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The Curious Court-Martial of Henry Howe

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THE CURIOUS COURT-MARTIAL OF HENRY HOWE

Jeremy S. Weber*

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I. INTRODUCTION

In a brick office building originally built for the government, at the intersection of two main streets in the Northern Plains town of Grand Forks, North Dakota, sits one of the most fascinating figures in the history of military justice. His renown these days as a small-firm attorney rests largely on the local level. Few people in Grand Forks—best known for the nearby Air Force base and the 1997 Red River flood that devastated the town¹—realize that more than fifty years ago, his seemingly innocuous Vietnam War protest resulted in one of the most famous courts-martial in American history. Yet the court-martial of Henry H. Howe, Jr., now in his mid-seventies, has

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1. The Grand Forks flood caused ninety percent of the city’s 52,500 residents to evacuate, while eighty-three percent of the city’s homes and sixty-two percent of its commercial buildings were damaged. In the midst of the flooding, a fire broke out that damaged eleven historic buildings and sixty apartments. *1997 Grand Forks Flood By the Numbers*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/1997-grand-forks-flood-numbers> (last visited Aug. 1, 2018). The image of downtown burning while surrounded by flood water prompted the local newspaper, the *Grand Forks Herald*, to famously run the headline, “Come hell and high water.” Brad Elliot Schlossman, *The Story Behind the Herald’s Iconic ‘Come Hell and High Water’ Edition*, GRAND FORKS HERALD (N.D.) (Apr. 21, 2017), <http://www.grandforksherald.com/news/4254469-story-behind-heralds-iconic-come-hell-and-high-water-edition>. The author served at Grand Forks Air Force Base during the flood and participated in humanitarian relief efforts there.

left a legacy, establishing a precedent about the limits of the First Amendment’s application to military members, and a cautionary tale for military members not to express contempt toward a United States President.

Nearly seventy years into existence of the history of the Uniform Code of Military Justice (“UCMJ”),² the court-martial of Lieutenant Henry Howe remains a truly unique case. Howe remains to this day the only military member convicted of violating Article 88 of the UCMJ for using contemptuous words against the President of the United States, his conviction a result of his participation in an antiwar protest in 1965.³ Today, at the age of seventy-five, Howe remains a fascinating figure, a personality truly worthy of his place in military history.

II. *UNITED STATES V. HOWE*

A. *The Protest*

Howe grew up in Virginia but moved to Colorado in eighth grade when his father—a scientist with the Coast and Geodetic Service—was transferred to the Upper Ionospheric Research Program in Boulder, eventually heading the computer division there and also teaching astronomy and navigation at the United States Air Force Academy—took a job in the astronomy program at the University of Colorado.⁴ In an interview for this article, Howe recalled how his father stoked his interest in political and scientific issues, taking the junior Howe to Democratic conventions as a child and imparting his pacifist views.⁵ Howe graduated from the University of Colorado at Boulder with a degree in political science, having completed the Reserve Officers’ Training Corps program.⁶ He entered the Army immediately after graduation, and by 1965, he was an Army Reserve Second Lieutenant about a year into an active duty tour with the 31st Engineer Battalion at Fort Bliss in El Paso, Texas.⁷ A newspaper article in November 1965 described the unmarried Howe as “a studious appearing young man wearing glasses,” and a later account characterized him as a “thin, serious-faced young man.”⁸

By late 1965, the first stirrings of public opposition to the Vietnam War emerged. On November 6, 1965, this anti-war sentiment hit the Texas border town of El Paso, at least on a small scale. A group of protestors from the local Texas Western College planned to demonstrate against American policy in Vietnam.⁹ The

2. 10 U.S.C. §§ 801–946 (2018).

3. Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1199 (1986).

4. E-mail from Henry H. Howe, Jr. to Jeremy Weber (on file with author). Howe’s father worked as a scientist on the Earth’s magnetic field and accompanied Admiral Byrd on his 1946 to 1947 Antarctic expedition. *Id.*; *Parents Hope for Bond for ‘Anti-War’ Officer*, EL PASO HERALD-POST, Jan. 11, 1966, at B5.

5. Telephone Interview with Henry H. Howe, Jr. (June 27, 2017) [hereinafter Howe Interview].

6. Kelly Kennedy, *Dissent Landed Vietnam Protestor in Prison – And Then in Law School*, ARMY TIMES, Jan. 16, 2006, at 10; *United States v. Howe*, 37 C.M.R. 429, 433 (C.M.A. 1967).

7. *Howe*, 37 C.M.R. at 433.

8. *Bliss Marcher Faces Charges*, EL PASO HERALD-POST, Nov. 10, 1965, at 1; John Rechy, “*Conduct Unbecoming . . .*” *Lieutenant on the Peace Line*, THE NATION, Feb. 21, 1966, at 207.

9. *Howe*, 37 C.M.R. at 433.

protest had generated significant controversy in the weeks leading up to it and had “consumed much space in the local press and in broadcasts on local radio and television stations.”¹⁰ A group of professors and students from the college had asked the El Paso City Council for permission to hold a demonstration. The Council refused at first, with the mayor and an alderman expressing disdain at the unpatriotic nature of an anti-war protest.¹¹ However, the Council later bowed to “pressure,”¹² which apparently came in the form of a press conference called by an assistant professor at the college (a former Air Force officer) and a threatened suit against the Council.¹³ The City Council’s attempts to block the demonstration only served to draw more attention to the otherwise unremarkable gathering. Counter-movements by local civic groups to oppose the protestors sprang up, and the assistant professor heading the planned demonstration was assigned a campus policeman for protection after threatening phone calls were made.¹⁴ In the end, the City Attorney advised the Council that no permission was necessary at all, but by that point the protestors added the initial denial of its free speech rights as another focus of the demonstration.¹⁵

Despite the protest, El Paso was hardly a hotbed of anti-war activity. In his classic 1969 critique of the military justice system, the famously-named *Military Justice is to Justice as Military Music is to Music*, Robert Sherrill painted a vivid picture of the buildup to the demonstration:

To understand what happened to Howe, one must understand a little about El Paso. Because of its location on the Mexican border and because it has for so many years depended on military payrolls for a large share of its income, El Paso is probably as trashy and as characterless a major city as any in this country. It is a way station for prostitutes, dope smugglers and other border types. Its Chamber of Commerce, with an eye on the nearby military bases, is driven by a kind of hyper-patriotism. So when the little band of war protestors sought a permit to march, the response from the community was pronounced. The Junior Chamber of Commerce suggested that El Pasoans fly the American flag prominently to show their united “stand against Communism.” The Civitans Club adopted a resolution demanding that professors at the local college who sympathized with the students be “silenced.” Letters poured in to both of the city’s newspapers damning “Communist-inspired beatniks.”¹⁶

The demonstration appears to have been a spectacle. Estimates of onlookers ranged from “hundreds” of people to about 2,000.¹⁷ A sizable pro-war

10. *Id.*

11. Rechy, *supra* note 8, at 205.

12. *Id.*; Howe, 37 C.M.R. at 432.

13. Charles Horky, *Texas Western Professor Backs Right to Speak Out*, EL PASO HERALD-POST, Nov. 2, 1965, at 1.

14. Rechy, *supra* note 8, at 206.

15. Howe, 37 C.M.R. at 433.

16. ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 178–79 (1970). *But see* Rechy, *supra* note 8, at 205–06 (characterizing El Paso as a “generally tolerant city” but also “seething with apathy”).

17. Howe, 37 C.M.R. at 432; Marshall Hail, *El Pasoans Stage Viet Nam Protest*, EL PASO HERALD-POST, Nov. 6, 1965, at 1.

counterdemonstration also took place.¹⁸ The local newspaper reported that onlookers shouted jeers such as “You yellow Reds” at the protestors, and police chased away young spectators holding eggs.¹⁹ Despite the commotion, the protest seemed to generate, the protest itself appears to have been quite small; the *El Paso Herald-Post* numbered the demonstrators at about twenty-five while others pegged the number at closer to a dozen.²⁰ While “cat calls and comments” flew between the two groups, the protest remained peaceful.²¹ El Paso police were out in force, supplemented by military police from Fort Bliss, who were there “to aid the civilian police concerning any military personnel in uniform that might be involved in the demonstration by returning them to Fort Bliss.”²² The demonstration itself lasted only half an hour.²³

Lieutenant Howe was not a member of the college group that staged the demonstration and apparently had no connection to the group.²⁴ In fact, a Texas Western professor who led the demonstration later testified that he did not know Howe and that Howe was not involved in planning the protest.²⁵ Howe had simply read about the demonstration in the newspaper and decided to join it.

