

Under UCMJ, right to free speech does not mean anything goes

By CMDR Wayne L. Johnson, JAGC, USN (Ret.)

Retired military members are subject to the Uniform Code of Military Justice (UCMJ) per Article 2 (a). Lately, some retired generals could be running afoul of Article 88, which says, “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 Transportation, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.”

This does not apply to enlisted personnel. I would not, however, recommend an enlisted person to push the issue as there are other articles in the UCMJ that a creative military lawyer could probably use to cover contempt. Article 134, UCMJ, allows for a lot of creativity in charging.

Both Articles 2 and 88 have been held by the courts to pass constitutional muster, including the First Amendment’s freedom of expression. Whether a general’s statement about Secretary of Defense Donald Rumsfeld’s handling of the war in Iraq violates Article 88 would have to be determined by a court-martial.

The solution for a retired officer concerned about violating Article 88 but feeling compelled to speak out would be to resign his or her commission and forfeit military retirement. Drawing one’s military compensation means you are agreeing to remain subject to the UCMJ.