

A FIRST AMENDMENT ANALYSIS OF MILITARY REGULATIONS RESTRICTING THE WEARING OF MILITARY UNIFORMS BY MEMBERS OF THE INDIVIDUAL READY RESERVE WHO PARTICIPATE IN POLITICALLY THEMED THEATRICAL PRODUCTIONS

Abstract: Adam Kokesh, a veteran of the Iraq War and a member of the Individual Ready Reserve, performed a public reenactment of combat in Iraq while wearing elements of his military uniform. Although federal statutes permit the wearing of a military uniform during such expression, the United States Marine Corps punished Kokesh based on his violation of military regulations. This Note explains that Kokesh's experience is representative of a policy by which the uniform-related expression of members of the Individual Ready Reserve has been restricted to a greater degree than that of the general public. After examining three available First Amendment standards by which this additional restriction might be evaluated, this Note concludes that the most appropriate standard is the standard for the regulation of expressive conduct and that the imposition of this additional restriction on the uniform-related expression of members of the Individual Ready Reserve fails to satisfy that standard.

INTRODUCTION

Adam Kokesh served as a United States Marine in the Iraq War.¹ After returning to the United States, he received an honorable discharge from active duty and became a graduate student at George Washington University.² Kokesh sought to communicate to the public both the nature of his experiences in combat and his opinions about the morality of the continuing occupation of Iraq.³ Pursuing this goal, Kokesh and other veterans donned elements of military uniforms and staged a reenact-

¹ See David Montgomery, *Antiwar to the Corps*, WASH. POST, May 31, 2007, at C1.

² See *id.*

³ See *id.*; see also Dave Helling, *Marine's War Protest Brings Charges*, CLASH, KAN. CITY STAR (Mo.), June 1, 2007, at A1.

ment of a typical mission in Iraq on the streets of Washington, D.C., in the spring of 2007.⁴

Federal statutes permit the wearing of a military uniform in this context.⁵ Military regulations governing servicemembers in the active and reserve components, however, prohibit the wearing of military uniforms in such performances.⁶ Kokesh, like tens of thousands of other veterans of recent wars, was a member of the Individual Ready Reserve ("IRR"), a reserve component of the military.⁷ Members of the IRR essentially live and work as civilians but may be recalled to active duty in times of national emergency.⁸

Following the event in Washington, D.C., a photo taken of Kokesh during the event appeared in a prominent newspaper.⁹ Within days, officers at the highest levels of the Marine Corps hierarchy initiated disciplinary action against Kokesh and two other IRR members who wore uniform items at antiwar protests.¹⁰ Kokesh was stripped of his honorable discharge and was administratively separated from the IRR.¹¹ In general, such involuntary administrative separation can result in limited access to veterans' benefits and may interfere with efforts to secure civilian employment.¹²

This Note considers the question of whether the First Amendment permits the government to restrict the uniform-related expression of IRR members when it has declined to restrict such expression in the general public.¹³ Part I of this Note briefly describes the historical practices of veterans' organizations, examines situations in which IRR members may be disciplined for engaging in similar practices, and explains that non-veterans may lawfully engage in at least some of the uniform-related expression for which IRR members may be punished.¹⁴ Part II articulates three available standards for evaluating whether the imposition of additional restrictions on IRR members' expression denies to

⁴ See Montgomery, *supra* note 1.

⁵ See 10 U.S.C. § 772(f) (2006); 18 U.S.C. § 702 (2000). See generally *Schacht v. United States*, 398 U.S. 58 (1970) (stating that the exceptions listed in 10 U.S.C. § 772 limit the applicability of 18 U.S.C. § 702 and that street skits fall within § 772(f)).

⁶ See *infra* notes 51–61 and accompanying text.

⁷ See Montgomery, *supra* note 1.

⁸ See *infra* notes 38–50 and accompanying text.

⁹ See David Montgomery, *Far from Iraq, a Demonstration of a War Zone*, WASH. POST, Mar. 20, 2007, at C1.

¹⁰ See *infra* notes 69–74 and accompanying text.

¹¹ See *infra* notes 75–77 and accompanying text.

¹² See *infra* notes 55–58 and accompanying text.

¹³ See *infra* notes 214–312 and accompanying text.

¹⁴ See *infra* notes 17–105 and accompanying text.

them the guarantees of the First Amendment.¹⁵ Part III argues that the most appropriate test of constitutionality is the standard for the regulation of expressive conduct and concludes that the imposition of additional restrictions on IRR members' expression fails to satisfy the requirements of that standard.¹⁶

I. VETERANS, MILITARY UNIFORMS, AND PUBLIC EXPRESSION

A. Historical Context

War veterans have traditionally exercised substantial influence over the nation's political process.¹⁷ Following the Civil War, military veterans comprised roughly five percent of the population and organized the nation's first veterans' organization, the Grand Army of the Republic, in order to maximize the impact of their considerable political influence.¹⁸ This power was exercised in large part to elect favored candidates to public office and to secure pensions for former servicemembers.¹⁹ Similarly, following World War I, veterans' organizations such as the American Legion lobbied for additional compensation for servicemembers.²⁰ These organizations initially secured a discharge bonus as well as the promise of an additional payment due to each veteran in 1945 or to the next of kin at the time of the veteran's death.²¹ Faced with the hardship of the Great Depression, organized groups of veterans secured the early payment of this bonus in 1936.²²

As the nation prosecuted the protracted campaign in Vietnam, war veterans exercised a somewhat different form of advocacy, the criticism of a prolonged and continuing conflict by veterans who had quite recently been participants in that same conflict.²³ Members of Vietnam

¹⁵ See *infra* notes 106–213 and accompanying text.

¹⁶ See *infra* notes 214–312 and accompanying text.

¹⁷ See PAUL DICKSON & THOMAS B. ALLEN, *THE BONUS ARMY* 2 (2004).

¹⁸ See *id.* at 4.

¹⁹ See *id.* In the 1870s, more than 20% of the national budget was allocated for the payment of veterans' benefits. See *id.*

²⁰ See *id.* at 20–21.

²¹ See *id.* at 20–21, 28, 29. Support for the delayed payment was so strong that Congress overrode the President's veto of the act. See *id.* at 29.

²² See DICKSON & ALLEN, *supra* note 17, at 253. This early payment was also accomplished through an override of the President's veto. See *id.*

²³ See, e.g., ANDREW E. HUNT, *THE TURNING, A HISTORY OF VIETNAM VETERANS AGAINST THE WAR* 8–9 (1999) (describing the activities of Donald Duncan, who became a full-time antiwar activist within months of resigning from the U.S. Army Special Forces after serving eighteen months in Vietnam and receiving several decorations for bravery in combat).

Veterans Against the War ("VVAW") participated in televised debates,²⁴ engaged in public demonstrations of antiwar sentiment,²⁵ testified before Congress,²⁶ placed statements in major newspapers,²⁷ held public hearings in which veterans described their wartime experiences,²⁸ and executed "guerrilla theater" performances in which uniformed veterans reenacted wartime experiences in public locations.²⁹ Although sympathetic organizations composed of veterans of earlier wars offered to assimilate the Vietnam veterans, members of VVAW declined due to a belief that the VVAW organization would acquire greater public credibility if it was composed exclusively of veterans of the current conflict.³⁰

While advocating for an end to the Vietnam War, members of VVAW employed the components of military uniforms in order to achieve several objectives.³¹ First, VVAW members wore elements of military uniforms in order to communicate and confirm their status as recently discharged veterans, an element of personal identity to which they attributed the unique credibility of their message.³² Second, mem-

²⁴ See GERALD NICOSIA, *HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT* 25 (2001).

²⁵ See Hamid Mowlana & Paul H. Geffert, *Vietnam Veterans Against the War: A Profile Study of the Dissenters*, in JOHN KERRY & VIETNAM VETERANS AGAINST THE WAR, *THE NEW SOLDIER* 172 (1971) (stating that approximately 2300 veterans appeared for a demonstration in Washington, D.C., on April 23, 1971).

²⁶ See DOUGLAS BRINKLEY, *TOUR OF DUTY* 371 (2004) (describing VVAW member John Kerry's testimony before the Senate Foreign Relations Committee).

²⁷ See NICOSIA, *supra* note 24, at 25.

²⁸ See HUNT, *supra* note 23, at 69-72 (describing VVAW's "Winter Soldier Investigation," in which more than 100 Vietnam veterans publicly related their recollections of the war, including numerous descriptions of atrocities committed by U.S. servicemembers).

²⁹ See *id.* at 50 (describing instances in which VVAW members wearing combat attire reenacted village searches and feigned capturing, torturing, and killing mock detainees). "Guerrilla theater" performances seem to have been a particularly effective method of causing observers to reconsider their support for the war. See *id.* at 51.

³⁰ See *id.* at 11 (quoting a founding member of VVAW as stating that, although the Veterans for Peace "would have preferred that we stay under their umbrella," such a relationship would cause VVAW to "los[e] that direct ability for us to say, 'We've been there. This is the experience.'"); NICOSIA, *supra* note 24, at 17 (stating that VVAW declined to merge with existing veterans' groups and limited membership to Vietnam veterans because "the particular leverage they had was in speaking as veterans of this very war" and "[p]eople would listen to them about Vietnam *because they had been there*").

³¹ See NICOSIA, *supra* note 24, at 60, 101, 140-43.

³² See *id.* at 101 (stating that, in response to insinuations by President Nixon that many members of VVAW were not actually veterans, VVAW encouraged participants in a demonstration in Washington, D.C., to wear their uniforms and medals during the event as proof of their authenticity); see also KERRY & VIETNAM VETERANS AGAINST THE WAR, *supra* note 25, at 10 (suggesting that, after hosting one event in which many observers did not believe the speakers were actually Vietnam veterans, members of VVAW wore uniform items to a

bers of VVAW symbolically returned to the U.S. government awards typically displayed on military uniforms in order to communicate regret for participation in the conflict.³³ Third, those members who participated in "guerrilla theater" performances wore uniform items as theatrical props, objects which increased the realism and accessibility of the performance for the audience.³⁴

B. *Current Restrictions*

Recently, it has become apparent that many veterans of the Iraq War may not enjoy the freedom to wear or otherwise utilize elements of a military uniform while communicating a message of dissent.³⁵ The United States Marine Corps has adopted a policy under which a substantial percentage of returning war veterans who have departed active service may be punished for wearing a military uniform during the period of time when their impressions of and experiences in an ongoing conflict might be most relevant to the nation's political discourse.³⁶ Punishment of veterans under this policy may be inflicted in situations in which a civilian with no connection to the military could not be subjected to criminal sanction.³⁷

1. *The Individual Ready Reserve*

With few exceptions, every person who joins the United States Armed Forces must serve for a minimum period of between six and eight years.³⁸ Not all of that service must be performed on active duty, however.³⁹ Rather, servicemembers who complete their active duty com-

subsequent public demonstration so that each member would have "some proof that he had been in Vietnam").

³³ See NICOSIA, *supra* note 24 at 140–43 (describing the incident in which hundreds of VVAW members returned awards to the U.S. government by throwing them onto the steps of the Capitol).

³⁴ See KERRY & VIETNAM VETERANS AGAINST THE WAR, *supra* note 25, at 28 (picturing a veteran wearing a combat uniform and helmet while participating in a mock search-and-destroy mission); NICOSIA, *supra* note 24, at 60 (relating that VVAW members participating in Operation RAW, an 86-mile march, the centerpiece of which was a set of guerrilla theater demonstrations, were directed to wear their combat fatigues and pistol belts and brought additional props such as toy rifles and body bags).

³⁵ See Trista Talton, *War Protester's Case Raises Questions About IRR Rules*, MARINE CORPS TIMES, June 25, 2007, at 31.

³⁶ See *id.*

³⁷ See generally *Schacht v. United States*, 398 U.S. 58 (1970); Montgomery, *supra* note 1.

³⁸ See 10 U.S.C. § 651(a) (2006).

³⁹ See *id.*

mitment may perform the remainder of their service in the reserve component.⁴⁰

The reserve component exists "to provide trained units and qualified persons . . . to fill the needs of the armed forces whenever more units and persons are needed."⁴¹ The reserve component is divided into a Ready Reserve, a Standby Reserve, and a Retired Reserve.⁴² The Ready Reserve is further subdivided into the Selected Reserve and the Individual Ready Reserve ("IRR").⁴³ Many members of the IRR are servicemembers who have elected to depart the armed forces following their required period of active duty but who have not yet completed their statutory military service obligation.⁴⁴ Others remain in the IRR voluntarily or to complete a contractual service obligation extending beyond the statutory requirement.⁴⁵

The IRR is not a military unit in the conventional sense but is instead a pool of experienced personnel upon whom the military may draw in times of national need.⁴⁶ Servicemembers who enter the IRR remain connected to the military only in that they may be involuntarily recalled to active duty and retain certain ministerial obligations.⁴⁷ Unless activated to perform training functions, muster duty, or operational activities, servicemembers in the IRR receive no salary from the military and are not entitled to benefits such as medical or dental care.⁴⁸ Additionally, the Uniform Code of Military Justice (the "UCMJ")

⁴⁰ See *id.* § 651(b).

⁴¹ 10 U.S.C. § 10102 (2006).

