

REPORT DOCUMENTATION PAGE			Form Approved OMB No. 0704-0188	
Public reporting burden for this collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0188), Washington, DC 20503.				
1. AGENCY USE ONLY (Leave blank)		2. REPORT DATE 28.Oct.98		3. REPORT TYPE AND DATES COVERED THESIS
4. TITLE AND SUBTITLE THE VOICE FROM THE PULPIT: CAN THE DEPARTMENT OF DEFENSE REGULATE THE POLITICAL SPEECH OF MILITARY CHAPLAINS?			5. FUNDING NUMBERS	
6. AUTHOR(S) CAPT CARR JOHN A				
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) HARVARD UNIVERSITY			8. PERFORMING ORGANIZATION REPORT NUMBER	
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES) THE DEPARTMENT OF THE AIR FORCE AFIT/CIA, BLDG 125 2950 P STREET WPAFB OH 45433			10. SPONSORING/MONITORING AGENCY REPORT NUMBER 98-114	
11. SUPPLEMENTARY NOTES				
12a. DISTRIBUTION AVAILABILITY STATEMENT Unlimited distribution In Accordance With AFI 35-205/AFIT Sup 1			12b. DISTRIBUTION CODE	
13. ABSTRACT (Maximum 200 words)				
14. SUBJECT TERMS				
15. NUMBER OF PAGES			16. PRICE CODE	
17. SECURITY CLASSIFICATION OF REPORT		18. SECURITY CLASSIFICATION OF THIS PAGE	19. SECURITY CLASSIFICATION OF ABSTRACT	20. LIMITATION OF ABSTRACT

**THE VOICE FROM THE PULPIT:
CAN THE DEPARTMENT OF DEFENSE REGULATE
THE POLITICAL SPEECH OF MILITARY CHAPLAINS?**

First Lieutenant John A. Carr, USAF

1998

147 Pages

Master in Public Policy

John F. Kennedy School of Government, Harvard University

19990106 050

Efforts by the Department of Defense (DoD) to accommodate the religious development and fulfillment of its personnel have created a number of extremely complex and challenging legal dilemmas. In mid-1996, the Catholic Church sponsored a nationwide postcard campaign to advocate for the ban of the partial birth abortion procedure. As part of this effort, Catholic chaplains were to urge parishioners to contact members of Congress and express their support for the ban. After military legal advisors concluded that this type of solicitation was forbidden by DoD regulations, the District Court for the District of Columbia in *Rigdon v. Perry*, 962 F.Supp 150 (D.D.C. 1997), issued a preliminary injunction against the enforcement of these regulations.

In the wake of the court order, this Policy Analysis Exercise analyzes the ability of DoD to regulate the political speech of military chaplains. First, the application of the Religion Clauses to the military community is examined. Second, free speech challenges to military regulations and restrictions are explored. Third, the specific case of *Rigdon v. Perry* is reviewed. Finally, policy options are suggested that specifically define those political activities that threaten the military's interest in a politically-disinterested force. These policy options are intended to clearly delineate the religious activities that are permissible from those political activities that jeopardize the military's interest in political neutrality. The incorporation of these policy options into the existing regulations will protect the military's interests and guide the resolution of any future conflict between military commanders and religious leaders.

**THE VOICE FROM THE PULPIT:
CAN THE DEPARTMENT OF DEFENSE REGULATE
THE POLITICAL SPEECH OF MILITARY CHAPLAINS?**

Submitted to:

Mr. Harlan G. Wilder
General Law Division, Chief
Office of the Judge Advocate General
Headquarters, United States Air Force

Prepared by:

John A. Carr

Candidate for:

Master in Public Policy in Press, Politics, and Public Policy
John F. Kennedy School of Government, Harvard University

Juris Doctor
Harvard Law School, Harvard University

Advisor: Professor Fred Schauer, Frank Stanton Professor of the First Amendment
Seminar Leader: Professor Thomas E. Patterson, Bradlee Professor of Government and the Press
April 7, 1998

The opinions contained in this document are those of the author and do not necessarily represent the views of the Air Force, the Department of Defense, or the United States Government.

TABLE OF CONTENTS

INTRODUCTION.....	1
I. THE MILITARY AND THE RELIGION CLAUSES	4
A. The Establishment Clause	5
B. The Free Exercise Clause.....	8
1. Government Action Aimed At Religion	8
2. Government Action That Incidentally Burdens Religion.....	10
II. THE MILITARY AND THE FREE SPEECH CLAUSE	16
A. Free Speech Challenges Of Military Personnel	16
B. Civilian Access To Military Installations And The Base Chapel	18
III. THE CASE OF RIGDON v. PERRY	22
A. Case History	22
B. Decision Of The District Court.....	24
1. Military Regulations Do Not Preclude Chaplains From Urging Members To Contact Congress Concerning Pending Legislation	24
2. Restriction On Chaplains' Activities Violates The Religious Freedom Restoration Act	26
3. Restriction On Chaplains' Activities Violates The Right Of Free Speech.....	28
C. Reaction To The Case And The Decision Not To Appeal.....	31
1. Congressional Reaction	31
2. Press Coverage	32
IV. POLICY CONSIDERATIONS FOR FUTURE INCIDENTS.....	33
A. Clarify Impermissible Political Activities.....	34
1. Clarify The Meaning Of "Official Authority Or Influence"	37
2. Clarify The Meaning Of "Particular Candidate Or Issue"	38
B. Incorporate The Prior Review Provision Into AFI 51-902.....	39
CONCLUSION	40

APPENDIXES

- A. Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty (June 15, 1990).
- B. Air Force Policy Directive 51-9, Civil Law for Individuals (Nov. 5, 1993).
- C. Air Force Instruction 51-902, Political Activities by Members of the US Air Force (Jan. 1, 1996)
- D. Air Force Instruction 51-903, Dissident and Protest Activities (Feb. 1, 1998).
- E. FREE SPEECH IN THE MILITARY COMMUNITY: STRIKING A BALANCE BETWEEN PERSONAL RIGHTS AND MILITARY NECESSITY (forthcoming).

INTRODUCTION

Efforts by the Department of Defense (DoD) to accommodate the religious development and fulfillment of its personnel have created a number of extremely complex and challenging legal dilemmas. The mere existence of the military chaplaincy program, fully funded by the government and older than the Constitution itself, is a constitutional anomaly. While the military cooperates in this programmatic effort to fulfill the religious needs of its personnel, servicemembers remain subject to regulations that protect the military's interests in good order and discipline and a politically-disinterested force. The near complete absence of legal challenges to these regulations is a testimonial to the military's sensitivity toward religion and its ability to successfully accommodate the variety of religious practices.

The harmonious relationship that typically exists between the commander and the chaplain is due in large part to the beneficial effect of spiritual development on military personnel. The spiritual enlightenment and guidance of military servicemembers occurs at a personal level and advances the military's goal of high morale and an effective fighting force. For example, the Air Force has undertaken significant efforts to instill the core values of integrity, excellence, and service before self in its members. Chaplains have stated the belief that "Air Force core values have always been, and will continue to be, Chaplain Service core values."¹ Others have put the point more succinctly: "I would encourage chaplains to be the core values."² So long as the religious guidance is consistent with the advancement of the military's interests, conflicts are unlikely to arise.

¹ Quotation of Chaplain Howard Ashford, 48 THE LEADING EDGE, at 4 (Magazine of the United States Chaplain Service) (Mar./Apr. 1998).

² Quotation of Chaplain Lisa Pineau, 48 THE LEADING EDGE, at 4 (Magazine of the United States Chaplain Service) (Mar./Apr. 1998).

At other times, however, the guidance provided by religious leaders may conflict with the military's interests and violate service regulations. These instances place the government in the awkward position of permitting or providing counseling which undermines the military's mission. Notable antagonisms have surrounded the U.S. involvement in Vietnam, the military's exclusion of women in combat and the discharge of homosexual members, and most recently, the limitations on political activity.

In mid-1996, the Catholic Church sponsored a nationwide postcard campaign to advocate for the ban of the partial birth abortion procedure. As part of this effort, Catholic chaplains were to urge parishioners to contact members of Congress and express their support for the so-called Partial Birth Abortion Ban. After military legal advisors concluded that this type of solicitation was forbidden by DoD regulations, the District Court for the District of Columbia in *Rigdon v. Perry* issued a preliminary injunction against the enforcement of these regulations.³

In response to the court's decision, this policy analysis has been prepared for the General Law Division of the Office of the Judge Advocate General of the Air Force. Serving as a primary legal advisor to the Air Staff and the Judge Advocate General, the General Law Division is tasked with formulating permissible legal and policy options when conflicts arise between the Office of the Chaplains and military commanders. In order to facilitate this tasking, this policy analysis has two purposes. First, it examines the legal constraints on military regulations and policies that implicate the Religion Clauses. Second, it considers the policy options that are available to the military within these legal confines. These policy options are intended to clearly delineate the religious activities that are permissible from those political activities that jeopardize the military's interest in political neutrality.

³ 962 F.Supp 150 (D.D.C. 1997).

This discussion will consist of four parts. In Part I, the application of the Religion Clauses to the military community will be examined. Responding to Establishment Clause challenges, courts have upheld the existence of the Army's chaplaincy program finding that the military may, in fact, be constitutionally required to employ religious providers. In doing so, the court declined to apply the traditional test employed in the civilian setting and deferred to the judgment of high-level military authorities. Interpreting the Free Exercise Clause, the Supreme Court has upheld military regulations that are facially neutral and of general applicability. Again, the Court refused to apply civilian precedent and deferred to the expertise of the military.

In Part II, free speech challenges to military regulations and restrictions will be explored. Courts have determined that the speech of military members, and implicitly chaplains, can be restricted based upon a commander's determination that the speech is likely to impact military interests regardless of where the speech occurs. Civilian standards have not been utilized and substantial deference is given to the commander's estimations. In evaluating the free speech claims of civilians seeking access to military facilities, courts have adopted a forum analysis that permits reasonable viewpoint-neutral restrictions in nonpublic forums and those designated public forums created for a particular expressive activity.

In Part III, the specific case of *Rigdon v. Perry* will be reviewed. Father Rigdon was informed that military regulations prohibited the encouragement of his parishioners to contact Congress concerning the Partial-Birth Abortion Ban. The District Court for the District of Columbia granted his motion for summary judgment and issued a preliminary injunction. In doing so, the court determined that the DoD Directive was inapplicable to the type of speech contemplated by Father Rigdon. Even if the Directive did restrict this type of speech, the court determined that the military's regulation violated the Religious Freedom Restoration Act (RFRA)

and the First Amendment's freedom of speech clause. The continued applicability of RFRA to the federal government is questionable after the Supreme Court declared the Act unconstitutional as applied to the states. The court's First Amendment analysis is also susceptible to attack. Legal arguments are outlined that support restrictions on the political speech of both military personnel and civilian advocates. Finally, the reaction to the case by Congress and the press is detailed.

In Part IV, policy options are suggested that specifically define those political activities that threaten the military's interest in a politically-disinterested force. First, options are presented to clarify the language contained in AFI 51-902. Alternatives to the phrase "Official authority or influence" are outlined. Refinements to the meaning of "particular candidate or issue" are also detailed. Second, it is suggested that a prior review provision be incorporated into AFI 51-902. This provision would enable the installation commander to review political material before it is distributed and prevent its dissemination if it poses a clear threat to the maintenance of a politically-disinterested force. The incorporation of these policy options into the existing regulations will protect the military's interests and guide the resolution of any future conflict between military commanders and religious leaders.

I. THE MILITARY AND THE RELIGION CLAUSES

The commands of the two Religion Clauses of the First Amendment pose unique challenges to the military establishment generally, and the military chaplaincy program specifically. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion."⁴ The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."⁵ As a review of the applicable case

⁴ U.S. CONST. amend I.

⁵ U.S. CONST. amend I.

law illustrates, courts have been reluctant to apply the civilian protections of the Religion Clauses to the military community.

The purpose of the following analysis is two-fold. First, it demonstrates that courts have been reluctant to apply the prevailing civilian precedent to challenges arising in the military context. With rare exception, courts have either formulated a special test for the military or deferred outright to the military authorities' determination of military necessity. Second, it highlights that courts have relied upon the affidavits and declarations of government officials when deferring to the military's expertise. This testimony has articulated the specific nature of the threat to the good order and discipline of the military.

A. The Establishment Clause

The Supreme Court, in *Lemon v. Kurtzman*,⁶ outlined a three-part test to determine if the government has violated "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"⁷ First, the government action must have a secular purpose.⁸ Second, the action's "principal or primary effect must be one that neither advances nor inhibits religion."⁹ Finally, "the statute must not foster 'an excessive government entanglement with religion.'"¹⁰

One may initially question whether the mere existence of the military's chaplaincy program violates the Establishment Clause. In *Katcoff v. Marsh*, the Second Circuit held that the Army chaplaincy program was not only permissible under the Establishment Clause, but may be required

⁶ 403 U.S. 602 (1971).

⁷ *Id.* at 612 (quoting *Walz v. Tax Commission*, 397 U.S. 664, 668 (1970)).

⁸ *Id.*

⁹ *Id.* (citing *Board of Education v. Allen*, 392 U.S. 236, 243 (1968)).

¹⁰ *Id.* at 613 (quoting *Walz*, 397 U.S. at 674).

in order to fulfill the Free Exercise rights of military personnel.¹¹ Joel Katcoff, joined by fellow Harvard Law School student Allen Wieder,¹² argued that "the constitutional rights of Army personnel and their dependents to freely exercise their religion can better be served by an alternative Chaplaincy program which is privately funded and controlled."¹³

A three-judge panel of the 2nd Circuit disagreed. After reviewing both the history of the Army's chaplaincy program, which pre-dated the Constitution, and the subsequent Congressional authorizations under the power to provide for the common defense,¹⁴ the court detailed the unique justifications for and roles fulfilled by chaplains in the military.¹⁵ Specifically, the court recognized the problems associated with the enormous size and diversity of the Army and the subsequent need for spiritual counselors who understood the personal stresses and conflicts of military life.¹⁶

For the purposes of this discussion, the case is significant for two reasons. First, the court realized that the chaplaincy program would undoubtedly fail the *Lemon* test.¹⁷ However, the court reasoned that the Establishment Clause could not be interpreted in a vacuum. Instead, it was necessary to "take into account the deference required to be given to Congress' exercise of its War Power and the necessity of recognizing the Free Exercise rights of military personnel."¹⁸ The court

¹¹ 755 F.2d 223 (2nd Cir. 1985). See generally William T. Cavanaugh, Jr., Note, *The United States Military Chaplaincy Program: Another Seam in the Fabric of Our Society?*, 59 NOTRE DAME L. REV. 181 (1983).

¹² See Marianne Bernhard, *Law Students Challenge Military Chaplain Programs*, THE WASHINGTON POST, May 2, 1980, at C16, available in LEXIS, Nexis Library, ARCNWS File. Originally, Wieder claimed that the chaplaincy program also inhibited military personnel's free exercise of religion because of "the effects the Army has on the chaplain. It determines when he gets a merit raise, when he's promoted, . . ." *Id.*

¹³ Katcoff, 755 F.2d at 229. In fiscal year 1981, Congress appropriated over \$85 million for chaplaincy services, of which \$62 million was spent to pay the salaries of chaplains and their assistants. An additional \$7.7 million of non-appropriated funds were collected through voluntary donations of congregations and spent on denominational activities. *Id.* at 229.

¹⁴ *Id.* at 225 (referencing U.S. CONST. art I, § 8, cl. 1).

¹⁵ *Id.* at 225-28. The court specifically noted that the denominational quotas for military chaplains are based upon the denominational distribution of the entire U.S. population so that in the event of a nation-wide mobilization, the program will accurately reflect the conflated Army. *Id.* at 225-26.

¹⁶ *Id.* at 226-28.

¹⁷ *Id.* at 232. But see Cavanaugh, *supra* note 11 at 200-03, arguing that the primary purpose of the chaplaincy program is to provide for the welfare of the troops which should be enough to satisfy the secular purpose test.

¹⁸ *Id.* at 235. The court reasoned that the purpose of the Establishment Clause was "to insure religious liberty for our country's citizens by precluding a government from imposing, sponsoring, or supporting religion or forcing a person to

decided that the appropriate test by which to evaluate the constitutionality of the chaplaincy program was whether, after considering the practical alternatives, the program "is relevant to and reasonably necessary for the Army's conduct of our national defense."¹⁹ Given the unique characteristics of the military community and the inability of local civilian clergy to provide for the personnel's religious needs, the chaplaincy program substantially met this test.²⁰

The second reason the case is significant is that high-ranking government officials provided specific testimony. The government submitted the declarations of a number of top command officers of the Army, including General Edward C. Meyer, Chief of Staff of the Army. The declarations were "to the effect that because of the sheer size of the military population and the unique conditions under which our Army's military forces must function a military chaplaincy is essential and the services provided by it to soldiers could not effectively be furnished by civilian

remain away from the practice of religion." *Id.* at 231 (citing *Everson v. Board of Education*, 330 U.S. 1 (1947)). Put differently, the court explained that:

Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. *Id.* (quoting *Everson*, 330 U.S. at 15-16).

Since it assigns military personnel to locations around the world, if the Army failed to provide chaplains then that itself might amount to a violation of the Establishment Clause. *Id.* at 231-32. Especially in the case of compulsory military service, if the Army refused to make religion available then this might also amount to a violation of the Free Exercise Clause. *Id.* at 234. The court noted with approval the Supreme Court dictum contained in *Abington School Dist. v. Schempp*, 374 U.S. 203, 296-98 (1963) (Brennan, J., concurring) ("Since government has deprived such persons of the opportunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be."); 308-09 (Stewart, J., dissenting) ("Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him with the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion.") *Id.* at 234-235. See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1157 (2nd ed. 1988). While the court's argument is reasonable, it appears to rest on the assumption that military personnel had adequate spiritual counseling available prior to induction into the service. It could be argued that the Army would be responsible for providing only that level of religious accommodation necessary to replicate this pre-existing practice. It could also be argued that even if the Army deployed personnel in a remote location, it is the responsibility of the particular religious sect to provide for the religious needs of its followers, or subsidize the Army for providing the services. Regardless, it seems clear that it is in the best interest of the military to provide chaplains for its service personnel.

¹⁹ *Id.* at 235.

²⁰ The court did remand the case to determine whether government financing of military chaplains in large urban areas such as Washington D.C., New York City, and San Francisco was reasonably necessary. *Id.* at 237-38.

sources, particularly on the battlefield or in other crisis situations.”²¹ Alternatively, the court summarized the submissions as stating that without chaplains who were able to deploy with the troops on short notice “the motivation, morale and willingness of soldiers to face combat would suffer immeasurable harm and our national defense would be weakened accordingly.”²² The court contrasted this testimony with the scant evidence submitted by the plaintiffs to support their “inherently impractical” and “speculative suggestion, made without an evidentiary basis for believing that the claim is well-grounded in fact.”²³

B. The Free Exercise Clause

The government may infringe upon an individual’s Free Exercise rights by the application of two types of regulations. The first type of regulation is directly aimed at and intended to effect a specific religious practice. The second type of regulation is not directly aimed at a religious practice, but is instead generally applicable and only incidentally restricts a religious practice. As in cases decided under the Establishment Clause, courts have encountered some difficulty in applying civilian precedent to Free Exercise claims arising in the military, and often defer to the judgment of government authorities or fashion a unique constitutional test.

1. Government Action Aimed At Religion

When analyzing Free Exercise claims, the Court has looked to both the text and the effect of the government action. If a court determines that the “object” of the government action is to interfere with a particular unpopular religious practice, then strict scrutiny will be applied and the statute will have to be narrowly tailored and advance a compelling government interest. For example, in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*,²⁴ the Court held that a city

²¹ *Id.* at 231.

²² *Id.* at 228.

²³ *Id.* at 236.

²⁴ 508 U.S. 520, 546 (1993).

ordinance outlawing animal sacrifice was prompted by hostility toward the Santeria religion, was neither neutral nor of general applicability, and did not narrowly advance a compelling state interest.

The most pertinent case involving this type of challenge to a military regulation is *Hartmann v. Stone*.²⁵ In *Hartmann*, child-care providers challenged a Army day care regulation that forbid, with limited exceptions, religious activities during the day-care program.²⁶ The court found that the regulation was not neutral or generally applicable because neutral “means that there must be neutrality *between* religion and non-religion.”²⁷ Quoting *Lukumi Babalu Aye*, the court noted that “if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral” and is subject to strict scrutiny regardless of whether the regulation imposes a substantial burden on the exercise of religion.²⁸ The court concluded that the regulation failed to meet this test.²⁹

Significantly, the court also rejected the Army’s argument that the court should defer to the judgment of military authorities. While it acknowledged the substantial deference typically shown to military regulations, the court found these cases distinguishable. First, the day care providers were private, independent contractors³⁰ and not necessarily military personnel.³¹ Second, the previous cases involved neutral regulations of general applicability.³² Finally, the regulations

²⁵ 68 F.3d 973 (6th Cir. 1995). See generally Maj. Lawrence Wilde, *Hartmann v. Stone*, 1996-JUN ARMY LAW. 69 (1996).

²⁶ *Id.* at 975.

²⁷ *Id.* at 978. Because the regulation was not neutral and generally applicable, the court determined that it did not need to address the Religious Freedom Restoration Act. See *infra* notes 62-68 and accompanying text. *Hartmann v. Stone* and *Rigdon v. Perry* appear to be the only cases to consider to applicability of RFRA to the military.

²⁸ *Id.* at 979 (quoting 508 U.S. at 533).

²⁹ *Id.* at 979-983.

³⁰ *Id.* at 981.

³¹ *Id.* at 985.

³² *Id.*

implicated the traditional authority of parents to determine the scope of their children's care.³³ The court did note that under extreme circumstances, such as a massive troop deployment, an exception to the program might be justified by military necessity.³⁴ Absent such an extreme situation, the regulation must provide an exception for those day care providers and parents who wished to include religion in the daily regime.

2. *Government Action That Incidentally Burdens Religion*

The standard for analyzing neutral government regulations of general applicability that have only the unintended effect of burdening the exercise of religion has undergone significant changes in recent years. The Supreme Court outlined the original balancing test in *Sherbert v. Verner*.³⁵ Sherbert, a Seventh-day Adventist, was discharged from her job because she refused to work on Saturday, her faith's Sabbath Day.³⁶ She was denied unemployment benefits because she had refused "suitable work" without good cause.³⁷ The Court found that the ruling "forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand."³⁸ Consequently, since the denial of benefits represented a substantial burden on religious practices, the state was required to show that its refusal to provide an exemption was necessary to advance a compelling governmental interest,³⁹ a burden that was not met in the case.

During the *Sherbert* era, the most significant and relevant application by the Supreme Court of the Free Exercise Clause to the military is the case of *Goldman v. Weinberger*.⁴⁰ Captain

³³ *Id.* (citing *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)).

³⁴ *Id.*

³⁵ 374 U.S. 398 (1963).

³⁶ *Id.* at 399.

³⁷ *Id.* at 401.

³⁸ *Id.* at 404.

³⁹ *Id.* at 406.

⁴⁰ 475 U.S. 503 (1986) (5-4 opinion). See generally *Military Ban on Yarmulkes*, 100 HARV. L. REV. 163, 172 (1986) (concluding that the Court's refusal in the case to "establish guidelines for government action when that action impinges

(Rabbi) Goldman felt compelled by his religious beliefs to wear a yarmulke while on-duty and in uniform. Air Force Regulation 35-10 only permitted the wearing of non-visible religious apparel.⁴¹ Goldman argued "that the Free Exercise Clause of the First Amendment requires the Air Force to make an exception to [AFR 35-10] for religious apparel unless the accouterments create a 'clear danger' of undermining discipline and esprit de corps."⁴² The Court held that the Free Exercise Clause did not require the Air Force to make an exception to its uniform and generally applicable dress regulations even if it had the effect of substantially burdening religion.

Then-Justice Rehnquist, joined by four other Justices,⁴³ declined to apply the *Sherbert* balancing test to the Air Force's refusal to grant Rabbi Goldman an exemption.⁴⁴ Instead, he explained that "the military is, by necessity, a specialized society separate from civilian society"⁴⁵ which requires "a respect for duty and discipline without counterpart in civilian life."⁴⁶ He further noted that, even when evaluating whether military needs justify a regulation of religiously motivated conduct, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."⁴⁷ This deference is justified because the courts are ill-equipped to determine the impact of any particular intrusion

upon constitutionally protected interests . . . sends a legitimating message to military officials prone to suppress the individuality of service personnel and leaves unanswered the question of when, if ever, the Court is prepared to defend the liberties of Americans who serve their country in the armed forces"). See also 10 U.S.C. § 774 (West 1998) providing that military members may wear items of religious apparel except when the Secretary of the individual service determines that "wearing of the item would interfere with the performance of the member's military duties;" or when the Secretary determines by regulation that "the item of apparel is not neat and conservative."

⁴¹ *Id.* at 513 (Stevens, J., concurring).

⁴² *Id.* at 509.

⁴³ Justice Rehnquist's opinion was joined by Chief Justice Burger, Justice White, Powell, and Stevens. *Id.* at 503. Justice O'Connor, Marshall, Blackmun, and Brennan dissented.

⁴⁴ *Id.* at 506-07. But see *Sherwood v. Brown*, 619 F.2d 47 (9th Cir. 1980) (per curiam) (affirming court-martial conviction of naval enlisted member who refused to comply with uniform requirements because of religious beliefs). Applying the test articulated in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the court found that the regulations were the least restrictive means of furthering the Navy's compelling interest in upholding safety requirements. The Navy's position was supported by an affidavit of a senior naval officer. *Id.* at 48.

⁴⁵ *Id.* at 506-507 (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)).

⁴⁶ *Id.* at 507 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

⁴⁷ *Id.*

upon military discipline⁴⁸ and because the Constitution tasks the Executive and Legislative Branches with establishing and carrying out military policy.⁴⁹

According to Justice Rehnquist, the Air Force had determined that "standardized uniforms encourages the subordination of personal preferences and identities" as well as "a sense of hierarchical unity by eliminating outward individual distinctions except for those of rank."⁵⁰ Consequently, the expert testimony provided by Captain Goldman that religious exceptions to AFR 35-10 would increase morale "is quite beside the point."⁵¹ The "appropriate military officials" decided the desirability of dress regulation, and "they are under no constitutional mandate to abandon their considered professional judgment" and grant an exception.⁵²

Although he noted that a modest departure from uniform regulations created "almost no danger of impairment of the Air Force's military mission,"⁵³ Justice Stevens also concluded that the Court should consider as legitimate and rational the "plausible," yet possibly "exaggerated," interest that the military professionals attached to uniform dress regulations.⁵⁴ Furthermore, Justice Stevens reasoned that if the Air Force entered the business of granting exceptions, then the decisionmaker would be forced to evaluate the sincerity and character of the requester's faith as well as the reaction of other airmen to the favored treatment.⁵⁵ As Steven concluded, "[t]he Air Force has no business drawing distinctions between such persons when it is enforcing commands of universal application."⁵⁶

⁴⁸ *Id.* at 507-08 (quoting *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962))).

⁴⁹ *Id.* at 508 (quoting *Rostker v. Golberg*, 453 U.S. 57, 70 (1981)).

⁵⁰ *Id.*

⁵¹ *Id.* at 509.

⁵² *Id.*

⁵³ *Id.* at 511 (Stevens, J., concurring) (joined by Justice White and Powell).

⁵⁴ *Id.* at 512 (Stevens, J., concurring).

⁵⁵ *Id.* at 513 (Stevens, J., concurring).

⁵⁶ *Id.* In one of three dissenting opinions, Justice O'Connor argued that there was no reason why the Court had refused to apply the free exercise principles applicable in the civilian context, such as *Sherbert*, to the military. *Id.* at 530

While not applied by the Court in *Goldman*, the balancing test announced in *Sherbert* continued to be utilized intermittently until 1990, when the Court, per Justice Scalia, decided *Employment Division v. Smith*.⁵⁷ The issue was whether Oregon was required to grant an exemption to its general criminal prohibition on the possession and use of peyote for religious use by Native Americans, and furthermore, whether Oregon could deny unemployment benefits for individuals dismissed from their jobs because of such religiously inspired use.⁵⁸ The Court announced that the *Sherbert* test is inapplicable to "across-the board criminal prohibitions on a particular form of conduct."⁵⁹ Instead, so long as the criminal prohibition was generally applicable and not intended to effect a particular religious practice, the Court will not require the state to advance a compelling interest. To do otherwise would permit an individual, "by virtue of his

(O'Connor, J. dissenting). In adjudging Goldman's free exercise challenge, she would first ask whether the government interest is of unusual importance. Second, the Court should determine whether granting the type of exemption sought would "do substantial harm to [an] especially important government interest." *Id.* at 531 (O'Connor, J. dissenting). The military would typically be able to meet the requirements of this test, but "[i]n the rare instances where the military has not consistently or plausibly justified its asserted need" and the individual seeking the exemption establishes that the military's rationale is unfounded, the Government's policy for uniformity must yield. *Id.* at 532 (O'Connor, J. dissenting). Based upon the facts presented to the Court, the Air Force should have been required to grant Goldman an exemption.

Justice Brennan expressed his continued belief that strict scrutiny should be applied to First Amendment claims arising in the military setting. Even under a lower rationality standard, however, the Air Force had failed to provide a credible explanation of how wearing a yarmulke would interfere with the military's interests. *Id.* at 516 (Brennan, J., dissenting). The visible/non-visible standard utilized by the Air Force had the additional impermissible effect of favoring majority religions over minority faiths. *Id.* at 522 (Brennan, J., dissenting).

Justice Blackmun believed that the Air Force was permitted to consider not only the effects of granting Goldman's request, but also the cumulative effect of "accommodating constitutionally indistinguishable requests for religious exemptions." However, he concluded that the Air Force had failed to produce any evidence that either effect was significant. *Id.* at 524-25 (Blackmun, J., dissenting). Specifically, Justice Blackmun pointed to the absence of evidence that a significant number of military personnel would request religious exemptions that could not be judged by a neutral standard such as safety. *Id.* at 527 (Blackmun, J., dissenting).

⁵⁷ 494 U.S. 872 (1990). Justice Scalia announced the opinion of the Court, which was joined by Chief Justice Rehnquist, Justice White, Stevens, and Kennedy. Justice O'Connor filed an opinion concurring in the judgment. Justice Blackmun's dissenting opinion was joined by Justice Brennan and Marshall.

⁵⁸ *Id.* at 874.

⁵⁹ *Id.* at 884-85. In distinguishing *Sherbert*, the Court noted that it had "never invalidated any government action on the basis of the *Sherbert* test except the denial of unemployment compensation" and in recent years "abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all." *Id.* at 883. Examining the rationale of earlier decisions, the Court also explained that the only instances when it held that the application of a neutral, generally applicable law to religiously motivated conduct violated the First Amendment involved hybrid constitutional protections, such as the Free Exercise Clause and the freedom of speech. *Id.* at 880-881.

beliefs, 'to become a law unto himself,'"⁶⁰ opening "the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."⁶¹

In direct response to the Court's decision in *Smith*, Congress passed the Religious Freedom Restoration Act of 1993 (RFRA).⁶² The Act provides in relevant part:

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability . . . Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁶³

The stated purpose of the Act is "to restore the compelling interest test as set forth in [*Sherbert* and *Wisconsin v. Yoder*]⁶⁴ and to guarantee its application in all cases where free exercise of religion is substantially burdened."⁶⁵ The Act applies retroactively to "all Federal and State law . . . whether statutory or otherwise"⁶⁶ and defines the government to include "a branch, department, agency, instrumentality, and official . . . of the United States, a State, or subdivision of a State."⁶⁷ As indicated by the reports of the Judiciary committees of the House and Senate, the Act was intended to apply to the military even though the courts were instructed to continue to defer to the expertise of military authorities.⁶⁸

⁶⁰ *Id.* at 885 (quoting *Reynolds v. United States*, 98 U.S. 145, 167 (1879)).

⁶¹ *Id.* at 888.

⁶² 42 U.S.C. § 2000bb et seq., 107 Stat. 1488 (West 1998).

⁶³ *Id.* § 2000bb-1(a),(b).

⁶⁴ 406 U.S. 205 (1972).

⁶⁵ 42 U.S.C. § 2000bb(b)(1) (West 1998).

⁶⁶ *Id.* § 2000bb-3(a).

⁶⁷ *Id.* § 2000bb-2(1).

⁶⁸ The Senate report contrasted the "unitary standard set forth in the act" to the less protective measures the Supreme Court applied in *Goldman v. Weinberger*. S. REP. NO. 111, 103d Cong., 1st Sess. 23 (1993), reprinted in 1993 U.S.C.C.A.N. 1892. Although such claims would now be reviewed under the traditional compelling governmental interest test, the Senate committee expressed its confidence "that the [Act] will not adversely impair the ability of the U.S. military to maintain good order, discipline, and security" because the "courts have always recognized the compelling nature of the military's interest in these objectives in the regulations of our armed services." *Id.* Somewhat contradictory, however, the Committee explained that it "intends and expects" that the courts will continue to extend to military authorities "significant deference in effectuating these interests." *Id.* Consequently, on one hand the Committee created a statutory obligation which is supposed to be reviewed by the courts under the strictest form of

While Congress intended to alter constitutional precedent with the enactment of RFRA, the Supreme Court in *City of Boerne v. Flores*⁶⁹ struck the Act as applied to the states because it exceeded Congress' enforcement power under §5 of the Fourteenth Amendment. A strong argument could be made, however, that the Act is severable and still applicable to the federal government. Courts that have been presented with this question have declined to decide the issue, resting their decisions on other grounds.⁷⁰ Additionally, President Clinton issued guidelines in the wake of *Flores* that explain the permissible limits of religious exercise and religious expression in the federal workplace.⁷¹ According to the accompanying White House press release, the guidelines do not address the religious exercise or expression by uniformed military personnel or "the conduct of business by chaplains employed by the Federal Government."⁷² Consequently, absent a federal court holding that RFRA is still applicable to the federal government, the pre-RFRA court

scrutiny, and on the other hand expressed its expectation that the courts will continue to defer to the judgment of the military authorities. *Id.*

The Committee report from the House clarifies to some extent when it is appropriate to defer to the judgment of military authorities, but complicates the analysis by classifying military claims alongside those of prisoners. The Committee explained that "[s]eemingly reasonable regulations based upon speculation, exaggerated fears of thoughtless policies cannot stand." H.R. REP. NO. 88, 103d Cong., 1st Sess. 14 (1993). Instead, the government "must show that the relevant regulations are the least restrictive means of protecting a compelling governmental interest." *Id.* Examination under this standard, however, "does not mean the expertise and authority of military . . . officials will be necessarily undermined" because maintaining discipline in the armed forces has been "recognized as governmental interests of the highest order." *Id.* Once again, the Committee has recognized the government's compelling interest in maintaining military discipline and the expertise of military authorities, but has failed to provide the courts with specific guidance for when deference is due. From the language of the Committee's report, deference would seem to be justified unless the regulation is based on pure speculation or does not meet some minimal level of reasonableness.

The significance of the Committee's reference to parallel claims arising from within the prison system is unclear. The report states that the claims of both prisoners and military personnel must be reviewed under the compelling interest test, and discusses the expertise and authority of military and prison officials and the compelling interests they seek to protect in the same sentences. It could be argued that there is no significance and the Committee was merely recognizing two special contexts in which courts have applied a different standard of review and a unique amount of deference. However, it could also be argued that the Committee's language indicates that it intended the courts to display the *same* amount of deference to prison and military claims arising under the Act. If this argument is persuasive, then the legal precedent from the prison community take on added significance to the resolution of military claims.

⁶⁹ — U.S. —, 117 S.Ct. 2157 (1997).

⁷⁰ See e.g., *United States v. Grant*, 117 F.3d 788, 792 (5th Cir. 1997) (assuming RFRA applicable, defendant had failed to show substantial burdening of religion); *Tinsley v. Department of Justice*, 1997 WL 529068 *1 (D.C. Cir. 1997) (claimant failed to state a claim).

⁷¹ Memorandum on Religious Exercise and Religious Expression in the Federal Workplace, Memorandum for the Heads of Executive Departments and Agencies, 33 WEEKLY COMP. PRES. DOC. 1246 (Aug. 14, 1997).

precedent, e.g., *Smith* and *Sherbert*, should guide the resolution of Free Exercise claims in the military context. Recall that during the *Sherbert* era, however, the Supreme Court in *Goldman v. Weinberger* declined to apply the test to neutral military regulations of general applicability.

