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The Military Courts And Servicemen’s First Amendment Rights

By EDWARD F. SHERMAN*

The isolation of military law from civilian influences and the independence of the court-martial system from civilian court scrutiny have tended to insulate the military from the great intellectual ferment that has characterized the evolution of the law surrounding the First Amendment over the past 50 years. Many of the fertile discussions in the academic context which have contributed to the development of a typically American concept of free speech, such as the debates of Meikljohn and Chafee and Mendelson and Frantz, and the writings of Emerson, Kalven, Charles Black and Paul Freund, have been


4. Z. CHAFEES, FREE SPEECH IN THE UNITED STATES (1941), reviewed, Meiklejohn, 62 HARV. L. REV. 891 (1949).


largely ignored by attorneys and judges in military speech cases. As a result, a distinctively military philosophy of the First Amendment still prevails in military courts which has severely limited the availability of judicial protection for servicemen's free speech rights.

The responsibility for applying the First Amendment to the military has fallen largely to the military courts, and especially to the Court of Military Appeals since its creation as the "Supreme Court of the Military" almost 20 years ago. The unavailability of civilian court review except in habeas corpus actions on rather narrow grounds and the persistence of strict doctrines of "nonreviewability" and "exhaustion of remedies" that prevent civilian court review of most military determinations have virtually excluded nonmilitary courts from any role in the application of the First Amendment to servicemen. The product of the military courts in the First Amendment area has not been distinguished. The courts of military review (the military's intermediate appellate courts) have been hampered by their lack of independence from the military establishment and uncertainty as to their judicial role.

11. UNIFORM CODE OF MILITARY JUSTICE art. 67, 10 U.S.C. § 867 (1964) [hereinafter cited as UCMJ].
12. In Burns v. Wilson, 346 U.S. 137 (1953), the Supreme Court expanded the prior limitation of habeas corpus review of courts-martial to questions of jurisdiction to include claims of denial of due process which the military had manifestly refused to consider. See generally Developments in the Law—Federal Habeas Corpus, 83 HARv. L. REV. 1028-38 (1970).
14. E.g., Levy v. Corcoran, 389 F.2d 929 (D.C. Cir. 1967), cert. denied, 387 U.S. 960 (1967) (unsuccessful attempt to invoke federal court jurisdiction to enjoin court-martial on grounds of chilling effect on First Amendment rights). When federal courts have been willing to consider First Amendment claims of servicemen, relief has generally been denied. Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969) (refusal to prevent punitive activation of reservist who claimed regulations as to length of hair violated his constitutional rights); Saunders v. Westmoreland, 2 Sel. Serv. L. Rep. 3157 (D.D.C. May 26, 1969) (refusal to prevent transfer overseas allegedly due to petitioner's statements to newspaper reporter). But see Smith v. Ritchey, 89 S. Ct. 54 (1968) (stay issued by Douglas, J., to prevent transfer overseas of serviceman claimed to have resulted from his role in organizing peace march); United States ex rel. Chaparro v. Resor, 412 F.2d 443 (4th Cir. 1969) (full hearing ordered on claim that pretrial confinement was imposed due to petitioner's expression of antiwar sentiments and was therefore prohibited punishment).
15. See, e.g., statement of board of review in Howe, 37 C.M.R. 555, 557 (1966): "We do not attempt here to resolve grave constitutional questions as a matter of first
Consequently, the few First Amendment cases decided by them display little familiarity with the precedents and scholarship in the area and little appreciation of the issues and policies involved. The Court of Military Appeals has decided few First Amendment cases, and with its limited personnel of three judges, it has been so heavily preoccupied with applying criminal due process standards to courts-martial that it has not exhibited much sensitivity nor expertise in the First Amendment area. As a result, the five principal First Amendment cases which have been decided by the Court of Military Appeals, United States v. Vorhees,16 United States v. Howe,17 the related cases of United States v. Daniels18 and United States v. Harvey,19 and United States v. Gray,20 have left the First Amendment area in a confused state.

In each of these cases the court has made scant attempt to use the experience of the Supreme Court in dealing with similar issues in other contexts, developing instead its own rationale for a restrictive application of the First Amendment based upon its view of the distinctive conditions of military life.

The recent extension of greater First Amendment protections to other groups whose right to free speech is not as broad as the ordinary citizen's, such as students,21 public school teachers,22 and government employees,23 demonstrates the difference in approach to First Amendment questions between the military and civilian courts today. The issues, however, are not likely to remain static. Agitation for broader free speech rights for servicemen continues, and since military authorities have made only limited concessions to such demands,24 military

impression for such serious determinations of constitutionality have already been made for us by the decisional pronouncements of the United States Supreme Court and our own Court of Military Appeals." For discussion of institutional weaknesses in the courts of military review (called boards of review prior to Aug. 1969), see Sherman, Military Law, supra note 1, at 47-48, 102-03.

24. In May 1969, the Army issued a directive on dissent which recognized the right of servicemen, under certain circumstances, to engage in certain First Amendment activities such as possession of literature, membership in unions, publishing of under-
First Amendment cases are likely to continue to arise. In this developing context, it may be useful to analyze the Court of Military Appeals' decisions concerning the First Amendment since, like so many other constitutional decisions that were the products of compromise, they display less than a complete assurance that the course taken was correct, and therefore they still allow for an alternative course in the future.

I. Pre-Vietnam First Amendment Cases

The American Articles of War were adopted almost verbatim from the British Articles of War in 1775, and even after substantial changes in 1951, the Uniform Code of Military Justice still retains a number of the 18th century provisions.\(^{25}\) A number of these make a variety of speech and speech-related activities military offenses. Obviously some such offenses have a place in the military framework, such as communication with the enemy,\(^{26}\) disrespect toward a superior officer,\(^{27}\) noncommissioned officer,\(^{28}\) and solicitation of desertion or mutiny.\(^{29}\) Others relate to interests of more questionable validity today, such as making "provoking words or gestures" towards another person subject to the code,\(^{30}\) presumably aimed at curbing fighting among the troops, and "contemptuous words" uttered by commissioned officers against the President, Vice President, Congress, Secretaries, Governors, or legislatures,\(^{31}\) allegedly aimed at keeping the military out of politics.\(^{32}\) Finally, the two "general articles" forbid "conduct unbecoming an officer
and a gentleman" (article 133), and "all disorders and neglects to the prejudice of good order and discipline in the armed forces," and "conduct of a nature to bring discredit upon the armed forces" (article 134). One specification under article 134, the crime of making "disloyal statements ... with design to promote disloyalty among the troops," is directly aimed at speech considered to have a dangerous effect upon the troops. Article 134 also assimilates "crimes and offenses not capital" as defined by the federal criminal statutes, and thus a variety of federal crimes aimed at speech, such as the 1917 Espionage Act and the 1940 Smith Act, can be tried in courts-martial without the due process guarantees provided in civilian courts.