In a recent interview, Howe explained his reason for joining the protest. He stated that during his year or so in the Army he became convinced of the immorality and wrongness of the Vietnam War. This belief arose after he was assigned to brief soldiers on a Pentagon “white paper” touting the reasons why America’s involvement in Vietnam was just. Howe’s research in preparation for the briefing led him to the opposite conclusion—a position he said he actually shared with soldiers when he conducted the required briefings, with no adverse consequences.²⁶ Based on his growing anti-Vietnam War views, Howe decided to take part in the local demonstration event. As the small group of college students began to march, Howe joined in, holding a piece of cardboard with writing on both sides. One side of the sign stated, “LET’S HAVE MORE THAN A ‘CHOICE’ BETWEEN PETTY, IGNORANT FACISTS [sic] in 1968”; the other stated, “END JOHNSON’S FACIST [sic] AGRESSION [sic] IN VIETNAM.”²⁷ Howe was not on duty and wore civilian clothes.²⁸ A newspaper report shortly after the demonstration noted that spectators did not notice Howe was a military member.²⁹

In the interview for this article, Howe stated he believed his actions were in

18. *Howe*, 37 C.M.R. at 432.

19. Hail, *supra* note 17, at 1.

20. *Id.*

21. *Howe*, 37 C.M.R. at 432. A different account was provided by a letter to the local newspaper, which blamed both the protestors and the counter-demonstrators for behaving themselves poorly, alleging that the event “was on the outskirts of becoming a mob riot.” Jim Bryman Jr., Editorial, *Protests Demonstration as Childish*, EL PASO HERALD-POST, Nov. 10, 1965, at B2.

22. *Howe*, 37 C.M.R. at 432.

23. SHERRILL, *supra* note 16, at 179.

24. *Howe*, 37 C.M.R. at 433.

25. *Officer Sentenced for Viet Protest*, CHI. TRIB., Dec. 23, 1965, at 3.

26. *Howe* Interview, *supra* note 5. Howe stated that to his surprise, no one seemed to pay much attention to the content of his briefings and seemed not to notice his developing anti-Vietnam War views.

27. *Howe*, 37 C.M.R. at 433.

28. Aldrich, *supra* note 3, at 1199.

29. *Bliss Marcher Faces Charges*, *supra* note 8, at A6.

compliance with Army regulations.³⁰ A review of Army regulations in effect at the time seems to support his position. Army Regulation 600-20, which had just been updated days before the demonstration, stated:

46.1 Participation in public demonstrations. Participation in picket lines or any other public demonstrations, including those pertaining to civil rights, may imply Army sanction of the cause for which the demonstration is conducted. Such participation by members of the Army, not sanctioned by competent authority, is prohibited –

- a. During the hours they are required to be present for duty.
- b. When they are in uniform.
- c. When they are on a military reservation.
- d. When they are in a foreign country.
- e. When their activities constitute a breach of law and order.
- f. When violence is reasonably likely to result.³¹

The available details of this event supply no reason to believe any of these conditions was implicated by Howe's actions.

Despite Howe's apparent compliance with the regulation, military officials responded promptly. It is not clear how military policemen on the scene recognized Howe; Howe recounted in his interview that military intelligence officials present at the demonstration recognized him from their previous interactions with him.³² A military policeman on the scene testified in later legal proceedings that he recognized "three or four other servicemen" at the demonstration.³³ The policeman also testified that he had talked with Howe before the demonstration about "other subjects" and learned he was a military member through this conversation.³⁴ Another view about how Howe's military affiliation was discovered involves a gas station attendant who allegedly saw a military sticker in Howe's car when Howe stopped to ask for directions to the demonstration; the attendant then supposedly called the police.³⁵

Regardless of how military police became aware of Howe's status, they decided to act. Likely recognizing their jurisdiction over this off-base matter was limited, military police had civilian police arrest Howe for "vagrancy."³⁶ Howe was the only protest participant whom police stopped.³⁷ With his handmade cardboard sign in the small El Paso demonstration, Howe became the first known military member to

30. Howe Interview, *supra* note 5.

31. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY AND PROCEDURE ¶ 46.1 (Oct. 27, 1965) [hereinafter AR 600-20].

32. Howe Interview, *supra* note 5.

33. *Howe*, 37 C.M.R. 429, 433 (C.M.A. 1967).

34. Marshall Hail, *Case Built Up Against Lieutenant*, EL PASO HERALD-POST, Dec. 21, 1965, at 1.

35. Kennedy, *supra* note 6, at 10; SHERRILL, *supra* note 16, at 179–80. Howe refuted this account in his interview for this article. Howe Interview, *supra* note 5.

36. Kennedy, *supra* note 6, at 10; SHERRILL, *supra* note 16, at 180 (the arresting civilian police officers reportedly told Howe they were acting on a request from the military police).

37. Rechy, *supra* note 8, at 207. It was reported that Howe's military identification card was found in one of his shoes after he would not produce his identification for officers who stopped him. Hail, *supra* note 34, at A8; *Army Officer Sentenced for Viet War Protest*, PITTSBURGH POST GAZETTE, Dec. 23, 1965, at 2. Howe disputed this, stating he did not have his military identification card on him, and military officials decided to take custody of him based solely on their personal recognition of him. Howe Interview, *supra* note 5.

demonstrate against the Vietnam War.³⁸

B. The Court-Martial

The Army reacted “quickly and forcefully” to Howe’s act of protest.³⁹ Just four days after the demonstration, Howe faced a preliminary hearing, having been charged with three violations of the UCMJ: using contemptuous words against the President, conduct unbecoming an officer and a gentleman, and public use of language disloyal to the United States with design to promote disloyalty and disaffection among the troops and civilian populace.⁴⁰ The “law officer” (the forerunner to today’s military judge)⁴¹ granted a defense motion to dismiss the third charge, but the Army proceeded to a general court-martial on the contemptuous words and conduct unbecoming charges.⁴²

These remaining charges both represent controversial UCMJ provisions. Both have long histories in military law, but both have been criticized as overreaching and vague.⁴³ In particular, the charge of using “contemptuous words” against the President, codified in Article 88 of the UCMJ, represents a disputed exercise of military authority over servicemembers’ speech. Article 88 reads as follows:

Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty, shall be punished as a court-martial may direct.⁴⁴

Article 88 uniquely generates controversy because it restricts military members’ free speech rights on the basis of the speech’s viewpoint. The article rests at the fulcrum of two competing Constitutional imperatives—servicemembers’ free speech rights and the need to maintain a loyal, apolitical military.⁴⁵ It has frequently drawn criticism from those who believe it fails to adequately protect military members’ free speech rights. For example, one commentator has noted that the article “is the most restrictive of the UCMJ’s prohibitions on speech” and “leaves soldiers unable

38. Terry H. Anderson, *The GI Movement and the Response from the Brass, in GIVE PEACE A CHANCE: EXPLORING THE VIETNAM ANTIWAR MOVEMENT* 93, 95 (Melvin Small & William D. Hoover eds., 1992).

39. *Id.*

40. *United States v. Howe*, 37 C.M.R. 429, 432 (C.M.A. 1967); *Bliss Marcher Faces Charges, supra* note 8, at 1, A6.

41. *The Manual for Courts-Martial* in effect at the time of Howe’s court-martial defined the duties of the law officer. The law officer served in largely an advisory role to the president of the court-martial (who functioned roughly as the equivalent of a jury foreperson with additional authority). The law officer ruled on all interlocutory questions of law except challenges and “advise[d] the court-martial on questions of law and procedure which may arise.” *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, ch. IX, ¶ 39 (1951) [hereinafter MCM].

42. *Howe*, 37 C.M.R. at 432.

43. See generally John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 *HARV. L. REV.* 1697 (1968); D.B. Nichols, *The Devil’s Article*, 22 *MIL. L. REV.* 111 (1963) (summarizing the histories and controversies surrounding UCMJ Articles 88 and 133/134, respectively).