II. THE MILITARY AND THE FREE SPEECH CLAUSE

The free speech restrictions imposed by military regulations and policies have also been the source of great controversy and debate. When First Amendment challenges are brought, courts utilize one of two analytical frameworks depending upon whether the individual is a military member or civilian. If the individual is a military member, courts exhibit a substantial amount of deference to the military concerning the potential harm of the speech. Many of the traditional First Amendment protections do not exist for servicemembers because of the military's unique nature and need for obedience and subordination. Finally, military personnel are subject to the free speech restrictions imposed by the UCMJ regardless of whether on-base or off-base, and whether the speech takes place on a street or within the confines of their home.

When the individual is a civilian, courts have adopted a forum analysis to evaluate restrictions on access to government property such as the military base or base chapel. Government property can be categorized as a public forum, designated public forum, or nonpublic forum. In both nonpublic forums and designated public forums, access restrictions are permitted so long as they are reasonable and viewpoint-neutral.

A. Free Speech Challenges Of Military Personnel

A comprehensive analysis of free speech challenges to prosecutions under the Uniform Code of Military Justice is contained in Appendix E. For the purposes of this discussion, this examination illustrates three points. First, courts have not conducted a public forum analysis when

⁷² The White House, Office of the Press Secretary, White House Press Release, *Guidelines On Religious Exercise and Religious Expression in the Federal Workplace* (Aug. 14, 1997) available at www.whitehouse.gov.

evaluating the free speech claims of military personnel. For example, in *United States v. Howe*,⁷³ an officer's conviction for using contemptuous words against the President in violation of Article 88 was upheld despite the fact that the speech was uttered on an off-base public sidewalk. If a servicemember, including a chaplain, violates a specific provision of the UCMJ, then she can be prosecuted under the article regardless of whether the violation occurred in a public forum or a nonpublic forum. For example, if the speech violates a punitive regulation or other lawful order, then the member may be prosecuted under Article 92 regardless of whether the actions occur in a public or nonpublic forum.

Second, courts have not required that commanders show actual harm to military interests before restrictions on speech are permitted. As the Court of Appeals for the Armed Forces explained in *United States v. Priest*, "the danger resulting from the erosion of military morale and discipline is too great to require that discipline must have already been impaired before a prosecution for uttering statements can be sustained."⁷⁴ Consequently, in *Parker v. Levy*,⁷⁵ the Supreme Court endorsed the continued application of the "clear and present danger" test to the speech of military personnel instead of the more rigorous "imminent lawless action" utilized in the civilian context.⁷⁶

Finally, courts have shown substantial deference to expertise of military commander's in determining the existence of a threat to military interests. For example, in *Ethredge v. Hail*,⁷⁷ the Eleventh Circuit upheld the base commander's order for the removal from a civilian employees vehicle of a bumper sticker that embarrassed or disparaged the President. The installation commanders submitted affidavits stating that they believed the bumper sticker would "undermine

⁷³ 37 C.M.R. 429 (C.M.A. 1967).

⁷⁴ 45 C.M.R. 338, 344 (C.M.A. 1972).

⁷⁵ 417 U.S. 733 (1974).

⁷⁶ See e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

military order, discipline, and responsiveness” and that anonymous phone callers had threatened to break the window out of Ethredge’s truck.⁷⁸ As the court concluded, “[w]e must give great deference to the judgment of these officials.”⁷⁹

B. Civilian Access To Military Installations And The Base Chapel

While military personnel remain subject to the speech restrictions imposed by the UCMJ even when off-base and out of uniform, civilians come under the authority of the base commander only after they enter the physical boundary of the base. The question then becomes whether the military authorities may properly limit the access of civilians to the base installation, and specifically the base chapel. Furthermore, it must be determined if the answer is different when the civilian claims either a free speech or free exercise right. Although a court denied First Amendment challenges to exclusion orders brought by ministers during the Vietnam War,⁸⁰ recent case law addressing this issue is virtually non-existent.

When civilians seek access to government property, the Supreme Court has “adopted a forum analysis as a means of determining when the Government’s interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for

⁷⁷ 56 F.3d 1324 (11th Cir. 1995).

⁷⁸ *Id.* at 1328.

⁷⁹ *Id.* at 1328.

⁸⁰ See e.g., *Bridges v. Davis*, 443 F.2d 970 (9th Cir. 1971) (per curiam), *reh’g denied*, 445 F.2d 1401 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). In *Bridges*, three ministers and eight servicemen sought an injunction against the commanding officers of Naval and Marine bases in Hawaii. The commanders had issued orders barring the ministers from base. In August 1969, the ministers had invited AWOL military personnel to seek sanctuary in their church and twenty-four military fugitives entered the church. *Id.* at 971. After military police arrested twelve of the members and returned them to the base prison, the ministers were permitted to conduct services in the prison. Although warned about the prison rules, one of the ministers permitted the prisoners to drink a bottle of wine and eat birthday cake. *Id.* at 972. Despite additional warnings, another minister conducted services in a short sleeved shirt and trousers, quoted songs that contained a four letter word and joined the prisoners in smoking cigarettes. After the base commander determined that the service had “a disturbing effect on the entire military community” and so enraged one prison guard that he said he would refuse to perform church duties involving the ministers, an order was issued barring the ministers from base. *Id.* at 972-73. Applying the standard articulated in *Cafeteria & Restaurant Workers, etc. v. McElroy*, 367 U.S. 886 (1961), the court found that the order was not patently arbitrary or discriminatory given the totality of the circumstances. *Id.* at 973-74.

other purposes.”⁸¹ The Court has recognized three types of forums: traditional public forums, designated or limited public forums, and nonpublic forums. A court’s categorization of the government property in question is critical to the permissibility of the restriction because it determines the level of scrutiny that will be applied. Since it was created to facilitate the religious rights of military personnel, the base chapel should be categorized as a designated public forum because access is for the limited purpose of religious services, is limited to the base community, and is scheduled at the military’s discretion.

Traditional public forums are those places such as streets, sidewalks and public parks that “by long tradition or by government fiat have been devoted to assembly or debate.”⁸² Courts will apply strict scrutiny to content-based exclusions within the public forum. If the exclusion is a content-neutral time, place, and manner restriction, then it must be narrowly tailored to achieve a significant government interest and leave open ample alternative channels of communication.⁸³ Applying these standards to a military base, the Supreme Court in *Flower v. United States* held that a base commander could not prohibit the distribution of leaflets by a previously “barred” civilian on a street within the base that was open to the public.⁸⁴ As clarified by later opinions, the controlling factors in *Flower* were that “the military ha[d] abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression.”⁸⁵

Designated public forums are the second category of government property, and are formed when the government designates a “place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain

⁸¹ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). See generally Major Andy K. Hughes, *The Regulation of Printed Materials on Military Installations*, 1992-Oct ARMY LAW. 16 (1992); John C. Cruden and Calvin M. Lederer, *The First Amendment and Military Installations*, 1984 DET. C.L. REV. 845 (1984).

⁸² *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n.*, 460 U.S. 37, 45 (1983).

⁸³ *Id.* at 45.

⁸⁴ 407 U.S. 197 (1972) (per curiam). The Court summarily reversed the defendant’s conviction without the benefit of briefs or oral arguments. *Id.* at 200 (Rehnquist, J., dissenting).

subjects.”⁸⁶ If the government limits the use of the forum to particular purposes for which it was created, then restrictions must only be reasonable and viewpoint-neutral.⁸⁷ Courts will not find that a public forum has been created “in the face of clear evidence of a contrary intent” or “when the nature of the property is inconsistent with expressive activity.”⁸⁸

The third category, nonpublic forums, consists of all other government property.⁸⁹ Within nonpublic forums, the government may restrict speech based upon content and “need only be reasonable, so long as the regulation is not an effort to suppress the speaker’s activity due to disagreement with the speaker’s view.”⁹⁰ In *Greer v. Spock*,⁹¹ Army regulations at Fort Dix that prohibited political demonstrations and speeches and required prior approval of literature were challenged both facially and as applied. The base commander denied access to political candidates in order to avoid the appearance of partisan political favoritism and to preserve the training environment of the troops.⁹² The Supreme Court held that the base was a nonpublic forum because military authorities had not “abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates.”⁹³

Of special importance for this discussion, the Court also recognized the military’s interests in maintaining both the appearance and reality of political neutrality. It explained that keeping official military activities free of entanglement with partisan political campaigns “is wholly consistent with the American tradition of a politically neutral military establishment under civilian

⁸⁵ *United States v. Albertini*, 472 U.S. 675, 686-87 (1985).

⁸⁶ *Greer v. Spock*, 473 U.S. 788, 802 (1985).

⁸⁷ See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

⁸⁸ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (internal citations omitted).

⁸⁹ See *International Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992).

⁹⁰ *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2nd Cir. 1997) (quoting *Lee*, 505 U.S. at 679).

⁹¹ 424 U.S. 828 (1976).

⁹² *Id.* at 833 n.3.

⁹³ *Id.* at 837. The Court further noted that “[t]he decision of the military authorities that . . . a religious service by a visiting preacher at the base chapel . . . would be supportive of the military mission of Fort Dix surely did not leave the

control.”⁹⁴ Finally, the Court concluded that restrictions on distribution did not target political speech, but was a general exclusion applicable whenever the commander determined that there was a clear threat to good order, loyalty and discipline. Absent evidence of arbitrary, invidious or irrational application, the regulation did not violate the First Amendment.⁹⁵

authorities powerless thereafter to prevent any civilian from entering Fort Dix to speak upon any subject whatever.” *Id.* at 838 n.10.

⁹⁴ *Id.* at 839. Concurring in the Court’s opinion, Chief Justice Burger recognized that the 200-year tradition of keeping the military removed from the political arena supported the restrictions on political activity within the confines of the base. This policy did not, however, justify the restrictions on distribution. While these restrictions did permit the commander to act to avert clear threats to good order and discipline, this interest would also be served by a total ban on the distribution of all political leaflets on-base. He concluded that the differences between permitting distribution of political leaflets and political rallies were substantial enough that the distribution restriction could be committed to the judgment of the military authorities. *Id.* at 840-41 (Burger, C.J., concurring). In closing, Chief Justice Burger added that the real threat to civilian control of the military was posed not by the distribution of literature, but by the commander who attempts to deliver his soldiers’ votes to a particular candidate. “It is only a little more than a century ago that some 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.” *Id.* at 842.

Justice Powell also joined the Court’s opinion, but wrote separately to emphasize the heavy burden that restrictions upon free speech must carry. Guided by the analysis undertaken in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court must decide “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Id.* at 843 (quoting *Grayned*, 408 U.S. at 116). In the domain of the military, the “functional and symbolic incompatibility” of political speech with the specialized society of the military must be added to the potential disruption of base activity at Fort Dix. *Id.* at 844. Justice Powell agreed with the Court that the public’s legitimate interest in maintaining the reality and appearance of political neutrality within the military outweighed the candidates’ interests in accessing the base as a forum. *Id.* at 845. This neutrality prevents candidates from courting the “military vote” and dissuades the media from interpreting the candidate’s turnout on-base as a sign of support for one candidate or the other. The policy also avoids questions of whether commanders have exerted direct or indirect pressure on subordinates. *Id.* at 846-47. Since candidates were able to communicate through alternative channels of communication generally available to the public—such as television, radio and direct mail—the infringement upon speech were narrowly tailored to the government interest. *Id.* at 847. Justice Powell did note, however, that if the base were opened to any candidate, then political neutrality would require that all candidates be allowed access. *Id.* at 848 n.3. Finally, he concluded that the literature distribution restrictions were permissible because the commander was only authorized to deny permission when the material posed a danger to military order and discipline. *Id.* at 848-49.

⁹⁵ *Id.* at 840. In at least two other military contexts, courts have rejected arguments that the government created a designated public forum. In *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), the Supreme Court held that the Combined Federal Campaign was a nonpublic forum because the government did not intend to create a forum for expressive conduct. Furthermore, the Court concluded that restriction on the type of organizations that could participate in the campaign were reasonable and viewpoint-neutral. *Id.* at 789-811. In *General Media Communications, Inc. v. Cohen*, 131 F.3d 273 (2d Cir. 1997), the Second Circuit found that military exchanges were nonpublic forums because they were primarily created for commercial purposes, were not open to the public, and were authorized to stock only certain products. *Id.* at 280. The court determined that Congress could ban the sale of certain adult magazines within the exchanges. The ban advanced the legitimate government interests in avoiding the appearance of official endorsement of the material and protected the “military’s image and core values.” *Id.* at 283-84. For court opinions discussing whether military bases were converted into public forums during an “open house,” see *United States v. Albertini*, 472 U.S. 675, 686 (1985) (dictum) (“Nor did Hickam [Air Force Base] become a public forum merely because the base was used to communicate ideas or information during the open house.”); *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991) (en banc) (government did not intend to create public forum during open house at Peterson Air Force Base); *Persons For Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir.

III. THE CASE OF RIGDON V. PERRY

The military's enforcement of generally applicable and neutral regulations was directly challenged in the case of *Rigdon v. Perry*. When the Catholic Church sponsored a nationwide postcard campaign urging congregants to contact Congress concerning the Partial Abortion Ban Act, military chaplains sought legal guidance on their ability to participate in the effort. After legal advisors explained that military regulations prohibited the chaplains from urging military members to contact Congress, the chaplains sought a preliminary injunction against enforcement of the regulations. The district court granted the injunction, arguing that the restrictions violated the chaplains' freedom of speech and freedom of religion. Although the court's legal analysis is suspect, the case was not appealed. While a number of factors may have influenced the decision not to appeal the case, the reaction of a member of Congress and the portrayal of the incident in the press suggested some disapproval of the military's actions.

A. Case History

On May 29, 1996, Rev. Msgr. Aloysius Callaghan, Chancellor for the Archdiocese for the Military Services, authored a letter that informed U.S. military chaplains of the "Project Life Post Card Campaign" (Campaign).⁹⁶ As explained by the letter, the purpose of the Campaign was to ask Catholics around the country to "sign postcards urging their U.S. Senators and U.S. Representatives to vote to ensure the acceptance of the Partial Abortion Ban Act, HR 1833 which would outlaw a particularly brutal and inhumane late-term abortion technique."⁹⁷ Rev. Callaghan stated that "this

1982) (government did not intend to create public forum during open house at Offutt Air Force Base), *cert. denied*, 459 U.S. 1092 (1982).

⁹⁶ Letter from Rev. Msgr. Aloysius Callaghan, Chancellor for the Archdiocese for the Military Services, to Military Chaplains (May 29, 1996). The Campaign was scheduled to take place on the weekend of June 29th and 30th, and was jointly sponsored by the National Committee for a Human Life Amendment and the Secretariat for Pro-Life Activities of the National Conference of Catholic Bishops.

⁹⁷ *Id.* The letter included other information, a Congressional mailing list, and a copy of the project postcard that could be copied and given to parishioners.

is a crucial time for action" and suggested that chaplains "might well consider asking [their] parishioners to be a part of this joint effort."⁹⁸

A few aspects of the letter should now be noted. First, it is unclear whether the letter was sent to all military chaplains or solely Catholic chaplains. Second, the letter relied upon the political term "Campaign" to describe the effort and twice referred to the attached postcards as "paper ballots."⁹⁹ Finally, Rev. Callaghan did not command the chaplains to participate in the effort, instead stating that they "might well consider asking parishioners" to join the effort and "could copy and give" the ballot to parishioners.¹⁰⁰

At the request of the Office of Chaplains, the Judge Advocate General of the Air Force issued a legal opinion on June 5, 1996. Quoting from DoDD 1344.10, AFI-902, and DoDI 5500.7-R, the opinion concluded that "your military status, and the status of your chaplains, carries with it unique responsibilities and limitations that have been imposed by Congress to insure the separation of our military forces from political issues."¹⁰¹ The Navy and the Army issued similar statements. Additionally, legal advisors from each of the three services reiterated that chaplains could continue to discuss the morality of any issue during sermons. Father Rigdon, joined by Jewish and Muslim leaders and other congregants, filed suit in the District Court for the District of Columbia on September 10, 1996 alleging violations of their First Amendment rights to freedom of speech and freedom of religion.

⁹⁸ *Id.* In a final paragraph, the letter concluded that "[o]ur people in the military are by profession ambassadors of peace and guardians of life. With your help they can be a part of this important project for life."

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ Memorandum from Bryan G. Hawley, Major General, USAF, The Judge Advocate General, for AF/HC (June 5, 1995).

B. Decision Of The District Court

On April 7, 1997, the United States District Court for the District of Columbia, per District Judge Sporkin, granted the chaplains' motion for summary judgment and motion for preliminary injunction.¹⁰² After finding that the chaplains' claims were justiciable,¹⁰³ the court found that the military directives relied upon by the government did not preclude chaplains from urging members to contact members of Congress on pending legislation. Furthermore, the court held that even if the directives did prohibit such conduct by the chaplain's, the directives would violate the chaplains' rights under the Religious Freedom Restoration Act as well as their First Amendment free speech rights. Because the court's resolution of the case raises a number of significant legal questions, the court's reasoning will be examined in some detail.

1. Military Regulations Do Not Preclude Chaplains From Urging Members To Contact Congress Concerning Pending Legislation

The court held that the military regulations relied upon by the government did not prevent military chaplains from urging their congregations to contact members of Congress.¹⁰⁴ While it had originally relied upon three regulatory prohibitions,¹⁰⁵ the government at oral arguments relied exclusively on DoD Directive 1344.10, Political Activities of Members of the Armed Forces on

¹⁰² *Rigdon v. Perry*, 962 F.Supp. 150, 152 (D.D.C. 1997).

¹⁰³ The government had argued that because Congress had adjourned without passing the Partial Birth Abortion Act there was no longer any pending legislation for the chaplains to encourage their congregants to write Congress to oppose. *Id.* at 155. However, the court noted that in the interim, both the House of Representatives and the Senate had introduced bills to amend the United States Code to ban partial birth abortions. *Id.* (citing H.R. 1122, 143 CONG. REC. H1202-05 (Mar. 20, 1997); S. 6, 143 CONG. REC. §158-02, § 158 (Jan. 21, 1997)). Consequently, the plaintiffs were still prevented from urging congregants to contact members of Congress. *Id.* at 155-56. The relevant issue, therefore, was whether the speak restriction was still in place and not whether the Post Card Campaign was on-going. The court then found that, with regard to Rabbi Kaye, the claims were not moot, the issue was ripe because the controversy was imminent and concrete, and the Rabbi had standing to assert the claim. *Id.* at 156 (citations omitted.)

¹⁰⁴ *Id.* at 156-60.

¹⁰⁵ The government had originally argued that the Anti-Lobbying Act, 18 U.S.C. § 1913 (prohibiting use of appropriated funds to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress), and §8001 of the Defense Appropriations Act for Fiscal Year 1996 (prohibiting use of appropriated funds for publicity or propaganda purposes not authorized by Congress) prohibited the contemplated political speech or lobbying activity. However, the government did not brief the applicability of the Defense Appropriations Act and conceded at oral arguments that the Anti-Lobbying Act was not relevant because it applied only to appropriated funds, which there was no evidence that the chaplains planned to utilize. *Id.* at 156-57.

Active Duty (June 15, 1990). The Directive prohibits an active duty member from using "his or her official authority or influence for . . . soliciting votes for a particular candidate or issue."¹⁰⁶ The court found that the Directive did not apply to the chaplain's speech for two reasons.

First, the Directive only prohibits solicitation for a "particular candidate or issue."¹⁰⁷ The chaplains, however, were not attempting to solicit votes for any particular candidate or issue such as a state ballot initiative. Instead, their conduct was one-step removed because they were encouraging their parishioners to contact members of Congress in the hope of influencing the member's vote.¹⁰⁸ The court decided that the military had failed to explain how the Directive was intended to prohibit this type of indirect solicitation.

Second, the court noted that the Directive only prohibits the exercise of "official authority or influence."¹⁰⁹ Since the chaplains have "rank without command," the court determined that they do not possess any "official" authority. Additionally, the court rejected the military's argument that a chaplain is acting under the color of military authority even when he is conducting services.¹¹⁰ Citing the evidentiary privilege for communications to the clergy acting in a spiritual capacity and the regulations governing the wearing of religious garments during ceremonies, the court concluded that the military has acknowledged the distinction between the chaplain acting in a religious capacity and as a representative of the military.¹¹¹ The court also rejected arguments that parishioners might view the chaplain's sermons as an "order," and noted that the military had failed to submit any evidence to support this "speculative assertion."¹¹² Consequently, the court

¹⁰⁶ *Id.* at 157.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 159.

¹¹¹ *Id.*

¹¹² *Id.* at 160.

concluded that when the chaplain is conducting services he is not acting as a representative of the military or under the color of military authority.

DoD Directive 1344.10 can be interpreted to apply to the chaplains' speech. The chaplain's "official authority or influence" does not necessary depend upon his ability to issue orders. Instead, "official influence" can be read to mean that influence which the chaplain has due to his position as an Air Force chaplain. Although the military has employed the chaplain to provide for the religious needs of the troops, his authority is limited to carrying out that responsibility—religious and spiritual guidance. By funding the chaplain's religious services and providing access to both the base chapel and a congregation, he has been given "official influence." Consequently, whether he has the authority to issue orders is not dispositive.

Under this interpretation, it is also irrelevant whether the congregants would consider the chaplain's sermons to be sponsored by the military. Obviously, the military does not officially endorse a denomination's religious teachings and would in fact be prevented from doing so by the Establishment Clause. Nor does the military endorse the political positions taken by every one of its personnel. The purpose of the Directive, however, is not only to avoid the public perceptions of endorsement but also to prevent military personnel from using the influence of their rank or position to solicit political votes. Consequently, whether the chaplain is acting in the capacity of religious provider or military officer, the Directive's restrictions are intended to prevent him from using the influence created by virtue of his position as chaplain to solicit votes for "a particular candidate or issue."

2. Restriction On Chaplains' Activities Violates The Religious Freedom Restoration Act

The court held that the restrictions imposed by the government violated RFRA. First, the court agreed with the plaintiff's that the restrictions imposed a "substantial burden" on the

chaplains free exercise rights because the sermons were censored. The court did not clearly articulate why the restrictions impose a substantial burden on religion. Instead, it was not appropriate for the court to determine what constituted an "important component" of the given religion.¹¹³ To resolve the question, the court merely noted that the activity was at least as important as other circumstances where a substantial burden had been found.¹¹⁴

Second, the court found that the government's restrictions were not the least restrictive means of furthering a compelling government interest. It was not disputed that the maintenance of a politically-disinterested military, the protection of good order and discipline, and military members' political rights constituted a compelling government interest.¹¹⁵ The court stated, however, that the government had relied on nothing more than "common sense" to support its claim and "failed to submit any evidence" showing that the speech would "enhance the potential for 'political conflicts' . . . let alone create a clear danger to the loyalty, discipline or morale of the troops."¹¹⁶ This deficiency was contrasted to the evidence deemed persuasive in *Ethredge v. Hail*¹¹⁷ and *Cornelius v. NAACP Legal Defense and Educ. Fund.*¹¹⁸

The court appears to have ignored the specific guidance provided by Congress in applying RFRA to this regulation. The Committee on the Judiciary from both houses explained that courts were expected to give substantial deference to the expertise of military authorities. The district court, however, concluded that the military had not presented credible evidence to support its

¹¹³ *Id.* at 161.

¹¹⁴ *Id.* (referencing *Western Presbyterian Church v. Bd. of Zoning Adjustment of the District of Columbia*, 862 F.Supp. 538, 545-46 (D.D.C. 1994) (Sporkin, J.) (Church's program for the needy); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir. 1996) (wearing crucifix around one's neck)).

¹¹⁵ *Id.* at 162.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 162 n.10 (citing 56 F.3d 1324, 1328 n.3 (11th Cir. 1995)). In *Ethredge*, a military commander ordered a civilian employee to remove a bumper sticker from his truck that disparaged the President. The installation commanders submitted affidavits that they believed the sign would "undermine military order, discipline, and responsiveness" and anonymous phone callers had threatened to break the window out of *Ethredge's* truck, this

assertion that the chaplains' speech threatened a politically-disinterested military and good order and discipline. In response, the military might consider submitting affidavits and declarations from high-level military authorities, members of Congress, other members of the chaplains congregation, and members of the general public attesting to the reality and perception of the sermon's effect on both military interests.

3. Restriction On Chaplains' Activities Violates The Right of Free Speech

The court also found that the government's restriction on the chaplains' speech violated their First Amendment free speech rights. First, the court decided that the military's religious facilities were designated public forums, which are "created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."¹¹⁹ The court found that "it has been the government's clear intent that certain facilities on military property (e.g., chapels) and personnel (e.g., chaplains) be dedicated exclusively to the free exercise rights of its service people."¹²⁰

In light of the examination in Part II A, it is not clear why the court conducted a forum analysis to determine the free speech rights of a military servicemember. Additionally, it is also not clear that the base chapel is a designated public forum as opposed to a nonpublic forum. The relevance of the determinations may be limited, however, because in both types of forums the government may restrict speech so long as the exclusion is reasonable and viewpoint-neutral. Even if the chapel is a designated public forum, the expressive activity permitted within the forum must be religious in nature. As such, political fund-raisers or theatrical productions would not fall within the purposes for which the forum was created.

standard was met. As the court concluded, "[w]e must give great deference to the judgment of these officials." *Id.* at 1328.

¹¹⁸ *Id.* (citing 473 U.S. 788, 810 (1985)).

¹¹⁹ *Id.* at 163 (citing *Cornelius*, 473 U.S. at 802).

Second, the court determined that the military's restriction was viewpoint-based because it favored the religious views of one person over the other.¹²¹ Under the court's interpretation, the restriction prevented Father Rigdon from urging his congregation to contact Congress but did not prevent other chaplains from urging their parishioners not to contact Congress. Additionally, the restriction did not impact chaplains who did not think that their religious beliefs required them to urge members to contact Congress.¹²² Since the restriction was viewpoint-based, it would be permissible only if it was narrowly tailored to advance a compelling state interest. The court found that the restriction failed to survive strict scrutiny for the same reason that it violated RFRA.¹²³

The court's conclusion that the restriction distinguishes between viewpoints is clearly erroneous. The Directive plainly states that an active duty military member may not use his official authority or influence to solicit votes for a candidate or issue. It is both content-neutral and viewpoint-neutral. It would be content-based if it stated, "You may urge others to contact Congress on any issue other than abortion." It would be viewpoint-based if it stated, "You may urge members to contact Congress only if you favor abortion, but not if you oppose abortion." As a generally applicable and neutral regulation, the Directive did not discriminate based upon either content or viewpoint. Consequently, the issue is not whether the military was targeting this particular speech for special treatment, but is instead whether the speech should be granted an exemption from an otherwise valid regulation.

Under the court's analysis, every criminal law and military regulation would be viewpoint-based. For example, assume that Father Rigdon has concluded the only way to stop abortions was to harass women as they entered the abortion clinics, even though other priests have concluded that

¹²⁰ *Id.*

¹²¹ *Id.* at 163-65.

¹²² *Id.* at 163-64.

¹²³ *Id.* at 164-65.

this is not necessary. Additionally, assume some priests have concluded that the proper way to combat abortion is not to harass the women but maintain constant prayer. Under the court's reasoning, the state would not be permitted to limit the chaplain's speech because it has discriminated based upon viewpoint. A similar analysis could be constructed for encouraging troops not to fight in a given war, in violation of Article 134, or encouraging parishioners to wear religious apparel in violation of uniform regulations.

It may be unusual for a military chaplain to advocate this type of conduct, especially the disobedience of military orders. However, since the court refused to distinguish between advocacy of a religious nature and advocacy which is prohibited by criminal laws or military regulations, the chaplain could effectively transform the base chapel into a political headquarters.¹²⁴ He could pass around petitions, collect offerings for anti-abortion candidates, or even invite candidates to deliver the "sermon" for the week. In fact, even a civilian chaplain would be entitled to access to the base's religious facilities for "religious" services regardless of the content of his speech or the viewpoints that he expressed. A base commander would be powerless to exclude a "disruptive" civilian chaplain from the base chapel. This type of situation may place the military in the precarious position of either permitting access to the chapel or closing it down.

¹²⁴ In the civilian community, religiously motivated political advocacy is afforded the double protections of the Free Speech and Free Exercise clauses. Although the activity is protected, the government is permitted to grant tax-exempt status under 26 U.S.C. § 501(c)(3) to organizations on the condition that no substantial portion of the organization's activities involves efforts to influence the political process. *See* *Regan v. Taxation Without Representation*, 461 U.S. 540 (1983). In *United States Catholic Conference v. Baker*, 885 F.2d 1020 (2nd Cir. 1989) (finding that organizations lacked standing as clergy, taxpayers, voters, or competitive advocates to bring challenge), *cert. denied*, 495 U.S. 918 (1990), a coalition of pro-choice organizations unsuccessfully attempted to force the Internal Revenue Service to revoke the Catholic Church's tax-exempt status on the basis that this condition had been violated. Additionally, the decisions of the IRS to revoke or refuse to grant tax-exempt status to "religious" organizations have been challenged by the actual religious organizations. *Cf.* *Brian Ruud International v. United States*, 733 F.Supp. 396 (D.D.C. 1989) (granting declaratory judgment that ministry constituted tax-exempt organization under 26 U.S.C. § 501(c)(3)) *with* *Western Catholic Church v. Commissioner of Internal Revenue*, 73 T.C. 196 (1979), *aff'd* 631 F.2d 736 (7th Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) (concluding that organization was not organized for religious purpose and that tax exemption was properly revoked); *Bubbling Well Church of Universal Love, Inc. v. Commission*, 74 T.C. 531 (1980). While these cases illustrate that religious organizations remain subject to generally applicable statutes, they

In summary, the court determined that DoD Directive 1344.10 did not prohibit the chaplains from urging their parishioners to contact Congress concerning the Partial Birth Abortion Ban. Even if the Directive did restrict the contemplated speech, the regulation violated the chaplains' Free Exercise rights under RFRA and Free Speech rights under the First Amendment. Under RFRA, the court found that the restriction imposed a substantial burden upon the chaplains' exercise of religion but was not the least restrictive means of furthering a compelling a state interest. After determining that the base chapel was a designated public forum, the court concluded that the restriction discriminated impermissibly based upon the viewpoint of the speaker.

C. Reaction To The Case And The Decision Not To Appeal

Although the decision was susceptible to attack on a variety of legal grounds, the Department of Justice's decision not to appeal the case to the Circuit Court of Appeals undoubtedly took into consideration many factors. The reaction of two groups in particular suggests that Father Rigdon had their support and sympathy. First, Sen. Orin Hatch sent a personal letter to the President asking that he not appeal the case. Second, a number of newspaper articles strongly criticized the military and the President for "censoring" chaplains and suggested that the decision to limit the chaplains' activity was politically motivated.

1. Congressional Reaction

The Congressional Record does not contain any reaction to the case by members of Congress.¹²⁵ On June 3, 1997, however, Senator Orin Hatch (R-Utah) issued a press release detailing a letter in which he urged President Clinton to direct the Department of Justice and the

also involve the distribution of a government benefit. So long as it is willing to forego tax-exempt status, a religious organization can participate in the political process to the same extent as any other organization.

¹²⁵ A search of the LEXIS Nexis Congressional Record database of the terms "Rigdon" and "chaplain" retrieved no results.

Solicitor General not to appeal Judge Sporkin's decision.¹²⁶ In the letter, Sen. Hatch describes the case as upholding "the freedom of military chaplains to preach their consciences and the freedom of their congregations to hear *uncensored* sermons."¹²⁷ He further states that if the case is appealed, both the chaplains' and the congregations' religious freedom "will be threatened once again, for no good purpose."¹²⁸ While detailing the events that prompted the litigation, Sen. Hatch quotes from the legal memoranda issued by DoD and concludes that it forced the chaplains to choose between "religious and military duty."¹²⁹ Given the critical importance of religious rights to military personnel—"one of those precious freedoms that inspires the loyal service of our military men and women and the pride of all who hold American liberty precious"—Sen. Hatch asked the President not to appeal the case and to ensure that all branches of the service comply with the decision.¹³⁰

2. Press Coverage

The filing of the case was reported in six newspapers.¹³¹ A review of the six stories reveals that three quoted Father Rigdon, three quoted a representative of the Becket Fund for Religious Liberty, and three quoted either the TJAG letter or the DoD Directive. Two referred to the military's action as "censorship" and mentioned that the district court was reviewing past restraints

¹²⁶ *Chair Hatch Urges President To Not Appeal Military Religious Liberty Case*, Congressional Press Releases, June 3, 1997, available in LEXIS, Nexis Library, CURNWS File.

¹²⁷ *Id.* (emphasis added).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Military chaplains plumb church-state tar pit*, NATIONAL CATHOLIC REPORTER, Oct. 18, 1996, at 36; *Air Force chaplain sues over abortion lobby ban*, THE TIMES UNION (Albany, NY), Sept. 28, 1996, at C7; *Diego Ribadeneira, Reserve chaplain sues the military*, THE BOSTON GLOBE, Sept. 28, 1996, at B2; *Bradley Peniston, Religious servicemen file suit in abortion case*, THE CAPITAL (Annapolis, MD), Sept. 26, 1996, at A1; *Toni Locy, Priest Sues Military Over Speech Issues; Chaplains Couldn't Push Postcard Campaign*, THE WASHINGTON POST, Sept. 24, 1996, at A15; *Larry Witham, Military chaplains' role disputed; Catholics, others sue for right to fight partial-birth abortions*, THE WASHINGTON TIMES, Sept. 21, 1996, at A3, available in LEXIS, Nexis Library, CURNWS File.

of military chaplains. Finally, the story in the National Catholic Reporter noted that this issue would not arise if the chaplains were civilians rather than military officers.¹³²

The release of the court's opinion also spawned a series of news stories across the nation, although most were relegated to papers' back sections. An accurate re-statement of the case and the court's opinion appeared in the Washington Post¹³³ and the Abortion Report.¹³⁴ However, on April 16, 1997, five newspapers picked up a story written by Tony Snow of the Detroit News.¹³⁵ The story invoked images of President Clinton entering church on Sunday mornings only to require the Department of Defense to issue a Directive forbidding chaplains from urging members to speak out against partial-birth abortions. The articles quote from Judge Sporkin's opinion and characterize the military's legal opinion as a "gag order." Finally, it is argued that Clinton should not appeal the case because of the political opposition to the partial-birth procedure and because of his recent efforts to court conservative votes by expanding religious discussions in public forums.

IV. POLICY CONSIDERATIONS FOR FUTURE INCIDENTS

As highlighted by the legal examination conducted in Part I and II of this analysis, the military retains substantial authority to promulgate generally applicable regulations without violating the First Amendment rights of its personnel. Regulations of speech within a designated public forum are permissible so long as they are reasonable and viewpoint-neutral. If RFRA has

¹³² Father Rigdon did refute this claim, explaining that it was a question of inculturation. He further stated, however, that if church teaching indicated that "a certain war was 'an evil, unjust war and Catholics cannot participate,' he would not." It is unclear whether he would also encourage his congregants not to participate. NATIONAL CATHOLIC REPORTER, *supra* note 131.

¹³³ Toni Locy, *Military Chaplains' Rights Upheld; Ban on Urging Antiabortion Letters to Congress Faulted by Court*, THE WASHINGTON POST, Apr. 9, 1997, at A19, available in LEXIS, Nexis Library, CURNWS File.

¹³⁴ "Partial Birth": Judge Says Chaplains' Rights Violated, ABORTION REPORT, Apr. 10, 1997, available in LEXIS, Nexis Library, CURNWS File.

¹³⁵ Tony Snow, *On This Free-Speech Issue, Clinton Doesn't Have A Prayer*, SUN-SENTINEL COMPANY, Fort Lauderdale, Florida, May 3, 1997, at 15A; Tony Snow, *Judge Rejects Clinton Attack On Military Chaplains' Free Speech Rights*, ST. LOUIS POST-DISPATCH, Apr. 21, 1997, at 7B; Tony Snow, *Clinton shouldn't interfere in sermons*, THE DALLAS MORNING NEWS, Apr. 18, 1997, at 31A; Tony Snow, *Clinton tries to censor sermons*, THE CINCINNATI ENQUIRER, Apr. 16, 1997, at A14; Tony Snow, *Clinton was off base censoring a sermon*, THE DETROIT NEWS, Apr. 14, 1997, at A9, available in LEXIS, Nexis Library, CURNWS File.

not survived *Flores*, generally applicable regulations appear to be permissible even if substantial burdens are imposed upon religious exercise. If, on the other hand, RFRA remains applicable to the federal government, then a regulation that substantially burdens the exercise of religion is permitted only if it narrowly advances a compelling governmental interest. Congress has expressly stated, however, its expectation that the courts will continue to show substantial deference to the judgment of military authorities.¹³⁶

The current challenge is to specifically define those political activities that pose a substantial threat to the maintenance of a politically neutral military. Once those activities are identified, the language of the regulations may be clarified to prevent any confusion as to the application of the restrictions. This endeavor will have the benefit of providing the military with a solid legal foundation to enforce the prohibitions. It will also ensure that military personnel have a clear understanding of the political activities in which they are permitted to engage, thereby dissipating any chilling effect that a more general prohibition may impose.