Military regulations and orders of superiors carry criminal sanctions through the offenses of disobedience of a lawful command of a superior officer or noncommissioned officer and disobedience of any lawful order or regulation. These often have a direct effect upon speech. For example, military regulations provide for censorship of speeches and writings of members of the military, forbid participation in a variety of political activities, and bar participation in certain off-post demon-

37. See id. at ¶ 213(e).
40. The Supreme Court, in O'Callahan v. Parker, 395 U.S. 258 (1969), indicated that the grant of court-martial jurisdiction must be narrowly construed because of the absence of a number of constitutional rights provided in a civilian trial such as the right to indictment by a grand jury, to trial by a jury chosen at random from one's peers, and to a judicial process and structure free from disciplinary influences. It has now been held that courts-martial lack jurisdiction over discharged servicemen for crimes committed while on active duty, United States ex rel. Toth v. Quarles, 350 U.S. 11 (1957); over civilian dependents overseas in peacetime, Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960); Reid v. Covert, 354 U.S. 1 (1957); over civilian employees of the military, McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960); Grisham v. Hagan, 361 U.S. 278 (1960); and over offenses of servicemen that are not service-connected, O'Callahan v. Parker, 395 U.S. 258 (1969).
42. Id. art. 91, 10 U.S.C. § 891.
43. Id. art. 92, 10 U.S.C. § 892.
44. Defense Dep't Dir. 5230.9 (Dec. 24, 1966).
45. Id. 1344.10 (Sept. 23, 1969).
strations and other free speech activities.48

Since it is only in the last decade that military courts have begun to accept the premise that the Bill of Rights applies directly to servicemen,47 it is perhaps not surprising that recognition of First Amendment rights is late in coming to the military. Although civilian laws restrictive of speech, whether phrased in terms of local police powers or national security, have frequently been held unconstitutional, the highly restrictive and rather vague speech and speech-related offenses within the military justice system have scarcely been questioned. The rationalization that there is no place for free speech in the military because of the need for obedience and discipline has been almost universally accepted. Therefore, although substantial numbers of servicemen were court-martialled for speech which was critical of the President during the Civil War,48 World War I,49 World War II,50 and the Korean War,51 First Amendment issues were rarely raised and never found to constitute a bar to prosecution or conviction.

A. United States v. Voorhees

The first significant court-martial case to raise First Amendment issues squarely, United States v. Voorhees (1954),52 was not a dissenter

46. Defense Dep't Dir. 1325.6 (Sept. 12, 1969); Defense Dep't Dir. 1334.1 (Aug. 11, 1969); Army Reg. 600-20 (May 17, 1968).
47. In United States v. Clay, 1 U.S.C.M.A. 74, 77, 1 C.M.R. 74, 77 (1951), the Court of Military Appeals took the position that servicemen in courts-martial were only entitled to "military due process," that is, those rights requisite to fundamental fairness in a court-martial derived from Congress, and enacted in UCMJ rather than from the Bill of Rights. However, in United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960), it reversed its position, stating, "the protection of the Bill of Rights, except those which are expressly or by necessary implication inapplicable, are available to members of our armed forces." Id. at 430-31, 29 C.M.R. at 246-47; accord, United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). See generally Henderson, Courts-Martial and the Constitution: The Original Understanding, 71 HARV. L. REV. 293 (1957); Weiner, Courts-Martial and the Bill of Rights: The Original Practice (pts. I, II), 72 HARV. L. REV. 1, 266 (1958).
49. See Kester 1724-29. Records of the general courts-martial, U.S. Army Judiciary, show 72 convictions for seditious or disloyal statements and 7 convictions for speaking words inducing others to misbehave from 1917 to 1919. Reply to the Assignment of Errors at app. I, United States v. Amick & Stolte, C.M. 418868 (NBR 1968).
50. See Kester 1729-32; Reply to the Assignment of Errors at app. I, United States v. Amick & Stolte, C.M. 418868 (NBR 1968).
51. See, e.g., McQuaid, 5 C.M.R. 525 (1952).
case but a case involving a violation of military censorship regulations by a career Army officer. The defendant was a lieutenant colonel who wrote a book about the Korean War containing several passages critical of General McArthur. He submitted the book for review by the appropriate authorities as required by military regulations, but when a year later the authorities demanded that he delete certain passages, he refused and published the book without permission. He was convicted of violating a lawful order and dismissed from the service.

Vorhees provided the newly-established Court of Military Appeals with an opportunity to address First Amendment issues for the first time, and although each of the three judges wrote a separate opinion, all three recognized the applicability of the First Amendment to the military. Chief Judge Quinn, writing the principal opinion, stated that servicemen's First Amendment rights must be limited by the requirements of military necessity, and, by interpreting the regulations to provide for censorship in order to insure against security violations, he found them constitutional.

Judge Brosman dissented from the majority's approval of the regulations and the finding that the regulations were limited to censorship for security reasons. In one of the few military court opinions which has indicated an awareness of the broad First Amendment precedents of the Supreme Court of the 1930s and 1940s, he noted the preferred position of free speech, the constitutional prohibition on prior restraints which strikes at censorship, and the constitutional infirmity of vagueness and overbreadth. He maintained that military censorship extending beyond security considerations to standards of "policy and propriety," as the censorship in the Vorhees case had seemed to do, was a violation of the First Amendment. However, he stated that he felt the conviction might have been permissible if it were under one of the express offenses stated in the Uniform Code.

Finally, Judge Latimer was willing to give only grudging recognition to the First Amendment issues, stating, "I believe it ill-advised and

53. Ironically, the passages objected to by the military censors described a breach of security regulations by General McArthur's early release of information concerning Korean invasion plans, allegedly done to establish a more favorable image for himself. 4 U.S.C.M.A. 509, 516, 16 C.M.R. 83, 90 (1954).
54. Army Reg. 360-5, Sec. 4, para. 15C (Oct. 20, 1950).
unwise to apply the civilian concepts of freedom of speech and press to the military services unless they are compressed within limits so narrow they become almost unrecognizable."58 He also stated that military censorship was appropriate to insure that servicemen did not publish writings inconsistent with military policy and propriety.59 His position was supported by a hard-hitting argument that the military has a right to protect both the morale of its men and its public image by censoring critical comment:

No man willingly lays down his life for a national cause which he is led to believe is unsound or unjust. Yet implicit in military life is the concept that he who so serves must be prepared to do so. If morale and discipline are destroyed, our forces cannot be trained adequately, and the nation must necessarily fail in battle. A few dissident writers, occupying positions of importance in the military, could undermine the leadership of the armed forces; and if every member of the service was, during a time of conflict, or preparation therefor, [sic] permitted to ridicule, deride, deprecate, or destroy the character of those chosen to lead the armed forces, and the cause for which this country was fighting, then the war effort would most assuredly fail.60

Judge Latimer went further: "It matters little whether the published comments were true or false because the effect on the public would be the same and the cause would be weakened."61 Thus he seemed to indorse a test which would consider the military's interest in protecting its public image from critical comment by servicemen as paramount, no matter what the context or circumstances, simply because of a remote possibility that morale or the war effort might be adversely affected. Since Vorhees in 1954, Judge Latimer's position has not been stated in such bald terms as grounds to support court-martial convictions, but it is still frequently relied upon as grounds for excluding criti-

58. 4 U.S.C.M.A. at 531, 16 C.M.R. at 105.
59. After the Vorhees decision, the Armed Services expressly limited censorship to security purposes with respect to the press, but its scope was broader with respect to speech by military personnel. Vagts, Free Speech in the Armed Forces, 57 COLUM. L. REV. 187, 203 (1957). However, since Vorhees did not determine whether censorship must be limited to security purposes, it has been assumed that it need not be. In 1966, a Department of Defense directive was issued requiring prior review of all speeches or writings of department employees on matters of national interest, subjects of potential controversy between the services, and policy matters within the purview of other federal agencies. A speech or writing could only be released "after it has been reviewed for security and for conflict with established Department of Defense and Government policies and programs." Defense Dep't Dir. 5230.9 (Dec. 24, 1966) noted in Brown, Must the Soldier be a Silent Member of Our Society?, 43 MILITARY L. REV. 71, 94-97 (1969).
60. 4 U.S.C.M.A. at 533, 16 C.M.R. at 107.
61. Id., 16 C.M.R. at 107.
cal literature or speech activities from military installations. 62

B. Other Post-Korean War Cases

The Court of Military Appeals heard only two cases involving First Amendment issues between the 1954 Vorhees decision and the Vietnam War, and it disposed of them without reaching the constitutional issues. In United States v. Wysong, 63 a sergeant, who had attempted to persuade other servicemen not to give information in an official investigation of his wife, was ordered by his superior officer not to talk to anyone about the investigation except in line of duty. The court found the order invalid, despite its valid purpose, since it was too broad, applying even off-duty, and was too vague and indefinite. Although the court did not expressly rest its decision on First Amendment grounds, it indicated that the order would have sealed the sergeant off from the other men, an obvious violation of First Amendment rights.

