we do not believe that excuses or justifies providing an education that is ideologically constrained.²

² We recognize that service academies are certainly not the only higher education institutions that have restrictions on faculty free speech. A prime example is the faith adherence requirement many private religiously-affiliated colleges and universities impose on faculty, which has the effect of also being a speech restriction. See, e.g., Camila Domonoske, *Professor Who Said Christians, Muslims Share a God is Leaving Christian College*, NPR (Feb. 7, 2016), <http://www.npr.org/sections/thetwo-way/2016/02/07/465916095/professor-who-said-christians-muslims-share-a-god-is-leaving-christian-college>. We believe there are two notable differences between private schools and service academies that suggest service academies ought not be permitted to restrict their faculty speech in the same way. First is the public versus private distinction; service academies cannot violate the First Amendment, while private schools can limit speech in ways that would violate the First Amendment if they were government actors. Additionally, we think the product of the service academies is different. As future military officers and members of the government who will oversee and respond to diverse people and ideas, it is not in the Nation's interest to limit the ideas to which the cadets are exposed during their education. Simply stated, a civilian student is welcome

This Article argues that service academy professors have explicit and implicit limitations on their freedom of speech that can have a chilling effect on academic freedom. The Article suggests that academic freedom is restricted in distinctive ways by the schools themselves, society, and career considerations. Part II is a case study, of sorts, where we explore the public backlash against a controversial article authored by a professor at the United States Military Academy. We discuss the implications of the reactions to the article and the need for a reaffirmation of academic freedom for service academy faculty. Part III identifies institutionalized policies that act as a prior restraint on scholarship produced by service academy faculty. We argue that those policies violate academic freedom and can have a deleterious, chilling effect on scholarly pursuits. Finally, in Part IV we consider servicemember faculty in particular, exploring the limits placed upon them by uniquely military speech crimes and career concerns after they leave their teaching assignments at the academies.

II. *TRAHISON DES PROFESSEURS*, BACKLASH, AND THE REAFFIRMATION OF ACADEMIC FREEDOM

A. *The Article*

In its Spring/Summer 2015 edition, the relatively new student-edited *National Security Law Journal* published an article by William C. Bradford, titled *Trahison des Professeurs*.³ Bradford's ar-

to self-limit the views she is likely to hear during her college experience while a cadet should not be.

³ William C. Bradford, *Trahison des Professeurs: The Critical Law of Armed Conflict Academy as an Islamist Fifth Column*, 3 NAT'L SEC. L.J. 278, https://www.nslj.org/wp-content/uploads/3_NatlSecLJ_278-461_Bradford1.pdf. In a footnote describing the author, Bradford is listed as an Associate Professor of Law at the National Defense University and National Defense College in Abu Dhabi, United Arab Emirates. *Id.* at 278, n.*. The *Journal* is published at the George Mason School of Law. As the title of the *Journal* suggests, it aims to publish scholarship exploring "national security law, including topics relating to foreign affairs, intelligence, and national defense." *About Us*, NAT'L SEC. L.J., <https://www.nslj.org/about/> (last visited March 10, 2016). The

ticle tested the outer limits of the *Journal's* commitment to diverse viewpoints, and arguably blew right past them. Bradford's thesis asserts that a cabal of "elites," including the media and members of the United States government, are eroding the will of the American people to fight "Islamists"⁴ by focusing on instances of United States war crimes and its failure to abide by the laws of armed combat (LOAC).⁵ These actors within United States society are the Islamists' psychological operation force-multipliers in their asymmetric war with the West.⁶ The majority of the piece, however, focuses on the "third element of the triumvirate" cabal—academics that write scholarship critical of, or argue for restrictions on, the United States' use of force in military conflicts.⁷ Bradford spends countless pages collecting and critiquing various scholarly LOAC arguments with which he disagrees.

For example, Bradford criticizes arguments that a person detained during armed conflict is either a combatant or a civilian and that the LOAC does not recognize a third category—"unlawful combatants."⁸ Similarly, he criticizes arguments that those who do not fall under the Geneva Convention's protection for Prisoners of War must nonetheless be entitled to protection from coercive interrogation and receive due process.⁹ In addition, Bradford argues that LOAC scholars hypocritically "condemn state actors when human shields are killed but withhold criticism of Islamist defenders who

Journal invites submissions representing diverse and original contributions to national security law. *Id.*

⁴ Bradford defines "Islamists" as "individual[s] and groups who use or advocate force to recreate the Caliphate . . ." Bradford, *supra* note 3, at 282 n.5.

⁵ *Id.* at 290–91.

⁶ *Id.* at 284, 293.

⁷ *Id.* at 296. In an attempt at either grade school humor or clever wit, Bradford refers to these LOAC scholars as "CLOACA"—contemptuously critical LOACA scholars—undoubtedly knowing that a "cloaca" is the part of the body of some animals into which body waste empties before it is expelled. *Id.* at 301; See *Cloaca*, ENCYCLOPAEDIA BRITANNICA <http://www.britannica.com/science/cloaca> (last visited March 10, 2016).

⁸ *Id.* at 312–13.

⁹ *Id.* at 313.

employ them.”¹⁰ As yet another example, the piece criticizes the argument that the United States’ use of Unmanned Aerial Vehicles—drones—to engage in targeted killing is akin to extrajudicial killing and assassination.¹¹ Academics, Bradford argues, have facilitated the release of unlawful combatants detained by the U.S. by arguing that the U.S. has engaged in torture.¹² Bradford’s analysis can be summed up as a reproach of LOAC scholarship that he believes is too constraining for the United States and too permissive for its enemies. He avers that these, and similar arguments, enable enemies of the United States and increase the risk to United States forces.¹³

Standing on their own, Bradford’s critiques discussed above seem well within the norms of scholarly discourse. However, Bradford does not limit his piece to criticisms of other scholars’ work. He lumps these scholars together into a monolithic entity worthy of blanket opprobrium for their kneejerk assumptions that the United States’ use of military force is immoral and for their failure to hold Islamists accountable for their own war crimes.¹⁴ Bradford’s piece most antagonistically stretches the limits of rationality when he turns from his doctrinally specific responses to certain scholarly LOAC arguments and accuses those authors of engaging in material support for terrorism through their scholarship.¹⁵ He derisively refers to scholars with whom he disagrees as anti-American cowards who are intellectually dishonest and useful idiots comprising a Fifth Column for Islamists.¹⁶ Based on these arguments, he proffers that “disloyal” scholars should be terminated from their employment and charged with treason and material support of terrorism.¹⁷ Departing even further from reality, he asserts that these scholars, the schools

¹⁰ *Id.* at 325–26.