44. Art. 88, UCMJ; 10 U.S.C. § 888.

45. Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 *A.F. L. REV.* 71, 106–07 (2013).

to voice their criticism of a war in which they are forced to participate.”⁴⁶ Another has argued that “[w]hile there may be justification for curtailing the rights of military members in some areas, the extent to which free speech rights are impinged upon by Article 88 is unwarranted.”⁴⁷

Article 88’s restrictions may be divisive, but similar provisions have a long history in military law. Dating back even before the Bill of Rights, military law has prohibited use of contemptuous words against the President and other prominent government officials.⁴⁸ In the days before the UCMJ, when the Army and Navy each had its own disciplinary code, 114 military members were convicted at courts-martial for violating contemptuous words provisions between the Civil War and World War II, with the preponderance of these coming during wartime.⁴⁹ However, post-World War II reforms sought to reform the military justice system to make it more fair and uniform across the board, transforming it from a harsh, commander-controlled system of discipline to a system that more evenly balanced civilian principles of justice with military discipline.⁵⁰ As a part of this reform effort, Congress re-examined the prohibition against uttering the contemptuous words, resulting in UCMJ Article 88.⁵¹

The version of Article 88 that emerged both expanded and limited the reach of previous contemptuous words prohibitions. It not only expanded the list of government officials to whom the prohibitions applied, but it also prohibited only commissioned officers from using contemptuous words; enlisted members no longer fell under the prohibition.⁵² This article generated little debate in the extensive Congressional hearings about the new UCMJ. While the Senate raised some questions about the article as the UCMJ moved through Congress, the Senate accepted the assurance of Professor Edmund Morgan (chairman of the UCMJ’s drafting committee) that the article “would not be used often.”⁵³ The article was passed in 1950, in substantially the same form as it exists today.⁵⁴

Article 88 does not define “contemptuous words.” That task is left to the *Manual for Courts-Martial* (“MCM”) and the courts. The MCM’s definition establishes some limits on the scope of the contemptuous words proscription:

It is immaterial whether the words are used against the official in an official or private

46. Sarah N. Rosen, *Be All That You Can Be? An Analysis of and Proposed Alternative to Military Speech Restrictions*, 12 U. PA. J. CONST. L. 875, 880–81 (2010).

47. Aldrich, *supra* note 3, at 1219.

48. Kester, *supra* note 43, at 1708–18.

49. *Id.* at 1720–21.

50. See generally Edmund Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953) (describing public pressure to institute military justice reforms and Congressional response to that pressure).

51. For an authoritative look at the development of the uniform code, see ROBINSON O. EVERETT, *MILITARY JUSTICE IN THE ARMED FORCES OF THE UNITED STATES* 1–16 (1956).

52. Kester, *supra* note 43, at 1718.

53. Weber, *supra* note 45, at 106 (citing *Bills to unify, consolidate, revise, and codify the Articles of War, the Articles for the Government of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before the Subcomm. of the Comm. On Armed Services, United States Senate*, 81st Cong., 1st Sess. 99 (1949)).

54. Art. 88, UCMJ; 10 U.S.C. § 888 (1950). The only substantive changes since the original UCMJ Article 88 are the addition of the word “commissioned” before “officer,” and the addition of the Secretary of Homeland Security to the list of officials to whom contemptuous words may not be directed.

capacity. 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. Similarly, expressions of opinion made in a purely private conversation should not ordinarily be charged. Giving broad circulation to a written publication containing contemptuous words of this kind in the presence of military subordinates, aggravates the offense. The truth or falsity of the statements is immaterial.⁵⁵

Thus, the MCM sets up a distinction between two extremes: “expressions of opinion made in a purely private conversation” on one side, and “giving broad circulation to a written publication containing contemptuous words . . . in the presence of military subordinates” on the other.⁵⁶ The former is protected, while the latter is subject to criminal sanction. The MCM also raises a potential defense for “adverse criticism of one of the officials or legislatures named in the article in the course of a political discussion,” though the reach of such a defense is unclear.⁵⁷ In the opinion of one military lawyer, any such defense is likely to fail:

[T]he political discussion defense will fail as a safe harbor for any service member who uses words contemptuous on their face, even if uttered in heated political debate and even if the accused did not intend the words to be personally contemptuous. Further, unless the official and personal capacities of the official are clearly severable, the courts will treat the offensive words as personally contemptuous.”⁵⁸

The exact reach of the article remains unclear. What is a “purely private conversation” or a “personally contemptuous” remark is left to the courts to decide. However, the article is almost never charged at a court-martial, so the courts have not had the opportunity to further define the reach of the article. The Military Judges’ Benchbook, a non-binding but influential source of military law,⁵⁹ defines the term as follows: “‘Contemptuous’ means insulting, rude, and disdainful conduct, or otherwise disrespectfully attributing to another a quality of meanness, disreputableness, or worthlessness.”⁶⁰ While helpful, the Benchbook definition does not cite a primary source, and even if it is considered authoritative, it hardly provides a bright line for determining what speech crosses over from permissible criticism of an official’s policies to a personal and contemptuous attack on the person. Military members are left to guess at the exact parameters of the provision’s coverage. Article 88 remains all about “line-drawing”; “[s]ubtle differences of language, tone, setting, and audience may put a case over the line.”⁶¹

Regardless of any lack of clarity about Article 88’s reach, Howe’s court-martial

55. MCM, *supra* note 41, at pt. IV, ¶ 12 (2016).

56. Weber, *supra* note 45, at 107.

57. *Id.*

58. Michael J. Davidson, *Contemptuous Speech Against the President*, ARMY LAW., July 1999 at 1, 7.

59. See *United States v. Hopkins*, 56 M.J. 393, 394 (C.A.A.F. 2002) (referring to the guidance in the Military Judges’ Benchbook as “nonbinding”). The Benchbook is a Department of the Army publication, and the foreword to the publication notes that it is a summary of legal authorities that should be cited rather than the Benchbook. DEP’T OF THE ARMY PAMPHLET 27-9, MILITARY JUDGES’ BENCHBOOK v (2014) [hereinafter BENCHBOOK].

60. BENCHBOOK, *supra* note 59, at ¶ 3-12-1(d).

61. Eugene R. Fidell, *Free Speech v. Article 88*, 124 U. S. NAVAL INST. PROC. 2 (Dec. 1998).

proceeded apace. Trial was scheduled right before Christmas 1965, less than two months after the El Paso demonstration. Howe moved for a change of venue, citing a newspaper cartoon critical of war protestors that he said had been tacked to his door with a “calling card” of his, which had been altered to read “Communist” instead of “Lieutenant.”⁶² The law officer denied that motion, after which Howe pled not guilty to both charges.⁶³ Howe later recounted that his defense counsel engaged in some discussions toward a plea bargain (termed a “pretrial agreement” in military justice parlance),⁶⁴ but Howe insisted on pleading not guilty so that he could argue the appropriateness of his actions in court.⁶⁵ Once the case reached trial, the government brought several witnesses against Howe, including the military policeman who recognized Howe, three El Paso City police officers, and a military officer who observed the demonstration.⁶⁶ The government did not move to admit the actual cardboard sign seized from Howe, reportedly to avoid a defense motion alleging that the seizure was illegal.⁶⁷ However, the government introduced pictures of the Howe carrying the sign, along with a film of the demonstration.⁶⁸

Howe’s defense counsel sought dismissal of the charges on constitutional grounds, arguing Howe was exercising his First Amendment rights, but the law officer denied the defense motion.⁶⁹ Howe’s attorney then argued that his client was not guilty because he was not a member of a pacifist group and “generally favored a strong Army.”⁷⁰ A leader of the demonstration from Texas Western College testified in Howe’s defense, as did Howe’s sister, who characterized Howe as “a good student, popular, a delegate to Boys’ State, and president of the Colorado University Young Democrats.”⁷¹ Howe’s parents were also present in the courtroom for the trial.⁷² Howe did not testify in findings, but in the sentencing proceeding he made a brief statement, stating he was sorry, he wanted to remain in the Army, and he was willing to serve in Vietnam.⁷³

A five-officer panel—one Colonel, one Major, one Captain, and two First Lieutenants—deliberated for only about ten minutes before convicting Howe of both charges.⁷⁴ He was sentenced to dismissal from the service, forfeiture of all pay and

62. *Skirmishes Mark Trial*, LAS CRUCES SUN NEWS, Dec. 21, 1965, at 2; *Court Denies Venue Change for Officer*, ODESSA AM., Dec. 21, 1965, at 2A.

63. Hail, *supra* note 34, at 1.

64. See MCM, *supra* note 41, at pt. II, 71 (2016) (detailing permissible terms of and procedures for submitting and accepting a pretrial agreement).

65. Howe Interview, *supra* note 5.

66. Hail, *supra* note 34, at 1, A6.

67. Rechy, *supra* note 8, at 207–08.

68. *Id.* at 208; *Officer Sentenced for Viet Protest*, *supra* note 25, at 3.

69. Rechy, *supra* note 8, at 208; Hail, *supra* note 34, at A8.

70. Franklin Whitehouse, *A.C.L.U. Will Aid Army War Critic*, N.Y. TIMES, Jan. 17, 1966, at 5.

71. *Army Lieutenant Found Guilty of Contempt Toward President*, ALAMOGORDO DAILY NEWS (N.M.), Dec. 22, 1965, at 1.

72. *Court Denies Venue Change for Officer*, *supra* note 62, at 2A.

73. *Army Officer Sentenced for Viet War Protest*, *supra* note 37, at 2.