The other case, United States v. Schmidt, 64 involved a soldier who felt he was being harassed by his first sergeant for complaining to his Senator about food and living conditions. He told his commander that he was going to send a press release headlined “FT. RILEY SOLDIER RECEIVES PUNISHMENT FOR EXERCISING RIGHTS” to the newspapers if the harassment did not stop. He was court-martialed


and convicted of extortion and wrongful communication of a threat. The court reversed in three separate opinions, the principal opinion by Judge Kilday holding that affirmance "would not comport with the fairness, integrity, or public reputation of judicial proceedings." Judge Ferguson emphasized the free speech aspects, stating that discipline had been "perverted into an excuse for retaliating against a soldier for doing only that which Congress had expressly said it wishes him to be free to do," and that "[i]t was also open to him respectfully to make known his intention to air his just grievance publicly, without being subjected to adjudication as a blackmailer."

II. Vietnam War First Amendment Cases

A. United States v. Howe

It was inevitable that the Vietnam war, which has caused deep divisions among other Americans, would also generate dissent among servicemen. Thus, shortly after President Johnson ordered combat troops into Vietnam, a significant First Amendment case arose involving the attempt by a young officer to express his feelings about the administration’s war policies. Second Lieutenant Henry Howe, Jr., stationed at Ft. Bliss, Texas, read in the newspapers that a group of professors and students at the local university were going to hold a demonstration against American policy in Vietnam in the main plaza of El Paso on a Saturday morning. He made a sign reading "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS [sic] IN 1968" and on the other side, "END JOHNSON'S FACIST [sic] AGGRESSION IN VIET NAM," and while off-duty and dressed in civilian clothes he drove to the plaza, some 8 miles from Ft. Bliss, and joined a line of about twelve demonstrators who were walking in a circle carrying signs reading "LET'S GET OUR BOYS OUT OF VIET NAM," "GET OUT OF VIET NAM," "PEACE IN VIET NAM," and "WOULD JESUS CARRY A DRAFT CARD?" A crowd of about two thousand had assembled around the demonstrators, a large number of them supporting the Vietnam war including some with "WIN IN VIET NAM" signs and some American Legionnaires in uniform passing out American flags. There were a few cat-calls and
comments aimed at the demonstrators, but since there was a substantial police contingent on hand, there was never any threat of a violent confrontation.\textsuperscript{71}

The crowd was predominantly civilian.\textsuperscript{72} One military policeman testified later that he recognized only three or four other soldiers in the crowd, although others may have been present in civilian clothes.\textsuperscript{73} Lt. Howe, however, was recognized by one of the military policemen. He was tried and convicted by a general court-martial of two military crimes applicable only to officers: making contemptuous words against the President under article 88, and conduct unbecoming an officer and a gentleman under article 133.\textsuperscript{74} He was sentenced to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for 2 years (later reduced to 1 year).\textsuperscript{75}

1. THE DECISION OF THE BOARD OF REVIEW

The Army Board of Review affirmed the conviction in an opinion that demonstrated the gulf between the treatment of First Amendment cases in military and civilian courts.\textsuperscript{76} No attempt was made to consider the case in light of civilian precedents; in fact, the only Supreme Court First Amendment case cited was the 1927 decision in \textit{Whitney v. California},\textsuperscript{77} a decision which has since been expressly overruled by the Supreme Court.\textsuperscript{78} The board did state that military tribunals are bound to protect the First Amendment rights that apply to servicemen but, in a now-familiar rubric, added that First Amendment rights are not absolutes and must be subjected to reasonable limitations based on military necessity. The board had no difficulty in identifying those "reasonable limitations." In language reminiscent of the presumption of constitutionality given to legislative enactments in the economic regulation cases of the late 1930s and 1940s, the board observed that Congress has the power under article I, section 8, clause 14 of the Constitution "to make Rules for the Government and Regulation of the land and naval Forces" and therefore:

It is not for us to question the wisdom of Congress in enacting Articles 88 and 133 of the Uniform Code of Military Justice as ap-

\begin{itemize}
\item \textsuperscript{71} See id.
\item \textsuperscript{72} \textit{Id.}, 37 C.M.R. at 433.
\item \textsuperscript{73} \textit{Id.} at 169, 37 C.M.R. at 433.
\item \textsuperscript{74} \textit{Id.} at 167, 37 C.M.R. at 431.
\item \textsuperscript{75} \textit{Id.}
\item \textsuperscript{76} Howe, 37 C.M.R. 555 (1966).
\item \textsuperscript{77} 274 U.S. 357 (1927).
\item \textsuperscript{78} Brandenburg v. Ohio, 395 U.S. 444 (1969).
\end{itemize}
pellant would have us do . . . . Further, we need not decide the precise balance to be struck between appellant's claim of a preferred right to free speech and the Congressional limitations imposed upon the exercise of that right. The overriding power in the Congress on the subject of military justice had been consistently recognized by the decisions of the Supreme Court and the United States Court of Military Appeals. Burns v. Wilson, 346 US 137, 140, 97 L. Ed. 1508, 73 S Ct 1045 (1953); Dyens v. Hoover, 20 Howard 65, 79 (US 1858); United States v. Culp, [14 U.S.C.M.A. 199, 33 C.M.R. 411 (1963)] at 416 . . . . Accordingly, appellant's right, as an officer, to speak may not override a reasonable and necessary standard of conduct firmly entrenched in our system of military justice. Our only concern . . . is whether the conduct of the appellant, of which he stands convicted, falls within the pale of what Congress in its wisdom proscribed.79

The precedents cited by the board all refer to passages supporting the proposition that due to Congress' constitutional power over the Armed Forces and the special status of the military under the Executive branch, courts are hesitant to interfere with the military. This doctrine, insofar as it was applied to create a sort of presumption as to the validity of court-martial convictions against claims of constitutional deprivations, is now thoroughly discredited.80 It still has some vitality in cases where the issue is whether civilian court review of discretionary military determinations is appropriate or whether exhaustion of military remedies has been accomplished or should be required prior to such review;81 but the day is long past when servicemen's constitutional rights can be overridden by mere invocation of Congress' constitutional power over the Armed Forces or reference to standards "firmly entrenched in our system of military justice."

The board's decision also ignores the special status given First Amendment rights under prior Supreme Court precedents. Although the "preferred status of First Amendment rights" theory is not universally accepted,82 the Supreme Court continues to indicate that the legislative presumption working in favor of the constitutionality of economic legislation is not applicable in free speech cases.83 The

79. 37 C.M.R. at 558-59.
board's test—whether Lt. Howe's conduct "falls within the pale of what Congress in its wisdom proscribed" places far too much emphasis upon the presumed validity of congressional exercise of power to gibe with contemporary First Amendment requirements.

a) Effect on Subordinate-Superior Relationships

Despite the board's invocation of a presumption of legislative validity and a disclaimer of any intention to balance interests, it did go on to discuss the government interests involved in the conviction of Lt. Howe. It viewed the article 8 prohibition on an officer's contemptuous words against the President as necessary for the preservation of order and discipline in the military which, in turn, was viewed as essential to the ultimate purpose of the military "to prepare for and to be successful in combat against the enemies of the United States." In what one commentator has termed "a sort of disciplinary domino theory," the board argued that the whole hierarchy of military command was threatened by Lt. Howe's contemptuous words against the President:

The appellant may not contemptuously assail his Commander-in-Chief with impunity no more than he may behave himself with disrespect toward his superior officer. His relationship as an officer to the President, the highest source of military command authority, in this regard is significantly the same as his relationship to his superior officer—in both instances, respect is required and demanded. . . . The preservation of the necessary subordinate-superior relationship in the military service permits no such privilege or impunity, especially where, as here, a military officer notoriously vilifies the very superior authority to whom a duty of respect is owing and who appointed him to military office.

