

5-2020

Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers

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Hannah M. Miller, *Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers*, 73 *Vanderbilt Law Review* 1209 (2020)

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Generals & General Elections: Legal Responses to Partisan Endorsements by Retired Military Officers

Retired generals and admirals of the U.S. military appear to be endorsing partisan political candidates in greater numbers, with more visibility. This Note argues that the practice represents a clear danger to civilian control over the military and weakens military effectiveness. It explains that while retirees remain subject to military jurisdiction, the existing array of statutory and regulatory restrictions on political activity cannot adequately address the problem. Neither can professional norms be expected to shore themselves up to solve it. This Note describes how political restrictions on servicemembers have evolved over time in response to novel challenges to civilian control. It illustrates that retired officers—who receive lifetime pensions and remain subject to recall—have always been a part of the civilian-control conversation. It also analogizes to judicial ethics, Hatch Act prohibitions, and postemployment business ethics restrictions on military retirees, finding several compelling state interests that could justify narrowly tailored restraints on retiree speech.

This Note ultimately offers an assortment of potential legal responses to the endorsement problem. These include modest changes that others have proposed, such as additional disclaimers, restrictions on the use of ranks and titles, and rules that would formally ostracize endorsers from events and partnerships with the active military. The Note also suggests a more radical last-ditch proposal: officers seeking promotion to general or admiral would have to agree, as a term of their employment contract at the highest ranks, to refrain from endorsing partisan candidates for eight years after retirement. Certainly, retired flag officer endorsements represent only one symptom of a larger civil-military divide in the United States. But this symptom deserves further study, and not just because of its harmful effects. It serves as a reminder that while civilian control may be a fundamental, constitutionally derived principle, it relies on measures beyond the Constitution to manifest and protect it.

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INTRODUCTION

Timed to coincide with the “Commander-in-Chief Forum” on NBC,¹ then-presidential candidate Donald Trump released a list of endorsements from eighty-eight retired generals and admirals (“flag officers”).² Not to be outdone, Hillary Clinton released her own list the following day with the names of ninety-five former flag officers, asserting that this number bested that of any recent Democratic presidential nominee and pointing out that Trump had received four hundred fewer such endorsements than Mitt Romney in 2012.³ Both the Republican and Democratic National Conventions in 2016 featured outspoken former generals: Michael Flynn gave a speech and led the Republican crowd in chants of “lock her up”—the “her” being Clinton⁴—while John Allen “marched” on the Democratic stage and called on active servicemembers to vote with him.⁵

By most accounts, the number and visibility of these kinds of political endorsements from retired flag officers have escalated in the past three decades,⁶ accompanied by an increase in controversy.⁷ It is

1. See, e.g., Carrie Dann, *88 Retired Generals and Admirals Endorse Trump*, NBC NEWS (Sept. 6, 2016, 6:14 AM), <https://www.nbcnews.com/card/88-retired-generals-admirals-endorse-trump-n643251> [<https://perma.cc/E2XR-2E8E>].

2. Press Release, Donald J. Trump for President, Inc., *88 Retired U.S. Generals and Admirals Endorse Trump* (Sept. 6, 2016), <https://web.archive.org/web/20160907051243/https://www.donaldjtrump.com/press-releases/88-retired-u.s.-generals-and-admirals-endorse-trump> [<https://perma.cc/Q2VU-RFNW>] (archived copy of the Trump campaign website captured on Sept. 7, 2016). A copy of the “Open Letter from Military Leaders” can be found at https://assets.donaldjtrump.com/MILITARY_LETTER.pdf [<https://perma.cc/4B8Q-3P6W>].

3. Press Release, Hillary for America, *Ninety-Five Retired Generals and Admirals Endorse Hillary Clinton* (Sept. 7, 2016), <https://web.archive.org/web/20160908190854/https://www.hillaryclinton.com/briefing/updates/2016/09/07/ninety-five-retired-generals-and-admirals-endorse-hillary-clinton/> [<https://perma.cc/5ULN-QYY7>] (archived copy of the Clinton campaign website captured on Sept. 8, 2016).

4. Peter Feaver, *We Don't Need Generals to Become Cheerleaders at Political Conventions*, FOREIGN POL'Y: SHADOW GOV'T (July 29, 2016, 4:32 PM), <https://foreignpolicy.com/2016/07/29/we-dont-need-generals-to-become-cheerleaders-at-political-conventions/> [<https://perma.cc/LYM2-3DXX>].

5. Peter Feaver, *Controversy Over Military Partisan Cheerleading Continues*, FOREIGN POL'Y: SHADOW GOV'T (Aug. 2, 2016, 5:51 PM), <https://foreignpolicy.com/2016/08/02/controversy-over-military-partisan-cheerleading-continues/> [<https://perma.cc/7NE2-JV25>].

6. See Erik L. Christiansen, *Curbing the Trend of Retired General/Flag Officer Political Endorsements* 3 n.6 (Jan. 4, 2017) (unpublished Strategy Research Project), <http://publications.armywarcollege.edu/pubs/3407.pdf> [<https://perma.cc/95WT-H4BA>] (reviewing the literature identifying the increase in retired flag officer endorsements, listing notable endorsements from 1988 to 2012, and noting that endorsement lists increased in number and visibility in 2000).

7. See Martin Dempsey, *Keep Your Politics Private, My Fellow Generals and Admirals*, DEF. ONE (Aug. 1, 2016), <https://www.defenseone.com/ideas/2016/08/keep-your-politics-private-my-fellow-generals-and-admirals/130404/> [<https://perma.cc/X779-TC77>] (“From my personal experience across several administrations, the commander-in-chief will value our military advice

no mystery why candidates consistently seek to leverage support from this demographic. The U.S. military enjoys the highest public approval rating among government institutions,⁸ and politicians understand that statements from senior officers can significantly affect public opinion in other contexts, like approval for a proposed use of force abroad.⁹

But campaign outlets and the press inevitably refer to retired flag officers by their former rank and publish old photos of them in uniform, a practice the officers themselves do little to discourage.¹⁰ This leads to a conflation of their past and present status. As many commentators have noted, any influence wielded by these individuals

only if they believe that it is given without political bias or personal agenda.”); Feaver, *supra* note 5 (“When Allen demonstrates that he thinks it is acceptable to dismiss criticism *ab initio* from civilians who have not served in combat . . . [h]e is also complicating the jobs of those who have a professional obligation to prepare for . . . a Trump presidency . . .”); Feaver, *supra* note 4 (arguing that retired flag officers have a responsibility not to engage in partisan endorsements); Matthew Moten, *We Have a Big Problem with Retired Generals Wading into Partisanship*, FOREIGN POL’Y: BEST DEF. (Sept. 12, 2016, 11:06 AM), <https://foreignpolicy.com/2016/09/12/we-have-a-big-problem-with-retired-generals-wading-into-partisanship/> [<https://perma.cc/GE9Z-88H9>] (tracing the history of the modern endorsement practice and suggesting that it is not only problematic on its own, but also makes candidates more comfortable speaking about the military in inappropriately partisan terms). *But see General Michael Flynn Sounds Off on Generals Allen and Dempsey, Khizr Khan*, FOX NEWS RADIO (Aug. 1, 2016), <https://radio.foxnews.com/2016/08/01/general-michael-flynn-sounds-off-on-generals-allen-and-dempsey-khizr-khan/> [<https://perma.cc/G2V3-4KX3>] [hereinafter *Flynn Radio Interview*] (providing transcript of Flynn’s response to criticism to his partisan activity); Michael E. O’Hanlon, *In Defense of John Allen*, BROOKINGS (Aug. 1, 2016), <https://www.brookings.edu/blog/order-from-chaos/2016/08/01/in-defense-of-john-allen/> [<https://perma.cc/4UDT-CDU7>] (arguing that retired flag officers should be able to engage in the “national political debate”).

8. See Lydia Saad, *Military, Small Business, Police Still Stir Most Confidence*, GALLUP (June 28, 2018), <https://news.gallup.com/poll/236243/military-small-business-police-stir-confidence.aspx> [<https://perma.cc/9KYF-A8FB>] (reporting that seventy-four percent of respondents have a “[g]reat deal” of confidence in the military, compared to fifty-four percent in the police, thirty-seven percent in the Supreme Court, twenty-nine percent in public schools, twenty-two percent in the criminal justice system, and eleven percent in Congress).

9. See JIM GOLBY, KYLE DROPP & PETER FEAVER, LISTENING TO THE GENERALS: HOW MILITARY ADVICE AFFECTS PUBLIC SUPPORT FOR THE USE OF FORCE 5 (Ctr. for a New Am. Sec. ed., 2013), <https://s3.amazonaws.com/files.cnas.org/documents/CNAS-Generals-report-updated.pdf> [<https://perma.cc/4LH5-HP98>] (finding that statements by senior military leaders opposing a proposed use of force abroad caused a seven percent decline in overall public support for the action, while approving statements caused a three percent increase in public support).

10. *E.g.* Eric Schmitt, *Clinton and Trump Each Lay Claim to Military Brass*, N.Y. TIMES (Sept. 7, 2016), <https://www.nytimes.com/2016/09/08/us/politics/clinton-and-trump-each-lay-claim-to-military-brass.html> [<https://perma.cc/QV3Y-Z4WR>]; Hillary for America (@HFA), TWITTER (Sept. 7, 2016, 4:33 PM), <https://twitter.com/HFA/status/773665567744126976> [<https://perma.cc/N9C7-89J6>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2016, 8:49 PM), <https://twitter.com/realdonaldtrump/status/756697615509688320> [<https://perma.cc/6BMD-Z8CJ>]. The individuals themselves certainly contribute. For example, Flynn’s twitter handle is “@GenFlynn.” General Flynn (@GenFlynn), TWITTER, <https://twitter.com/GenFlynn> (last visited Mar. 20, 2020) [<https://perma.cc/T5NV-DCEB>].

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hinges on the credibility of their former institution,¹¹ a credibility derived in part from a tradition of nonpartisan service to civilian leaders.¹² Not only do retired military officer endorsements fail to affect how most Americans vote,¹³ they also appear to erode public trust in military leaders.¹⁴

This Note explores the issue of flag officer endorsements in presidential elections and recommends that if lesser interventions fail to curb the practice, Congress should condition an officer's promotion to flag officer rank upon a promise that she will wait eight years after retirement to make an endorsement. Part I summarizes why the United

11. See Dempsey, *supra* note 7 (“Their opinion is valued chiefly because it is assumed they speak with authority for those who have served in uniform.”); Martin E. Dempsey, Letter to the Editor, *Military Leaders Do Not Belong at Political Conventions*, WASH. POST (July 30, 2016), https://www.washingtonpost.com/opinions/military-leaders-do-not-belong-at-political-conventions/2016/07/30/0e06fc16-568b-11e6-b652-315ae5d4d4dd_story.html [https://perma.cc/XV6P-4T2W] (“[Generals Allen and Flynn] weren’t introduced . . . as ‘John’ and ‘Mike.’ They were introduced as generals. As generals, they have an obligation to uphold our apolitical traditions. They have just made the task of their successors . . . more complicated.”); Feaver, *supra* note 4 (“[T]hey appear to be speaking for the military. They are cloaking themselves in the extraordinarily high degree of respect that the American public accords to the uniformed military.”).

12. See Bryan Bender, *Twitter and Facebook are Politicizing the Military*, POLITICO (Feb. 26, 2017, 7:10 AM), <https://www.politico.com/story/2017/02/pentagon-survey-twitter-facebook-military-politicization-235378> [https://perma.cc/X2U4-UXBS] (quoting researcher who links public trust in the military to a perception that it is “above the political fray”); Feaver, *supra* note 4 (arguing that “a crucial pillar” of public respect for the military is the belief that it “self-consciously and purposefully stands outside of partisan politics”); *id.* (linking a perception of nonpartisanship to higher levels of public esteem and arguing that the “act of wading into partisan politics while also pretending to be above partisan politics . . . risks undermining public confidence in [the military]”).

13. A 2013 YouGov survey asked, “Suppose you were voting in an election and one of the candidates has been endorsed by a retired military officer. Would this make you more or less likely to vote for the candidate endorsed by the retired military officer?” WARRIORS & CITIZENS: AMERICAN VIEWS OF OUR MILITARY CROSSTABS 1, at 40 (Kori N. Schake & Jim Mattis eds., 2016), https://www.hoover.org/sites/default/files/pages/docs/civ-mil_1_tabs.pdf [https://perma.cc/M64Y-DZ2T] [hereinafter WARRIORS & CITIZENS]. Sixty-four percent of nearly one thousand respondents said it would have “no effect,” and ten percent answered “don’t know.” *Id.* Only twenty-seven percent answered that it would affect their vote in some direction. *Id.*; see also JAMES GOLBY, KYLE DROPP & PETER FEAVER, *MILITARY CAMPAIGNS: VETERANS’ ENDORSEMENTS AND PRESIDENTIAL ELECTIONS* 10 (Ctr. for a New Am. Sec. ed., 2012), https://s3.amazonaws.com/files.cnas.org/documents/CNAS_MilitaryCampaigns_GolbyDroppFeaver.pdf [https://perma.cc/8FVN-KV99] (discussing surveys and concluding, “[A]t the most aggregate level . . . political endorsements from military members and veterans do not persuade voters”).

14. See Peter Feaver, *Do Retired Military Endorsements Boost Support for Candidates—or Just Reduce Support for the Military?*, FOREIGN POLY: SHADOW GOV’T (Sept. 8, 2016, 5:24 PM), <https://foreignpolicy.com/2016/09/08/do-retired-military-endorsements-boost-support-for-candidates-or-just-reduce-support-for-the-military/> [https://perma.cc/89EL-BPUF] (summarizing Morning Consult poll from August 2016 that indicated the Flynn and Allen endorsements had no clear effect on voting choices but did lead respondents to express decreased confidence in military leaders); cf. GOLBY, DROPP & FEAVER, *supra* note 13, at 17–18 (finding that military endorsements had no significant effect on reported levels of public trust in the military, but did make respondents more likely to associate violence, homophobia, or racism with the military).

States needs a nonpartisan military establishment. It explains that retired flag officer endorsements threaten the constitutional tenet of civilian control over the military and weaken military effectiveness. It concludes by addressing common defenses of the practice.

Part II explains the unique legal status of military retirees and outlines the existing array of statutory and regulatory restrictions on their political activities through a historical lens. Part III explains why these restrictions fail to address the flag officer endorsement problem. It also describes why shoring up professional norms through the exertion of peer and public pressure—the most common purported solution to this issue—will continue to fail. Part IV draws analogies to other contexts in which restrictions on endorsements have been seen as necessary to protect related compelling state interests. It examines anti-endorsement provisions as applied to judges and civil servants and studies the postemployment ethics rules for military retirees in the business context.

Finally, Part V outlines several potential legal responses, evaluating their ability to reduce the number or impact of flag officer endorsements, curb parties' desire to seek them out, and reinforce professional norms. For each proposal, it provides a preliminary analysis of First Amendment implications. Ultimately, it recommends a combination of modest proposals that could help protect the public's current level of trust in the military and foster a healthier relationship between elected officials and top military leaders. It also provides a sketch of a bolder option that Congress could consider employing in the event that the modest proposals fail to adequately contain the problem.

Before proceeding, a few quick words about scope. Retired flag officer endorsements represent only one symptom of a larger politicization¹⁵ problem within the military—one that some scholars

15. Scholars use the word “politicization” to describe multiple related but distinct concepts in reference to the military: (1) an increasing likelihood that members will advocate for political positions (of any stripe) or feel entitled to make decisions more appropriately made by political leaders, (2) an increasing likelihood that members will sympathize with one particular political party or ideology, (3) an increasing likelihood that civilian leaders will employ the military in ways that encourage or take advantage of the first two trends, and (4) an increasing likelihood that civilian leaders will employ the military in ways the scholar believes are not correct uses for the military. In this Note, I explore (1). While outside the scope of this Note, some have suggested that (3) and (4) are also problems. See Kori Schake & Jim Mattis, *A Great Divergence?*, in WARRIORS & CITIZENS, *supra* note 13, (“[P]ressures could . . . cause cynicism about civilians for hiding behind the military to avoid taking responsibility for their political choices”); W. Kent Davis, *Swords into Plowshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61, 68–77 (1998) (describing and criticizing expanded domestic uses of the military). Many have also referenced (2) in observing that the officer corps skews conservative, while enlisted soldiers have more representative political views. *E.g.* GOLBY, DROPP & FEAVER, *supra* note 9, at 9 n.25. See generally JASON K. DEMPSEY, OUR ARMY: SOLDIERS, POLITICS, AND AMERICAN CIVIL-

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believe is worsening.¹⁶ Certainly servicemembers of all ranks and those remaining on active duty are part of this problem. For example, lower-ranking personnel are the most likely to publicize their political views on social media.¹⁷ But it makes sense to begin this inquiry by examining the behavior of senior officers, because civilians are more likely to perceive them as spokespeople for the military as an interest group.¹⁸ And it makes sense to begin with retirees instead of active duty personnel, because existing restraints on the active force are both more robust and more likely to be enforced, while retiree speech exists in a less black-and-white legal landscape.¹⁹

While much of the analysis in this Note might apply with equal force to endorsements in congressional or state races, it is limited at present to addressing the problem in U.S. presidential elections. The overwhelming bulk of flag officer endorsements fall into this category. Moreover, presidential elections heighten many of the dangerous consequences of partisan endorsements described in Part I because they engage a national audience and involve the greatest participation by the public.²⁰ Therefore, flag officer endorsements pose the most significant threat in this arena.