A. Clarify Impermissible Political Activities

The limitations imposed on the political activities of military personnel are outlined in DoDD 1344.10,¹³⁷ AFD 51-9,¹³⁸ and AFI 51-902.¹³⁹ Because the restrictions are most specifically listed in AFI-902, it will be the primary subject of this discussion. The AFI is punitive in its entirety. AFI 51-903 also requires that Air Force members obtain the permission of the installation commander before distributing or posting any unofficial printed or written material on-base.¹⁴⁰ Finally, the Anti-Lobbying Act, 18 U.S.C § 1913, prohibits the use of appropriated funds for

¹³⁶ See *supra* note 68.

¹³⁷ Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty (June 15, 1990). See Appendix A.

¹³⁸ Air Force Policy Directive 51-9, Civil Law for Individuals (Nov. 5, 1993). See Appendix B.

¹³⁹ Air Force Instruction 51-902, Political Activities by Members of the US Air Force (Jan. 1, 1996). See Appendix C.

lobbying activities. The chaplain has at his disposal, however, non-appropriated funds that may be used to copy postcards or print fliers. Both chaplains and other military personnel could also use personal funds to copy and distribute material. Consequently, the Act does not appear to be applicable and will not be discussed in this context.

Limitations on the political activities of military personnel appear to be imposed for two related purposes. The first purpose is to guarantee the appearance and reality of civilian supremacy over the military. The military must be prevented from appearing to endorse a particular candidate or political issue and from impacting the ultimate decisions reached by civilian leaders. This restraint ensures that civilian authorities and the public will be confident in the military's proper subordination. Perhaps the greatest threat to civilian control, as identified by Chief Justice Burger in *Greer v. Spock*, is the commander who attempts to deliver his soldier's votes to a particular candidate.¹⁴¹

The second purpose served by limiting the political activities of military members is to prevent divisive political issues from jeopardizing the readiness of the unit. Heated discussions over controversial political issues have the potential to seriously disrupt the efficient operation of the workplace. Additionally, co-workers are likely to feel resentment if they perceive that pressure is being placed on them to agree with or support a co-worker's political position.

In order to serve both of these purposes, AFI 51-902 draws a distinction between partisan political activities and non-partisan activities. Partisan activities are defined as those activities "supporting or relating to candidates who represent, or issues specifically identified with, national or state political parties or associated or ancillary organizations," and include all candidates for

¹⁴⁰ Air Force Instruction 51-903, ¶2, Dissident and Protest Activities (Feb. 1, 1998). See Appendix D. The base commander has the authority to prohibit distribution of the material if it poses a clear danger to the loyalty, discipline, or morale of military members or interferes with accomplishing the military mission. *Id.* ¶ 2.2.

¹⁴¹ 424 U.S. 828, 842 (1976). See *supra* note 94.

national or state office.¹⁴² Nonpartisan activities are defined as those activities “supporting or relating to candidates who do not represent, or issues not specifically identified with, national or state political parties or associated or ancillary organizations,” including “issues relating to constitutional amendments, referenda, approval of municipal ordinances, and others of similar character which are not considered identified with national or state political parties.”¹⁴³ The majority of prohibitions contained in AFI 52-902 concern partisan political activities. In order to prevent the perception of official endorsement, military personnel are also prevented from appearing at certain nonpartisan events in uniform¹⁴⁴ or from identifying themselves as representatives of the Air Force in certain circumstances.¹⁴⁵

As applied to the activities of military chaplains, it seems clear that if the chaplain were to advocate for a partisan political cause then AFI 51-902 would be violated. This would be true, of course, regardless of whether the advocate was a chaplain or a basic airman. It appears, however, that Partial Birth Abortion ban and the abortion controversy in general are not identified with any political party and, therefore, qualify as nonpartisan political activities.

The question that remains is whether any prohibition contained within AFI 51-902 does, or should, reach the advocacy of a nonpartisan political issue. The most pertinent provision in the AFI is paragraph 3.1, which provides that Air Force members may not “[u]se official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a

¹⁴² AFI 51-902, *supra* note 139, ¶ 2.4.

¹⁴³ *Id.* ¶ 2.3.

¹⁴⁴ *Id.* ¶ 4.3-4.5, ¶ 4.8.

¹⁴⁵ *Id.* ¶ 3.13, ¶ 4.1, ¶ 4.6. *See also* Banks v. Ball, 705 F.Supp. 282 (E.D. Virginia, 1989) (concluding that Naval Reservist's interests in communicating on matter of public concern with Congress on official stationery without authorization in violation of Article 1149 of Navy Regulations was outweighed by military's national security interest in uniformity, esprit de corps and efficiency under the *Pickering* test, and that Article 1149 was a proper time, place, and manner regulation) *aff'd sub nom.* Banks v. Garrett, 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 821 (1990), *reh'g denied*, 498 U.S. 993 (1990).

particular candidate or issue, or to require or solicit political contributions from others.”¹⁴⁶ To answer this question, the two provisions at issue in *Rigdon*—the meanings of “official authority or influence” and “particular candidate or issue”—should be specifically defined.

1. Clarify The Meaning Of “Official Authority Or Influence”

The term “official authority or influence” can be clarified in a variety of ways. The first option is to simply delete the word “influence” from the sentence. The term “official authority” would then be the equivalent of “military authority” as used in 18 U.S.C. § 609, which limits the use of military authority to influence the vote of military members.¹⁴⁷ “Official authority” could be defined as “the authority of a military member to issue orders on behalf of the Air Force.” It would prohibit any military personnel from invoking the authority granted by the Air Force to interfere with a subordinate’s vote or support for a particular candidate or issue.

The second option would be to replace the phrase “official authority or influence” with the words “official authority or position.” “Official position” could be defined as “the prestige or influence possessed by a military member by virtue of his or her position within the Air Force.” The advantage of this definition is that it does not depend on the ability of the member to issue orders to the audience in question. Therefore, it could be read to apply to those members who are not in command positions, to include chaplains, members of the medical profession, and Judge Advocates. In fact, the prohibition would be independent of the rank of the member. It could be applied to the efforts of an enlisted member on Wing Staff to influence the vote of a junior officer if the enlisted member attempts to invoke the prestige of his position to convince or influence that officer.

¹⁴⁶ AFI 51-902, *supra* note 139, ¶ 3.1. This paragraph closely parallels the language of DoDD 1344.10, *supra* note 137, ¶ D(1)(b)(1).

¹⁴⁷ See DoDD 1344.10, *supra* note 137, Enclosure 2.

The third option would be to merely include a definition of "official authority or influence" in the AFI. "Official influence" could be defined as "the influence possessed by the member by virtue of his position in the Air Force." The advantages of this option are nearly identical to the advantages of the second option. It would make the prohibition applicable to members who do not have specific command authority as well as subordinates who invoke the prestige of their position to influence other members, regardless of their rank.

2. Clarify The Meaning Of "Particular Candidate or Issue"

In order to protect further the military's interests in political neutrality, the term "particular candidate or issue" could also be clarified. The emphasis of the paragraph appears to be on interference with the election process. The first option, therefore, would be to replace "particular issue" with the words "particular ballot issue." This definition would apply to both partisan and nonpartisan issues and limit the paragraph's prohibitions to efforts to interfere with an individual's "vote" during the election process. It would not apply to efforts to interfere with or influence other phases of the political process.

The second option would be to replace the word "issue" with "issues specifically identified with national or state political parties or associated or ancillary organizations." This phrase is the definition of partisan political issue contained in paragraph 2.4. Because it would permit the member to solicit votes for nonpartisan political issues, this option would be less restrictive than the first option. This limitation would be consistent with the line drawn throughout the instruction prohibiting a host of partisan political activities. However, to the extent that the public or civilian leaders could perceive that the military has swung its support to a particular nonpartisan issue, it would not protect the military's interest in political neutrality. It also would not prevent divisive political issue from posing a substantial disruption to workplace.

The third option would be to replace the words "solicit votes" and "issue" with the phrase "solicit votes or support for a particular candidate, for a partisan or nonpartisan ballot issue, or any specific legislative action." The phrase "specific legislative action" is taken from paragraph 4.6, which permits a member to sign a petition under certain circumstances. This option would prevent the member from attempting to influence not only an individual's vote in an election, but would also prevent the member from attempting to solicit support for matters before either Congress or a state legislature. Consequently, it would reach the type of advocacy at issue in *Rigdon* and offer substantial protection to the maintenance of a politically-disinterested military.

The final option would be to replace the words "solicit votes" and "issue" with the phrase "solicit votes or support for a particular candidate, for a partisan or nonpartisan ballot issue, or any action pending before or contemplated by a legislative body or regulatory executive agency." The word "regulatory" is inserted to exempt policy issues internal to the Department of Defense or the Air Force. The advantage of this option is that would prevent a military member from using the official authority of the Air Force to influence others to support or interfere with *any* portion of the political process. It would apply not only to an abortion bill pending before Congress, but also to a proposed rule change before the F.C.C. Since there would not appear to be any justification for a member to use official authority to "solicit votes or support" for this list of political action, this option would provide comprehensive protection of the military's interests.

B. Incorporate The Prior Review Provision Into AFI 51-902

AFI 51-903, entitled Dissent and Protest Activities, prohibits military members from distributing or posting "any printed or written material, other than publications of an official government agency or base-regulated activity, within any Air Force installation without the

permission of the installation commander or that commander's designee."¹⁴⁸ The commander may prohibit distribution or posting if the material would pose a clear danger to the loyalty, discipline, or morale of military members or interfere with the accomplishment of the military mission.¹⁴⁹ In *Brown v. Glines*, the Supreme Court upheld a prior review provision from constitutional attack.¹⁵⁰

Although this prohibition would appear to apply to the distribution of political literature, this type of action may not be considered to be "dissident or protest activity." Additionally, the threat may not necessarily be to the good order and discipline of the military, but instead may be to the maintenance of a politically-disinterested force. Consequently, a similar provision could be inserted into AFI 51-902. It would require the approval of the installation commander to distribute or post any political material within the installation and authorize the commander to deny permission to any material that poses a clear danger to a politically neutral force.

CONCLUSION

Conflicts between the interests protected by military commanders and the activities of military chaplains are rare. In most instances, the spiritual and religious guidance provided by the chaplain will be beneficial to the morale and efficiency of the commander's unit. Religious organizations and individual ministers increasingly lecture, however, on a breadth of social issues and advocate for a variety of political causes. When chaplains cross the line between religious teaching and political lobbying, the military's interest in maintaining a political-disinterested force is threatened. By carefully and narrowly detailing the prohibited political activities of military personnel in generally applicable regulations, that line can be maintained without violating the First Amendment rights of servicemembers.

¹⁴⁸ AFI 51-903, *supra* note 140, ¶ 2.

¹⁴⁹ *Id.* ¶ 2.2.

¹⁵⁰ 444 U.S. 348 (1980). See Appendix E notes 240-55 and accompanying text.

Department of Defense
DIRECTIVE

June 15, 1990
DODD 1344.10

ASD(FM&P)

SUBJECT: Political Activities by Members of the Armed Forces on Active Duty.

References: (a) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces," September 25, 1986 (hereby canceled)
(b) Title 10, United States Code
(c) DoD Directive 5200.2, "DoD Personnel Security Program," December 20, 1979
(d) DoD Directive 1325.6, "Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces," September 12, 1969
(e) Title 5, United States Code
(f) DoD Directive 1334.1, "Wearing of the Uniform," August 11, 1969
(g) Title 2, United States Code, Sections 441a, 441f, and 441g
(h) Title 18, United States Code, Sections 592 through 594, 596, 602 through 603, 606 through 607, and 609

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a) to update DoD policies on political of members of the Armed Forces on active duty (AD).
2. Implements Section 973(b) of reference (b).

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense (OSD); the Military Departments; the Chairman, Joint Chiefs of Staff and Joint Staff; the Unified and Specified Commands; and the Coast Guard when it is not operating as a Service in the Navy, by agreement with the Department of Transportation.

C. DEFINITIONS

1. Active Duty (AD). Full-time duty in the active Military Service of the United States without regard to duration or purpose, including fulltime training duty; annual training duty; attendance, while in the active Military Service, at a school designated as a Service school by law or by the Secretary of the Military Department concerned; and National Guard duty, as defined in 10 U.S.C. 101(42) (reference (b)).

2. Armed Forces. The U.S. Army, Navy, Air Force, Marine Corps, and Coast Guard, including the Reserve components and the National Guard, as defined in 10 U.S.C. 101(9), 101(10), and 101(12) (reference (b)).

3. Civil Office. A nonmilitary office involving the exercise of the powers or authority of civil government, to include elective and appointive office in the U.S. Government, a U.S. territory or possession, State, county, municipality, or official subdivision thereof.

4. Extended Active Duty (EAD). AD under a call or order for a period in excess of 180 days.

5. Nonpartisan Political Activity. Activity supporting or relating to candidates not representing, or issues not specifically identified with, national or State political parties and associated or ancillary organizations. Issues relating to constitutional amendments, referendums, approval of municipal ordinances, and others of similar character are not considered under this Directive as specifically being identified with national or State political parties.

6. Partisan Political Activity. Activity supporting or relating to candidates representing, or issues specifically identified with, national or State political parties and associated or ancillary organizations.

7. Secretary Concerned. Defined in 10 U.S.C. 101(8) (reference (b)).

D. POLICY

It is DoD policy that a member of the Armed forces (hereafter referred to as "member") is encouraged to carry out the obligations of a citizen. While on AD, however, members are prohibited from engaging in certain political activities. Subject to the guidelines in enclosure 1, the following DoD policy shall apply:

1. General

a. A member on AD may:

(1) Register, vote, and express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

(2) Make monetary contributions to a political organization.

(3) Attend partisan and nonpartisan political meetings or rallies as a spectator when not in uniform.

b. A member on AD shall not:

(1) Use his or her official authority or influence for interfering with an election; affecting the course or outcome of an election; soliciting votes for a particular candidate or issue; or requiring or soliciting political contributions from others.

(2) Be a candidate for, or hold, civil office except as authorized in subsections D.2. and D.3., below.

(3) Participate in partisan political management, campaigns, or conventions.

(4) Make campaign contributions to another member of the Armed Forces or an employee of the Federal Government.

c. To assist in applying paragraphs D.1.a. and D.1.b., above, to particular situations, enclosure 1 provides guidelines and examples of permissible and prohibited political activities. The guidelines in enclosure 1 do not supersede other specific requirements and policies, such as those established in DoD Directives 5200.2 and 1325.6 (references (c) and (d)).

d. Enclosure 2 provides a summary of Federal statutes restricting certain types of political activities by members of the Armed Forces.

2. Candidacy for Elective Office. A member on AD may not:

a. Campaign as a nominee, or as a candidate for nomination, for civil office, except as authorized in paragraph D.3.c., below. When circumstances warrant, the Secretary concerned or the Secretary's designee may permit a member to file such evidence of nomination or candidacy for nomination, as may be required by law. Such permission shall not authorize activity while on AD that is otherwise prohibited in paragraph D.1.b., above, or enclosure 1 or 2.

b. Become a candidate for any civil office while serving an initial tour of extended active duty (EAD) or a tour of EAD that the member agreed to perform as a condition of receiving schooling or other training wholly or partly at U.S. Government expense.

3. Election or Appointment to Civil Office

a. Except as authorized by paragraph D.3.c., below, or otherwise provided for by law, no member on AD may hold or exercise the functions of civil office:

(1) In the U.S. Government that:

(a) Is an elective office.

(b) Requires an appointment by the President by and with the advice and consent of the Senate.

(c) Is a position on the executive schedule under sections 5312 through 5317 of reference (e)

(2) In the government of a State; the District of Columbia; a territory, possession, or commonwealth of the United States; or in any political subdivision thereof.

b. A member may hold or exercise the functions of a civil office in the U.S. Government that is not described in subparagraph D.3.a.(1), above, when assigned or detailed to such office or to perform such functions.

c. As long as they are not serving on EAD, enlisted members and Reserve officers may hold partisan or nonpartisan civil office if such office is held in a private capacity and does not interfere with the performance of military duties. Additionally, enlisted members on EAD may seek and hold nonpartisan civil office as a notary public or member of a school board, neighborhood planning commission, or similar local agency, as long as such office is held in a private capacity and does not interfere with the performance of military duties. Officers on active duty may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.

d. Unless prohibited by Service regulations, a member on AD may serve as a regular or reserve civilian law enforcement officer or as a member of a civilian fire or rescue squad. Such service shall be in a private capacity, shall not involve the exercise of military authority, and shall not interfere with the performance of military duties.

e. A member elected or appointed to a prohibited civil office may request retirement and shall be retired if eligible for retirement. If such member does not request or is not eligible for retirement, the member shall be discharged or released from AD, as determined by the Secretary concerned.

f. The separation and retirement requirements of paragraph D.3.e., above, do not apply if the member declines to serve in the prohibited office; if the Secretary concerned determines that the member should not be released from active duty based on the needs of the Service; or if the member is:

- (1) Obligated to fulfill an AD Service commitment.
- (2) Serving or has been issued orders to serve afloat or in an area that is overseas, remote, a combat zone, or a hostile fire pay area.
- (3) Ordered to remain on AD while the subject of an investigation or inquiry.
- (4) Accused of an offense under the Uniform Code of Military Justice (UCMJ), 10 U.S.C., chapter 47 (reference (b)), or serving a sentence or punishment for such offense. (5) Pending administrative separation action or proceedings.
- (5) Pending administrative separation action or proceedings.

(6) Indebted to the United States.

(7) On AD during a period of declared war, a national emergency, or other period when a unit of the Reserves or National Guard has been called to AD.

(8) In violation of an order or regulation prohibiting such member from assuming or exercising the functions of civil office.

g. A member who refuses to decline to serve in a prohibited civil office after being denied separation or retirement in accordance with paragraph D.3.f., above, may be subject to disciplinary or adverse administrative action under Service regulations.

h. No actions undertaken by a member in carrying out assigned military duties shall be invalidated solely by virtue of such member having assumed or exercised the functions of a civil office in violation of subsection D.3., above.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) shall be responsible for the administration of this Directive.

2. The Secretaries of the Military Departments shall be responsible for issuance of appropriate implementing documents for their respective Departments.

F. PROCEDURES

All members of the Armed Forces on AD engaging in political activities shall follow the guidelines in enclosure 1.

G. EFFECTIVE DATE AND IMPLEMENTATION

This Directive is effective immediately. The Secretaries of the Military Departments shall forward one copy of implementing documents to the Assistant Secretary of Defense (Force Management and Personnel) within 120 days.

GUIDELINES ON POLITICAL ACTIVITIES

A. PURPOSE

This enclosure provides guidance for implementing this Directive.

B. EXAMPLES OF PERMISSIBLE POLITICAL ACTIVITIES

A member on active duty may:

1. Register, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces.
2. Promote and encourage other military members to exercise their voting franchise, if such promotion does not constitute an attempt to influence or interfere with the outcome of an election.
3. Join a political club and attend its meetings when not in uniform. (See DoD Directive 1334.1, reference (f).)
4. Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the Secretary concerned or the Secretary's designee.
5. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen and not as a representative of the Armed Forces.
6. Write a letter to the editor of a newspaper expressing the member's personal views on public issues or political candidates, if such action is not part of an organized letter-writing campaign or concerted solicitation of votes for or against a political party or partisan political cause or candidate.
7. Make monetary contributions to a political organization, party, or committee favoring a particular candidate or slate of candidates, subject to the limitations under 2 U.S.C. 441a and 18 U.S.C. 607 (references (g) and (h)).
8. Display a political sticker on the member's private vehicle.

C. EXAMPLES OF PROHIBITED POLITICAL ACTIVITIES

In accordance with the statutory restrictions in 10 U.S.C. 973(b) (reference (b)) and

Enclosure 1

references (g) and (h), and the policies established in section D., above, of this Directive, a member on AD shall not:

1. Use official authority or influence to interfere with an election, affect the course or outcome of an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others.
2. Be a candidate for civil office in Federal, State, or local government, except as authorized in section D., above, of this Directive, or engage in public or organized soliciting of others to become partisan candidates for nomination or election to civil office.
3. Participate in partisan political management or campaigns, or make public speeches in the course thereof.
4. Make a campaign contribution to another member of the Armed Forces or to a civilian officer or employee of the United States for promoting a political objective or cause.
5. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for promoting a political objective or cause.
6. Allow or cause to be published partisan political articles signed or written by the member that solicit votes for or against a partisan political party or candidate.
7. Serve in any official capacity or be listed as a sponsor of a partisan political club.
8. Speak before a partisan political gathering of any kind for promoting a partisan political party or candidate.

9. Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate.

10. Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature.

11. Use contemptuous words against the officeholders described in 10 U.S.C. 888 (reference (b)), or participate in activities proscribed by DoD Directives 5200.2 and 1325.6 (references (c) and (d)).

12. Perform clerical or other duties for a partisan political committee during a campaign or on an election day.

13. Solicit or otherwise engage in fundraising activities in Federal offices or facilities, including military reservations, for a partisan political cause or candidate.

14. March or ride in a partisan political parade.

15. Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on the top or side of a private vehicle.

16. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by, or associated with, a partisan political party or candidate.

17. Sell tickets for, or otherwise actively promote, political dinners and similar fundraising events.

18. Attend partisan political events as an official representative of the Armed Forces.

D. POLITICAL ACTIVITIES NOT EXPRESSLY PERMITTED OR PROHIBITED

Some activities not expressly prohibited may be contrary to the spirit and intent of section D. of the Directive or section C. of this enclosure. In determining whether an activity violates the traditional concept that Service members should not engage in partisan political activity, rules of reason and common sense shall apply. Any activity that may be viewed as associating the Department of Defense or the Department of Transportation, in the case of the Coast Guard, or any components of such Departments directly or indirectly with a partisan political cause or candidate shall be avoided.

E. LOCAL NONPARTISAN POLITICAL ACTIVITIES

This Directive does not preclude participation in local nonpartisan political campaigns, initiatives, or referendums. A member taking part in local nonpartisan political activity, however, shall not:

1. Wear a uniform or use any Government property or facilities while participating.
2. Allow such participation to interfere with, or prejudice, the member's performance of military duties.
3. Engage in conduct that in any way may imply that the Department concerned or any component of such Department has taken an official position on, or is otherwise involved in, the local political campaign or issue.

F. ADDITIONAL REQUIREMENTS

Members of the Armed Forces on AD engaging in permissible political activities shall:

1. Give full time and attention to the performance of military duties during prescribed duty hours.
2. Avoid any outside activities that may be prejudicial to the performance of military duties or are likely to bring discredit upon the Armed Forces.
3. Refrain from participating in any political activity while in military uniform, as proscribed by DoD Directive 1334.1 (reference (f)), or using Government facilities or resources for furthering political activities.

STATUTORY RESTRICTIONS PERTAINING TO POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES

Members of the Armed Forces are prohibited by various provisions of titles 10, 2, and 18, United States Code (references (b), (g), and (h)), from engaging in certain types of political activities. The statutory provisions most directly applicable to members of the Armed Forces are as follows:

"Title 10 U.S.C. Sec. 973. Duties: officers on active duty; performance of civil functions restricted

"(a) No officer of an armed force on active duty may accept employment if that employment requires him to be separated from his organization, branch, or unit, or interferes with the performance of his military duties.

"(b) (1) This subsection applies--

(A) to a regular officer of an armed force on the active-duty list (and a regular officer of the Coast Guard on the active duty promotion list);

(B) to a retired regular officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days; and

(C) to a reserve officer of an armed force serving on active duty under a call or order to active duty for a period in excess of 180 days.

(2) (A) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States--

(i) that is an elective office;

(ii) that requires an appointment by the President by and with the advice and consent of the Senate; or

(iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.

(B) An officer to whom this subsection applies may hold or exercise the function of a civil office in the Government of the United

States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

(3) Except as otherwise authorized by law, an officer to whom this subsection applies may not hold or exercise, by election or appointment, the functions of a civil office in the government of a State, the District of Columbia, or a territory, possession, or commonwealth of the United States (or of any political subdivision of any such government).

(4) Nothing in this subsection shall be construed to invalidate any action undertaken by an officer in furtherance of assigned official duties.

"(c) an officer to whom subsection (b) applies may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation.

"(d) The Secretary of Defense, and the Secretary of Transportation with respect to the Coast Guard when it is not operating in the Navy, shall prescribe regulations to implement this section."

"Title 2 U.S.C. Sec. 441a. Limitations on contributions and expenditures

"(a) Dollar limits on contributions

(1) No person shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate in any calendar year which, in the aggregate, exceed \$20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

(2) No multicandidate political committee shall make contributions--

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed \$15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed \$5,000.

(3) No individual shall make contributions aggregating more than \$25,000 in any calendar year. For purposes of this paragraph, any contribution made to a candidate in a year other than the calendar year in which the election is held with respect to which such contribution is made is considered to be made during the calendar year in which such election is held.

(8) For purposes of the limitations imposed by this section, all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate. The intermediary or conduit shall report the original source and the intended recipient of such contribution to the Commission and to the intended recipient.

"Title 2 U.S.C. Sec. 441f. Contributions in the name of another prohibited "No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such contribution, and no person shall knowingly accept a contribution made by one person in the name of another person."

"Title 2 U.S.C. Sec. 441g. Limitation on contribution of currency

"No person shall make contributions of currency of the United States or currency of any foreign country to or for the benefit of any candidate which, in the aggregate, exceed \$100, with respect to any campaign of such candidate for nomination for election, or for election, to Federal office."

"Title 18 U.S.C. Sec. 592. Troops at polls

"Whoever, being an officer of the Army or Navy, or other person in the civil, military, or naval service of the United States, orders, brings, keeps, or has under his authority or control any troops or armed men at any place where a general or special election is held, unless such forces be necessary to repel armed enemies of the United States, shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and be disqualified from holding any office of honor, profit, or trust under the United States.

"This section shall not prevent any officer or member of the armed forces of the United States from exercising the right of suffrage in any election district to which he may belong, if otherwise qualified according to the laws of the State in which he offers to vote."

"Title 18 U.S.C. Sec. 593. Interference by armed forces

"Whoever, being an officer or member of the Armed Forces of the United States, prescribes or fixes or attempts to prescribe or fix, whether by proclamation, order or otherwise, the qualifications of voters at any election in any State; or

"Whoever, being such officer or member, prevents or attempts to prevent by force, threat, intimidation, advice or otherwise any qualified voter of any State from fully exercising the right of suffrage at any general or special election; or

"Whoever, being such officer or member, orders or compels or attempts to compel any election officer in any State to receive a vote from a person not legally qualified to vote; or

"Whoever, being such officer or member, imposes or attempts to impose any regulations for conducting any general or special election in a State, different from those prescribed by law; or

"Whoever, being such officer or member, interferes in any manner with an election officer's discharge of his duties--

"Shall be fined not more than \$5,000 or imprisoned not more than five years, or both; and disqualified from holding any office of honor, profit or trust under the United States.

"This section shall not prevent any officer or member of the Armed Forces from exercising the right of suffrage in any district to which he may

belong, if otherwise qualified according to the laws of the State of such district."

"Title 18 U.S.C. Sec. 594. Intimidation of voters

"Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined not more than \$1,000 or imprisoned not more than one year, or both."

"Title 18 U.S.C. Sec. 596. Polling armed forces

"Whoever, within or without the Armed Forces of the United States, polls any member of such forces, either within or without the United States, either before or after he executes any ballot under any Federal or State law, with reference to his choice of or his vote for any candidate, or states, publishes, or releases any result of any purported poll taken from or among the members of the Armed Forces of the United States or including within it the statement of choice for such candidate or of such votes cast by any member of the Armed Forces of the United States, shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

"The word 'poll' means any request for information, verbal or written, which by its language or form of expression requires or implies the necessity of an answer, where the request is made with the intent of compiling the result of the answers obtained, either for the personal use of the person making the request, or for the purpose of reporting the same to any other person, persons, political party, unincorporated association or corporation, or for the purpose of publishing the same orally, by radio, or in written or printed form."

"Title 18 U.S.C. Sec. 602. Solicitation of political contributions

"It shall be unlawful for--

(1) a candidate for the Congress;

(2) an individual elected to or serving in the office of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;

(3) an officer or employee of the United States or any department or agency thereof; or

(4) a person receiving any salary or compensation for services from money derived from the Treasury of the United States to knowingly solicit, any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 from any other such officer, employee, or person. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both."

"Title 18 U.S.C. Sec. 603. Making political contributions

"(a) It shall be unlawful for an officer or employee of the United States or any department or agency thereof, or a person receiving any salary or compensation for service from money derived from the Treasury of the United States, to make any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 to any other such officer, employee or person or to any Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, if the person receiving such contribution is the employer or employing authority of the person making the contribution. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

"(b) For purposes of this section, a contribution to an authorized committee as defined in section 302(e) (1) of the Federal Election Campaign Act of 1971 shall be considered a contribution to the individual who has authorized such committee."

"Title 18 U.S.C. Sec. 606. Intimidation to secure political contributions

"Whoever, being one of the officers or employees of the United States mentioned in section 602 of this title, discharges or promotes, or degrades, or in any manner changes the official rank or compensation of any other officer or employee, or promises or threatens so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose, shall be fined not more than \$5,000 or imprisoned not more than three years, or both."

"Title 18 U.S.C. Sec. 607. Place of solicitation

"(a) It shall be unlawful for any person to solicit or receive any contribution within the meaning of section 301(8) of the Federal Election Campaign Act of 1971 in any room or building occupied in the discharge of official duties by any person mentioned in section 603, or in any navy yard, fort, or arsenal. Any person who violates this section shall be fined not more than \$5,000 or imprisoned not more than three years, or both.

"(b) The prohibition in subsection (a) shall not apply to the receipt of contributions by persons on the staff of a Senator or Representative in, or Delegate or Resident Commissioner to, the Congress, provided, that such contributions have not been solicited in any manner which directs the contributor to mail or deliver a contribution to any room, building, or other facility referred to in subsection (a), and provided that such contributions are transferred within seven days of receipt to a political committee within the meaning of section 302(e) of the Federal Election Campaign Act of 1971."

"Title 18 U.S.C. Sec. 609. Use of military authority to influence vote of member of Armed Forces

"Whoever, being a commissioned, noncommissioned, warrant, or petty officer of an Armed Force, uses military authority to influence the vote of a member of the Armed Forces or to require a member of the Armed Forces to march to a polling place, or attempts to do so, shall be fined in accordance with this title or imprisoned not more than five years, or both. Nothing in this section shall prohibit free discussion of political issues or candidates for public office."

Donald J. Atwood
Deputy Secretary of Defense

Enclosures - 2

1. Guidelines on Political Activities
2. Statutory Restrictions Pertaining to Political Activities by Members of the Armed Forces

5 NOVEMBER 1993



Law

CIVIL LAW FOR INDIVIDUALS

NOTICE: This publication is available digitally on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>. If you lack access, contact your Publishing Distribution Office (PDO).

OPR: HQ USAF/JAG
(Lt Col C. Cheatham)

Certified by: HQ USAF/JA
(Maj Gen Nolan Sklute)

Pages: 7

Distribution: F

1. Air Force personnel must be aware that certain activities are prohibited by law or policy. To maintain good order and discipline, installation commanders must be informed of the legal basis for restricting activities of individuals. Commanders must be aware of their responsibilities for complaints made under the Uniform Code of Military Justice (UCMJ). This directive establishes policies for identifying prohibited activities, states the legal basis for those prohibitions and for restrictions which may be imposed by installation commanders, provides for prosecution of civilians for misdemeanors committed on Air Force installations, and requires timely and equitable consideration of Article 138, UCMJ complaints.
2. The US Constitution prohibits any person holding any office of profit or trust under the United States from accepting gifts from foreign governments without the consent of the Congress. Air Force military and civilian personnel (including experts and consultants and their dependents) must not accept gifts from foreign governments except as authorized by Title 5, United States Code, Section 7342, and according to instructions implementing this directive (AFI 51-901, *Gifts From Foreign Governments*).
3. The Air Force must maintain political neutrality. Air Force members on active duty, including members of the Air Force Reserve on active duty or active duty for training and members of the Air National Guard when federalized, must not engage in political activities on or off duty that are prohibited by Federal law or by instructions implementing this directive (AFI 51-902, *Political Activities by Members of the US Air Force*).
4. Demonstrations or other activities within an Air Force installation which could result in interfering with or preventing the orderly accomplishment of the installation mission or which present a clear danger to loyalty, discipline, or morale of members of the Armed Forces are prohibited.
 - 4.1. Distribution or posting of printed or written materials on Air Force installations is prohibited without prior approval of the installation commander.
 - 4.2. Air Force members must not participate in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result.

- 4.3. Air Force members must not actively participate in organizations that support supremacist causes or that attempt to create illegal discrimination based on race, creed, color, sex, religion, national origin, or ethnic group and will not actively participate in organizations which advocate the use of force or violence or otherwise engaging in efforts to deprive individuals of their civil rights. Mere membership in these organizations is not prohibited.
5. All Air Force personnel must comply with the provisions of Title 10, United States Code, Section 976, and must not engage in negotiation, collective bargaining, or other representational or organizational activities prohibited by law or by instructions implementing this directive (AFI 51-906, *Representational and Organizational Activities of Military Personnel*).
6. Civilians who commit misdemeanor violations of Federal law on military reservations under Air Force control in the United States or Puerto Rico may be tried before a US Magistrate according to the Federal law and instructions implementing this directive (AFI 51-905, *Use of Magistrates for Trial of Misdemeanors Committed by Civilians*). Active duty Air Force members shall not be so tried; rather appropriate action will be taken by military commanders.
7. Air Force commanders must act on Article 138, UCMJ, complaints submitted by Air Force members, grant redress where warranted, and process such complaints according to instructions implementing this directive (AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*). This paragraph does not apply to Air National Guard units and members, unless called into Federal service.
8. The Judge Advocate General, Headquarters US Air Force, shall be responsible for interpreting this directive and its implementing instructions.
9. The prohibitions and restrictions on individual activities apply to military and civilian Air Force personnel, including the Air Force Reserve and Air National Guard when federalized, and may also apply to the activities of other individuals present on Air Force installations. Violations of specific prohibitions and requirements of this directive or its implementing instructions by military personnel may result in punishment under Article 92 of the UCMJ. Violations by civilian employees may result in administrative disciplinary action without regard to otherwise applicable criminal or civil sanctions for violation of related laws.
10. Measures of compliance are described and displayed in Attachment 1.
11. Related laws and Department of Defense (DoD) directives are listed in Attachment 2.
12. Implementing Air Force Instructions (AFI) are listed in Attachment 3.

NOLAN SKLUTE, Maj General, USAF
The Judge Advocate General

Attachment 1

MEASURING COMPLIANCE WITH POLICY

A1.1. Compliance with policies regarding Article 138, UCMJ, will be assessed by reviewing deficiency reports which shall be provided to The Judge Advocate General (HQ USAF/JA) on a semiannual basis on or before 1 February and 1 August **Figure A1.1.**

A1.2. The General Law Division, HQ USAF/JAG, will compile deficiency information from the complaint files reviewed by that office. The report will identify complaints filed which were not properly acted on by the general court-martial convening authority (GCMCA). This consists of cases where the GCMCA failed to grant warranted redress, and cases returned to the GCMCA because insufficient inquiries were conducted into the underlying complaints **Figure A1.2.**

A1.3. Failures to grant warranted relief will be assessed by identifying cases where the GCMCA could have granted relief, did not, but relief was subsequently granted by the Secretary of the Air Force.

A1.4. Semiannual reports will be prepared for the calendar year. The second semiannual report for each year will also be an annual report and will include information about the second 6 months of each calendar year as well as cumulative information for the entire calendar year.

A1.5. The reports will not require collection of information from major commands or field operating agencies. All Article 138 complaints acted on by a GCMCA are reviewed by HQ USAF/JAG. HQ USAF/JAG files contain all information necessary to prepare the report.