¹¹ *Id.* at 317.

¹² *Id.* at 341–42.

¹³ *Id.* at 314–15.

¹⁴ *See id.* at 301.

¹⁵ *Id.* at 359–60.

¹⁶ *Id.* at 424–33.

¹⁷ *Id.* at 447–49.

in which they teach, and their home offices are lawful targets for military strikes because of their status as unlawful combatants.¹⁸

However ludicrous Bradford's piece may be, it appears to have initially gone, for the most part, unnoticed or ignored.¹⁹ Save from the community of LOAC scholars, it may have remained so.²⁰ However, once he was hired by the United States Military Academy at West Point (USMA) as an assistant professor in early August 2015, the article became international news.²¹ On August 29, 2015 the Guardian newspaper published an article titled *West Point Professor Calls on US Military to Target Legal Critics of War on Terror*.²² The Guardian detailed Bradford's arguments and quoted the *National Security Law Journal's* editor-in-chief describing the article's publication as an egregious mistake.²³ Within days, Bradford resigned from the USMA, reportedly because of misstatements about his prior military service.²⁴ At the same time, Professor Ilya Somin of George Ma-

¹⁸ *Id.* at 449–50.

¹⁹ The website *Opinio Juris* published an editorial criticizing Mr. Bradford's piece on August 17, 2015. However, its author did not discuss his recent hire at the United States Military Academy. Kevin Jon Heller, *The National Security Law Journal Outdoes the Onion*, *OPINIO JURIS* (Aug. 17, 2015, 8:56 PM), <http://opiniojuris.org/2015/08/17/the-national-security-law-journal-outdoes-the-onion/>.

²⁰ Michael E. Miller, *West Point Law Professor Resigns After Advocating Attacks on Colleagues "Sympathetic to Islamist Aims"*, *WASH. POST* (Sept. 15, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/01/west-point-law-professor-resigns-after-advocating-attacks-on-u-s-legal-scholars-sympathetic-to-islamist-aims/> (noting that "[e]ven before the Guardian's article, academics had complained about Bradford's article.").

²¹ Spencer Ackerman, *West Point Professor Calls on US Military to Target Legal Critics of War on Terror*, *GUARDIAN* (Aug. 29, 2015, 8:00 AM), <http://www.theguardian.com/us-news/2015/aug/29/west-point-professor-target-legal-critics-war-on-terror>.

²² *Id.*

²³ *Id.*

²⁴ Matt Ford, *The West Point Professor Who Contemplated a Coup*, *ATLANTIC* (Aug. 31, 2015), <http://www.theatlantic.com/politics/archive/2015/08/west-point-william-bradford/403009/>; Andrew Tilghman, *West Point Professor Resigns After Inflammatory Article*, *MILITARY TIMES*, (Sept. 2, 2015, 8:40 AM),

son University School of Law ridiculed the piece and cited another colleague's astonishment at Bradford's premise.²⁵ The professors also admonished the *Journal* for failing its obligation to publish only quality scholarship.²⁶

B. Reaffirming Academic Freedom

Whether *Trahisson des Professeurs* adds something useful to the scholarly discussion of LOAC is better left to others more versed in the nuances of LOAC. The article, however, is not only a topic for LOAC scholars to discuss. The piece presents a more fundamental challenge for those of us who teach at service academies. How do we join the chorus rejecting Bradford's assertions, while at the same time avoid undermining the academic freedom we have the right to insist upon from our institutions, the media, and the public? Service academies are under a spotlight in which other higher education institutions do not often find themselves. They are responsible for graduating the future leaders of one of the most powerful organs of our society. One wonders whether Bradford's piece would have gained international notoriety had he not been a professor at the USMA. Certainly the service academies retain the institutional academic freedom to hire those professors they believe will effectuate their educational missions.²⁷ However, once hired, service academies, and the nation's interest in them producing well-educated officers capa-

<http://www.militarytimes.com/story/military/2015/09/01/west-point-professor-william-bradford/71530668/>.

²⁵ Ilya Somin, *Student-Edited "National Security Law Journal" Repudiates Article That Advocates Targeting Legal Scholars as "Enemy Combatants" in the War on Terror*, VOLOKH CONSPIRACY (Aug. 31, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/08/31/the-student-edited-national-security-law-journal-repudiates-article-that-advocates-targeting-legal-scholars-as-enemy-combatants-in-the-war-on-terror/>.

²⁶ *Id.*

²⁷ See Alisa Chang, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 952-53 (2001).

ble of thinking critically, can only be served by ensuring the marketplace of scholarly work is unencumbered for their professors.²⁸

With the swift backlash that occurred in Bradford's case, there is a possibility that professors at service academies will receive the message that it is undesirable to explore controversial topics, whether directly related to the military or otherwise. The consistent linking of Bradford with the USMA, the amplified newsworthiness of the piece because of his employer, the unwanted attention to USMA, and his abrupt resignation, all have the potential to chill the scholarly pursuits of service academy faculty. Professors at service academies who might otherwise test orthodoxy or challenge the *staus quo*, no matter their discipline, may avoid drawing attention to themselves or their institution. They recognize that service academies fear bad publicity as much as, if not more than, any other higher education institution. Because of Bradford's experience, professors may fear that scholarship that would otherwise only be read by those in their discipline will instead become an international news story. They may also fear that that sort of attention may result in the institution distancing itself and reevaluating the professor's employment. This apprehension is of particular concern for those professors who have not attained tenure or who work at a service academy that does not provide tenure. This apprehension would be lamentable.