⁴² *Id.* § 10141.

⁴³ *Id.* §§ 10143–10144.

⁴⁴ See 10 U.S.C. § 651(a)–(b); DEP'T OF DEF., DIRECTIVE NO. 1235.13 ¶ 3.2 (2005) [hereinafter DIRECTIVE 1235.13].

⁴⁵ See DIRECTIVE 1235.13, *supra* note 44, ¶ 3.2.

⁴⁶ See *id.* Approximately 158,000 servicemembers in the Army or Marine Corps are currently assigned to the IRR. See Montgomery, *supra* note 1.

⁴⁷ See 10 U.S.C. § 10144; *id.* § 12301(a) (permitting involuntary activation in time of war or national emergency); *id.* § 12302(a) (permitting involuntary activation in time of national emergency declared by the President); *id.* § 12304(a)–(b) (permitting activation to augment the force for an operational mission or to respond to certain emergency circumstances). Members of the IRR must notify "the Secretary concerned of any change in the member's address, marital status, number of dependents, or civilian employment and of any change in the member's physical condition that would prevent the member from meeting the physical or mental standards prescribed for the member's armed force." *Id.* § 10205(a). Additionally, members of the IRR may be required to muster once per year for no more than one day (including travel to and from the muster location) and to submit to physical examinations to determine physical fitness for various activities. See *id.* §§ 10206(b), 12319(a)–(b).

⁴⁸ See 10 U.S.C. § 1074(a)(2)(A)–(B) (2006) (limiting the entitlement to military medical and dental care to servicemembers on active duty and officers who have been recently commissioned and who are awaiting the delivery of orders to an initial period of active

does not permit the exercise of personal jurisdiction by the military over a member of the IRR unless the servicemember has been ordered to participate in inactive duty training, has been recalled to active duty, or has voluntarily subjected himself to military authority.⁴⁹ A servicemember in the IRR lives and works as a civilian.⁵⁰

2. Mechanism for Control of IRR Members

Although IRR members are not subject to prosecution under the UCMJ or to military discipline in the conventional sense, the Marine Corps may respond to a "serious offense" by an IRR member by initiating administrative separation.⁵¹ An offense is considered serious for this purpose when "the specific circumstances of the offense warrant separation" and "a punitive discharge would be authorized for the same or a closely related offense under the UCMJ."⁵² This reference to the UCMJ exists only to describe the magnitude of the required offense, and no military or civilian conviction is necessary to initiate an administrative separation under these circumstances.⁵³ Violation of UCMJ article 92 (failure to obey an order or regulation) is a crime that may be pun-

duty); 37 U.S.C. § 204(a)(2) (2000) (limiting the entitlement to basic pay to members of the reserve component who are "participating in full-time training, training duty with pay, or other full-time duty"); *id.* § 433(a)-(b) (authorizing payment of a per diem allowance to a member of the IRR who is required to muster for at least two hours). *But see* 10 U.S.C. § 1063(b) (granting Secretary of Defense discretion to permit IRR members to use military commissary stores and retail facilities); Press Release, U.S. Dep't of Def., Reserve and Guard Receive Unlimited Commissary Benefits (Nov. 24, 2003), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=5815> (declining to limit access of IRR members to military commissary stores).

⁴⁹ See 10 U.S.C. § 802(a)(1), (a)(3), (c), (d)(2) (2006).

⁵⁰ See Kevin D. Hartzell, Note, *Voluntary Warriors: Reserve Force Mobilization in the United States and Canada*, 29 CORNELL INT'L L.J. 537, 539 n.8 (1996) (stating that "Individual Ready Reservists are not assigned to units and do not train"); David Montgomery, *In Clash with Marines, Reservists Gain Ally in VFW*, WASH. POST, June 2, 2007, at C1 (noting that IRR members "aren't paid, don't drill, have no chain of command, yet may be recalled to active duty during the few years they are on inactive reserve"); see also Brendan I. Koerner, *You're in the Army Now (and Forever)*, SLATE, June 29, 2004, <http://www.slate.com/id/2103118/> (stating that members of the IRR "return to the civilian world," are not "attached to a specific unit," and that "many IRRists aren't even aware that they're in the reserves at all").

⁵¹ See HEADQUARTERS, U.S. MARINE CORPS, MARINE CORPS SEPARATION AND RETIREMENT MANUAL ¶ 6210(6) (2007) [hereinafter MARCORSEPMAN], available at <http://www.marines.mil/news/publications/Documents/MCO%20P1900.16F%20W%20CH%201-2.pdf>. Congress has granted to the Secretary of Defense a general and delegable authority to prescribe conditions under which an enlisted servicemember may be discharged before his term of service expires. See 10 U.S.C. § 1169(1) (2006).

⁵² See MARCORSEPMAN, *supra* note 51, ¶ 6210(6).

⁵³ See *id.*

ished by a punitive discharge under the UCMJ, and, therefore, the Marine Corps considers such disobedience to constitute a serious offense for the purposes of administrative separation.⁵⁴

Although administrative separation is not punitive, it is adverse in the sense that the servicemember is fired and may be assigned an undesirable characterization of service upon discharge.⁵⁵ Involuntary discharge or a service characterization of "general" or "other than honorable" may limit access to certain veterans' benefits⁵⁶ and may pose an obstacle to obtaining civilian employment.⁵⁷ Administrative separation for a serious offense generally results in a characterization of service of "other than honorable," but the more favorable characterization of

⁵⁴ See JUDGE ADVOCATE GENERAL'S CORPS, U.S. NAVY, MANUAL FOR COURTS-MARTIAL UNITED STATES § 4 ¶ 16e(1), app. 11 ¶ b(11)–(13) (2008) [hereinafter MCM], available at <http://www.jag.navy.mil/documents/mcm2008.pdf>; E-mail identified as USMC (14) (June 4, 2007, 06:50 EST) (on file with author). In preparation for this Note, the author requested relevant documents from Headquarters Marine Corps, Marine Forces Reserve, and Marine Corps Mobilization Command under the Freedom of Information Act. Documents labeled "USMC" refer to responsive records provided by Headquarters Marine Corps. Although the names of the authors and recipients of these records were redacted prior to release, it is possible to discern the general contours of the Marine Corps' response to this incident.

Other UCMJ violations that may result in a punitive discharge and therefore qualify as grounds for administrative separation include the making of "disloyal statements." See MCM, *supra*, § 4 ¶ 72e. Disloyal statements typically "involve either political or moral objections to governmental actions or policies." John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 315 (1998). Consequently, the use of administrative discharge as a disciplinary tool against IRR members could potentially disrupt political speech that, in a purely civilian context, lies at the core of First Amendment protection. See, e.g., *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))).

⁵⁵ See MARCORSEPMAN, *supra* note 51, ¶¶ 1002(7), 1004(2).

⁵⁶ See, e.g., 38 U.S.C. § 3011(a)(3)(B) (2000) (limiting educational assistance in most circumstances to veterans who receive a discharge from active duty characterized as honorable).

⁵⁷ See *Rew v. Ward*, 402 F. Supp. 331, 341 (D.N.M. 1975) (stating that employers are likely to make additional inquiries regarding an applicant's service "any time something differs from the norm"); see also *Casey v. United States*, 8 Cl. Ct. 234, 242 (Cl. Ct. 1985) (stating that even an administrative discharge with a characterization of honorable is likely to interfere with subsequent employment applications because prospective employers "do know and understand the importance of separation codes" included in discharge forms). See generally David S. Franke, *Administrative Separation from the Military: A Due Process Analysis*, ARMY LAW., Oct. 1990, at 11 (describing the relationship between due process analysis and the adverse effect of an administrative discharge on subsequent civilian employment prospects).

"general (under honorable conditions)" may be warranted in some circumstances.⁵⁸

Because administrative separation may be justified by the commission of a serious offense, and because violation of a regulation is considered a serious offense, an IRR member who wears a military uniform in a manner forbidden by Department of Defense ("DoD") regulations may be administratively discharged.⁵⁹ DoD regulations forbid members of the Armed Forces (including retired members and members of Reserve components) from wearing military uniforms "[d]uring or in connection with furthering political activities . . . when an inference of official sponsorship for the activity or interest may be drawn," when "participating in activities such as unofficial public speeches, interviews, picket lines, marches, rallies or any public demonstration . . . may imply Service sanction of the cause for which the demonstration or activity is conducted," and "when wearing of the uniform may tend to bring discredit upon the Armed Forces."⁶⁰ Consequently, the current military policy permits the administrative discharge of an IRR member who wears a military uniform while engaged in a public demonstration of po-

⁵⁸ MARCORSEPMAN, *supra* note 51, ¶ 6210(1). For IRR members, conduct in the civilian community may form the basis for a discharge characterization of "other than honorable" only when the conduct "directly affects the performance of military duties (service related)," whereas such conduct may form the basis for a discharge characterization of "general (under honorable circumstances)" when the conduct merely "adversely affects the overall effectiveness of the Marine Corps including military morale and efficiency." See *id.* ¶ 1004(4)(d).

⁵⁹ See *supra* notes 51–54 and accompanying text.

⁶⁰ DEP'T OF DEF., INSTRUCTION No. 1334.01 ¶¶ 3.1, 3.1.2–4 (2005) [hereinafter INSTRUCTION 1334.01] (codified at 32 C.F.R. § 53.2). Additionally, the Marine Corps maintains service-specific uniform regulations that also proscribe the wearing of military uniforms in certain circumstances. See HEADQUARTERS, U.S. MARINE CORPS, ORDER P1020.34G W/CH 1–4, at 1–5 (2003); Wear of the Marine Corps Combat Utility Uniform, ALMAR 035/07 (July 25, 2007), <http://www.marines.mil/news/messages/Pages/2007/WEAROFTHEMARINECORPSCOMBATUTILITYUNIFORM.aspx> (last visited Sept. 5, 2008). These regulations, like other restrictions on military expression, advance several important government interests, including the maintenance of civilian supremacy over the armed forces and good order and discipline within the military establishment. See Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 188–89 (1957); see also Chief Justice Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 186 (1962) ("Thus it is plain that the axiom of subordination of the military to the civil is not an anachronism. Rather, it is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life."). Such regulations, however, may also harm countervailing government interests, such as minimizing intrusions on basic and fundamental liberties, providing a relatively harmless outlet for military discontent, ensuring that military service is sufficiently appealing to attract and retain personnel, and preventing the grant of "a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times." See Vagts, *supra*, at 190–91.

litical opinion, including activities that were often employed by VVAW, such as public assembly and guerrilla theater.⁶¹

3. Recent Application of the Mechanism for Control of IRR Members

On March 19, 2007, members of Iraq Veterans Against the War ("IVAW") participated in a guerrilla theater performance in Washington, D.C.⁶² Dressed in elements of military uniforms, IVAW members carried out a mock patrol, employed imaginary weapons, detained simulated enemy personnel, and portrayed reactions to sniper fire and friendly casualties.⁶³ The purpose of the demonstration was to educate members of the general public who, according to IVAW members, are largely ignorant of the nature and difficulty of military activities in Iraq.⁶⁴ Adam Kokesh, a Marine who fought in Fallujah, Iraq, and who was awarded the Combat Action Ribbon and the Navy and Marine Corps Commendation Medal, participated in the performance.⁶⁵ At the time of the presentation, Kokesh had been honorably discharged from active duty and was a member of the Marine Corps IRR.⁶⁶ During the performance, Kokesh wore elements of the distinctive Marine Corps camouflage uniform from which he had removed personal insignia, such as his name tag.⁶⁷ Photographs of Kokesh participating in the event appeared in the *Washington Post*.⁶⁸

On or about March 22, 2007, the Commandant of the Marine Corps, the service's highest ranking officer, directed subordinates to identify Marines who appeared in uniform in media reports of anti-war activities and to forward that information to appropriate subordinate commands with instructions to initiate disciplinary action.⁶⁹ In response to this command, Headquarters Marine Corps Judge Advocate Division staff rapidly identified three Marines in the IRR ("IRR Marines") who had been photographed in uniform at antiwar activi-

⁶¹ See INSTRUCTION 1334.01, *supra* note 60, ¶¶ 3.1, 3.1.2-4; see also Lt. Col. Jeffrey P. Sexton, *Limitations on the Wearing of the Uniform by Members of the Armed Services at Non-Military Events*, ARMY LAW., Mar. 2008, at 32 (discussing applicability of Instruction 1334.01 to public demonstrations of antiwar sentiment, including guerrilla theater).

⁶² See Montgomery, *supra* note 9.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See Montgomery, *supra* note 1.

⁶⁶ See *id.*

⁶⁷ See Trista Talton, *IRR Marines Face Punishment for Anti-War Protests*, Comments, MARINE CORPS TIMES, June 11, 2007, at 12.

⁶⁸ See *id.*; see also Montgomery, *supra* note 9.