The difficulty with this rationale is that it is extremely difficult to find a causal connection between contemptuous words about a political figure and injury to superior-subordinate relationships. It is possible that use of contemptuous words by a subordinate concerning a superior whom he knows personally or with whom he comes into contact would have an undesirable effect upon their relationship and, therefore, upon the mission of the organization. Such an effect is much more doubtful, however, when the superior is simply the nominal Commander-in-Chief of a multi-million man army. Obedience is necessary in the


85. Id. at 559.
86. Kester, supra note 48, at 1753.
87. 37 C.M.R. at 559.
military, but as Kester has observed,

Whether the required obedience will be affected at all by statements of dislike towards a remote political figure with whom the speaker's relationship is little more than an abstraction is at least problematical. The military code quite amply provides for punishment of any disrespect towards a military superior. 88

The application of article 88 only to officers and the consequent implication that enlisted men are free to use contemptuous words against government officials—at least within the bounds of other legitimate limitations on their conduct 89—makes the justification for a criminal offense based on officers' contemptuous words even more questionable. There is, however, a considerable tradition in the military which views the status of the commissioned officer as requiring a high degree of conformity to rigid standards of personal conduct. Commissions are viewed as coming directly from the President, thus entitling one to the special privileges and prerogatives of the officer class but also requiring a higher standard of conduct and a special loyalty, almost like medieval fealty, to the Commander-in-Chief. This tradition may help to explain the board's anger at a young officer who "notoriously and ignominiously vilifies the very superior authority to whom a duty of respect is owing and who appointed him to military office" and its ready acceptance of the notion that such conduct was a threat to the very existence of the military.

It is unrealistic, however, particularly under present-day conditions, to find a serious threat to the military from the mere use of contemptuous words against the President by an officer. In an army where most second lieutenants are serving only a mandatory 2-year tour and military formalism is increasingly giving way to the pragmatic considerations of bureaucratization and specialization, 90 the traditional attitudes of officers concerning duty and respect towards remote superiors have been substantially diluted. Furthermore, the President today, although Commander-in-Chief, is much more importantly a political figure, and at certain times a very controversial one. The recent Supreme Court decision 91 reversing a conviction for threatening the life

88. Kester, supra note 48, at 1753-54.
89. The predecessor of article 88 prior to the UCMJ applied to all servicemen. Today, enlisted men's speech that is contemptuous of government officials may still fall under the provisions of article 134 as "disloyal statements" or "disorders and neglects to the prejudice of good order and discipline" or "conduct of a nature to bring discredit upon the armed forces."
of the President of a defendant who said at a rally, "If they ever make me carry a rifle the first man I want to get in my sights is L. B. J." provides a good example of the contemporary view of the President's status. The Court held the statement was "political hyperbole" protected by the First Amendment, implying that the role of the President as a political figure is not immune from even extremely intemperate criticism.

b) Effect on Order and Discipline

The board also reasoned that Lt. Howe's conduct would have a direct and detrimental effect upon order, discipline, and his performance as an officer because soldiers "could hardly be expected to willfully and cheerfully respond to the orders of the appellant where the latter has publicly manifested such disloyalty and contempt to his superior." If indeed the enlisted men in Lt. Howe's unit would not be able to follow his orders and direction because of his participation in the peace march, then his conduct would have a direct effect upon his ability to perform his duties and the military might have a legitimate interest in taking action in respect to that conduct. However, in Lt. Howe's case no evidence was presented in the court-martial indicating such an effect upon his performance as an officer. Since only three or four military men could be identified as present, and Lt. Howe, dressed in civilian clothes, was not readily identifiable as an Army officer, it seems unlikely that his participation in the march would have ever reached the notice of his men back at Ft. Bliss had the military not arrested him and catapulted his activities onto the front pages of the newspapers.

Even if Lt. Howe's conduct had resulted in publicity which identified him as an officer, still the threat to his ability to carry out his duties is questionable. Quite apart from the fact that in today's Army an officer who displays concern over such socially relevant issues such as the Vietnam War may win the admiration of some enlisted men, it is doubtful whether an officer's ability to carry out his duties, especially in an administrative position such as Lt. Howe's (he was assistant motor officer in an engineer battalion), would be in any way affected. In fact, the military trains its men to be obedient to the office, and not to the man. It would be a serious sign of failure of the military system if soldiers refused to respond to officers because of their off-duty expressions of political beliefs.

92. Id. at 706.
c) **Effect on Fitness as an Officer**

The board's contention that the use of contemptuous words about the President necessarily affects an officer's ability to command obedience and respect from his subordinates has a related and somewhat more convincing aspect. Use of such words may, in itself, show that an individual is unfit to carry out the duties of an officer even if it has no immediate effect upon his performance. Obviously a variety of non-criminal conduct, especially pertaining to moral and social standards, may provide grounds for a determination that one is not fit to be an officer, and the military, like any employer, should not be required to continue such an individual in his position after such a determination.

This rationale, however, is not suitable for justifying the result in *Howe*. First, it is not at all certain that Lt. Howe's participation in the demonstration should be considered the type of conduct which demonstrates unfitness as an officer in today's Army. Possibly his unwise choice of words on the placard could place his conduct within this category, but given the expected anonymity of his act and the usual indulgence given to "political hyperbole,"96 such conduct alone would seem insufficient to prove unfitness. Second, the action taken against Lt. Howe was not administrative, such as a reprimand, an unfavorable rating, removal from his job, or dismissal from the Army; it was a criminal prosecution for a felony.97 Although the Army might have had legitimate grounds to discipline or even to dismiss him,98 a criminal prosecution raises very different considerations. Criminal prosecution is a much more serious form of official response to an employee's speech and raises criminal due process as well as First Amendment considerations. Surely the degree of proof and immediacy of danger to a legitimate government interest should be considerably stronger for a court-martial than that required for dismissal on the same grounds. The board seems to have accepted all too uncritically the military rhetoric about an officer being held to a "higher standard of conduct"99 without

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98. Grounds for discharge and dismissal are established by statute and by regulations issued pursuant to them. Although the military has broad discretionary powers to discharge particular individuals from the service, discharge may be voided if in violation of: statutory authority, Harmon v. Brucker, 355 U.S. 579 (1958) (per curiam); regulations, Roberts v. Vance, 343 F.2d 236 (D.C. Cir. 1964); or statutory standards, Kennedy v. Secretary of the Navy, 401 F.2d 990 (D.C. Cir. 1968); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965); Reed v. Franke, 297 F.2d 17 (4th Cir. 1961) (dictum). See also Stapp v. Resor, 314 F. Supp. 475 (S.D.N.Y. 1970).
distinguishing the military's use of administrative means to reprimand or to remove an officer from its more questionable right to treat him as a criminal.

The issue is not unique to the military; similar problems arise when a public employee criticizes official policies or his superiors. It was once generally accepted that public employees owed a duty of loyalty to all officials up the chain of command and therefore that they could be fired for critical speech. This position, however, has been rejected by the courts. In Swalley v. United States, the Court of Claims held that a Brooklyn Navy Yard employee who wrote a letter to the Secretary of the Navy alleging favoritism in promotions could not be dismissed from his job even though he failed to demonstrate that there was a reasonable basis for the statements. The court held that the New York Times rule of actual malice applies to such statements by public employees because suppression of criticism would have a stifling effect upon their free speech rights. Then, in 1968, the United States Supreme Court resolved the issue in Pickering v. Board of Education holding that a public school teacher could not be dismissed for writing a letter to a local newspaper that was critical of the board of education even if it contained false statements if they were not made knowingly or recklessly. The board had contended, as did the Army in Howe, that the teacher owed a duty of loyalty to support his superiors. The Court found that since the letter was not directed towards any person with whom the teacher would normally be in contact in the course of his daily work, the criticism of his "ultimate employer" neither impeded his performance in the classroom nor interfered with the regular operation of the schools generally. In a footnote the Court recognized that other considerations might be pertinent in those cases where "the need for confidentiality is so great that even completely correct public state-
ments might furnish a permissible ground for dismissal” or “the relationship between a superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them.”