An academic's scholarship should stand on its own merit, without relation to his institution. If Bradford's piece is unworthy of a scholar at a service academy, then it is because it is unworthy of a scholar, not because he is employed by a service academy. This is not to suggest that those professors who pilloried and derided Bradford's piece sought to discourage academic freedom. To the contrary, their reactions to his piece were part of a well-functioning marketplace. Bradford was able to find a journal that, rightly or wrongly, published his piece. Scholars in the field then responded to his piece

²⁸ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'") (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

by lambasting it and the *Journal* for publishing it. And weak scholarship should be derided. However, that derision must be accompanied by the concomitant pledge that, however absurd his proposals, he is “entitled to full freedom in research and in the publication of the results”²⁹

Lest the reaction to Bradford’s piece discourage service academy faculty, they must be affirmatively assured that academic freedom is as much their right as it is the right of academics at other institutions. This right should be guaranteed even if they write about national security, the use of military force, or the way in which the military or government functions. A professor who receives her paycheck from the Department of Defense should not think it is accompanied by an expectation that her scholarship will necessarily conform to the military or government’s messaging. She must feel free to challenge conventional wisdom in her discipline. Indeed, it is because she works for a rigidly hierarchical organization that possesses the power to criminalize insubordinate and contemptuous speech that her academic freedom must be more stridently affirmed. Who better to be a protected voice of dissent, critique, or, perhaps defense of government or military policy than someone from within?

In addition to academic freedom in their scholarship, service academy faculty must also be free to explore unorthodox ideas in the classroom without being daunted by public or media backlash summarized by the comment: “I hope they’re not teaching their students that stuff.” Because service academies hold themselves out as elite institutions of higher education, they must establish and defend, in the face of public pressure, their faculty’s academic freedom to encourage a discipline-based, robust debate within the professor’s classroom. The professors are not military “trainers.” They are not responsible for simply presenting students with data and insisting on memorization and regurgitation. To the extent that training is necessary for the students’ military career, they will, and should, re-

²⁹ 1940 *Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS’N OF UNIV. PROFESSORS 14 (1970), <http://www.aaup.org/file/1940%20Statement.pdf>.

ceive that elsewhere in their academy experience.³⁰ Professors at service academies should be expected to play the same role for their students as professors at civilian institutions. While they undoubtedly have the ethical responsibility to refrain from teaching untruths,³¹ they must also be free to engage their students in thought experiments, theses defense, and exposure to unconventional ideas, especially those ideas that challenge military orthodoxy.

For example, consider a legal studies class at a service academy that explores the laws that govern the use of military force. In the first instance, as with her civilian counterparts, the service academy professor is responsible for knowing and teaching the state of the law. However, the classroom educational experience should not stop there. The professor must be free, indeed expected, to explore the boundaries of the law, the soundness of the law, and the potential for change in the law. Moreover, the professor must be free to assess critically the United States' compliance with existing law. For the public, media, or others to expect that professors avoid these questions with their students for fear they will not be able to distinguish the law "as it is," from what it "should be," "could be," and "should not be" is to infantilize the students and expect less of them than would be expected of students at other higher education institutions. To be sure, students at service academies are just as likely as their civilian counterparts to hear presidential candidates suggest "carpet bombing" an enemy³² or killing combatants' family mem-

³⁰ In part, one's view on the necessity of full academic freedom for service academy faculty is premised on the belief that the faculty at a service academy have a distinct role from the military training staff. Recognizing the overall purpose of service academies to produce officers for the nation's military, we do not contend that everyone in a service academy environment should enjoy full academic freedom. Service members involved in training cadets "how to be an officer," or how to shoot a pistol, for example, do not need full academic freedom. This distinction will be objected to by some military faculty—and indeed some service academy administrators—who do not see the education role as wholly distinct from the training role. Many service member faculty consider themselves to have the dual role of educators and trainers, professors and mentor officers.

³¹ Chang, *supra* note 27, at 934.

³² Chris Magerian, *Ted Cruz Wants to "Carpet Bomb" Islamic State, but with Some Limits*, L.A. TIMES (December 15, 2015, 9:25 PM),

bers.³³ However absurd those ideas may be, the classroom is the forum to confront, test, defend, or reject them without fear that the public or media will decry a military service academy that “teaches students that stuff.”

Bradford’s article, for all its absurdities, presents an opportunity. It is an opportunity to reassert that service academy faculty aspire to the same level of intellectual curiosity and scholarship as their colleagues at civilian institutions. While service academies function as a commissioning source for the military, the faculty who teach and research at those institutions must be equally as engaged in the robust exploration and debate of ideas as their civilian counterparts. If they are to succeed as scholars, then their academic freedom must be trumpeted, even while occasionally castigating a single work that fails to meet professional standards. In addition, the public and media should not assume or expect that the faculty avoid contentious and difficult ideas in the classroom. It should be no less shocking that service academy faculty have the same academic freedom, indeed expectation, to confront their students with difficult questions. We do a disservice to the graduates of service academies and their professors if academic freedom is questioned either in scholarly pursuits or in the classroom.

III. INSTITUTIONAL PRIOR RESTRAINT AND ITS POTENTIAL FOR CHILLING ACADEMIC FREEDOM

A. *Institutional Policies*

In light of Bradford’s article and resignation, despite our disagreement with his assertions, we find it necessary to defend against the prospective threat to academic freedom posed by some service academies’ potentially chilling institutional policies regarding scho-

<http://www.latimes.com/politics/la-pol-sac-ted-cruz-carpet-bomb-20151215-htmlstory.html>.

³³ Tom LoBianco, *Donald Trump on Terrorists: 'Take Out Their Families'*, CNN (Dec. 3, 2015, 12:19 PM), <http://www.cnn.com/2015/12/02/politics/donald-trump-terrorists-families/>.

larship.³⁴ The original source of these policies lies in a Department of Defense Directive (DoDD) that governs the clearance of Department of Defense (DoD) information for public release.³⁵ DoDD 5230.09 is an operational instruction that applies to all organizations within the DoD, including service academies, and requires that all information produced by students and faculty that is intended for public release must first be submitted for review and clearance.³⁶ It directs that “clearance shall be granted if classified information is not disclosed, *DoD interests are not jeopardized*, and the author accurately portrays official policy, even if the author takes issue with that policy.”³⁷ The breadth and vagueness of the emphasized language demonstrate the wide latitude the military maintains to squelch academic scholarship that is contrary to perceived military interests.