⁶⁹ See E-mail identified as USMC (01) (Mar. 22, 2007, 12:18 EST) (on file with author).

ties.⁷⁰ One of the IRR Marines was Adam Kokesh, who was identified based on the photographs of the March 19 guerrilla theater performance that appeared in the *Washington Post*.⁷¹ By the end of the day on March 22, Headquarters Marine Corps forwarded the information regarding the IRR Marines to the Staff Judge Advocate at Marine Forces Reserve and indicated to the subordinate command that a report of the disciplinary action taken against the IRR Marines was an "item of interest" for the Commandant of the Marine Corps.⁷² Marine Forces Reserve in turn forwarded the information to its own subordinate command, Marine Corps Mobilization Command, which most directly administers the IRR.⁷³

On April 19, 2007, Marine Forces Reserve reported to Headquarters Marine Corps that Marine Corps Mobilization Command had completed the investigation and initiated action to administratively separate two of the IRR Marines, including Kokesh, from the IRR.⁷⁴

⁷⁰ See E-mail identified as USMC (02) (Mar. 22, 2007, 12:55 EST) (on file with author) (identifying Corporal Cloy Richards in photograph of an event on March 17, 2007); E-mail identified as USMC (04) (Mar. 22, 2007, 14:23 EST) (on file with author) (identifying Sergeant Liam Madden as a uniformed protester); E-mail identified as USMC (05) (Mar. 22, 2007, 15:56 EST) (on file with author) (identifying Corporal Adam Kokesh as a uniformed protester in the Montgomery piece); E-mail identified as USMC (06) (Mar. 22, 2007, 16:53 EST) (on file with author) (stating Judge Advocate Division personnel identified the IRR Marines).

⁷¹ See E-mail identified as USMC (05), *supra* note 70.

⁷² See E-mail identified as USMC (07) (Mar. 22, 2007, 18:11 EST) (on file with author).

⁷³ See *id.*

⁷⁴ See E-mail identified as USMC (09) (Apr. 19, 2007, 18:11 EST) (on file with author). E-mail USMC (09) indicates that the Marine Corps was acutely aware of the fact that disciplinary action must be limited to administrative separation because the Uniform Code of Military Justice does not grant the military jurisdiction over the misconduct of IRR members acting as civilians. See *id.*

Marine Corps Mobility Command did not elect to initiate administrative separation proceedings against Corporal Richards because Richards "sincerely acknowledged his reserve obligations and his intent to abide by uniform regulations in the future." See *id.* Richards was left 80% disabled by two deployments to Iraq and agreed to cease wearing his uniform at antiwar events due to his concern that disciplinary action would result in the reduction of his disability benefits. See David Montgomery, *Marines Reduce Penalty for Reservist-Protester*, WASH. POST, June 5, 2007, at C2.

The Marine Corps initiated proceedings to administratively separate Sergeant Madden in response to his wearing of a partial uniform at an antiwar march and in response to his making "disloyal statements" at times when he was not wearing uniform items. See Montgomery, *supra* note 1; E-mail identified as USMC (09), *supra*. Madden was already a person of interest to the Marine Corps due to his efforts to encourage active duty servicemembers to express opposition to the Iraq War to their elected representatives and had been formally warned in 2006 to cease wearing his uniform at antiwar events. See Rick Maze & William H. McMichael, *Troops Call for End to Iraq War in Letter to Congress*, MARINE CORPS TIMES, Jan. 29, 2007, at 23; E-mail identified as USMC (04), *supra* note 70; E-mail identi-

On June 4, 2007, an administrative separation board concluded that Kokesh had committed serious offenses—one of which was apparently the violation of uniform regulations—and should be discharged with a characterization of general (under honorable conditions).⁷⁵ Kokesh was discharged from the IRR on June 11, 2007.⁷⁶ Had he not been administratively separated, Kokesh's obligation to serve in the IRR would have expired on June 18, 2007, and he would not have been eligible to reenlist.⁷⁷

fied as USMC (09), *supra*. By late June 2007, the Marine Corps ceased its attempt to discharge Madden, ostensibly because he had agreed to cease wearing his uniform at political events. See Stephanie Ebbert, *Marine Corps Drops Case Against Antiwar Reservist*, BOSTON GLOBE, June 30, 2007, at B3. Madden strongly disputed the assertion that he agreed to curtail his activities and has stated that he intends to continue to wear his uniform at anti-war events so that observers will "know who the veterans are when they see a protest walking by." See *id.*

⁷⁵ See Montgomery, *supra* note 74; Sergeant Kokesh Goes to Washington, <http://kokesh.blogspot.com/2007/06/gonzo-reporting-from-kangaroo-court.html> (June 19, 2007, 10:59 EST) (recounting that the discharge board stated that Kokesh's administrative separation was justified by his commission of serious offenses). It should be noted that Kokesh's discharge was not solely based upon his wearing of his military uniform at a political event. See Talton, *supra* note 67; see also Dave Helling, *Brass Backs Marine's General Discharge*, KAN. CITY STAR (Mo.), June 14, 2007, at A2 (stating that Kokesh was punished "for his actions in a March war protest and his subsequent obscene communication" (emphasis added)); Dave Helling, *Marine Protester Denied Rehearing*, KAN. CITY STAR (Mo.), June 7, 2007, at A3 (stating that Kokesh was discharged "for wearing a stripped-down uniform to a war protest and using an obscenity in an e-mail to a Marine officer" (emphasis added)). In addition to the uniform-related charge, Kokesh was also charged with making disrespectful comments to an officer after he told a Major investigating the uniform incident to "go fuck yourself." See Helling, *supra* note 3; E-mail identified as USMC (09), *supra* note 74. This Note will not assess whether this statement, absent the uniform-related charge, would independently justify administrative separation or invoke First Amendment protections. The Marine Corps has implied that Kokesh would not have been separated had he not compounded his uniform-related offense by using disrespectful language and by refusing to agree to cease wearing the uniform at similar events. See E-mail identified as USMC (13) (June, 3, 2007, 21:33 EST) (on file with author); E-mail identified as USMC (24) (June 8, 2007, 16:50 EST) (on file with author) (advising that a photo depicting a retired Marine Corps officer in uniform that had been posted on the website of a private company for whom the officer served as a member of the Board of Advisors would not result in disciplinary action because, even if officials "determine[d] that the photo was not in compliance with regulations, you can bet [redacted] wouldn't respond the way Cpl Kokesh did (both in word and deed)"). Any suggestion that the disrespectful speech issue rather than the uniform issue was determinative is called into question by the fact that Sergeant Madden also declined to cease wearing the uniform at political events and explicitly compared investigating officers to "German Colonels . . . in 1939" and, yet, was not discharged. See Ebbert, *supra* note 74.

⁷⁶ See Talton, *supra* note 35.

⁷⁷ See Talton, *supra* note 67.

C. Disparate Rights

At first glance, it would appear that federal law prohibits persons with no military affiliation from engaging in the same type of guerrilla theater performance that resulted in Kokesh's discharge.⁷⁸ Section 702 of title 18 of the U.S. Code imposes criminal sanctions on "[w]hoever . . . , without authority, wears the uniform or a distinctive part thereof or anything similar to a distinctive part of the uniform of any of the armed forces of the United States"⁷⁹ Similarly, 10 U.S.C. § 771 states that "[e]xcept as otherwise provided by law, no person except a member of the Army, Navy, Air Force, or Marine Corps" may wear a military uniform, a distinctive part of a military uniform, or uniform items similar to a distinctive part of a military uniform.⁸⁰ Section 772 of title 10, entitled "When wearing by persons not on active duty authorized," lists a series of exceptions to the blanket prohibition on the wearing of military uniforms by persons without authority.⁸¹ Among those exceptions is § 772(f), a provision stating that "[w]hile portraying a member of the Army, Navy, Air Force, or Marine Corps, an actor in a theatrical or motion-picture production may wear the uniform of that armed force if the portrayal does not tend to discredit that armed force."⁸² Because it is not clear that guerrilla theater is a "theatrical production" and because a street performance intended to demonstrate the unpleasant conduct of military combatants could tend to discredit the armed forces, this statutory scheme presumably does not permit guerrilla theater performances by persons with no military affiliation.⁸³

In 1970, however, in *Schacht v. United States*, the U.S. Supreme Court considered whether or not the prosecution of a participant in a guerrilla theater production under this statutory scheme violated constitutional protections.⁸⁴ In 1967, while participating in what the Court termed a "street skit," Daniel Schacht wore "a blouse of the type cur-

⁷⁸ See 10 U.S.C. § 771 (2006); 18 U.S.C. § 702 (2000). This Note uses the phrase "persons with no military affiliation" to refer to persons who are not presently serving in either an active or a reserve component of the military. A member of the IRR is, by definition, serving in a reserve component of the military and is therefore not a person with no military affiliation. See *supra* notes 41–43.

⁷⁹ 18 U.S.C. § 702.

⁸⁰ 10 U.S.C. § 771.

⁸¹ *Id.* § 772; see *Schacht*, 398 U.S. at 61 (stating that the exceptions listed in 10 U.S.C. § 772 modify the applicability of 18 U.S.C. § 702).

⁸² 10 U.S.C. § 772(f).

⁸³ See *id.* §§ 771–772; 18 U.S.C. § 702.

⁸⁴ See 398 U.S. at 61, 62.

rently authorized for Army enlisted men," buttons that were "of the official Army design," and a piece of obsolete military headgear to which he had affixed "the eagle insignia currently worn on the hats of Army officers."⁸⁵ Schacht and two associates prepared a performance and then publicly presented their skit in front of the Armed Forces Induction Center in Houston, Texas.⁸⁶ The skit depicted two soldiers shooting a suspected enemy operative and then discovering that they had in fact killed a pregnant woman.⁸⁷ Schacht was indicted for a violation of 18 U.S.C. § 702, convicted by a jury, and sentenced to pay a fine and to serve six months in prison.⁸⁸

The Court faced three distinct questions.⁸⁹ First, was it permissible for Congress to ban the wearing of military uniforms without authority as in 18 U.S.C. § 702?⁹⁰ Second, did Schacht's conduct qualify him as an "actor . . . in a 'theatrical production'" for the purposes of the exception established by 10 U.S.C. § 772(f)?⁹¹ Third, was it permissible for Congress to condition the applicability of § 772(f) on whether or not the particular theatrical production tended to discredit the Armed Forces?⁹²

As to the first question, the Court addressed the issue in just a single sentence and concluded only that "previous cases would seem to make it clear that 18 U.S.C. § 702, making it an offense to wear our military uniforms without authority is, standing alone, a valid statute on its face."⁹³ To support this contention, the Court cited only *United States v. O'Brien*, a 1968 case in which the U.S. Supreme Court established a four-part test for evaluating whether government regulation of expressive conduct is permissible despite First Amendment constraints.⁹⁴

⁸⁵ *Id.* at 59 n.2, 60.

⁸⁶ *Id.* at 60-61.

⁸⁷ *Id.*

⁸⁸ *Id.* at 59.

⁸⁹ See *Schacht*, 398 U.S. at 61-62.

⁹⁰ See *id.* at 61.

⁹¹ See *id.*

⁹² See *id.* at 62.

⁹³ *Id.* at 61. Six justices joined in support of this line of reasoning and conclusion. See *id.* at 61, 65. Three justices implicitly endorsed an identical outcome to this question but did not describe the reasoning that supported their conclusion. See *id.* at 69 (White, J., concurring in the result).

⁹⁴ *Schacht*, 398 U.S. at 61; see *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) ("However, even on the assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment, it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."). For more on the test established by *O'Brien* and on the applicability of that test to the wearing of military uniforms, see *infra* notes 182-200 and accompanying text.

Faced with the question of whether Schacht was acting in a "theatrical production" within the meaning of § 772(f), the Court embraced an inclusive interpretation of the phrase.⁹⁵ First, relying on the common meaning and historical understanding of the term "theatrical production," the Court stated that phrase must embrace outdoor performances by amateurs, even if such a performance is not confined to a traditional stage or accompanied by the trappings of a more formal production.⁹⁶ Second, the Court indicated that Congress specifically altered the language of the statute in a recent revision in order "to move to broader, more flexible language, which, for example, would include television as well as other types of theatrical productions wherever presented."⁹⁷ Based on this inclusive interpretation of the term, the Court concluded "emphatically" that the street skit in which Schacht participated was a "theatrical production" within the meaning of § 772(f).⁹⁸

Finally, the Court examined whether the final clause of § 772(f), which limited the applicability of the section only to those theatrical productions that do not tend to discredit the armed forces, was an unconstitutional restraint of free speech.⁹⁹ The Court concluded that this provision violated First Amendment protections because it expressly linked criminal liability to speech content.¹⁰⁰ Consequently, the Court struck this final clause from the statute and stated that "[t]he final clause of § 772(f), which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."¹⁰¹

Given that the Supreme Court has emphatically stated that street skits invoke the protection of § 772(f) and that such protection may not

⁹⁵ See *Schacht*, 398 U.S. at 61-62.

⁹⁶ See *id.* at 61.

⁹⁷ *Id.* at 62 n.3.

⁹⁸ See *id.* at 61-62. Six justices embraced this interpretation and outcome. See *id.* at 61-62, 65. Three justices proposed a similarly broad and malleable definition but suggested that the application of the definition should be left to the jury. See *id.* at 69-70 (White, J., concurring in the result) ("The critical question in deciding what is to count as a 'theatrical production' ought to be whether or not, considering all the circumstances of the performance, an ordinary observer would have thought he was seeing a fictitious portrayal rather than a piece of reality.").

⁹⁹ See *id.* at 62-63.

¹⁰⁰ See *Schacht*, 398 U.S. at 62-63.