Since Pickering, federal courts have given broad protection to public employees’ right to engage in critical speech. Nonetheless they have permitted dismissal in situations where the superior-subordinate relationship is so intimate that the criticism threatens discipline and harmony on the job, where the speech indicates unfitness to perform duties, or where it is blatantly false or recklessly inaccurate. Of particular interest are the cases involving critical speech by members of the para-military. Brukiewa v. Police Commissioner of Baltimore involved the dismissal of a police officer, an official in the policemen’s union, for criticizing police department procedures and the police commissioner on local television. The trial judge upheld the dismissal proceedings, finding that his statements were “corrosive of confidence in the police department” and that “the morale and discipline of the Department had to obviously suffer from the divisive effects of the statements.”

The Court of Appeals of Maryland reversed, holding that despite the need for obedience and discipline in the police force, his statements were not directed toward a superior with whom he came in frequent contact. They did not impair his fitness to perform his daily duties and, therefore, were protected by the First Amendment.

Meehan v. Macy involved the dismissal of a Canal Zone police officer, also a union official, for making extremely critical statements about policies during a tense and unstable period in the Canal Zone. The Court of Appeals for the District of Columbia affirmed his dismissal for conduct unbecoming a police officer, but after Picker-

107. Id. at 570 n.3.
113. Id. at 43, 263 A.2d at 218.
114. Id. at 57, 263 A.2d at 221.
115. 392 F.2d 822 (D.C. Cir. 1968).
116. Id.
ing was announced, it granted a rehearing en banc and remanded for reconsideration in light of *Pickering*.

Since the board of review and Court of Military Appeals decisions in *Howe* preceeded *Pickering*, the type of inquiries deemed relevant in *Pickering* and its progeny were not made. Under those standards, there seems to be nothing in the record to warrant suppression of Lt. Howe's First Amendment rights. The military courts which have considered critical speech by servicemen since *Pickering*, however, have ignored the decision, and at least at present, the First Amendment protections extended to teachers, policemen, and other public employees have not been applied to servicemen.

2. **THE DECISION OF THE COURT OF MILITARY APPEALS**

The Court of Military Appeals affirmed the conviction of Lt. Howe on a somewhat different rationale than that applied by the board of review. It expressly endorsed the "clear and present danger test" as the appropriate standard for determining whether Lt. Howe's speech could be curbed, and after citing a selective group of narrow cases which had applied the test, it then concluded, with almost no analysis, that the conditions of the test were met:

> We need not determine whether a state of war presently exists. We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.

Without clearly identifying its approach, the court seems to have used the phrase "clear and present danger" to describe the sort of *ad hoc* balancing test espoused by the Supreme Court in *Dennis*. Unlike the board of review, however, it did not view the military interest involved as protection against an immediate threat to order and discipline. Although it stated that "the evil which Article 88 . . . seeks to avoid is

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121. *Dennis v. United States*, 341 U.S. 494, 494-95 (1950): "In each case [courts] must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger."
the impairment of discipline and the promotion of insubordination by an officer of the military service,"122 the court made little attempt to demonstrate that Lt. Howe's conduct actually posed such a threat.

a) The "Man on a White Horse" Rationale

Instead, the court devised a new rationale: suppression of Lt. Howe's speech was justified because "the ancient and wise provisions [of the military law] insuring civilian control of the military will restrict the 'man on a white horse.'"123 This approach to the First Amendment apparently involves an entirely different governmental interest than the protection of good order and discipline which concerned the board of review. Due to the importance of the interest involved—the protection of the government—it could arguably pose just as great a "clear and present danger" under the Dennis ad hoc balancing approach. If this is the proper context, the strained attempts of the board to prove that Lt. Howe's conduct was an immediate threat to order and discipline would become quite unnecessary. The governmental interest in protecting the Republic from military coups by men on white horses, much like the governmental interest in national security deemed paramount in Dennis, would clearly outweigh Lt. Howe's First Amendment rights. The court cited no precedent for its "man on a white horse" rationale; it quoted instead at considerable length from Chief Justice Warren's 1962 James Madison Lecture at New York University School of Law in which he observed that in this hemisphere only the United States and Canada have avoided rule by the military throughout our national existence, a result attributed to civilian supremacy in government.124 This new rationale, however, especially if it can be interpreted to justify prosecuting a second lieutenant for criticizing the President publicly, needs to be examined much more carefully.

(1) Historical Validity

The historical premise for concluding that strict separation of members of the military from politics has saved this country from takeover by a "man on a white horse" is itself questionable. The degree of involvement in politics by military men in this country has always been substantial. It could hardly be said that a country with seven General-

123. Id. at 175, 37 C.M.R. at 439.
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Presidents, a country that has elected war heroes to the Presidency after almost every war, accurately illustrates the virtue of strict separation of military men from political affairs. In this century, General Leonard Wood actively campaigned for a military buildup prior to our entry into World War I in violation of administration policy; General Patton made statements during World War II at odds with administration policies concerning allies and post-war plans; and General MacArthur criticized the administration's Korean War policies in letters to opposition members of Congress. Activities on behalf of Generals Eisenhower and MacArthur to secure the 1952 Republican Presidential nomination were undertaken while both were still on active duty, and, in fact, so many Generals made speeches related to political issues in that campaign that sociologist C. Wright Mills concluded, "There is no doubt about it: There are now Republican and Democratic generals."

Nevertheless, military men have been disciplined because of their involvement in politics. General Billy Mitchell was court-martialled for his aggressive campaign against the official military rejection of expanded air power after World War I, and General MacArthur was removed from his post as Allied Commander in Korea after his continued criticisms of administration policies. In 1961 General Edwin Walker was relieved of his command in Europe after publicity about his political activities. These reportedly included distribution of John Birch Society literature to day rooms and Army newsstands, indoctrination of troops with allegedly "right wing" materials, and public accusations that a number of former public officials, including presidents Roosevelt and Truman and Secretary of State Acheson, were "definitely pink."

Running at crosscurrents to all of this is the strong opposition that has been expressed by high-ranking military men to the limitations on their right to discuss political matters. General Walker said in 1961:

125. Kester, supra note 48, at 1733 n.225.
126. O. Bradley, A Soldier's Story 230-31, 393 (1951).
If men are to be precluded from offering their sentiments on a matter which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; freedom of speech may be taken away, and dumb and silent we may be led, like sheep, to the slaughter.  

General Curtis LeMay, a vice-presidential candidate on the Wallace third-party ticket in 1968, strongly objected to the "muzzling" of the military and argued that the "man on a white horse" threat was greatly exaggerated.

General MacArthur made one of the most fundamental attacks on the policy of military political neutrality in an address to the Massachusetts Legislature on July 25, 1951, shortly after his removal from command by President Truman. He said:

I find in existence a new and heretofore unknown and dangerous concept that the members of our armed forces owe primary allegiance and loyalty to those who temporarily exercise the authority of the executive branch of government, rather than to the country and its Constitution which they are sworn to defend.

No proposition could be more dangerous. None could cast greater doubt upon the integrity of the armed forces.

For its application would at once convert them from their traditional constitutional role as the instrument for defense of the Republic into something partaking of the nature of a pretorian guard, owing sole allegiance to the political master of the hour.

It is obviously true that high-ranking military men may be especially well informed about at least some national issues, and therefore, that they are able to make important contributions to the public debate on them. Nonetheless, there must be the inevitable recognition that generals and other high-ranking officers are in a position to exert a tremendous influence upon public opinion. And it is this danger or power that is to be avoided by the "man on a white horse" rationale.