³⁴ The use of the word “some” is intentional because it appears that while the USMA and the U.S. Air Force Academy (USAFA) have institution-level policies applicable to all professors regarding the need for institutional “clearance” of scholarship prior to publication, the United States Naval Academy (USNA) apparently does not. See USAFA’s FOI 35-101; *Army Regulation 360-1, The Army Public Affairs Program*, U.S. DEPT. OF THE ARMY (May 25, 2011), http://armypubs.army.mil/epubs/pdf/r360_1.pdf (applies to the USMA [hereinafter *AR 360-1*]). Nevertheless, Department of Defense regulations apply to the USNA whether they have a service or “local” implementing instruction. See, e.g., *Department of Defense Directive No. 5230.09, Clearance of DoD Information for Public Release*, U.S. DEP’T OF DEFENSE (Aug. 22, 2008), para. 2.a., <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf>

³⁵ *Department of Defense Directive No. 5230.09, Clearance of DoD Information for Public Release*, U.S. DEP’T OF DEFENSE (Aug. 22, 2008), <http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf> [hereinafter *DoDD 5230.09*].

³⁶ *Id.* *DoDD 5230.09* curiously claims to “ensure a climate of academic freedom” by exempting from this requirement papers or materials that will not be released outside the institution. *Id.* at 2. While student papers will often meet this requirement, we suspect most faculty spend little time producing academic papers that are *not* intended for release outside the institution. Thus, while *DoDD 5230.09* begins by espousing academic freedom, it then goes on to limit academic freedom for the scholarly work that academic freedom is most oft sought. This sleight of hand invokes the biblical passage from the book of Job: “the Lord giveth, and the Lord taketh away.” *Job* 1:21.

³⁷ *DoDD 5230.09, supra* note 35, at 2 (emphasis added).

Army Regulation 360-1, which essentially incorporates the DoD language above, applies to the USMA.³⁸ The United States Air Force Academy (USAFA), however, has created its own “Faculty Operating Instruction,” FOI 35-101, to effectuate DoD 5230.09.³⁹ Notably, both Army Regulation 360-1 and FOI 35-101 originate as “Public Affairs” directives from the U.S. Army and within USAFA, respectively.⁴⁰

The USAFA’s FOI 35-101 creates a clearance process by which all faculty are required to submit any material planned for public release.⁴¹ The material must be submitted to both the faculty member’s department head and the Director of Research. In addition to reviewing for security issues and “policy consistency,” the department heads are expected to serve as the subject matter experts and competent authorities for their disciplines.⁴² The Director of Research is the Dean’s Public Affairs Representative and also provides a security and policy consistency review.⁴³ While the objective is “maximum” clearance, the materials must not be contrary to the national interest and security, must “accurately” portray official policy, may not conflict with the public receiving prompt and complete information, may not conflict with law, and may not “conflict with ethical standards, or otherwise be incompatible with the responsibilities of the government personnel.”⁴⁴ If a manuscript is not cleared for publication, there is a procedure by which a faculty member can appeal the decision.⁴⁵ In addition to the need for clearance of publications, if a media outlet requests an interview of a faculty member,

³⁸ AR 360-1, *supra* note 34.

³⁹ On file with author.

⁴⁰ *Id.*; AR 360-1, *supra* note 34.

⁴¹ United States Air Force Academy Faculty Operating Instruction 35-101, *Clearance of Material for Public Release and Academic Freedom*, January 24, 2008. In the interest of full disclosure, and appreciating the irony, we note this very article was subject to the approval process discussed in this paragraph.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

the faculty member is required to coordinate the response and arrange the interview through the Public Affairs office.⁴⁶

B. Prior Restraints and Their Chilling Effect

To the extent that both the Supreme Court and commentators have considered the idea of academic freedom, it has often been through the lens of the First Amendment's commitment to open and robust debate.⁴⁷ That robust debate, particularly in academia, cultivates critical inquiry and brings about change and progress in society.⁴⁸ University professors play a role as "priests of our democracy," responsible for cultivating and practicing that exchange of ideas.⁴⁹ If academic freedom is corollary to our commitment to free speech as embodied in the First Amendment, then First Amendment principles must inform its understanding.

Perhaps the first and most important principle that led to the adoption of the First Amendment was rejection of prior restraints on expression.⁵⁰ The Court has defined prior restraints as a requirement that one's speech be submitted "to an official who may grant or deny permission to utter or publish it based upon its contents."⁵¹ There is a heavy presumption that prior restraints are unconstitutional.⁵² The disdain for prior restraints on speech lies in the preference of a "free society . . . to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand."⁵³ The

⁴⁶ *Id.*

⁴⁷ See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1096 (2003).

⁴⁸ *Wieman v. Updegraff*, 344 U.S. 183, 195-97 (1952).

⁴⁹ *Id.* at 196.

⁵⁰ *Schenck v. United States*, 249 U.S. 47, 51-52 (1919) ("It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . ."); see also *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

⁵¹ *Alexander v. United States*, 509 U.S. 544, 566 (1993).

⁵² *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

⁵³ See *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975).

purpose of this Article is not to explore the legality of prior restraints on scholarly publications. However, if academic freedom exists as a consequent interest to First Amendment values, then prior restraint on scholarly work should be presumed to be anathema, and a violation of academic freedom, only justified in the most limited, exceptional circumstances.⁵⁴

For most civilian scholars, any review and clearance process would be unheard of as they demand, and receive, the freedom to publish their scholarship “without interference from political or ecclesiastical authority, or from the administrative officials of the institution”⁵⁵ The expectations of service academy faculty should be no different. They should be free to share their ideas in the same way as their civilian colleagues. No less than their civilian colleagues, they are paid to develop theories, to speak, to write, and to teach about their intellectual labors in all stages of the creation, dissemination, and reformulation of those ideas.⁵⁶ However, the need to attain departmental and institutional approval may chill the topics a faculty member decides to explore and develop. There is a disincentive to investigate ideas one may perceive her department head, or the institution, thinks unworthy of scholarly pursuit, too divergent from the status quo, or too close to the line of prohibited scholarship. This is particularly so in the case of faculty who are not yet tenured or at institutions that do not offer tenure. In addition, the requirement that a scholar submit her work for internal approval may discourage the best faculty members from joining the institution altogether.

Moreover, as the internal review and clearance process is at least in part related to public affairs concerns, it seems to imply that

⁵⁴ Undoubtedly there are some disciplines, at civilian and military institutions, that have various legal limitations on the sharing of their scholarship. For example, there are laws that prohibit the sharing of certain technology. *See, e.g.*, 22 U.S.C., ch. 39 (2015) (regulating arms exports). However, there should not be a blanket review process applicable to all disciplines simply because a handful requires it. Each department’s need for a review process should be assessed and instituted only where necessary to comply with the law.

⁵⁵ Arthur Lovejoy, *Academic Freedom*, 1 ENCYC. OF THE SOC. SCIS. 384, 384 (1930).