¹⁰¹ See *id.* at 63. The three justices who did not join this portion of the opinion nevertheless explicitly agreed that the final clause of § 772(f) was unconstitutional. See *id.* at 69 (White, J., concurring in the result) ("I agree that Congress cannot constitutionally distinguish between those theatrical performances that do and those that do not 'tend to discredit' the military, in authorizing persons not on active duty to wear a uniform.").

be limited based on the content of the performance, it appears likely that a person with no military affiliation who wore a military uniform while participating in a guerrilla theater performance identical to that in which Kokesh participated could not be prosecuted under 18 U.S.C. § 702.¹⁰² Consequently, under current military policy, IRR members like Kokesh may be and have been punished by administrative separation for engaging in conduct that would be entirely lawful if performed by a person lacking military affiliation.¹⁰³ This disparity demonstrates that IRR members have been subjected to an additional restraint on their uniform-related expression and conduct.¹⁰⁴ Two questions remain: (1) By what standard should a court evaluate the constitutionality of this additional restraint; and (2) at what outcome should a court arrive when applying the appropriate standard?¹⁰⁵

II. CONSTITUTIONAL STANDARDS

This Part describes three First Amendment standards which may be applicable to evaluating the constitutionality of placing additional restrictions on the wearing of military uniforms by IRR members acting in theatrical productions.¹⁰⁶ First, the First Amendment permits the government to place additional restrictions on the speech of its own employees in some circumstances.¹⁰⁷ Second, a First Amendment standard might be derived from the judicial branch's historical pattern of deference to decisions by Congress and the executive about the rights and responsibilities of servicemembers.¹⁰⁸ Third, the First Amendment does not necessarily protect expression by conduct, such as the wearing of particular clothing.¹⁰⁹

A. Government Employee

In 1968, in *Pickering v. Board of Education*, the U.S. Supreme Court held that the First Amendment protects, to a limited degree, a government employee's right to speak as a citizen addressing matters of public

¹⁰² See *id.* at 61-63.

¹⁰³ See *id.*; see also *supra* notes 36-77 and accompanying text.

¹⁰⁴ See *Schacht*, 398 U.S. at 61-63; see also *supra* notes 36-77 and accompanying text.

¹⁰⁵ See, e.g., *O'Brien*, 391 U.S. at 377.

¹⁰⁶ See *infra* notes 110-213 and accompanying text.

¹⁰⁷ See *infra* notes 110-150 and accompanying text.

¹⁰⁸ See *infra* notes 151-181 and accompanying text.

¹⁰⁹ See *infra* notes 182-213 and accompanying text.

concern.¹¹⁰ When a government employee alleges that the employee's speech caused adverse treatment by a government employer in violation of the First Amendment, the Court requires a two-step inquiry into whether the government may restrict the employee's speech to a greater degree than it may restrict the speech of a non-employee.¹¹¹ This approach has been applied to both verbal speech and expressive conduct.¹¹² This analysis may be applied to a variety of speech restrictions, ranging from ad hoc disciplinary actions to broad statutory prohibitions.¹¹³

First, the Court determines if a First Amendment interest exists by evaluating whether the employee spoke as a citizen on a matter of public concern.¹¹⁴ An employee does not speak as a citizen when the employee makes statements pursuant to his official duties.¹¹⁵ In general, the Court determines whether an employee's speech addresses a matter of public concern based upon "the content, form, and context of a given statement, as revealed by the whole record."¹¹⁶ The Court has concluded that subjects such as the quality of the management of public institutions,¹¹⁷ the failure to distribute important government in-

¹¹⁰ See 391 U.S. 563, 565, 568 (1968); see also *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

¹¹¹ See *Garcetti*, 547 U.S. at 418.

¹¹² See *id.* at 420; *City of San Diego v. Roe*, 543 U.S. 77, 78, 79, 84 (2004) (applying *Pickering* analysis to dismissal of a police officer who sold videos depicting himself engaging in sex acts while wearing a police uniform and performing police duties, and concluding that the police officer's expression did not reach a matter of public concern, therefore failing the first prong of the analysis); see also *Locurto v. Giuliani*, 447 F.3d 159, 164-65, 172 (2d Cir. 2006) (applying *Pickering* analysis to dismissal of police officers who made racially insensitive statements and engaged in racially insensitive behavior while riding on a parade float).

¹¹³ See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466-67 (1995) (citing *Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973)).

¹¹⁴ See *Garcetti*, 547 U.S. at 418.

¹¹⁵ See *id.* at 421 (concluding that a prosecutor's advice to a supervisor regarding how to proceed with a case was a statement pursuant to the prosecutor's official duties). Although declining to articulate a test for determining the scope of an employee's official duties for First Amendment purposes, the Court in *Garcetti* indicated that the inquiry must be "a practical one" and that employers could not expand their control over employee communications simply by writing "excessively broad job descriptions." *Id.* at 424. At least one commentator has argued that this "statements pursuant to official duties" exception may preclude First Amendment protection for employees who speak at all when their official duty is to remain silent. See generally Jamie Sasser, Comment, *Silenced Citizens: The Post-Garcetti Landscape for Public Sector Employees Working in National Security*, 41 U. RICH. L. REV. 759 (2007).

¹¹⁶ See *Connick v. Myers*, 461 U.S. 138, 147-48 (1983).

¹¹⁷ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282, 284 (1977); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Pickering*, 391 U.S. at 569.

formation to citizens,¹¹⁸ and political intrusion into apolitical government functions¹¹⁹ are matters of public concern. Topics such as routine personnel matters,¹²⁰ a subordinate's personal confidence in the character of a supervisor,¹²¹ and the quality of communication within a public institution generally are not.¹²²

Second, if a First Amendment interest exists, the Court evaluates the extent to which the infringement of the First Amendment interest was justified by balancing the "interests of the [employee], as a citizen, in commenting upon matters of public concern [against] the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."¹²³ Factors that weigh in favor of the employee include determinations that the employee was the person most likely to have informed and definite opinions about "a question [for which] free and open debate is vital to informed decision-making by the electorate,"¹²⁴ and that the employee's action violated no established policy.¹²⁵ Factors that weigh in favor of the government include observations that the speech undermined the authority of superiors,¹²⁶ disrupted harmony among coworkers,¹²⁷ created a false impression in the mind of the public that was difficult to counter,¹²⁸ and caused other detrimental impacts to the function of the organization.¹²⁹ When the justification of the employer in limiting the employee's opportunities to contribute to public debate is not significantly greater than the employer's interest in limiting a similar contribution by any member of the general public, the regulation of

¹¹⁸ See *Pickering*, 391 U.S. at 569.

¹¹⁹ See *Connick*, 461 U.S. at 149.

¹²⁰ See *id.* at 148-49, 155.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *Garcetti*, 547 U.S. at 418; *Pickering*, 391 U.S. at 568.

¹²⁴ See *Pickering*, 391 U.S. at 571-72.

¹²⁵ See *Connick*, 461 U.S. at 153; *Doyle*, 429 U.S. at 284.

¹²⁶ See *Connick*, 461 U.S. at 151-52; *Pickering*, 391 U.S. at 570. The fact that a communication was made privately to a supervisor rather than publicly is not determinative, although the content of such a communication, as well as the time, place, and manner of the communication, may inform a court's evaluation of the effect on institutional efficiency. See *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 & n.4 (1979); see also *Garcetti*, 547 U.S. at 420-21 ("Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like any member of the general public to hold that all speech within the office is automatically exposed to restriction." (citations and internal quotations omitted)); *Connick*, 461 U.S. at 152-53.

¹²⁷ See *Connick*, 461 U.S. at 151-52; *Pickering*, 391 U.S. at 570.

¹²⁸ See *Pickering*, 391 U.S. at 572.

¹²⁹ See *id.* at 571.

the employee's speech must then be evaluated according to the relevant First Amendment standard for non-employees.¹³⁰

For the purposes of this doctrine, "employee" has been defined not by formal concepts of agency or employment law but rather by the existence of a reciprocal relationship in which the government provides a benefit and extracts a service.¹³¹ The Court has stated that any extra power that the government possesses to regulate employee speech more strictly than non-employee speech exists because "[w]hen someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her."¹³² In 1996, in *Board of County Commissioners v. Umbehr*, the U.S. Supreme Court considered whether *Pickering's* First Amendment balancing test for employees might extend to an independent contractor.¹³³ After concluding that the traditional distinction between contracts for employment and contracts for services was "at best a very poor proxy for the interests at stake," the Court chose to evaluate the applicability of the doctrine by examining the degree to which the plaintiff possessed a "close relationship" to the government.¹³⁴ The Court devised a spectrum of relationships, drawn from *Pickering* and from other precedents, that spanned

from government employees, whose close relationship with the government requires a balancing of important free speech and government interests, to claimants for tax exemptions, users of public facilities, and recipients of small government subsidies, who are much less dependent on the government but more like ordinary citizens whose viewpoints on matters of public concern the government has no legitimate interest in repressing.¹³⁵

¹³⁰ See *id.* at 572-74. For example, the Court in *Pickering* concluded that, based on the nature of the speech at issue, the relevant First Amendment standard for non-employees was the requirement that the plaintiff prove knowing or reckless falsity established by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). See *Pickering*, 391 U.S. at 573.

¹³¹ See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 678-80 (1996).

¹³² See *Waters v. Churchill*, 511 U.S. 661, 674-75 (1994).

¹³³ See *Umbehr*, 518 U.S. at 674.

¹³⁴ See *id.* at 678-80.

¹³⁵ See *id.* at 680 (citations omitted); see also Patrick J. Cammarata, *Applying First Amendment Principles to Shield Independent Government Contractors from Retaliatory Dismissal*; Board of County Commissioners v. Umbehr, 38 B.C. L. REV. 422, 429-30 (1997).

Consequently, because independent contractors, who act as surrogates for government agencies and who receive "a valuable financial benefit," lie at an intermediate point on this spectrum of relationships, they are entitled only to the limited First Amendment protections established by *Pickering*.¹³⁶

At least two courts have adopted the *Pickering* test in cases involving military servicemembers.¹³⁷ In 1995, in *Lee v. United States*, the U.S. Court of Federal Claims considered a case in which James Lee, a reserve officer on paid active duty with the Air Force, was required by regulations to inform his superiors of any conditions which could interfere with his duties as a nuclear missile launch control officer.¹³⁸ Lee told his superior officers that he had moral reservations about the use of nuclear weapons and was not sure that he could follow an order to launch a nuclear missile.¹³⁹ Lee was subsequently subjected to administrative action, including reassignment and then honorable discharge from the service.¹⁴⁰ In a suit for back pay and reinstatement, Lee charged that his discharge violated, among other things, his First Amendment rights.¹⁴¹ Applying the first prong of the *Pickering* test, the court concluded that no violation of the First Amendment had occurred because Lee's own inability to launch nuclear weapons was not a matter of public concern.¹⁴² Additionally, the court reasoned that, even if a matter of public concern had been raised and the analysis

¹³⁶ See *Umbehr*, 518 U.S. at 674, 680-81. The Court has also recently applied the *Pickering* test to the regulation of recruiting activity by private schools that have voluntarily joined state athletic associations. See *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2495-96 (2007). In 2007, in *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, the Court did not precisely articulate why the contractual relationship between the school and the athletic association was sufficiently similar to an employment relationship to invoke the *Pickering* test, although the Court did appear to emphasize the voluntariness of membership in the athletic association and the fact that members benefit substantially from the common agreement to abide by certain restrictions. See *id.* Reflecting on this imprecise fit between the facts and the doctrine, Justice Thomas stated that "no First Amendment framework readily applies to this case" and referred to the application of the *Pickering* test as "the bizarre exercise of extending obviously inapplicable First Amendment doctrine." *Id.* at 2499 (Thomas, J., concurring in the judgment).

¹³⁷ Carr, *supra* note 54, at 364.

¹³⁸ See 32 Fed. Cl. 530, 534 (1995).

¹³⁹ *Id.* at 534-35.

¹⁴⁰ *Id.* at 535-36.

¹⁴¹ *Id.* at 534, 536.

¹⁴² *Id.* at 543. In the aftermath of *Garcetti*, it appears that the court could have also concluded that the first prong was not satisfied because Lee was required to make his statements by regulations, was therefore making a statement pursuant to his official duties, and consequently was not speaking as a citizen. See *Garcetti*, 547 U.S. at 421; *Lee*, 32 Fed. Cl. at 543.

proceeded to the second prong, application of the balancing test would demonstrate that the Air Force's "compelling need to ensure that all members will carry out all lawful orders" outweighed Lee's speech interest.¹⁴³

In 1989 in *Banks v. Ball*, the U.S. District Court for the Eastern District of Virginia evaluated a case in which Richard Banks, a reserve officer apparently on paid active duty with the Navy, wrote letters to Congress in order to complain that his unit was unlikely to receive new equipment on schedule.¹⁴⁴ He wrote the letters on his official letterhead, included in them his office telephone number, and made references to his status as the commanding officer of his unit.¹⁴⁵ Regulations prohibited naval personnel from acting in their official capacity when contacting members of Congress.¹⁴⁶ Banks's superior officer subsequently initiated an administrative action that resulted in Banks's reassignment to a nonpaying billet in a voluntary training unit.¹⁴⁷ In evaluating Banks's claim that the administrative action violated his First Amendment rights, the court first concluded that the delay of deliveries of military equipment was a matter of public concern.¹⁴⁸ Continuing, the court applied the balancing test and determined that the military interest in uniformity and discipline outweighed Banks's interest in communicating in his official capacity, particularly given the fact that Banks could have communicated effectively in ways that did not violate the regulation, including by writing as a private citizen and by circulating his letter through the chain of command.¹⁴⁹ Consequently, the military was justified in imposing additional restrictions on the service-member's speech.¹⁵⁰

B. Military Deference

Cases involving inquiries into the constitutionality of military conduct generally fall into one or more of three categories.¹⁵¹ First, a case may require an examination of "the vertical reach of the Bill of Rights within the military"—the extent to which the Constitution lim-

¹⁴³ *Lee*, 32 Fed. Cl. at 543.