(2) Dissent in Uniform

A question parallel to critical speech arises regarding the wearing of the uniform in conjunction with activities critical of the government. Participation in off-post demonstrations while in uniform violates military regulations and may also be grounds for court-martial as "conduct unbecoming an officer" or "conduct of a nature to bring discredit

133. C. LeMay, America in Danger 7, 9 (1968).
134. N.Y. Times, July 26, 1951, at 12, col. 1 (late city ed.).
upon the armed forces." 136 Here too, however, it is questionable whether the military ban on wearing of the uniform is really aimed at maintaining political neutrality and at preventing the dangers raised by the "man on a white horse" rationale.

It is true that servicemen in uniform are likely to be noticed and that their participation in activities that are critical of government policies may raise doubts as to their loyalty to the government and ability of the government to command the support and obedience of its troops. There is, however, little in the American political tradition to suggest such dangers from the mere wearing of uniforms in conjunction with critical speech activities. The public has grown accustomed in recent years to the sight of striking or protesting teachers, policemen, and other public employees, and there seems to be increasing recognition that public employees are capable of performing their duties conscientiously while still opposing policies of their employer. Furthermore, the American political tradition, especially as expressed by the First Amendment, accepts the premise that citizens may oppose the government without forfeiting their loyalty to their country. There seems to be little basis for concluding that soldiers cannot do likewise.

Although the threat of undue military pressure or a coup is unlikely when servicemen or even small numbers of servicemen are considered individually, that may change if servicemen from the same unit appear together as a military group due to the suggestion of coordinated solidarity and organization. The threat involved, however, is dependent upon such factors as the number of servicemen involved, the nature of the activity, and the degree of active participation by servicemen. Certainly military regulations aimed at preventing group participation in off-post demonstrations where unlawful or violent activities are likely to result would stand on a different footing than a blanket prohibition of uniformed participation. Unfortunately, however, the Court of Military Appeals in Howe dealt with none of the subtle and difficult issues raised in these situations, and the "man on a white horse" rationale

provides little guidance as to the relevant factors for consideration.

(3) *The Government's Use of the Serviceman in Politics*

One very troubling aspect of the "man on a white horse" rationale is that both the government and the military have effectively used military personnel to affirmatively support government policies and to propagandize for those policies in the media. The military maintains an extensive public relations program designed exclusively to affect civilian opinions concerning government and military policies\(^\text{137}\) and, in the late 1950s, a mandatory program of troop indoctrination was implemented for similar purposes.\(^\text{138}\)

The Department of Defense, the services, and most military posts and installations have speakers' bureaus that provide military speakers, usually in uniform, to present the "official" point of view on a variety of public issues. This service is not unpopular as noted by Derek Shearer of the Institute for Policy Studies:

Through speakers' bureaus which each Army post is encouraged to maintain, an estimated 1,000 audiences a month are provided with Army speakers. Young, returned veterans from Vietnam are urged to address public gatherings; *Army Digest* noted proudly that, since returning from Vietnam, a Col. John G. Hughes had delivered 240 speeches. *The Washington Post* reported in December 1969 that an Army major was used by the Pentagon to provide public counterattacks to critics of the war. Maj. James Rowe, who spent five years as a captive of the Vietcong, filmed twenty television interviews and cut six radio tapes with Congressmen; the tapes were sent to the home stations of the Congressmen or used in Army information programs. In several of these appearances, Rowe questioned the patriotism of Sen. George McGovern, and charged that the American liberal press was printing material which breaks the morale of American prisoners.

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Under the rubric of Community relations, the services operate traveling exhibits which tour the country, telling the military "story." The Army's community Relations Branch estimates that

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\(^{137}\) There has been substantial military interest in public relations since World War II. In 1948, General MacArthur had 135 military and 40 civilian aides assigned to his Far East Command for publicity functions and General Eisenhower had 44 military and 113 civilian aides for the same purpose. J. SWOMLEY, JR., *THE MILITARY ESTABLISHMENT* 113-28 (1964). $27,953,000 was allocated for military public relations in 1969. Shearer, *The Brass Image*, *The Nation*, vol. 210, Apr. 20, 1970, at 455 [hereinafter cited as Shearer].

some 13.5 million people viewed twenty-two of its travelling exhibits in the last half of 1968.139

Although congressional critics have questioned the size and partisanship of certain military information and public relations programs,140 few would question the right of the military to engage in such activities altogether. Military propaganda aimed at civilians, even if deceptive, has generally been taken for granted in wartime.141 Thus in World War II, propaganda about the invincibility of our Armed Forces, the virtues of our commanders, and the superiority of our weapons was considered essential to preserve civilian support and morale. This justification is more difficult to maintain in time of peace or limited war when propaganda is not as necessary to spur civilian war production or to bolster the morale of a civilian populace undergoing shortages and hardships. It would appear that military propaganda today, which is more of the information and public relations variety, is particularly related to encouraging volunteers for the Armed Forces and to providing public support for military policies and budgetary needs.

But if the military is justified in using active duty military men to express support for government policies, the question arises as to whether critics within the military should be forbidden from also expressing their views. If so, then the opposite effect from the "man on the white horse" danger may occur, that is, the military may be used not merely to carry out the administration's policies, but actively to support the particular political policies of the existing government. President Johnson's heavy scheduling of speeches, many of them with strong political overtones, at military installations in 1967 and early 1968 is an indication of the political danger of associating the military too closely with the partisan policies of an administration.142 Some of the anti-military feeling which arose during this period of the Vietnam War may be attributable to the close identification of the military with pro-Vietnam War policies and the feeling that the military had gone beyond a nonpartisan role of merely executing policy to become a

139. Shearer, supra note 137, at 460.

140. E.g., Senator William Fulbright made four speeches on the Senate floor in December 1969 concerning the public relations activities of the military establishment. Id. at 455. See also "Colonel's Lecture Tours Challenged by Fulbright," N.Y. Times, Feb. 22, 1969, at 3, col. 6, describing program which has sent an estimated 175 colonels on lecture tours since 1948.

141. See generally H. LASSWELL, PROPAGANDA TECHNIQUES IN THE WORLD WAR (1927); H. LAVINE & J. WECHELSER, WAR PROPAGANDA AND THE UNITED STATES (1940); AMERICA'S WEAPONS OF PSYCHOLOGICAL WARFARE (R. Summers ed. 1951); T. QUALTER, PROPAGANDA AND PSYCHOLOGICAL WARFARE (1962).

142. See Sherman, Buttons, supra note 136, at 17.
spokesman for certain political policies in which it had a vested interest.

Guidelines for activities by critical servicemen are difficult to draw, but it appears both unrealistic and inequitable to permit Howe-type suppression of all such criticism based on the "man on a white horse" rationale. However, there appear to be valid reasons to distinguish between high ranking officers and all other servicemen, and allow "muzzling" of the former but not of the latter.

First, high-ranking officers, by definition, speak from positions of authority. It is difficult for the public to disassociate the speaker from his position in the military. On the other hand, very few would mistake a second lieutenant or enlisted man as speaking for the Army. Second, high-ranking officers serve voluntarily, and if they find themselves no longer able to support administration policies, they are free, as most of the dissenting generals have done, to retire and to speak freely as a civilian. Most enlisted men and many junior officers are serving either directly or indirectly as the result of the Selective Service Act. They cannot resign until their mandatory tour is over, and therefore a ban on critical speech effectively silences them for the duration of their military obligation. Third, the publicly-expressed views of high-ranking military men may have some effect upon their subordinates, given the military emphasis upon obedience to superiors and the well-known fact that policy comes from high commands. It is much less likely that enlisted men will feel constrained to adopt the views of a second lieutenant or another enlisted man expressed at an off-post rally, and this is especially so if the views are not in conformity with official policies.

b) The Inadequacy of the Rationale

It appears that the Court of Military Appeals' easy reliance upon the "man on a white horse" danger to justify article 88 "contemptuous words" convictions and inferentially to justify article 133 "conduct unbecoming an officer" convictions for critical speech, eschewing analysis of the particular circumstances under which the conduct took place, does not conform to the policies intended to be served by the "clear and present danger" test. The "man on the white horse" rationale simply does not provide a constitutionally sufficient basis for identifying a military interest clearly paramount to a serviceman's First Amendment rights.