⁵⁶ Jennifer Elrod, *Academics, Public Employee Speech, and the Public University*, 22 BUFF. PUB. INT. L.J. 1, 64 (2004).

the academic mission and one of its primary pillars—scholarship—is a matter of public affairs or “optics.” Undoubtedly, for various reasons the public and media often hold service academies to a different standard when compared with other higher education institutions. They are often too quick to attribute the actions of a few to the entire institution. Nevertheless, scholarly writing should not be viewed with an eye towards public relations. It should be viewed through the lens of scholarship’s purpose: to add value, perspective, and enrichment to a discipline. Certainly faculty trumpet academic freedom because their scholarship may challenge, offend, or make people uncomfortable. However, to aspire to the highest ideals of academic freedom, the marketplace and professional peers should determine whether a piece is worthy of publication, not the institution. To be sure, the administrations within service academies may find themselves confronted with “disagreeable” scholarship from their faculty. Yet it is better to deal with the public relations concerns of the few who draw unwelcome attention through their scholarship “than to throttle them and all others beforehand.”⁵⁷

When discussing the need for institutional and departmental clearance before publication, it is often suggested that the department head and institution need to be forewarned if a faculty member plans to publish a scandalous piece. That suggestion, however, furthers the potentially chilling effect of the policy. Faculty at civilian institutions rely on the administration to raise the shield of academic freedom to deflect public criticism of a professor’s scholarship. A professor who is asked to forewarn his institution before publishing an edgy piece could receive the message that the institution is so concerned about getting ahead of the public reaction that it is best to avoid placing the institution, and perhaps the professor himself, in that position. In addition, or in the alternative, it is suggested that if a department head knows about his faculty’s avant-garde scholarship, he can provide “coverage” for the faculty member if her work would cause discomfort for the institution. This too presents a potentially chilling message. To the extent the department head’s review of

⁵⁷ *Promotions, Ltd.*, 420 U.S. at 559.

scholarship places him in a position to provide coverage, it invites the disturbing question: Coverage from what?⁵⁸

The need for institutional awareness of scholarly pursuits seems to be a unique response engrained in the operational military. Commanders in the military are expected to have intimate knowledge of, and take responsibility for, their subordinates' behavior—both professional and personal.⁵⁹ The commander's effectiveness is then judged by the subordinates' performance of their tasks. Unlike academia, however, a commander's subordinates are expected to perform a specific task in line with their training.⁶⁰ The success of a particular mission is not directly tied to the innovation of ideas or theories that the soldiers produce.⁶¹

Some service academies have imported that supervisor/supervisee relationship into the university setting, though it seems at odds with the role professors play in higher education. In particular, the requirement that a professor seek prior approval before publication fails to recognize a professor's unique duties and role within the institution. The role of professors, whether at civilian or military institutions, is to "put their views on public display almost daily through their scholarship, research, public statements, classroom teaching, and community service."⁶² While uniformity of task performance and direct supervisory responsibility is valuable in the operational military and other professions, academics succeed when they are utterly free to "test[], retest[], and refine[]" their theories in an open exchange of ideas.⁶³ Indeed, it is when their ideas are

⁵⁸ Department heads, and seemingly the institution writ large, are expected to know what their subordinates are publishing and, if confronted with the unorthodox or controversial work of a professor, they are expected to have knowledge of it. This would seem unimaginable in a civilian institution; no department head would be expected to have reviewed, be knowledgeable of, and responsible for his professors' scholarship. However, holding a department head responsible for what his professors writes fits with the expectations placed on the supervisors in the operational military.

⁵⁹ Used here, "commander" is synonymous with "supervisor."

⁶⁰ See Elrod, *supra* note 56, at 66.

⁶¹ *Id.*

⁶² See *id.* at 63.

⁶³ *Id.*

considered novel and cutting-edge that a scholar's efforts are considered a success.⁶⁴ In addition, those professional successes aid the institution by attracting other "sources of revenue, scholars, and students."⁶⁵ While strict supervisory responsibility is valuable in the operational military, it can limit the professor's responsibility to formulate theories and challenge students, thus subverting the goal of higher education.⁶⁶

IV. UNIQUE CONSIDERATIONS FOR MILITARY FACULTY AT SERVICE ACADEMIES

A. *Legal Restraints*

Though a significant focus of this Article is to identify extra-legal constraints on academic freedom at the United States' military service academies, it is important to recognize there are significant legal constraints on a large percentage of their faculties as well. At least two thirds of the faculty at the United States Air Force Academy (USAFA) and United States Military Academy (USMA), and roughly half of the faculty at the United States Naval Academy (USNA), are active duty service members who experience real legal restraints on their free speech, without exception for academic expression.⁶⁷ The

⁶⁴ *See id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 61.

⁶⁷ The proportion of faculty who are military officers versus civilian employees at each service academy varies. The USNA faculty is roughly 50 percent civilian, while the USMA and USAFA hover between 25 and 40 percent. "Faculty" are educators engaged in classroom instruction that is roughly consistent with the understanding of that term in civilian academia. The term does not include the many more service members and civilians engaged in "training" activities such as teaching cadets how to shoot pistols or pilot aircraft. *See* Kirsten M. Keller, et al., *The Mix of Military and Civilian Faculty at the United States Air Force Academy: Finding a Sustainable Balance for Enduring Success*, RAND CORP. 5-6 (2013), http://www.rand.org/content/dam/rand/pubs/monographs/MG1200/MG1237/RAND_MG1237.pdf. Aside from internal service academy policies, legal restrictions on the type of speech that might limit academic freedom are primarily aimed only at military servicemembers. Though the Hatch Act of 1939 prohibits political activity by certain federal government employees, including civilian

Supreme Court has clearly and repeatedly emphasized that the military is a separate society.⁶⁸ In 1953, the Supreme Court said, “The military constitutes a specialized community governed by a separate discipline from that of the civilian.”⁶⁹ The Court later applied this “separation” to the free speech context, finding that servicemembers do not enjoy the same First Amendment protections as their civilian counterparts:

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.⁷⁰

Because of the Court's restrictive understanding of service members' free speech rights, we make no claim here that restrictions on service academy faculty's free speech unconstitutionally violate the First Amendment. Rather, we argue it is not in the academies'—and the Nation's—interest to limit faculty speech in the way the military departments and their service academies currently can. Simply stated, when cadets at service academies learn from active duty service member faculty, they are learning from individuals who are not free to express views as broad, varying, and educational as their faculty counterparts at civilian institutions.