¹⁴⁴ See 705 F. Supp. 282, 282-84 (E.D. Va. 1989).

¹⁴⁵ *Id.* at 284.

¹⁴⁶ *Id.* at 285.

¹⁴⁷ *Id.* at 284.

¹⁴⁸ *Id.* at 287.

¹⁴⁹ *Banks*, 705 F. Supp. at 287-88.

¹⁵⁰ *Id.* at 288.

¹⁵¹ See Warren, *supra* note 60, at 186.

its the exercise of military authority over persons properly under military control.¹⁵² Second, a case may require inquiry into "the horizontal reach of the Bill of Rights," a question of whether the rights of a particular type of person may be restricted by military authority at all.¹⁵³ Third, a case may require evaluation of actions taken by a non-military government actor for the purpose of advancing a military interest.¹⁵⁴ This third category of case is not relevant to the current inquiry, as the military itself has asserted the authority to regulate the expression of IRR members.¹⁵⁵

In "horizontal" cases, which require an inquiry into whether the person, property, or object is a proper subject of regulation premised upon the exercise of military authority, the Court has accepted the proposition that even a relatively attenuated connection to military matters is sufficient to justify such a regulation.¹⁵⁶ Although several recent decisions have limited the exercise of court-martial jurisdiction over persons not on active duty,¹⁵⁷ the Court has generally acknowledged that Congress's military authority justifies the regulation by statute of such essentially civilian activities as selective service functions,¹⁵⁸ law school recruitment practices,¹⁵⁹ and the wearing of military uni-

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.* Although this note will not further investigate this third category of military cases, examples offered by Chief Justice Warren include *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579 (1952), and *United Steelworkers of America v. United States*, 391 U.S. 39 (1959). See Warren, *supra* note 60, at 198-99.

¹⁵⁵ See *supra* notes 9-77 and accompanying text.

¹⁵⁶ See *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 101 (1943); *Ex parte Quirin*, 317 U.S. 1, 46 (1942). But see *Duncan v. Kahanamoku*, 327 U.S. 304, 324 (1946); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121-22 (1866).

¹⁵⁷ See *Reid v. Covert*, 354 U.S. 1, 23 (1957) (rejecting court-martial jurisdiction over servicemember's civilian dependent living on a military base located in foreign territory); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 22-23 (1955) (rejecting court-martial jurisdiction over discharged servicemember). Although later overruled by *Solorio v. United States*, 483 U.S. 435, 436 (1987), the Court's decision in *O'Callahan v. Parker*, 395 U.S. 258, 272-74 (1969), for a time prohibited the exercise of court-martial jurisdiction over servicemembers whose alleged crimes were not connected to their activities in the service.

¹⁵⁸ See *United States v. O'Brien*, 391 U.S. 367, 377-78 (1968) (indicating that Congress possesses the constitutional authority under its military powers to require civilians to both register for a military draft and retain certificates of eligibility); see also *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (endorsing the notion that Congress's military powers include the authority to select which categories of people shall be subjected to selective service registration requirements).

¹⁵⁹ See *Rumsfeld v. Forum for Academic and Institutional Rights*, 547 U.S. 47, 59-60 (2006) (stating that Congress has the constitutional authority under its military powers to compel law schools to grant access to military recruiters).

forms by persons with no military affiliation.¹⁶⁰ Consequently, the regulation of the wearing of military uniforms by IRR members is likely within the military power of Congress and therefore presents no "horizontal" question.¹⁶¹

In "vertical" cases, which consider the degree to which the Constitution restrains government regulation of persons, property, or objects properly under military control, the Supreme Court has, since the 1970s, applied what is frequently termed the "Military Deference Doctrine."¹⁶² The doctrine recognizes that, although the subjects of military control have constitutional rights, the degree to which courts may intervene to protect those rights is more limited than the protection afforded to comparable rights of a person under purely civil authority.¹⁶³ The Court has suggested three justifications for this proposition.¹⁶⁴ First, the Constitution grants Congress and the executive the authority to govern the military and is silent on the role of the judiciary in this regard.¹⁶⁵ By implication, the judiciary's constitutional authority to review Congress's judgments regarding military matters is somewhat limited.¹⁶⁶ Second, military judgments necessarily require

¹⁶⁰ See *Schacht v. United States*, 398 U.S. 58, 61 (1970) (indicating that Congress possesses the constitutional authority to regulate the wearing of military uniforms by civilians).

¹⁶¹ See *id.*

¹⁶² See John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161, 307-08 (2000).

¹⁶³ See *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (concluding that active duty military personnel enjoy First Amendment guarantees to a lesser extent than civilians), *superseded by statute*, National Defense Authorization Act for Fiscal Years 1988 and 1989, § 508, Pub. L. No. 100-180, 101 Stat. 1019, 1086-87 (codified at 10 U.S.C. § 774 (2006)); *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Parker v. Levy*, 417 U.S. 733, 751 (1974) ("While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community."); O'Connor, *supra* note 162, at 232-33.

¹⁶⁴ See *Middendorf v. Henry*, 425 U.S. 25, 38, 43-44 (1976); O'Connor, *supra* note 162, at 259; see also John N. Ohlweiler, Note, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 152-53 (1993).

¹⁶⁵ U.S. CONST. art. I, § 8 (granting Congress the power to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces); U.S. CONST. art. II, § 2 (designating the President as the commander in chief of the army and navy); see U.S. CONST. art. III (omitting specific mention of the relationship between the judiciary and the military); see also Keith M. Harrison, *Be All You Can Be (Without the Protection of the Constitution)*, 8 HARV. BLACKLETTER L.J. 221, 223-24 (1991).

¹⁶⁶ See *Solorio*, 483 U.S. at 447-48 ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); *Goldman*, 475 U.S. at 508 ("[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for

expertise that may be lacking in the judiciary.¹⁶⁷ Consequently, prudential concerns counsel that this lack of judicial competence justifies more limited intervention in military affairs.¹⁶⁸ Third, the military is a specialized society that cannot properly function without uncommon devotion to obedience, discipline, and conformity.¹⁶⁹ These needs are inconsistent with the constitutional protections typically available to civilians, and, therefore, some lesser degree of protection is necessary to permit the military to effectively advance national interests.¹⁷⁰

Despite these concerns, the Court will provide some substantive review of alleged violations of the constitutional rights of a person who is properly the subject of military authority.¹⁷¹ The Court will also apply at least one of three techniques in order to reduce the scope of those rights and promote deference to the political branches' authority over military matters.¹⁷² First, the Court may apply a more lenient standard of review to the constitutional claim.¹⁷³ Second, if the proper standard

their governance is challenged." (quoting *Rostker*, 453 U.S. at 70)); *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment . . . and Congress and the courts have acted in conformity with that view."); *Middendorf*, 425 U.S. at 43 ("In making such an analysis we must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces that counsel should not be provided in summary courts-martial." (citation omitted)); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (rejecting a challenge to sex-based features of the military promotion system on the grounds that, in setting up the system, Congress had exercised its "broad constitutional power" to "determine how best our Armed Forces shall attend to [military] business.").

¹⁶⁷ See *Solorio*, 483 U.S. at 448 ("The notion that civil courts are ill equipped to establish policies regarding matters of military concern is substantiated by experience . . ." (internal quotation marks omitted)); *Chappell*, 462 U.S. at 302 (stating in reference to military matters that "it is difficult to conceive of an area of governmental activity in which the courts have less competence" (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973))); *Rostker*, 453 U.S. at 65-66.

¹⁶⁸ See *Goldman*, 475 U.S. at 507-08; *Middendorf*, 425 U.S. at 44.

¹⁶⁹ See *Goldman*, 475 U.S. at 507 ("[T]o accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps."); *Chappell*, 462 U.S. at 300 ("[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting.").

¹⁷⁰ See *Chappell*, 462 U.S. at 300 ("Civilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with the established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the necessarily unique structure of the Military Establishment.").

¹⁷¹ See O'Connor, *supra* note 162, at 282.

¹⁷² See *id.*

¹⁷³ See *Weiss v. United States*, 510 U.S. 163, 177 (1994) (declining to apply civilian due process standards to military context); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (declining to apply the public forum doctrine to the suppression of political speech on a portion of a military installation open to the public); *Parker*, 417 U.S. at 756 ("Because of the factors

of review involves a balancing test, the Court may amplify the magnitude of the government's interest in regulating conduct.¹⁷⁴ Third, the Court may limit the availability of various causes of action to servicemembers.¹⁷⁵ The application of such techniques results in heightened judicial deference to the government's assessment of the magnitude of its own interest in regulating military activity.¹⁷⁶

The Court has applied the Military Deference Doctrine to at least one case involving the wearing of military uniforms.¹⁷⁷ In 1986, in *Goldman v. Weinberger*, the U.S. Supreme Court considered a claim by an active duty officer in the Air Force that regulations restricting the wearing of religious items while in uniform infringed on his First Amendment right to the free exercise of his religion.¹⁷⁸ Stating that "courts must

differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the [UCMJ] is the standard which applies to criminal statutes regulating economic affairs.").

¹⁷⁴ See, e.g., *Rostker*, 453 U.S. at 69–72 (applying civilian gender-based discrimination due process standard with heightened attention to Congress's assessment of government interest).

¹⁷⁵ See *United States v. Johnson*, 481 U.S. 681, 692 (1987) (denying active duty servicemember cause of action under Federal Tort Claims Act where defendants were members of nonmilitary government agency); *United States v. Shearer*, 473 U.S. 52, 57–58 (1985) (denying servicemembers cause of action under the Federal Tort Claims Act where defendants were superiors in chain of command); *Chappell*, 462 U.S. at 304 (denying *Bivens*-type cause of action to enlisted military personnel in suits against superior officers); see also *United States v. Stanley*, 483 U.S. 669, 684 (1987) (stating that the *Chappell* doctrine applies to all suits arising out of activity incident to military service); Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 443 (1999); O'Connor, *supra* note 162, at 282 (stating that denying causes of action to servicemembers contributes to judicial deference to the military by pushing "the resolution of disputes between servicemembers and their superiors" out of "the courts and to the political branches").

¹⁷⁶ See O'Connor, *supra* note 162, at 261. Many circuits, prior to reviewing the merits of a claim, will also apply a justiciability test that takes into account exhaustion of military remedies, type of harm, nature and strength of the servicemember's claim, potential injury if review is denied, type and degree of interference with military function, and the extent of military expertise or discretion involved in the challenged decision. See E. Roy Hawkins, *The Exhaustion Component of the Mindes Justiciability Test Is Not Laid to Rest by Darby v. Cisneros*, 166 MIL. L. REV. 67, 69–73 (2000) (discussing prevalence of justiciability test announced by *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971)); Gabriel W. Goensteen, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 397–403 (1984).

¹⁷⁷ See *Goldman*, 475 U.S. at 507–10; see also *Khalsa v. Weinberger*, 787 F.2d 1288, 1289–90 (9th Cir. 1986); *United States v. Stone*, 37 M.J. 558, 561–564 (A.C.M.R. 1993) (applying Military Deference Doctrine in concluding that active duty servicemember who made false and disturbing claims about his conduct in Operation Desert Shield while on leave and speaking in uniform to high school assembly could constitutionally be punished but that any punishment for unflattering but substantially truthful speech might be prohibited by the First Amendment).

¹⁷⁸ See *Goldman*, 475 U.S. at 505–06.

give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest," the Court then accepted that the military's "considered professional judgment . . . is that the traditional outfitting of personnel in standardized uniforms encourages the subordination of personal preferences and identities in favor of the overall group mission."¹⁷⁹ Consequently, the Court concluded that "the regulations challenged here reasonably and evenhandedly regulate dress in the interest of the military's perceived need for uniformity" and were therefore permissible.¹⁸⁰ Although the Court did not precisely articulate its standard of review, it did note, without overt disapproval, the appellate court's conclusion that, rather than applying a strict scrutiny or rational basis standard, a court should permit the military to restrict First Amendment rights when the government pursues legitimate military ends and the regulation is designed to accommodate the individual right to an appropriate degree.¹⁸¹

C. Expressive Conduct

In 1968, in *United States v. O'Brien*, the U.S. Supreme Court considered whether government regulation banning conduct could violate the First Amendment.¹⁸² The specific regulation in question in *O'Brien*

¹⁷⁹ See *id.* at 507–08.