MILITARY RELATIONS 70–82 (2009) (describing studies that identify the political affiliation of the officer corps and enlisted soldiers). However, recent data suggests officers are increasingly less likely to identify as Republican. HEIDI A. URBEN, LIKE, COMMENT, RETWEET: THE STATE OF THE MILITARY'S NONPARTISAN ETHIC IN THE WORLD OF SOCIAL MEDIA 15 tbl.2 (2017), https://ndupress.ndu.edu/Portals/68/Documents/casestudies/cco_casestudy-1.pdf [<https://perma.cc/2VF3-ZM75>].

16. *E.g.*, Jason Dempsey & Amy Schafer, *Is There Trouble Brewing for Civil-Military Relations in the U.S.?*, WORLD POL. REV. (May 23, 2017), <https://www.worldpoliticsreview.com/articles/22222/is-there-trouble-brewing-for-civil-military-relations-in-the-u-s> [<https://perma.cc/HC2G-BQBN>]; *see also* Alice Hunt Friend, *Military Politicization*, CTR. FOR STRATEGIC & INT'L STUD. (May 5, 2017), <https://www.csis.org/analysis/military-politicization> [<https://perma.cc/Q9NM-XYYA>] (explaining existing methods of measuring politicization, describing the limitations of these methods, and concluding at the very least that “professional standards for ‘citizen-soldiers’ have shifted over time from general abstention from any political affiliation to a broad comfort with registering with—and consistently voting for—political parties”).

17. URBEN, *supra* note 15, at 24; *see also* Bender, *supra* note 12 (summarizing Urben’s data).

18. *Cf.* Dempsey & Schafer, *supra* note 16 (“[G]eneral [public] ignorance of the diversity of political viewpoints among service members has enabled some politicians and retired officers to opportunistically capitalize on the armed forces’ [conservative] reputation to advance personal political views and ambitions.”).

19. *See infra* Part II.

20. *Cf.* *Voter Turnout*, MIT ELECTION DATA + SCI. LAB fig.1, <https://electionlab.mit.edu/research/voter-turnout> (last visited Mar. 20, 2020) [<https://perma.cc/AUW6-3XTF>] (reporting significantly higher turnout rates for “on-year” elections—that is, those including a U.S. presidential race—as compared to “off-year” elections, from 1980 to 2016).

I. THE DANGER OF “GENERAL” ELECTIONS

The Supreme Court has called “a politically neutral military establishment under civilian control” an “American constitutional tradition.”²¹ Scholars offer different normative theories about the exact behaviors that “civilian control” should curtail and disagree about exactly how to describe the constitutional allocation of powers over the military in furtherance of this goal.²² Rather than engage in these lively debates, this Part will sketch out broad areas of agreement regarding the importance and utility of a nonpartisan military establishment and explain why political endorsements from retired flag officers endanger civilian control while also reducing military effectiveness.

A. The Importance of a Nonpartisan Military Establishment

The Founders sought to prevent the risk of a military coup, presidential abuse of military might, and military adventurism.²³ They preferred part-time citizen militias over standing armies,²⁴ and while they reluctantly authorized the creation of a standing national force, they subordinated it to the command of a civilian executive and then divided up the other powers necessary to exercise military power between the executive and Congress.²⁵ Since 1789, U.S. military officers

21. Greer v. Spock, 424 U.S. 828, 839 (1976); see also Laird v. Tatum, 408 U.S. 1, 15 (1972) (“The concerns . . . reflect a traditional and strong resistance of Americans to any military intrusion into civilian affairs. That tradition has deep roots in our history and found early expression, for example, in the . . . constitutional provisions for civilian control of the military.”).

22. See, e.g., David Luban, *On the Commander in Chief Power*, 81 S. CAL. L. REV. 477 (2008) (describing separationist and consolidationist theories of civilian control and advocating for a “third way”); John Yoo, *Administration of War*, 58 DUKE L.J. 2277 (2009) (advancing a conception of civilian control that emphasizes consolidation of power under the executive).

23. See Luban, *supra* note 22, at 531 (“[T]he framers and ratifiers feared a Caesar or a Cromwell, wished to limit the president’s power to abuse the standing army, despised military adventurism, and feared that a president with formidable war powers might indulge in it.”).

24. SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE: THE THEORY AND POLITICS OF CIVIL-MILITARY RELATIONS* 167 (rev. ed. 1981); see THE FEDERALIST NO. 8 (Alexander Hamilton) (describing standing armies and the “correspondent appendages of military establishments” as “institutions which have a tendency to destroy [nations’] civil and political rights”).

25. U.S. CONST. art. I, § 8, cl. 11–16 (enumerating the powers of Congress to declare war, raise and support armies, provide for and maintain a navy, “make Rules for the Government and Regulation” of these forces, and control state militias when “employed in the Service of the United States”); U.S. CONST. art. II, § 2, cl. 1–2 (stating that “[t]he President shall be Commander in Chief of the Army and Navy of the United States” and giving the president power to appoint “Officers of the United States” with the Senate’s advice and consent); see Geoffrey Corn & Eric Talbot Jensen, *The Political Balance of Power over the Military: Rethinking the Relationship Between the Armed Forces, the President, and Congress*, 44 HOUS. L. REV. 553, 561–62 (2007) (describing the constitutional division of authority over the military). For an account of the Framers’ efforts to divide the military powers among the federal and state governments, and an argument for why

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have taken an oath to support and defend *the Constitution*—not just the commander in chief or Congress.²⁶ The primary concern in the nation’s early years was the improper concentration of military power in the hands of too few civilians, not the wayward independence of a fledgling military establishment.²⁷

But as conflict became more complex, the management of violence required specialists, and the military professionalized.²⁸ A much larger, more permanent military establishment needed to be able to serve the interests of the state throughout periods of political transition. Full-time military professionals inevitably developed institutional values and biases as a result of their function within the state.²⁹ A different primary risk emerged—that military leaders would inappropriately pursue policy preferences inconsistent with the wishes of civilians in the executive branch or Congress.³⁰

Professor Samuel Huntington famously argued that the constitutional separation of powers does not adequately constrain the modern military establishment and may in fact draw military leaders into interbranch political conflicts.³¹ His solution was what he called objective civilian control, the principle of loyalty to professional norms and ethics instead of civilian partisan connections.³² He argued that a robust, apolitical professional ethic maximizes the military’s ability to serve as an effective tool of the state.³³

Modern principal-agent theorists critique and build on Huntington’s insights. They envision the ideal military as a faithful agent, merely advising on and carrying out the policy preferences of civilian principals in the executive or legislative branches but never

the modern military force structure violates these vertical checks, see Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989 (2020).

26. See *Oaths of Enlistment and Oaths of Office*, U.S. ARMY CTR. MIL. HIST., <https://history.army.mil/html/faq/oaths.html> (last visited Mar. 26, 2020) [<https://perma.cc/QV9L-HPML>] (reproducing text of oaths).

27. See HUNTINGTON, *supra* note 24, at 168 (“The Framers’ concept of civilian control was to control the uses to which civilians might put military force Unable to visualize a distinct military class, they could not fear such a class.”).

28. *Id.* at 13, 32.

29. See *id.* at 61–70 (deducing a number of values and preferences that likely result from the professional role of the military).

30. See, e.g., Richard H. Kohn, *The Erosion of Civilian Control of the Military in the United States Today*, 55 NAVAL WAR C. REV. 9, 33 (2002) (“[I]n the last generation, the American military has slipped from conceiving of its primary role as advice to civilians followed by execution of their orders, to trying—as something proper, even essential in some situations—to impose its viewpoint on policies or decisions.”).

31. HUNTINGTON, *supra* note 24, at 177.

32. *Id.* at 74, 83.

33. *Id.* at 83.

substituting their own.³⁴ While this is the ideal, the reality is that some substitution occurs. This can be conceived of as a “spectrum” of shirking behaviors;³⁵ as the “relative influence” of military officials over civilian counterparts;³⁶ as “bargaining” between the electorate, civilians in government, and the military elite;³⁷ or as a “conflictual collaborative relationship” marked by a “dialogue of unequals.”³⁸ A related but distinct concern involves military leaders leveraging “outsized political popularity” with the public to distort the decisionmaking process.³⁹ But however articulated, the basic idea is that civilian principals are democratically accountable to the electorate, unlike military agents, and therefore they should get the ultimate decisionmaking power.⁴⁰ While military agents can and must provide expert technical advice, the principals enjoy the prerogative to choose “incorrectly” from the perspective of military effectiveness.⁴¹

Of course, the line between providing technical advice and wading into policy can be difficult to identify.⁴² This tension is especially visible when Congress demands the “honest and unvarnished opinions of military leaders” and those opinions happen to diverge from those of

34. See, e.g., PETER D. FEAVER, ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS 56–58 (2003); see also Kohn, *supra* note 30, at 9, 33; Deborah N. Pearlstein, *The Soldier, the State, and the Separation of Powers*, 90 TEX. L. REV. 797, 816–17 (2012) (outlining the principal-agent model).

35. See Kohn, *supra* note 34, at 16 (listing various ways that the military can “evade,” “circumscribe,” and “stymie” civilian authority).

36. *Id.* at 15.

37. See Mackubin Thomas Owens, *Military Officers: Political Without Partisanship*, STRATEGIC STUD. Q., Fall 2015, at 88, 95–96.

38. See ELIOT A. COHEN, SUPREME COMMAND: SOLDIERS, STATESMEN, AND LEADERSHIP IN WARTIME 10, 12 (2003):

[T]he ultimate domination of the civilian leader is contingent, often fragile, and always haunted by his own lack of experience at high command . . . Civil-military relations must thus be a dialogue of unequals and the degree of civilian intervention in military matters a question of prudence, not principle, because principle properly opens the entire field of military activity to civilian scrutiny and direction.

39. Pearlstein, *supra* note 34, at 841. Sometimes this can occur with the approval or sanction of the civilian principals. See Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 343–44 (1994).

40. Pearlstein, *supra* note 34, at 802, 816–17.

41. See Luban, *supra* note 22, at 484 (noting that “wrench[ing] the commander in chief power out of the hands of the competent professionals (the generals) and put[ting] it into the hands of amateurs (the civilians)” could conceivably “impede military effectiveness,” which may be a “rational trade-off”); Pearlstein, *supra* note 34, at 802, 816–17 (noting that as part of the principal-agent relationship, civilians have the “right to be wrong” (quoting FEAVER, *supra* note 34, at 57)).

42. See, e.g., COHEN, *supra* note 38, at 264 (arguing that Huntington’s theory of objective control must be updated to account for “boundaries between political ends and military means” that are “more uncertain” than he suggested).

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civilian executive officials.⁴³ For example, military leaders have testified before Congress and contradicted executive branch superiors regarding, among other things, the appropriate number of troops in combat zones, the desirability of homosexual servicemembers serving openly, and the legal protections owed to captured enemy combatants in the War on Terror.⁴⁴

As these examples suggest, and as many commentators acknowledge, top military leaders must be politically savvy to best serve their dual political principals, and in some cases it may be that the “best military advice cannot be formed without advocating policy.”⁴⁵ But *partisanship* among military leaders has never been seriously defended,⁴⁶ and the next Section will explore its numerous corrosive consequences. Of course, partisanship represents only one element of what many believe is a growing crisis in civil-military relations that cannot be fully explored in this Note. It bears mentioning, however, that what drives much of the current anxiety is the growing power and influence of the military’s top flag officers—especially the geographic combatant commanders and the Chairman of the Joint Chiefs of Staff.⁴⁷ The time is right to dig a little deeper into the postretirement political activities of these key leaders.

*B. Flag Officer Endorsements Impede Civilian Control
and Military Effectiveness*

Whether articulated in Huntingtonian or principal-agent terms, retired flag officer endorsements threaten civilian control of the military, which in turn can weaken military effectiveness. If civilian

43. Victor Hansen, *Understanding the Role of Military Lawyers in the War on Terror: A Response to the Perceived Crisis in Civil-Military Relations*, 50 S. TEX. L. REV. 617, 627 (2009).

44. Yoo, *supra* note 22, at 2286–90.

45. J.P. Clark, *We Want It, What Is It? Unpacking Civilian Control of the Military*, STRATEGY BRIDGE (April 4, 2017), <https://thestrategybridge.org/the-bridge/2017/4/4/unpacking-civilian-control-of-the-military> [<https://perma.cc/ZQF8-GYTY>]; see, e.g., Owens, *supra* note 37, at 88, 97 (“[O]fficers must understand both the political environment and the policy process and be able to participate in debates over policy without becoming swept up in partisan politics.”).

46. See, e.g., COHEN, *supra* note 38, at 264 (“Huntington is correct in his contention that such partisanship will eventually diminish military proficiency.”).

47. See, e.g., Mark Patrick Nevitt, *The Operational and Administrative Militaries*, 53 GA. L. REV. 905, 909, 912–13, 917–18, 925–32 (2019) (explaining the structure of the Joint Chiefs of Staff and the geographic combatant commands, and describing how the Goldwater-Nichols Act of 1986 reallocated a huge amount of power to these individuals and “isolated the operational military from oversight”); Paul D. Shinkman, *The Joint Chiefs’ Power Surge*, U.S. NEWS & WORLD REP. (Sept. 30, 2019, 11:37 AM), <https://www.usnews.com/news/national-news/articles/2019-09-30/how-joe-dunford-quietly-changed-the-joint-chiefs-role-in-preparing-for-war> [<https://perma.cc/UP42-SG85>] (arguing that former Chairman of the Joint Chiefs of Staff Gen. Joseph Dunford fought for and won new responsibilities outside of the office’s role and that civilian DoD staffers “have become ostracized from the critical work” that leads to decisionmaking).

principals fear generals becoming political enemies after retirement, they may be less likely to trust them with the information necessary to make decisions that require genuine professional expertise.⁴⁸ Alternatively, they may improperly defer to military leaders on policy decisions, subordinating the priorities of the electorate to military institutional biases or the political preferences of unelected officers. Worst yet, principals could select replacements based not on technical competence but on perceived political compatibility.⁴⁹ Continued endorsements, especially in the face of controversy, could effectively confirm to junior military leaders that the norms have changed and that freely broadcasting their own partisan views is acceptable.⁵⁰ Subordinates who believe their views are disfavored may lose trust in the chain of command, reducing cohesion and unit readiness. Increasingly seeing themselves as partisan actors, senior military advisors may be more likely to engage in the most evasive shirking behaviors, like leaking to the press in an effort to shape decisions on force structure or deployments.⁵¹

Finally, members of the American public, after years of seeing retired officers trotted across political stages and years of reading competing lists of endorsements, may begin to think of the military as “just one more pressure group acting to advance its views and interests, not the neutral instrument of the state.”⁵² This could have a self-fulfilling effect, encouraging those within the force to see their

48. See Steve Corbett & Michael J. Davidson, *The Role of the Military in Presidential Politics*, PARAMETERS, Winter 2009–2010, at 58, 67–68 (“Civilian political leadership may distrust and fear its senior military advisers as possible political threats, impeding a free flow of confidential information and candor.”). One anecdote demonstrates how easily this lack of trust could develop. Retired Admiral Bill Crowe, who had served as Chairman of the Joint Chiefs of Staff under George H.W. Bush, ultimately endorsed Bill Clinton. After losing reelection, Bush told Crowe’s successor, Colin Powell, that he “was disappointed,” saying, “Thought I treated him pretty well. Offered to let him stay on as chairman for another term.” See Clifford M. Bayne, *From Stars to Stumps: How Retired Flag Officer Political Endorsements Affect Civil-Military Relations* 46–47 (June 1, 2016) (unpublished MPhil thesis, Air University School of Advanced Air and Space Studies) (quoting COLIN L. POWELL, *MY AMERICAN JOURNEY* 561 (1995), <https://apps.dtic.mil/dtic/tr/fulltext/u2/1030401.pdf> [<https://perma.cc/Y4VG-TGKC>]). Had Bush been reelected, it is easy to see how a feeling that Crowe had been personally disloyal could have influenced his interactions with Crowe’s successors.

49. *E.g.*, Corbett & Davidson, *supra* note 48, at 68.