Service member faculty are specifically constrained by several provisions of the Uniform Code of Military Justice (UCMJ), to which all active duty service members are subject. Three articles of the UCMJ are the most likely to be implicated by a professor engaging in the type of speech that might ordinarily be considered pro-

faculty members, its prohibitions for civilians like service academy professors do not restrict speech in a way that limits academic freedom.

⁶⁸ See, e.g., *Parker v. Levy*, 417 U.S. 733, 758 (1974); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

⁶⁹ *Orloff*, 345 U.S. at 94.

⁷⁰ *Parker v. Levy*, 417 U.S. at 758.

tected academic expression:⁷¹ Article 88 prohibits “Contemptuous Words Toward Certain Officials;”⁷² Article 133 prohibits “Conduct Unbecoming an Officer and a Gentleman;”⁷³ and Article 134 prohibits “Disorderly Conduct” that either prejudices good order and discipline or brings discredit upon the armed forces.⁷⁴

Article 88 prohibits commissioned officers⁷⁵ from using “contemptuous words” against the President, Vice President, Congress, Secretary of Defense, and other similar senior civilian officials.⁷⁶ The statute does not define “contemptuous,” leaving a significant question regarding what types of comments are punishable. The Manual for Court-Martial explanation of the offense states that adverse criticism of an official in the course of a political discussion is not chargeable.⁷⁷ Rather, the comments must be *personally* contemptuous.⁷⁸ While this limitation seems to insulate the kinds of genuine political dialogue in which faculty might engage, the only reported appellate case addressing an Article 88 conviction suggests otherwise.⁷⁹ Additionally, aggravating circumstances include: “giving broad circulation to a written publication containing contemptuous words,” as a scholar would when publishing; and “utterance of contemptuous words . .

⁷¹ A host of other provisions could ostensibly be implicated, though we think it unlikely. These include: Article 89, Disrespect of a Superior Commissioned Officer, 10 U.S.C. § 889 (2015); Article 92, Failure to Obey an Order or Regulation, 10 U.S.C. § 892 (2015); Article 104, Aiding the Enemy, 10 U.S.C. § 904 (2015); and Article 117, Provoking Speech or Gestures, 10 U.S.C. § 917 (2015).

⁷² 10 U.S.C. § 888 (2015).

⁷³ 10 U.S.C. § 933 (2015).

⁷⁴ 10 U.S.C. § 934 (2015).

⁷⁵ To our knowledge, though enlisted members play a vital training role at each service academy, all servicemember faculty are commissioned officers.

⁷⁶ 10 U.S.C. § 888 (2015).

⁷⁷ MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 12c (2000) [hereinafter MCM].

⁷⁸ *Id.*

⁷⁹ *United States v. Howe*, 37 C.M.R. 429 (1967); discussed *infra* at notes 80–81 and accompanying text.

. in the presence of military subordinates,”⁸⁰ as a faculty member might do with their cadet students in the classroom.

The paucity of modern Article 88 prosecutions leaves the contours of this offense undefined.⁸¹ The only such conviction to receive appellate review since the UCMJ was enacted in 1950 was the court-martial of Lieutenant Henry Howe, in which he was convicted of violating Article 88 for holding a sign in a demonstration that read “LET’S HAVE MORE THAN A ‘CHOICE’ BETWEEN PETTY, IGNORANT, FACISTS [sic] in 1968” on one side and “END JOHNSON’S FACIST [sic] AGGRESSION IN VIETNAM.”⁸² Howe was ostensibly convicted because labeling the President’s actions “fascist” and implying Johnson was a “petty, ignorant fascist” were considered contemptuous.⁸³ One can see how this particular example might be troubling to military faculty, such as those in academic disciplines like political science, history, law, and military studies that assess presidential policy, and who may have legitimate academic reasons to characterize various political officials and their actions as “petty,” “ignorant,” or “fascist.” Indeed, recent popular discussion of whether a presidential candidate’s policies are “fascist”⁸⁴ highlights the possibility that a professor may wish to publish serious analysis that concludes the

⁸⁰ *Manual for Courts-Martial United States* U.S. DEP’T OF DEFENSE IV-17 (ed. 2012), https://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2012.pdf [hereinafter *Manual for Courts-Martial*].

⁸¹ Over 100 general courts-martial for offenses under predecessors to Article 88 were convened during the Civil War and two World Wars. See John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1720 (1968). The authors are aware of only two such prosecutions since the UCMJ was enacted in 1950: *United States v. Howe*, 37 C.M.R. 429 (1967) and that of Lieutenant Watada, Hal Bernton, *Army Charges Lieutenant Who Wouldn’t Go to Iraq*, SEATTLE TIMES (Jul. 6, 2006), http://old.seattletimes.com/html/iraq/2003107653_watadacharged6m.html.

⁸² *United States v. Howe*, 37 C.M.R. 429, 433 (1967).

⁸³ *Id.* at 445.

⁸⁴ See, e.g., Jamelle Bouie, *Donald Trump is a Fascist*, SLATE (Nov. 25, 2015), http://www.slate.com/articles/news_and_politics/politics/2015/11/donald_trump_is_a_fascist_it_is_the_political_label_that_best_describes.html; M.J. Lee, *Why Some Conservatives Say Trump Talk Is Fascist*, CNN (Nov. 25, 2015), <http://www.cnn.com/2015/11/24/politics/donald-trump-fascism/>.

policies are indeed fascist, and such expression may come even after the candidate has been elected President. Under current law, such a conclusion would be unwise for a military faculty member to say or publish.