74. *Id.* at 3. Several other contemporaneous accounts repeat that the members deliberated for only 10 minutes; however, one newspaper account stated the members deliberated for one hour. *GI Demonstrator Gets 2 Years*, FRESNO BEE, Dec. 22, 1965, at 1.

allowances, and two years in prison at hard labor.⁷⁵ Howe showed no emotion when the verdict was rendered.⁷⁶

C. The Aftermath

The court-martial left Howe unbowed. Three days after his conviction, Howe conducted a telephone interview with the *Boulder Camera* newspaper in which he said:

[I am] not sorry for the actions I took in El Paso on Nov. 6. I still feel the same way about President Johnson and the policy we are following in Viet Nam. Yet I feel the man in uniform has the responsibility to his service and his country to take a stand on situations he knows not to be in their best interest.⁷⁷

Several days later, in an interview with the *Denver Post* from the stockade at Fort Bliss, Howe told a reporter:

One of the hallmarks of fascism is the suppression of free speech. There is a clear distinction between responsibility to the military and the rights of a citizen. I have never refused to obey an Army order. I would go to Vietnam if ordered to do so. On the other hand, I believe I have the right to express my opinions as a citizen.⁷⁸

Howe called for the country to be “reunified” toward ending the war.⁷⁹ However, at that point, the interview ended when confinement officials discovered Howe was speaking with a reporter.⁸⁰

Howe’s defense attorney characterized the sentence as “too harsh.”⁸¹ The convening authority—a general officer who referred the case to trial and had authority to approve the results of the court-martial or grant clemency⁸²—apparently agreed. A little more than a month after the trial, General George Powers, the commanding officer at Fort Bliss, reduced Howe’s two-year confinement sentence to one year.⁸³ Following the convening authority’s action, Howe departed confinement

75. *Army Officer Sentenced for Viet War Protest*, *supra* note 37, at 3; *United States v. Howe*, 37 C.M.R. 429, 433 (C.M.A. 1967).

76. *2-Year Sentence Given to Rebellious U.S. Army Officer Called Too Harsh*, TOWN TALK (Alexandria, La.), Dec. 23, 1965, at 20 [hereinafter *2-Year Sentence*].

77. *Officer Shows No Regrets*, ARIZONA DAILY STAR (Tucson), Dec. 26, 1965, at D6.

78. SHERRILL, *supra* note 16, at 184; *Army Officer, Anti-War Marcher, May Appeal Case to Supreme Court*, ARIZONA DAILY STAR (Tucson), Jan. 2, 1966, at E6 [hereinafter *Army Officer, Anti-War Marcher*].

79. *Army Officer, Anti-War Marcher*, *supra* note 78, at E6.

80. *Id.*

81. *2-Year Sentence*, *supra* note 76, at 20.

82. In a general court-martial, a senior commander refers the case to trial. Art. 22, UCMJ; 10 U.S.C. § 822. Following trial, that same commander receives clemency matters from the accused and advice from the staff judge advocate, and then takes action on the case. Art. 60, UCMJ; 10 U.S.C. § 860. At the time of Howe’s court-martial and until recently, that convening authority had unfettered discretion to grant clemency to the accused in either findings or the sentence “for any reason or no reason, legal or otherwise.” *United States v. Rivera*, 42 C.M.R. 198, 199 (C.M.A. 1970). In recent years Congress has dramatically limited the authority of convening authorities to grant clemency in certain cases. See Tyler J. Sena, *Finding Avenues for Meaningful Clemency: In the Aftermath of the 2014 and 2015 NDAA’s*, 14 REPORTER 15 (2016) (summarizing changes made in recent National Defense Authorization Acts in this area).

83. *Army Reduces Term of ‘Vietnik’*, PITTSBURGH PRESS, Jan. 29, 1966, at 11; *Howe*, 37 C.M.R. 429, 431 (C.M.A. 1967).

in El Paso for the federal prison at Fort Leavenworth, Kansas to serve out the remainder of his confinement sentence.⁸⁴

Howe's team continued to work on his behalf as he served his term of confinement. While Howe's mother busied herself answering letters from followers of Howe's case, Howe's attorneys sought to collaterally attack Howe's conviction.⁸⁵ His attorneys sought a writ of habeas corpus in District Court, claiming Howe had been mistreated in the Fort Bliss stockade and was kept imprisoned rather than restricted to quarters (as was sometimes permitted for officers) only because of the political nature of his case.⁸⁶ Government lawyers responded by providing pictures of Howe's confinement conditions showing he had a television and access to several Communist-themed books, a fact that caused a stir in the local press.⁸⁷ The District Court ultimately denied the petition after General Powers testified that Howe was "not fit to be an officer" and thus was not entitled to be released.⁸⁸ However, Defense Secretary Robert McNamara soon thereafter granted Howe parole, and he was released from confinement.⁸⁹

Howe's petition for habeas corpus generated support among likeminded students at Texas Western College. A group of students from the college demonstrated on his behalf at the District Court where Howe's habeas petition was to be heard.⁹⁰ However, Howe did not find similarly receptive crowds everywhere. Several weeks after the demonstration at District Court, Howe, fresh from parole, attended a protest march in Denver, Colorado, as part of a series of Vietnam War protests across the globe.⁹¹ While Howe did not speak, his father did. However, the senior Howe's remarks were drowned out by chants of "Leavenworth" from hecklers.⁹²

D. The Appeal

His habeas attack on his conviction in District Court turned away, Howe's lawyers turned their attention to a direct appeal through the military justice system. With a sentence that included a dismissal and confinement for one year, Howe's case automatically proceeded to appeal to the Army Board of Review, a body of Army lawyers who reviewed

84. *Officer is Taken to Penitentiary*, ABILENE REPORTER-NEWS, Feb. 5, 1966, at 11B; *Lt. Howe Gets New Quarters in Kansas*, WKLY. GAZETTE (Colorado Springs, Colo.), Feb. 8, 1966, at 10B.

85. *Army Officer, Anti-War Marcher*, *supra* note 78, at E6.

86. Rechy, *supra* note 8, at 204.

87. Loretta Overton, *Howe Permitted to Keep Books Commie Flavored*, EL PASO HERALD-POST, Feb. 1, 1966, at 1.

88. Rechy, *supra* note 8, at 204; *Peace Case Bail Denied Lieutenant*, TIMES (Shreveport, La.), Mar. 12, 1966, at 6.

89. *Thousands Stage Coast-to-Coast Demonstrations*, ALBUQUERQUE J., Mar. 27, 1966, at 1; *Anti-War Officer to Appeal Verdict*, AMARILLO GLOBE-TIMES, Apr. 14, 1966, at 17. In his interview for this article, Howe speculated that his release was due to the likelihood that the Supreme Court would view his habeas petition more favorably; by releasing him, the military rendered the issue moot. Howe Interview, *supra* note 5.

90. *Students Plan Protest for Officer*, EL PASO HERALD-POST, Jan. 27, 1966, at 1.

91. *Thousands Stage Coast-to-Coast Demonstrations*, *supra* note 89, at 1.

92. *Id.*; *Paper Named in Libel Suit by Soldier*, ODESSA AM., Sept. 2, 1966, at 4-A (additionally, Howe later reportedly filed a \$350,000 lawsuit against the *Rocky Mountain News* arising from a letter critical of Howe written by another soldier who himself had also taken part in an anti-Vietnam War demonstration).

more serious court-martial convictions.⁹³ He was represented by ACLU attorneys in this appeal who were eager to portray Howe's conviction as a violation of his constitutional rights.⁹⁴ Howe raised ten "assignments of error" before the Army board, the most significant centering on challenges to the two charges' constitutionality under the First Amendment.⁹⁵ The panel of three Army officers disposed of each alleged error in businesslike fashion, holding that Howe's First Amendment right "may not override a reasonable and necessary standard of conduct firmly entrenched in our system of military justice."⁹⁶ In finding Howe's language on his protest sign "patently contemptuous in fact and in law" under Article 88, the court engaged in an extended discussion of the wrongfulness of Howe's misconduct, holding that it could "not permit the very trust, fidelity and honor, reposed in the appellant by Presidential appointment and commission as a military officer, to be infamously compromised with privilege."⁹⁷ With regard to the Article 133 charge, the court wasted no time in holding that Howe's acts "are personally dishonorable and disgraceful and manifestly exceed the limit of tolerance below which the standards of an officer cannot fall without compromising his standing as such."⁹⁸ Thus, the Board of Review upheld Howe's conviction and sentence.⁹⁹

Howe's case then proceeded to the United States Court of Military Appeals ("CMA"), which has discretion whether to accept a case for review.¹⁰⁰ The court at first denied Howe's petition to hear his case, but Howe petitioned for reconsideration of that decision.¹⁰¹ After receiving briefs and hearing oral argument on Howe's petition for reconsideration, the court again declined to grant review of Howe's case.¹⁰² In so doing, however, the court substantively analyzed Howe's claim that UCMJ Article 88, as applied to him, violated his right to free speech.