50. *Id.* at 68–69. Peter Feaver has also pointed out that a “poisonous” effect on the active force can occur when endorsers defend their expertise by suggesting an opposing candidate with no military experience has no credibility to challenge them. Feaver, *supra* note 5. Feaver argues that this broadcasts to active duty military officers that “it is acceptable to dismiss criticism *ab initio* from civilians who have not served in combat,” when the orders of said civilians must be obeyed regardless. *Id.*

51. Bayne, *supra* note 48, at 23; see also Owens, *supra* note 37, at 92–93 (summarizing some of the most common shirking behaviors).

52. Richard H. Kohn, *General Elections: The Brass Shouldn’t Do Endorsements*, WASH. POST, Sept. 19, 2000, at A23.

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organization in this way; it could also cause a drop in public esteem for the military and veterans.⁵³ Low public esteem could hinder recruitment,⁵⁴ especially recruitment from a diverse ideological cross-section, which would make the military less representative of the entire nation and could compound ideological imbalances.⁵⁵ A skeptical public could ultimately elect civilian principals that are more openly hostile to the military and less willing to defer to genuine military technical expertise.⁵⁶ In sum, retired flag officer endorsements degrade the apolitical professional ethic, threatening Huntington's Objective Civilian Control. They also make the principal-agent relationship increasingly toxic and unworkable. These effects, undesirable on their own, may also reduce the military's effectiveness by instilling subordinate distrust and tension within the chain of command and decreasing the odds that the best professional expertise will be followed.

C. Evaluating Common Defenses of Flag Officer Endorsements

Of course, not everyone sees the practice of flag officer endorsements as a problem. Endorsers and some like-minded academics offer four general defenses of the practice: (1) it helps educate the electorate about the national security issues at stake;⁵⁷ (2) because endorsers are no longer on active duty, they should be able to express political views like ordinary civilians;⁵⁸ (3) veterans have frequently run for—and won—political office, making mere endorsements relatively inconsequential;⁵⁹ and (4) as long as endorsements go to both major

53. See, e.g., Feaver, *supra* note 4 (arguing that the media and the Supreme Court are held in low esteem because they are “supposed to stand above partisanship but in fact appear not to,” and warning that the military could see a similar effect).

54. Bayne, *supra* note 48, at 26.

55. Some argue this already occurs. See Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553, 630 (2003):

Young people are choosing to join or to avoid the military on the basis of perceived ideological compatibility with an institution that has disregarded its constitutional obligations to be representative of the society from which it draws its members and to maintain its political neutrality with respect to its civilian principals.

56. Bayne, *supra* note 48, at 26.

57. See, e.g., O'Hanlon, *supra* note 7 (arguing that it is better to debate the “vague and murky” guidelines surrounding the appropriateness of partisan activities than to “deprive our national political debate of the seasoned and reasoned views of some of its finest and most knowledgeable citizens”).

58. See, e.g., Feaver, *supra* note 5 (paraphrasing a critique the author had been sent regarding the endorser's First Amendment rights).

59. See, e.g., O'Hanlon, *supra* note 7 (arguing that in criticizing his fellow retired generals for endorsing political candidates, Martin Dempsey had “forgotten” Presidents Washington, Grant, Eisenhower, and other former generals who have run or considered running for president).

parties, there is little chance of harm.⁶⁰ None of these defenses withstand scrutiny.

The first defense can be stated in principal-agent terms. Retired flag officers who choose to endorse are simply providing the “ultimate civilian principal”⁶¹ (the electorate) with more information about the chosen candidate’s national security policies and bona fides.⁶² The logic of this defense breaks down when confronted with the realities of a modern presidential election. Campaigns competitively aggregate lists of endorsements and pit one seemingly qualified general on television opposite another seemingly equally qualified one. Voters may understandably conclude that there is no consensus about which candidate is “better” on national security and military issues. They may reasonably reject endorsement information as unhelpful, especially if it is rolled out less to garner support for specific positions and more to simply deflect attention away from a candidate’s lack of personal military experience or some other security-related “weakness.”⁶³

Of course, the industrious voter might compare endorsers’ resumes and research any offered justifications, especially those of endorsers that are more active on the campaign trail. But even assuming that voters would accord more weight to the implied views of former flag officers than to civilian “experts,” it is at least an open question whether they should. Having worn a uniform may mean that veterans have a personal stake in political decisions involving the military. But unless a veteran also has experience relative to specific

60. See, e.g., Friend, *supra* note 16 (“[I]t may seem harmless so long as both major parties can marshal officer-advocates . . .”).

61. Pearlstein, *supra* note 34, at 817 (quoting FEAVER, *supra* note 34, at 302).

62. One can imagine a variant of this defense that argues some kinds of endorsements are better than others. Officers endorsing candidates on ideological grounds should be criticized, but endorsements based on “institutional” reasons like military spending or veterans’ benefits should be considered benign. Presumably, the idea is that military spending and veterans’ benefits generally receive bipartisan support, and thus the endorsement appears more “technical” and less overtly political. This distinction is too simplistic. As recent moves to provide more private-sector medical care to veterans demonstrates, “better on funding” is a position that incorporates many implicit political judgments. See Lisa Rein, *VA Is Gearing Up for a Massive Shift of Health Care to the Private Sector. But Democrats Are Fighting Back.*, WASH. POST (Mar. 21, 2019), https://www.washingtonpost.com/politics/va-is-gearing-up-for-a-massive-reroute-of-health-care-to-the-private-sector-but-democrats-are-fighting-back/2019/03/21/637f732a-467b-11e9-90f0-0ccfeec87a61_story.html [https://perma.cc/H4PU-XJ5D] (describing those who believe recent Trump Administration regulations will lead to destructive privatization of the Veterans Health Administration). Even assuming an endorsement would be communicated in a nuanced way instead of simply tallied on a list, voters could easily conflate “better treatment for the troops” with support for a candidate’s position on where to send those troops. And endorsers would always be able to frame incredibly divisive political issues, such as restrictions on transgender troops, in “institutional” terms. That danger is precisely the issue.

63. Cf. Kohn, *supra* note 52 (“[R]etired Joint Chiefs Chairman William Crowe and a handful of other retired flag officers endorsed Bill Clinton, defusing his draft dodging as an issue.”).

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geopolitical issues, her personal stake does not necessarily equate to a more credible opinion than those of civilians who have observed and studied the same issues from other vantage points.⁶⁴ Finally, the data suggest that even if voters gain information from flag officer endorsements, very few of them change their previous support or nonsupport for the endorsed candidate.⁶⁵ If the practice does not even help guide voting decisions, then it represents all risk and no reward.

The second defense argues that these men and women have retired, making their actions akin to those of any other civilians wishing to exercise political speech.⁶⁶ As others have recognized, however, these endorsements derive authority (and thus appeal) from their invocation of institutional experience and expertise.⁶⁷ No campaign widely publicizes the approval of a junior soldier that served one contract and then left the military. No candidate seeks the approval of a retired flag officer in her capacity as a parent or a homeowner. Rather, candidates seek a prominent leader that the public can imagine as a proxy for the military writ large. Even if the endorser is careful about disclaiming this notion, campaigns certainly embrace it.⁶⁸

As a matter of law, these retirees also differ significantly from ordinary civilians. The Uniform Code of Military Justice (“UCMJ”) still applies to them, and each branch defines its own membership to include them.⁶⁹ The same concerns about neutrality that motivate restrictions on active duty servicemembers already motivate certain modest restrictions on the political activities of retirees.⁷⁰ In sum, while free

64. See Rosa Brooks, *Sorry Folks, Veterans Are Not Necessarily Experts on Foreign Policy*, FOREIGN POL’Y (Sept. 8, 2016, 11:03 AM), <https://foreignpolicy.com/2016/09/08/veterans-are-not-necessarily-experts-on-foreign-policy-commander-in-chief-forum-trump-clinton/> [https://perma.cc/NZC6-RE2F] (“A supply sergeant in the Army has a personal stake in whether U.S. troops are deployed to Iraq, but this doesn’t make him an expert on the Middle East. The same is true of senior officers: Some have valuable strategic insight about geopolitics; others don’t.”).

65. WARRIORS & CITIZENS, *supra* note 13, Crosstabs 1, at 40.

66. See, e.g., Feaver, *supra* note 5.

67. *Supra* notes 11–13 and accompanying text.

68. GOLBY, DROPP & FEAVER, *supra* note 13, at 15 (“Retired senior officers may think they are drawing fine distinctions between the formal institution of active-duty military and their own views as retired citizens. But the truth is that no one, especially not the campaign team, is very interested in their views as private citizens.”).

69. 10 U.S.C. § 802(a)(4) (2012) (applying the UCMJ to “[r]etired members of a regular component of the armed forces who are entitled to pay”); e.g., 10 U.S.C. § 7075(b)(3) (2012) (“The Regular Army includes . . . the retired officers and enlisted members of the Regular Army.”); 10 U.S.C. § 9075(b)(3) (2012) (“The Regular Air Force includes . . . the retired officers and enlisted members of the Regular Air Force.”); see also DEPT OF THE ARMY, REG. 27–10: MILITARY JUSTICE ¶ 5–2(b)(3) (May 11, 2016), https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/r27_10_FINAL.pdf [https://perma.cc/T5B2-ZZUD] [hereinafter AR 27–10] (“Retirees are subject to the UCMJ and may be tried by court-martial for violations . . . that occurred . . . while in a retired status.”).

70. See *infra* Part II.

speech concerns may dictate the scale of the appropriate remedy, they do not explain away the problem of retired flag officer endorsements. Where one fundamental constitutional tenet—civilian control—buts up against another—free speech—constraints on these individuals should at least be up for debate.

The third defense of the practice asks: Why should we object to retired flag officers making endorsements if we would not object to them running for office?⁷¹ One response is that voters can more directly express their approval or disapproval of a candidate's behavior.⁷² Another distinction derives from the public perception of a declared candidate compared to an endorser. Those that run for office explicitly project an image of themselves as a partisan, with a personal political stake in the outcome.⁷³ Endorsers, by contrast, project themselves as vessels of decades of nonpartisan experience. For example, Michael Flynn defended his involvement with President Trump's campaign by saying, "I feel obligated because of my service to this country," suggesting some kind of professional duty to "help this country" via his endorsement.⁷⁴ Similarly, John Allen justified his support for Hillary Clinton by saying he "felt compelled to speak up and be heard."⁷⁵ Both retired generals pointed to decades of abstention from politics while in the active force as a reason for voters to take their endorsements seriously.⁷⁶ In other words, endorsers are "standing on the stage wrapped in the mantle of a non-partisan institution but deploying that garb for a partisan end."⁷⁷

Finally, some might argue that as long as endorsements go to both major parties, there is little chance of harm because the public will not associate the military with one particular party. This is shortsighted. Members of the public already believe that

71. See, e.g., O'Hanlon, *supra* note 7. Huntington addressed a form of this argument while laying out his theory of objective civilian control. He analyzed the success of military candidates from Washington to Eisenhower and concluded, counterintuitively, that it was "conclusive proof that political power and military professionalism are incompatible in the American climate." HUNTINGTON, *supra* note 24, at 158. He argued that the "military man *qua* military man" has never been a successful candidate. *Id.* Rather, Americans favored nonprofessionals in the era of amateur citizen-soldiers, "military iconoclast[s]," or else career soldiers able to convey reluctance for politics but commitment to serving the entire nation. *Id.* at 157–62.

72. Dempsey, *supra* note 7; Feaver, *supra* note 5.

73. See Dempsey, *supra* note 7.

74. Flynn Radio Interview, *supra* note 7.

75. Jeff Schogol, *Marine Gen. John Allen Has Endorsed Hillary Clinton for President. Here's Why that Matters*, MARINE CORPS TIMES (July 25, 2016), <https://www.marinecorpstimes.com/news/2016/07/25/marine-gen-john-allen-has-endorsed-hillary-clinton-for-president-here-s-why-that-matters/> [https://perma.cc/JG3K-RWCX].

76. Flynn Radio Interview, *supra* note 7; Schogol, *supra* note 75.

77. Feaver, *supra* note 5.

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servicemembers tend to vote Republican,⁷⁸ even though actual political preferences within the force have diversified considerably in recent years.⁷⁹ Many factors likely feed this perception, including the fact that with the exception of President Trump, recent Republican candidates tended to collect more endorsements from former flag officers.⁸⁰ But even if both major parties could consistently raise equal numbers of endorsements, and even if the public would perceive a bipartisan equilibrium, this does not erase the politicization problem. Most of the consequences described above would still apply—relationships with civilian principals could suffer from lack of trust, civilians could select advisors based on political compatibility, subordinates with differing views could become disenchanted, and so on.⁸¹ Endorsements may cause harm simply by making active servicemembers more comfortable advocating for partisan positions of any stripe.

In fact, one could argue that any spread across the political spectrum magnifies a core problem of retired flag officer endorsements. If so many military professionals land on opposite sides, it amplifies the perception that there is less of a professional “right answer” to military issues. When questions emerge that have less to do with policy judgments and more to do with the realities of managing conflict, civilian principals may not accord professional advice sufficient weight.⁸² In other words, if civilians no longer think of military leaders as nonpartisan experts, will they reject actual expertise when it is most relevant, vital, and urgent?

II. THE LEGAL FRAMEWORK AND HISTORICAL CONTEXT OF RETIREE POLITICAL ACTIVITY

The preceding Part argued that retired flag officer endorsements degrade civilian control over the military and make the military less effective at accomplishing its mission. This Part explains the unique legal status of retirees within the military justice system. It then reviews the existing array of statutory and regulatory restrictions on the political activities of active and retired servicemembers, placing them in historical context. This discussion demonstrates that the United States has a long history of utilizing legal tools to promote

78. *WARRIORS & CITIZENS*, *supra* note 13, Crosstabs 1, at 42.

79. *URBEN*, *supra* note 15, at 15 tbl.2, 16 tbl.4.

80. *See* Press Release, Hillary for America, *supra* note 3 (revealing that Mitt Romney received hundreds more endorsements than Donald Trump, and, indeed, hundreds more than Hillary Clinton).

81. *See* Friend, *supra* note 16; *supra* Section II.B.

82. *See supra* text accompanying notes 34–41, 45.

civilian control over the military and reveals that conceiving of retirees as part of the equation is far from novel. Civilian control is a fundamental principle derived from the Constitution, but it relies on legal measures beyond the Constitution to manifest and protect it.⁸³

*A. How and Why Retired Servicemembers Are
Subject to Military Jurisdiction*

This Section provides some background on the military justice system more generally and then explains military jurisdiction over retirees. The Constitution empowers Congress to “make Rules for the Government and Regulation of the land and naval Forces.”⁸⁴ This means that Congress can authorize a system that remains largely independent from Article III courts in order to hold servicemembers accountable for impermissible conduct.⁸⁵ It has done so. Structured around the authority of (nonlawyer) commanders, the current statutory scheme evolved from British customary military law⁸⁶ and is codified in Title X of the U.S. Code as the Uniform Code of Military Justice (“UCMJ”).⁸⁷ In part, the UCMJ includes substantive offenses known as “punitive articles,” which can be military-specific (think desertion or disrespecting a superior officer) or look much like typical civilian criminal provisions (think theft, drug possession, and murder).⁸⁸ The UCMJ is also a procedural vehicle, authorizing and describing how to

83. See Stephen I. Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L.J. 241, 243 (2018) (“Although we take the principle of civilian control of the military (and military noncontrol of civilians) for granted, it turns out that . . . many of its most significant manifestations are statutory, not constitutional.” (emphasis omitted)).

84. U.S. CONST. art. I, § 8, cl. 14. This allows Congress significant leeway in restricting the individual liberties of servicemembers, to include subjecting them to trial by courts-martial, which need not provide all of the safeguards afforded to civilian defendants. *Reid v. Covert*, 354 U.S. 1, 19 (1957); *Ex parte Reed*, 100 U.S. 13 (1879)); see also U.S. CONST. amend V (qualifying the right to a grand jury for capital “or otherwise infamous crime[s]” with the words “except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger”).

85. See Dan Maurer, *Are Military Courts Really Just Like Civilian Criminal Courts?*, LAWFARE (July 13, 2018, 10:00 AM), <https://www.lawfareblog.com/are-military-courts-really-just-civilian-criminal-courts> [<https://perma.cc/67RF-C9SG>] (explaining the unique nature of the military justice system, highlighting why it was historically “cleanly segregated . . . from its civilian cousin,” and questioning the Supreme Court’s recent assertion of appellate jurisdiction over it). *But see* *Ortiz v. United States*, 138 S. Ct. 2165, 2168–69 (2018) (holding that the Supreme Court has appellate jurisdiction to review decisions of the highest appeals court in the military system, the Court of Appeals of the Armed Forces).

86. See *Parker v. Levy*, 417 U.S. 733, 744–47 (1974) (sketching out the historical roots of the military justice system).

87. *Id.* at 751.

88. 10 U.S.C. §§ 877-934 (2012).