Even more nebulous than Article 88 is the UCMJ's Article 133, which prohibits "conduct unbecoming an officer and a gentleman."⁸⁵ Many varied activities fall within this proscription, including, but not limited to, cheating on an exam, public drunkenness, and public association with known prostitutes.⁸⁶ One well-known case of an Article 133 prosecution for engaging in expressive activity is the court-martial of Captain Howard Levy during Vietnam.⁸⁷ Levy was charged with violating Article 133 for making "statements variously described as intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful to Special Forces personnel and to enlisted personnel who were patients or under his supervision."⁸⁸ These statements included encouraging black soldiers to refuse to deploy due to racial discrimination and referring to special forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children."⁸⁹ As with Article 88, context matters regarding whether statements constitute an offense, but the statements that constituted a violation of Article 133 in this case should give servicemember faculty pause. It is not difficult to imagine faculty at colleges and universities referring to military activity as "murder" or suggesting servicemembers should object to perceived racial inequity. However, the student cadets at a service academy will not hear this view personally adopted or articulated by a cautious servicemember professor. In fact, the student cadet is quite likely to hear only a vigorous denouncement of such views. Moreover, there is

⁸⁵ Article 133 has been challenged as void for vagueness and thus providing insufficient notice numerous times, but appellate courts have routinely upheld the Article. *See, e.g.,* *Parker v. Levy*, 417 U.S. 733, 746-47 (1974); *United States v. Rogers*, 54 M.J. 244, 256 (C.A.A.F. 2000); and *United States v. Amazaki*, 67 M.J. 666, 670 (A. Ct. Crim. App. 2009).

⁸⁶ *Manual for Courts-Martial*, *supra* note 78, at IV-100.

⁸⁷ *Parker*, 417 U.S. at 733.

⁸⁸ *Id.* at 739.

⁸⁹ *Id.* at 737.

strong disincentive for a military faculty member at a service academy to declare United States military actions contrary to international or domestic law.

The most indistinct of all UCMJ offenses may be Article 134, which prohibits disorderly conduct that is “to the prejudice of good order and discipline” or brings “discredit upon the armed forces”⁹⁰ Though the *Manual for Courts-Martial* contains a list of specifically identified disorders that can be charged under Article 134, any “disorder” that either disrupts good order and discipline or brings discredit upon the armed forces may be charged.⁹¹ In the free speech context, one such early case involved the court-martial of Private First Class Allen McQuaid.⁹² McQuaid was an Air Force band member who made a variety of assertions for which he was convicted under Article 134, including claiming the Cold War was being waged by the banking industry to protect an unfair economic system and that servicemembers with successful careers succeeded because they compromised their integrity and pandered to “capitalists and their henchmen.”⁹³ McQuaid appealed to “guys who ‘hate’ the service” to “follow the dictates of their own consciences.”⁹⁴ As in other cases described above, McQuaid’s comments are in the same vein one might expect a professor to discuss, perhaps in the context of a course or scholarship in political science, government, law, or military studies. For example, a professor wishing to echo sentiment expressed in some quarters that a particular military conflict was primarily conducted for the benefit, or at the behest, of large military contractors would essentially be making the same claims as McQuaid.

The number of appellate cases addressing Article 88, 133, and 134 convictions in the free speech context is small, and often those cases are old. It is difficult to know whether that is due to few incidents of such expression, a general military sensitivity to First Amendment concerns, or both. But the existence of such cases at all,

⁹⁰ 10 U.S.C. § 934 (2015).

⁹¹ *Id.*

⁹² *United States v. McQuaid*, 5 C.M.R. 525 (A.F.B.R. 1952).

⁹³ *Id.* at 528.

⁹⁴ *Id.*

combined with unfettered commander discretion regarding charging decisions, can have the effect of chilling speech by servicemember faculty who might otherwise assert anti-administration or anti-military positions in their role as educators.

Prosecution for engaging in political speech of the type a professor might articulate is rare, but is neither hypothetical nor limited only to decades-removed cases. In 2006, Army Lieutenant Ehren Watada was charged with violating Article 88 for contemptuous statements, including:

[T]his administration was just continually violating the law to serve their purpose, and there was nothing to stop them. Realizing the president is taking us into war that he misled us . . . has broken the bond of trust that we had. If the president can betray my trust, it's time for me to evaluate what he's telling me to do.⁹⁵

Additionally, Watada was charged with violating Article 133 for various statements, such as: The United States war in Iraq was illegal, illegitimate, and contrary to “what the Constitution extols”; his participation in the war would “make [him] party to war crimes”; he was ashamed of wearing the uniform because of the deception used to initiate the war; and that to stop an illegal and unjust war, soldiers can choose to stop fighting it.⁹⁶ While Lieutenant Watada was not a professor at a service academy, the case is instructive because the UCMJ applies equally to Lieutenant Watada and servicemember professors. Again, Lieutenant Watada’s comments are of the same type one might expect a professor—perhaps in a law, political science, or military studies course—to make in scholarship or to students. In light of Articles 88, 133, and 134, such a military faculty member

⁹⁵ Hal Bernton, *Army Charges Lieutenant Who Wouldn't Go to Iraq*, SEATTLE TIMES (Jul. 6, 2006), http://old.seattletimes.com/html/iraq/2003107653_watadacharged6m.html. The Article 88 charges were dropped before trial. Ultimately, Watada’s prosecution failed due to prosecutorial missteps and double jeopardy.

⁹⁶ *Full Text Of Watada Statements Cited In Army Charging Documents*, SEATTLE TIMES (Feb. 3, 2007), <http://www.seattletimes.com/seattle-news/full-text-of-watada-statements-cited-in-army-charging-documents/>.

would have to be very cautious, if not completely avoid, making such claims.

In addition to the statutory provisions identified above, military regulations also limit certain forms of speech by all service-members, and accordingly active duty faculty at service academies. DoDD 1344.10 generally requires that members on active duty not engage in partisan political activity, and that members not on active duty avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement.⁹⁷ The DoDD specifically identifies some prohibited practices, while warning that other activities not expressly prohibited may nevertheless be prohibited if they are contrary to the “spirit and intent” of the Directive.⁹⁸ Expressly prohibited activities that could arguably limit otherwise legitimate academic expression include: “allow[ing] or caus[ing] to be published partisan political articles, letters, or endorsements signed or written by the member that solicits votes for or against a partisan political party, candidate, or cause;” “speak[ing] before a partisan political gathering, including any gathering that promotes a partisan political party, candidate, or cause;” and “participat[ing] in any radio, television, or other program or group discussion as an advocate for or against a partisan political party, candidate, or cause.”⁹⁹

Each of these broadly prohibited categories of activities include the types of academic speech in favor of or in opposition to a political position, or possibly even specific candidate, in which academics often engage. For example, an international relations professor who wishes to publish an article detailing the anticipated adverse international consequences of electing a particularly polarizing presidential candidate—and arguing that voters should select another candidate—would be prohibited. The prohibition of advocacy for partisan *causes* is even more limiting, as it ostensibly limits broader issue-based advocacy scholarship. And the degree to which

⁹⁷ *Department of Defense Directive No.1344.10, Political Activities by Members of the Armed Forces*, DEP’T OF DEFENSE 2 (February 19, 2008) <http://www.dtic.mil/whs/directives/corres/pdf/134410p.pdf>.