Howe had a reasonable First Amendment case to plead, given that he marched in civilian clothes while off duty, expressed no opinion in his official capacity, and apparently conformed to Army regulations governing political activities. The message on his sign, it could be argued, was not directed toward President Johnson personally but rather focused on his policy of prosecuting the Vietnam War. In this context, an argument can at least be made that Howe's speech did not undermine military political neutrality or respect for the President as Commander-in-Chief. Moreover, Howe's speech was directly political in nature, a category of speech that rests at the heart of the First Amendment.¹⁰³ If Article 88

93. Article 66(c), UCMJ, required that the Judge Advocate General of a service refer every case involving a dismissal or confinement for one year or more to a board of review (now called a court of criminal appeals). With minor exceptions, the provision remains in effect today. Art. 66(c), UCMJ; 10 U.S.C. § 866(b)(3).

94. *Court Martial Appeal Backed*, BALT. SUN, Jan. 17, 1966, at A2.

95. *United States v. Howe*, 37 C.M.R. 555, 557 (A.B.R. 1966).

96. *Id.* at 558.

97. *Id.* at 559.

98. *Id.* at 560.

99. *Id.* at 561.

100. Article 67, UCMJ, stated that with certain exceptions not applicable in Howe's case the Court of Military Appeals (now called the Court of Appeals for the Armed Forces) may grant a convicted servicemember's petition for review of a lower court decision for "good cause." With minor exceptions, the provision remains in effect today. Art. 67, UCMJ; 10 U.S.C. § 867(a)(3).

101. *United States v. Howe*, 37 C.M.R. 429, 431 (C.M.A. 1967).

102. *Id.* at 447.

103. *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966); Aldrich, *supra* note 3, at 1193; Lawrence J. Morris, *Free*

depends on careful line-drawing, Howe certainly had an argument that he was on the safe side of the line, or at least that the line was so unclear as to be unconstitutionally vague.

However, the Court of Military Appeals disagreed. The court opened with a detailed discussion of the history of prohibitions against contemptuous speech under military law, noting that the UCMJ provision dates back to the 1765 British Articles of War and were adopted by the Continental Congress in 1775.¹⁰⁴ The court then turned to an analysis of the limits of First Amendment protections, noting that the constitutional right to free speech is not absolute and must be balanced against other rights and harms.¹⁰⁵ In particular, the court advanced the notion that Article 88 protects against the “evil” of “the impairment of discipline and the promotion of insubordination by an officer of the military service in using contemptuous words toward the Chief of State and the Commander-in-Chief of the Land and Naval Forces of the United States.”¹⁰⁶ In a time where military forces were engaged in combat in Vietnam, the court held, the idea that “such conduct by an officer constitutes a clear and present danger to discipline within our armed services . . . seems to require no argument.”¹⁰⁷ In so doing, the court essentially fused criticism of President Johnson’s policies with criticism of President Johnson personally; the court “decided to ignore Johnson the politician and treat him strictly as Johnson the Commander in Chief, a military man and not the top politician in the country.”¹⁰⁸

The court also noted that Article 88 is aimed at a larger constitutional issue: the protection of civilian control of the military. The court observed that civilian supremacy over the military is a “tradition [that] has been bred into us,” requiring vigilant oversight to protect against the “intemperance of military power” experienced by the colonists at the hands of the King at the nation’s founding.¹⁰⁹ Punishing conduct such as Howe’s, the court held, provided a bulwark against “an entering wedge for incipient mutiny and sedition.”¹¹⁰ The court then held that the same concerns that justified Article 88 also apply with equal force to Article 133, holding that the conduct unbecoming an officer and a gentleman article was not unconstitutionally vague or in violation of the First Amendment.¹¹¹ Thus, the court denied Howe’s petition, effectively affirming the conviction and sentence.¹¹²

The court’s opinion is notable for what it does not discuss. The court did not discuss Howe’s off-duty status or the fact that apparently no one, aside from military police, recognized him as a military member. The court did not discuss why Howe’s speech on his sign was “personally contemptuous” of the President, apart from stating that Article 88 is “plain and unambiguous” and thus, the law officer was not required to instruct the members on the difference from personally contemptuous language versus political

Speech in the Military, 65 MARQ. L. REV. 660, 670–71 (1982).

104. *Howe*, 37 C.M.R. at 433–34.

105. *Id.* at 436–37.

106. *Id.* at 437.

107. *Id.* at 437–38.

108. SHERRILL, *supra* note 16, at 189.

109. *Howe*, 37 C.M.R. at 439.

110. *Id.*

111. *Id.* at 439–43.

112. *Id.* at 447.

speech.¹¹³ The opinion, a 1982 law review article asserts, “provides inadequate guidance to military personnel considering participation in off-post, off-duty demonstrations because it is not clear whether it was the topic of Vietnam, the fact of a public march, or Howe’s signs themselves that were the basis of the decision.”¹¹⁴ Nonetheless, the message was clear to Howe: his conviction would stand.¹¹⁵

III. POST-MILITARY LIFE

With his term of confinement served, his appeals exhausted, and his dismissal executed, Howe moved on from military life. Howe’s experience in the El Paso protest seemed to solidify his desire to speak out against perceived injustice. As a 2006 account of Howe asserted, “[t]he court-martial meant to quiet Howe instead instilled in him a need to speak his mind—loudly—and to fight for the rights of others to do so.”¹¹⁶

Howe enrolled in law school at Golden Gate University and was admitted to the North Dakota bar in 1973.¹¹⁷ His forty-five year career in private practice has been eventful. A search of the LEXIS database reveals dozens of cases in which Howe appeared before the North Dakota Supreme Court.¹¹⁸ Handling both criminal defense and a range of civil matters, Howe earned several significant victories. In 2003, he led a class action lawsuit against Microsoft for allegedly engaging in anti-competitive acts; the state Supreme Court ruled in his favor when Microsoft challenged Howe’s certification of the class action.¹¹⁹ Microsoft later settled the suit for an estimated nine million dollars, with much of the proceeds benefiting school districts.¹²⁰ Howe has also appeared in military courts at nearby Grand Forks Air Force Base on several occasions, an experience he described rewarding but also surreal in light of his own court-martial.¹²¹ He earned a reputation as a tough litigator. A fellow attorney said of Howe: “Henry is the guy who would try cases of the person who was a meth dealer with three priors who was going down for life. Henry would more often than not win, or get evidence suppressed and then he’d win.”¹²²

113. *Id.* at 443–44.

114. Morris, *supra* note 103, at 671.

115. At the time, servicemembers did not have the right to petition the Supreme Court for certiorari on appeal of a court-martial conviction. They gained this right in the Military Justice Act of 1983, but that right does not extend to denial of a petition for discretionary review. *See* Art. 67a, UCMJ; 10 U.S.C. § 867a. Thus, Howe would not have been entitled to seek certiorari in his appeal even under the post-1983 provisions, as the Court of Military Appeals denied review of his case.

116. Kennedy, *supra* note 6, at 10.

117. Profile of Henry H. Howe, STATE OF N.D. COURTS, <https://www.ndcourts.gov/Lawyers/03090> (last visited Dec. 21, 2017).

118. *See, e.g.*, Bell v. N.D. Dep’t of Transp., 816 N.W.2d 786 (N.D. 2012); City of Grand Forks v. Corman, 767 N.W.2d 847 (2009); City of Grand Forks v. Thong, 640 N.W.2d 721 (N.D. 2002); Johnson v. Johnson, 617 N.W.2d 97 (N.D. 2000); Dunklee v. Wills, 542 N.W.2d 739 (N.D. 1996); Breyfogle v. Braun, 460 N.W.2d 689 (N.D. 1990); Koch v. Williams, 456 N.W.2d 299 (N.D. 1990); Raam v. Powers, 396 N.W.2d 306 (N.D. 1986); Dahlen v. Dahlen, 393 N.W.2d 765 (N.D. 1986); Oviatt v. Oviatt, 355 N.W.2d 825 (N.D. 1984); Jamestown v. Rolfzen, 238 N.W.2d 661 (N.D. 1976).