A1.6. The reports will be prepared by the Air Force General Law Division in the format provided in **Figure A1.2.** measuring total complaints received at HQ USAF/JAG and total cases returned for deficiencies for each reporting period.

Figure A1.1. Sample Article 138 Deficiency Report.

HQ USAF/JAG

(Semiannual) (Annual) Report on Article 138, UCMJ Complaints

HQ USAF/JA

1. This report is required by AFD 51-9, *Civil Law for Individuals*, and measures compliance with policies for resolving Article 138, UCMJ, complaints. It covers complaints reviewed for the Secretary of the Air Force during the period

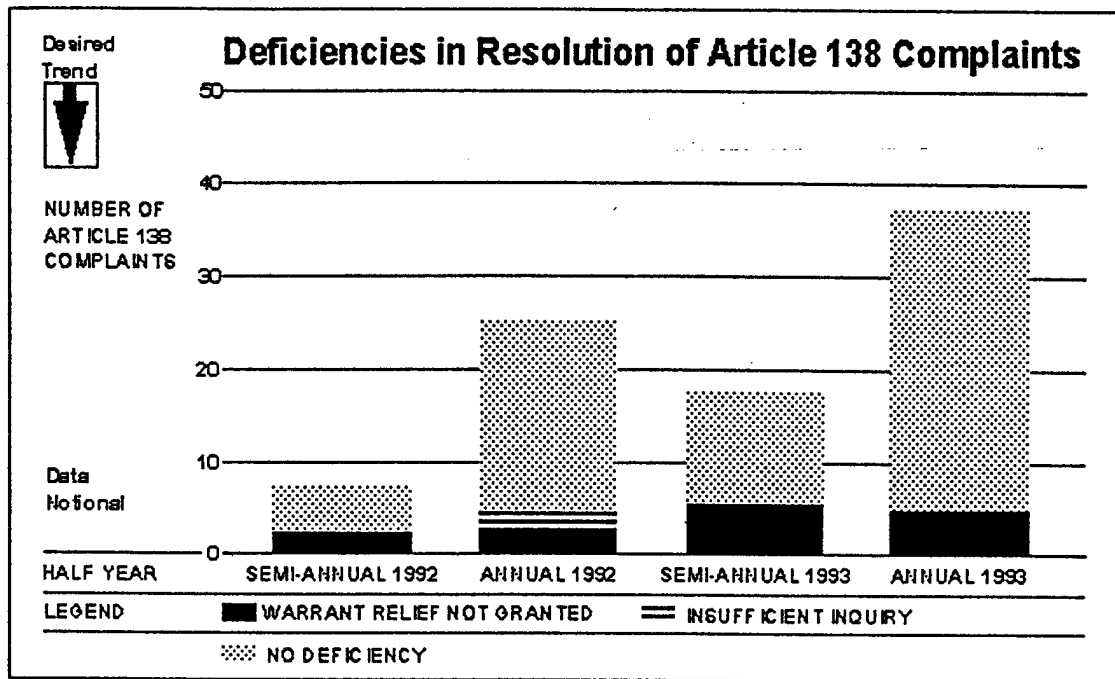
2. <u>Article 138 Complaints Reviewed</u>	<u>Semiannual</u>	<u>Annual</u>
a. Total complaints reviewed.	X	X
b. Relief granted by general court-martial authority (GCMCA). No further relief warranted.	X	X
c. Relief granted by HQ USAF/JAG but not GCMCA where GCMCA had authority to do so.	X	X
d. Relief granted by HQ USAF/JAG in addition to that granted by GCMCA.	X	X
e. Complaints returned to GCMCA due to insufficient inquiry.	X	X

3. Other pertinent information.

Chief, General Law Division
Office of The Judge Advocate General

1 Attachment
Graph, Deficiencies

Figure A1.2. Sample Metric of Deficiencies in Resolution of Article 138 Complaints.



Attachment 2

RELATED LAWS AND DOD DIRECTIVES

Title 2, United States Code, Section 441

Title 5, United States Code, Section 7342

Title 10, United States Code, Sections 938, 976, and 3401

Title 18, United States Code, Sections 592, 593, 594, 596, 602, 603, 606, 607 609, and 1382

DoD Directive 1005.13, *Gifts From Foreign Governments* October 13, 1988

DoD Directive 1325.6, With Changes 1 and 2, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces* September 12, 1969

DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty* June 15, 1990

DoD Directive 1354.1, *DoD Policy on Organizations That Seek to Represent or Organize Members of the Armed Forces in Negotiation or Collective Bargaining* November 25, 1980

Attachment 3

IMPLEMENTING AFIS

AFI 51-901, *Gifts From Foreign Governments* (formerly AFR 11-27)

AFI 51-902, *Political Activities of Members of the US Air Force* (formerly AFR 110-2)

AFI 51-903, *Dissident and Protest Activities* (formerly AFR 35-15)

AFI 51-904, *Complaints of Wrongs Under Article 138 UCMJ*, (formerly AFR 110-19)

AFI 51-905, *Use of Magistrates for Trial of Misdemeanors Committed by Civilians* (formerly AFR 110-15)

AFI 51-906, *Representational and Organizational Activities of Military Personnel* (formerly AFR 30-24)

1 JANUARY 1996

Law



**POLITICAL ACTIVITIES BY MEMBERS OF
THE US AIR FORCE**

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

NOTICE: This publication is available digitally on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>. If you lack access, contact your Publishing Distribution Office (PDO).

OPR: HQ USAF/JAG (Capt Mark R.
Strickland)

Certified by: HQ USAF/JAG Mr Harlan G. Wilder)

Supersedes AFI 51-902, 8 March 1994

Pages: 5
Distribution: F

This instruction implements AFPD 51-9, *Civil Law for Individuals*. It provides prohibitions and guidelines regarding political activities. It applies to members of the Regular Air Force and Air Force Reserve on active duty for training, including the Air National Guard when federalized. It implements DoD Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, June 15, 1990. Air Force members on active duty are prohibited from engaging in political activities as provided in this instruction. Violations of this instruction are punishable under the *Uniform Code of Military Justice* (UCMJ), Article 92, *Failure to Obey a Lawful Regulation*.

SUMMARY OF REVISIONS

This issuance revises AFI 51-902, 8 March 1994. This instruction implements changes to DoD Directive 1344.10, which allows active duty officers to hold non-partisan positions on independent school boards located exclusively upon military reservations. A | indicates revisions from the previous edition.

1. Responsibilities. This instruction establishes responsibilities for Air Force members on active duty for more than 30 days. **Paragraph 8** of this instruction also establishes responsibilities for Air Force members on active duty for 30 days or less. Air Force members on active duty must comply with this instruction.

2. Definitions:

2.1. Active Duty. Full-time duty in the active military service of the United States, including full-time duty in the Air National Guard when federalized.

2.2. Civil Office. A specific nonmilitary position created by law whose incumbent has certain specific duties imposed by law and involving the exercise of some portion of the sovereign power of the

United States or of a state. Civil office may be either an elective or an appointive office under the United States, a US Territory, possession, or commonwealth, or a state, county, or municipality, or any of their official subdivisions.

2.3. Nonpartisan Political Activity. Activity supporting or relating to candidates who do not represent, or issues not specifically identified with, national or state political parties or associated or ancillary organizations. Issues relating to constitutional amendments, referenda, approval of municipal ordinances, and others of a similar character which are considered not specifically identified with national or state political parties.

2.4. Partisan Political Activity. Activity supporting or relating to candidates who represent, or issues specifically identified with, national or state political parties or associated or ancillary organizations. A candidacy, declared or undeclared, for national or state office is a partisan political activity, even if the candidate is not affiliated with a national or state political party.

3. Prohibited Activities. Air Force members may not:

3.1. Use official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or solicit political contributions from others.

3.2. Be a candidate for, or hold civil office, except as authorized in paragraphs 5 and 6.

3.3. Participate in partisan political management, campaigns, or conventions, or make public speeches in the course of such activity.

3.4. Allow, or cause to be published, partisan political articles signed or authorized by the member for soliciting votes for or against a partisan political party or candidate.

3.5. Serve in any official capacity or be listed as a sponsor of a partisan political club.

3.6. Speak before a partisan political gathering of any kind for promoting a partisan political party or candidate.

3.7. Participate in any radio, television, or other program or group discussion as an advocate of a partisan political party or candidate.

3.8. Conduct a political opinion survey under the auspices of a partisan political group, or distribute partisan political literature.

3.9. Perform clerical or other duties for a partisan political committee during a campaign or on election day.

3.10. Solicit or otherwise engage in fund-raising activities in federal offices or facilities, including military reservations, for a partisan political cause or candidate.

3.11. March or ride in a partisan political parade.

3.12. Participate in any organized effort to provide voters with transportation to the polls, if the effort is organized by or associated with a partisan political party or candidate.

3.13. Attend, as an official representative of the Armed Forces, partisan political events, even without actively participating.

3.14. Engage in the public or organized recruitment of others to become partisan candidates for nomination or election to a civil office.

3.15. Make campaign contributions to a partisan political candidate.

3.16. Make campaign contributions to another member of the Armed Forces or an officer or employee of the federal government for promoting a political objective or cause.

3.17. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for promoting a political objective or cause.

3.18. Use contemptuous words against the office holders described in Title 10, United States Code, Section 888.

3.19. Display a large political sign, banner, or poster on the top or side of a member's private vehicle (as distinguished from a political sticker).

3.20. Sell tickets for, or otherwise actively promote, political dinners and other such fund-raising events.

4. Permitted Activities. Air Force members may:

4.1. Register to vote, vote, and express a personal opinion on political candidates and issues, but not as a representative of the Armed Forces.

4.2. Make monetary contributions to a political organization or political committee favoring a particular candidate or slate of candidates, subject to limitations under Title 2, United States Code, Section 441a and Title 18, United States Code, Section 607.

4.3. Attend political meetings or rallies as a spectator when not in uniform.

4.4. Join a political club and attend its meetings when not in uniform.

4.5. Serve as an election official, if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the prior approval of the major command commander or equivalent authority. This approval authority may be delegated, but not below the level of installation commander.

4.6. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot, if the signing does not obligate the member to engage in partisan political activity and is done as a private citizen and not as a representative of the Armed Forces.

4.7. Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, if those views do not attempt to promote a partisan political cause.

4.8. Display a political sticker on the member's private vehicle, or wear a political button when not in uniform and not on duty.

4.9. Write a personal letter, not for publication, expressing preference for a specific political candidate or cause, if the action is not part of an organized letter-writing campaign on behalf of a partisan political cause or candidate.

5. Candidacy for Elective Civil Office. Air Force members:

5.1. May not campaign as a candidate for nomination or as a nominee for civil office. Where the circumstances justify, and when request is made through channels to, and approved by, HQ USAF/JAG, a member may be permitted to file evidence of nomination or candidacy for nomination as required by law. Such permission will not authorize activity while on active duty that is otherwise prohibited by this instruction. Absent compelling reasons, a request will normally not be approved, unless the member is likely to separate from active duty or active duty for training at least 30 days before the scheduled election.

5.2. May not become a candidate for any civil office while serving an initial tour of extended active duty or a tour of extended active duty that the member agreed to perform as a condition to receiving schooling or training wholly or partly at US expense.

6. Members Elected or Appointed to Civil Office. Except as authorized by law, or through 6.5, regular officers on the active duty list and members on active or full-time National Guard duty under a call or order for a period of more than 180 days may not hold or exercise the functions of a civil office:

6.1. In the US Government that is an elective office; requires an appointment by the President by and with the advice and consent of the Senate; or is in a position on the Executive Schedule under Title 5, United States Code, Sections 5312 through 5317.

6.2. In the government of a state; the District of Columbia; a territory, possession, or commonwealth of the United States; or in any political subdivision of the foregoing.

6.3. A member described in paragraph 6. may hold or exercise the functions of a civil office in the US Government not described in paragraph 6.1. when assigned or detailed to that office or to perform those functions.

6.4. Enlisted members, regardless of duty status, may seek and hold nonpartisan civil office on a local school board, neighborhood planning commission, and similar agencies. Officers on active duty may seek and hold nonpartisan civil office on an independent school board that is located exclusively on a military reservation. Such offices must be held in a private capacity and may not interfere with the performance of military duties.

6.5. Air Force members may serve as a regular or reserve civilian law enforcement officer or member of a civilian fire or rescue squad when approved by the member's commander. Such service must be in a personal capacity, may not involve the exercise of military authority, and may not interfere with the performance of military duties. In the case of regular officers on the active duty list or full-time National Guard and retired and reserve officers on active duty under a call or order for a period of more than 180 days, however, the position must not be a civil office described in paragraph 6.1. or paragraph 6.2.

6.6. A member subject to paragraph 6. above, and elected or appointed to an office as described, may request retirement and will be retired if eligible. If a member does not request or is not eligible for retirement, the member will be discharged or released from active duty. However, these retirement and separation requirements do not apply if the member:

6.6.1. Declines to serve in the civil office.

6.6.2. Is obligated to fulfill an active duty service commitment.

6.6.3. Is serving or has been issued orders to serve in an area that is overseas, remote, a combat zone, hostile fire pay area, or afloat.

- 6.6.4. Is ordered to remain on active duty while the subject of an investigation or inquiry.
 - 6.6.5. Is accused of an offense under the UCMJ or serving a sentence or punishment for such offense.
 - 6.6.6. Is notified of action to administratively separate the member.
 - 6.6.7. Is indebted to the United States.
 - 6.6.8. Is on active duty during a declaration of war or of a national emergency, or any period when a unit of the Reserves or National Guard has been called to active duty.
 - 6.6.9. Is prohibited by an order or regulation from assuming or exercising the functions of a civil office in violation of this regulation.
- 6.7. Nothing in paragraphs 6. through 6.6. will be construed to invalidate any action taken by a member in carrying out assigned duties after assuming or exercising the functions of a civil office in violation of this instruction.

7. Duty Restrictions. No member of the Air Force may be assigned or detailed to perform duties in the legislative or judicial branches of the US Government. A member may, however, perform such duties if under a scholarship, fellowship, grant, or internship, or for a specific duration on a specific project as a member of the staff, court, or committee of the Congress. The member must first agree to incur an active duty service obligation commencing from the termination of the assignment or detail and lasting equal to the assignment or detail, or to the obligation prescribed in other applicable regulations, whichever is greater.

8. Air Force Members on Active Duty for Less Than 30 Days. They will:

- 8.1. Give full time and attention to performing military duties during prescribed duty hours.
- 8.2. Avoid any outside political activities that may be prejudicial to performing military duties or inconsistent with the accepted customs and traditions of the Armed Forces.
- 8.3. Refrain from participating in any political activity while in military uniform and from using government facilities for political activities.

9. Statutes. Federal statutes prohibiting certain types of political activities by members of the Armed Forces include Title 18, United States Code, Sections 592-594, 596, 602-603, 606-607 and 609; and Title 2, United States Code, Sections 441a, 441f, 441g, and 441i.

NOLAN SKLUTE, Maj General, USAF
The Judge Advocate General

1 FEBRUARY 1998

Law



DISSIDENT AND PROTEST ACTIVITIES

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

NOTICE: This publication is available digitally on the SAF/AAD WWW site at: <http://afpubs.hq.af.mil>. If you lack access, contact your Publishing Distribution Office (PDO).

OPR: HQ USAF/JAG
(Lt Col William E. Boyle)
Supersedes AFI 51-903, 4 March 1994

Certified by: HQ USAF/JAG
(Mr. Harlan G. Wilder)
Pages: 4
Distribution: F

This instruction implements AFPD 51-9, *Civil Law for Individuals*, and Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, October 1, 1996. It provides prohibitions and guidance regarding dissident and protest activities involving Air Force installations or Air Force members. It applies to all Air Force military personnel serving on active duty or active duty for training. Military members who violate the prohibitions contained in paragraphs 2., 5., 5.1., 7., and 7.2., are subject to disciplinary action under Article 92, or other applicable articles of the Uniform Code of Military Justice.

SUMMARY OF REVISIONS

This revision aligns the instruction with AFPD 51-9, and updates the instruction to implement DODD 1325.6, October 1, 1996. The revision contains minor editing changes for clarification. Major textual changes were made concerning prohibited activities paragraph 5.); new guidance on the functions of command (paragraph 5.2.); and, training requirements to educate members about prohibited activities (paragraph 6.). Punitive language was added to paragraphs 2., 5.1., 7., and 7.2., to comply with notice requirements. A 1 indicates revisions from the previous edition.

1. Authority and Responsibility of Commanders. Air Force commanders have the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline. This authority and responsibility includes placing lawful restriction on dissident and protest activities.

1.1. Air Force commanders must preserve the service member's right of expression, to the maximum extent possible, consistent with good order, discipline, and national security.

1.2. To properly balance these interests, commanders must exercise calm and prudent judgment and should consult with their staff judge advocates. In appropriate cases, commanders may find it advisable to confer with higher authority before initiating action to restrict manifestations of dissent.

1.3. AFI 31-209, *Air Force Resource Protection Program*, contains additional guidance.

2. Possession and Distribution of Printed Materials. Air Force members may not distribute or post any printed or written material, other than publications of an official government agency or base-regulated activity, within any Air Force installation without permission of the installation commander or that commander's designee. Members who violate this prohibition are subject to disciplinary action under Article 92 of the Uniform Code of Military Justice in addition to any other applicable violation of the Uniform Code of Military Justice or Federal law.

2.1. The member must provide a written request including a copy of the material and a proposed plan or method for distribution or posting.

2.2. The installation commander or authorized designee determines if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces or interference with accomplishing the military mission would result from publication or distribution of the materials. If so, the commander or authorized designee shall prohibit the distribution or posting and notify SAF/PA.

2.2.1. Do not prohibit distribution or posting of publications on the sole ground that the material is critical of government policies or officials. See Article 88--Contempt Toward Officials, the Uniform Code of Military Justice, when publications are critical of officials.

2.2.2. This instruction will not be used to prohibit the distribution of publications or other materials through the US mail or the distribution of materials officially approved by the Air Force or Army and Air Force Exchange Service (AAFES) for distribution through official outlets, such as military libraries and exchanges.

2.3. Do not prohibit mere possession of materials unauthorized for distribution or posting, unless otherwise unlawful. These materials may be impounded if a member of the Armed Forces distributes or posts, or attempts to distribute or post them, within the installation. Return

impounded materials to the owners when they leave the installation, unless the materials are determined to be evidence of a crime.

3. Writing for Publications. Air Force members may not write for unofficial publications during duty hours. While unofficial publications, such as "underground newspapers," are not prohibited, they may not be produced using government or nonappropriated fund property or supplies on or off-duty. If such a publication contains language, the utterance of which is punishable by the Uniform Code of Military Justice or other Federal laws, those members involved in printing, publishing, or distributing such materials are subject to discipline for such infractions.

4. Off-limits Action. Action may be initiated under AFJI 31-213, *Armed Forces Disciplinary Control Boards and Off-Installation Liaison and Operations*, to place establishments "off limits" when, for example, activities taking place include counseling members of the Armed Forces to refuse to perform their duty or to desert, or involve acts with a significant adverse effect on health, welfare, or morale of military members.

5. Prohibited Activities. Military personnel must reject participation in organizations that espouse supremacist causes; attempt to create illegal discrimination based on race, creed, color, sex, religion, or national origin; advocate the use of force or violence; or otherwise engage in the effort to deprive individuals of their civil rights.

5.1. Active participation, such as publicly demonstrating or rallying, fund raising, recruiting and training members, organizing or leading such organizations, or otherwise engaging in activities in relation to such organizations or in furtherance of the objectives of such organization that the commander concerned finds to be detrimental to good order, discipline, or mission accomplishment, is incompatible with military service and prohibited. Members who violate this prohibition are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the Uniform Code of Military Justice.

5.1.1. Mere membership in the type of organization enumerated is not prohibited, however, membership must be considered in evaluating or assigning members (AFI 36-2701, *Social Actions Operating Procedures*; AFI 36-2403, *The Enlisted Evaluation System*; AFI 36-2402, *Officer Evaluation System*; and AFI 36-2706, *Military Equal Opportunity and Maltreatment Program*).

5.2. Commanders are authorized to use the full range of administrative procedures, including separation or appropriate disciplinary action against military personnel who actively participate in such groups.

5.3. It is a function of command to be vigilant about the existence of the type of activities enumerated above. Active use of investigative authority to include a prompt and fair complaint process, and the use of administrative powers, such as counseling, reprimands, orders, and performance evaluations should be used to deter such activities.

6. Training Policy on Prohibited Activities. The policy on prohibited activities shall be included in initial active duty training, pre-commissioning training, professional military education, commander training, and other appropriate Air Force programs.

7. Demonstrations and Similar Activities. Demonstrations or other activities within an Air Force installation, which could result in interference with or prevention of the orderly accomplishment of a mission of the installation or which present a clear danger to loyalty, discipline, or morale of members of the Armed Forces, are prohibited. Members who violate this prohibition are subject to disciplinary action under Article 92, in addition to any other appropriate articles of the Uniform Code of Military Justice.

7.1. It is a crime for any person to enter a military installation for any purpose prohibited by law or unlawful regulation, or for any person to enter or reenter an installation after having been barred by order of the installation commander (AFI 31-209; 18 U.S.C. 1382).

7.2. Air Force members are prohibited from participating in demonstrations when they are on duty, when they are in a foreign country, when they are in uniform, when their activities constitute a breach of law and order, or when violence is likely to result. Members who violate this provision are subject to disciplinary action under Article 92 of the Uniform Code of Military Justice.

8. Military Grievances. The right of Air Force members to complain and request redress of their grievances against actions of their commanders is protected by Article 138, UCMJ (AFI 51-904, *Complaints of Wrongs Under Article 138, Uniform Code of Military Justice*) and by the Inspector General Complaint

System (AFI 90-302). Military personnel may also petition or present a grievance to any member of Congress without fear of reprisal. An open door policy for complaints is a basic principle of good leadership. Commanders should ensure that adequate procedures exist locally for identifying complaints and taking necessary corrective actions.

BRYAN G. HAWLEY, Maj General, USAF
The Judge Advocate General

FREE SPEECH IN THE MILITARY COMMUNITY: STRIKING A BALANCE BETWEEN PERSONAL RIGHTS AND MILITARY NECESSITY

FIRST LIEUTENANT JOHN A. CARR*

The United States government should not engage in foreign wars for the purpose of protecting access to crude oil, and if soldiers are asked to participate in such a war they should refuse to fight. Women should never be permitted in a combat zone, but maybe homosexual men should not be discharged. President Clinton's handling of Bosnia proves that he is incompetent to lead the military; he's a draft-dodger anyway. Someone should tell Congress that it ought to give airmen a pay raise instead of wasting money on-base beautification projects.¹

If a civilian read aloud the preceding statement in Lafayette Park, the government would almost undoubtedly be without the authority to sanction him. But what if the speaker was a civilian shouting outside the gates of Andrews Air Force Base? The Chief-of-Staff of the Air Force addressing a banquet hall full of military personnel? An airman speaking to fellow airmen in his dormitory? A lieutenant in a letter to the editor of the *Air Force Times*? Does the Uniform Code of Military Justice (UCMJ) prohibit these statements or does the military member have a First Amendment free speech right? When should a commander be advised to initiate actions against a member and what type of sanction should be imposed?

The First Amendment's freedom of speech clause has long posed unique challenges to the military community.² Active duty military members are subject to the Uniform Code of Military Justice that limits not only

* Lieutenant Carr (United States Air Force. B.S., 1994, United States Air Force Academy), is a 1998 J.D. Candidate, Harvard Law School; and a 1998 M.P.P. Candidate, John F. Kennedy School of Government, Harvard University. The author would like to thank Professor Fred Schauer, Frank Stanton Professor of the First Amendment, John F. Kennedy School of Government, for the insightful comments and helpful suggestions he conveyed during the supervision of this article. The author would also like to thank Andre Barry, Jamison Colburn, Amy Kroe, Douglas Kysar, and Ken Ludwig for reviewing earlier drafts of this article.

¹ This statement is a compilation of comments made by military personnel and overheard by the author during the last eight years. It is provided to facilitate the following discussion and in no way represents the views or opinions of the author.

² The First Amendment provides that "Congress shall make no law. . . abridging the freedom of speech. . ." U.S. CONST. amend I.

conduct, but also certain forms of speech.³ It seems obvious that First Amendment protections will be applied to military personnel in a different manner, but the more perplexing challenge is to define the exact boundary of that protection; if, in fact, any boundary actually exists.

The most intense period of the military free speech debate was sparked by the United States involvement in the Vietnam War. With the initiation of the draft, thousands of unwilling and educated conscripts were "shocked by military practices that had never been seriously questioned."⁴ Not wholly by coincidence, this turmoil occurred as the Supreme Court was articulating the fundamental principles underlying First Amendment doctrine. However, the Supreme Court and the military courts of review refused to apply this new line of precedent to the military community, reasoning that the unique nature of the military as a "separate community" necessitated a different application of First Amendment principles.

As the furor of the Vietnam War subsided, many scholars attempted to refine earlier examinations⁵ of the "separate community" rationale.⁶ While many authors questioned the wisdom of granting the military a near *carte blanche* to define what constitutes a "clear and present danger" to military order and discipline, the courts consistently deferred to the military's exercise of delegated authority. The lull in the storm during the Reagan military build-up of the early 1980's⁷ was interrupted by the Supreme Court's decision in *Goldman v. Weinberger*⁸ and recent academic examinations have focused

³ Rule for Courts-Martial 202, Ch. II 13-14, MANUAL FOR COURTS-MARTIAL, United States (1995 ed.) [hereinafter MCM] (outlining limitations on personal jurisdiction); Rule for Court-Martial 203, Ch. II 15, MCM. (outlining limitations on subject-matter jurisdiction); See also *Solorio v. United States*, 483 U.S. 435, 436 (1987) (jurisdiction in courts-martial depends solely on the accused's status as a person subject to the UCMJ and not on the "service-connection" of the offense).

⁴ Donald N. Zillman and Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 397 (1976) [hereinafter Zillman and Imwinkelried II].

⁵ See, e.g., Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962); Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187 (1957).

⁶ See, e.g., Zillman and Imwinkelried II, *supra* note 3; Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423 (1977); Donald N. Zillman and Edward J. Imwinkelried, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42 (1975) [hereinafter Zillman and Imwinkelried I]; Edward F. Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

⁷ A notable addition to the debate concerning the separate community rationale during this time period is James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177 (1984).

⁸ 475 U.S. 503 (1986) (holding that military is not required by the Free Exercise Clause of the First Amendment to provide exception to uniform dress regulations for wearing of yarmulke). See generally Felice Wechsler, Comment, *Goldman v. Weinberger: Circumscribing the First Amendment Rights of Military Personnel*, 30 ARIZ. L. REV. 349 (1988) (expressing belief that the decision is the "latest in a long line of Supreme Court cases giving virtually unlimited

almost exclusively on the First Amendment vulnerability of the so-called "Don't Ask, Don't Tell" policy.⁹

The Department of Defense has changed dramatically since the Vietnam War. The all-volunteer force has replaced the draft. With the democratization of the former Soviet Union and the stand-down of U.S. nuclear forces, military personnel are currently assigned to peacekeeping missions across the globe. Additionally, while courts continue to distill the free speech rights of government employees,¹⁰ federal civil servants,¹¹ and

deference to military decisionmaking where the constitutional rights of service people conflict with claimed military necessity."); First Lieutenant Dwight H. Sullivan, *The Congressional Response to Goldman v. Weinberger*, 121 MIL. L. REV. 125 (1988); *Military Ban on Yarmulkes*, 100 HARV. L. REV. 163, 172 (1986) (concluding that the Court's refusal in the case to "establish guidelines for government action when that action impinges upon constitutionally protected interests . . . sends a legitimating message to military officials prone to suppress the individuality of service personnel and leaves unanswered the question of when, if ever, the Court is prepared to defend the liberties of Americans who serve their country in the armed forces"); Lt. Richard G. Vinet, USNR, Comment and Note, *Goldman v. Weinberger: Judicial Deference to Military Judgment in Matters of Religious Accommodation of Servicemembers*, 36 NAVAL L. REV. 257 (1986). See also 10 U.S.C. § 774 (West 1998) providing that military members may wear items of religious apparel except when the Secretary of the individual service determines that "wearing of the item would interfere with the performance of the member's military duties;" or when the Secretary determines by regulation that "the item of apparel is not neat and conservative."

⁹ See Department of Defense Directive 1304.26, Qualification Standards for Enlistment, Appointment, and Induction (Dec. 21 1993); DoD Directive 1332.14, Enlisted Administrative Separations (Dec. 21, 1993); DoD Directive 1332.30, Separation of Regular and Reserve Commissioned Officers (Mar. 14, 1997); 32 C.F.R. § 41, App. A (1992), (codified at 10 U.S.C. § 654 (1994)). For First Amendment examinations of the Directives, see generally Scott W. Wachs, *Slamming The Closet Door Shut: Able, Thomasson And The Reality Of "Don't Ask, Don't Tell"*, 41 N.Y.L. SCH. L. REV. 309 (1996); Daniel S. Alter, *Confronting The Queer And Present Danger: How To Use The First Amendment When Dealing With Issues Of Sexual Orientation Speech And Military Service*, 22-SUM HUM. RTS. 22 (1995); Walter J. Krygowski, Comment, *Homosexuality And The Military Mission: The Failure Of The "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875 (1995); Kenneth Williams, *Gays In The Military: The Legal Issues*, 28 U.S.F. L. REV. 919 (1994); David A. Schlueter, *Gays And Lesbians In The Military: A Rationally Based Solution To A Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393 (1994); Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, And Legal Perspectives*, 131 MIL. L. REV. 55 (1991).

¹⁰ See e.g., *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995), *cert. denied*, 516 U.S. 861 (1995); *Horton v. Taylor*, 767 F.2d 471 (8th Cir. 1985), *aff'd*, 817 F.2d 476 (8th Cir. 1987); *Hughes v. Whitmer*, 714 F.2d 1407 (8th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

¹¹ See, e.g., *Johnson v. Department of Justice*, 65 M.S.P.R. 46 (1994) (racially derogatory comments about co-worker made in the presence of other agency personnel while on duty did not relate to matter of public concern), *appeal dismissed*, 48 F.3d 1236 (Fed. Cir. 1995) (unpublished disposition); *Means v. Department of Labor*, 60 M.S.P.R. 108 (1993) (disruptive, insubordinate, and disrespectful conduct and speech relating to workload and performance standards were not related to matter of public concern); *Jackson v. Small Business Admin.*, 40 M.S.P.R. 137 (1989); *Sigman v. Department of the Air Force*, 37 M.S.P.R. 352 (1988) (speech that addresses internal agency complaints but not issues of concern to the community do not relate to matters of public concern), *aff'd*, 868 F.2d 1278

independent contractors,¹² the government is privatizing thousands of positions formally held by uniformed personnel.¹³ In the end, however, the military's mission remains the protection of the national security interests of the United States through the use of force. Given these dramatic transformations and the continued development of First Amendment doctrine, this article has two purposes.

Part I of the article examines the courts' resolution of free speech challenges to UCMJ prosecutions and administrative actions. First, the arguments supporting judicial deference to government authorities are introduced. Judicial deference has been justified on the grounds that the Constitution entrusts the regulation of the military to the Legislative and Executive branches. Additionally, courts have noted the lack of judicial competence to review the impact of a particular threat to the unique mission of the military community. Second, the cases in which free speech challenges have been made to either UCMJ prosecutions or administrative actions are profiled. For the purposes of this discussion, the restrictions on the speech of military personnel are divided into three categories. The first category consists of the specific Articles of the Uniform Code of Military Justice. The second level includes the regulations promulgated by the Department of Defense and the Air Force. The lawful orders of specific commanders comprise the third set of restrictions.

An examination of the applicable case law in each category illustrates that courts continue to exhibit substantial deference to the judgment of military commanders concerning the threat to military interest posed by certain types of speech. When the free speech challenges of military personnel are reviewed under traditional First Amendment doctrine—a rare occurrence—the courts have found that the restrictions are permissible because the military's interests are substantial and unrelated to the suppression of free expression. It appears, therefore, that the military may impose restrictions on the speech of military personnel whenever the speech poses a significant threat to discipline, morale, esprit de corps, or civilian supremacy. While this formulation may seem severe when contrasted to civilian protections, Congress and the President have established official channels to permit servicemembers to voice dissent without the fear of retaliation. Additionally, the Department of Defense and the Air Force have enacted regulations that protect certain types of speech. The lack

(Fed. Cir. 1989) (unpublished disposition); *Mings v. Department of Justice*, 813 F.2d 384 (5th Cir. 1987); *Barnes v. Department of the Army*, 22 M.S.P.R. 243 (1984); *Curry v. Department of the Navy*, 13 M.S.P.R. 327 (1982).

¹² In *Board of County Commissioners v. Umbehr*, 518 U.S. 668 (1996), the Supreme Court, per Justice O'Connor, held that the First Amendment protects independent contractors from government termination or prevention of automatic renewal of at-will contracts in retaliation for contractor's speech, and such claims will be evaluated under the balancing test outlined in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

¹³ The federal government's guidelines for privatization are outlined in OFFICE OF MANAGEMENT AND BUDGET CIRCULAR A-76 (Aug. 4, 1983).

of successful free speech challenges to personnel actions is a testament to the responsible use of this discretion by military commanders.

Part II of the article reexamines the arguments both for and against affording military personnel greater free speech protections. The evaluations of these arguments serve not only to support the judiciary's continued treatment of the military as a separate community, but also to provide legal advisors relevant factors to consider when making recommendations to commanders. Additionally, a commander's ability to protect the military's interests from the threats posed by the speech of civilians and government employees is canvassed.

Finally, arguments are presented to refute the suggestions that courts should adopt either the traditional civilian First Amendment doctrine or, at least during peacetime, the protections afforded government employees and federal civil servants. Courts should not adopt either standard because of the intrusive nature of the inquiry and the need for the military to impose criminal sanctions in certain circumstances. To the extent that the protections differ, however, legal advisors should recommend as a general rule that military members be afforded the same First Amendment protections provided government employees. Criminal sanctions should be sought in situations when a substantial breakdown in military custom is likely or the threat to military interests is greater than would be posed by a similarly situated government employee.

I. REGULATION OF SPEECH IN THE MILITARY

When confronted with Constitutional challenges to military regulations or criminal prosecutions, courts have displayed a substantial amount of deference to government authorities for two related reasons. The first reason is the responsibility imposed by the Constitution on the Legislative and Executive branches to administer the military.¹⁴ The second is the concept of the military as a "separate community." The separate community rationale is based upon the unique military mission,¹⁵ the critical importance of obedience

¹⁴ See, e.g., *Solorio v. United States*, 483 U.S. 435, 447 (1987) ("Decisions of this Court . . . have also emphasized that Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military."); *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("Nor can it be denied that the imposing number of cases from this Court [previously cited] suggest that judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."); ("The responsibility for determining how best our Armed Forces shall attend to [fighting or being ready to fight wars] rests with Congress, see U.S. CONST., Art. I, § 8, cls. 12-14, and with the President. See U.S. CONST. Art. II, § 2, cl. 1.") *Id.* at 71 (quoting *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975)).

¹⁵ See, e.g., *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972) ("In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. . . . The

and subordination,¹⁶ and the complimentary development of military custom.¹⁷ Based upon one or more of these characteristics, courts confronted with free speech issues in the military context typically refuse to apply the free speech protections afforded civilians or other government employees, preferring to defer to the military's judgment of the potential disruptive effect of the speech in question.

This judicial deference has both supporters and critics. Hon. Sam Nunn has written that the "Supreme Court's jurisprudence in the field of military law has been characterized by the highest degree of deference to the role of Congress and respect for the judgment of the armed forces in the delicate task of balancing the interests of national security and the rights of military personnel."¹⁸ Others disagree, choosing to depict the Supreme Court's treatment of the First Amendment in the military context as "the area of most extreme judicial abdication."¹⁹ It has been noted, however, that "the judiciary has become more sensitized to violations of individual rights and the perils of unchecked discretion."²⁰ Recently, in fact, a number of judges have taken

armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself.").

¹⁶ See, e.g., *Brown v. Glines*, 444 U.S. 348, 354 (1980) ("To ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'" (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)); *Parker v. Levy*, 417 U.S. 733, 758 (1974) ("[T]he different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.").

¹⁷ See, e.g., *Parker v. Levy*, 417 U.S. 733, 744 (1974) (In order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'" (quoting *Martin v. Mott*, 12 Wheat. 19, 35, 6 L.Ed. 537 (1827)).