¹⁸⁰ See *id.* at 510.

¹⁸¹ See *id.* at 506. Justice Brennan, in a vigorous dissent, argued that the majority was applying "a subrational-basis standard" that credited the military's assertion of necessity "no matter how absurd or unsupported it may be." See *id.* at 515 (Brennan, J., dissenting); see also *Khalsa*, 787 F.2d at 1289–90 (noting similarity between *Goldman* standard of review and "the doctrine of limited reviewability of military regulations as followed in this circuit"); *Adair v. England*, 183 F. Supp. 2d 31, 52 (D.D.C. 2002) (noting that *Goldman* provides "little clear guidance" regarding the appropriate standard of review); Barney F. Bilello, Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 491 (1989) (suggesting that *Goldman* "fails to provide any intelligible guidance beyond the confines of the particular facts of the case for resolving constitutional claims of members of the armed forces"); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 872 (1987) (suggesting that the Court in *Goldman* "implied that any decision of the military, as long as the military authorities labeled it necessary for some military need, would be immune from judicial scrutiny"). Recognizing this confusion, in 2002 in *Adair*, the U.S. District Court for the District of Columbia declined to extend the *Goldman* standard to a case where the challenged policy did not advance a specific or important "operational, strategic, or tactical objective" and instead applied strict scrutiny to military policies which allegedly skewed the promotion and retention of chaplains based on religious denomination. See 183 F. Supp. 2d at 35, 50–53, 55. But see *Larsen v. U.S. Navy*, 486 F. Supp. 2d 11, 29 (D.D.C. 2007), *aff'd on other grounds*, 525 F.3d 1, 3–4 (D.C. Cir. 2008).

¹⁸² See 391 U.S. at 376–77.

was a statute that imposed criminal penalties on the destruction or mutilation of a draft card.¹⁸³ David Paul O'Brien burned his draft card on the steps of a courthouse in order to "influence others to adopt his antiwar beliefs" and was subsequently indicted and convicted.¹⁸⁴

The Court in *O'Brien* reached four important conclusions.¹⁸⁵ First, while rejecting the idea "that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," the Court accepted the proposition that the communicative element of certain conduct could be sufficient to invoke First Amendment protections.¹⁸⁶ The Court assumed (without deciding) that O'Brien's expressive conduct included a sufficiently "communicative element" to implicate First Amendment protections.¹⁸⁷

Second, the Court concluded "that when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."¹⁸⁸ The Court announced a four-part test to be applied when evaluating this interest:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁸⁹

¹⁸³ See *id.* at 370.

¹⁸⁴ See *id.* at 369–70.

¹⁸⁵ See *id.* at 376–86.

¹⁸⁶ See *id.* at 376.

¹⁸⁷ See *O'Brien*, 391 U.S. at 376. The Supreme Court later clarified the limits of expressive conduct by stating that "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

¹⁸⁸ *O'Brien*, 391 U.S. at 376. Where the asserted government interest is the suppression of free expression, the *O'Brien* test is inapplicable. See *Johnson*, 491 U.S. at 407 ("In order to decide whether *O'Brien's* test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression.").

¹⁸⁹ See *O'Brien*, 391 U.S. at 377.

Third, the Court concluded that the statute prohibiting the destruction or mutilation of draft cards satisfied this four-part test.¹⁹⁰ As for part one, the Constitution grants Congress "broad and sweeping" authority to make laws necessary and proper to raise and support armies.¹⁹¹ Evaluating part two, the Court concluded that requiring registrants to retain intact draft cards served a legitimate and substantial government interest in efficiently operating the draft system because the issuance and possession of unaltered draft cards minimizes future administrative burdens on the Selective Service system, ensures that registrants have access to important information such as their draft number and the address of their local draft board, reminds the registrant to make mandatory communications to their draft board, and protects against the use of altered or forged draft cards.¹⁹² Assessing part three, the Court found that the government interest was unrelated to the suppression of free expression because "both the government interest and the operation of [the statute] are limited to the noncommunicative aspect of O'Brien's conduct."¹⁹³ Lastly, with regard to part four, the Court "perceive[d] no alternative means that

¹⁹⁰ See *id.* at 382.

¹⁹¹ See *id.* at 377. Where a military uniform regulation prohibits conduct authorized by Congress, the regulation is likely outside the constitutional power of the military. See U.S. CONST. art. I, § 8 (granting Congress the power to make rules for the government and regulation of the land and naval forces); *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (recognizing implicitly Congress's power to create rights related to the wearing of military uniforms); *Chappell*, 462 U.S. at 301 (referring to Congress's power to regulate rights and duties within the military establishment as "plenary"); *In re Hodge*, 220 B.R. 386, 397 (D. Idaho 1998) (endorsing, in commentary on the aftermath of *Goldman*, Congress's power to create a statutory right that supersedes restrictions imposed by military uniform regulations); *Alameen v. Coughlin*, 892 F. Supp. 440, 450 n.11 (E.D.N.Y. 1995) (recognizing that a statute effectively overruled the outcome of *Goldman*); cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 & n.23 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers." (citing *Steel Seizure*, 343 U.S. at 637 (Jackson, J., concurring))); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (stating that, in an administrative law context, "the [C]ourt, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 177-78 (1804) (declaring unlawful a military order authorizing captures on the high seas because the order exceeded authority granted by Congress). But see David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 766 (2008) (concluding that, although the Court has accepted the proposition that Congress may restrict executive military activity, the Court has not ruled out the possibility that the executive retains some inherent and inviolable military authority).

¹⁹² See *O'Brien*, 391 U.S. at 378-80.

¹⁹³ See *id.* at 381-82.

would more precisely and narrowly assure" the fulfillment of the government's objective.¹⁹⁴

Fourth, and finally, the Court stated that indications that the purpose of a regulation is the suppression of free expression may be drawn from the text or application of the regulation but generally may not be implied from elements of legislative history.¹⁹⁵

The *O'Brien* test has been applied in civilian cases contesting regulations that required or forbade the wearing of uniforms or other clothing by public employees,¹⁹⁶ members of the general public,¹⁹⁷ public school students,¹⁹⁸ exotic dancers,¹⁹⁹ and Ku Klux Klan members.²⁰⁰ The *O'Brien* test has also been applied to the military context on at least one occasion.²⁰¹ In 1991, in *United States v. Wilson*, the U.S. Army Court of Military Review considered whether the First Amendment prohibited the punishment of an active duty soldier who blew his nose on the

¹⁹⁴ See *id.* at 381.

¹⁹⁵ See *id.* at 382–86.

¹⁹⁶ See *Local 491, Int'l Bhd. of Police Officers v. Gwinnett County*, 510 F. Supp. 2d 1271, 1281–82 (N.D. Ga. 2007) (utilizing *O'Brien* analysis to justify reduced scrutiny when reviewing a police policy prohibiting the wearing of uniforms by off duty officers at public meetings). But see *Zalewska v. County of Sullivan*, N.Y., 316 F.3d 314, 319–20 (2d Cir. 2003) (declining to apply *O'Brien* analysis to a county transportation department's dress code because the act of wearing a skirt instead of pants was not sufficiently expressive to invoke First Amendment protections due to the lack of a particularized and comprehensible message).

¹⁹⁷ See *Sult v. State*, 906 So. 2d 1013, 1025–31 (Fla. 2005) (Cantero, J., dissenting) (applying *O'Brien* analysis to a state statute that prohibited the unauthorized wearing of law enforcement uniforms); *State v. McLamb*, 932 P.2d 266, 272–74 (Ariz. Ct. App. 1996) (applying *O'Brien* analysis to an ordinance banning the unauthorized use of police insignia on clothing).

¹⁹⁸ See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391–93 (6th Cir. 2005) (applying *O'Brien* analysis to school dress code); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 285–87 (5th Cir. 2001) (applying *O'Brien* analysis to regulation requiring the mandatory wearing of school uniforms); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001); *Lowry v. Watson Chapel Sch. Dist.*, 508 F. Supp. 2d 713, 719 (E.D. Ark. 2007); *Jacobs v. Clark County Sch. Dist.*, 373 F. Supp. 2d 1162, 1185 (D. Nev. 2005).

¹⁹⁹ See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296–302 (2000) (applying *O'Brien* analysis to a public nudity ban that effectively required exotic dancers to wear pasties and a G-string); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991); *McCrothers Corp. v. City of Mandan*, 728 N.W.2d 124, 135 (N.D. 2007).

²⁰⁰ See *State v. Miller*, 398 S.E.2d 547, 550–51 (Ga. 1990) (applying *O'Brien* analysis to statute banning the wearing of masks); *Hernandez v. Commonwealth*, 406 S.E.2d 398, 400–01 (Va. Ct. App. 1991). But see *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206–08 (2d Cir. 2004) (declining to apply *O'Brien* analysis to statute banning the wearing of masks because, in the case of Klan members, the mask is optional, is redundant, "adds no expressive force to the message portrayed by the rest of the outfit," and is therefore not expressive conduct); *Hernandez v. Superintendent, Fredericksburg-Rappahannock Joint Sec. Ctr.*, 800 F. Supp. 1344, 1351 (E.D. Va. 1992).

²⁰¹ See *Carr*, *supra* note 54, at 332.

American flag during a flag-raising detail in order to express dissatisfaction with military life.²⁰² The soldier had been convicted of disobeying a lawful order and dereliction of duty in violation of UCMJ Article 92.²⁰³ The court in this case addressed several related questions.²⁰⁴ First, did the accused engage in expressive conduct?²⁰⁵ Second, do members of the military enjoy First Amendment protection of expressive conduct?²⁰⁶ Third, if so, by what standard should that protection be evaluated?²⁰⁷ Fourth, how should this standard be applied to the facts of this case?²⁰⁸

In answering the first question, the court adopted the finding of the trial judge that "the accused's statements and his conduct in blowing his nose on the flag when viewed together are expressive conduct."²⁰⁹

As to the second question, the court stated,

Members of the armed forces enjoy the First Amendment's protections of freedom of speech. This includes not only the right to verbally express ideas but also to utilize non-verbal means of communication. However, members of the armed forces may be subject to restraints on the exercise of their freedom of speech not faced by civilians. This is so because the needs of the armed forces may warrant regulation of conduct that would not be justified in the civilian community.²¹⁰

With respect to the third question, the court concluded that, where expressive conduct is incidentally regulated, the four-part *O'Brien* test must be applied.²¹¹

²⁰² See 33 M.J. 797, 798 (A.C.M.R. 1991). The soldier stated that the Army and the United States "sucked," then said "[t]his is what I think," and blew his nose on the American flag, leaving on the flag "a small wet circle." *Id.*

²⁰³ *Id.* at 797-98.

²⁰⁴ *Id.* at 798-800.

²⁰⁵ *Id.* at 799.

²⁰⁶ See *id.* at 798-99.

²⁰⁷ *Wilson*, 33 M.J. at 799.

²⁰⁸ *Id.* at 800.

²⁰⁹ *Id.* at 798-800. The appellate court also adopted the trial court's conclusion that *Texas v. Johnson* was inapplicable because the regulation in question was designed to govern the performance of military duties and therefore only incidentally restricted interests protected by the First Amendment. See *id.* at 798, 800.

²¹⁰ *Id.* at 799 (citing *United States v. Womack*, 29 M.J. 88 (C.M.A. 1989)). The proposition that First Amendment rights of servicemembers are limited due to unusually strong government interests is well suited to the *O'Brien* test, which explicitly accounts for such government interest. See *O'Brien*, 391 U.S. at 377.

²¹¹ See *Wilson*, 33 M.J. at 799.

To address the fourth question, the court methodically applied the elements of the *O'Brien* test in order to arrive at the proper outcome and stated that: (1) Article 92 of the UCMJ is a legitimate exercise of government authority because the government is empowered to regulate the conduct of soldiers who are on duty and in uniform; (2) Article 92 promotes an effective military force and therefore advances a substantial government interest; (3) the purpose served by Article 92 is unrelated to the suppression of free expression; and (4) Article 92's incidental restriction of free speech is no greater than necessary.²¹² Consequently, the court held that each component of the four-part test was satisfied and that Article 92 therefore did not unconstitutionally restrict the defendant's expressive conduct.²¹³

III. SELECTING AND APPLYING A STANDARD

As explained in Part I, the government has placed additional restrictions on the uniform-related expression of Individual Ready Reserve ("IRR") members.²¹⁴ Although a person with no military affiliation may wear a military uniform while participating in a guerrilla theater performance without fear of penalty, IRR members who engage in identical conduct may be subject to involuntary administrative separation, an act which may reduce access to veterans' benefits and stigmatize the individual.²¹⁵ As discussed in Part II, this additional restriction on uniform-related expression might be evaluated under any of three distinct standards in order to investigate conformity with First Amendment restrictions on government regulation.²¹⁶ Of the three available standards, the expressive conduct standard established by the U.S. Supreme Court in *United States v. O'Brien* is most appropriate to this problem.²¹⁷

A. Application of the Government Employee Standard Is Inappropriate or Futile

Two considerations suggest that the application of the *Pickering* test to evaluate the constitutionality of these restrictions on IRR members

²¹² *Id.* at 800.

²¹³ *Id.*

²¹⁴ See *supra* notes 35–105 and accompanying text.