119. Howe v. Microsoft Corp., 656 N.W.2d 285, 287 (N.D. 2003).

120. Dave Kolpack, *Final Approval Given in Microsoft Lawsuit Settlement*, BISMARCK TRIBUNE, June 30, 2004, at 5C.

121. Howe Interview, *supra* note 5.

122. Opinion, BISMARCK TRIB., Nov. 15, 2014, at 8.

Howe has also experienced his share of personal legal scrapes. In the words of one military justice scholar, Howe “amassed an impressive record of bar disciplinary actions” over the course of his legal career.¹²³ However, the toughness and advocacy he displayed throughout his own court-martial and appeal have served him well in defending himself against these actions, as he has prevailed more often than not. In 1976, just three years after being admitted to the bar, Howe was charged with tampering with a witness after he telephoned a woman who had filed a criminal complaint against the mother of his client.¹²⁴ The county court dismissed the charge, and after the state Supreme Court reversed that dismissal, the charge was apparently later dismissed again.¹²⁵ In 1977, the state Supreme Court overturned Howe’s conviction for failure to appear after release, although the state high court expressed its disapproval of Howe’s actions and the government alleged that Howe violated state appellate procedure rules in ten ways in pursuing his appeal of the conviction.¹²⁶ Apart from these criminal charges, Howe was suspended from practicing law for 90 days in 1977 and for 120 days in 2001.¹²⁷ The appeal of Howe’s 2001 suspension also references five prior disciplines for Howe’s misconduct, spanning from 1977 to 1998, centered mostly on lack of diligence or lack of communication with clients.¹²⁸ However, Howe was successful enough in combatting the allegations against him that his suspensions were rare and brief.¹²⁹

In 2014, the state bar imposed an interim suspension on Howe when he was charged with criminal conspiracy to commit murder, among other alleged acts of misconduct.¹³⁰ Howe was charged with conspiring with two suspected drug dealers and an undercover informant to kill a female undercover informant who was a key witness against a client of Howe’s in a drug case.¹³¹ However, prosecutors later dismissed the charges and the state bar lifted the interim suspension on Howe’s ability to practice law.¹³² Howe vowed to carry out his own investigation of the drug task force agents who implicated him and others.¹³³

Later in 2014, Howe was suspended from practicing law for six months and one day for violating rules of professional conduct in representing immigration clients; he later settled a malpractice suit arising from that incident.¹³⁴ Howe was reinstated from this

123. EUGENE R. FIDELL, *MILITARY JUSTICE: A VERY SHORT INTRODUCTION* 65 (2016).

124. *State v. Howe*, 247 N.W.2d 647, 650 (N.D. 1976) (Howe allegedly told the woman, “[w]ell, I’m not making a threat, I’m making a statement—if you want to play these silly little legal games, I’ll sue you for your back teeth. You know I’m a good lawyer—I’ll sue you for everything you’ve got and charge you with neglect”).

125. *Id.* at 650–51, 655–56; *State v. Howe*, 257 N.W.2d 413, 413, 416 (N.D. 1977).

126. *Howe*, 257 N.W.2d at 414, 419.

127. *In re Howe*, 865 N.W.2d 844, 845 (N.D. 2015).

128. *In re Disciplinary Action Against Howe*, 626 N.W.2d 650, 657 (N.D. 2001).

129. *Id.* at 651 (Howe’s 2001 appeal of a suspension states that following his admission to the North Dakota bar in 1973, “he has remained a member of the Bar, except for a 90-day suspension in 1977”).

130. *In re Disciplinary Action Against Howe*, 842 N.W.2d 646, 646 (N.D. 2014).

131. Stephen J. Lee, *Grand Forks Attorney Charged With Conspiracy to Murder Informant*, ST. PAUL PIONEER PRESS (Minn.) (Jan. 30, 2014, 11:01 PM), <https://www.twincities.com/2014/01/30/grand-forks-attorney-charged-with-conspiracy-to-murder-informant/>.

132. *In re Disciplinary Action Against Howe*, 847 N.W.2d 126, 126 (N.D. 2014).

133. *Top Stories from the Herald for 2014*, GRAND FORKS HERALD (N.D.) (Dec. 30, 2014, 9 PM), <https://www.grandforksherald.com/news/3644853-top-stories-herald-2014>.

134. *In re Disciplinary Action Against Howe*, 843 N.W.2d 325, 325 (N.D. 2014); Sarah Volpenhein,

suspension with restrictions after providing proof of rehabilitation, but he was nonetheless reprimanded for violating a rule of professional conduct concerning his statements about a judge during his suspension.¹³⁵ His actions in that matter are discussed as a case study in a new professional responsibility textbook.¹³⁶

Howe has remained in the spotlight in recent years. In 2016, he engaged in extended and public battles with the City over a number of issues, including delinquent taxes and the length of grass outside his downtown office. Howe ultimately paid the delinquent taxes but sued the city for billing him over the grass issue, alleging the grass ordinance was “unconstitutional for its vagueness” and arbitrarily applied.¹³⁷ In 2017, Howe represented two dozen people in a legal fight against a planned development of a local park.¹³⁸ Howe filed to run for a local school board seat in 2018.¹³⁹

Howe’s prominence in Grand Forks and across North Dakota is such that the *Grand Forks Herald* has its own “tag” for him on its website, with several stories devoted to him in recent years.¹⁴⁰ However, few in Grand Forks are apparently aware of Howe’s role in military justice history. The *Grand Forks Herald*, despite its extensive coverage of Howe over the years, has made no mention of his Vietnam-era experiences. Two reporters who have covered Howe’s activities for the *Grand Forks Herald* were interviewed for this article; both stated they had some vague awareness that Howe had been in the military during Vietnam, but neither knew of his court-martial. One described him as a small man, a quiet speaker and “kind of a local man of mystery to us.”¹⁴¹

IV. THE CONTINUING IMPACT OF *UNITED STATES V. HOWE*

Howe’s civilian law career has carried a good deal of renown, but his most lasting

Malpractice Suit Against Howe Settled out of Court, GRAND FORKS HERALD (N.D.) (Aug. 17, 2015, 8 PM), <http://www.grandforksherald.com/news/crime-and-courts/3819640-malpractice-suit-against-howe-settled-out-court>.

135. *In re Howe*, 865 N.W.2d 844, 844–46 (N.D. 2015).

136. JOHN P. SAHL ET AL., PROFESSIONAL RESPONSIBILITY IN FOCUS 194–99 (2018).

137. Sam Easter, *After Tax Payment, Howe Properties to Return to Private Ownership*, GRAND FORKS HERALD (N.D.) (Oct. 12, 2016, 3:00 PM), <https://www.grandforksherald.com/news/4135448-after-tax-payment-howe-properties-return-private-ownership>; Sam Easter, *Grand Forks Attorney Henry Howe Files Civil Complaint Over Grass Violation Letters, Seeks \$10,000 in Damages*, GRAND FORKS HERALD (N.D.) (July 14, 2016, 6:00 PM), <https://www.grandforksherald.com/news/4074234-grand-forks-attorney-henry-howe-files-civil-complaint-over-grass-violation-letters>.

138. Sam Easter, *Arbor Park Supreme Court Case sees most Appellants Withdraw from Suit*, GRAND FORKS HERALD (N.D.) (Nov. 21, 2017, 7:00 PM), <http://www.grandforksherald.com/news/4363412-arbor-park-supreme-court-case-sees-most-appellants-withdraw-suit>; Sam Easter, *Grand Forks Attorney Calls Arbor Park Lawsuit ‘Frivolous’ in City’s Response*, GRAND FORKS HERALD (N.D.) (July 21, 2017, 7:00 PM), <http://www.grandforksherald.com/news/4301317-grand-forks-attorney-calls-arbor-park-lawsuit-frivolous-citys-response>; Sam Easter, *Efforts Underway to Void Grand Forks Arbor Park Election*, GRAND FORKS HERALD (N.D.) (July 12, 2017 11:00 AM), <http://www.grandforksherald.com/news/government-and-politics/4296511-efforts-underway-void-grand-forks-arbor-park-election>.

139. April Baumgarten, *New Grand Forks School Board to Face Big Decisions*, GRAND FORKS HERALD (N.D.) (June 10, 2018, 5:00 AM), <http://www.grandforksherald.com/news/education/4457897-new-grand-forks-school-board-face-big-decisions>. Howe did not win one of the open seats. Pamela Knudson, *Bill Palmiscno Leads School Board Candidates*, GRAND FORKS HERALD (N.D.) (June 12, 2018, 10:00 PM), <http://www.grandforksherald.com/news/education/4459722-bill-palmiscno-leads-school-board-candidates>.

140. Archive of Articles mentioning Henry Howe, GRAND FORKS HERALD (N.D.), http://www.grandforksherald.com/tags/henry_howe (last visited Aug. 3, 2018).