¹⁸ Hon. Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 1995-JAN ARMY LAW. 27 (1995).

¹⁹ C. Thomas Dienes, *When the First Amendment is Not Preferred: The Military and Other Special "Contexts"*, 56 U. CIN. L. REV. 779, 799 (1988). Prof. Dienes comments that:

Justice Rehnquist's opinion for the Court in [*Goldman v. Weinberger*, 475 U.S. 503 (1986)] reflects two characteristics common to most judicial treatment of the first amendment claims in the military context. First, there is an insensitivity, or perhaps more exactly, a lack of attention to and concern with the burden on the litigant's first amendment rights. Second, there is a strong deference to the special needs of the military's separate society and an unwillingness to review the military's judgment on the importance of the interests served by the regulation and the need for the restriction to satisfy that interest.

Id. at 808 (footnote omitted).

²⁰ *Zillman and Imwinkelried II*, *supra* note 4, at 400.

exception to the military's exercise of discretion, citing either outright abuse²¹ or selective enforcement.²²

Both courts and commentators have justified the judicial deference to the military on the grounds that the Constitution vests the primary responsibility for respecting the rights of servicemembers with the Legislative and Executive branches. The Constitution gives Congress the power to "raise and support Armies,"²³ "provide and maintain a Navy,"²⁴ and "make Rules for the Government and Regulation of the land and naval Forces."²⁵ The President is designated as the "Commander in Chief of the Army and Navy of the United States."²⁶ Given this division of responsibility, it has been argued that the two branches have safeguarded the rights of service personnel while protecting the readiness of the military. Sen. Nunn explains that:

a system of military and criminal and administrative law that carefully balances the rights of individual service members and the changing needs of the armed forces . . . has demonstrated considerable flexibility to meet the needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline. The principles of judicial review developed by the Supreme Court recognizes the fact that over the years Congress has acted responsibly in addressing the constitutional rights of military personnel.²⁷

Others have challenged the courts' reliance on Congress and the President to protect the rights of military personnel. Although acknowledging the role played by the two co-equal branches of government, Prof. Thomas Dienes concludes that this role "does not deny the power and duty of the courts to protect the constitutional rights of military personnel."²⁸ He argues that the "military and its courts do have special expertise regarding military needs, but

²¹ *Rigdon v. Perry*, 962 F.Supp 150, 165 (D.D.C. 1997) ("What we have here is the government's attempt to override the Constitution and the laws of the land") (granting motion for summary judgment and preliminary injunction based on First Amendment freedom of speech and religion against military's attempt to prevent chaplain from urging congregation to contact Congress on pending legislation).

²² *Holmes v. California Army National Guard*, 124 F.3d 1126, 1139 (9th Cir. 1997) (Reinhardt, J., dissenting) ("From General Eisenhower on, up and down the ranks, even to Commander-in-Chief, there are many who would have had to forfeit their positions had the military's code of sexual conduct been strictly and honestly enforced.").

²³ U.S. CONST. art. I, § 8, cl. 12.

²⁴ U.S. CONST. art. I, § 8, cl. 13.

²⁵ U.S. CONST. art. I, § 8, cl. 14.

²⁶ U.S. CONST. art. II, § 2, cl. 1.

²⁷ Nunn, *supra* note 18, at 33. See also *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").

²⁸ Dienes, *supra* note 19, at 822.

the civilian courts have a special competence and constitutional obligations in protecting constitutional freedoms against government abuse."²⁹

Underlying the judiciary's cautious excursions into the realm of military command are fears that courts lack the competence to contradict the judgment of military experts. Chief Justice Earl Warren has explained that the Supreme Court's deference to military determinations is based upon the "strong historical" tradition supporting "the military establishment's broad power to deal with its own personnel."³⁰ According to Warren, the "most obvious reason" for this deference is that "courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."³¹ The Supreme Court has alluded to the judiciary's lack of expertise to review prosecutions based upon military custom. In *Parker v. Levy*, it cited lower court opinions which held that the applications of military custom are best determined by military officers who are "more competent judges than the courts of common law."³² Additionally, in the oft-quoted opinion of *Orloff v. Willoughby*, the Court expressly adopted a hands-off approach to the military, stating:

But judges are not given the task of running the Army. . . . The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.³³

²⁹ *Id.* Cf. *Goldman v. Weinberger*, 475 U.S. 503, 513-14 (1986) (Brennan, J., dissenting) ("The Court's response to Goldman's request [for exception to Air Force uniform regulations to wear yarmulke] is to abdicate its role as principal expositor of the Constitution and protector of individual liberties in favor of credulous deference to unsupported assertions of military necessity.")

³⁰ Warren, *supra* note 5, at 187.

³¹ *Id.*

³² 417 U.S. 733, 748 (1974) (quoting *Smith v. Whitney*, 165 U.S. 553, 562 (1897)). See *infra* notes 72-73 and accompanying text.

³³ 345 U.S. 83, 93-94 (1953). In *Orloff*, the defendant was lawfully inducted into the service but was denied a commission and assignment to the Medical Corps because he refused to supply certain information on the loyalty certificate. *Id.* at 89. He petitioned "the courts, by habeas corpus, to discharge him because he has not been assigned to the specialized duties nor given the commissioned rank to which he claims to be entitled by the circumstances of his induction." *Id.* at 84. The Supreme Court held that while *Orloff* could not be punished for refusing to furnish the information, the President was under no obligation to commission him as an officer—a position of honor and trust—if he did. *Id.* at 91. The Court also held that since *Orloff* was lawfully inducted into the service, he did not have *habeas corpus* to obtain judicial review of the military's assignment decision. See also *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("In the context of the present case, when evaluating whether the military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest").

While one may wonder how the Army could intervene in judicial matters absent a siege of the Court, the opinion unmistakably endorses a deferential attitude toward the military community based upon its unique and "legitimate" needs.

When deciding constitutional or statutory issues in the military context, the Supreme Court has emphasized the special characteristics of the military community as a separate society. For example, the Court reviewed the nature of and justifications for these characteristics in *Parker v. Levy*.³⁴ The Court stressed that it "has long recognized that the military is, by necessity, a specialized society separate from civilian society."³⁵ This specialization is necessitated by the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."³⁶ The Court noted that "the military has, again by necessity, developed laws and traditions of its own during its long history."³⁷ Quoting from previous opinions, it also reiterated that the army "is not a deliberate body"³⁸ and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."³⁹ Furthermore, in order to "maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or 'general usage of the military service.'"⁴⁰

Whatever the significance of the separate community rationale, it has not been seriously argued that the unique characteristics of the military community negate entirely the free speech protections of the First Amendment. In fact, neither the Supreme Court nor the military courts of review have implied that the First Amendment is inapplicable to members of the armed forces. In *Goldman v. Weinberger*, the Court pointed out that the special demands of "military life do not, of course, render entirely nugatory in the military context the guarantees of the First Amendment."⁴¹ Chief Justice Earl Warren has written that the Supreme Court recognizes the "proposition that our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes."⁴² Additionally, the Court of Military Appeals has stated that "the protections in the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces."⁴³

³⁴ *Parker v. Levy*, 417 U.S. 733 (1974). See *infra* 65-95 and accompanying text.

³⁵ *Id.* at 743.

³⁶ *Id.* (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)).

³⁷ *Id.*

³⁸ *Id.* at 744 (quoting *In re Grimley*, 137 U.S. 147, 153 (1890)).

³⁹ *Id.* (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion)).

⁴⁰ *Id.* (quoting *Martin v. Mott*, 12 Wheat. 19, 35, 6 L.Ed. 537 (1827)).

⁴¹ 475 U.S. 503, 507 (1986).

⁴² Warren, *supra* note 5, at 188.

⁴³ *United States v. Jacoby*, 29 C.M.R. 244, 246-47 (C.M.A. 1960).

A few protections contained in the Bill of Rights are expressly made inapplicable to military personnel by the very wording of the Amendments. For example, the Fifth Amendment's Grand Jury provision contains an exception for "cases arising in the land or naval forces."⁴⁴ Additionally, "a court-martial has never been subject to the jury-trial demands of Article III of the Constitution."⁴⁵ Other provisions of the Bill of Rights, while applicable to the military, are interpreted differently in the military context. For example, the Court of Appeals for the Armed Forces (CAAF) has invoked the separate society rationale to qualify the Fourth Amendment's search and seizure protection.⁴⁶ The question, therefore, is not *whether* free speech protections are available to military personnel, but *to what extent*.

The search for an answer to this question commonly begins with an examination of the original intent of the Framers. One scholar concludes that the persuasive scholarship indicates the Founding Fathers "envisioned a limited, if not non-existent, role for the first amendment in the armed services."⁴⁷ Sen. Nunn has commented that "[d]ifferences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War, through the formation of the Constitution, to the present."⁴⁸ However, others have argued that reliance on history is misplaced and that the Founding Fathers favored the militia to a standing army precisely because of the restraints on civil liberties in the military environment.⁴⁹ Justice

⁴⁴ See, e.g., *United States v. Curtis*, 44 M.J. 106, 130 (C.A.A.F. 1996) ("The defense argues that the language [of the Fifth Amendment], 'when in actual service in time of War or public danger' limits the military exclusion. This argument was long ago rejected by the Supreme Court, which said 'that the words, ... 'when in actual service in time of war or public danger'... apply to the militia only.'" (quoting *Johnson v. Sayre*, 158 U.S. 109, 115 (1895)) *rev'd on other grounds per curiam*, 46 M.J. 129 (C.M.A. 1997).

⁴⁵ *United States v. Gray*, 37 M.J. 751, 755 (A.C.M.R. 1993) (citing *Ex Parte Quirin*, 317 U.S. 1 (1942); *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866); *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986)).

⁴⁶ *United States v. McCarthy*, 38 M.J. 398, 402 (C.M.A. 1993) ("This Court has observed, 'Since the military is, by necessity, a specialized society separate from civilian society, . . . it is foreseeable that reasonable expectations of privacy within the military society will differ from those in the civilian society.'" (quoting *United States v. Middleton*, 10 M.J. 123, 127 (C.M.A. 1981)). In the military setting, a commander who issues a search authorization does not have to be a judicial officer, the warrant does not have to be in writing or supported by oath or affirmation, and general inspections may be ordered without probable cause and without the specificity required for a typical warrant. See e.g., *United States v. Lopez*, 35 M.J. 35, 45 (C.M.A. 1992) (Cox, J., concurring).

⁴⁷ Zillman, *supra* note 6, at 429 (citing L. LEVY, *LEGACY OF SUPPRESSION, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (Torch Book ed. 1963); Weiner, *Courts-Martial and the Bill of Rights: The Original Practice*, 72 HARV. L. REV. 1, 266 (1958)).

⁴⁸ Nunn, *supra* note 18, at 32.

⁴⁹ Stephanie A. Levin, *The Deference that is Due: Rethinking the Jurisprudence of Judicial Deference to the Military*, 35 VILL. L. REV. 1009, 1023-61 (1990). Professor Levin examines the historical opposition to a standing army preceding and surrounding the ratification of the Constitution. She argues that the Founding Fathers did not envision or anticipate today's enormous military establishment, and instead preferred to rely upon a citizen militia that would

Stewart stated his belief that the dramatic transformations in the size and function of the military justify a departure from earlier holdings.⁵⁰ Even Chief Justice Warren acknowledged that size of the military build-up during Vietnam and the broad reach of the draft caused many to question the "wisdom of treating the military establishment as an enclave beyond the reach of the civilian courts."⁵¹

The justifications for judicial deference to military authorities when servicemembers bring constitutional challenges to criminal and administrative prohibitions continue to be debated. A review of the available case law indicates, however, that courts regard the military as constituting a separate community that necessitates a distinct application of First Amendment principles and protections. Consequently, although military members have brought free speech challenges in a variety of circumstances, they are rarely, if ever, successful.

The military may limit the speech of a military member through the application of three levels of restrictions. The first level is contained in the punitive articles of the Uniform Code of Military Justice, codified at 10 U.S.C. §§ 880-934. The second level consists of the regulations of the Department of Defense and the individual services. The third level includes the lawful general orders of military commanders. These orders may take the form of base-wide restrictions or may be directed at the conduct or speech of an individual soldier.

The courts' evaluations of the speech restrictions imposed at each of these three levels highlight a number of fundamental tensions that exist when First Amendment challenges are made. How much free speech protection should be afforded a military member? Does it matter that the conversation occurred in a private setting or off-base? Involved the discussion of political issues rather than military issues? Addressed policy decisions still pending or orders that have already been delivered? With these questions structuring the following discussion, the free speech challenges to the military restrictions will be examined in detail.

A. Legislative Restrictions

The punitive articles of the UCMJ contain a series of provisions that may restrict the service member's speech. A large number of the articles have never been considered to intrude upon the First Amendment even as applied to

retain connections to civilian life and civil liberties. Consequently, she concludes that it "is inappropriate to judge this 'standing army' and a temporary army with the same yardstick of military necessity." *Id.* at 1058.

⁵⁰ See *infra* notes 89-90 and accompanying text.

⁵¹ Warren, *supra* note 5, at 188.

the civilian community.⁵² In these instances, such as extortion and perjury, the crime involves speech in the most literal sense. The speech is not, however, deemed to be within the coverage of the First Amendment because it has "nothing to do with what the concept of free speech is all about."⁵³ Additionally, provisions such as Article 116's sanction for breach of the peace⁵⁴ and Article 117's sanction for provoking speech or gestures⁵⁵ closely parallel categories of speech that are unprotected in the civilian sector. Even Article 100's subordinate compelling surrender and Articles 89 and 91's disrespect and insubordinate conduct prohibitions do not seem to raise serious free speech challenges given the compelling government interests at stake in each case.

Four articles, however, have prompted either serious judicial review or academic scrutiny. Article 134 prohibits all disorders to the prejudice of good order and discipline, conduct of a nature to bring discredit upon the armed services and crimes and offenses not capital. Article 133 proscribes conduct unbecoming an officer and a gentleman. Article 92 makes punishable violations of lawful general orders or regulations, specific lawful orders and dereliction of duty. Finally, Article 88 prohibits a servicemember from using contemptuous words against certain government officials. Each Article has been upheld against facial First Amendment challenges. Additionally, convictions under the Articles have been affirmed even when the

⁵² See, e.g., Article 81—Conspiracy, Article 82—Solicitation, Article 83—Fraudulent enlistment, appointment, or separation, Article 104—Aiding the Enemy (See e.g., *United States v. Bayes*, 22 C.M.R. 487 (A.B.R. 1956), *review denied*, 23 C.M.R. 421 (C.M.A. 1957); *United States v. Batchelor*, 19 C.M.R. 452 (A.B.R. 1955), *aff'd*, 22 C.M.R. 144 (C.M.A. 1956)), Article 107—False official statement, Article 123—Forgery, Article 127—Extortion, Article 128—Assault, Article 131—Perjury, Article 132—Frauds against the United States, Article 132—(False Swearing), Article 134—(Perjury: subornation of), Article 134—(Requesting commission of offense), Article 134—(Soliciting another to commit an offense), Article 134—(Threat or hoax: bomb), Article 134—(Threat, communicating).

⁵³ Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 274 (1981). In this article, Prof. Schauer presents an excellent discussion of the distinction between the coverage and protection of the First Amendment. See also Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983).

⁵⁴ Article 116—Riot or breach of the peace provides: "Any person subject to this chapter who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct." Cf. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (advocacy must be directed to incite imminent lawless action and be likely to produce such action).

⁵⁵ Article 117—Provoking speeches or gestures provides: "Any person subject to this chapter who uses provoking or reproachful words or gestures towards any other person subject to this chapter shall be punished as a court-martial may direct." The accompanying explanation states that the "provoking" and "reproachful" words are those "which a reasonable person would expect to induce a breach of the peace under the circumstances." MCM, *supra* note 3, ¶ 42(c)(1). Cf. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words which by their very utterance inflict injury or tend to incite an immediate breach of the peace are unprotected by the First Amendment). See also *United States v. Johnson*, 45 C.M.R. 53 (C.M.A. 1972).

servicemember's speech occurred off-base and during a private conversation. These underlying circumstances are relevant only to the determination of whether the speech met the elements of the offense, and not whether the speech is protected by the First Amendment.

1. Article 134—General Article

The general article is separated into three clauses.⁵⁶ The first includes "all disorders and neglects to the prejudice of good order and discipline in the armed forces."⁵⁷ This clause implies an internal focus on the conduct's effect on the actual efficiency of the military. The second clause includes "all conduct of a nature to bring discredit upon the armed forces."⁵⁸ Conduct and speech is punishable under this clause that "has a tendency to bring the service into disrepute or which tends to lower it in public esteem."⁵⁹ Finally, the article imposes sanctions for "crimes and offenses not capital."⁶⁰ Under certain circumstances, violations of federal law and that state law made applicable by the Federal Assimilative Crimes Act⁶¹ are proscribed by this clause.⁶²

The Manual for Courts-Martial also provides a list of specifications that can be charged under the general article. The two most pertinent to this discussion are disloyal statements⁶³ and indecent language.⁶⁴ Typically, disloyal statements involve either political or moral objections to governmental actions or policies. Conversely, indecent language almost always involves personal, if not private, communications. Before reviewing the First Amendment implications of these specifications, the Supreme Court's treatment of the general article will be detailed.

The Supreme Court upheld Article 134 against both vagueness and overbreadth challenges in *Parker v. Levy*.⁶⁵ In doing so, the Court relied extensively on the separate community rationale and the special responsibilities vested in Congress and the President by the Constitution. Because an understanding of the Court's approach and reasoning is necessary

⁵⁶ Article 134, UCMJ, MCM, ¶60 United States (1995 ed.). See generally James K. Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 HASTINGS L.J. 259 (1971).

⁵⁷ MCM, *supra* note 3, ¶ 60(a).

⁵⁸ *Id.*

⁵⁹ *Id.* ¶ 60(c)(3).

⁶⁰ *Id.* ¶ 60(a).

⁶¹ 18 U.S.C. § 13.

⁶² MCM, *supra* note 3, ¶ 60(c)(4).

⁶³ *Id.* ¶ 72.

⁶⁴ *Id.* ¶ 89.

⁶⁵ 417 U.S. 733 (1974). See generally Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 Wis. L. REV. 839 (1994).

to the discussion contained in Part II, the opinion will be examined in some detail.

Parker was commissioned as a Captain in the Army and was assigned as Chief of the Dermatological Service at Fort Jackson.⁶⁶ In the execution of his duties at the hospital, Parker made a number of statements to enlisted personnel concerning the U.S. involvement in Vietnam.⁶⁷ He was convicted by a court-martial of violating Article 90, 133, and 134, and was sentenced to dismissal, total forfeiture, and three years at hard labor. Although the Third Circuit found that Parker's conduct fell within the conduct proscribed by Article 133 and 134, it nevertheless reversed his conviction.⁶⁸ The court reasoned that the Articles were void for vagueness.⁶⁹

The Supreme Court, per Justice Rehnquist, reinstated Parker's conviction.⁷⁰ After recounting the special characteristics of the military community,⁷¹ the Court reviewed the early history and understanding of Article 134, which pre-dated the Constitution. It then noted lower court precedent concluding that questions involving the application of military customs were best determined by military officers who are "more competent judges than the courts of common law."⁷² In fact, the Court cited the Court of Claims reasoning that cases involving Article 134 determinations were "not measurable by our innate sense of right or wrong, of honor or dishonor, but must be gauged by an actual knowledge and experience of military life, its usage and duties."⁷³

⁶⁶ *Id.* at 736.

⁶⁷ The record described the following statement as representative:

The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murders of women and children.

Id. at 736-37.

⁶⁸ *Parker v. Levy*, 478 F.2d 772 (3rd Cir. 1973), *rev'd*, 417 U.S. 733 (1974).

⁶⁹ *Parker*, 417 U.S. at 741-42.

⁷⁰ Justice Douglas, Stewart, and Brennan dissented. Justice Marshall did not participate. *Id.* at 735.

⁷¹ See *supra* notes 34-40 and accompanying text.

⁷² *Parker*, 417 U.S. at 748 (quoting *Swaim v. United States*, 165 U.S. 553 (1897) (quoting *Smith v. Whitney*, 116 U.S. 178 (1886))).

⁷³ *Id.* at 748-49 (quoting *Swaim v. United States*, 28 Ct.Cl. 173, 228 (1893)).

The Court restated the characteristics that distinguish the military community and governing UCMJ from civilian society and civilian law.⁷⁴ It emphasized the "different purposes of the two communities" and stated that while military members "enjoy many of the same rights" as civilians, they do not have "the same autonomy" since their "function is to carry out the policies made by . . . civilian superiors."⁷⁵ Finally, the Court noted that because of the "broader sweep of the Uniform Code" the military takes affirmative steps to make personnel aware of the UCMJ's contents.⁷⁶

Turning to Parker's vagueness challenge, the Court found that the Court of Appeals for the Armed Forces (CAAF) and other military authorities had construed the article "in such a manner as to at least partially narrow its otherwise broad scope."⁷⁷ The Court explained that "[f]or the reasons which differentiate society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."⁷⁸ This reasoning led the Court to hold that "the proper standard of review for a vagueness challenge to the articles of the [UCMJ] is the standard which applied to criminal statutes regulating economic affairs,"⁷⁹ namely that "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness."⁸⁰ Applying this standard to the facts of the case, the Court concluded that Parker "could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so" violated Article 134.⁸¹

The Court similarly dispensed of Parker's overbreadth challenge.⁸² Acknowledging that it typically permits attacks "on overly broad statutes with

⁷⁴ *Id.* at 750-51.

⁷⁵ *Id.* at 751.

⁷⁶ *Id.* The Court cited Article 137, 10 U.S.C. § 937, which requires that the Code's provisions be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter" and that a complete text of the UCMJ and subsequent regulations be "made available to any person on active duty, upon his request, for his personal examination." *Id.* at 751-52.

⁷⁷ *Id.* at 752. The effect of this interpretation was to supply "considerable specificity by way of examples of the conduct which they cover," which had been further supplemented by "less formalized custom and usage." *Id.* at 754.

⁷⁸ *Id.* at 756.

⁷⁹ *Id.* at 756-57.

⁸⁰ *Id.* at 756.

⁸¹ *Id.* at 757.

⁸² Overbreadth doctrine has been described alternatively as either providing the accused with standing to assert a third-party's interests or requiring that the accused be sanctioned by a constitutionally valid rule of law. See Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 867 (1991); Henry P. Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1 (1981), edited and reproduced in *THE FIRST AMENDMENT: A READER* 276 (John H. Garvey and Frederick Schauer eds., 2d ed. 1996). Under the latter description, the Court is concerned with the "fit" of the law with the stated governmental interests that it seeks to advance. It has been observed, therefore, that "the Court has reached interchangeably to 'overbreadth' and

no requirement that the person making the attack demonstrate that his conduct could not be regulated by a statute drawn with the requisite narrow specificity," the Court held that this type of attack was not available to military personnel.⁸³ Instead, the "different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that would be constitutionally impermissible outside it."⁸⁴ The Court quoted at length from the "sensibly expounded" reasoning of the CAAF in *United States v. Priest*:

In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it is both directed at inciting imminent lawless action and is likely to produce such action. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.⁸⁵

Acknowledging that its civilian precedent involved noncriminal sanctions while the UCMJ imposed a wide range of criminal and administrative punishments, the Court nevertheless decided that the "weighty countervailing policies" which permit the extension of standing for overbreadth challenges in civilian society "must be accorded a good deal less weight in the military context."⁸⁶ The Court found, therefore, that Article 134 could be applied to "a wide range of conduct" without infringing on the First Amendment.⁸⁷ As applied to the facts of the case, Parker's conduct was simply "unprotected under the most expansive notions of the First Amendment."⁸⁸

Three points from Justice Stewart's dissent deserve special attention for the purposes of this discussion. First, Justice Stewart felt that the transformations of the modern military justified a departure from the Court's precedent. He admitted that beginning in 1858, the Court upheld the

'least restrictive alternative' challenges both inside and outside the First Amendment context." Consequently, if the Court is unconcerned with the precise fit of the law, as it is when conducting mere rationality review, then "statutory 'overbreadth' is not a meaningful objection as a matter of substantive constitutional doctrine." Monaghan, at 37-39.

⁸³ Parker, 417 U.S. at 758 (quoting *Gooding v. Wilson*, 405 U.S. 518, 520-521 (1972)).

⁸⁴ *Id.*

⁸⁵ *Id.* at 758-59 (quoting 45 C.M.R. 338, 344 (C.M.A. 1972) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. Gray*, 42 C.M.R. 255 (1970))).

⁸⁶ *Id.* at 760 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 611 (1973)).

⁸⁷ *Id.*

⁸⁸ *Id.* at 761.

predecessors to Article 133 and 134 against constitutional attack. At that time the standing army and navy numbered in the hundreds and the small professional cadre perhaps understood the conduct that was prohibited by the Articles. "But times have surely changed."⁸⁹ Given the induction of millions of men through the procedures of the draft who receive only a brief explanation of the UCMJ, Stewart felt that the soldiers should not be subject to the uncertainties of the Articles "simply because these provisions did not offend the sensibilities of the federal judiciary in wholly different period of our history."⁹⁰

Second, Stewart concluded that the military's argument that the vagueness of the Articles was necessary to "maintain high standards of conduct" lacked merit.⁹¹ Instead, he concluded that the "vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and esprit de corps."⁹² In a footnote, he cited with approval the suggestion of General Kenneth J. Hodson, former Judge Advocate General of the Army and Chief Judge of the Army Court of Military Review, that Article 134 should be replaced with specific sets of orders outlawing particular conduct.⁹³ Violations of these orders could then be prosecuted as a failure to obey a lawful order under Article 92.

Finally, Justice Stewart thought that the military's resort to either criminal or administrative remedies was significant. He explained that he did not "for one moment denigrate" the importance of commissioned officers being men of honor or that military necessity required that "servicemen generally must be orderly and dutiful."⁹⁴ Therefore, the military must make character evaluations of its personnel for the purposes of promotion, retention, duty assignment, and internal discipline. Stewart recognized, however, that the UCMJ operated as a criminal statute, and he could not "believe that such meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law."⁹⁵

To summarize, the Supreme Court held in *Parker* that a military member might succeed in making a vagueness challenge only if he could not have known that his conduct was within the purview of the statute. Second, the civilian overbreadth doctrine designed to provide incentives for legislatures to narrowly tailor restrictions impacting protected speech is practicably inapplicable in the military context. Given the vagueness of the articles, courts are able to discern a "wide range" of restricted conduct that does not infringe

⁸⁹ *Id.* at 781 (Stewart, J., dissenting).

⁹⁰ *Id.* at 783 (Stewart, J., dissenting).

⁹¹ *Id.* at 787 (Stewart, J., dissenting).

⁹² *Id.* at 788 (Stewart, J., dissenting).

⁹³ *Id.* at 789 n.42 (Stewart, J., dissenting).

⁹⁴ *Id.* at 789 (Stewart, J., dissenting).

⁹⁵ *Id.* (Stewart, J., dissenting).

upon the First Amendment, so the statute's overbreadth is not substantial. The Court also affirmed that the clear and present danger test applies in the military context and displayed a substantial amount of deference to the military's professional judgment as to whether the test was met. Finally, in finding that the statement was outside the protection of the First Amendment, the Court implicitly concluded that Parker's speech was disloyal to the United States and that the imposition of criminal sanctions was permissible. These principles will guide much of the First Amendment law that follows.

Three weeks after *Parker*, the Supreme Court handed down *Secretary of the Navy v. Avrech*.⁹⁶ Avrech was convicted of violating Article 80, which punishes attempts to commit other UCMJ offenses.⁹⁷ The underlying offense was publishing statements disloyal to the United States "with design to promote disloyalty and disaffection among the troops" in violation of both clause 1 and 2 of Article 134.⁹⁸ The Court of Appeals had reversed Avrech's conviction, holding that Article 134 was unconstitutionally vague.⁹⁹ Relying on *Parker*, the Supreme Court summarily reinstated his conviction.¹⁰⁰

Remembering his own World War I military experience, Justice Douglas submitted a strongly worded dissent that echoes many of the arguments against restricting the speech of military personnel.¹⁰¹ After detailing the exact statement that Avrech typed,¹⁰² Douglas recounted that his fellow soldiers "lambast[ed] General 'Black Jack' Pershing who was distant, remote, and mythical."¹⁰³ He understood that what they said "would have offended our military superiors," but since he was free to write Congress "we

⁹⁶ 418 U.S. 676 (1974) (per curiam).

⁹⁷ *Id.* at 676.

⁹⁸ *Id.* at 676-77.

⁹⁹ *Id.* at 677 (citing 477 F.2d 1237 (1973)).

¹⁰⁰ *Id.* at 678.

¹⁰¹ *Id.* at 678 (Douglas, J., dissenting).

¹⁰² Avrech typed out the following, somewhat ironic statement and planned to have it copied and distributed. Instead, it was given to a superior officer.

It seems to me that the South Vietnamese people could do a little for the defense of their country. Why should we go out and fight their battles while they sit at home and complain about communist aggression. What are we, cannon fodder or human beings? . . . The United States has no business over here. This is a conflict between two different politically minded groups. Not a direct attack on the United States. . . . We have peace talks with North Vietnam and the V.C. That's fine and dandy except how many men died in Vietnam the week they argued over the shape of the table? . . . Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace than a complete U.S. withdrawal. We've been sitting ducks for too long. . . .

Id. at 679 (Douglas, J., dissenting) (emphasis added).

¹⁰³ *Id.* at 680 (Douglas, J., dissenting).

saw no reason why we could not talk it out among ourselves.”¹⁰⁴ Douglas emphasized that Averch was not setting up a “rendezvous for all who wanted to go AWOL,” but instead “was attempting to speak with his comrades about the oppressive nature of the war they were fighting.”¹⁰⁵ At best, Douglas felt that the statements might have prompted a letter to family or member of Congress. Finding the statements innocuous, Douglas expressed his sharp disapproval of the military attitude towards free speech in the ranks:

I think full dedication to the spirit of the First Amendment is the real solvent of the dangers and tensions of the day. That philosophy may be hostile to many military minds. But it is time the Nation made clear that the military is not a system apart but lives under a Constitution that allows discussion of the great issues of the day, not merely the trivial ones—subject to limitations as to time, place, or occasion but never as to control.¹⁰⁶

Douglas’s dissent raises four objections to the Court’s resolution of the general article prosecutions. First, he believes that Averch’s statement was not a clear and present danger to good order and discipline. Second, he appears to observe that a certain amount of dissent is both natural and beneficial to the morale of the troops. Third, Douglas recognizes that certain limits exist on the military’s authority to control the speech of its personnel. Whether the right to communicate with Congress is based upon the Constitution or statute, an outlet exists for the channeling of concerns and complaints. Finally, however, Douglas seems to conclude that the official means of expression should not be exclusive, and that if a member could write to Congress, then less formal channels should be open as well.

While *Parker* and *Averch* are the most significant Supreme Court treatments of disloyal statements under Article 134,¹⁰⁷ the leading case from

¹⁰⁴ *Id.* (Douglas, J., dissenting).

¹⁰⁵ *Id.* (Douglas, J., dissenting).

¹⁰⁶ *Id.* (Douglas, J., dissenting).

¹⁰⁷ Although the Article was enacted after *Parker* and *Priest*, the explanation accompanying Article 134—Disloyal Statements currently provides:

Examples include praising the enemy, attacking the war aims of the United States, or denouncing our form of government with intent to promote disloyalty or disaffection among members of the armed services. A declaration of personal belief can amount to a disloyal statement if it disavows allegiance owed to the United States by the declarant. The disloyalty involved for this offense must be to the United States as a political entity and not merely to a department or other agency that is part of its administration.

MCM, *supra* note 3, ¶ 72(c).

the CAAF is *United States v. Priest*.¹⁰⁸ The court upheld Priest's conviction for disloyal statements under the predecessor to Article 134. The court concluded that the publication of 800 to 1,000 pamphlets calling for the violent overthrow of the government, taken in its entirety, was disloyal to the government; that Priest intended to promote disloyalty and disaffection among servicemen; and that the conduct was prejudicial to good order and discipline.

The case is significant in a number of respects. The CAAF specifically held that the "imminent lawless action" test outlined in *Brandenburg v. Ohio*¹⁰⁹ did not apply in the military context. Citing the different nature of the military mission and community, the court concluded that:

the danger resulting from the erosion of military morale and discipline is too great to require that discipline must have already been impaired before a prosecution for uttering statements can be sustained. As we have said before, the right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country.¹¹⁰

Instead, the court endorsed Justice Holmes's assertion in *Schenck v. United States*:

The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.¹¹¹

Consequently, it was not necessary for the government to show a materialized effect on the military resulting from Priest's statements. Instead, the inquiry is "whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."¹¹²

Having articulated this standard, the court concluded that the facts supported Priest's conviction. Although the court realized that the military personnel's level of education was extremely high, it still reasoned that "not all of them have the maturity of judgment to resist propaganda."¹¹³ In this case, "[o]ne possible harm from the statements is the effect on others if the

¹⁰⁸ 45 C.M.R. 338 (C.M.A. 1972). See also *United States v. Harvey*, 42 C.M.R. 141 (C.M.A. 1970); *United States v. Gray*, 42 C.M.R. 255 (C.M.A. 1970); *United States v. Amick*, 40 C.M.R. 720 (A.B.R. 1969).

¹⁰⁹ 395 U.S. 444 (1969) (per curiam).

¹¹⁰ *Priest*, 45 C.M.R. at 344.

¹¹¹ *Id.* at 344 (quoting 249 U.S. 47, 52 (1919)).

¹¹² *Id.* at 344-45.

¹¹³ *Id.* at 345.

impression becomes widespread that revolution, smashing the state, murdering policemen, and assassination of public officials are acceptable conduct.”¹¹⁴

The lesson to be taken from the court’s reasoning is that even a seemingly remote threat to good order and discipline will be sufficient in most instances to justify a criminal conviction. The court attached great weight to the fact that Priest advocated the violent overthrow of the government instead of exercising the right of every citizen to petition the government for redress or to elect candidates who espouse his views.¹¹⁵ The court also understood that it was “highly desirable” for military members to “have a good understanding of national issues,” and noted that this is not a case of “political discussion between members of armed forces in the privacy of their rooms or at an enlisted men’s or officers’ club.”¹¹⁶ In the end, however, the court stated that “the primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the Government and to the Commander in Chief.”¹¹⁷

While the number of prosecutions for disloyal statements decreased sharply after Vietnam, the military courts have recently seen a substantial increase in the number of indecent language specifications under Article 134.¹¹⁸ The CAAF has consistently declined First Amendment challenges to the prosecutions, finding that “indecent” is synonymous with “obscene,” and such language is not afforded constitutional protection.¹¹⁹ Furthermore, the CAAF has explained that “whether language is indecent depends on a number of factors, including but not limited to ‘fluctuating community standards of morals and manners, the personal relationship existing between a given speaker and his auditor, motive, intent and the probable effect of the communication.’”¹²⁰ Language is indecent if it “is calculated to corrupt morals or excite libidinous thoughts.”¹²¹

As review of the reported cases indicates, criminal sanctions can be imposed under Article 134 even for the content of “private” speech. Courts have affirmed convictions for the interstate transportation of child pornography, charged under the “crimes and offenses not capital” provision of

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 342.

¹¹⁶ *Id.* at 345-46.

¹¹⁷ *Id.* at 345.

¹¹⁸ Article 134—Indecent language provides: “Indecent language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral senses, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts.” MCM, *supra* note 3, ¶ 89.

¹¹⁹ *United States v. Moore*, 38 M.J. 490, 492 (C.M.A. 1994) (citing *United States v. French*, 31 M.J. 57, 59 (C.M.A. 1990)).

¹²⁰ *United States v. Hullett*, 40 M.J. 189, 191 (C.M.A. 1994) (quoting *United States v. Linyear*, 3 M.J. 1027, 1030 (N.C.M.R. 1977), *petition denied*, 5 M.J. 269 (C.M.A. 1978)).

¹²¹ *Hullett*, 40 M.J. at 191 (quoting *Linyear*, 3 M.J. at 1030).