²¹⁵ See *supra* notes 35–105 and accompanying text.

²¹⁶ See *supra* notes 110–213 and accompanying text.

²¹⁷ See *infra* notes 270–290 and accompanying text.

would be inappropriate or futile.²¹⁸ First, the *Pickering* test is applied to restrictions on expression by government employees, and a member of the IRR is not a government employee within the meaning of the *Pickering* test.²¹⁹ Second, the *Pickering* test, if applied, would simply require the application of some other appropriate test for evaluating restrictions on the speech of non-employees.²²⁰

IRR members are not employees within the meaning of the *Pickering* test because they possess an insufficiently close relationship to the government.²²¹ In 1996, in *Board of County Commissioners v. Umbehr*, the U.S. Supreme Court rejected a formalistic definition of the term "employee" for the purposes of deciding the applicability of the *Pickering* test.²²² Instead, the Court concluded that relationships between individuals and the government fall upon a spectrum of closeness based on the individual's dependency on government assistance and the legitimacy of the government's interest in controlling the individual's expression.²²³ The relationship's position on this spectrum of closeness determines whether the individual is an employee within the meaning of the *Pickering* test.²²⁴ Unless recalled to active duty, IRR members live and work in the civilian community, perform no military duties except occasional ministerial functions designed to ensure readiness for recall, receive no salary or substantial employment benefits from the military, and are not governed by the military justice system.²²⁵ Consequently, IRR members receive no valuable benefit from the government and perform few, if any, government functions that could justify a government interest in controlling expression.²²⁶ This lack of dependency and lack of employee-like functions strongly suggest that IRR members do not have a close relationship with the government.²²⁷ Consequently, like users of public facilities or recipients of small government benefits, IRR members are not government employees within the meaning of the *Pickering* test, and restrictions on

²¹⁸ See *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 680-81 (1996); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 572-74 (1968).

²¹⁹ See *Umbehr*, 518 U.S. at 680-81.

²²⁰ See *Pickering*, 391 U.S. at 572-74.

²²¹ See *Umbehr*, 518 U.S. at 680-81.

²²² See *id.* at 678.

²²³ See *id.* at 680-81.

²²⁴ See *id.*

²²⁵ See *supra* notes 46-50 and accompanying text.

²²⁶ See *supra* notes 46-50 and accompanying text.

²²⁷ See *Umbehr*, 518 U.S. at 680-81.

expression by IRR members must be evaluated under some other relevant standard.²²⁸

Notably, the conclusion that IRR members are not employees within the meaning of the *Pickering* test does not contradict the application of the *Pickering* test to previous cases in which the military restricted the expression of servicemembers.²²⁹ In 1995, in *Lee v. United States* and in 1989, in *Banks v. Ball*, the U.S. Court of Federal Claims and the U.S. District Court for the Eastern District of Virginia, respectively, applied the *Pickering* test to speech-related disciplinary actions against reserve officers.²³⁰ In both cases, however, the officers made the statements for which they were punished while performing official government functions and apparently receiving pay from the government.²³¹ Because such factors heighten individual dependency on government assistance and justify the government's interest in regulating speech, the servicemembers in *Lee* and *Banks* possessed an increased degree of closeness to the government that is generally absent in cases involving IRR members, who perform few official functions and generally receive no pay.²³² In light of this distinction, a determination that IRR members are not employees within the meaning of *Pickering* does not conflict with the holdings of *Lee* and *Banks*.²³³

Additionally, even if the *Pickering* test were applied to instances in which IRR members are disciplined for wearing uniform items during guerrilla theater performances, such application would be futile because the outcome of the test would resolve nothing and would instead direct the court to apply a relevant standard for non-employees.²³⁴ When applying *Pickering*, a court must first inquire whether the employee spoke as a citizen on a matter of public concern.²³⁵ It is likely that IRR members performing guerrilla theater speak as citizens because such expression is not pursuant to any of their official duties.²³⁶ The subject of a guerrilla theater performance, the conduct of an on-

²²⁸ See *id.*

²²⁹ See generally *Lee v. United States*, 32 Fed. Cl. 530 (1995); *Banks v. Ball*, 705 F. Supp. 282 (E.D. Va. 1989).

²³⁰ See *Lee*, 32 Fed. Cl. at 542; *Banks*, 705 F. Supp. at 286–87.

²³¹ See *Lee*, 32 Fed. Cl. at 534, 536; *Banks*, 705 F. Supp. at 283–84.

²³² See *Umbehr*, 518 U.S. at 680–81; *supra* notes 46–50 and accompanying text.

²³³ See *Umbehr*, 518 U.S. at 680–81; *supra* notes 46–50 and accompanying text.

²³⁴ See *Pickering*, 391 U.S. at 572–74.

²³⁵ See *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

²³⁶ See 10 U.S.C. §§ 10205(a), 10206(b) (2006); *id.* § 12319(a)–(b); *cf. Garcetti*, 547 U.S. at 421 (stating that employees are not speaking as citizens when they make statements pursuant to their official duties).

going military operation, is likely a matter of public concern because it relates to the external functions and official conduct of a government institution.²³⁷

Since an IRR member participating in a guerrilla theater performance is speaking as a citizen on a matter of public concern, a court must then balance the interests of the employee, as a citizen, in commenting on matters of public concern against the interest of the government, as an employer, in providing efficient services.²³⁸ Because IRR members are likely to have recently served on active duty in any ongoing conflict, they are people likely to possess informed and definite opinions about a question, the conduct of the war, for which free and open debate is vital to informed decision-making by the electorate, a fact which weighs in favor of the IRR members' ability to engage in such expressive conduct.²³⁹ More importantly, few, if any, factors weigh in favor of the government's interest in regulating IRR members' expression.²⁴⁰ Expression by IRR members cannot disrupt relationships with coworkers or superiors because IRR members do not generally perform any official duties and therefore have no contact with supervisors or coworkers.²⁴¹ Additionally, IRR members are unlikely to convey a false impression that is difficult to counter because the purpose of guerrilla theater is to convey truth and because the military presumably has access to ample information that could be communicated to the public in order to counter falsity.²⁴² Given this strong employee interest and weak government interest, it appears likely that the government's interest in limiting an IRR member's opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any citizen.²⁴³ Consequently, the regulation of the IRR member's expression must be evaluated by a relevant standard

²³⁷ See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 282, 284 (1977); *Perry v. Sindermann*, 408 U.S. 593, 594-95, 598 (1972); *Pickering*, 391 U.S. at 569.

²³⁸ See *Pickering*, 391 U.S. at 568; see also *Garcetti*, 547 U.S. at 418.

²³⁹ See *Pickering*, 391 U.S. at 572 (stating that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions [about a matter of public concern, and therefore] it is essential that they be able to speak out freely . . . without fear of retaliatory dismissal").

²⁴⁰ See *id.* at 569-70, 572; cf. *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (concluding that the need to protect "close working relationships [that] are essential to fulfilling public responsibilities" is a factor that weighs in favor of the government's interest in providing efficient services).

²⁴¹ See *Pickering*, 391 U.S. at 569-70; cf. *Connick*, 461 U.S. at 151-52.

²⁴² See *Pickering*, 391 U.S. at 572; HUNT, *supra* note 23, at 53.

²⁴³ See *Pickering*, 391 U.S. at 569-70, 572-73.

for non-employees, a conclusion which demonstrates the futility of reliance on the *Pickering* test in this context.²⁴⁴

B. *Application of the Military Deference Doctrine Is Unjustified*

Furthermore, courts should not defer to the military's judgment regarding the necessity of regulating the wearing of uniform items by IRR members because application of the Military Deference Doctrine to this circumstance would advance none of the three considerations which traditionally justify such deference.²⁴⁵ Application of the Military Deference Doctrine would, in fact, frustrate, rather than advance, the exercise of Congress's constitutional power to regulate the military; it would not prevent the judiciary from intruding into matters in which it has limited competence; and it would not prevent a disruption of the specialized military society.²⁴⁶

First, application of the Military Deference Doctrine to restrictions on the uniform-related expression of IRR members performing in guerrilla theater events would not show respect for Congress's military authority because, in this case, such deference would frustrate rather than advance the will of Congress.²⁴⁷ Congress, in 10 U.S.C. § 772, has described situations in which the wearing of military uniforms by "persons not on active duty" is authorized.²⁴⁸ One such situation is when an actor, a broadly inclusive term which implies no presence or absence of military affiliation, portrays a member of the military in a theatrical production, a category which includes guerrilla theater.²⁴⁹ Therefore, Congress has authorized a person not on active duty to wear a military uniform while acting in guerrilla theater performances.²⁵⁰ Because an IRR member is not on active duty, Congress has authorized IRR members to wear a military uniform while participating in such performances.²⁵¹ Consequently, the imposition of adverse consequences, such

²⁴⁴ See *id.* at 572-74.

²⁴⁵ See *supra* notes 164-170 and accompanying text; cf. *Stencel Aero Eng'g Co. v. United States*, 431 U.S. 666, 672-74 (1977) (deciding whether to extend the doctrine announced in *Feres v. United States*, 340 U.S. 135 (1950), by examining whether the principles underlying the doctrine were equally applicable to the new context and holding the doctrine should govern in the new context because "the factors considered by the *Feres* court are largely applicable in this type of case as well").

²⁴⁶ See *supra* notes 164-170 and accompanying text.

²⁴⁷ See, e.g., *Solorio v. United States*, 483 U.S. 435, 447-48 (1987).

²⁴⁸ 10 U.S.C. § 772 (2006).

²⁴⁹ See *id.* § 772(f); *Schacht v. United States*, 398 U.S. 58, 61-62 (1970).

²⁵⁰ See 10 U.S.C. § 772; *Schacht*, 398 U.S. at 61-62.

²⁵¹ See 10 U.S.C. § 10144.

as administrative separation, on IRR members who wear military uniforms while participating in a guerrilla theater performance ignores the will of Congress.²⁵² Application of the Military Deference Doctrine to judicial review of such a separation would only serve to compound this frustration of legislative authority.²⁵³ Such a result is antithetical to the first justification underlying the Military Deference Doctrine, respect for the judgment and constitutional authority of the legislative branch with respect to military functions.²⁵⁴

Second, application of the Military Deference Doctrine to restrictions on the uniform-related expression of IRR members performing in guerrilla theater performances would not prevent the judiciary from making judgments about matters in which it lacks competence, as a nondeferential review of such a restriction would not require inquiry into such matters.²⁵⁵ The connection between IRR members and the military is severely attenuated.²⁵⁶ IRR members live and work as civilians.²⁵⁷ IRR members' military duties are limited to those few administrative functions which are necessary to ensure availability for recall to active duty in a time of national need.²⁵⁸ IRR members are not governed by the military justice system and do not receive pay or substantial benefits from the military.²⁵⁹ This limited connection between IRR members and the military precludes the notion that judicial review of the administrative separation of IRR members based on uniform-related expression would require a court to establish policies related to matters of military concern.²⁶⁰ Because review of such a separation would not require a court to stray beyond the traditional boundaries of judicial competence, the application of the Military Deference Doctrine to limit such review could hardly be said to prevent an imprudent outcome.²⁶¹

Third, application of the Military Deference Doctrine in this context would not prevent the disruption of the specialized military society because a court evaluating the administrative separation of an IRR

²⁵² See *id.* § 772; *Schacht*, 398 U.S. at 61-62.

²⁵³ See *supra* notes 172-176 and accompanying text.

²⁵⁴ See, e.g., *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

²⁵⁵ Cf. *Solorio*, 483 U.S. at 448-49.

²⁵⁶ See *Montgomery*, *supra* note 50.

²⁵⁷ See *id.*

²⁵⁸ See 10 U.S.C. §§ 10205-10206; *id.* § 12319.

²⁵⁹ See 10 U.S.C. § 802(a)(1), (a)(3), (c), (d)(2); *id.* § 1074(a)(2)(A)-(B); 37 U.S.C. § 204(a)(2) (2000); *id.* § 433(a)-(b).

²⁶⁰ Cf. *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986).

²⁶¹ Cf. *Chappell*, 462 U.S. at 302 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

member under a nondeferential standard would not be required to evaluate or dictate the characteristics of the specialized military society.²⁶² The existence of a specialized military society in which constitutional protections may be limited is justified by the fact that members of that society perform military functions which cannot succeed without instinctive obedience and strict conformity.²⁶³ For example, in 1986, in *Goldman v. Weinberger*, the U.S. Supreme Court applied the Military Deference Doctrine to a challenge to uniform regulations pertaining to an active duty servicemember, in part due to the military's extraordinary need to foster obedience in order to accomplish military tasks.²⁶⁴ Unlike the active duty officer in *Goldman*, however, IRR members live as civilians within a civilian setting.²⁶⁵ Unless recalled to active duty, IRR members do not perform military activities for which unusually strict discipline and immediate obedience may be required.²⁶⁶ Consequently, the justifications underlying the recognition of a specialized military society do not extend to members of the IRR, and IRR members must be considered members of the civilian community for constitutional purposes.²⁶⁷ Therefore, application of the Military Deference Doctrine to the review of administrative separation of IRR members would not protect the existence of a specialized military society, as a court reviewing the exercise of authority under a nondeferential standard would not be required to evaluate the regulation of any member of the specialized military society.²⁶⁸

Because the application of the Military Deference Doctrine in this context would not prevent infringement on Congress's constitutional authority, would not prevent the judiciary from making judgments relating to matters in which it lacks competence, and would not advance the interest of the specialized military society, it is not the appropriate standard under which to review this exercise of government authority.²⁶⁹

²⁶² Cf. *id.* at 300.