141. Telephone interview with Sam Easter, Reporter, GRAND FORKS HERALD (N.D.) (Apr. 27, 2017).

legacy to the law will likely be his court-martial. Howe's court-martial garnered attention and no small amount of criticism at the time. A professor at Dickinson College wrote a letter to the *New York Times* soon after the court-martial, calling Howe's conviction and sentence "a travesty of justice" that "serves only to provide ammunition to those who point to totalitarian drift in our society."¹⁴² In a lengthy analysis in the *New York Times Magazine* criticizing the state of military justice generally, the former Acting General Counsel of the Army wrote that Howe's case demonstrated that Article 88 of the UCMJ "serves no disciplinary purpose sufficient to justify its possible inconsistency with the First Amendment."¹⁴³ *The Nation* ran a lengthy article critical of the military justice system, citing its handling of Howe as an example of its deficiencies.¹⁴⁴

Despite the criticism, Howe's conviction stood, and his status as the only servicemember convicted of violating UCMJ Article 88 makes him a cautionary tale in military circles. From time to time since Howe's case, officers have rubbed up against Article 88's restrictions. Each time this happens, Howe's name resurfaces in the national discussion. Howe's case gained attention in 1977 when the Chairman of the Joint Chiefs of Staff told an audience at the National War College that Congress is like a man at a chess match who "occasionally reaches in and moves a piece and thereby screws it up."¹⁴⁵ During discussion about whether the Chairman should be charged with violating Article 88, several people—including a judge on the Court of Military Appeals—argued that Howe's conviction demonstrated that Article 88 was unconstitutional and should be abolished.¹⁴⁶ Howe's case again received minor attention again in 1982, when an Army specialist attended a disarmament rally in Germany, causing military leaders to remind servicemembers of the limits of free speech when it comes to politics.¹⁴⁷

Discussion about Howe's court-martial resurfaced during the early stages of the Clinton presidency, as the new President faced skepticism and some amount of criticism from some military officers because of allegations he had "dodged" the military draft during Vietnam.¹⁴⁸ Air Force Major General Harold N. Campbell gave a speech to military members in which he characterized the President as a "gay-loving, pot-smoking, draft-dodging womanizer."¹⁴⁹ Speculation initially raised the possibility of a court-martial for General Campbell, but officials ultimately issued him non-judicial punishment under

142. Michel P. Richard, Letter to the Editor, *Howe Court-Martial*, N.Y. TIMES, Jan. 9, 1966, at E13.

143. Joseph W. Bishop, Jr., *The Quality of Military Justice*, N.Y. TIMES MAG., Feb. 22, 1970, at 34.

144. See generally Rechy, *supra* note 8, at 204–08.

145. Tom Tiede, *A Military Violation?*, SANTA CRUZ SENTINEL, Apr. 19, 1977, at 11.

146. *Id.*

147. Maxwell Glen & Cody Shearer, *Warning from Ranks in Europe*, ANNISTON (Ala.) STAR, Jan. 7, 1982, at 4.

148. Tim Weiner, *Clinton as a Military Leader: Tough On-the-Job Training*, N.Y. TIMES, Oct. 28, 1996, at 1; Doyle McManus, *Clinton Seen Mending Rift with Military*, L.A. TIMES, Sept. 4, 1995, at 1; Weber, *supra* note 45, at 116.

149. Paul Quinn-Judge, *Air Force Reprimands, Retires General Accused of Ridiculing Clinton*, BOS. GLOBE, June 19, 1993, at 3.

Article 15 of the UCMJ¹⁵⁰ consisting of a forfeiture of pay and a reprimand.¹⁵¹ During this controversy, the press invoked Howe's court-martial as a precedent for punishing officers who criticize the President.¹⁵²

Five years later, news of President Clinton's affair with a White House intern led Marine Corps Major Shane Sellers to write a newspaper column in the *Navy Times* that characterized President Clinton as an "adulterous liar" and a "criminal."¹⁵³ This generated warnings from the Pentagon about the restrictions contained in Article 88.¹⁵⁴ Nonetheless, a few months later, *The Washington Times* carried an opinion piece from another Marine Corps Major, Daniel Rabil, who called the President a "lying draft dodger" and a "moral coward."¹⁵⁵ Military leaders again cited Howe's conviction in cautioning servicemembers not to publicly criticize the President.¹⁵⁶

In this century, Air Force Lieutenant Colonel Stephen Butler wrote a letter to the editor of the *Monterey County Herald* criticizing President George W. Bush and his handling of the 9/11 terrorist attacks, concluding: "This guy is a joke."¹⁵⁷ Initially, observers speculated that Butler might be charged with violating Article 88, and used Howe's case to demonstrate limits on servicemembers' free speech rights.¹⁵⁸ The Air Force did not disclose Butler's punishment, though one newspaper account noted he was reassigned and may have received non-judicial punishment.¹⁵⁹ In 2006, Army Lieutenant Ehren Watada announced at a news conference he was refusing to deploy to Iraq, repeatedly condemning President Bush for lying and betraying the trust of the American people in leading the country to war in Iraq.¹⁶⁰ For a time, it appeared that Howe's streak as the only person convicted of violating UCMJ Article 88 was in jeopardy, as the Army

150. See generally UCMJ Article 15 under which a commander may impose "non-judicial punishment" upon a member under his or her command. The maximum punishment permissible in such a form varies with the ranks of the commander and the member, but generally consists of forfeiture of pay, extra duties, restriction within certain specified limits, and, for enlisted members, reduction in rank. Art. 15, UCMJ; 10 U.S.C. § 815.

151. Kirk Spitzer, *General's Remarks Under Investigation*, USA TODAY, June 9, 1993, at 2A; Quinn-Judge, *supra* note 149.

152. David Evans, *Air Force General Will Have to Learn Not to Bad-Mouth the Boss-in-Chief*, DAILY PRESS (NEWPORT NEWS, VA.), June 20, 1993, at H3.

153. Steven Lee Myers, *Testing of a President: Critics; Marines Scold Officer Who Called Clinton an 'Adulterous Liar' in a Column*, N.Y. TIMES, Nov. 14, 1998, at A10.

154. Steven Lee Myers, *Military Warns Soldiers of Failure to Hail Chief*, N.Y. TIMES, Oct. 21, 1998, at A22. Major Sellers received only verbal counseling and a letter of counseling for his actions; *Marine Gets Warning Over His Criticism of Clinton*, BOSTON GLOBE, Nov. 14, 1998, at A13.

155. Rowan Scarborough, *Major Gets Punished for Criticizing President*, WASH. TIMES, Dec. 7, 1998, at 1. Major Rabil also was not punished for his actions, instead receiving a letter of caution and a transfer in his reserve capacity to non-drill status. Major Rabil responded by publicly criticizing military leaders for their "moral laziness" in hiding behind Article 88 and not publicly condemning the President. Daniel Rabil, *Code of Dishonor*, WASH. TIMES, Mar. 16, 1999, at A19.

156. Paul Richter, *Military Warns Soldiers Not to Criticize Clinton*, L.A. TIMES, Oct. 20, 1998, at A1, 11.

157. Kim Curtis, *Colonel May Face Court-Martial for Attacking President in Letter*, CALIFORNIAN, June 5, 2003, at 3C; Drew Brown, *Anti-Bush Letter Touches Raw Nerve in Military*, AKRON BEACON J., June 9, 2002, at A13.

158. Curtis, *supra* note 157, at 3C.

159. Dale Eisman, *Remarks Providing a Lesson in Military Law for Senior Officials, Freedoms Balanced with Duty to Country*, VIRGINIAN PILOT-LEDGER STAR, Oct. 25, 2003, at A1.

160. Michael Gilbert, *Army Charges Could Bring Prison Time for Iraq War Resister*, NEWS TRIB. (Tacoma, Wash.), July 6, 2006, at A1.

charged Lieutenant Watada with violating the contemptuous words provision.¹⁶¹ However, the Army later dropped this charge.¹⁶²

Howe's court-martial and appeal have also generated a good deal of scholarly interest and set a lasting legal precedent. Despite the lack of guidance in the Court of Military Appeals' decision as to how to distinguish between permissible and impermissible speech under Article 88, the opinion has been cited in eighteen subsequent court decisions, a high number considering the court did not actually accept the petition for review.¹⁶³ Howe's case has also been discussed at some length in eight law review articles in recent decades.¹⁶⁴ Many of the major books on military justice also discuss Howe's case.¹⁶⁵

Still, because Howe's case came on the leading edge of military members' protest actions in Vietnam, it has not received the recognition it might have. Howe blazed the way for a number of visible acts of military members' protests against the Vietnam War. None of these acts of protest were more prominent than those of Army Captain Howard Levy. Levy, an Army doctor, disobeyed an order to train members in dermatology procedures to ready them for combat and made several public statements to enlisted personnel degrading the efforts of military members fighting in the war and encouraging his audience to refuse to go to Vietnam.¹⁶⁶ The Army court-martialed Levy under several UCMJ provisions, including violating the UCMJ's "General Article"—Article 134—which criminalizes acts of a nature to bring discredit upon the armed forces and those prejudicial to good order

161. Hal Bernton, *Army Charges Lieutenant Who Wouldn't Go to Iraq*, SEATTLE TIMES, July 6, 2006, at A1.

162. *Watada v. Head*, No. CO7-5549BHS, 2008 WL 4681577 (W.D. Wash. Oct. 21, 2008).