Clause 3 of Article 134.¹²² The courts have also determined that private communication between adults is unprotected, especially if hostile and degrading.¹²³ Openly sexual comments that rise to the level of indecent communication can be charged under Article 134,¹²⁴ although comments that create a hostile work environment can be charged in certain circumstances under Article 92 or 93. When the conduct involves children, the courts have been even more reluctant to entertain First Amendment challenges, relying on "the Supreme Court's conclusion in [*New York v. Ferber*]¹²⁵ that the right to communicate to young children may be restricted."¹²⁶

In addition to imposing criminal sanctions for "private" conversations, a charge under Clause 1 or 2 of Article 134 can also be applied to conduct that occurs off-base. The off-base nature of the speech is relevant to the extent that it indicates whether the act was actually prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. The Army Court of Military Review (ACMR) found that this showing was not met in the particularly interesting case of *United States v. Hadlick*.¹²⁷ Hadlick was convicted under Article 134 after he spit on the American flag while in a drunken stupor at a police station. The CAAF remanded the case to the ACMR with instructions to consider whether Hadlick's conduct was expressive speech and protected in light of *Texas v. Johnson*.¹²⁸ The ACMR

¹²² See, e.g., *United States v. Pullen*, 41 M.J. 886, 887 (A.F.C.C.A. 1995) (finding that 18 U.S.C. § 2252(a)(4)(A) has scienter requirement and therefore rejecting First Amendment challenge to conviction on one specific specification of knowing possession of 3 or more items depicting minors engaged in sexually explicit conduct, in violation of statute, imported into Article 134 through its "crimes and offenses not capital" clause), *review denied*, 43 M.J. 166 (C.A.A.F. 1995); *United States v. Olinger*, 41 M.J. 615 (N.M.C.M.R. 1994) (same).

¹²³ See, e.g., *United States v. Caver*, 41 M.J. 556, 561 (N.M.C.C.A. 1994) ("considering the factors set forth in the record, including the context of the utterance, the intent and effect of the communication, and applying community standards," accused use of the term "bitch" was indecent), *review denied*, 43 M.J. 151 (C.A.A.F. 1995).

¹²⁴ See, e.g., *United States v. Gill*, 40 M.J. 835, 837 (A.F.C.M.R. 1994) (rejecting accused's assertions that conviction violated his First Amendment right to freedom of speech because the writings were private communications between consenting adults and holding that it was sufficient that the language was indecent on its face and was prejudicial to good order and discipline, as clearly established by the testimony of the two victims), *review denied*, 42 M.J. 100 (C.A.A.F. 1995); *United States v. Durham*, 1990 WL 199847 *1 (A.F.C.M.R. 1990) (per curiam) (summarily rejecting appellant's argument that his indecent language specifications violate his First Amendment right to free speech), *review denied*, 32 M.J. 470 (C.M.A. 1991).

¹²⁵ 458 U.S. 747 (1982) (upholding state prohibition on distribution of child pornography based on government interest in preventing the sexual exploitation of children).

¹²⁶ *United States v. Orben*, 28 M.J. 172, 175 (C.M.A. 1989) (holding that under the circumstances, display of non-pornographic or obscene pictures to minor constituted taking indecent liberties when accompanied by behavior and language demonstrating intent to arouse his own sexual passions, those of the child, or both), *cert. denied*, 493 U.S. 854 (1989).

¹²⁷ CM 8900080 (A.C.M.R. 30 Nov. 1989) (unpublished opinion), *aff'd*, 33 M.J. 163 (C.M.A. 1991).

¹²⁸ 491 U.S. 397 (1989) (striking Texas statute making it a crime to desecrate the American flag).

held that Hadlick spit on the flag "for no particular reason" and therefore had no claim to First Amendment protection.¹²⁹ However, the court set aside the conviction, concluding that "we have no information that the act was observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting."¹³⁰

The issue presented in the case did not go unnoticed.¹³¹ If, unlike Hadlick, a military member burns a flag for expressive purposes during an off-base demonstration, can the military impose a criminal sanction under the UCMJ without offending the First Amendment? One commentator has concluded that "[I]ittle question exists that a flag burner in the ranks will undermine the effectiveness of response to command."¹³² Flag burning strikes at "the very heart of good order and discipline" and would subject the flag burner to abuse from the members in his command.¹³³ A breach of the peace may result, and "any trust" in the flag-burner's "ability and desire to defend his fellow soldiers—let alone his country—in combat would be questionable."¹³⁴

Although the government failed to prove that Hadlick's off-base conduct violated Article 134, this showing was made in *United States v. Stone*.¹³⁵ Stone was convicted under Clause 2 (conduct discrediting the service) for giving a false account of his military actions in Iraq during Operation Desert Shield/Desert Storm to a high school assembly. Appearing in uniform and donning a green beret that he was not authorized to wear, Stone described to the students how he had parachuted from 50,000 feet into Baghdad prior to the beginning of the air war.¹³⁶ He also claimed to have been in Iraq in December, 1990, and told the students "that they may be in jeopardy because terrorists intent on retaliation may be watching his activities."¹³⁷

The Army Court of Military Review (ACMR) rejected Stone's contention that the speech could not have discredited the military because he delivered it while on leave and spoke only for himself.¹³⁸ Instead, it found that

¹²⁹ Hadlick, slip op. at 3.

¹³⁰ Hadlick, slip op. at 4.

¹³¹ See generally Jonathan F. Potter, *Flag Burning: An Offense Under the Uniform Code of Military Justice?*, 1990-NOV ARMY LAW. 21 (1990); Gregory A. Gross, Note, *Flag Desecration in the Army*, 1990-APR ARMY LAW. 25 (1990).

¹³² Potter, *supra* note 131, at 26.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 37 M.J. 558 (A.C.M.R. 1993) *aff'd*, 40 M.J. 420 (C.M.A. 1994).

¹³⁶ *Id.* at 561. Stone also told the students that as the leader of the four-man Green Beret team, he wore a computerized "glove" worth \$1.2 million that tied into "Star Wars" satellites, would warn him of approaching enemy forces and direct him to helicopter landing zones. *Id.* at 561 n.3. The local newspaper covered the assembly. The newspaper publisher, the brother of then Vice-President Dan Quayle, proudly forwarded a copy of the story to the Vice President's office, which then forwarded it to the Pentagon. *Id.* at 562.

¹³⁷ *Id.*

¹³⁸ *Id.* at 562.

Stone had acted in an official capacity by making the speech regarding his military activities while in uniform and in public.¹³⁹ Because the presentation was false but not disloyal, the court examined the surrounding circumstances to determine if it was service-discrediting. Stone claimed that the speech could not have discredited the service because the audience warmly received it.¹⁴⁰ The court found, however, that the government had provided ample evidence to the contrary.¹⁴¹ Affirming the ACMR's decision, the CAAF summarily stated that the "First Amendment does not protect false statements about military operations made by a soldier in uniform to a public audience of high school students during wartime."¹⁴²

The question left unresolved by the opinion is whether Stone would be subject to prosecution if his story were true. The court simply noted that such a case would raise First Amendment concerns.¹⁴³ Imagine that Stone had described a true account of a massacre by U.S. military personnel that he witnessed first-hand. After hearing the presentation, the audience had diminished confidence in the integrity of military personnel. Why would this speech not discredit the military? Could it be that Stone must first report the incident through approved channels, such as a filing an Inspector General complaint or sending a letter to Congress?¹⁴⁴ Does he have to wait for a response before he tells the story to the public?

It could be argued that Clause 2 is intended to reach only false speech

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 564.

¹⁴¹ *Id.* at 565. The government presented evidence at trial that, once the falsity of the presentation was exposed, the audience had diminished confidence in the integrity of military personnel. Evidence was also produced indicating that special operations personnel believed that the story, although completely false, might endanger members during the ground war. Finally, a public affairs officer for the Special Forces issued an apology to the high school principal and suggested methods to dispel the anxiety caused resulting from the terrorism remarks. *Id.* at 562.

¹⁴² *United States v. Stone*, 40 M.J. 420, 424-25 (C.M.A. 1994).

¹⁴³ *Stone*, 37 M.J. at 564.

¹⁴⁴ Although he did not witness the events in Vietnam on March 16, 1968, Ronald Ridenhour heard first-hand accounts from fellow soldiers. After his discharge and return to the states, he initiated the investigation into what would become known as the "My Lai Massacre" with a letter to the Department of the Army, the Department of Defense, and numerous government officials and members of Congress. He ended the letter with the following statement

I have considered sending this to newspapers, magazines, and broadcasting companies, but I somehow feel that investigation and action by the Congress of the United States is the appropriate procedure, and as a conscientious citizen I have no desire to further besmirch the image of the American serviceman in the eyes of the world. I feel this action, while probably it would promote attention, would not bring about the constructive actions that the direct actions of the Congress of the United States would.

RICHARD HAMMER, *THE COURT-MARTIAL OF LT. CALLEY* 23-28 (1971).

that discredits the military, but this is not clear from the plain language of the Article. Even if this interpretation were correct, it would place great weight on the truth/falsity determination. For example, what if Stone had told the students it was his opinion that "President Clinton's handling of Bosnia proves that he is incompetent to lead the military; he's a draft-dodger anyway?" If reasonable people could disagree about the validity of this opinion, then is the speech within the reach of Clause 2? Does the First Amendment protect Stone from prosecution?

A second point from the ACMR's opinion deserves consideration. The court found that Stone acted in his official capacity because he delivered the discussion of his military activities while in uniform and in a public forum. It is not clear why these facts are relevant to the determination that his presentation was discrediting to the service. First, Stone's presence in a public forum increased the likelihood that the speech would discredit the military. At least in the civilian context, however, categorizing a facility as a "public forum" under First Amendment doctrine significantly limits the government's ability to regulate speech.¹⁴⁵ Second, even if Stone was out of uniform, the audience no doubt understood that he was speaking about his personal experiences in the military. If he had already been discharged from the military, then he would not be subject to prosecution under the UCMJ. Furthermore, even if he was not speaking about his military activities, so long as the audience knew he was in the service the presentation could still be discrediting to the service. For example, imagine that he had given a presentation out of uniform and off-base on the legalization of child pornography and the audience knew he was an airman from the local base. Is this within the reach of Clause 2? Is it protected by the First Amendment?

The most recent First Amendment challenge to an Article 134 conviction was brought in *United States v. Brown*.¹⁴⁶ Brown was a member of a unit of the Louisiana National Guard that was mobilized during the Gulf War. A number of his fellow airmen became discontent when his unit was deployed to Fort Hood, Texas. After meetings with the commanding officer failed to alleviate their concerns, Brown and others arranged for charter buses to transport them back to Louisiana. Brown was charged and convicted with violating 10 U.S.C. § 976, incorporated by Clause 3 of Article 134, which prohibits *inter alia* the organization of military members for strike, march, or demonstration against the government.¹⁴⁷ Brown claimed that the statute was vague and overly broad and interfered with his First Amendment freedom of speech.

¹⁴⁵ See *infra* notes 325-26 and accompanying text.

¹⁴⁶ 45 M.J. 389 (C.M.A. 1996).

¹⁴⁷ *Id.* at 392-393.

Delivering the CAAF's opinion,¹⁴⁸ Judge Crawford reviewed the Supreme Court precedent that recognizes the military as a "separate community" and concluded that Brown could have little doubt that "organizing *battalion-wide* meetings to discuss living conditions, long hours, and inadequate time off, then arranging for transportation home would be improper."¹⁴⁹ In fact, she reasoned that there would be no question that the allegation would meet the vagueness requirement had the government charged Brown under Clause 1 or 2 of Article 134. Turning to the specific First Amendment issue, Judge Crawford developed a checklist to guide the analysis. Military personnel have "a right to voice their views so long as it does not impact on discipline, morale, esprit de corps, and civilian supremacy."¹⁵⁰ After reviewing both the legal precedent and scholarly articles that outline the critical importance of each factor to the military community, she concluded that Brown's speech was unprotected by the First Amendment. Although it does not appear to have been necessary for the Court's holding, Judge Crawford made special note of the many alternative outlets that Brown may have pursued with his complaint, to include the chain of command under Article 138, an Inspector General complaint, and communication with members of Congress.¹⁵¹

2. Article 133—Conduct unbecoming an officer and gentleman

Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.¹⁵²

In *Parker v. Levy*, the Supreme Court upheld Article 133 against vagueness and overbreadth challenges using the same line of reasoning that it found convincing for Article 134. The Court found that the specific needs of

¹⁴⁸ Chief Judge Cox concurred in the result, but did not "view this as a First Amendment case." *Id.* at 399. Although he found it "highly unusual" that the government relied on a federal statute outside of the UCMJ, he still concluded that "it is quite clear that the appellant's conduct was prejudicial to good order and discipline in the military and punishable as such." *Id.* at 399-400. Judge Gierke concurred in part and in the judgment, affirming the conviction on the basis of Clause 1 of Article 134 instead of Clause 3. Judge Sullivan dissented, finding that the underlying conduct did not constitute "union" activity under the federal statute. *Id.* at 401-02.

¹⁴⁹ *Id.* at 394 (emphasis in original).

¹⁵⁰ *Id.* at 396.

¹⁵¹ *Id.* at 398.

¹⁵² Article 133, UCMJ, MCM, *supra* note 3, ¶ 59(a). For an excellent discussion of the historical development and rationale supporting Article 133 and 134, UCMJ, see Maj. Keithe E. Nelson, *Conduct Expected of an Officer and a Gentleman: Ambiguity*, 12 AFJAG L REV. 124 (1970). Maj. Nelson explains that "the elimination of the mandatory dismissal punishment and the resultant change of wording in the Manual for Courts-Martial have operated to increase the vagueness surrounding [Article 133]." *Id.* at 138-39.

the military community permitted restrictions that would not be applicable to the civilian populace.¹⁵³ Additionally, the Court noted that the military courts of review had narrowed the broad language of the article. The underlying conduct must have “double significance and effect.”¹⁵⁴ As Winthrop explained, “[t]hough it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace; socially or as a man, the offender, and at the same time must be of such a nature or committed under such a circumstance as to bring dishonor or disrepute upon the military profession.”¹⁵⁵ The explanation accompanying the article provides further guidance, stating that not every officer “is or can be expected to meet unrealistically high moral standards.”¹⁵⁶ There is a limit of tolerance, however, “based on customs of the service and military necessity below which the personal standards of [the officer] cannot fall without seriously compromising the person’s standing as an [officer] or the person’s character as a gentleman.”¹⁵⁷

First Amendment challenges to Article 133 prosecutions have been made in three types of cases. The first implicates the “Don’t Ask, Don’t Tell” policy. In essence, the member’s statement that “I am a homosexual” is treated as an admission. The admission is then used as evidence to discharge the member based upon the engagement in prohibited conduct.¹⁵⁸ Because it has received ample consideration elsewhere, the constitutional implications of the policy will not be discussed here.¹⁵⁹

The second type of case involves an officer’s solicitation of another to violate a federal statute. Criminal solicitation is typically considered outside the coverage of the First Amendment and is, therefore, unprotected. In *United States v. Bilby*,¹⁶⁰ the accused solicited another to violate the federal statute prohibiting the interstate transportation of child pornography.¹⁶¹ The CAAF held that “[i]t is not necessary, under Article 133, that the conduct of the officer, itself, otherwise be a crime” and concluded that “it is unbecoming for an officer to solicit someone to violate a Federal statute—period.”¹⁶²

The third type of case involves an officer’s private use of sexually explicit language. In most instances, civilians who engage in this type of

¹⁵³ *Parker v. Levy*, 417 U.S. 733, 753-54 (1974).

¹⁵⁴ *Id.* at 754 (quoting *United States v. Howe*, 37 C.M.R. 429, 441-442 (1967) quoting (WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 711-12 (2d. ed. 1920))).

¹⁵⁵ *Id.* (quoting *Id.*).

¹⁵⁶ MCM, *supra* note 3, ¶ 59(c)(2).

¹⁵⁷ *Id.*

¹⁵⁸ *See, e.g., Holmes v. California Army National Guard*, 124 F.3d 1126, 1136-37 (9th Cir. 1997).

¹⁵⁹ For a list of articles that address the constitutionality of the “Don’t Ask, Don’t Tell” policy, see note 9.

¹⁶⁰ 39 M.J. 467 (C.M.A. 1994), *cert. denied*, 513 U.S. 1077 (1995).

¹⁶¹ 18 U.S.C. § 2252.

¹⁶² *Bilby*, 39 M.J. 470.

speech are protected from prosecution,¹⁶³ so long as the speech is not obscene¹⁶⁴ or does not involve children.¹⁶⁵ In *United States v. Hartwig*,¹⁶⁶ a captain serving during the Gulf War received a letter from a 14-year old schoolgirl. Although it was unclear whether he knew the exact age of the girl,¹⁶⁷ Hartwig responded with a letter that contained strong sexual overtones and a request for the girl to send a nude picture of herself to him.¹⁶⁸ On appeal, Hartwig challenged his conviction on First Amendment grounds, claiming that the private letters were protected. The CAAF held that “[w]hen an alleged violation of Article 133 is based on an officer’s private speech, the test is whether the officer’s speech poses a ‘clear and present danger’ that the speech will, ‘in dishonoring or disgracing the officer personally, seriously compromise[] the person’s standing as an officer.’”¹⁶⁹ The court found, therefore, that “the private nature of his letter neither clothes it with First Amendment protection nor excludes it from the ambit of Article 133.”¹⁷⁰ As the court explained, the Supreme Court over a century ago “upheld the constitutional authority of Congress to prohibit private or unofficial conduct by an officer which ‘compromised’ the person’s standing as an officer ‘and brought scandal or reproach upon the service.’”¹⁷¹

The CAAF disposed of a similar First Amendment challenge in *United States v. Moore*.¹⁷² Moore was convicted under Article 133 for the communication of indecent language, which the court described as “not simply amorous banter between two long-time lovers; rather it was demeaning vulgarity interwoven with threats and demands for money and sex.”¹⁷³ The

¹⁶³ See, e.g., *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989) (unanimously striking statute that prohibited indecent interstate “dial-a-porn” telephone calls while upholding ban on obscene services).

¹⁶⁴ The now familiar three-part test for obscenity was outlined by the Court in *Miller v. California*, 413 U.S. 15 (1973), *reh’g denied*, 414 U.S. 881 (1973).

¹⁶⁵ In *Sable*, 492 U.S. at 126, the Court noted that “there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.” The Court concluded, however, that the statute was not narrowly tailored to serve that interest. *Id.* at 126. See also *New York v. Ferber*, 458 U.S. 747 (1982) (upholding state prohibition on distribution of child pornography based on government interest in preventing the sexual exploitation of children).

¹⁶⁶ 39 M.J. 125 (C.M.A. 1994).

¹⁶⁷ *Id.* at 126-27.

¹⁶⁸ *Id.* at 127.

¹⁶⁹ *Id.* at 128 (quoting MCM, *supra* note 3, ¶ 59(c)(2)). See also *United States v. Modesto*, 39 M.J. 1055, 1061 (A.C.M.R. 1994) (“Assuming without deciding that cross-dressing in a public place has First Amendment implications, we have no doubt that the conduct presented a ‘clear and present’ danger’ that the conduct, ‘in dishonoring or disgracing the officer personally, [would] seriously compromise[] the person’s standing as an officer.’” (quoting MCM, *supra* note 3, ¶ 59(c)(2))), *aff’d*, 43 M.J. 315 (C.A.A.F. 1995).

¹⁷⁰ *Id.* at 128.

¹⁷¹ *Id.* at 128-29 (quoting *Smith v. Whitney*, 116 U.S. 167, 185 (1886)).

¹⁷² 38 M.J. 490 (C.M.A. 1994).

¹⁷³ *Id.* at 492 (quoting Army Court of Military Review’s unpub. op. at 3-4).

court explained that the "conduct of an officer may be unbecoming even when it is in private," and his actions "were clearly unbecoming an honorable, decent, and moral man."¹⁷⁴ Furthermore, "any 'reasonable military officer' would recognize that fact," and his "statements were of a kind to bring discredit upon himself and raise serious questions regarding his leadership ability."¹⁷⁵

3. Article 92—Failure to obey order or regulation

Any person subject to this chapter who — (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.¹⁷⁶

While Article 92 may be applied to a wide-range of speech, convictions have recently been challenged on First Amendment grounds in three particular circumstances: flag desecration, "hostile environment" sexual harassment, and possession of a drug recipe. Although rejected in all three cases, the mere fact that free speech challenges were argued illustrates the growing tendency of the accuseds to resort to First Amendment defenses.

In 1991, the ACMR rejected a free speech challenge to an Article 92 conviction in *United States v. Wilson*.¹⁷⁷ Wilson was a disenchanted military policeman on flag-detail. After expressing his disgust of the Army and the United States, he blew his nose on the American flag.¹⁷⁸ The accused was charged with dereliction of duty in that he "willfully failed to ensure that the United States flag was treated with proper respect by blowing his nose on the flag when it was his duty as military policeman on flag call to safeguard and protect the flag."¹⁷⁹ The duty was based upon military custom, which was proven by reference to Army field manual, and knowledge of the custom was established by the testimony of his first sergeant.¹⁸⁰

The military judge determined that soldier's actions were expressive conduct "entitled to protection unless government has greater countervailing interest in suppressing the particular speech."¹⁸¹ The ACMR recounted the

¹⁷⁴ *Id.* at 493 (internal quotation marks omitted).

¹⁷⁵ *Id.* (quoting *United States v. Frazier*, 34 M.J. 194 (C.M.A. 1992)).

¹⁷⁶ Article 92, UCMJ, MCM, *supra* note 3, ¶ 16(a).

¹⁷⁷ 33 M.J. 797 (A.C.M.R. 1991).

¹⁷⁸ *Id.* at 798.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 798 n.1.

¹⁸¹ *Id.* at 798. The military judge also found that if the accused in this case were a civilian and purchased his own flag, the conduct would be protected under *Texas v. Johnson*, 491 U.S. 397 (1989). Additionally, if the soldier was off duty and out of uniform and procured his own flag,

"separate community" rationale, stating that the "essence of military service 'is the subordination of desires and interests of the individual to the needs of the service.'"¹⁸² However, since it determined that Wilson's conduct was expressive speech and the governmental regulation only incidentally related to the suppression of free speech, the ACMR proceeded to evaluate the government regulation based upon the test outlined in *United States v. O'Brien*.¹⁸³ Given the long precedent establishing the unique nature of the military community, it is somewhat surprising that the ACMR did not apply the clear and present danger test in this instance. In fact, this is the only reported case in which a military court of review has utilized the *O'Brien* test.

As defined by the ACMR, the *O'Brien* test asks four questions. Is the regulation within the constitutional power of the government? Does it further an important or substantial government interest? Is the governmental interest unrelated to the suppression of free expression? Is the incidental restriction on alleged First Amendment freedoms no greater than necessary to further that interest?¹⁸⁴

Applying the *O'Brien* test, the court found that Article 92 "is a legitimate regulatory measure because the government may regulate the conduct of soldiers."¹⁸⁵ Second, Article 92 "furthers an important and substantial government interest in promoting an effective military force."¹⁸⁶ Third, the purpose of Article 92, "in proscribing failures to perform military duty is, on its face, unrelated to the suppression of free speech."¹⁸⁷ Finally, the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further the government interest in promoting the disciplined performance of military duties."¹⁸⁸ Consequently, Wilson's expressive conduct was unprotected.

Aside from the fact that it was applied in this situation, the *O'Brien* test's application presents an interesting dilemma for future accuseds wishing to challenge an Article 92 conviction. In short, it is nearly impossible. Because the ACMR chose to evaluate the government's interests in suppressing free expression and the incidental effect of the restriction in general terms, the analysis is applicable to any challenge to an Article 92 conviction.

It could be argued, however, that the *O'Brien* test should be applied to the underlying duty and not the general article. Wilson's duty was to show the

"arguably then that expression of a position might be protected, that issue has yet to be decided." *Id.*

¹⁸² *Id.* at 799 (internal quotation marks omitted) (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (citing *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953))).

¹⁸³ *Id.* at 799-800 (citing 391 U.S. 367 (1968), *reh'g denied* 393 U.S. 900 (1968)).

¹⁸⁴ *Id.* at 800.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

proper respect to the flag as a member of the flag-raising detail. Initially, it could be argued that the government's restriction is not incidental to the suppression of speech, and therefore, the *O'Brien* test should not apply. Alternatively, applying the *O'Brien* test, it could be argued that the government's interest in showing the proper respect for the flag is not unrelated to the suppression of free expression. Even applying a more specific definition of the underlying duty, Wilson's challenge would likely fail because his conduct involved government property and he was assigned as a military policeman. However, a different fact scenario might lend itself to this type of argument.

First Amendment challenges were also made to an Article 92 conviction involving seven specifications of sexual harassment in *United States v. Daniel*.¹⁸⁹ The accused argued that the underlying Navy Regulation's prohibition of "hostile environment" sexual harassment was facially void for vagueness because of its chilling effect on speech. The court reversed the conviction on other grounds, finding that the regulation was not punitive and therefore could not serve as the basis for an Article 92 conviction. However, in light of the recent Supreme Court's treatment of similar challenges to Title VII,¹⁹⁰ future challenges are likely to be unsuccessful.

Finally, a conviction under Article 92 was challenged on free speech grounds in *United States v. McDavid*.¹⁹¹ McDavid was charged and convicted, *inter alia*, of violating an Air Force regulation by possessing a handwritten drug "recipe" with criminal intent to produce a controlled substance.¹⁹² On appeal, he argued that "punishing someone for possessing a document that they wrote themselves has profound constitutional implications."¹⁹³ The Air Force Court of Criminal Appeals reiterated that the prosecution was for possessing a drug recipe *with criminal intent*, and not merely the "dissemination of ideas or the expression of views." The court concluded that it had "no First Amendment concerns about a specification which alleges as criminal the act of

¹⁸⁹ 42 M.J. 802, 804-06 (N.M.C.C.A. 1995) (Secretary of the Navy Instruction 5300.26A, Department of the Navy Policy on Sexual Harassment (Aug. 2, 1989) was not a punitive regulation but merely a policy statement and, therefore, could not serve as basis for Article 92, UCMJ offense), *review denied*, 43 M.J. 429 (C.A.A.F. 1995). For examinations of sexual harassment prosecutions in the military, see Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 MIL. L. REV. 1 (1993); Mary C. Griffin, Note, *Making the Army Safe for Diversity: A Title VII Remedy for Discrimination in the Military*, 96 YALE L.J. 2082 (1987).

¹⁹⁰ Interpreting Title VII, the Supreme Court has held that if the work environment could reasonably be perceived to be hostile or abusive no showing of psychological injury was necessary. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Although free speech issues were briefed by both parties, the Court's opinion did not even reference the First Amendment. See Richard H. Fallon, Jr., *Sexual Harassment, Content-Neutrality, and the First Amendment Dog that Didn't Bark*, 1994 SUP. CT. REV. 1 (1994).

¹⁹¹ 37 M.J. 861 (A.F.C.M.R. 1993), *review denied*, 39 M.J. 405 (C.M.A. 1994).

¹⁹² *Id.* at 862.

¹⁹³ *Id.* at 863.

possessing a recipe for concocting an illegal controlled substance, together with some of the chemical components of the controlled substance.”¹⁹⁴

4. Article 88—Contempt toward officials

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.¹⁹⁵

According to the clear language of Article 88, only “contemptuous” words against the listed officials are prohibited. Furthermore, the explanation accompanying the Article states that “[n]either ‘Congress’ nor ‘legislature’ includes members individually.”¹⁹⁶ The discussion also indicates that it is “immaterial whether the words are used against the official in an official or private capacity.”¹⁹⁷ However, so long as the words are “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.”¹⁹⁸ Finally, “[t]he truth or falsity of the contemptuous statement is immaterial.”¹⁹⁹

The prohibition contained in Article 88 is not only content-based, it is also view-point based. Under the civilian protections of the First Amendment, the government is forbidden to discriminate among speakers based upon the speaker’s viewpoint. Even in a nonpublic-forum such as a military base, the government may impose restrictions upon civilian speech only if the restriction is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”²⁰⁰ Civilians are, therefore, protected from prosecution for uttering words that are “contemptuous” against public officials. For example, in *Watts v. United States*, the Supreme Court reversed the conviction of a teenager who stated during a protest rally “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”²⁰¹ Watts was convicted under a federal statute that prohibited any person from knowing and willfully making a threat against the life of the President.²⁰²

¹⁹⁴ *Id.* at 863-64.

¹⁹⁵ MCM, *supra* note 3, ¶ 12(a).

¹⁹⁶ *Id.* ¶ 12(c).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 46 (1983).

²⁰¹ 394 U.S. 705, 706 (1969) (per curiam).

²⁰² *Id.* at 705-06 n. * (quoting 18 U.S.C. § 871(a)).

Although the statute was valid on its face, the Court explained that “[w]hat is a threat must be distinguished from what is constitutionally protected speech.”²⁰³ Taken in context and “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”²⁰⁴ the only offense Watts committed was to engage in “a kind of very crude offensive method of stating a political opposition to the President.”²⁰⁵

The most recent court-martial conviction under Article 88 involved 2nd Lt. Henry Howe’s off-duty participation in a sidewalk demonstration to protest the Vietnam War.²⁰⁶ During the fall of 1965, Howe carried a sign that read “LET’S HAVE MORE THAN A ‘CHOICE’ BETWEEN PETTY, IGNORANT, FACISTS [sic] IN 1968” and “END JOHNSON’S FACIST [sic] AGRESSION [sic] IN VIETNAM.”²⁰⁷ While he was not in uniform, the record indicates that the protest march prompted extensive media coverage and approximately 2000 people were present.²⁰⁸ Military policemen, on hand to assist civilian police with any military personnel that might become involved in the demonstration, recognized Howe and several others.²⁰⁹

Howe was convicted by a general court-martial of violating Article 88 and 133, and ultimately received a sentenced of dismissal, total forfeitures, and one-year confinement.²¹⁰ On appeal, the CAAF rejected Howe’s assertion that Article 88 violated his First Amendment rights. The court noted the restrictions contained in the provision are older than the Constitution itself, appearing in the Article of War adopted by the Continental Congress in 1775.²¹¹ After detailing the subsequent congressional endorsement of the article, the court concluded that the reenactments “constituted a contemporary construction of the Constitution and is entitled to the greatest respect.”²¹² While highlighting that the protections afforded by the First Amendment are not absolute, the court emphasized that the evil the article seeks to avoid is “the impairment of discipline and the promotion of insubordination by an officer of the military service.”²¹³ The court noted that given the hundreds of thousands of troops fighting in Vietnam and the thousands of draftees, it “seems to require no argument” that Howe’s conduct constituted a clear and present

²⁰³ *Id.* at 707.

²⁰⁴ *Id.* at 708 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)).

²⁰⁵ *Id.* (internal quotation marks omitted).

²⁰⁶ *United States v. Howe*, 37 C.M.R. 429 (C.M.A. 1967).

²⁰⁷ *Id.* at 433.

²⁰⁸ *Id.* at 432.

²⁰⁹ *Id.* at 432-33.

²¹⁰ *Id.* at 431.

²¹¹ *Id.* at 434.

²¹² *Id.* at 438.

²¹³ *Id.* at 437.

danger to discipline within the armed forces.²¹⁴ The conclusion that Article 88 "does not violate the First Amendment is clear."²¹⁵

Apart from the actual finding that Article 88 is facially valid, the court's holding is significant in at least three respects. First, the court relied heavily upon the fact that the restrictions proscribed in the article pre-dated the First Amendment. The consequent reenactment of the Article by Congress led the court to conclude that this prohibition was acceptable. It has been argued, however, that this reasoning is inapplicable to the current military community because the Founding Fathers had never envisioned a large peacetime standing army.²¹⁶ Second, the court placed great emphasis on the "separate community" theory and the importance of civilian control of the military to survival of our democratic government.²¹⁷ Third, the ease by which the court found that Howe's expressive conduct represented a clear and present danger to military discipline is notable.

This article has not gone without criticism.²¹⁸ It has been argued that Article 88 "precludes military officers from engaging in open and vigorous debate about officials and their policies,"²¹⁹ and "must have a chilling effect on anyone subject to its strictures and aware of its prohibition."²²⁰ Arguably, however, the actual threat to free speech posed by Article 88 is small.

Consider the remarks of Maj. Gen. Harold N. Campbell, a 32-year veteran who reportedly called President Clinton a "dope-smoking," "skirt-chasing," "draft-dodging" Commander-in-Chief during a speech in the Netherlands in the summer of 1993.²²¹ An Air Force inquiry ensued and reportedly concluded that Gen. Campbell had violated Article 88.²²² Soon thereafter, Air Force Chief of Staff Gen. Merrill McPeak announced at a Department of Defense briefing that Gen. Campbell was given a written reprimand under Article 15 and had requested to retire.²²³ Regardless of one's voting preferences or the popularity of an opinion with others,²²⁴ it seems clear

²¹⁴ *Id.* at 437-38.

²¹⁵ *Id.* at 438.

²¹⁶ See generally Levin, *supra* note 49.

²¹⁷ Howe, 37 C.M.R. at 439 (quoting Warren, *supra* note 4).

²¹⁸ See generally Richard W. Aldrich, Comment, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189 (1986); 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).

²¹⁹ Aldrich, *supra* note 218, at 1195.

²²⁰ *Id.* at 1206.

²²¹ Eric Schmitt, *General to Be Disciplined for Disparaging President*, N.Y. TIMES, June 16, 1993, at A20, available in LEXIS, Nexis Library, ARCNWS File.

²²² *Pentagon Fines, Reprimands And Retires General Who Ridiculed Clinton*, UPI, June 18, 1993, available in LEXIS, Nexis Library, ARCNWS File.

²²³ Gen. Merrill McPeak, Defense Department Briefing, June 18, 1993, available in LEXIS, Nexis Library, ARCNWS File.

²²⁴ See Bruce Smith, *Memo to the Navy: Ask the JAG*, 42-DEC. FED. LAW. 18 (1995) (emphasizing that the Naval Institute's *Proceedings* essay critical of DoD policies on

that Gen. Campbell's remarks were inappropriate. Amounting to a personal attack on the President, the comments were not aimed at a pending national issue or policy. The incident did add to the impression held by many that the military did not hold the highest opinion of the President, but whether the "open and vigorous" public debate benefited from this additional information is at least questionable. As President Clinton reportedly responded, "for a general officer to say that about the commander-in-chief—if that happened—is a very bad thing."²²⁵

C. Department of Defense Regulations and Air Force Instructions

The Department of Defense and the individual services have promulgated a variety of regulations that restrict the speech activities of its members.²²⁶ If the regulation is punitive, violations may be charged under Article 92, UCMJ.²²⁷ A number of punitive Air Force Instructions (AFI) raise possible free speech issues, such as the Internet restrictions contained in AFI 33-129²²⁸ and the unprofessional relationship prohibitions outlined in AFI 36-2909.²²⁹ Of particular interest for the purpose of this inquiry, however, are the restrictions on political speech.

The restrictions on the political activities of Air Force personnel are contained in DoD Directive 1344.10²³⁰ and Air Force Instruction 51-902.²³¹ The AFI prohibits a host of partisan political activity, to include the use of "official authority or influence to interfere with an election, to affect its course or outcome, to solicit votes for a particular candidate or issue, or to require or

personnel and social issues that provoked outrage in Washington D.C. illustrates that "even political commentary that enjoys widespread support among the ranks can still constitute a violation of the law or good judgment.").

²²⁵ Charles Aldinger, *General Ridiculed Clinton, Official Says*, Reuters North American Wire, June 15, 1993, available in LEXIS, Nexis Library, ARCNWS File.

²²⁶ The two regulations implementing the "Don't Ask, Don't Tell" policy have evoked the most controversy in recent years. See *supra* note 9.

²²⁷ See, e.g., *United States v. Daniel*, 42 M.J. 802 (N.M.C.C.A. 1995) (finding that Naval instruction governing sexual harassment was not punitive and could not serve as basis for charge of violating lawful general order or regulation under Article 92, UCMJ), *review denied*, 43 M.J. 429 (C.A.A.F. 1995).

²²⁸ Air Force Instruction 33-129, ¶ 6.1.3, Transmission of Information via the Internet (Jan. 1, 1997) (prohibiting, *inter alia*, the storage or transmission of obscene or offensive language or material on government computer system). See *supra* notes 118-21 and accompanying text. (indecent)

²²⁹ Air Force Instruction 36-2909, ¶ 5, Professional and Unprofessional Relationships (May 1, 1996).

²³⁰ Department of Defense Directive 1344.10, Political Activities by Members of the Armed Forces on Active Duty (June 15, 1990).