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enforce (1) the punitive articles, (2) military orders,⁸⁹ (3) applicable punitive regulations,⁹⁰ and even (4) other noncapital offenses defined by federal statute.⁹¹

Levels of process within the military justice system—and the kinds of sanctions available at those levels—vary widely. This is in part because the “relationship of the Government to members of the military . . . is not only that of lawgiver to citizen, but also that of employer to employee.”⁹² On one end of the spectrum, commanders may take no action, or they may use “administrative corrective measures” like counseling sessions, written reprimands, and transfers.⁹³ In the middle of the spectrum, commanders may direct “nonjudicial punishment,” which provides limited due process but only exposes the servicemember to minor penalties like pay reductions and extra duty.⁹⁴ On the spectrum’s other end, commanders may refer servicemembers to a court-martial, a trial-like proceeding with the most serious potential consequences.⁹⁵

Congress has decided to include military retirees within this separate legal ecosystem. It has done so by defining the composition of each service to include “retired officers and enlisted members”⁹⁶ and by specifying that the UCMJ applies to “[r]etired members of a regular component of the armed forces who are entitled to pay.”⁹⁷ Practically, this means that regulations and policies that do not distinguish between “retired” and “active” members apply to retired members as well, and violators may face enforcement through a UCMJ process. Federal statutes that do not distinguish as to status would also apply to retired members, and could be enforced through a civilian proceeding or via the UCMJ.

89. Violations of regulations may be charged as a violation of the punitive article “failure to obey order or regulation.” 10 U.S.C. § 892.

90. 10 U.S.C. § 892.

91. See 10 U.S.C. § 934 (2012); see also *United States v. Perkins*, 47 C.M.R. 259, 263 (A.F.C.M.R. 1973) (“As a general rule, crimes and offenses not capital, as defined by Federal statutes, may be properly tried as offenses under clause (3) of [Punitive] Article 134.”). When violations of federal statutes are at issue, the military will often share jurisdiction with other state and federal entities.

92. *Parker*, 417 U.S. at 751.

93. Maurer, *supra* note 85; see also *Parker*, 417 U.S. at 750 (“Forfeiture of pay, reduction in rank, and even dismissal from the service bring to mind the law of labor-management relations as much as the civilian criminal law.”).

94. 10 U.S.C. § 815 (2012); Maurer, *supra* note 85.

95. 10 U.S.C. §§ 815-876 (2012). These potential consequences include extended incarceration, large rank reductions, dishonorable discharges, and even capital punishment. 10 U.S.C. § 856. Servicemembers facing nonjudicial punishment may also elect to face a court-martial instead. 10 U.S.C. § 815(a).

96. *E.g.*, 10 U.S.C. § 7075(b)(3) (2012); 10 U.S.C. § 9075(b)(3) (2012).

97. 10 U.S.C. § 802(a)(4) (2012).

Since the first military pension system in 1878, military and Article III courts have affirmed the exercise of military jurisdiction over retirees,⁹⁸ while rejecting military jurisdiction over ex-servicemembers generally.⁹⁹ In 2019, the Supreme Court declined to hear a constitutional challenge to the exercise of court-martial jurisdiction over a retiree.¹⁰⁰

A combination of two theories justifies continued exercise of jurisdiction over retired personnel: (1) retirees continue to receive government compensation, and (2) retirees may be ordered back to active duty at any time.¹⁰¹ The first justification can be traced to 1881, when the Supreme Court found a retiree eligible for a statutory pay increase, commenting, ostensibly in support of this proposition, that he remained subject to court-martial authority.¹⁰² Subsequent courts thus found a jurisdictional hook via the pension.¹⁰³ But more recently, in *Barker v. Kansas*, the Court held that retirement benefits should be considered “deferred pay for past services,” not “current compensation for reduced current services,” at least for the purposes of state tax

98. See J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction over Retirees Under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1, 3–4, 3 n.6, 4 nn.7–10 (2003) (tracing the inception and confirmation of the idea that “the military” includes pensioned military officers, citing, for example, the Supreme Court’s judgment that “[t]he retired officer remains a member of the Army” in *McCarty v. McCarty*, 453 U.S. 210, 221 (1981)).

99. *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (rejecting the extension of military jurisdiction over ex-servicemembers as a whole). Ex-servicemembers comprise a much larger group than the subsection of those who have attained a retired status, typically after serving twenty or more years on active duty. In 2018, there were 2,001,343 military retirees receiving retired pay; only 543,121 of those were retired officers. U.S. DEP’T OF DEF., STATISTICAL REPORT ON THE MILITARY RETIREMENT SYSTEM 17 (2019), https://media.defense.gov/2019/May/14/2002131753/-1/-1/0/MRS_STATRPT_2018%20V5.PDF [<https://perma.cc/A5PJ-DF3S>]. The total U.S. veteran population that year was over 19 million. Press Release, Bureau of Labor Statistics, Employment Situation of Veterans — 2018, 2 (Mar. 21, 2019), <https://www.bls.gov/news.release/pdf/vet.pdf> [<https://perma.cc/SS4L-X7QF>].

100. *Larrabee v. United States*, 139 S. Ct. 1164 (2019) (mem.) (denial of cert.). The Supreme Court has emphasized that the “Constitution . . . condition[s] the proper exercise of court-martial jurisdiction over an offense on one factor: the military status of the accused,” as defined by Congress. *Solorio v. United States*, 483 U.S. 435, 439–40, 450–51 (1987). Congress has defined the service components to include those in retired status. *Supra* note 96 and accompanying text.

101. 10 U.S.C. § 688 (2012). This Note limits its analysis to flag officers retired from active duty and acknowledges that the justification for jurisdiction may be significantly weaker with regard to those who retired after serving their career in a reserve status. See *Leider*, *supra* note 25, at 1071–74 (questioning Congress’s authority to assert criminal jurisdiction over reservists).

102. See *United States v. Tyler*, 105 U.S. 244, 244–46 (1881) (holding that a retired servicemember should benefit from a statutory increase in pay because he remained subject “to the . . . articles of war” (a precursor to the UCMJ) and “a military court-martial[] for any breach of those rules,” and that “the connection is continued, with a retirement from active service only”).

103. See *United States v. Dinger*, 76 M.J. 552, 555 & n.12 (N.M. Ct. Crim. App. 2017) (“Later courts have cited *Tyler* for the proposition that receipt of retirement pay is one reason Congress may constitutionally authorize courts-martial of those in a retired status.”).

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law.¹⁰⁴ The Court has also rejected court-martial jurisdiction over the family members of servicemembers stationed abroad, despite the fact that these “dependents” receive government benefits.¹⁰⁵ Conversely, the services have court-martialed members of the Individual Ready Reserve in a “nonduty, nonpay status.”¹⁰⁶ Therefore, receipt of payment “is neither wholly necessary, nor solely sufficient” to explain the extension of military jurisdiction to retirees.¹⁰⁷

The nation’s potential need to tap already trained personnel for additional service provides a more satisfying explanation than the government benefits explanation standing alone. Like members of the Individual Ready Reserve, military retirees may be ordered to active duty at any time,¹⁰⁸ and in recent decades, some have been called up in this way.¹⁰⁹ As the U.S. Court of Claims has put it, the pension ensures a “direct connection” to the military, but the money continues to flow “not solely [as a] recompense for past services, but a means devised by Congress to assure [retirees’] availability and preparedness in future contingencies.”¹¹⁰

In Part III, the practical difficulties of enforcement will emerge. But for now, suffice it to say that retirees hold a unique legal status among former government employees. Because they receive a pension and could be obligated to return to active service, military retirees remain subject to the personal jurisdiction of the military legal system. A portion of military law governs their behavior until they die.

104. 503 U.S. 594, 595 (1992). The Court made clear, however, that “[m]ilitary retirees unquestionably remain in the service and are subject to restrictions and recall.” *Id.* at 599.

105. *Reid v. Covert*, 354 U.S. 1, 19–20 (1957).

106. *See, e.g., United States v. Nettles*, 74 M.J. 289, 290, 292–93 (C.A.A.F. 2015) (involving an appellant ordered to active duty from the Individual Ready Reserve—one of the most dormant reserve components that does not require drilling or entail pay—so that he could be court-martialed).

107. *Dinger*, 76 M.J. at 555–56.

108. 10 U.S.C. § 688 (2012); *see also* 10 U.S.C. § 8102 (2012) (providing that “except in time of war or national emergency, not more than ten retired flag officers of the Regular Navy may be on active duty”).

109. *See* Rebecca Leung, *60 Minutes: Old Soldiers Back on Duty*, CBS NEWS (Dec. 3, 2004), <https://www.cbsnews.com/news/old-soldiers-back-on-duty-03-12-2004/> [<https://perma.cc/2JZK-DBVV>] (interviewing people that had been called to active duty from the Individual Ready Reserve and retirement); *see also* Devon L. Suits, *Army Seeks Retired Medical Soldiers to Support COVID-19 Efforts*, U.S. ARMY (Mar. 27, 2020), https://www.army.mil/article/234059/army_seeks_retired_medical_soldiers_to_support_covid_19_efforts [<https://perma.cc/A28R-V6LM>] (describing a call for retired personnel to volunteer to return to active duty in response to the COVID-19 pandemic).

110. *Hooper v. United States*, 326 F.2d 982, 987 (Ct. Cl. 1964); *see Dinger*, 76 M.J. at 554–57 (reviewing Supreme Court precedent bearing on the exercise of court-martial authority over retirees and concluding, “[W]e are firmly convinced that those in a retired status remain ‘members’ of the land and Naval forces who may face court-martial”).

*B. The Evolution of Restrictions on the
Political Activities of Servicemembers*

The oldest still-existing restrictions on the political activities of servicemembers can be found in a series of Civil War-era federal criminal statutes outlawing obviously coercive uses of command authority to skew election results.¹¹¹ They prohibit (1) the posting of troops at polling places,¹¹² (2) the marching of servicemembers to polling places,¹¹³ (3) the use of “military authority” to “influence the vote” of servicemembers,¹¹⁴ and (4) officer interference with local election officials.¹¹⁵ These provisions likely grew out of a concern that officers had coerced union soldiers to vote for either Abraham Lincoln or George McClellan during the presidential election of 1864.¹¹⁶ If soldiers have ever been prosecuted on the basis of these statutes, trial records are not readily available; the statutes appear to be rarely, if ever, enforced today.¹¹⁷

Another political restriction dates to 1870 and came about as part of Congress’s efforts to downsize the army during Reconstruction.¹¹⁸ Congress prohibited army officers from holding “any

111. The modern versions of these provisions can be traced to a 1909 statute. *See* sections 22, 23, 24, 25, and 26 of 35 Stat. 1093 (1909), <http://uscode.house.gov/statviewer.htm?volume=35&page=1092> [<https://perma.cc/A495-UXR5>]. These re-consolidated penal provisions were based on provisions originally enacted on February 25, 1865 and collected in the 1875 Revised Statutes as sections 5528, 5529, 5530, 5531, and 5532. *See* 1 Rev. Stat. 1077–78 (1875); *see also* 52 THE CONGRESSIONAL GLOBE: THE OFFICIAL PROCEEDINGS OF CONGRESS 1129 (F. & J. Rives, Washington, D.C. 1865) (recording that the president had signed a bill “to prevent officers of the Army and Navy . . . from interfering in elections in the States”).

112. 18 U.S.C. § 592 (2012).

113. 18 U.S.C. § 609 (2012).

114. 18 U.S.C. § 609.

115. 18 U.S.C. § 593 (2012).

116. *See* Jonathan W. White, *How Lincoln Won the Soldier Vote*, N.Y. TIMES: OPINIONATOR (Nov. 7, 2014, 8:50 PM), <https://opinionator.blogs.nytimes.com/2014/11/07/how-lincoln-won-the-soldier-vote/> [<https://perma.cc/2U4T-9XHJ>] (describing the widespread manipulation of soldiers’ votes during the 1864 election); *see also* Greer v. Spock, 424 U.S. 828, 841–42 (1976) (Burger, C.J., concurring) (“[S]ome officers of the Armed Forces, then in combat, sought to exercise undue influence either for President Lincoln or for his opponent, General McClellan, in the election of 1864.”)

117. *See* Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 110 n.108 (2013) (while unaware of the provisions’ provenance prior to 1986, noting that “the [anti-interference] statute has rarely—if ever—been used to form the basis of a prosecution” and describing cases where it had been “cited tangentially”). It seems most likely that if servicemembers were prosecuted based on these provisions, it would have been during the Civil War.

118. *See* Memorandum from Theodore B. Olson, Assistant Attorney Gen., Office of Legal Counsel, to William P. Tyson, Dir., Exec. Office for U.S. Attorneys 9 (May 17, 1983) [hereinafter Olsen OLC Memo]. Professor Stephen Vladeck obtained this memo through a FOIA request and made it available at <https://perma.cc/YLM8-KTR6>. *See* Stephen Vladeck, *Military Officers and the Civil Office Ban*, 93 IND. L.J. 241, 245 n.13 (2018).

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civil office, whether by election or appointment.”¹¹⁹ The Chairman of the House Committee on Military Affairs cited the risk that officers would increasingly be detailed to civil positions when civilians could not be found, leading to the “military grow[ing] to be paramount to the civil, instead of the civil being paramount to the military.”¹²⁰ Senators ultimately prevailed in limiting the ban to active duty officers.¹²¹ But as originally passed by the House, the statute would have applied to pensioned retirees as well, since they “were still so much ‘connected with’ the military.”¹²² Typical language from legislators expressed the belief that “the military should be separate from and subordinate to the civil authority.”¹²³ Debates appeared to assume that the legislation would absolutely bar officers from holding any position in the civil government—elected or appointed, federal or state—unless another statute expressly allowed the practice.¹²⁴ The ban on civil office continued in various forms over the next century and a half. The current incarnation prevents active officers from holding partisan elective offices, nominative positions that require Senate advice and consent, and many other executive positions.¹²⁵

A curious, but apparently never-enforced statute dating from World War II forbids anyone, whether in the military or not, from polling servicemembers about how they voted or how they intend to vote.¹²⁶ Because it only prohibits polling that “requires or implies the necessity of an answer,”¹²⁷ it likely does not apply to standard volunteer-based surveys, and these days, there is no shortage of data on how servicemembers plan to vote in the lead up to presidential elections.¹²⁸ One can imagine several purposes for such an antipolling provision, especially considering its passage coincided with legislation

119. Act of July 15, 1870, ch. 294, § 18, 16 Stat. 315, 319.

120. Olson OLC Memo, *supra* note 118, at 10 (citing CONG. GLOBE, 41st Cong., 2d Sess. 150 (1970) (statement of Chairman Logan)).

121. *See* 16 Stat. 319.

122. Olson OLC Memo, *supra* note 118, at 10 (citing CONG. GLOBE, 41st Cong., 2d Sess. 1853 (1970) (statement of Rep. Jones)).

123. *See id.* at 11 (citing CONG. GLOBE, 41st Cong., 2d Sess. 3398 (1970) (statement of Sen. Thurman)).

124. *See id.* at 10.

125. 10 U.S.C. § 973 (2012) (implemented by U.S. DEPT OF DEFENSE, DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ¶ 4.1.2.3 (Feb. 19, 2008)). The restriction on holding civilian offices first appeared in the U.S.C. in 1956. *See* 70A Stat. 203 (1956).

126. 18 U.S.C. § 596 (2012).

127. 18 U.S.C. § 596.

128. *E.g.*, George R. Altman & Leo Shane III, *This Poll of the U.S. Military Has Gary Johnson Tied with Donald Trump in the Race for President*, MILITARY TIMES (Sept. 21, 2016), <https://www.militarytimes.com/news/2016/09/21/this-poll-of-the-u-s-military-has-gary-johnson-tied-with-donald-trump-in-the-race-for-president/> [https://perma.cc/6CEX-6ZZR].

encouraging states to change election laws in order to permit absentee voting by deployed servicemembers.¹²⁹ Within the ranks, it ensured that leaders could not force subordinates to reveal political preferences that could lead to discriminatory treatment and distrust. Perhaps Congress also wanted to discourage the newly enfranchised servicemembers from conceiving of themselves as a political bloc and avoid exposing partisan tendencies within the fighting population to the larger public.

When the Department of Defense (“DoD”) was created following World War II, President Truman and Congress vigorously debated how to ensure civilian control over a more consolidated, more permanent postwar military establishment.¹³⁰ Some were concerned about the extreme popularity of high-ranking veterans and believed that centralizing military governance that had previously been dispersed among the separate service secretaries would inappropriately empower a single person.¹³¹ Both the House and Senate bills stipulated that the secretary of defense must be a civilian appointee, but the House bill went further in specifying that the secretary could not have previously served as an active duty officer.¹³² 10 U.S.C. § 113(a) codifies the compromise they reached: a waiting period of seven years (originally ten years) before a former officer could assume the position.¹³³

In 1976, the Supreme Court pointed to many of the statutory restrictions described above as evidence that the United States has historically created laws in pursuit of a “politically neutral military establishment under civilian control,” a justification for the Court upholding a policy that barred candidates from making speeches and distributing campaign literature at Fort Dix.¹³⁴

The Civil War anti-interference provisions, the civil office ban, the prohibition on polling, and the secretary of defense waiting period suggest that Congress has historically found it necessary to enact legal constraints on servicemembers when facing novel threats to civilian control. The waiting period and the legislative history of the civil office

129. Donald S. Inbody, *Should Soldiers' Votes Get Counted? That's Not as Easy as You Think*, WASH. POST: MONKEY CAGE (Nov. 11, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/11/11/ensuring-soldiers-a-chance-to-vote-was-a-challenge-in-the-civil-war-it-still-is-today/> [<https://perma.cc/CVV7-KVBJ>].

130. KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., STATUTORY RESTRICTIONS ON THE POSITION OF SECRETARY OF DEFENSE: ISSUES FOR CONGRESS 5–7 (2017).

131. *Id.* at 6–7.

132. *Id.* at 8.

133. *Id.* Congress has made two exceptions: first for George Marshall in 1950, *id.* at 8–11, and second for James Mattis in 2017, Exception to Limitation Against Appointment of Persons as Secretary of Defense, Pub. L. No. 115-2, 131 Stat. 6 (2017).

134. *Greer v. Spock*, 424 U.S. 828, 839 & n.12 (1976).

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ban also suggest that restrictions on retirees—even significant restrictions—have always been a part of this conversation. As Professor Stephen Vladeck has observed, the survival of the constitutional principle of civilian control may depend on these kinds of supplementary legal “manifestations.”¹³⁵

C. Existing Restrictions on Partisan Endorsements

Currently, the most salient restrictions on the individual political expression of active and retired personnel come from two sources: (1) a DoD regulation and (2) a punitive article of the UCMJ.

1. The Regulatory Prohibition on Implied DoD Endorsements

DoD Directive 1344.10, titled “Political Activities by Members of the Armed Forces,” (“the Political Activity Directive”) prevents *active* military personnel from publicly endorsing partisan candidates.¹³⁶ But its overarching purpose is much broader: to avoid a perception that the DoD or any individual service component endorses any particular candidate or party.¹³⁷ In the active duty context, this means prohibiting the most conspicuous forms of political activity while preserving acceptably private forms of expression. For example, active personnel may not author, sign, or publish partisan political writings that solicit votes,¹³⁸ but they may write letters to the editor concerning political matters under certain conditions.¹³⁹ They may not march in political parades or perform duties for political groups, but they may become a member of a political group and participate as a “mere spectator” when not wearing the uniform.¹⁴⁰ They may not display a large political sign on their vehicles or in front of their on-base housing unit, but they may put a bumper sticker on their car.¹⁴¹ They may not fundraise for campaigns, but they may contribute themselves.¹⁴²

135. See Vladeck, *supra* note 83, at 243, 251 (“[I]nsofar as these statutes themselves are protecting deeper, transcendent constitutional norms, courts ought to be mindful of those norms when confronted with questions about these statutes’ meaning and application . . .”).

136. See U.S. DEP’T OF DEF., DIR. 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES ¶ 4.1.2.3 (Feb. 19, 2008) [hereinafter DIRECTIVE 1344.10].

137. See *id.* ¶ 4 (“In keeping with the traditional concept that members on active duty should not engage in partisan political activity, and that members not on active duty should avoid inferences that their political activities imply or appear to imply official sponsorship, approval, or endorsement, the following policy shall apply . . .”).

138. *Id.* ¶ 4.1.2.3.

139. *Id.* ¶ 4.1.1.6.

140. *Id.* ¶¶ 4.1.1.9, 4.1.2.1, 4.1.2.8, 4.1.2.10.

141. *Id.* ¶¶ 4.1.2.11–12.

142. *Id.* ¶¶ 4.1.1.7, 4.1.2.1.

This attempt at a balance between individual rights and military neutrality can be observed in the Political Activity Directive's restrictions on retired personnel as well, albeit with a much higher threshold for what makes a behavior too conspicuous. For example, DoD logos cannot be used on political materials.¹⁴³ Retirees who run for office can mention their rank, component, and former title; they can even use a military photograph, but it may not be the "primary graphic representation" in any material and they must make their retiree status clear.¹⁴⁴ Should retiree candidates use this kind of military information, it "must be accompanied by a prominent and clearly displayed disclaimer" refuting the implication of endorsement by the DoD or the applicable service component.¹⁴⁵ Generally, however, retirees may participate in most of the political activities prohibited to active servicemembers, subject to a catchall provision that they do not "otherwise act in a manner that could reasonably give rise to the inference or appearance of official sponsorship, approval, or endorsement."¹⁴⁶ Crucially, this prohibits the implication of endorsement by *the DoD*, not endorsements by individuals.¹⁴⁷

2. The UCMJ's Punitive Article of "Contempt Towards Officials"

The other legal restriction that bears on political endorsements by retirees is the UCMJ punitive article "contempt toward officials." It criminalizes the use of "contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State."¹⁴⁸ It does not specify duty status, and thus applies to retirees.¹⁴⁹ Prosecutorial guidance issued by the executive branch limits the applicability of this provision by requiring

143. U.S. DEP'T OF DEF., INSTR. 5535.12, DOD BRANDING AND TRADEMARK LICENSING PROGRAM IMPLEMENTATION Enclosure 2, ¶ 2.d (Sept. 13, 2013).

144. DIRECTIVE 1344.10, *supra* note 136, ¶¶ 4.3.1.1, 4.3.2.1; *see also* Andrew Alan Pinson, Note, *A Bridge Too Far? Directive 1344.10 and the Military's Inroads on Core Political Speech in Campaign Media*, 44 GA. L. REV. 837 (2010) (criticizing restrictions on candidates).

145. DIRECTIVE 1344.10, *supra* note 136, ¶ 4.3.1.2.

146. *Id.* ¶ 4.1.4.

147. *See id.*

148. 10 U.S.C. § 888 (2012). Two other UCMJ punitive articles known as the "general articles" have bearing on political speech. These prohibit "conduct unbecoming an officer and a gentleman," "disorders and neglects to the prejudice of the good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces." 10 U.S.C. §§ 933, 934 (2012). These offenses would be unlikely to encompass endorsements unless accompanied by extreme additional facts, so I do not discuss them here. *See generally* Weber, *supra* note 117, at 108 (describing the application of the general articles to political speech).

149. *See* 10 U.S.C. § 888; *supra* note 97 and accompanying text (explaining Congress's extension of the UCMJ to retired servicemembers).

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that the speech target officials in their personal capacity in order to be chargeable.¹⁵⁰ It also prohibits charging those who express contempt towards officials not contemporaneously holding the specified offices, even if the targeted officials may have held a specified office in the past.¹⁵¹

III. CURRENT LEGAL AND PROFESSIONAL CONSTRAINTS FAIL TO DETER ENDORSEMENTS

This Part will explain why none of the legal constraints discussed in Part II limit former flag officers from publicly endorsing political candidates and why retirees would be unlikely to face enforcement in any event. It concludes by arguing that professional norms alone are not enough to solve the problem.

No statutory or regulatory provision constrains the standard retired flag officer endorsement. At first glance, the Civil War prohibition on officers using “military authority” to “influence the vote” of servicemembers would seem to apply.¹⁵² The context of the statute makes it clear, however, that “authority” refers to the specific order-giving authority vested in the chain of command, not a general credibility that could sway opinions, like the credibility of a former flag officer.¹⁵³ A contempt charge could hypothetically apply in the event that a former flag officer uses vitriolic language to denounce an incumbent opponent of her preferred candidate. Obviously, this would leave most, if not all, of the typical endorsements untouched.

The catchall provision in the Political Activity Directive comes the closest to a limitation. When an officer has reached the highest ranks and held the most prestigious leadership roles, her endorsement draws on institutional credibility and implies a kind of consensus among the military establishment.¹⁵⁴ Thus, one could argue that just by nature of their unique rank and status, retired flag officers “could

150. See JOINT SERV. COMM. ON MILITARY JUSTICE, MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV-21, ¶ 14(c) (2019), [https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20\(Final\)%20\(20190108\).pdf?ver=2019-01-11-115724-610](https://jsc.defense.gov/Portals/99/Documents/2019%20MCM%20(Final)%20(20190108).pdf?ver=2019-01-11-115724-610) [<https://perma.cc/22SG-CR58>] (“If not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged as a violation of the article.”).

151. See *id.* (“The official or legislature against whom the words are used must be occupying one of the offices or be one of the legislatures named in Article 88 at the time of the offense.”).

152. See 18 U.S.C. § 609 (2012).

153. The same sentence of the statute prohibiting the use of “military authority” to “influence the vote” of servicemembers also specifically outlaws the use of this authority to influence servicemembers to vote at all—by “requir[ing]” them to “march to a polling place.” *Id.*

154. See *supra* notes 11–13, 67–68 and accompanying text (describing the various sources of an individual officer’s influence).

reasonably give rise to the inference or appearance of official sponsorship, approval, or endorsement” by the DoD or a service component when they endorse a political candidate.¹⁵⁵ Endorsers would argue, however, that an inference of DoD endorsement would require leveraging more explicitly “official” symbols like logos or uniforms. They would cite the example set by hundreds of their predecessors over the last few decades as an indication that they acted “reasonably.”

Even if the restrictions described above could adequately constrain retiree endorsements, experience suggests that enforcement against retirees would not occur. First, it is worth noting that military commanders since Vietnam have exercised “great restraint in employing the powerful tools at their disposal” to curtail political speech—as they should.¹⁵⁶ Active servicemembers have certainly violated the Political Activity Directive¹⁵⁷ and uttered contemptuous speech,¹⁵⁸ but courts-martial and nonjudicial punishments have been rare, with commanders typically handling the problem via administrative correctives like reprimands.¹⁵⁹

Enforcement against retirees, while theoretically possible, remains practically unlikely. To levy charges against a retired army officer, a commander would need to demonstrate “extraordinary circumstances” and obtain a referral from the Criminal Law Division of the Office of the Judge Advocate General.¹⁶⁰ The other service components impose similar policies limiting the exercise of prosecutorial discretion.¹⁶¹ Practically speaking, this means retirees almost never face court-martial proceedings, especially not retired flag officers.¹⁶² The army did not court-martial a retired general until

155. DIRECTIVE 1344.10, *supra* note 136, ¶ 4.1.4.

156. Weber, *supra* note 117, at 114.

157. See STANDARDS OF CONDUCT OFFICE, OFFICE OF GEN. COUNSEL, DEP'T OF DEF., ENCYCLOPEDIA OF ETHICAL FAILURE 121–31 (2014), [https://www.jag.navy.mil/distrib/instructions/EncyclopediaofEthicalFailures\(2014\).pdf](https://www.jag.navy.mil/distrib/instructions/EncyclopediaofEthicalFailures(2014).pdf) [<https://perma.cc/2HEE-KP6H>] (documenting corrective actions taken against recent violations of the Political Activity Directive and the Hatch Act).

158. See John C. Wigglesworth, *Contemptuous Speech Against the President*, AIR COMBAT COMMAND (Oct. 21, 2010), <https://www.acc.af.mil/News/Commentaries/Display/Article/203584/contemptuous-speech-against-the-president/> [<https://perma.cc/9FNW-AHVJ>] (describing contemptuous speech cases charged under Article 88 and its predecessors).

159. See Weber, *supra* note 117, at 114–19 (explaining trends in the enforcement of restrictions on military political speech, including Article 88 and others).

160. AR 27–10, *supra* note 69, ¶ 5–2(a)(3). The same policy provides that “[i]f necessary to facilitate courts-martial action, retired Soldiers may be ordered to active duty.” *Id.*

161. Wigglesworth, *supra* note 158 (observing that, in the air force context, “if not personally contemptuous, adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion, even though emphatically expressed, may not be charged”).

162. See Ives & Davidson, *supra* note 98, at 16–33 (surveying eight court-martials of retired officers, two of flag officer rank, and twelve court-martials of retired enlisted personnel).

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1998.¹⁶³ And the army's 1918 court-martial of a former musician who disparaged President Wilson represents the only contemptuous speech court-martial against any retiree to date, and it resulted in acquittal.¹⁶⁴

And of course, using a criminal prosecution to handle the endorsement problem would be like bringing a tank to a bar fight. No one critical of the practice has suggested that a criminal remedy would be even remotely appropriate.¹⁶⁵ But the way forward with a more proportional administrative sanction is unclear. The existing framework for postemployment ethical violations can presumably handle violations of the Political Activity Directive by retirees, but unless the retiree remains a part of the federal government and has a new federal supervisor, there is no obvious initiator of administrative sanctions, since she does not have a commander unless called back to active duty.¹⁶⁶ Civilian courts are not a viable option because no specific penalties are provided by statutes, as is the case with procurement-related ethics violations¹⁶⁷ or conflicts of interest.¹⁶⁸

Thus, theoretically available restrictions on retired flag officer endorsements are either disproportionate, unlikely to be enforced, or both. Most commentators assume that professional norms represent the only realistic response. Former Chairman of the Joint Chiefs of Staff Martin Dempsey asserts that it "is not something that needs to be fixed with law, policy, or administrative rule," and that the solution is simply to "say no."¹⁶⁹ Political scientists James Golby, Kyle Dropp, and Peter Feaver write, "[W]e are not suggesting the use of any legal coercion to stop them," and instead argue that "senior veterans [should] avoid the prominent endorsements that have become increasingly the norm . . . as a voluntary measure."¹⁷⁰ They observe that a "taboo might already be emerging," fostered by outspoken former flag officers

163. *Id.* at 24–25.

164. *Id.* at 25.

165. *See infra* Part V (cataloguing potential responses to this problem, none of which include criminal sanction).

166. *Cf.* DEP'T OF DEF., DOD 5500.07-R, THE JOINT ETHICS REGULATION (JER) ¶¶ 10-100, 10-200 (2011) [hereinafter JER] (explaining that the UCMJ is the mechanism for sanctioning "current DoD employees" and mentioning specific statutes "that regulate the post-Government service Federal employment activities of former or retired DoD employees" but not outlining a general administrative mechanism applicable to retirees).

167. *See* 41 U.S.C. § 2105 (2012) (outlining administrative, criminal, and civil penalties for violations of restrictions on obtaining and disclosing information relating to the federal procurement policy).

168. *See* 18 U.S.C. § 216 (2012) (outlining criminal and civil penalties for the offenses of bribery, graft, and conflicts of interest).

169. Dempsey, *supra* note 7.

170. GOLBY, DROPP & FEAVER, *supra* note 13, at 18.

decrying the practice in an attempt to exert peer pressure.¹⁷¹ Certainly Dempsey is not alone among his peers in broadcasting criticism,¹⁷² and some retired four-star generals have reportedly tried to encourage others to resist appeals from campaigns.¹⁷³

Unfortunately, the evidence does not justify optimism that professional norms will strengthen themselves without some kind of intervention. Endorsers have acted in the face of criticism since the late 1980s, when the modern form of the practice began.¹⁷⁴ And yet this has not prevented the onslaught of former flag officers signing onto endorsement letters and accepting public roles in campaigns.¹⁷⁵ In fact, some, like Hillary Clinton supporter General John Allen, actually lean on the norm to posture themselves as followers of conscience that simply cannot stay quiet due to an unprecedented sense of “crisis.”¹⁷⁶ What prevents endorsers from arguing that every election represents such a crisis?

The same reasons motivating past legal interventions and current restrictions on the political activity of active and retired servicemembers should motivate a novel legal response to the current problem of retired flag officer endorsements. Unique among former government workers, those receiving a military pension remain under the jurisdiction of their former institution, and a major theme of the Political Activity Directive acknowledges that the public perception of retirees can negatively impact the military’s ability to remain apolitical.

171. *Id.*

172. See, e.g., Molly O’Toole, *Ex-General to Top Brass: Stay Out of the ‘Cesspool of Domestic Politics’*, FOREIGN POL’Y (July 11, 2016, 7:53 PM), <https://foreignpolicy.com/2016/07/11/ex-general-to-top-brass-stay-out-of-the-cesspool-of-domestic-politics/> [<https://perma.cc/D7HC-V6PU>] (recalling an interview with John Kelly, a retired marine general (and future white house chief of staff), who argued that the practice increases “mistrust” and that an endorsement “just becomes a talking point on CNN” without convincing any voters); Dana Priest & Greg Miller, *He Was One of the Most Respected Intel Officers of His Generation. Now He’s Leading ‘Lock Her Up’ Chants*, WASH. POST (Aug. 15, 2016), https://www.washingtonpost.com/world/national-security/nearly-the-entire-national-security-establishment-has-rejected-trumpexcept-for-this-man/2016/08/15/d5072d96-5e4b-11e6-8e45-477372e89d78_story.html [<https://perma.cc/3XVN-729U>] (quoting a statement from Former Chairman of the Joint Chiefs of Staff Mike Mullen criticizing Flynn and Allen for their “disappointing lack of judgment in [speaking out] for crass partisan purposes”).