⁹⁸ *Id.* at para. 4.1.5.

⁹⁹ *Id.* at para. 4.1.2.3–4.1.2.6.

a particular cause must be associated with a specific political party is unclear. For example, might the close relationship between Federalist Society members and the Republican Party (especially in the form of judicial nominations) mean that advocating for or against Federalist Society ideals is prohibited?¹⁰⁰

Department of Defense Instruction (DODI) 1325.06 directs military commanders to balance servicemember free speech rights against national security and good order and discipline.¹⁰¹ Under DODI 1325.06, military personnel may not:

actively advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or those that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights.¹⁰²

Here, the lack of specificity regarding what is “extremist doctrine,” “extremist ideology,” or “illegal discrimination” may chill some speech in which military faculty members might otherwise engage. For example, if a military studies professor wishes to publish an article advocating a return to male-only military service and notes with approval organizations supporting that cause, has he violated this regulation? What about a philosophy professor who advocates adoption of some form of sharia law in predominantly Muslim communities in the United States?

¹⁰⁰ See, e.g., MICHAEL AVERY & DANIEL McLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS* (2013); David Fontana, *A Small Right-Wing Conspiracy: The Federalist Society*, *THE DAILY BEAST* (JUNE 11, 2013), <http://www.thedailybeast.com/articles/2013/06/11/a-small-right-wing-conspiracy-the-federalist-society.html>.

¹⁰¹ *DoD Instruction 1325.06, Handling Dissident and Protest Activities Among Members of the Armed Forces*, DEP'T OF DEFENSE para. 3.b (Nov. 27, 2009), <http://www.dtic.mil/whs/directives/corres/pdf/132506p.pdf>.

¹⁰² *Id.* at para. 8.a.

B. Career Restraints

Military faculty members at service academies also potentially suffer from the chilling effect of adverse career consequences from engaging in controversial or unpopular speech.¹⁰³ At each major service academy, the vast majority of military faculty are “rotational,”¹⁰⁴ meaning they are assigned to teach at the service academy for an assignment only, and then are returned to operational roles in their respective services.¹⁰⁵ Military faculty members receive the same performance evaluations as their non-faculty counterparts, and negative, or even mediocre, performance reports due to a faculty member’s expression of unpopular opinions would follow that servicemember for the remainder of their military career.¹⁰⁶ Moreover, knowing one must return to a specific military occupation provides strong incentive not to criticize members of that occupation or its leaders. For example, a pilot teaching at a service academy would very likely avoid criticizing fellow pilots in the classroom or in scholarship, fearing subsequent reprisal from other pilots or being required to engage, perhaps hypocritically, in the same activity the fa-

¹⁰³ As noted above, we are aware there are potential career concerns for civilian faculty members at service academies, too, especially where tenure is not offered.

¹⁰⁴ A small percentage of military faculty at each major service academy enjoy permanent positions on the faculty, whether through appointment as a “Permanent Professor” under federal law, 10 U.S.C. § 4336 (2015), or by service-specific regulations permitting long-term assignment. *See, e.g.*, HQ United States Air Force Academy Operating Instruction 36-3520, *Senior Military Faculty*, March 13, 2015, <http://static.e-publishing.af.mil/production/1/usafa/publication/usafai36-3520/usafai36-3520.pdf>

¹⁰⁵ Instructor duty is typically a four-year assignment. *See, e.g.*, *Employment in the Department of Political Science*, U.S. AIR FORCE ACAD., <http://www.usafa.edu/df/dfps/Employment/employmentpage.cfm>. (last visited March 13, 2016).

¹⁰⁶ *See, e.g.*, AFI 36-2406, *Officer And Enlisted Evaluation Systems*, 30 November 2015, para. 1.1 (discussing the purpose of officer evaluation system, of which annual performance reports are the primary component, “is to provide a reliable, long-term, cumulative record of performance and promotion potential based on that performance”).

culty pilot criticized. Similarly, a law professor might avoid attacking the publicly expressed legal opinions of the Judge Advocate General of her service, no matter how valid and worthwhile such scholarship might be, fearing such statements would doom her subsequent career progression. At this time, there are no institutional protections for servicemember faculty who will return to their operational specialties following their “tour” as an instructor. This means the very individuals best positioned, based on experience and education, to challenge military orthodoxy are strongly disincentivized from engaging in academic criticism of military activities. In general, the military does not value dissent, and the non-academic military leaders who control a servicemember’s career are highly unlikely to excuse such dissent because it was uttered while the servicemember was in an academic position. Indeed, to many that notion is laughable.

V. CONCLUSION

One might observe that each of the above potential limitations on free academic expression can be skirted if professors are willing merely to present ideas, rather than advocating them. For example, presenting the idea that “*some have argued* the United States’ use of force in Syria is without legal justification” is qualitatively different than affirmatively asserting “the war in Syria is illegal,” with the emphasized language essentially disassociating the professor from the view. And while the successful classroom presentation of that idea to cadets might occur through either articulation, this presents a fundamental question: Is it the academic’s role to advocate rather than simply inform? If the answer is no, then the negative effect of the legal restrictions dissipates greatly. However, we expect that most scholars—certainly those in our discipline of law—would argue the opposite. Whether a professor chooses pedagogically to advocate or inform in the classroom, scholarship advocates a thesis, and this type of speech by military faculty members is constrained.¹⁰⁷

¹⁰⁷ Indeed, one of the authors of this article once chose to forego publishing an article in the national security law arena for the reasons stated above.

Professors play a unique role in society. Unlike virtually all other professions, they are charged with pondering, nurturing, and sharing the ideas that often challenge conventional thinking. In order to meet that charge they must be free to test and refine those ideas with others, whether the public or experts in their field. If that freedom to submit ideas to the marketplace is limited by institutional policies that serve a gate-keeping function, the result could be a calculation by some that, for various reasons, it is best to not pursue a particular line of inquiry or argument. That would be regrettable because it is in that uninhibited zone of inquiry that the freest intellectual experimentation can take place and, even by professors at service academies, progress can be made.

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