²³¹ Air Force Instruction 51-902, Political Activities by Members of the US Air Force (Jan. 1, 1996) [hereinafter AFI 51-902] (punitive regulation in its entirety); See also Major General Nolan Sklute, TJAG Policy 10, Political Activities by Air Force Military Personnel (1995 Revision).

solicit political contributions from others.”²³² On the other hand, members can vote, attend political meetings and rallies as a spectator out of uniform, and express personal views on non-partisan, public issues in a letter to the editor of a newspaper.²³³ It would appear, therefore, that a lieutenant would be permitted to submit the statement at the beginning of this article as a letter to the editor of the *Air Force Times*. Additionally, the military permits personnel to place a “political sticker on the member’s private vehicle, or wear a political button when not in uniform and not on duty.”²³⁴

While service members are generally permitted to engage in the conduct outlined in the two regulations, commanders have also been provided guidance on the handling of political protest and dissent. These responsibilities are contained in DoD Directive 1325.6²³⁵ and AFI 51-903.²³⁶ The AFI provides that “commanders must preserve the service member’s right of expression, to the maximum extent possible, consistent with good order, discipline, and national security.”²³⁷ Commanders, however, “have the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline.”²³⁸ Consequently, an Air Force member may not “distribute or post any printed or written material” other than official publications “within any Air Force installation without permission of the installation commander or that commander’s designee.”²³⁹

The regulations serve two related purposes. The first is to avert clear and present dangers to military order and discipline as described in the preceding court opinions. The second purpose is to maintain a politically disinterested military that remains safely under the control of civilian superiors. The balance between the free speech rights of military personnel

²³² AFI 51-902, *supra* note 231, ¶ 3.1.

²³³ *Id.* ¶ 4. For a discussion of service regulations prohibiting military personnel from appearing at certain functions in uniform, see *United States v. Locks*, 40 C.M.R. 1022, 1023 (A.F.B.R. 1969) (“The Air Force designs and furnishes the uniform according to its own criteria; the First Amendment does not forbid the Air Force from determining the uniform’s use according to its own criteria.”), *review denied*, 40 C.M.R. 327 (C.M.A. 1969); *United States v. Toomey*, 39 C.M.R. 969, 973 (A.F.B.R. 1968) (rejecting free speech challenge to Article 92 charge for violating Air Force uniform regulation and finding that “there can be no doubt that the wearing of the uniform while participating in a demonstration protesting the Selective Service Act and its implementation . . . is highly injurious to the reputation of the military service.”)

²³⁴ *Id.* ¶ 4.8.

²³⁵ DoD Directive 1325.6, *Guideline for Handling Dissident and Protest Activities Among Members of the Armed Forces* (Oct. 1, 1996).

²³⁶ Air Force Instruction 51-903, *Dissident and Protest Activities* (Feb. 1, 1998) (superceding AFI 51-903 (Mar. 4, 1994) (originally covered by AFR 35-15 (Dec. 7, 1987))). Paragraphs 2, 5, 5.1, 7, 7.2 are punitive.

²³⁷ *Id.* ¶ 1.1.

²³⁸ *Id.* ¶ 1.

²³⁹ *Id.* ¶ 2.

and the military's interest in good order and discipline and mission effectiveness can be a particularly challenging task.

In *Brown v. Glines*, the Supreme Court denied a facial challenge to military regulations that required military personnel and civilians to gain prior command approval before circulating certain material.²⁴⁰ Two Air Force regulations were at issue in the case. The first regulation, AFR 35-1(9) prohibited the public solicitation or collection of petitions by a military member in uniform, by a military member in a foreign country,²⁴¹ or by any person within an Air Force facility without command permission.²⁴² The second regulation, AFR 35-15(3) prohibited military personnel from distributing or posting any unofficial material within an Air Force facility without command permission.²⁴³ Since the regulations applied to all petitions and unofficial material, the restrictions were content-neutral. Like the ACMR in *United States v. Wilson*,²⁴⁴ the Supreme Court essentially applied the *O'Brien* test to the regulations. The Court concluded that the regulations were permissible under the First Amendment because they advanced a substantial government interest unrelated to the suppression of free expression and restricted speech no more than was reasonably necessary to protect that interest.

Glines was a reserve captain on active duty at Travis Air Force base. He drafted a petition to several members of Congress and the Secretary of

²⁴⁰ 444 U.S. 348 (1980). The Court also held that the regulations did not violate 10 U.S.C. § 1034, which it interpreted as protecting the ability of an individual military member to contact members of Congress. *Id.* at 358.

²⁴¹ The Supreme Court upheld similar Navy and Marine Corps regulations on overseas solicitation in *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980). See also *Brown v. Allen*, 444 U.S. 1063 (1980), *vacating* 583 F.2d 438 (9th Cir. 1978).

²⁴² Air Force Reg. 30-1(9) (1971) provided: "Right to petition. Members of the Air Force, their dependents and civilian employees have the right, in common with all other citizens, to petition the President, the Congress or other public officials. However, the public solicitation or collection of signatures on a petition by any person within an Air Force facility or by a member when in uniform or when in a foreign country is prohibited unless first authorized by the commander." *Brown*, 444 U.S. at 349-50 n.1.

²⁴³ Air Force Reg. 35-15(3)(a) (1970) provided: "(1) No member of the Air Force will distribute or post any printed or written material other than publications of an official governmental agency or base regulated activity within any Air Force installation without permission of the commander or his designee . . . ; (2) When prior approval for distribution or posting is required, the commander will determine if a clear danger to the loyalty, discipline, or morale of members of the Armed Forces, or material interference with the accomplishment of a military mission, would result. If such a determination is made, distribution or posting will be prohibited and HQ USAF (SAFOI) will be notified of the circumstances. (3) . . . ; (4) Distribution or posting may not be prohibited solely on the ground that the material is critical of Government policies or officials. (5) In general, installation commanders should encourage and promote the availability to service personnel of books, periodicals, and other media which present a wide range of viewpoints on public issues." *Id.* at 350-51 n.2.

²⁴⁴ See *supra* notes 177-88 and accompanying text.

Defense complaining about the Air Force grooming standards.²⁴⁵ While on temporary duty at Anderson AFB, Guam, he had the petition circulated without obtaining prior approval of the base commander. When his commander was notified of the incident, Glines was assigned to the standby reserves.²⁴⁶

While recounting the special characteristics and attributes of the military as a separate society, the Court found that the regulations "protect a substantial Government interest unrelated to the suppression of free speech."²⁴⁷ That interest was the avoidance of a "clear danger to the loyalty, discipline, or morale of the troops on the base under his command."²⁴⁸ The Court repeated selective quotes from its precedent that explain the "separate community" rationale. For example, "[t]o ensure that they always are capable of performing their mission promptly and reliably, the military services 'must insist upon a respect for duty and a discipline without counterpart in civilian life.'"²⁴⁹ Significantly, the Court also noted that the location or combat status of the base was immaterial. The restrictions necessary for military readiness and discipline "are as justified on a regular base in the United States, as on a training base, or a combat-ready installation in the Pacific."²⁵⁰ Regardless of where the base is located, airmen "may be transferred to combat duty or called to deal with a civil disorder or natural disaster."²⁵¹

After finding that the regulations advanced a substantial government interest, the Court also concluded that "the Air Force regulations restrict speech no more than is reasonably necessary."²⁵² The regulations "prevent commanders from interfering with the circulation of any materials other than those posing a clear danger to military loyalty, discipline, or morale."²⁵³ The additional limitations contained in the regulations convinced the Court the

²⁴⁵ The petition to the Secretary of Defense read:

Dear Secretary of Defense:

We, the undersigned, all American citizens serving in the Armed Services of our nation, request your assistance in changing the grooming standards of the United States Air Force.

We feel that the present regulations on grooming have caused more racial tension, decrease in morale and retention, and loss of respect for authorities than any other official Air Force policy.

We are similarly petitioning Senator Cranston, Senator Tunney, Senator Jackson, and Congressman Moss in the hope of our elected or appointed officials will help correct this problem.

Id. at 351 n.3 (quoting *Glines v. Wade*, 586 F.2d 675, 677 n.1 (9th Cir. 1978)).

²⁴⁶ *Id.* at 351.

²⁴⁷ *Id.* at 354.

²⁴⁸ *Id.* at 353 (quoting *Greer v. Spock*, 424 U.S. 828, 840 (1976)).

²⁴⁹ *Id.* at 354 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

²⁵⁰ *Id.* at 356 n.14 (citations omitted).

²⁵¹ *Id.*

²⁵² *Id.* at 355.

²⁵³ *Id.* at 355.

commander's censorship authority was sufficiently limited. Finally, the Court reasoned that the prior approval requirement was necessary because if the commander did not have the opportunity to review the material, then he "could not avert possible disruption among his troops."²⁵⁴ In an important footnote, the Court conceded that commanders could "apply these regulations 'irrationally, invidiously, or arbitrarily,' thus giving rise to legitimate claims under the First Amendment."²⁵⁵ Since Glines never requested permission to circulate his petition, the question was not before the Court.

It is unclear how the Court determined that the substantial government interests advanced by the regulations were unrelated to the suppression of free expression. It is indisputable that the military has a substantial interest in protecting loyalty, discipline, or morale. The regulations in question, however, advance that interest by requiring members to obtain prior approval for certain forms of speech from the base commander. It may be argued that the military is concerned, in general, with preventing disruptions to good order and discipline. The implications of this argument, however, are far reaching because it would appear that the purpose of *every* military restriction and regulation is to prevent disruptions to loyalty, discipline or morale. If this observation is correct, then the First Amendment rights of military personnel can be reduced to a simple statement: Members have the right to speak so long as the speech does not pose a clear threat to the good order and discipline of the military.

D. Specific Command Orders

There are few cases in which First Amendment challenges have been made to a commander's specific order. Of course, this may be a result of either a lack of specific orders being issued or a lack of specific orders being challenged. The most pertinent free speech challenge to a specific order dealt with a bumper sticker on a civilian employee's vehicle.

In *Ethredge v. Hail*,²⁵⁶ the commander of Robins Air Force base issued an administrative order barring "bumper stickers or other similar paraphernalia" that "embarrass or disparage the Commander in Chief."²⁵⁷ Ethredge, a civilian employee who had worked at the base for over twenty-five years, refused to remove a bumper sticker from his truck that read "HELL WITH CLINTON AND RUSSIAN AID" claiming that it was protected speech under the First Amendment.²⁵⁸ The Eleventh Circuit denied his challenge, finding that Robins Air Force Base was a non-public forum, permitting officials to impose speech regulations so long as it "is reasonable and not an

²⁵⁴ *Id.* at 356.

²⁵⁵ *Id.* at 357 n.15 (internal quotations omitted).

²⁵⁶ 56 F.3d 1324 (11th Cir. 1995).

²⁵⁷ *Id.* at 1325.

²⁵⁸ *Id.* at 1325-26.

effort to suppress expression merely because public officials oppose the speaker's view."²⁵⁹

The court reasoned that the order was not viewpoint-based because it did not prohibit criticism of the President. Other vehicles on-base had bumper stickers that read "Bill Clinton has what it takes to take what you have" and "Defeat Clinton in '96."²⁶⁰ Additionally, the court found that the order in no way limited the application of the restriction to opponents of the President. Since it merely prohibited bumper stickers that embarrass or disparage the President, it also applied to supporters of the President.²⁶¹

Having decided that the order was viewpoint neutral, the court also found that it was reasonable. A commander is not required to "demonstrate actual harm before implementing a regulation restricting speech."²⁶² The commander merely needed to demonstrate a "clear danger to military order and morale."²⁶³ Since the installation commanders submitted affidavits that they believed the sign would "undermine military order, discipline, and responsiveness" and anonymous phone callers had threatened to break the window out of Ethredge's truck, this standard was met.²⁶⁴ As the court concluded, "[w]e must give great deference to the judgment of these officials."²⁶⁵

This case raises two points of interest. First, despite the court's conclusion to the contrary, the order is undoubtedly both content and viewpoint based. It discriminates based upon content because it applies only to signs that reference the President.²⁶⁶ It discriminates based upon viewpoint because it applies to comments that are "disparaging or embarrassing" but not to comments that praise the President or merely state vague disapproval.

²⁵⁹ *Id.* at 1327 (quoting *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 46, (1983)).

²⁶⁰ *Id.* at 1327 n.2.

²⁶¹ *Id.* at 1327.

²⁶² *Id.* at 1328 (citing *Greer v. Spock*, 424 U.S. 828, 840 (1976)).

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* (citing *Goldman v. Weinberger*, 475 U.S. 503, 507-08 (1986)).

²⁶⁶ It could be argued that the sign did not have to reference the President, but instead had to only address a topic that embarrassed or disparaged him. Under this reasoning, the content or subject of the sign would be irrelevant and the restriction would be aimed at the effect of the sign on the President. While this interpretation raises vagueness problems, it also highlights a potential weakness in the wording of the order. While a third party might be able to judge whether a sign disparaged the President, it is less clear that a third party could determine whether the sign embarrassed him. Even when confronted with Gen. Campbell's remarks, see *supra* notes 221-25, President Clinton reportedly responded "For me, personally, I didn't care . . . People say whatever they want about me personally." Schmitt, *supra* note 221. "He doesn't know me from Adam so, you know, he's just repeating something he's heard." Aldinger, *supra* note 221. It might be suggested, therefore, that an order of this nature use a standard that is easily interpreted and applied by third parties, perhaps even the "contemptuous words" prohibition contained in Article 88, UCMJ.

Viewpoint discrimination in this instance is not determined by looking at the underlying political party or even motivation of the speaker.

Perhaps the more interesting aspect of the decision, however, is threat to military order and discipline posed by the message. Callers had threatened to break the windows out of Ethredge's truck. This type of behavior is illegal. Unlike Parker's disloyal statements during Vietnam, Ethredge was certainly not advocating for the occurrence of this lawless action. Instead, his "speech" was likely to incite lawless action to his detriment. It could be argued that the real threat to "good order and discipline" arose from the inability of co-workers to resist the urge to destroy property, not from Ethredge's bumper sticker. Although ordinarily reluctant to give a crowd a "heckler's veto" to silence the speaker,²⁶⁷ courts have not applied this line of civilian precedent to the military because of the government's compelling interest in maintaining good order and discipline.

In conclusion, federal courts have typically displayed a substantial degree of restraint in adjudicating the First Amendment claims of military personnel. This deference is justified because the Constitution places the primary responsibility for regulating the military—and balancing the military interests and free speech rights of servicemembers—in the Legislative and Executive branches. Additionally, a lower degree of free speech protection is necessary to safeguard the military's ability to fulfill its unique mission and role in society.

A review of the available case law indicates that the military may impose speech restrictions whenever necessary to protect its significant interests. Sanctions may be imposed, therefore, even when the speech occurs off-base and during an otherwise private conversation. Courts rarely review free speech challenges under the traditional civilian precedent and often defer outright to the judgment of military authorities. In other cases, courts have either resurrected the "clear and present danger" test or upheld military prohibitions under the *O'Brien* test after finding that the substantial government interest is unrelated to the suppression of free expression. Consequently, it appears that the servicemember's primary means of dissent are limited to those official channels established and protected by Congress and the President.

²⁶⁷ See, e.g., *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) ("Speech cannot be financially burdened, anymore than it can be punished or banned, simply because it might offend a hostile mob.") (citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 337 U.S. 1 (1949)).

II. FIRST AMENDMENT DOCTRINE AND THE PROTECTION OF MILITARY INTERESTS

The proper scope of First Amendment protection for the speech of military personnel continues to be the source of intense debate. Critics have called for the courts to review the free speech challenges of military personnel according to either the traditional civilian First Amendment doctrine or, at least during peacetime, the protections afforded government employees and federal civil servants. These arguments must be considered in light of the dramatic transformations that the military has experienced during the last decade. Perhaps the most pertinent changes include the decreased number of military personnel, the increased level of education of the force structure, and the growing proportion of federal civil servants and independent contractors. Furthermore, the traditional focus on nuclear missions has been replaced with short-notice deployments and peacekeeping operations. Despite these seemingly critical modifications, the military mission remains the protection of the nation's interests through the application of force.

Consequently, the following examination has three primary objectives. The first objective is to review the arguments both for and against granting military personnel greater free speech protections. These arguments are presented to defend the judiciary's continued deference to military authorities as well as to provide legal advisors with pertinent factors to consider when providing guidance to commanders. The second objective is to describe how the current legal framework protects military interests from the threats posed by civilians and government employees. This discussion indicates that commanders possess substantial discretion to exclude civilians from the base and discharge federal employees based upon their speech without transgressing the First Amendment.

Finally, it is argued that, although this discretion appears adequate to protect the military's interest, courts should not apply the free speech standards of civilians and government employees to military personnel because of the intrusive nature of the inquiry and the military's need to impose criminal sanctions in certain circumstances. This section concludes, however, that legal advisors should recommend, as a general rule, that military members be afforded the same First Amendment protections provided government employees, to the extent that the protections differ. Criminal sanctions should be sought in situations when a substantial breakdown in military custom is likely or the threat to military interests is greater than would be posed by a similarly situated government employee.

A. Arguments Against Greater Free Speech Protections

Two arguments are typically advanced to justify the current restrictions on service members' speech activities. The first argument focuses on the

threat to good order and discipline that certain speech activities pose to the effective accomplishment of the military mission. The second involves the maintenance of the proper relationship between the military and the civilian leaders of the country. The unique mission and characteristics the military community underlie both arguments. Furthermore, the need to protect these military interests explain and justify the special free speech restrictions imposed upon military personnel.

1. Threats to Good Order, Discipline, and Morale

The first argument supporting the unique free speech restrictions in the military context centers on the threats to good order, discipline, and morale posed by dissenting voices within the ranks.²⁶⁸ The military fulfills a unique purpose and mission. It must be prepared to immediately defend the national interests anywhere in the world. It has been entrusted with a vast array of weapons systems and technologies, capable of destroying not only towns and countries, but human civilization as we know it. This awesome responsibility distinguishes military personnel from other civilian paramilitary officers such as the police and prison guards.

The Supreme Court has acknowledged the special relationship between the military and the service member, describing induction not merely as a job but a change in "status."²⁶⁹ Sen. Nunn explains that once a person changes her status from civilian to military, either voluntarily or involuntarily, "that person's duties, assignments, living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice."²⁷⁰ Military necessity requires that a high-level of training and unit readiness be maintained at all times, because a crisis may erupt at any time.²⁷¹

It has been recognized, therefore, that the unique military mission and responsibilities underlying the separate community rationale necessitate a different application of First Amendment principles than those applied to other civilians or other government employees. The military policies "must reflect the very realistic possibility that the soldier who is behind a comfortable desk today might be in a hostile and physically challenging field environment on very short notice."²⁷² In *Brown v. Glines*, the Supreme Court specifically noted that "[l]oyalty, morale, and discipline are essential attributes of all military service."²⁷³ The Court further recognized that military personnel

²⁶⁸ Zillman and Imwinkelried II, *supra* note 4, at 405.

²⁶⁹ *Solorio v. United States*, 483 U.S. 435, 439 (1987) (jurisdiction in courts-martial depends solely on the accused's status as a person subject to the UCMJ and not on the "service-connection" of the offense).

²⁷⁰ Nunn, *supra* note 18, at 28.

²⁷¹ Vagts, *supra* note 5, at 189.

²⁷² Nunn, *supra* note 18, at 31.

²⁷³ 444 U.S. 348, 356-57 n.14 (1980). See *supra* note 240-55 and accompanying text.

"may be transferred to combat duty or called to deal with civil disorder or natural disaster" regardless of where they are assigned.²⁷⁴ As Prof. Detlev Vagts explains, the military member must "sacrifice some of the liberties which he is called upon to protect—no revolutionary regime has ever found it possible to grant true democracy to an Army."²⁷⁵

It seems rather obvious that the rogue military member who refuses to deploy to the Gulf because he disagrees with official policy should be criminally sanctioned. However, it has been noted that "[d]espite the delegation of ample congressional power to control disobedient and disruptive *conduct*, the military argues that it also needs protection against disobedient and disruptive *words*."²⁷⁶ Civilians are generally provided significant protection under the First Amendment for their use and choice of words in order to maintain an "uninhibited, robust, and wide-open" public debate that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."²⁷⁷ Content based restrictions are permissible only when necessary to advance a compelling state interest. As a general rule, civilian advocacy can only be restricted if it is intended to incite imminent lawless action and not if it merely poses a threat to incite lawless action at some indefinite time in the future.²⁷⁸

As the discussion in Part I illustrates, the military's mission has prompted a substantial deviation from the free speech protection afforded civilians. As the CAAF explained in *United States v. Priest*, the military standard for illegal advocacy continues to be the clear and present danger test, requiring that a commander conclude that the speech will cause some level of harm to the unit even if that harm has not materialized.²⁷⁹ Consequently, although the "heckler's veto" may not be used to silence a speaker in the civilian setting, "constitutional decisions requiring authorities to control the angry crowd rather than the unpopular speaker are not precedents for the military."²⁸⁰

The military is not required to control the angry crowd because of the critical importance of unit cohesion to the accomplishment of the mission.²⁸¹

²⁷⁴ *Id.*

²⁷⁵ Vagts, *supra* note 5, at 189.

²⁷⁶ Zillman, *supra* note 6, at 434 (footnote omitted).

²⁷⁷ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁷⁸ See, e.g., *Hess v. Indiana*, 414 U.S. 105, 107-08 (1973) (per curiam) (concluding that demonstrator's comment to law enforcement officer police that "We'll take the f***king street later [or again]" amounted, at worst, only to advocacy of illegal action at some indefinite future time).

²⁷⁹ *United States v. Priest*, 45 C.M.R. 338 (C.M.A. 1972).

²⁸⁰ Zillman and Imwinkelried II, *supra* note 4, at 405; Zillman, *supra* note 6, at 442 ("Courts have shown little concern with the civilian principle that the troublemakers and not the peaceful speakers should be controlled.").

²⁸¹ Many who critique the "Don't Ask/Don't Tell" policy challenge the reasonableness of the crowd being angry in the first place. See *supra* note 9.

Sen. Nunn has quoted a number of high-level military commanders who have testified before Congress on the importance of this characteristic to combat capability. General H. Norman Schwarzkopf has explained that "in my forty years of Army service in three different wars, I have become convinced that [unit cohesion] is the single most important factor in a unit's ability to succeed on the battlefield."²⁸² While serving as Chairman of the Joints Chiefs of Staff, General Colin Powell argued:

we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.²⁸³

The commander is ultimately responsible for the maintenance of good order and discipline within the unit. Consequently, when unit cohesion is threatened, she can order Ethredge to take the bumper sticker off his truck²⁸⁴ instead of forcing the military community to tolerate this disruptive voice.

While the military organization does occupy a unique role, many have questioned the court's application of different First Amendment standards to the entire military community. "First, many servicemen pursue careers little different from and no more strenuous or dangerous than numerous civilian pursuits."²⁸⁵ As the military privatizes thousands of positions formally occupied by uniformed personnel, the rationale supporting different standards for non-combat positions has been questioned. Second, it has been argued that "in the era of the all-volunteer force, as the armed services seek to induce talented, educated, upward mobile youths to choose a military career, exclusive reliance on 'duty, honor, country' has waned."²⁸⁶ A different type of military is emerging based on a model that is "more democratic, personalistic, occupation-oriented, [and] managerial."²⁸⁷

The changing attributes of military service have prompted many scholars to question the wholesale exclusion of military personnel from the free speech protections afforded civilians.²⁸⁸ It has been argued that courts should begin the analysis by assuming that civilian precedent applies, and insist "that the Government articulate and substantiate the specific military interest which allegedly precludes the application of the particular civilian

²⁸² Nunn, *supra* note 18, at 29 (quoting S. REP. NO. 112, 103d Cong., 1st Sess. 274-75 (testimony of General General H. Norman Schwarzkopf, United States Army (Ret.), before the Senate Armed Services Committee, May 11, 1993)).

²⁸³ *Id.* (quoting testimony of General Colin L. Powell, United States Army, Chairman of the Joint Chiefs of Staff, before the Senate Armed Services Committee, July 20, 1993).

²⁸⁴ See *supra* notes 256-65 and accompanying text.

²⁸⁵ Zillman and Imwinkelried II, *supra* note 4, at 403.

²⁸⁶ Dienes, *supra* note 19, at 825.

²⁸⁷ *Id.* at 824.

²⁸⁸ Zillman and Imwinkelried II, *supra* note 4, at 436.

legal standard in question.”²⁸⁹ These commentators take exception to the generalized abstract military concerns that are typically advanced by the military. Instead, Prof. Dienes argues that the mere “[r]ecitation of the vital interest of the military the *might* be at stake in a particular case, and that *might* justify the burden imposed on the individual, is simply an inadequate basis for forcing the surrender of first amendment rights.”²⁹⁰ Given the sheer size of the military establishment, “[a] government which boasts that it is a government of, for, and by the people—all the people—cannot reduce millions of men to second class citizens.”²⁹¹

In addition to arguments concerning the need for a wholesale exclusion of all uniformed personnel from civilian free speech protections, it has also been noted that not all dissenting speech is detrimental to the military. It is conceivable that dissenting speech may, in certain circumstances, actually be supportive of military effectiveness by uncovering inefficiency and error.²⁹² It would appear, however, that the military has provided adequate channels for a member to voice such concern. For example, personnel may air grievances through the chain-of-command by Article 138 and may initiate an Inspector General complaint or individually communicate with members of Congress in an unofficial capacity without the fear of retaliation.²⁹³ While one Air Force officer has recently alleged retaliation,²⁹⁴ there appears to be a host of available channels for reporting any number of perceived problems to the appropriate authorities.

2. *Proper Relationship Between Military and Civilian Leaders*

The second rationale supporting restrictions on the speech activities of military personnel addresses the threat to the civilian control of the military

²⁸⁹ *Id.*

²⁹⁰ Dienes, *supra* note 19, at 825. Compare Justice Marshall’s concern that “the Court has taken its second step in a single day toward establishing a doctrine under which any military regulation can evade searching constitutional scrutiny simply because of the military’s belief—however unsupportable it may be—that the regulation is appropriate.” *Greer v. Spock*, 424 U.S. 828, 872-73 (1976) (Marshall, J., dissenting) (referring to *Middendorf v. Henry*, 425 U.S. 25 (1976) (right to counsel inapplicable to summary court-martial proceedings)).

²⁹¹ Vagts, *supra* note 5, at 190.

²⁹² Zillman, *supra* note 6, at 435-39.

²⁹³ See *infra* note 321-23 and accompanying text. Cf. *Banks v. Ball*, 705 F.Supp. 282 (E.D. Virginia, 1989) (concluding that Naval Reservist’s interests in communicating on matter of public concern with Congress on official stationery without authorization in violation of Article 1149 of Navy Regulations was outweighed by military’s national security interest in uniformity, esprit de corps and efficiency under the *Pickering* test, and that Article 1149 was a proper time, place, and manner regulation) *aff’d sub nom. Banks v. Garrett*, 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 821 (1990), *reh’g denied*, 498 U.S. 993 (1990).

²⁹⁴ William Matthews, *Whistle-blower faces discipline, Air Force officer alleges retaliation*, AIR FORCE TIMES, Sep. 22, 1997, at 10.

that dissent may create.²⁹⁵ The civilian leaders of the military, both elected and appointed, can be threatened by the vocalized dissent of both high-ranking officials and the involvement of military personnel in partisan political causes.²⁹⁶ The threats posed to the civilian leadership by the military range from the seizure of power by military coup to the refusal to obey orders. These civilian leaders, "who bear the ultimate responsibility, need protection from irresponsible abuse by their subordinates."²⁹⁷ Consequently, this rationale is closely related to the maintenance of good order and discipline.

There are two possible threats to civilian control of the military posed by the speech of military members. The first threat comes from personnel who voice disagreement with the official policies of the civilian leaders. It seems unquestionable that a commander of troops preparing to deploy should not be permitted to question the wisdom of the decision. The second threat comes from unauthorized statements of military personnel that may be interpreted as the official voice of the service. The harm from this type of statement can be felt both domestically and internationally, because it can "form the 'germ of truth' from which vast and meretricious propaganda claims of American war-mongering can be cultivated."²⁹⁸

The challenge is to define the proper role for the military leader or soldier who disagrees with a given political decision. Once again, the question is not whether the military member should obey the directive; he must. The question is whether he should be permitted to voice disagreement with the policy. It has been argued that allowing military personnel to voice dissent in the public arena "may promote the proper relationship among the military, its civilian leadership, and the people" and "help bring to the public both facts and opinions that might otherwise go unreported."²⁹⁹

²⁹⁵ Zillman, *supra* note 6, at 443-44; Zillman and Imwinkelried II, *supra* note 4, at 405-06; Vagts, *supra* note 5, at 188.

²⁹⁶ Justice Brennan has argued that the fear of military involvement in political activities is acerbated by the isolation of the military from the diverse dialogue of the civilian community. As he explained:

[W]here the interests and purpose of an organization are peculiarly affected by national affairs, it becomes highly susceptible to politicization. For this reason, it is precisely the nature of the military organization to tend toward that end. That tendency is only facilitated by action that serves to isolate the organization's members from the opportunity for exposure to the moderating influence of other ideas, particularly where, as with the military, the organization's activities pervade the lives of its members. For this reason, any unnecessary isolation only erodes neutrality and invites the danger that neutrality seeks to avoid.

Greer v. Spock, 424 U.S. 828, 868-69 (1976) (Brennan, J., dissenting) (footnote omitted).

²⁹⁷ Vagts, *supra* note 5, at 188.

²⁹⁸ *Id.* at 189.

²⁹⁹ Zillman, *supra* note 6, at 436.

It has even been suggested that the airing of grievances by military members actually may be beneficial to civilian control. By exposing issues to the attention of the public, "a dissenting officer who is ready to make it known that the armed forces are not as unified on the position as the might appear to be" may be the greatest asset to civilian control.³⁰⁰ In fact, it has been argued that the "most dangerous military may be the one with the 'isolated—garrison' mentality, totally removed from civilian concerns, but susceptible to rebellion in times of discontent."³⁰¹

B. Arguments For Greater Free Speech Protections

Three basic arguments are advanced in support of greater free speech protections for military personnel. First, it is argued that respect for the personal autonomy and individual development of the member may actually serve the military's interest in good order and discipline. Second, it is reasoned that avenues for free expression may act as a safety valve for internal dissent, permitting individuals to vent frustration while continuing to effectively perform their task. Finally, it is contended that the voicing of dissent and displeasure provides both the public and the military with valuable information on the military's internal conditions and prevailing attitudes. While each of the three are related to some extent, it is critical to distinguish between the dissenting voice that benefits the services without jeopardizing the mission, and that which undermines the good order and discipline of a unit.

1. *Personal Autonomy and Intellectual Development*

Perhaps the most basic argument in favor of providing substantial free speech protections to military personnel involves respect for the member's personal autonomy and intellectual self-awareness. By permitting the individual to speak freely and debate the validity of a wide range of topics, the military encourages the development of both the communication and intellectual skills necessary for effective leadership.³⁰² Especially in an environment that emphasizes conformity and uniformity, free expression has the capacity to remind the member of her own uniqueness and self-worth.³⁰³ Additionally, the member is afforded the opportunity to participate in the free exchange of ideas and information, reaching his own conclusions and ultimately strengthening his dedication to the organization's core values, rules, and regulations. As one scholar has observed, "it is difficult to believe that the

³⁰⁰ *Id.* at 446.

³⁰¹ *Id.* at 445.

³⁰² Zillman, *supra* note 6, at 433.

³⁰³ *Id.*

interests of the military are served by inhibiting the development of those skills and capacities required for full participation in any society."³⁰⁴

While it seems difficult to object to the benefits that such intellectual freedom bring, the process poses at least two threats to the military. The first threat is the potential disturbance caused by the debate itself. While it may be appropriate and useful to debate a military policy still under consideration, once a decision is made and a course of action initiated, continued discussion may pose a threat to the obedience and discipline that is vital to the military mission. As the CAAF succinctly stated in *Priest*, "the primary function of a military organization is to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the Government and to the Commander in Chief."³⁰⁵

The second threat that "open and vigorous debate" poses to the military community is that the individual member may conclude that the policy of the organization is flawed. However, the mere conclusion that the policy is incorrect does not pose a significant threat to the military unless the allegiance and loyalty of the member in actually performing his duties is compromised. Certainly, military personnel are not expected to agree wholeheartedly with every policy or order that is issued. They are expected, however, to wholeheartedly implement the policy or order to the best of their ability and without reservation.

Commentators have noted a number of other factors that weigh in favor of providing the individual member with greater free speech protections. The first is that participation in the military is not always voluntary, and membership is not always a lifetime status. Consequently, if personnel "are not free to develop those attributes of human personality and human dignity we seek to foster in our society, the society itself may suffer harm."³⁰⁶ Additionally, the suppression of speech can foster low morale and narrow thinking, actually hampering the attainment of the good order and discipline that the restrictions were meant to achieve.³⁰⁷ Finally, at least one scholar has argued for a form of *quid pro quo*, explaining that "[i]t is neither logical nor sound policy to encourage officers to foster public relations by presenting the viewpoint of the military departments in speeches, articles, and books, but at

³⁰⁴ Dienes, *supra* note 19, at 816-17.

³⁰⁵ *United States v. Priest*, 45 C.M.R. 338, 345 (C.M.A. 1972). See *supra* notes 108-17 and accompanying text. See also *Persons For Free Speech at SAC v. United States Air Force*, 675 F.2d 1010, 1017 (8th Cir. 1982) ("Civilians, our President and Congress make the 'ideological' decisions for the military. Where the military stands today may be an ideological controversy and even more so where the military will be tomorrow. But the debate on such controversies is for civilian forums not military bases.") (finding that government did not intend to create public forum during open house at Offutt Air Force Base), *cert. denied*, 459 U.S. 1092 (1982).

³⁰⁶ Dienes, *supra* note 19, at 817.

³⁰⁷ Zillman, *supra* note 6, at 433.

the same time to discourage them from expressing any unstereotyped views of their own."³⁰⁸

The personal autonomy concerns may be illusory, at least to the extent that military personnel are content with or acclimated to the restrictions that are now in place. Even if this speculation is true, the level of restriction should be cause for reflection. While the size of the military has dramatically decreased following the Gulf War, the limitations on free speech may influence the type of individual that is now volunteering for military service. Severe speech limitations are likely to narrow the intellectual diversity of incoming recruits. Permitting a degree of freedom of expression could encourage "needed men to remain in the service, while it would be hard to make service attractive to men who regarded themselves as objects of oppression."³⁰⁹ This suggestion in no way denigrates the capabilities or performance of the current force structure, but serves only as a reminder that the restrictions are not without costs and may become an issue if a Vietnam War size mobilization is again necessary.

2. *Safety Valve for Discontent*

In the highly centralized and bureaucratic military community, griping and complaining permits the "expression of grievances and perceived wrongs which, if left unexpressed, might fester and grow."³¹⁰ As Justice Douglas noted in *Averch*, it is common for a soldier to complain about the conditions he is forced to endure.³¹¹ A commander may, in fact, find a complete lack of unrest more troublesome than a small degree of dissent. As one commentator has reasoned, "[i]f the American temperament is considered, it seems dangerous to prevent accumulated military discontent from being discharged through the virtually harmless channels of griping to friends or writing letters to the editors of service or civilian papers or to families at home."³¹² Once the

³⁰⁸ Vagts, *supra* note 5, at 191.

³⁰⁹ *Id.* at 190.

³¹⁰ Dienes, *supra* note 19, at 818.

³¹¹ See *supra* notes 101-06 and accompanying text.

³¹² Vagts, *supra* note 5, at 190. As the Army Court of Criminal Appeals has stated:

That military personnel complain is not a classified matter. Complaining is indulged in by enlisted men and officers of all grades and ranks. Complaints can be registered on any topic and frequently are. 'Bitching,' to use the vernacular, may be expressed in gutter talk or in well articulated phrases and has been developed into a fine art. Nevertheless it sometimes serves a useful purpose. It provides an outlet for pent-up emotions, therapy for frustrations and a palliative for rebuffs and rejections. A noticeable failure to complain in a military organization is considered by some commanders as an indication of approaching morale problems.

United States v. Wolfson, 36 C.M.R. 722, 728 (A.B.R. 1966).

military member has voiced his complaints to members either outside or inside the chain of command, he may feel renewed enthusiasm for the task at hand.³¹³

Of course, military personnel who complain to family and friends pose little to no threat to the military establishment. The more significant question involves the proper reaction to discussions with other airmen, letters to the editor, bumper stickers, and common workplace gripe sessions. While the potential for the oppressive stifling of speech may be present under the current discretion given military commanders, the threat does not appear to have materialized. With the possible exception of Parker and Averch's disloyal statements during Vietnam,³¹⁴ one is hard-pressed to find a prosecution in Part I that would be objectionable on these grounds. As emphasized in the next section, Parker and Averch's convictions occurred during the conscription of the Vietnam War when military custom was not likely to control the proper expression of dissent. Consequently, criminal prosecutions instead of administrative discharges or re-assignments were justified for the purposes of deterrence.