The Supreme Court's reliance in Dennis upon an overpowering governmental interest in national security as sufficient to overcome the absence of an immediate danger has been subjected to considerable
criticism,

and in light of subsequent Supreme Court decisions such as *Yates v. United States*¹⁴⁴ and *Brandenburg v. Ohio*,¹⁴⁵ it is of limited application today. But even so, the danger protected against in *Dennis*, in light of the evidence presented of a well-organized Communist conspiracy ready to take illegal action when the time was ripe,¹⁴⁶ seems considerably more serious than the problematic dangers said to arise from Lt. Howe's conduct under the "man on a white horse rationale." The *Dennis* holding was further limited by the trial judge's instruction that the language must be found to go beyond teaching and advocacy to be reasonably and ordinarily calculated to incite to unlawful action,¹⁴⁷ a distinction deemed critical by the Supreme Court in *Yates*.¹⁴⁸ This instruction was not given in *Howe*.

One significant aspect of the *Howe* decision should be mentioned. The court not only failed to weigh interests in terms of the circumstances that afternoon in El Paso, but also failed to consider the type of disciplinary action taken by the military in view of other alternatives. As previously mentioned, high-ranking dissenters, many of whose public criticisms appear much more aggravated than Lt. Howe's, have never been court-martialed—with the sole exception of General Billy Mitchell. All have either been permitted to resign or have been involuntarily discharged or deactivated. There is the doctrine that the availability of alternatives involving less serious restrictions on First Amendment rights precludes suppression through use of a more serious restriction, and this doctrine has become an important element of First Amendment law.¹⁴⁹ Less restrictive alternatives such as reprimand, removal from his position, transfer, or dismissal¹⁵⁰ were readily available in the *Howe* case,


¹⁴⁷. Id. at 511-12.


¹⁵⁰. Transfer to another post has frequently been used in the Vietnam War period for dissenters and anti-war organizers. See cases of Pvt. Joseph Miles, organizer of GI's United Against the War in Vietnam at Ft. Bragg, suddenly reassigned to Alaska, Washington Daily News, June 5, 1969, at 3, col. 3; Sgt. Michael Sanders, honor guard at tomb of unknown soldier, reassigned to Vietnam despite physical impairments and only 7 months left in tour, after criticizing war in newspaper inter-
and no reasons were ever provided to show that they were inadequate to achieve the military disciplinary objectives.

The Court of Military Appeals expressly held in *Howe* that intent was not a necessary element of speaking "contemptuous words" against the President under article 88.151 Thus an officer can be convicted for speaking contemptuous words, even in a political context, without having intended the words to be personally disrespectful or contemptuous. This contrasts with the Supreme Court's previous holding in *Garrison v. Louisiana*152 that the *New York Times v. Sullivan*153 rationale applies to criminal libel of public officials, and therefore, conviction is only constitutional if there is proof of actual malice. The military offense of "contemptuous words," like the civilian offense of criminal libel, provides a restraint upon the right to make certain types of public statements. Criminal libel laws have been justified as necessary to curb libelous statements which might lead to public disorder,154 while the "contemptuous words" offense is claimed to be necessary to prevent undue military involvement in politics. Since both the military and civilian offenses forbid certain speech on policy grounds focusing on a danger perceived in the words themselves, both run the risk of unconstitutionality under First Amendment precedents. The Supreme Court, in *Garrison*, recognized this problem and thus imposed the *New York Times* requirement of intentional malice to limit the scope of criminal libel. In contrast, according to the holding in *Howe*, the "contemptuous words" themselves (which may not even reach the level of libel) can be punished without intent, much less actual malice.

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152. 379 U.S. 64 (1964).
154. See Beauharnais v. Illinois, 343 U.S. 250 (1952); City of Chicago v. Lambert, 197 N.E.2d 448 (Ill. 1964). See also Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (statute forbidding "any offensive, derisive or annoying word to any other person who is lawfully in a street or public place").
B. The Daniels and Harvey Additions

The next First Amendment case decided by the Court of Military Appeals during the Vietnam period was *United States v. Daniels,* decided in July, 1970 with a companion case, *United States v. Harvey.* *Daniels-Harvey* involved dissent by servicemen directed at Vietnam war policies, but unlike the *Howe* case, the dissent was expressed privately rather than publicly, by enlisted men rather than officers, was directed towards fellow servicemen rather than civilians, and was aimed at a particular goal rather than general political objectives.

George Daniels and William Harvey both volunteered for the Marine Corps, and they met for the first time in July, 1967, when they were assigned to an infantry training regiment at Camp Pendleton, California. Like many marine units at this period, this unit had a high proportion of blacks, and many of them were discontented. Many of these marines had voluntarily enlisted in the Marine Corps under a promise of aviation or other noninfantry assignments, but they had been "washed out" of the military training schools for these assignments because of poor academic performance. In each case they found themselves at Camp Pendleton being retrained as infantrymen for probable assignment in Vietnam. Some had sought some form of administrative relief at their previous posts, but they had been told their requests must wait until they arrived at Camp Pendleton. At Camp Pendleton they were told it was too late for consideration. The company commander recognized all of this when he described the unit as a group of "people who didn't want to be there, which is a particularly susceptible group of people."

Daniels and Harvey became friends after finding that they shared a common interest in the Black Muslim religion. Daniels had been expressing his ideas to other marines for some time, often saying that Vietnam was a white man's war, that black men should not fight there, and that the black and white races should be separated by force because they could not get along. Shortly after his arrival at Camp Pendleton, he told his commanding officer of his religious views and his opposition to the Vietnam War and requested either a change in his occupation specialty or discharge as a conscientious objector. The commander

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155. When discussing the details of Daniels and Harvey, the author speaks in part from knowledge derived during his association with the cases while serving as civilian defense counsel on both appeals.
asked him "not to spread this philosophy throughout the company" and said that he would see what he could do, but apparently he took no action on Daniels's request.

On July 27, 1967, Daniels and Harvey, together with some fifteen other Marines, mostly black, were sitting together under a tree after the noon meal in the field. Someone had a morning newspaper with headlines about the riots in Detroit that were going on at the time, and somehow the conversation turned from the riots to Vietnam. Daniels spoke a good deal, repeating what he had often said before: Vietnam was a whiteman's war; black men should not fight there and then have to come back and fight the white man in the United States. He also said that he already had instituted the procedure to see the commanding officer (called "request mast") about not going to Vietnam, and then he asked "who all was going with him." Harvey, on the other hand, said little, but he seemed to express agreement with Daniels. After the discussion, which lasted about 10 minutes, Harvey and another black marine informed the staff sergeant that they and a number of other marines wanted to request mast and, on the sergeant's instructions, Harvey made a list of the marines requesting mast.

The next morning at formation, the names were called and fourteen black marines fell out and marched over to the command office. The commanding officer refused to talk to them personally, but the gunnery sergeant interviewed each one; after warning them that they might be subject to mutiny charges, he sent them back to their unit. About six of them, including Daniels and Harvey, stated that they had requested mast because they did not want to go to Vietnam; two said they wanted hardship discharges; and most others asked for changes in their occupation specialties.