173. Feaver, *supra* note 4.

174. For a historical example, see David Evans, *Bush Ad Becomes a Political Minefield for a Retired Marine*, CHI. TRIB. (Mar. 13, 1992), <https://www.chicagotribune.com/news/ct-xpm-1992-03-13-9201230646-story.html> [<https://perma.cc/A84G-CJ2J>].

175. See *supra* notes 1–6 and accompanying text (providing examples of endorsements from the 2016 presidential campaign).

176. See Priest & Miller, *supra* note 172 (quoting Allen as acknowledging that “[r]etired senior officers should not take lightly the impact of public commentary in a political environment” but asserting that Trump would “create a civil-military crisis,” prompting him to speak out as a “matter of conscience”).

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The current legal framework cannot effectively address the endorsement problem, but neither can existing professional norms.

IV. ANTI-ENDORSEMENT LESSONS FROM OTHER CONTEXTS

In two nonmilitary contexts and one military but nonpolitical context, the government restricts individuals from making or implying endorsements. This Part first analogizes to codes of judicial ethics and restrictions on civil servants. It then describes how military retirees may not use rank or title to imply DoD endorsement of a private business, and how they may not immediately attempt to influence the official action of their former service component on behalf of a private organization. Each of these examples offers lessons about how to design, enforce, and justify provisions intended to deter or reduce the impact of retired flag officer endorsements.

A. Judges

The U.S. legal profession began attempting to regulate judicial ethics in the early twentieth century.¹⁷⁷ Today, the vast majority of federal judges¹⁷⁸ must adhere to Canon 5 of the Code of Conduct for United States Judges, which enumerates a prohibition against “publicly endors[ing] or oppos[ing] a candidate for public office.”¹⁷⁹ The American Bar Association (“ABA”) Model Code of Judicial Conduct, which forms the basis for most judicial ethics rules at the state level,¹⁸⁰ contains a nearly identical prohibition in Rule 4.1(A)(3).¹⁸¹ Significantly, the federal anti-endorsement provision applies to judges who have retired due to disability, retired into senior status, or retired but remain subject

177. See Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 314–15 (2003) (“The American Bar Association made its first attempt at promulgating rules of judicial conduct in 1924.”).

178. By this I mean essentially all Article III judges (but not the Supreme Court Justices) and many Article I judges, including those on the Court of Appeals for Veterans Claims and Court of Appeals for the Armed Forces. U.S. COURTS, CODE OF CONDUCT FOR UNITED STATES JUDGES 1–2 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [<https://perma.cc/LF9Y-7VD9>].

179. *Id.* at 18–19.

180. See *Model Code Anniversary*, JUD. ETHICS & DISCIPLINE (Mar. 21, 2017), <https://ncscjudicialethicsblog.org/category/new-codes-of-judicial-conduct/> [<https://perma.cc/THS9-EYTL>] (noting that “[m]ost states adopted the 1972 model code almost verbatim” and “30 jurisdictions have adopted new codes . . . that include many . . . 2007 model code revisions”).

181. See MODEL CODE OF JUDICIAL CONDUCT r. 4.1(A)(3) (AM. BAR ASS'N 2014) (stating that a judge shall not “publicly endorse or oppose a candidate for any public office”).

to recall.¹⁸² Similarly, a retired judge “subject to recall for service, who by law is not permitted to practice law” remains subject to the ABA anti-endorsement provision.¹⁸³ Potential sanctions span from public reprimand to removal.¹⁸⁴

The U.S. Court of Appeals for the Eighth Circuit upheld Minnesota’s anti-endorsement provision in 2012 under strict scrutiny, observing that even without actual bias against litigants, “the act of endorsement itself undermines the judiciary’s appearance of impartiality because the public may perceive the judge to be beholden to political interests.”¹⁸⁵ In 2010, the Seventh Circuit upheld Wisconsin’s endorsement prohibition, though it arrived at that conclusion by applying a balancing approach for government employee speech.¹⁸⁶ Like the Eighth Circuit, it found the risk of “undermin[ing] the appearance of impartiality” significant.¹⁸⁷ The court also found that “the constitutional protection in a political endorsement is tempered by the limited communicative value of such an endorsement.”¹⁸⁸ In other words, mere endorsements do little to broadcast the qualifications and beliefs of a judge who is herself campaigning for office, which the Supreme Court has found worthy of protecting.¹⁸⁹ Instead, they mainly boost the endorsee and suggest “an effort to . . . assume a role as political powerbroker.”¹⁹⁰

The Supreme Court has not considered judicial endorsements, but in *Williams-Yulee v. Florida Bar*, it upheld a restriction on judicial candidates personally soliciting campaign contributions.¹⁹¹ The Court

182. Senior judges are those who have met age and service requirements, meet yearly workload requirements (roughly the amount that an active service judge completes in three months), and remain salaried. See 28 U.S.C. § 371(b) (2012). A judge “permanently disabled from performing his duties” may fully retire from active service under 28 U.S.C. § 372(a). These judges, along with “[a]ll other retired judges who are eligible for recall to judicial service (except those in U.S. territories and possessions)” should comply with the entirety of the Code of Conduct except some of the sections of Canon 4—meaning Canon 5 continues to apply. See CODE OF CONDUCT, *supra* note 178, at 19–20.

183. See *Application*, AM. BAR ASS’N (2011), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2011_mcjc_application.pdf [https://perma.cc/BB7S-NS4L] (explaining in Part II that retired judges fitting this description need not comply with Rules 3.9 or 3.8(A), meaning Rule 4 continues to apply).

184. MODEL RULES FOR JUDICIAL DISCIPLINARY ENFORCEMENT r. 6 (AM. BAR ASS’N 2011).

185. *Wersal v. Sexton*, 674 F.3d 1010, 1025 (8th Cir. 2012).

186. *Siefert v. Alexander*, 608 F.3d 974, 983–88 (7th Cir. 2010).

187. *Id.* at 986.

188. *Id.*

189. See *id.* at 984 (noting the “distance between an endorsement and speech about a judge’s own campaign”); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that a canon prohibiting candidates for judicial office from announcing their views violated the First Amendment).

190. *Siefert*, 608 F.3d at 984.

191. 575 U.S. 433, 437 (2015).

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emphasized that preserving public trust in the judiciary's ability to administer justice was a compelling state interest.¹⁹² "[T]he role of judges differs from the role of politicians," and even though judges may successfully avoid favoring donors, the mere perception of favorable treatment would erode public confidence, justifying intervention.¹⁹³

Certainly a comparison between military officers and judges should not be taken too far, because anti-endorsement rules as applied to retired judges do not appear to have been tested in the courts, and there are separate, additional imperatives for maintaining judicial impartiality tied up in the due process rights of litigants.¹⁹⁴ But the drafters of the judicial codes of conduct understood that retired, pensioned judges subject to recall maintain the ability to harm public trust in the judiciary's neutrality. Likewise, retired, pensioned military officers—who are also subject to recall—maintain the ability to harm public trust in the military's neutrality. Just as judges must appear to be impartial in order to dispense justice effectively, the military must appear to be apolitical in order to serve the state effectively.¹⁹⁵ Additionally, the Seventh Circuit's skepticism regarding the communicative value of mere endorsements applies with equal force in the military context. A flag officer adding her name and rank to a candidate's list of endorsements, without more, does little to educate the voting public about the candidate's merits or the issues at stake. But it does broadcast the flag officer's desire to be a "political powerbroker."¹⁹⁶

B. Civil Servants

Like judges, civil servants must temper their individual speech in the service of an institution meant to be nonpartisan. In 1939, Congress passed the Hatch Act, which subjected federal public employees (and some state employees) to a wide array of restrictions on partisan activities and which remains in force today, albeit somewhat narrowed.¹⁹⁷ Today, employees in agencies considered more sensitive—

192. *Id.* at 444–48.

193. *Id.* at 446.

194. *See, e.g., Siefert*, 608 F.3d at 984–85 (“[U]nlike restrictions designed, for example, to regulate federal employees’ political activity, restrictions on judicial speech may, in some circumstances, be required by the Due Process Clause.”).

195. *See supra* Sections I.A, I.B.

196. *Siefert*, 608 F.3d at 984.

197. *See* Hatch Act, 5 U.S.C. §§ 7321-7326 (2012). The Hatch Act actually built on over fifty years of rule development regarding the active participation of federal employees in political campaigns. *See* Scott J. Bloch, *The Judgment of History: Faction, Political Machines, and the Hatch*

like the Federal Election Commission, the National Security Council, and the Defense Intelligence Agency—violate regulations implemented under the Hatch Act if they “[e]ndorse or oppose a candidate for partisan political office” in campaign materials “in concert” with the campaign.¹⁹⁸ Additionally, all employees, even those in less restricted agencies, cannot use their “official authority or influence” to influence an election by, for example, using their official titles or positions while working with a campaign.¹⁹⁹ The Office of the Special Counsel (“OSC”) investigates Hatch Act violations, issues warning letters and legal opinions, and brings cases in front of the U.S. Merit Systems Protection Board.²⁰⁰ Sanctions include reprimands, grade reductions, fines up to \$1,000, suspension, removal, and temporarily banning individuals from federal employment.²⁰¹

Hatch Act restrictions have survived multiple constitutional challenges at the Supreme Court.²⁰² The Court has cited several government interests at play. These include selecting civil servants based on merit instead of political connections; enforcing the laws “in accordance with the will of Congress, rather than in accordance with their own or the will of a political party”; preventing leaders from coercing subordinates to vote for or support particular parties; and avoiding erosion of public trust in representative government.²⁰³ As discussed above, deterring retired flag officer endorsements would similarly discourage the selection of officers for senior military positions

Act, 7 U. PA. J. LAB. & EMP. L. 225, 230–36 (2005) (describing how the 1883 Pendleton Act marked the end of the spoils system and tracing the substantive evolution of Hatch Act provisions).

198. 5 C.F.R. § 734.411(d) (2019).

199. 5 C.F.R. § 734.302(a), (b)(1) (2019).

200. See *Your Role in an OSC Investigation*, U.S. OFF. OF SPECIAL COUNS. 1 (2018), <https://osc.gov/Documents/PPP/Processing%20Complaints%20of%20PPPs/Your%20Role%20in%20an%20OSC%20Investigation.pdf> [<https://perma.cc/2LK7-7GAV>].

201. See Eileen Ambrose, *Campaign Rules for Federal Employees Get an Update*, BALT. SUN (Jan. 27, 2013, 9:55 AM), <https://www.baltimoresun.com/maryland/bs-md-federal-hatch-20130127-story.html> [<https://perma.cc/3S2J-WYFJ>] (summarizing the new “menu” of penalties available after the Hatch Act Modernization Act passed in 2013).

202. See, e.g., *U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers*, 413 U.S. 548, 551 (1973) (holding that various Hatch Act restrictions were not unconstitutionally vague or overbroad); *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 78–82 (1947) (holding that Congress had the power to enact the Hatch Act and affirming termination of a public employee who had served as a poll watcher and a paymaster for party workers).

203. *U.S. Civil Serv. Comm’n*, 413 U.S. at 564–65. The Court cited a related rationale when it upheld mandatory disclosure requirements for lobbyists in *United States v. Harriss*, 347 U.S. 612 (1954). To refuse would be to “deny Congress in large measure the power of self-protection,” it observed, by allowing the “voice of special interest groups” to drown out that of the people. *Id.* at 625. Since the nation’s founding, civilian control of the military has been understood as governmental self-preservation. Instead of a coup, the modern threat is the risk that military leaders will prioritize their own interests over those of their civilian principals. See discussion *supra* notes 34–41.

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based on political compatibility, strengthen the hands of civilians in Congress and the executive branch over their military agents, avoid potential corrosive effects when subordinates perceive themselves to have disfavored political views, and fortify public trust in the military.²⁰⁴

C. Business Ethics

Retired flag officers face a number of restrictions on their employment activities beyond those that all officers must comply with once they leave the service.²⁰⁵ For example, while retired officers enjoy a broader privilege to use their previous rank and title than other former servicemembers,²⁰⁶ DoD ethics regulations prohibit them from using their military titles in the context of employment and business dealings if doing so “in any way casts discredit on DoD or gives the appearance of sponsorship, sanction, endorsement, or approval by DoD.”²⁰⁷ Additionally, the more stringent “revolving door” prohibitions for federal employees apply to retired flag officers—namely, they face the prospect of criminal prosecution if they communicate with employees of their former service component for the purpose of influencing its official action.²⁰⁸ This “cooling-off” period applies even if the retired flag officer was not “personally or substantially” involved in the matter at hand.²⁰⁹ But it does not prevent retirees from giving companies “behind-the-scenes” assistance.²¹⁰ These observations suggest that the statute primarily aims to temper the *perception* that

204. *See supra* Section I.B.

205. All separated officers face criminal liability if they perform certain activities for nonfederal employers. *See* 18 U.S.C. § 207 (2012). For example, they may never attempt to influence the government regarding a specific party on a particular matter that they worked on personally and substantially when employed by the government. *See* 18 U.S.C. § 207(a)(1). Regarding matters they did not personally work on but should have known were pending under their responsibility during their last year of service, separated officers may not attempt to work on those matters for another party for two years. *See* 18 U.S.C. § 207(a)(2).

206. *See* 10 U.S.C. § 772 (2012) (authorizing “retired officer[s] of the Army, Navy, Air Force, or Marine Corps” to “bear the title . . . of [their] retired grade[s]” but not affording the same privilege to nonretired officers or enlisted personnel unless they “served honorably in time of war”).

207. *See* JER, *supra* note 166, ¶ 2-304 (stipulating when retired military members “may use military titles in connection with commercial enterprises”); *see also* 5 C.F.R. § 2635.702(b) (2019) (explaining permissible usage of government positions and titles for executive branch employees).

208. *See* 18 U.S.C. § 207(c)(1) (2012); *see also* 18 U.S.C. § 207(c)(2)(iv) (explaining that the prohibition applies to those previously employed in the O-7 (flag officer) pay grade).

209. *Pre- and Post-Employment Restrictions for Separating and Retiring Air Force Personnel*, DEP’T OF THE A.F. GEN. COUNS. 13 (2016), <https://www.safgc.hq.af.mil/Portals/80/documents/gca/ethics/AFD-160727-002.pdf?ver=2016-08-18-110459-677> [<https://perma.cc/3LDG-GVDU>].

210. *Id.* at 7.

retirees will use their influence to improperly benefit contractors or lobbyists.²¹¹

Thus, regulatory and statutory business ethics restrictions on retired flag officers reflect the logical understanding that these officers, due to their high rank and visibility, are more likely to mistakenly suggest that their former employer “endorses” a project or favors an interest group. They are also more likely to generate public distrust in government should they immediately cozy up to private entities that stand to make a lot of money from the military. The same logic applies in the political endorsement context. By nature of their high rank and visibility, retired flag officers are more in danger of implying an endorsement by their former institution, and their overt acts of partisanship are more likely to degrade the public’s perception of a politically neutral military.

V. POTENTIAL LEGAL RESPONSES

So far, this Note has summarized why the United States requires an apolitical military, one subject to robust civilian control. It has argued that the practice of retired flag officers endorsing partisan political candidates appears to be worsening, represents a clear danger to civilian control, and weakens military effectiveness. It has explained that while retirees remain subject to military jurisdiction, the existing array of statutory and regulatory restrictions on political activity cannot adequately address the problem, and neither can professional norms. Finally, it has analogized to judicial ethics, Hatch Act prohibitions, and postemployment business ethics restrictions on retired flag officers. Now this Note turns to potential legal responses.

This Part first outlines some general concerns: namely, how to define “endorsement” and why any response would need to be framed around the endorser, not the campaign or the candidate. It attempts to situate the flag officer endorsement problem within some of the Supreme Court’s highly deferential decisions involving speech that could degrade military discipline and efficacy. The remaining Sections explain and evaluate four potential legal responses.

First, the DoD and each service component could enact new rules that would punish endorsers by blocking them from participating in events and partnerships sponsored by that component.²¹² Second, the DoD could update the Political Activity Directive to mandate that should a retired flag officer make a partisan endorsement, she must

211. *See id.* at 13 (describing the purpose of the “cooling-off” period).

212. GOLBY, DROPP & FEAVER, *supra* note 13, at 20.

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simultaneously provide a series of strongly worded disclaimers. Third, the DoD could update ethics regulations to prohibit the use of titles and rank in conjunction with partisan endorsements.²¹³ The disclaimer and military title proposals would ideally be backed up by Congress giving the OSC (or an entity within the DoD) clear statutory authority to refer cases to the U.S. Merit Systems Protection Board to conduct informal adjudications with the ability to impose civil penalties.

The most legally justifiable solution would likely be some combination of these three responses. While somewhat harder to justify under the First Amendment, a fourth response is worth discussing: a contractual promise that should officers be selected for promotion to flag officer rank, they will refrain from endorsing any candidate for partisan office for eight years after retirement.