3. *Free Flow of Information to the Public and the Military Authorities*

Allowing military members to speak freely has the potential to assist either the military or the political leaders of the country to make more informed decisions. Within the military, the voicing of dissent concerning official policies and programs may have a beneficial impact on the efficiency of the service.³¹⁵ However, if the matter concerns official military matters, then the concerns or suggestion can be voiced through formalized channels.

Between the military and the society at large, the voicing of grievances might provide the appropriate decisionmakers with information that would be otherwise unavailable. This form of unrestricted speech might result in more reasonable and sound policies.³¹⁶ As Prof. Vagts has observed, "preventing unofficial opinions from competing in the military marketplace of ideas, [grants] a dangerous monopoly to official dogma that may shelter a stagnation and inefficiency we can ill afford in these swift and perilous times."³¹⁷ Prof. Dienes argues that precisely because of the separate nature of the military community there is a "vital need for channels of communication between the military sector and civilian society."³¹⁸ These channels are necessary because "[b]oth the military and the larger civilian society have an interest in the

³¹³ Zillman, *supra* note 6, at 433.

³¹⁴ See *supra* notes 65-95 and 96-100 and accompanying text.

³¹⁵ Dienes, *supra* note 19, at 817. See also *Cortright v. Resor*, 447 F.2d 245, 256 (2nd Cir. 1971) (Oakes, C.J., dissenting) ("a Specialist Cortright and a General Gavin must equally be permitted to persuade the public, the Congress or the Executive that, for example, a given course of military-diplomatic action or foreign policy is wrong.")

³¹⁶ Zillman, *supra* note 6, at 432.

³¹⁷ Vagts, *supra* note 5, at 191.

³¹⁸ Dienes, *supra* note 19, at 817.

expression of ideas, opinions, attitudes, and grievances by military personnel."³¹⁹

It can be reasoned that the value of speech as a source of information would also increase with the knowledge of the speaker. This knowledge may or may not correlate with the rank of the military member. While an airman may possess first-hand information on the reliability of a weapons system, a general would be capable of speaking to the necessary force structure for a certain deployment. The comments of experts who disagree with official military policy may change the public's support for a particular issue under debate.³²⁰

While the courts have not provided military members with substantial free speech protections, Congress and the President have established at least three channels for dissent and redress regarding matters of official concern. Sen. Nunn has highlighted that Article 138 provides military personnel with a right to redress through the chain of command.³²¹ The military member is guaranteed by statute the right to communicate individually with members of Congress or an Inspector General, without incurring retaliatory action.³²² Finally, military personnel have the right to seek a correction of military records from the Secretary of Defense.³²³ While these channels do permit the airing of formal grievances, the harder question is to determine what means of informal or merely personal expressions of disapproval should be permitted, and if not, what type of sanctions are permissible.

C. Protecting Military Interests From Threats Posed by Civilians and Government Employees

Although a commander may impose substantial restrictions on the speech of military personnel, her ability to protect military interests from threats posed by the speech of civilians and government employees is more limited. Under the public forum doctrine, a commander can limit access to the base so long as the restrictions are reasonable and content-neutral. Threats from civilian activity outside of the base remain beyond the reach of the commander. Government employees have a First Amendment right to speak on subjects of public concern when the individual's interests outweighs the military's interests in promoting the efficiency of its public service. If the

³¹⁹ *Id.* at 819.

³²⁰ Zillman, *supra* note 6, at 432.

³²¹ Nunn, *supra* note 18, at 32 n.30 (citing 10 U.S.C. § 938 (1988)). See also Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953) ("The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.").

³²² *Id.* (citing 10 U.S.C.A. § 1034 (West 1994)).

³²³ *Id.* (citing 10 U.S.C. § 1552 (1988)).

speech is protected, then it cannot serve as the basis for most administrative actions.

1. Restrictions Applicable to Civilians

The ability of government authorities to protect the compelling interests of the military is primarily limited to the property that the government owns. The Supreme Court has "adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."³²⁴ The Court has recognized three types of forums: traditional public forums, designated or limited public forums, and nonpublic forums. A court's categorization of the government property in question is critical to the permissibility of the restriction because it determines the level of scrutiny that will be applied. The forum analysis permits a commander to protect the military interests only within the physical confines of the base.

Traditional public forums are those places such as streets, sidewalks and public parks that "by long tradition or by government fiat have been devoted to assembly or debate."³²⁵ Courts will apply strict scrutiny to content-based exclusions within the public forum. If the exclusion is a content-neutral time, place, and manner restriction, then it must be narrowly tailored to achieve a significant government interest and leave open ample alternative channels of communication.³²⁶ Applying these standards to a military base, the Supreme Court in *Flower v. United States* held that a base commander could not prohibit the distribution of leaflets by a previously "barred" civilian on a street within the base that was open to the public.³²⁷ As clarified by later opinions, the controlling factors in *Flower* were that "the military ha[d] abandoned any right to exclude civilian traffic and any claim of special interest in regulating expression."³²⁸

Designated public forums are the second category of government property, and are formed when the government designates a "place or channel of communication for use by the public at large for assembly or speech, for use by certain speakers, or for the discussion of certain subjects."³²⁹ If the government limits the use of the forum to particular purposes for which it was

³²⁴ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985). See generally Major Andy K. Hughes, *The Regulation of Printed Materials on Military Installations*, 1992-OCT ARMY LAW. 16 (1992); John C. Cruden and Calvin M. Lederer, *The First Amendment and Military Installations*, 1984 DET. C.L. REV. 845 (1984).

³²⁵ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

³²⁶ *Id.* at 45.

³²⁷ 407 U.S. 197 (1972) (per curiam). The Court summarily reversed the defendant's conviction without the benefit of briefs or oral arguments. *Id.* at 199 (Rehnquist, J., dissenting).

³²⁸ *United States v. Albertini*, 472 U.S. 675, 685-86 (1985).

³²⁹ *Greer v. Spock*, 473 U.S. 788, 802 (1985).

created, then restrictions must only be reasonable and viewpoint-neutral.³³⁰ Courts will not find that a public forum has been created "in the face of clear evidence of a contrary intent" or "when the nature of the property is inconsistent with expressive activity."³³¹ In *Rigdon v. Perry*, a district court found that base chapels were designated public forums because "it has been the government's clear intent that certain facilities on military property (e.g., chapels) and personnel (e.g., chaplains) be dedicated exclusively to the free exercise rights of its service people."³³²

The third category, nonpublic forums, consists of all other government property.³³³ Within nonpublic forums, the government may restrict speech based upon content and "need only be reasonable, so long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view."³³⁴ In *Greer v. Spock*,³³⁵ Army regulations at Fort Dix prohibited political demonstrations and speeches and required prior approval of literature were challenged both "facially" and "as applied." The base commander denied access to political candidates in order to avoid the appearance of partisan political favoritism and to preserve the training environment of the troops.³³⁶ The Supreme Court held that the base was a nonpublic forum because military authorities had not "abandoned any claim of special interest in regulating the distribution of unauthorized leaflets or the delivery of campaign speeches for political candidates."³³⁷

³³⁰ See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995).

³³¹ *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985) (internal citations omitted).

³³² 962 F.Supp 150, 163 (D.D.C. 1997).

³³³ See *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678-79 (1992).

³³⁴ *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 279 (2nd Cir. 1997) (quoting *Lee*, 505 U.S. at 679).

³³⁵ 424 U.S. 828 (1976).

³³⁶ *Id.* at 833 n.3.

³³⁷ *Id.* at 837. In at least two other military contexts, courts have rejected arguments that the government created a designated public forum. In *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788 (1985), the Supreme Court held that the Combined Federal Campaign was a nonpublic forum because the government did not intend to create a forum for expressive conduct. Furthermore, the Court concluded that restriction on the type of organizations that could participate in the campaign were reasonable and viewpoint neutral. *Id.* at 789-811. In *Communications, Inc. v. Cohen*, 131 F.3d 273 (2nd Cir. 1997), the Second Circuit found that military exchanges were nonpublic forums because they were primarily created for commercial purposes, were not open to the public, and were authorized to stock only certain products. *Id.* at 280. The court determined that Congress could ban the sale of certain adult magazines within the exchanges. The ban advanced the legitimate government interests in avoiding the appearance of official endorsement of the material and protected the "military's image and core values." *Id.* at 283-84. For court opinions discussing whether military bases were converted into public forums during an "open house," see *United States v. Albertini*, 472 U.S. 675, 686 (1985) (dictum) ("Nor did Hickam [Air Force Base] become a public forum merely because the base was used to communicate ideas or information during the open house."); *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991) (en banc).

It must be emphasized that when courts conduct a forum analysis to determine whether speech restrictions are permissible, the relevant inquiry concerns the nature of the forum and not the potential threat to military interests. It is entirely possible that a group of civilians shouting anti-military slogans and burning flags on a public sidewalk outside of Andrews A.F.B. would pose a substantial threat to good order and discipline. Undoubtedly, more than one base commander during the Vietnam War would have relished the opportunity to assert jurisdiction over these civilian demonstrators.

Strict limitations are placed on the government's ability to restrict this type of civilian speech.³³⁸ Military commanders have the authority *ex ante* to protect the military's interests from civilian threats only by restricting access to the base or by regulating the speech of those on the base in a reasonable and viewpoint-neutral manner. The commander may also issue an exclusion order *ex post* to any individual that poses a threat to good order and discipline, even if the order interferes with or is based upon the exercise of First Amendment rights.³³⁹ Put differently, the base commander's ability to restrict a civilian's

(government did not intend to create public forum during open house at Peterson Air Force Base); *Persons For Free Speech at SAC v. United States Air Force*, 675 F.2d 1010 (8th Cir. 1982) (government did not intend to create public forum during open house at Offutt Air Force Base), *cert. denied*, 459 U.S. 1092 (1982).

³³⁸ See, e.g., *Boos v. Barry*, 485 U.S. 312 (1988). In *Boos*, the Supreme Court examined a District of Columbia provision (§ 22-1115) that prohibited the display of any sign bringing a foreign government into disrepute within 500 feet of a foreign embassy or building occupied by an embassy official. A similar prohibition applied to assemblies. The Court found that the display provision was content-based because it applied to an entire category of speech, namely "signs or displays critical of foreign governments." *Id.* at 319. It was not viewpoint-based because the determination of which viewpoint is permitted depends upon the policies of foreign governments. *Id.* at 319. Applying strict scrutiny, the Court found that although the display provision may advance the government's interest in protecting the dignity of foreign officials, it was not narrowly tailored to serve that interest. *Id.* at 326-29. See also *Brown v. Palmer*, 944 F.2d 732, 739 (10th Cir. 1991) (en banc) ("the appellees were still free to advocate their own views of pacifism on the public streets immediately leading into Peterson AFB and they had access to the many other public for a within the immediate vicinity of Peterson AFB to reach the public that visited there during the open houses").

³³⁹ See e.g., *Bridges v. Davis*, 443 F.2d 970 (9th Cir. 1971) (per curiam), *reh'g denied*, 445 F.2d 1401 (9th Cir. 1971), *cert. denied*, 405 U.S. 919 (1972). In *Bridges*, three ministers and eight servicemen sought an injunction against the commanding officers of Naval and Marine bases in Hawaii. The commanders had issued orders barring the ministers from base. In August 1969, the ministers had invited AWOL military personnel to seek sanctuary in their church and twenty-four military fugitives entered the church. *Id.* at 971. After military police arrested twelve of the members and returned them to the base prison, the ministers were permitted to conduct services in the prison. Although warned about the prison rules, one of the ministers permitted the prisoners to drink a bottle of wine and eat birthday cake. *Id.* at 972. Despite additional warnings, another minister conducted services in a short sleeved shirt and trousers, quoted songs that contained a four letter word and joined the prisoners in smoking cigarettes. After the base commander determined that the service had "a disturbing effect on the entire military community" and so enraged one prison guard that he said he would refuse to perform church duties involving the ministers, an order was issued barring the ministers from base. *Id.* at 972-73. Applying the standard articulated in *Cafeteria & Restaurant Workers*, etc.

speech and thereby protect the military interests is determined by whether the military "owns" the land on which the civilian is standing.

The authority of other government officials to protect the military interests is limited by traditional First Amendment doctrine. Content-based restrictions must be necessary to achieve a compelling state interest unless the speech falls into an unprotected category of speech.³⁴⁰ Content-neutral time, place, and manner regulations must be narrowly tailored to advance a significant government interest and not foreclose adequate alternative channels of communication.³⁴¹ For example, Congress can pass a statute that makes it illegal to wear a military uniform without authority. It cannot, however, create an exception only for those actors that wear uniforms and portray the armed forces in a positive manner. In *Schacht v. United States*,³⁴² the Supreme Court noted that such a statute would seem constitutional on its face because it only has an incidental effect on speech.³⁴³ The Court, however, struck the exemption clause from the statute, reasoning that "Congress has in effect made it a crime for an actor wearing a military uniform to say things during his performance critical of the conduct or policies of the Armed Forces."³⁴⁴ Since the exemption was triggered based upon the viewpoint of the actor's speech, it "cannot survive in a country which has the First Amendment."³⁴⁵

2. Restrictions Applicable to Government Employees

The government has a greater degree of latitude in protecting its interest in the efficiency of its service from threats posed by government employees, to include federal civil servants³⁴⁶ and independent contractors.³⁴⁷ In *Pickering v. Bd. of Educ.*,³⁴⁸ the Supreme Court announced a two-part balancing test to determine whether a government employee's speech is protected by the First Amendment, and therefore, cannot be the basis for adverse administrative action. First, the speech must address a matter of public concern. If it does, then a court must determine whether the employee's interest as a citizen "in commenting on matters of public concern" is

v. McElroy, 367 U.S. 886 (1961), the court found that the order was not patently arbitrary or discriminatory given the totality of the circumstances. *Id.* at 973-74.

³⁴⁰ See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Cohen v. California*, 403 U.S. 15 (1971).

³⁴¹ See, e.g., *Clark v. Community For Creative Non-Violence*, 468 U.S. 288 (1984); *Hague v. CIO*, 307 U.S. 496 (1937).

³⁴² 398 U.S. 58 (1970).

³⁴³ *Id.* at 61 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The statute at issue was 18 U.S.C. § 702.

³⁴⁴ *Id.* at 62.

³⁴⁵ *Id.* at 63.

³⁴⁶ See *supra* note 10.

³⁴⁷ See *supra* note 11.

³⁴⁸ 391 U.S. 563 (1968).

outweighed by the government's interest as employer "in promoting the efficiency of the public services it performs through its employees."³⁴⁹ If the employee's rights outweigh the agency's interests, then no administrative action may be taken against the individual.

In *Pickering*, a teacher was dismissed after sending a letter to the local newspaper concerning a proposed tax increase.³⁵⁰ The letter was highly critical of the way school officials had handled past bond issue proposals and the allocation of money between educational and athletic programs.³⁵¹ The Court concluded that the letter addressed a matter of public concern.³⁵² Weighing in *Pickering's* favor was the fact that the speech did not endanger "either discipline by immediate superiors or harmony among coworkers,"³⁵³ and did not impact the actual operation of the school.³⁵⁴ Additionally, teachers are more likely to be informed on the issue of school fund allocation and should be able to speak freely on the issue to inform the debate.³⁵⁵ Although facts in the letter were false, *Pickering* did not make any claim of special access or knowledge and the information was contained in the public record.³⁵⁶ On the other hand, the school failed to show that the speech "in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."³⁵⁷ Therefore, *Pickering's* speech was protected by the First Amendment and could not be the basis for his dismissal.

The case of *Rankin v. McPherson*³⁵⁸ is an example of speech by a government employee that might be subject to prosecution under Article 88 if made by a military member. *McPherson* was employed in a clerical capacity in a county constable office. After hearing of the assassination attempt on President Reagan and in the course of discussing the administration's policies, she remarked to a co-worker "if they go for him again, I hope they get him."³⁵⁹ The remark was overheard by a fellow co-worker and reported to Constable *Rankin*. After confirming that she did in fact make the comment, *Rankin* fired her.³⁶⁰

The Supreme Court found that the speech was protected by the First Amendment. First, considering that it was made during a conversation of the

³⁴⁹ *Id.* at 568.

³⁵⁰ *Id.* at 564.

³⁵¹ *Id.* at 566.

³⁵² *Id.* at 571.

³⁵³ *Id.* at 570.

³⁵⁴ *Id.* at 571.

³⁵⁵ *Id.* at 571-72.

³⁵⁶ *Id.* at 572.

³⁵⁷ *Id.* at 572-73 (footnote omitted).

³⁵⁸ 483 U.S. 378 (1987) (5-4 opinion), *reh'g denied*, 483 U.S. 1056 (1987).

³⁵⁹ *Id.* at 381.

³⁶⁰ *Id.* at 382.

President's policies, the speech dealt with a matter of public concern.³⁶¹ The Court noted that neither the inappropriate nor controversial nature of the statement was relevant to this determination because debate on public issues should be "uninhibited, robust, and wide-open."³⁶² Second, the Court concluded that McPherson's free speech interests outweighed Constable Rankin's interests in discharging her. There was no evidence that the speech interfered with the efficiency of the office, impaired employee relationships, or discredited the office since the statement was not conveyed to the public.³⁶³ The Court stated that where "an employee serves no confidential, policymaking, or public contact role, the danger of the agency's successful functioning from that employee's private speech is minimal."³⁶⁴ Writing in dissent, Justice Scalia cautioned that the Court's statement "is simply contrary to reason and experience."³⁶⁵ He pointed out that it "boggles the mind" to think that McPherson had the right to say what she did, "so that she could not only not be fired for it, but could not be formally reprimanded for it, even even prevented from saying it endlessly into to future."³⁶⁶ Even if the employment decision was intemperate, "we are not sitting as a panel to develop sound principles of proportionality for adverse actions in the state civil service."³⁶⁷

The *Pickering* test is used to determine the permissible government restrictions on the speech of federal civil servants.³⁶⁸ For example, in *Sigman v. Department of the Air Force*, the Merit System Protection Board upheld the Air Force's removal of a GS-05 for unauthorized leave and three specifications

³⁶¹ *Id.* at 386.

³⁶² *Id.* at 387 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The Court also noted that the private nature of the conversation does not prevent the statement from addressing a matter of public concern. *Id.* at 386 n.11.

³⁶³ *Id.* at 388-89.

³⁶⁴ *Id.* at 390-91. In concurrence, Justice Powell explained that he thought it was unnecessary to engage in the *Pickering* analysis. In his opinion

[i]f a statement is on a matter of public concern, as it was here, it will be an unusual case where the employer's legitimate interests will be so great as to justify punishing an employee for this type of private speech that routinely takes place at all levels in the workplace. The risk that a single, off-hand comment directed at only one other worker will lower morale, disrupt the work force, or otherwise undermine the mission of the office borders on fanciful.

Id. at 393 (Powell, J., concurring).

³⁶⁵ *Id.* at 400. Justice Scalia was joined in dissent by Chief Justice Rehnquist, Justice White, and Justice O'Connor.

³⁶⁶ *Id.* at 399.

³⁶⁷ *Id.*

³⁶⁸ It has been reported that "Pentagon officials are considering a proposal to create a personnel system that would place civilian employees under some military rules." The proposal would not, however, place civilian under the UCMI. Lisa Daniel, *Civilian workers may face military rules*, AIR FORCE TIMES, Sep. 15, 1997, at 11.

of disrespectful, disruptive and intimidating behavior.³⁶⁹ The employee's actions included writing a four page memorandum that "expressed her concern over her heavy workload, personal problems, and management's internal personnel policies regarding distribution of work."³⁷⁰ The Board found her speech did not address a matter of public concern because the memo was "personal, highly critical of the appellant's supervisors, and concern[ed] internal matters that are not related to the public."³⁷¹ Additionally, the Board concluded that the agency's interests in promoting the efficiency of public service that it performs outweighed her free speech interests. The memorandum was distributed to all offices in the division and "had a very disruptive effect."³⁷² The employee's supervisor also felt "intimidated and frightened by the memo, which contained abusive and insulting language and made references to bodily harm."³⁷³

D. The Inadequacy of Alternative Standards

As the preceding discussion indicates, there are at least two alternative free speech standards currently utilized by the courts that could be applied to the First Amendment claims of military personnel. First, courts could apply the traditional free speech doctrine that determines permissible restrictions on civilian expression. Second, courts might provide military members with the same protections that are recognized for government employees. The analysis of each standard must consider not only the government's ability to limit the speech, but also what types of sanctions are permitted.

Before examining the potential effectiveness of each alternative, it must be realized that the vast majority of military personnel are not deterred from speaking out on controversial subjects or against official policy because of the threat of criminal sanctions. First, many military personnel will simply agree with official policy. Second, even those who may disagree are subject to the forces of conformity exerted by the unwritten dictates of military custom. Because of the role of custom, "many first amendment questions in the military will not reach the courts . . . The military Establishment, however, must itself bear the major responsibility for protecting first amendment values among its commanders."³⁷⁴

The role of military custom in shaping both the behavior and speech of military personnel has not been lost on commentators. Although stated over forty years ago, the observations of Prof. Vagts remain true: "A change of

³⁶⁹ 37 M.S.P.R. 352 (1988), *aff'd*, 868 F.2d 1278 (Fed. Cir. 1989). For additional cases, see *supra* note 11.

³⁷⁰ *Id.* at 354.

³⁷¹ *Id.* at 355.

³⁷² *Id.* at 356.

³⁷³ *Id.*

³⁷⁴ Zillman, *supra* note 6, at 436.

station, a missed promotion, a separation from active duty, all these can bring not only temporary inconvenience but also lasting ruin for a lifetime's career."³⁷⁵ Contrasting the effectiveness of criminal sanctions and military custom, he further posits that "a man who feels that a certain way of expressing himself is frowned upon by superiors, or may be deemed contrary to the 'customs of the service,' or may provoke a bad efficiency rating, is more likely to abstain from both the conduct directly disapproved and conduct resembling it than a man concerned only with avoiding a clearly defined criminal enactment."³⁷⁶ When combined with the "judicious use of administrative sanctions," military custom and tradition "will usually provide a sufficient deterrent to prevent the average officer from openly advocating major deviations from accepted policies."³⁷⁷

As this discussion highlights, however, military custom can only be effective if the airman actually values the approval of his peers and seeks to remain a member of the community "in good standing." The force of custom may be negated if the member has no intention of pursuing a career,³⁷⁸ has become ambivalent about serving in the armed forces, or has been inducted involuntarily. These situations may arise more often during a large-scale draft, but is still present in the all-volunteer force. Since a unit may be activated or deployed on very short notice, the commander must be able to protect the military mission and interests by applying additional sanctions when necessary. The question then becomes whether the commander should resort to criminal punishment or administrative sanctions, to include separation.

A few noted commentators have advocated the use of administrative sanctions in the majority cases. Zillman and Imwinkelried explain that "there is serious question whether it is advisable to criminally punish the problem soldier."³⁷⁹ Suggesting that there are many servicemembers who are wasting both their own time and military resources, they conclude that the prompt identification and removal of these individuals "through noncriminal, nonstigmatizing means does not harm any military interest."³⁸⁰ Nevertheless, Zillman and Imwinkelried realize that many military supporters "doubtlessly view the suggestion that military nonperformers be merely fired rather than jailed as absurd."³⁸¹ While this insistence upon criminal punishment is justified on a number of grounds,³⁸² the commentators suggest that "it is

³⁷⁵ Vagts, *supra* note 5, at 210.

³⁷⁶ *Id.*

³⁷⁷ *Id.* at 213.

³⁷⁸ *Id.* ("The deterrent force of custom and tradition may, however, be inadequate to deal with the occasional firebrand or fanatic, particularly when the person is not seeking a career in the service and thus has little to lose.").

³⁷⁹ Zillman and Imwinkelried II, *supra* note 4, at 403.

³⁸⁰ *Id.* at 404.

³⁸¹ *Id.* at 402.

³⁸² *Id.* The authors identify five justifications: 1) "the primary purpose of the military, fighting wars, is hard and dangerous"; 2) "the work of the military, defending national interests or even

possible to identify those truly unique military duties meriting criminal sanctions.”³⁸³

It could be argued that the public forum analysis should be applied to determine the free speech rights of military personnel. Under this alternative framework, the permissibility of the restriction would not depend upon the “status” of the individual, but instead on the physical location of the speech. A soldier’s statements on a public sidewalk during a protest rally, off-duty and out-of-uniform, would be given the full protections recognized for political speech. Only when the soldier is on-base could the government impose reasonable, viewpoint neutral regulations. In a particular case, the military may be able to restrict on-base speech if it constitutes a clear threat to good order and discipline and the restriction is narrowly tailored.

It could even be suggested that military personnel should be provided the full host of free speech protections even if the speech occurs on-base. The argument would be that since many members either live or spend a significant amount of time on-base, the base effectively becomes their “town” and should be treated accordingly. Therefore, an airman speaking to other airmen in the dormitory would be granted full First Amendment protection.

It is clear that the forum analysis is not the analytical framework utilized by the courts reviewing free speech challenges to military convictions. Recall that 2nd Lt. Howe was convicted under Article 88 for his participation in an off-base Vietnam War sidewalk demonstration.³⁸⁴ Additionally, Stone was convicted under Article 134 for delivering a false presentation to a high school assembly.³⁸⁵ Instead, the military member remains subject to the prohibitions contained in the UCMJ regardless of whether the speech is in a public forum. The fact the speech is uttered in a public form is relevant only to the extent that it is evidence of the actual commission of the crime, i.e., whether it was discrediting to the service.

The key to understanding why the military is permitted to restrict the speech of military personnel off-base can be discerned by examining the underlying compelling government interests that are advanced. Military regulations operate to protect the maintenance of good order and discipline, the reputation of the service in the public eye, and a politically-disinterested force. These threats may materialize whether the servicemember is on-base or off. For example, a group of soldiers planning an on-base political protest would pose a threat to good order and discipline whether the discussions took place in

the nation itself, is a vital national activity”; 3) “despite the rhetoric over the glory of the military, the great bulk of soldiers suffering casualties are from the lower social classes, generally poorly paid, and often lightly rewarded in prestige”; 4) “the military is by nature an emergency force”; and 5) “in many cases the objective of battle or war is only dimly perceived or even actively opposed by the combat troops.” *Id.*

³⁸³ *Id.* at 403.

³⁸⁴ See *supra* notes 206-15 and accompanying text.

³⁸⁵ See *supra* notes 135-42 and accompanying text.

the squadron room, the dormitory, or at an off-base coffee shop. Because of the critical importance of unit cohesion to the readiness and discipline of the military, the military must be able to restrict this type of activity.

Many commentators may view these restrictions as oppressive and argue that personal autonomy concerns and the interest in the free flow of information require more generous free speech protections. Congress and the President, however, have established a variety of official channels that protect and guarantee military personnel the right to air grievances. Additionally, as the regulations governing members' political activity highlight,³⁸⁶ the commander's discretion has been limited to those activities that pose a threat to good order and discipline. Courts remain willing to review irrational, invidious or arbitrary application of these regulations, and the absence of such findings is a testament to the responsible use of discretion by military commanders.

It appears that strong arguments can be made to rebut assertions that the traditional civilian First Amendment standards would be adequate to safeguard the military's interests. At least one commentator, however, has called on the courts to evaluate the free speech claims of military personnel under the same two-prong *Pickering* test applicable to government employees and federal civil servants.³⁸⁷ Only two courts have adopted this test, and both cases involved the free speech claims of military reservists.³⁸⁸

At first glance, this suggestion seems reasonable for two reasons. First, the majority of free speech challenges reviewed in Part I arose out of either Vietnam or the Gulf War. Second, even for those cases arising during peacetime, the application of the *Pickering* test would not appear to alter the courts' ultimate free speech determinations. For example, in the Article 134 convictions for indecent language,³⁸⁹ the speech does not appear to address any matter of public concern. In those cases involving speech or expressive

³⁸⁶ See *supra* notes 230-31.

³⁸⁷ Linda Sugin, Note, *First Amendment Right of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855 (1987) (arguing that courts may find free speech issues arising in combat situations to be nonjusticiable under political question doctrine but that in peace-time situations courts should evaluate free speech claims under the *Pickering* test).

³⁸⁸ *Lee v. United States*, 32 Fed.Cl. 530 (Fed.Cl. 1995) (finding that Air Force Reserve officer's expression of his inability to launch nuclear weapons because of moral reservations was not a matter of public concern under the *Pickering* test, and military's compelling need to ensure that all members will carry out orders outweighs any protection to which speech was entitled); *Banks v. Ball*, 705 F.Supp. 282 (E.D. Virginia, 1989) (concluding that Naval Reservist's interests in communicating on matter of public concern with Congress on official stationery without authorization in violation of Article 1149 of Navy Regulations was outweighed by military's national security interest in uniformity, esprit de corps and efficiency under the *Pickering* test, and that Article 1149 was a proper time, place, and manner regulation) *aff'd sub nom. Banks v. Garrett*, 901 F.2d 1084 (Fed. Cir. 1990), *cert. denied*, 498 U.S. 821 (1990), *reh'g denied*, 498 U.S. 993 (1990).

³⁸⁹ See *supra* notes 118-21 and accompanying text.

conduct that might address a matter of public concern, such as desecrating the flag³⁹⁰ or making comments about the President,³⁹¹ the military's interests in the efficiency of the service and the maintenance of proper "employee relationships" would seem to trump any individual interest in expression.

Even if the ultimate resolution of the cases would not change, there are at least two reasons why courts should not apply the *Pickering* test to free speech claims arising during peacetime. First, this distinction fails to consider the critical importance of readiness and unit cohesion. In the current world environment, personnel may be called into a potential combat situation on extremely short notice. Commanders do not have the luxury of rectifying dissension within the ranks on the plane ride overseas. Additionally, as the Supreme Court noted in *Brown v. Glines*, military personnel can be called to assist with civil disorder or a natural disaster even if a combat situation is not a foreseeable possibility.³⁹²

Second, even in peacetime the court's application of the *Pickering* test would be an intrusive and disruptive inquiry into the personnel decisions of the military. Courts would be able to review not only criminal prosecutions under the UCMJ, but also administrative discharges and re-assignments. The military would be forced to expend a tremendous amount of time and effort justifying each prosecution or personnel decision challenged by a disgruntled airman. Even in peacetime, the potential disruption to both commanders and the military community is severe. The Supreme Court recognized the intrusive nature of this type of examination in *Orloff v. Willoughby*.³⁹³ Although Orloff had been lawfully inducted into the service, he was denied a commission after he refused to provide information on the loyalty certificate. He requested the court to order the military to either commission him in the Medical Corps or discharge him. In holding that Orloff did not have *habeas corpus* to obtain judicial review of the commissioning decision, the Court noted that while Orloff's claim was under consideration by the courts "he has remained in the United States and successfully avoided foreign service until his period of induction is almost past. Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place."³⁹⁴

Even during the turmoil created by the Vietnam War, courts were reluctant to examine the military's personnel decisions. In *Cortright v. Resor*,³⁹⁵ the Second Circuit refused to interfere with an Army's transfer and reassignment decision. Cortright, a member of an Army band unit, was transferred from New York to Texas following his involvement in a number of

³⁹⁰ See *supra* notes 127-30 and 177-88 and accompanying text.

³⁹¹ See *supra* notes 221-25 and accompanying text.

³⁹² See *supra* notes 250-51 and accompanying text.

³⁹³ 345 U.S. 83 (1953). See *supra* note 33.

³⁹⁴ *Id.* at 94.

³⁹⁵ 447 F.2d 245 (2nd Cir. 1971), *cert. denied*, 405 U.S. 965 (1972).

Vietnam War protests. As explained by the commanding General, Cortright's actions were "weakening [the band's] general morale, its discipline and effectiveness" and the transfer was meant to strengthen the band's mission and make it a better military unit.³⁹⁶ Relying heavily on the Supreme Court's decision in *Orloff*, the court held that:

the Army has a large scope in striking the proper balance between servicemen's assertions of the right to protest and the maintenance of the effectiveness of military units to perform their assigned tasks—even such a relatively unimportant one as a military band's leading a Fourth of July parade. Any other holding would stimulate 'the flood of unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces.'³⁹⁷

Although there are strong arguments against the courts adopting the *Pickering* test to adjudge the free speech claims of military personnel, the test is not antithetical to the protection of military interests. Legal advisors should encourage military commanders to consider the protections afforded by the two-prong test in deciding whether to initiate actions against a member as well as the sanction to be imposed. This consideration is important because of the perceptions of inequality created by the blind application of one set of free speech protections for government employees and another set of protections for military personnel. Given the increased presence of both government employees and independent contractors within the military environment, this observation may be particularly true.

Imagine that a government employee during the Gulf War explains that he does not believe that the United States should engage in foreign wars for the purpose of protecting access to crude oil. This speech would address a matter of public concern. Depending upon the position of the employee in the organization and the impact of the speech on the efficiency of the office, his speech might be protected. If a court determines that the speech is protected, the government would not be able to fire him, impose administrative sanctions or even prevent him from saying it again. On the other hand, if a military member made the statement, then the speech is arguably unprotected. The comment appears to attack the war aims of the government and, therefore, would seem to at least meet the formal definition of a disloyal statement as outlined in Article 134.³⁹⁸ Consequently, he would be subject to criminal prosecution.

³⁹⁶ *Id.* at 249 (internal quotation marks omitted).

³⁹⁷ *Id.* at 255 (quoting *United States ex rel. Schonbrun v. Commanding Officer*, 403 F.2d 371, 375 (2nd Cir. 1968)).

³⁹⁸ See *supra* note 107.

Although prosecution for this statement appears highly unlikely in this scenario, the threat to the underlying military interests does not seem to be dependent on the identity of the speaker. In *Brown v. Glines*, the Supreme Court recognized that the "[u]nauthorized distributions of literature by military personnel are just as likely to undermine discipline and morale as similar distributions by civilians."³⁹⁹ Therefore, if the military member is subject to prosecution while the government employee is protected, then a feeling of inequality is likely to pervade the workplace. Even if the government employee's speech is not protected, the most severe type of sanction that can be imposed is some form of adverse administrative action.

Consequently, the military commander should be advised to initiate criminal prosecutions in two instances. First, prosecutions should be sought when the speech poses a serious threat of actual or potential harm to military interests that substantially outweighs any interest in personal autonomy or the free flow of information to the public. For example, if the airman attempts to publish and distribute literature that advocates the overthrow of the government, then prosecution under Article 134 seems completely justified.

Second, commanders should also be advised to proceed with criminal sanctions in circumstances where military custom is likely to be ineffective. In these instances, prosecutions would serve as a significant deterrence to future disruptive speech. Although the determination is case specific, custom is less likely to be effective when acceptance and advancement within the military community is not valued by either an individual or a distinct group of individuals. These conditions are more likely to be experienced when the retention rates within the military are declining and when service conditions become especially harsh. In this manner, the commander can create a sufficient incentive for the member to honorably fulfill his service obligation.

CONCLUSION

The application of the First Amendment to the military community remains an important yet divisive endeavor. Courts have recognized that the Constitution places the primary responsibility for regulating and maintaining the military in the Legislative and Executive branches. Because of the unique nature of the military's mission, courts realize that many of the traditional First Amendment values must be conditioned by the countervailing needs of the military. Consequently, military commanders are permitted to restrict and punish the speech of servicemembers when the good order and discipline of the service is threatened. Speech that is otherwise "private" or off-base nevertheless remains subject to regulation through the application of either the specific Articles of the UCMJ, service regulations, or the specific orders of

³⁹⁹ 444 U.S. 348, 356 n.13 (1980). See *supra* notes 240-55 and accompanying text.

commanders. Courts remain willing to review irrational, arbitrary, or invidious applications of these restrictions.

The judicial deference to the military and the substantial discretion possessed by commanders may be troubling to many. It is necessary, however, for the continued maintenance of the military as an effective and efficient fighting force. The free speech rights of military personnel may seem sharply curtailed when contrasted with the rights of civilians. A review of the limitations on the right of civilians to speak on-base and government employees to disrupt the workplace indicates, however, that the speech restrictions on military members are consistent with the special purposes of the military.

Most free speech issues in the military community will never be litigated before the courts. Consequently, military commanders must in the first instance balance the free speech rights of military personnel and the needs of the military. By carefully assessing the competing arguments both for and against permitting members to speak on various issues in a variety of circumstances, legal advisors will continue to constitute an indispensable source for prudent and responsible recommendations.