163. *In re Kendall*, 712 F.3d 814, 827 (3d Cir. 2013); *United States v. Easton*, 71 M.J. 168, 180 n.6 (C.A.A.F. 2012); *United States v. Forney*, 67 M.J. 271, 276 (C.A.A.F. 2009); *United States v. Wilcox*, 66 M.J. 442, 456 (C.A.A.F. 2008); *United States v. Frelix-Vann*, 55 M.J. 329, 332 (C.A.A.F. 2001); *United States v. Brown*, 45 M.J. 389, 394 (C.A.A.F. 1996); *United States v. Hartwig*, 39 M.J. 125, 128 (C.M.A. 1994); *United States v. Boie*, 70 M.J. 585, 588 (A.F. Ct. Crim. App. 2011); *United States v. Sollmann*, 59 M.J. 831, 834 (A.F. Ct. Crim. App. 2004); *United States v. Frelix-Vann*, 1999 CCA LEXIS 423 (A.F. Ct. Crim. App. Apr. 9, 1999); *United States v. Walts*, 1997 CCA LEXIS 258 (A.F. Ct. Crim. App. July 7, 1997); *United States v. Allen*, 31 M.J. 572, 607 (N-M.C.M.R. 1990); *United States v. Hart*, 30 M.J. 1176, 1178 (A.F.C.M.R. 1990); *United States v. Van Steenwyk*, 21 M.J. 795, 802 (N-M.C.M.R. 1985); *United States v. Clark*, 15 M.J. 594, 596–97 (A.C.M.R. 1983); *United States v. Reed*, 2 M.J. 972, 976 (A.C.M.R. 1976); *United States v. Grace*, 2 M.J. 846, 848 (A.C.M.R. 1976); *Green v. City of Sioux Falls*, 607 N.W.2d 43, 47 (S.D. 2000).

164. A search of the LEXIS database revealed the following articles citing to Howe's case: Douglas B. McKechnie & Eric Merriam, *Academic Freedom on the 'Guarded' Institution*, 14 FIRST AMEND. L. REV. 313, 333 (2016); Weber, *supra* note 45, at 164; John M. Kang, *In Praise of Hostility: Antiauthoritarianism as Free Speech Principle*, 35 HARV. J.L. & PUB. POL'Y 351, 414 (2012); Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL OF RTS. J. 315, 320 (2007); Robert N. Strassfield, *Lose in Vietnam, Bring the Boys Home*, 82 N.C. L. REV. 1891, 1905–06 (2004); 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, 65 (2003); John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 335 (1998); Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 69 (1989).

165. CHRIS BRAY, COURT-MARTIAL: HOW MILITARY JUSTICE HAS SHAPED AMERICA FROM THE REVOLUTION TO 9/11 AND BEYOND 325–26 (2016); FIDELL, *supra* note 123, at 65; EUGENE R. FIDELL, ELIZABETH L. HILLMAN & DWIGHT H. SULLIVAN, MILITARY JUSTICE CASES AND MATERIALS 502 (2007); JOSEPH DI MONA, GREAT COURT-MARTIAL CASES 222–23 (1972); SHERRILL, *supra* note 16, at 2, 67, 78, 183–90, 194, 196.

166. *Parker v. Levy*, 417 U.S. 733, 736–37 (1974).

and discipline.¹⁶⁷ Levy was convicted, and his appeal ultimately reached the Supreme Court.¹⁶⁸ In “likely the most important opinion dealing with the First Amendment rights of military members and the power of the military to regulate military speech,”¹⁶⁹ the Supreme Court upheld the conviction. The Court famously held:

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.¹⁷⁰

Whereas Howe generated a few small-scale protests and mostly local media coverage, the *Levy* case “spawned a revolution” of media attention and generated a flurry of protest activity across the nation.¹⁷¹ Howe’s case has garnered mostly brief mention in military justice texts; Captain Levy’s case fills numerous pages in each.¹⁷² A 2002 *New York Times* profile called Levy’s court-martial “one of the most highly publicized acts of resistance to the Vietnam War” while omitting any mention of Lieutenant Howe’s act two years earlier.¹⁷³

Still, Howe’s role in the annals of military justice seems secure, and Howe appears satisfied with his place in history. Interviewed by the *Army Times* in 2006, Howe stated that he believed his actions in taking part in the 1965 protest were permissible and that the underlying free speech issues he faced were still present forty years later.¹⁷⁴ He stated that he had not heard of UCMJ Article 88 before his part in the protest, and he felt like he served as a scapegoat for the Army’s interest in suppressing the budding dissent that was emerging over the Vietnam War.¹⁷⁵ His Iraq War-era interview caused him to search his actions in 1965 for contemporary lessons, but the most he could come up with was to voice more of a general protest of the war rather than aim it at the President.¹⁷⁶ He also said if he had it to do over again, he would spell “fascist” correctly.¹⁷⁷

In his telephone interview for this article, Howe expressed no regrets about his participation in the small El Paso protest, the resulting court-martial, or the series of protests by military members against the Vietnam War that followed his own actions:

I probably just wasn’t meant to be in the military, especially not during the Vietnam War. Somebody’s got to be the first; that was okay. I believed in what I was doing and didn’t have any question about it. It was absolutely clear that we were wrong [in Vietnam]. I think it’s dangerous when societies say that “we’re right no matter what.” We have that come back

167. *Id.* at 737.

168. *Id.* at 740–42.

169. Weber, *supra* note 45, at 118.

170. *Levy*, 417 U.S. at 758.

171. DI MONA, *supra* note 165, at 243.

172. *Id.* at 222–45; BRAY, *supra* note 165, at 326–27, 346; SHERRILL, *supra* note 16, at 100–60.

173. Joseph P. Fried, *Following Up*, N.Y. TIMES (July 21, 2002), <http://www.nytimes.com/2002/07/21/nyregion/following-up.html>.

174. Kennedy, *supra* note 6, at 10.

175. *Id.*

176. *Id.*

177. *Id.*

again; we had the Iraq war which was just a manufactured war that had absolutely no basis in reality. . . . Somebody's got to say that's wrong. If you don't, you're condoning it, and then you have Nazi Germany. Somebody's got to say it. If that helped other people do it, or if it didn't, I'm glad I did it. It was the right thing, and sometimes that's all you can do is do the right thing and accept the way it works out. I certainly didn't plan on going to the Army to get court-martialed and sent to prison, but that's the way it worked out. I don't ever wish that I hadn't done that.¹⁷⁸

V. CONCLUSION

More than fifty years after Howe's seemingly harmless protest using a handmade cardboard sign, the nation finds itself with a deeply controversial president who generates strong feelings, including negative ones.¹⁷⁹ As has been the case numerous times since Howe's actions, the possibility again exists that military members may be tempted to speak out against their president. Social media and other forms of viral communication make it easier than ever for military members to share their political views about the president and other high officials, with little forethought and a far wider audience than Howe could ever hope to reach.¹⁸⁰ While no one has been convicted of violating Article 88 in more than fifty years, the threat of military members running afoul of the article's equivocal provisions is perhaps greater than ever. When that happens, the case of Henry Howe, with his misspelled cardboard sign carried in a small demonstration in El Paso, may once again return to the spotlight.

For Howe's part, he hopes that his ability to move on from his court-martial sets a precedent for other military members to follow when faced with similar situations. He stated that while some might think the lesson of his court-martial is "keep your mouth shut," the moral of his story is more complex:

If people in the military are so afraid of what's going to happen to them, or if people in Congress are so afraid of what's going to happen to them if they call it the way it is, then what's the point? If we have military people who are going to hide the truth because they are afraid of what happens if they get stuck holding the bag, we're in far more trouble than if we understand that there are things worth taking a risk for.

I didn't know this would happen when I carried my sign to the park, but it was all true. Somebody's got to do it. Someone has to be first because if there isn't a first, there may not every be a second and a third and a fourth. The lies on Vietnam and the wrongfulness of our being there were all clear, and somebody had to do it. Somebody had to do that stuff. I never have said to myself that I shouldn't have done it, because I have to live with myself too.

You do what you do. Everybody only gets to go around once. It's better if you don't have to say about anything that's important, "I wish I'd done it differently," because you can't. You

178. Howe Interview, *supra* note 5.

179. For a breakdown of President Trump's approval ratings, see *Presidential Approval Ratings – Donald Trump*, <http://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx> (last visited Aug. 4, 2018). For a summary of controversial actions by the current President, see *President Donald Trump Timeline*, REALCLEAR POLITICS, https://www.realclearpolitics.com/timeline/president_donald_trump.html (last visited Aug. 4, 2018).

180. See generally Weber, *supra* note 45 (summarizing the rise of "viral media" and dangers that military members may be tempted to use new forms of media to improperly voice their political views).

get one pass through it.¹⁸¹

For better or worse, Henry Howe's case remains a truly unique chapter in military justice history. With Article 88 still in effect, periodic displays of protest by military members against Commanders-in-Chief, and the controversial nature of the current President, the American military may see the likes of Henry Howe's court-martial again.

181. Howe Interview, *supra* note 5.