A. Defining “Endorsement” and Targeting the Supply, Not the Demand

Endorsements represent political speech at the core of the First Amendment’s protection.²¹⁴ Of course, the majority of the retired flag officers who engage in the practice do so by simply allowing a campaign to publish their name and rank.²¹⁵ Mere endorsements, without more, have “limited communicative value” regarding the qualifications and beliefs of the candidate, as the Seventh Circuit observed in the context of judicial elections.²¹⁶ The data available bears this out inasmuch as retired flag officer endorsements fail to affect voters’ decisionmaking.²¹⁷ But what is a mere endorsement?

No matter the legal response chosen, defining “endorsement” without violating the First Amendment would represent a significant challenge. The definition needs to be expansive enough to prevent simple workarounds but limited enough to avoid precluding meaningful debate on issues. When considering a cap on how much individuals could spend “relative to a clearly identified candidate,” the Supreme Court avoided unconstitutional vagueness by interpreting the cap to be “limited to communications that include explicit words of advocacy of

213. *Cf.* Corbett & Davidson, *supra* note 48, at 70 (“In the near-term, the most effective restraint on political endorsements is the military itself.”).

214. *See* Morse v. Frederick, 551 U.S. 393, 403 (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) (plurality opinion))).

215. *See* discussion and sources cited *supra* notes 1–3 (describing flag officer endorsements during the 2016 presidential campaign).

216. Siefert v. Alexander, 608 F.3d 974, 986 (7th Cir. 2010).

217. *See* sources cited *supra* notes 13–14, 65.

election or defeat of a candidate.”²¹⁸ This language, focusing on connection to a named candidate instead of policies associated with those candidates, would be a good place to start in crafting a definition of partisan endorsement aimed at deterring flag officers.

In terms of overall design, any legal response would have to target the supply of the endorsements, not the demand. It would be tempting to directly address the role that campaigns play in competing to collect endorsements from former military leaders. But restricting campaigns from soliciting endorsements or spending campaign money on content featuring retired flag officers would stand on much shakier constitutional footing. Putting aside the rights of the officers, these options would certainly violate the candidates’ free speech and free association rights. The Supreme Court has made clear that in the context of congressional and executive elections, “[t]he candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and [to] vigorously and tirelessly . . . advocate his own election.”²¹⁹

Soliciting and using campaign funds represents a form of protected speech, and limitations beyond certain disclosure requirements are frequently invalidated.²²⁰ The Court already looks skeptically at quantitative expenditure limitations,²²¹ suggesting that a content-based expenditure limitation would be even less likely to survive strict scrutiny. Restricting candidates from soliciting retiree endorsements would also fail to achieve the intended effect. Political action committees (“PACs”) and other supporters would quickly step in to solicit and publicize these endorsements, sidestepping restrictions on

218. *Buckley v. Valeo*, 424 U.S. 1, 7, 43 (1976) (per curiam). Of course, the Court went on to find that the \$1,000 expenditure cap violated the First Amendment, *id.* at 44–51, but its analysis does not transfer easily to the proposals outlined in this Section. The cap applied to “*all citizens* and groups except candidates, political parties, and the institutional press,” *id.* at 19 (emphasis added), and implicated different state interests, *see id.* at 45–51 (rejecting “equalizing the relative ability of individuals and groups to influence the outcome of elections” as a compelling state interest and explaining why the spending cap was inadequately tailored to “prevent[] corruption and the appearance of corruption”).

219. *Id.* at 52. The Court has distinguished elections for judicial office. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446, 1662 (2015); *supra* Section IV.A (surveying anti-endorsement rules governing judges).

220. *See, e.g., Davis v. Fed. Election Comm’n*, 554 U.S. 724, 744–45 (2008) (holding that expenditure thresholds for self-financed congressional candidates constitute a facial violation of the First Amendment); *Buckley*, 424 U.S. at 57–58, 61 (invalidating limitations on campaign expenditures but finding that disclosure requirements of the Federal Election Campaign Act of 1971 did not violate the Constitution when narrowly construed). *See generally* FED. ELECTION COMM’N, FEDERAL ELECTION CAMPAIGN LAWS (2019), <https://www.fec.gov/resources/cms-content/documents/feca.pdf> [<https://perma.cc/XWU8-HMY5>] (collecting and outlining federal law on campaign finance and disclosure requirements).

221. *See, e.g., Randall v. Sorrell*, 548 U.S. 230, 236–37 (2006) (invalidating Vermont’s statutory limitation on the amount candidates for state office could expend).

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the campaigns themselves.²²² PACs may currently make unlimited election-related expenditures as long as they do so without consulting or cooperating with a candidate or a candidate's agent.²²³ Practically speaking, a campaign-centric approach would also be hard to enforce. While the evidence that a retired flag officer made an endorsement exists in the public domain, evidence of endorsement solicitation by campaign proxies would be nonobvious and purposefully obscured.

Restrictions on retired flag officers themselves would obviously also need to withstand scrutiny commensurate to the form such restrictions take, which the following Sections will explore. But these restrictions could draw on a number of rationales unavailable to restrictions on campaigns or candidates. First, as pensioned personnel that face the possibility of being recalled to service, retired flag officers continue to belong to their service components and continue to fall under UCMJ jurisdiction.²²⁴ Many of the motivations behind political activity restrictions on active servicemembers—the validity of which has never been seriously challenged—apply with equal force to retired flag officers.²²⁵ And while the DoD does not currently employ retired flag officers, it still regulates their conduct to some extent because they present much of the same risk of mistakenly implying an institutional endorsement.²²⁶ A reviewing court might therefore choose to apply more deferential balancing approaches to the First Amendment based on the

222. Ease of solicitation by proxy likewise dooms the suggestion by Golby, Dropp, and Feaver that political parties might conclude “that the costs of the military endorsements exceed the benefits,” leading to self-regulation. GOLBY, DROPP & FEAVER, *supra* note 13, at 20. They write: “The campaigns could agree not to give senior military officers or veterans speaking roles at conventions or in advertisements, negotiating the terms much as they negotiate the rules surrounding the presidential debates.” *Id.*

223. See *Making Independent Expenditures*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/> (last visited Mar. 21, 2020) [<https://perma.cc/8RHF-82NV>] (“Individuals, groups, corporations, labor organizations and political committees . . . may support or oppose candidates by making independent expenditures . . . [which] are not contributions and are not subject to limits.”); *id.* (clarifying that an “independent expenditure . . . [i]s not made in consultation or cooperation with, or at the request or suggestion of any candidate, or his or her authorized committees or agents, or a political party committee or its agents”); see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 372 (2010) (finding that corporate expenditures on electioneering communications constitute protected speech).

224. See discussion *supra* notes 96–110 (discussing the continued exercise of military jurisdiction over retired servicemembers).

225. See discussion *supra* Section II.C.

226. See, e.g., discussion *supra* notes 154–155, Sections II.C.2, IV.B.

idea that retired officer speech is like government employee speech²²⁷ or, more importantly, like the speech of active servicemembers.²²⁸

The Supreme Court observed in *Parker v. Levy* that “the military is, by necessity, a specialized society separate from civilian society,” and that “the different character of the military community and of the military mission requires a different application of [First Amendment] protections.”²²⁹ In other words, “within the military community there is simply not the same autonomy as there is in the larger civilian community.”²³⁰ This lack of autonomy is justified because the armed forces rely on discipline and duty within the ranks,²³¹ this discipline allows them to effectively fight the nation’s wars,²³² and either the Constitution or institutional competencies demand that the political branches—not the courts—should make judgments about how best to regulate the armed forces.²³³

The Court’s reliance on these rationales when reviewing constraints on military personnel has arguably created a “military deference doctrine.”²³⁴ When applying this doctrine, the Court may generate an entirely separate, more tolerant standard than it would normally apply, or it may apply the relevant civilian standard but “stack the deck” by emphasizing the importance of the government interests involved or giving significant weight to the government’s view of the appropriateness of the means chosen.²³⁵

For example, in *Brown v. Glines*, the Supreme Court upheld an Air Force regulation that required airmen to get prior approval before circulating petitions on base.²³⁶ The Court found that the regulation

227. See *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968) (balancing efficiency, workplace harmony, and the proper performance of an employee’s duties against the employee’s First Amendment rights).

228. See generally John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (describing three eras of Supreme Court jurisprudence deferring to the military on constitutional questions). But see Pinson, *supra* note 144, at 848–54, 861–65 (describing rationales for the Supreme Court’s military deference cases and arguing that none of them justify upholding restrictions on former servicemembers as candidates).

229. *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974).

230. *Id.* at 751.

231. See *id.* at 744, 759 (noting that there are “certain overriding demands of discipline and duty” and that “[s]peech that is protected in the civil population may . . . undermine the effectiveness of response to command” (citations omitted)); Pinson, *supra* note 144, at 850.

232. See, e.g., *Parker*, 417 U.S. at 743 (explaining that a separate military society is required because “it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise” (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955))).

233. See O’Connor, *supra* note 228, at 174–80, 259, 265 (describing cases utilizing these justifications); Pinson, *supra* note 144, at 850–51 (summarizing rationales for the military deference doctrine).

234. See, e.g., Pinson, *supra* note 144, at 848–54 (outlining the doctrine).

235. See *id.* at 852–53 (describing these two methods).

236. 444 U.S. 348, 361 (1980).

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“protect[ed] a substantial Government interest unrelated to the suppression of free expression,” specifically, the military’s interest in discipline and command authority, which are “prerequisites for military effectiveness.”²³⁷ And in the earlier case of *Greer v. Spock*, the Court even demonstrated a willingness to defer to restrictions on the political speech of *nonservicemembers* if that speech would affect military duties.²³⁸ Fort Dix regulations (in concert with an army regulation) prohibited political demonstrations and speeches as well as the distribution of publications on base without prior approval if such publications posed “a clear danger to the loyalty, discipline, or morale of [the] troops.”²³⁹ The Court upheld the installation commander’s decision to prohibit several candidates from holding events and his decision to evict civilians who distributed campaign literature without prior permission.²⁴⁰ It ended its opinion with strong language about the “American constitutional tradition of a politically neutral military establishment under civilian control,” linking this to the observation that “the military as such is insulated from both the reality and the appearance of acting as a handmaiden for partisan political causes or candidates.”²⁴¹

Greer and *Brown* obviously implicate the use of government facilities and platforms, a factor not directly present in the retiree endorsement context. But they demonstrate the Court’s willingness to adopt a more flexible approach to safeguard military effectiveness and civilian control—even when the speech involved is core political speech by those not on active duty. As previously discussed, deterring retired flag officer endorsements would help shore up civilian control and promote military effectiveness.²⁴² It would increase the odds of civilian leadership deferring to genuine professional expertise, reinforce trust in the chain of command, and encourage a larger cross-section of the population to volunteer for military service.²⁴³

Unlike the regulations in *Greer* and *Brown* or the criminal provisions in *Parker*, however, this Note does not advocate a direct prohibition or penalty. The next Sections will outline several potential

237. *Id.* at 354.

238. 424 U.S. 828, 840 (1976); see also O’Connor, *supra* note 228, at 247–48 (observing that *Greer* “extended the military deference doctrine” by deferring to policies of the executive branch—previously, it had only deferred to congressional statutes—and by deferring “to the regulation of military installations, even if those regulations may apply to civilians aboard such installations”).

239. *Greer*, 424 U.S. at 831 & n.2, 832–33 (quoting Fort Dix Reg. 210-26 (1968), Fort Dix Reg. 210-27 (1997), and Army Reg. 210-20, 5-5(c) (1970)).

240. *Id.* at 840.

241. *Id.* at 839.

242. See *supra* Section I.B.

243. See *id.*

indirect remedies, predict their efficacy, and offer a preliminary look at how military deference could interact with the applicable First Amendment standards should a retired flag officer bring a challenge in court.

B. Formalized Ostracism

Besides hoping for a stronger social taboo against endorsement, political scientists Golby, Dropp, and Feaver suggest an indirect enforcement mechanism: the service components could blacklist those in violation of the taboo and block them from participating in “briefings, mentoring assignments and other consulting opportunities” with the active force.²⁴⁴ The authors argue that eventually, fear of this formalized ostracism would deter potential endorsers.²⁴⁵ Certainly, senior leaders that have retired from the military continue to maintain strong relationships with those who remain on active duty, and threatening those relationships could make some potential endorsers think twice.

Unfortunately, this policy on its own would not deter the bulk of retired flag officer endorsements. Effectively maintaining and enforcing a blacklist would be difficult, considering the wide array of formal and informal events hosted by units of every size. And even assuming endorsers could be effectively ostracized from interacting directly with active military units, other groups like think tanks, universities, and nongovernmental organizations would happily volunteer to host and engage with senior military leaders, giving endorsers and their supporters plenty of incentive to perpetuate the practice.

On the plus side, this proposal would be relatively easy to justify legally, as long as it was applied evenhandedly.²⁴⁶ The military need not invite every retiree back to participate in these voluntary opportunities. And to the extent that military installations and resources are involved, *Greer* suggests that the services could prohibit participation by individuals whose prior partisan endorsements suggest they present the greatest risk of exposing active servicemembers to partisan speech.²⁴⁷

244. GOLBY, DROPP & FEAVER, *supra* note 13, at 20.

245. *Id.*

246. *See Greer*, 424 U.S. at 838–39 (observing that the Fort Dix policy had been “objectively and evenhandedly applied,” with no candidates from “any political stripe” evading it).

247. *See id.* at 840 (upholding base regulations that prohibited political demonstrations and speeches as well as the distribution of publications on base without prior approval if such publications posed “a clear danger to the loyalty, discipline, or morale of [the] troops.”).

2020] *RETIRED MILITARY OFFICER ENDORSEMENTS* 1251*C. Simultaneous Disclaimers and Restrictions on the Use of Military Titles*

A second potential approach would be for the DoD to update the Political Activity Directive to mandate that any time a retired flag officer makes a partisan endorsement (or causes a campaign or journalist to publish one), they must simultaneously provide a series of disclaimers, more strongly worded than those retiree-candidates must adhere to.²⁴⁸ For example, the disclaimer could read:

This endorsement does not imply that my views are shared by the DoD, any of the individual services, or any active duty military personnel. The DoD strongly discourages partisan political endorsements by retired senior officers because it has determined that they degrade professional ethics, reduce military effectiveness, and are easily misinterpreted in ways that undermine the constitutional principle of civilian control.

Such a disclaimer might deter some retired flag officers from endorsing, either because of the additional coordination required to include the language, or because the language itself might reduce the intended impact of the endorsement. For those that continue to endorse, the public might receive the information more skeptically. On the other hand, as soon as third parties pick up news of the endorsement, the disclaimer language will likely disappear from the public conversation. The same endorsers who already point to the professional taboo while justifying their actions could garner additional publicity by arguing that the stakes are so high that they simply had to speak out despite the disclaimers.

Alternatively, or in combination with the disclaimer requirement, the DoD could add a provision in the directive prohibiting retired flag officers from utilizing their rank or former duty positions in connection with a partisan endorsement, in campaign literature, or at a campaign event.²⁴⁹ As previously discussed, existing ethics regulations already address retirees' use of military titles in the context of employment and business dealings, prohibiting uses that "cast[] discredit on DoD" or "give[] the appearance of sponsorship, sanction, endorsement, or approval by DoD."²⁵⁰ This proposal would simply

248. See discussion *supra* Section II.C.1. Typical candidate disclaimers today read: "Use of military rank does not imply endorsement by the Marine Corps, or the Department of Defense." AMY MCGRATH, <https://amymcgrath.com/> (last visited Apr. 8, 2020) [<https://perma.cc/NF4D-5VHV>] (promoting the U.S. senate campaign of a retired marine corps lieutenant colonel).

249. This idea derives from a proposal by two retired army officers, who suggest that Congress might "create civilly enforceable restrictions specifically prohibiting retirees from using military titles in political settings." Corbett & Davidson, *supra* note 48, at 70.

250. See JER, *supra* note 166, ¶ 2-304 (stipulating when retired military members "may use military titles in connection with commercial enterprises"); see also 5 C.F.R. § 2635.702(b) (2019) (explaining permissible usage of government positions and titles for employees of the executive branch).

import the restriction to the political context and make explicit that the use of rank and titles by retired individuals who have reached the highest levels of military leadership inevitably implies institutional endorsement.²⁵¹ This proposal also shares an internal logic similar to the Hatch Act restriction on civil servants using “official authority or influence” to sway an election, which would include using an official title in connection with a campaign.²⁵² The restriction hones in on proxies for the institutional credibility that endorsers and campaigns exploit. Removing these signals for why the endorsement should matter might make the practice less attractive to both campaigns and the retired officers themselves.

Like the disclaimer requirement, however, a limit on the use of military titles could also be evaded. PACs and news outlets could do the investigative work and provide the public with rank and previous job title. And even if this proposal did reduce the use of military titles, it would not reduce the impact of endorsements by retired flag officers that have acquired significant name recognition.²⁵³

Nonetheless, these proposals would put some indirect legal pressure on retired flag officers to think before they sign on to a campaign. In combination with formally ostracizing endorsers from military events, mentorship programs, and partnership opportunities, the approach could reduce the overall number and impact of endorsements and signal widespread institutional disapproval of the endorsement practice, providing additional ammunition to those who criticize endorsers for violating the professional taboo.