²⁶³ See *id.*

²⁶⁴ See 475 U.S. at 507.

²⁶⁵ See *Montgomery*, *supra* note 50.

²⁶⁶ See 10 U.S.C. §§ 10205–10206; *id.* § 12319.

²⁶⁷ Cf. *Goldman*, 475 U.S. at 507; *Adair v. England*, 183 F. Supp. 2d 31, 50–53 (D.D.C. 2002).

²⁶⁸ Cf. *Chappell*, 462 U.S. at 300.

²⁶⁹ See *supra* notes 164–170, 245–268 and accompanying text.

C. Application of the Expressive Conduct Standard Is Appropriate

Three factors suggest that the expressive conduct standard announced by the U.S. Supreme Court in 1968 in *United States v. O'Brien* is most appropriate to evaluate restrictions on the wearing of military uniforms by IRR members participating in guerrilla theater performances.²⁷⁰ First, the wearing of military uniforms in a guerrilla theater performance is conduct which includes a sufficiently expressive element to implicate First Amendment protections.²⁷¹ Second, the wearing of military uniforms includes a nonspeech element in which the government could assert an interest in regulating.²⁷² Third, the *O'Brien* standard, through its deferential assessment of government interest, properly accommodates the special concerns that may arise in disputes between servicemembers and the military hierarchy.²⁷³

The application of the *O'Brien* standard to restrictions on the wearing of military uniforms during guerrilla theater performances is appropriate because such conduct includes a sufficiently expressive element to implicate First Amendment protections.²⁷⁴ In 1970, in *Schacht v. United States*, the U.S. Supreme Court cited only *O'Brien* as support for the proposition that Congress may pass legislation generally prohibiting the wearing of military uniforms.²⁷⁵ This reliance suggests that the wearing of military uniforms could be expressive conduct, and the Court has since explicitly stated that *Schacht* stands for the proposition that the wearing of military uniforms in a dramatic presentation criticizing a war is expressive conduct.²⁷⁶ Additionally, the *O'Brien* standard has been applied to a variety of other contexts in which government authority is exerted to require or limit the wearing of uniforms or other clothing.²⁷⁷ Such application suggests that clothing choices often incorporate a sufficiently expressive element to invoke First Amendment protection.²⁷⁸ Lastly, the fact that the conduct subject to regulation is an element of a theatrical production suggests that the conduct is suffi-

²⁷⁰ See *Texas v. Johnson*, 491 U.S. 397, 404, 407 (1989); *Schacht*, 398 U.S. at 61; *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v. Wilson*, 33 M.J. 797, 799-801 (A.C.M.R. 1991).

²⁷¹ See *Johnson*, 491 U.S. at 404; *Schacht*, 398 U.S. at 61.

²⁷² See *Johnson*, 491 U.S. at 407.

²⁷³ See, e.g., *Wilson*, 33 M.J. at 799-801.

²⁷⁴ See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289 (2000); *Johnson*, 491 U.S. at 404; *Schacht*, 398 U.S. at 61.

²⁷⁵ *Schacht*, 398 U.S. at 61.

²⁷⁶ See *Johnson*, 491 U.S. at 404; *Schacht*, 398 U.S. at 61.

²⁷⁷ See *supra* notes 196-200 and accompanying text.

²⁷⁸ See, e.g., *Johnson*, 491 U.S. at 403; *supra* notes 196-200 and accompanying text.

ciently expressive.²⁷⁹ The U.S. Supreme Court has concluded that performing an erotic dance without clothing is a form of expressive conduct.²⁸⁰ If a clothing choice in that performance context is sufficiently expressive to invoke speech protections, then surely the choice to wear a military uniform while reenacting an ongoing conflict for the purpose of political protest merits at least equivalent recognition.²⁸¹ Consequently, the conduct subject to regulation in this circumstance is expressive, and, therefore, the first prerequisite for the application of the *O'Brien* test is satisfied.²⁸²

Additionally, the application of the *O'Brien* standard to this context is appropriate because the government has an interest in regulating the wearing of military uniforms in politically themed theatrical productions, and that interest is unrelated to the suppression of free expression.²⁸³ The government has a legitimate interest in maintaining civilian supremacy over the military and in maintaining good order and discipline within the military.²⁸⁴ The incorporation of a military uniform into an act of political protest could suggest that either the military in general or some servicemembers in particular are disinclined to accept orders from military superiors or the civilian establishment.²⁸⁵ Consequently, the regulation of such conduct could advance important government interests which are distinguishable from the suppression free expression for its own sake, and therefore the second prerequisite for the application of the *O'Brien* test is satisfied.²⁸⁶

Lastly, the application of the *O'Brien* test to restrictions on the wearing of military uniforms by IRR members during guerrilla theater performances is appropriate because the *O'Brien* test properly accommodates the special concerns that may arise in the context of disputes within the military.²⁸⁷ In 1991, in *United States v. Wilson*, the U.S. Army Court of Military Review held that application of the *O'Brien* test to expressive conduct by an active duty servicemember properly balanced the needs of government in promoting a disciplined military

²⁷⁹ See *Pap's A.M.*, 529 U.S. at 289.

²⁸⁰ See *id.*

²⁸¹ Cf. *id.*

²⁸² See *id.*; *Johnson*, 491 U.S. at 404; *Schacht*, 398 U.S. at 61.

²⁸³ See *Schacht*, 398 U.S. at 61; *Vagts*, *supra* note 60, at 188-89; see also *Johnson*, 491 U.S. at 407.

²⁸⁴ See *Greer v. Spock*, 424 U.S. 828, 839 (1976); *Vagts*, *supra* note 60, at 188-89; see also *Warren*, *supra* note 60, at 186.

²⁸⁵ See *Vagts*, *supra* note 60, at 188-89; cf. *Greer*, 424 U.S. at 839.

²⁸⁶ See *Schacht*, 398 U.S. at 61; see also *Johnson*, 491 U.S. at 407.

²⁸⁷ See *Wilson*, 33 M.J. at 799-801.

with the rights guaranteed to servicemembers by the First Amendment.²⁸⁸ Given that, in *Wilson*, an appellate court within the military justice system embraced the *O'Brien* test as sufficiently protective of military interests within an active duty context, it seems likely that the test would similarly accommodate the more attenuated military interests in the regulation of IRR members' expressive conduct.²⁸⁹

In summary, the *O'Brien* test is appropriate for evaluating the constitutionality of restrictions on the wearing of military uniforms by IRR members during guerrilla theater performances because the conduct in question is expressive, the government interest advanced by such regulation is unrelated to the suppression of free expression, and the analysis properly protects the unique interests inherent to the military context.²⁹⁰

D. *Restrictions Do Not Satisfy the Expressive Conduct Standard*

The ultimate question in this Note is whether the First Amendment permits the military to restrict by regulation the wearing of military uniforms by IRR members acting in guerrilla theater productions to a greater degree than the government generally restricts similar expression by persons with no military affiliation.²⁹¹ The *O'Brien* test conclusively demonstrates that the First Amendment does not permit the military to impose such additional restrictions.²⁹²

Such restrictions fail the first prong of the *O'Brien* test because the military lacks the constitutional authority to forbid by regulation what Congress has permitted by statute.²⁹³ The Constitution grants Congress the plenary power to raise and support military forces and to make rules for their governance.²⁹⁴ This power extends to the regulation of the wearing of military uniforms by servicemembers and civilians.²⁹⁵ Congress has authorized persons not on active duty to wear a military uniform while acting in a theatrical production, a term which encompasses guerrilla theater performances.²⁹⁶ Until recalled to service, IRR

²⁸⁸ See *id.*

²⁸⁹ Cf. *id.*

²⁹⁰ See *Johnson*, 491 U.S. at 404, 407; *Schacht*, 398 U.S. at 61; *Wilson*, 33 M.J. at 799-801.

²⁹¹ See *supra* notes 102-105 and accompanying text.

²⁹² See 391 U.S. at 377.

²⁹³ See *id.*; *supra* note 191 and accompanying text.

²⁹⁴ See *Solorio*, 483 U.S. at 447; *Chappell*, 462 U.S. at 301; *supra* note 191 and accompanying text.

²⁹⁵ See *Schacht*, 398 U.S. at 61.

²⁹⁶ 10 U.S.C. § 772(f); see *Schacht*, 398 U.S. at 61-62.

members are not on active duty.²⁹⁷ Therefore, Congress has exercised its constitutional authority to authorize IRR members to wear military uniforms while acting in guerrilla theater performances.²⁹⁸ Consequently, any military regulation which purports to restrict such activities is unsupported by, and runs counter to, the judgment of Congress concerning a topic over which the legislative branch possesses primary authority.²⁹⁹ Because the first prong of the *O'Brien* test requires that the regulation be within the constitutional power of the government, and because the military regulation at issue does not obey the will of Congress in an area over which the Constitution assigns Congress primary control, the regulation at issue does not satisfy the first prong of the *O'Brien* test.³⁰⁰

Additionally, these restrictions fail the second prong of the *O'Brien* test because forbidding IRR members to wear military uniforms in circumstances in which civilians may wear military uniforms advances no important or substantial government interest.³⁰¹ Limiting the rights of IRR members to wear military uniforms while acting in politically themed theatrical productions could advance two distinct government interests: civilian supremacy and military discipline.³⁰² Once persons with no military affiliation are permitted to engage in such behavior, however, the government interests in the restriction of such expression by IRR members evaporate.³⁰³ First, the government interest in maintaining civilian supremacy ceases to apply because the audience typically has no means of distinguishing between uniformed actors who are IRR members and those who no longer have or have never had any military affiliation.³⁰⁴ Accordingly, the participation of IRR members in guerrilla theater performances does not add any implication of military rebellion that is not already present, as the audience cannot know if the actors performing possess any affiliation with the military.³⁰⁵ Second, the government interest in maintaining good order and discipline within the military ceases to be threatened by the

²⁹⁷ See 10 U.S.C. § 10144.

²⁹⁸ See *id.* § 772(f); *Schacht*, 398 U.S. at 61–62.

²⁹⁹ See 10 U.S.C. § 772(f); *Schacht*, 398 U.S. at 61–62.

³⁰⁰ See *O'Brien*, 391 U.S. at 377; *supra* note 191 and accompanying text.

³⁰¹ See *O'Brien*, 391 U.S. at 377.

³⁰² See *Vagts*, *supra* note 60, at 188–89; see also *Warren*, *supra* note 60, at 186.

³⁰³ See *NICOSIA*, *supra* note 24, at 101 (describing attempts by President Nixon to exploit the public's inability to determine whether persons in uniform were actually veterans in order to discredit VVAW).

³⁰⁴ See *id.*

³⁰⁵ See *id.*

participation of IRR members in guerrilla theater performances, because IRR members are not significantly more connected to military society than persons with no military affiliation.³⁰⁶ IRR members live and work as civilians and, in the course of performing IRR-related duties, interact rarely, if at all, with other military servicemembers.³⁰⁷ Since IRR members have essentially no greater interaction with the military than persons with no military affiliation, it seems unlikely that IRR members' participation in guerrilla theater could inflict on the military any greater disruption than is already present as a result of guerrilla theater performances by persons with no military affiliation.³⁰⁸ Consequently, once persons with no military affiliation are permitted to act in guerrilla theater productions, restricting the participation of IRR members in similar productions ceases to advance any important or substantial government interest.³⁰⁹

The *O'Brien* test dictates that the military may not restrict the wearing of uniforms by IRR members participating in guerrilla theater performances as long as Congress has authorized all persons not on active duty to engage in such expression.³¹⁰ The military not only lacks the constitutional authority to contradict the will of Congress, but also advances no important or substantial government interest by enforcing such restrictions.³¹¹ Therefore, such restrictions violate the guarantees of the First Amendment.³¹²

CONCLUSION

The government has punished members of IRR for engaging in uniform-related expression that is generally permissible. Although several First Amendment standards are available, the test enunciated by the Supreme Court in *United States v. O'Brien* is the most relevant to evaluating the constitutionality of such a restriction. The military lacks the constitutional authority to impose the restriction, and the government lacks an interest in more strictly regulating expression by IRR members. Consequently, the first two prongs of the *O'Brien* test are not

³⁰⁶ See *supra* notes 46-50 and accompanying text.

³⁰⁷ See *supra* notes 46-50 and accompanying text.

³⁰⁸ See *supra* notes 46-50 and accompanying text.

³⁰⁹ See *O'Brien*, 391 U.S. at 377.

³¹⁰ See *id.*

³¹¹ See U.S. CONST. art. I, § 8; *Solorio*, 483 U.S. at 447-48; *Chappell*, 462 U.S. at 301; *Vagts*, *supra* note 60, at 188-89; see also *Warren*, *supra* note 60, at 186.

³¹² See *O'Brien*, 391 U.S. at 377.

satisfied, and the First Amendment forbids such additional restrictions on the speech of IRR members.

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