As discussed previously, however, investigating and penalizing retirees for violations of the Political Activity Directive is typically not practicable, since they do not have a commander to implement administrative sanctions unless called back to active duty.²⁵⁴ Therefore,

251. See GOLBY, DROPP & FEATHER, *supra* note 13, at 19 (noting that flag rank makes an endorser “qualitatively different” from other officers because “it seems likely that the broader public would view his statements as ‘official’ even if he tried to claim they were his own private, personal views”); *id.* (observing that flag officers were the “clear targets” of presidential campaigns).

252. 5 C.F.R. § 734.302(a), (b)(1) (2019).

253. Cf. Paul D. Shinkman, *88 Generals, Admirals Pen Support for Trump*, U.S. NEWS & WORLD REP. (Sept. 6, 2016, 9:23 AM), <https://www.usnews.com/news/articles/2016-09-06/88-generals-admirals-pen-support-for-trump-but-lack-name-recognition-of-clinton-supporters> [<https://perma.cc/LGB8-QJFC>] (asserting that the retired admirals and generals supporting Trump “lack[] the kind of name-branding of the former military leaders who support Hillary Clinton” and that “[f]ew if any . . . have military experience that ma[ke] them household names”).

254. Cf. JER, *supra* note 250, ¶¶ 10-100, 10-200 (explaining that the UCMJ is the mechanism for sanctioning “current DoD employees” and mentioning specific statutes “that regulate the post-Government service Federal employment activities of former or retired DoD employees” but not outlining a general administrative mechanism applicable to retirees).

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to make a disclaimer requirement and title restriction more effective, Congress would have to give the OSC (or an entity within the DoD) clear authority to refer these types of cases to the U.S. Merit Systems Protection Board to conduct informal adjudications with the ability to impose civil penalties like fines.²⁵⁵ The Board already adjudicates certain appeals from DoD civilian employees,²⁵⁶ and it already hears Hatch Act cases,²⁵⁷ so its members would be able to draw on this experience in determining whether a retired flag officer's speech met the chosen definition for "endorsement" and whether titles and disclaimers were or were not utilized properly. For first-time offenses, the investigating entity could send violators letters telling them to add disclaimers or remove titles.

It is unclear how a reviewing court would evaluate a disclaimer requirement and a restriction on the use of titles. Neither specifically prohibits or penalizes the speech at issue, but a disclaimer like the one above compels individuals to host government speech in a potentially impermissible way,²⁵⁸ and both tools certainly put government pressure on speakers to avoid exercising their First Amendment rights. The Supreme Court sometimes finds this pressure problematic, such as when it held that a state commission could not identify "objectionable" books and write sellers discouraging their sale by tacitly threatening police or prosecutorial action.²⁵⁹ But other times, the Court takes a more lenient approach. In *Meese v. Keene*, the Court held that the government could identify foreign films as "political propaganda" and require exhibitors to project the label "political propaganda" prior to screening

255. This obviously assumes that the MSPB is staffed as intended, which has not been the case in recent years. See Nicole Orgrysko, *Senate Forces 'First' for MSPB as the Agency Loses All Members*, FED. NEWS NETWORK (Mar. 1, 2019, 10:49 AM), <https://federalnewsnetwork.com/workforce-rights/governance/2019/03/senate-forces-first-for-mspb-as-the-agency-loses-all-members/> [https://perma.cc/QMD9-JAXK].

256. See, e.g., DEP'T OF DEF., DODI 1400.25, VOLUME 731, DoD CIVILIAN PERSONNEL MANAGEMENT SYSTEM: SUITABILITY AND FITNESS ADJUDICATION FOR CIVILIAN EMPLOYEES ¶ 7 (2012) (explaining that individuals applying for or serving in covered positions may appeal adverse decisions about their suitability to the MSPB).

257. *Jurisdiction*, U.S. MERIT SYS. PROTECTION BOARD, <https://www.mspb.gov/About/jurisdiction.htm> (last visited Apr. 8, 2020) [https://perma.cc/J86R-H8J9].

258. Compare *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 64–65, 70 (2006) (upholding a federal statute that required law schools to permit military recruiters, despite the schools' contention that it forced them to project a lack of concern about "Don't Ask, Don't Tell"), with *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995) (holding that parade organizers could not be forced to include groups with messages they did not desire to present).

259. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963) (holding that the Rhode Island Commission to Encourage Morality in Youth violated the First Amendment when it identified "objectionable" books, wrote to sellers urging them not to stock these books, and informed sellers that the Commission provided local police a list of distributors and recommended obscenity prosecutions).

them.²⁶⁰ The Court found that the requirement “neither prohibits nor censors the dissemination of advocacy materials.”²⁶¹ Rather, it simply mandated “additional disclosures that would better enable the public to evaluate the import of the propaganda.”²⁶² Disclaimers on partisan endorsements by retired flag officers could be similarly justified. Especially if combined with general deference regarding military imperatives, these proposals would likely pass constitutional muster.

D. A Contractual Promise

The proposals in the previous Sections represent modest legal responses that the DoD could act on relatively easily. A more robust response merits some preliminary discussion: before military officers could apply for promotion to the flag officer rank, they would have to certify that should they be selected for promotion, they will refrain from endorsing any candidate for partisan office for eight years after retirement. I will call this “Wait for Eight.” A stricter version of this proposal would clarify in the contractual provision that should the retiree subsequently choose to endorse a candidate, she would face a monetary penalty, just as violators face damages for breach of contract in the civilian context. A contractual promise represents the best chance at effectively curbing the most dangerous retired flag officer endorsements but also raises the largest First Amendment concerns—namely the specter of an “unconstitutional condition,” the contours of which this Section will briefly sketch.

“Wait for Eight” would be more effective than disclaimers, title restrictions, and formalized ostracism. Evading a specific contractual prohibition through the use of third parties, though conceivable, would require more creativity²⁶³ and would not be worth the risk for most retirees, who could simply wait out the term and avoid risking a violation. Additionally, as the waiting period passes, the would-be endorser’s name recognition, association with recent national security issues, and connection to senior military and civilian leaders would fade, making a potential endorsement both less impactful and less likely to be solicited.²⁶⁴ For example, a waiting period of eight years

260. 481 U.S. 465 (1987).

261. *Id.* at 478.

262. *Id.* at 480.

263. For example, retirees could band together and form an advocacy organization that endorses specific candidates. Or the spouses of retired flag officers could endorse candidates. A sufficiently nuanced definition of “endorsement” could likely preclude the former. The latter presents less of a danger of implied institutional endorsement.

264. *Cf.* GOLBY, DROPP & FEAVER, *supra* note 13, at 18 (speculating that an endorsement from a four-star general like Stanley McCrystal, strongly associated with a specific conflict and

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would ensure the completion of two presidential elections, meaning that those abiding by the promise could not endorse a president that they served for in uniform, or even anyone running against a president that they served for in uniform.²⁶⁵ These characteristics popularize an endorsement and enflame its damaging effects.²⁶⁶ In this way, a contractual waiting period deters the most dangerous endorsements and incorporates a logic similar to that of the secretary of defense waiting period and the “cooling off” period in the business ethics context. Creating a decision point for servicemembers at the cusp of taking flag officer rank could also formalize an additional distinction between these officers and those of lower rank, encouraging officers at the threshold to recognize that their actions will carry an increased risk of implying institutional endorsement.

Could a contractual postemployment waiting period survive judicial review? Perhaps. Generally, the government cannot provide a benefit on the condition that an individual forgo her constitutional rights.²⁶⁷ Opponents would argue that the proposal represents a penalty coercing individuals to forgo promotion or else give up their full right to political speech after retirement. Should civil penalties be enforced, these could also generate a coercive juncture: a retired flag officer would have to decide if endorsing in spite of the contractual promise was worth losing some of her pension.

A reviewing court adopting this frame would likely treat the scheme like any other content-based restriction on speech and apply strict scrutiny, placing the burden on the government to establish that it is narrowly tailored to achieve a compelling state interest.²⁶⁸ The

presidential administration, would have a larger impact than one from four-star general John Nathman); Bayne, *supra* note 48, at 42–43 (arguing that the prominence of an endorsement depends on rank, public profile, frequency of the endorser’s previous interaction with the president, proximity to last date of active service, and existing public perception of partisanship).

265. Presidents may only serve two four-year terms. U.S. CONST. amend. XXII. No matter when in the cycle an officer retires, two presidential elections will occur during the eight-year waiting period. Any elections involving an incumbent that the officer could have served under would therefore occur during this period.

266. For example, the proposal would discourage selection of senior officers based on partisanship because administrations would assess less risk to a reelection campaign. Trust and inclusion in decisionmaking would likewise improve if such a fear was addressed. Finally, those that speak out after eight years of being away from the active service will more conspicuously be posturing themselves as personally partisan, instead of pretending that they are continuing with their duties.

267. *See, e.g.,* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 549 (2001) (holding unconstitutional a statutory prohibition against using Legal Services Corporation funds on representation “involving an effort to reform a Federal or State welfare system”); Speiser v. Randall, 357 U.S. 513 (1958) (holding unconstitutional a California veterans’ property tax exemption that required applicants to subscribe to an oath that they would not advocate the overthrow of the government or advocate for a foreign state against the United States).

268. *See, e.g.,* Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015).

government could cite several compelling state interests necessary for civilian control of the military that are analogous to those justifying restrictions on the political activities of civil servants²⁶⁹ and judges.²⁷⁰ It could argue that the scheme is narrowly tailored because it targets the most dangerous population of military endorsers and would only last for the amount of time in which the endorsements would be the most damaging. The military deference doctrine might even help “stack the deck.”²⁷¹ Ultimately, however, the government would face an uphill battle under this framework.

On the other hand, a reviewing court might choose not to frame this as a coercive condition at all. Cases involving conditions on individual rights frequently produce inconsistent results, with perhaps the least amount of coherence in the subset of cases involving conditions on speech.²⁷² On occasion, the Supreme Court has instead framed conditions on funding as “a legislature’s decision not to subsidize the exercise” of the right.²⁷³ For example, in *Regan v. Taxation with Representation*, it determined that the government’s decision not to tax contributions to nonprofits could be conditioned on the organization declining to use that money for “propaganda” or lobbying.²⁷⁴ Similarly, the Court determined that Congress could condition federal funding for family-planning services on providers’ compliance with regulations prohibiting abortion counseling and activities that “encourage, promote or advocate abortion.”²⁷⁵ Proponents for a contractual waiting period

269. For example, safeguarding public trust in the military’s nonpartisan nature. *Cf.* U.S. Civil Serv. Comm’n v. Nat’l Ass’n of Letter Carriers, 413 U.S. 548, 563–67 (1973) (identifying the selection of civil servants based on merit instead of political connections as a compelling state interest).

270. For example, ensuring that top military leaders are chosen based on their technical expertise, not their partisan sympathies. *Cf.* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444–48 (2015) (observing that even though elected judges may actually be able to avoid favoring donors whose donations they personally solicited, the perception of favorable treatment could erode public confidence in the judiciary’s ability to administer justice).

271. *See supra* note 235 and accompanying text (describing one way in which the Court might apply the doctrine).

272. *See* Larry Alexander, *Impossible*, 72 DENV. U. L. REV. 1007, 1009 (1995) (“Although some parts of the metadoctrines [of unconstitutional conditions] may be theoretically explicable . . . I think . . . that larger portions of the area, and particularly large portions of conditions on free speech, cannot be theoretically rationalized.”); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1416–17 (1989) (listing holdings that appear to create inconsistencies).

273. *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 549 (1983); *see also* Sullivan, *supra* note 272, at 1440 (describing how defining baselines determines whether a program “penalizes” or “subsidizes”); Cass R. Sunstein, *Why the Unconstitutional Conditions Doctrine is an Anachronism (with Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. REV. 593, 601–03 (1990) (observing that “generating the appropriate baselines from which to distinguish subsidies from penalties is exceptionally difficult”).

274. 461 U.S. at 542 n.1, 546–51.

275. *Rust v. Sullivan*, 500 U.S. 173, 180 (1991). Medicaid may also decline to subsidize a medically necessary abortion despite funding all other medically necessary pregnancy-related

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could argue that Congress similarly has the authority to promote individuals—paying them and bestowing them with the institutional weight and visibility of “general” or “admiral”—based in part on an assurance that these endowments will not be used in the future to degrade the military’s nonpartisan nature.²⁷⁶

It may simply be too much of a stretch to label present-day employment at higher rank (or a retirement pension at a specified level) a “subsidy” for postemployment political speech.²⁷⁷ Proponents could potentially distinguish the proposal by its nature as an employment contract. While the contours of the contractual provision would need to be outlined by Congress,²⁷⁸ fashioning the waiting period as a contractual promise instead of a statutory prohibition makes it more like postemployment restrictive covenants in the private sector, such as noncompete agreements, nonsolicitation agreements, and confidentiality provisions. It could also be analogized to exclusivity arrangements in product endorsement contracts signed by celebrities. All of these curtail speech and activities that would otherwise be permissible in order to protect legitimate business interests.²⁷⁹ Similarly, a contractual promise would curtail the otherwise permissible speech of retired flag officers in order to protect the government’s compelling interest in a nonpartisan military.

Ultimately, while an argument can be made to support a contractual promise, its novelty and uncertain relationship to the Court’s constitutional-condition cases suggest that it should be pursued only as a last resort.

costs. *Harris v. McRae*, 448 U.S. 297, 322–26 (1980); *see also* *Maher v. Roe*, 432 U.S. 464, 474–75 (1977) (reasoning that a Connecticut regulation restricting funding for nontherapeutic abortions did not represent “state interference with a protected activity” but rather “state encouragement of an alternative activity” such as bringing pregnancies to term).

276. *Cf.* Frederick Schauer, *Too Hard: Unconstitutional Conditions and the Chimera of Constitutional Consistency*, 72 *DENV. U. L. REV.* 989, 1002–03 (1995) (observing that the more senior the public official, the less likely we are to object to her dismissal for criticizing the president).

277. The Court’s recent emphasis on examining the “scope” of the federal program and whether the condition defines limits outside of this scope could also be problematic. *See* *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214–17 (2013) (“[T]he relevant distinction that has emerged from our cases is between conditions that define the limits of the government spending program—those that specify the activities Congress wants to subsidize—and conditions that seek to leverage funding to regulate speech outside the contours of the program itself.”).

278. This would represent a significant change to the military’s promotion and personnel management system and attempting to enact it at the agency level would be inappropriate, especially considering Congress’s more involved role in the selection of flag officers. For example, Congress authorizes the exact number of flag officers, as opposed to specifying percentages like it does for other ranks. *See* 10 U.S.C. §§ 525, 526, 12004, 12005 (2012).

279. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 188 (AM. LAW INST. 1981) (describing the relationship between promises not to compete and “the promisee’s legitimate interest”).

CONCLUSION

The United States requires a nonpartisan military, one subject to robust civilian control. The practice of retired flag officers endorsing political candidates appears to be worsening, and it represents a clear danger to civilian control. It also weakens military effectiveness. Retirees remain subject to military jurisdiction because they earn a pension and may be subject to recall. But the existing array of statutory and regulatory restrictions on political activity cannot adequately address the endorsement problem. To date, most commentators have suggested that shoring up professional norms represents the only palatable solution. Unfortunately, professional norms have failed to contain the growth of the practice.

Congress has historically found it necessary to enact legal constraints on servicemembers—and retirees—when facing novel threats to civilian control. And in other contexts—such as judicial ethics, the Hatch Act, and business ethics for military retirees—restrictions on endorsement speech have been justified by similar state interests. As a first step, the DoD should consider restricting retired flag officers who make partisan endorsements from partnership opportunities with the active force. It should also consider creating a strong disclaimer requirement for endorsers and expanding existing restrictions on the use of military rank and titles to prohibit their use in connection with a partisan endorsement. If these proposals fail to diminish the growing trend, Congress should consider modifying employment provisions so that those who take flag officer rank agree to refrain from endorsing for some time after retiring. Certainly, the partisan behavior of retired flag officers is only one element of a complicated civil-military relationship. But it serves as a reminder that while civilian control may be a fundamental constitutional principle, it relies on measures beyond the Constitution to manifest and protect it.

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* J.D. Candidate, 2020, Vanderbilt University Law School; B.A., 2013, Princeton University. Thank you to all of my *Vanderbilt Law Review* teammates for epitomizing professionalism and enriching the last two years of my life beyond belief. Thank you also to my professors, including Rachel Anderson-Watts, Timothy Meyer, Michael Newton, Ganesh Sitaraman, and Ingrid Wuerth. And of course, thank you to my husband and family—always. The views expressed in this Note are mine alone and do not reflect the official policy or position of the U.S. Army, DoD, or the U.S. government.