There were no further incidents after the request mast, but during the next few weeks Daniels, Harvey, and other members of the unit were called in for interrogation by agents of the Office of Naval Intelligence. The members of the unit, including Daniels and Harvey, completed their training and were graduated in the middle of August. As the men were leaving for various assignments, some to Vietnam, some not, Daniels and Harvey were arrested and charged with conspiracy to violate title 18, section 2387 of the United States Code, a section of the 1940 Smith Act which forbids attempting to cause insubordination, disloyalty, and refusal of duty by a member of the Naval forces of the United States.

Daniels was convicted by a general court-martial under this sec-
tion for making certain statements to eight other black marines either in informal discussions in the barracks or during the afternoon discussion after the Detroit riots. He was sentenced to a dishonorable discharge, forfeiture of all pay and allowances, reduction to the lowest enlisted grade, and confinement at hard labor for 10 years. Harvey was acquitted of the charges under section 2387. Nonetheless he was convicted of the lesser included offense of making "disloyal statements... with design to promote disloyalty among the troops" in violation of article 134. He was sentenced to 6 years confinement at hard labor, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. Navy boards of review subsequently affirmed both convictions on all specifications, but reduced the confinement to 4 years for Daniels and 3 years for Harvey.

1. The Decisions of the Boards of Review

One of the principal assignments of error before the boards of review was the vagueness and overbreadth of the offenses. Section 2387 was enacted in 1940 as part of the Smith Act (which is usually known for the more frequently used section which makes it a crime to advocate overthrowing the government by force or violence). The constitutionality of section 2387 has never been tested before the Supreme Court, but the Eighth Circuit Court of Appeals in 1943 had upheld its constitutionality against charges of vagueness and overbreadth in Dunne v. United States. There the court noted the similarity in

160. Daniels was charged with making a number of statements to each of the eight marines similar to the statements allegedly made to Pvt. Clarence Ellis Jones: "(1) The black and white races should be separated. (2) The black man had no country and that the black and white races should be separated. (3) The only way to separate the races was by force and violence. (4) The white man was brainwashing the black man and that the white man and the black man could never get along. (5) He (Pvt. Jones) should not go to Vietnam because the war was the white man's war and when the black man returned he would have to fight the white man anyway. (6) To request mast and inform the Company Commander that he (Pvt. Jones) would not go to Vietnam or fight in the Vietnam War." Transcript of trial, Appellate Exhibit 4, Charge 1, Specification 2, United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).


163. Act of June 28, 1940, ch. 439, §§ 2, 3, 5, 54 Stat. 670-71, which was the forerunner of 18 U.S.C. § 2385 (1964). Section 2385 also forbids publishing or distributing printed matter advocating the overthrow of the government by violence and organizing any group which teaches or advocates violent overthrow.

164. 138 F.2d 137 (8th Cir. 1943), cert. denied, 320 U.S. 790 (1943).
language to the Espionage Act of 1917,\cite{165} previously upheld in *Schenck v. United States*,\cite{166} *Frohwerk v. United States*,\cite{167} and *Debs v. United States*.\cite{168} Daniels, however, argued that *Dunne* was not dispositive of the issue. First, he noted that section 2387 seems not to have been used since World War II, probably because of doubts as to its constitutionality when there has been no declared war. The United States Code Annotated shows only four cases involving prosecutions under section 2387; all of them were Second World War cases, and all involved persons advocating the overthrow of the government by force.\cite{169} Section 2387 was only resurrected by the military for use against dissenters in the Vietnam War period,\cite{170} an application which Daniels argued was far different from its purpose in the World War II cases.

Second, *Daniels* noted that constitutional law precedents have required stricter standards of definition since *Dunne* was decided in 1943, and thus under current precedents, the language of section 2387 is overbroad and vague.\cite{171} The terms of the act, such as “loyalty” and “disloyalty,” are subjective terms without adequate legal definition to limit them to conduct that is outside the protection of the First Amendment. Furthermore, the statute makes no allowance for the circumstances under which an utterance is made; thus it is not limited to situations where there is a clear and present danger of unlawful action involving incite-
ment to action, rather than mere advocacy, as required by the Supreme Court in *Yates v. United States*,\(^{172}\) another Smith Act case.

The Navy Board of Review, in reliance on the World War II cases which had upheld the constitutionality of section 2387,\(^{173}\) rejected Daniels's objections as to vagueness and overbreadth. If found that the words used in section 2387 were sufficiently explicit to give fair notice of the conduct prohibited, and that the requirement of a specific intent "to interfere with, impair, and influence loyalty, morale, and discipline"\(^{174}\) sufficiently limited the scope of such conduct to prevent conflict with First Amendment rights.

Harvey, who was convicted of the lesser included offense of making "disloyal statements," had a somewhat stronger argument as to vagueness and overbreadth. Unlike section 2387 which couples the general term "disloyalty" with the more particular and therefore limiting phrase "insubordination, mutiny, and the refusal of duty,"\(^{175}\) the "disloyal statements" offense (which is one of the "specifications" found in the *Manual* for article 134), provides no such inherent limitations. Thus Harvey argued in his brief before the board of review:

The *Manual for Courts-Martial* provides only two unhelpful sentences in the section entitled "discussion" under the "disloyal statements" specification of Article 134. The first sentence states that certain disloyal statements which may not constitute an offense under §§2385, 2387, or 2388 may "be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces." The second sentence states: "Examples are public utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government." It strikes one immediately that these examples, which are not legal terms of art and have no judicial gloss to aid in definition, are also so vague that the serviceman still has little guidance as to what is criminal and so overbroad that they could include statements which are obviously protected by the First Amendment. For example, in the case of "praising the enemy," who is the enemy? Is it a country with whom the United States is engaged in a declared war? If not, how is a serviceman to know which countries might be considered "the enemy"? Is North Vietnam the enemy? Russia? Communist China? Cuba? East Germany? Poland? Syria and Egypt? What constitutes "praise"? Can one applaud the peace efforts of the Soviet Union in the Indian-Pakistan dis-

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175. The doctrine of *ejusdem generis*, if applicable, would narrow the meaning of "disloyalty" to characteristics possessed by the other enumerated terms. BLACK'S LAW DICTIONARY 608 (4th ed. 1951).
pute? Can he praise the educational programs of Premier Castro? Can he comment favorably on the tenacity of Ho Chi Minh? Article 104 states, "Enemy imports citizens as well as members of military organizations and does not restrict itself to the enemy government or its armed forces." Is one, therefore, forbidden not only from praising the government but also the people? Is it a crime to praise the spirit of the North Vietnamese while denouncing their government?

The example of "attacking the war aims of the United States" is equally confusing. Is it an attack on the war aims of the U.S. to call for escalation of the war? To urge that we pull out of Vietnam? Can a serviceman be sure what the war aims of the United States are? Is the aim of our present Vietnam policy to insure a popularly elected government in Vietnam or an anti-Communist government? Do statements calling for a coalition government constitute a crime? "Denouncing our form of government" is similarly unhelpful. What is meant by "our form of government?" Is it the Constitutional framework? Can a soldier advocate abolition of the electoral college established in the Constitution? Can he urge taking away constitutional powers of the Supreme Court or denounce the school desegregation decision? What elements are so basic to our "form of government" that they cannot be denounced—federalism, capitalism, democracy, welfare state programs, the draft? Harvey also argued that there was only a meager judicial gloss to assist in interpretation and it failed to provide clear guidelines that would prevent the term "disloyal" from embracing protected First Amendment speech.

As in Daniels, the Harvey board of review also rejected the vagueness and overbreadth arguments. It found that the terms of the specification contained in the Manual for Courts-Martial under article 134 were sufficiently clear to apprise one of what was considered criminal conduct, and that Harvey's statements were not constitutionally protected speech. Like the board in Daniels, the Harvey board did not come to

177. E.g., McQuaid, 5 C.M.R. 525 (1952), upheld the conviction of a PFC for posting a statement on an outside door at an Alaska air base praising the Soviet Union and criticizing both the United States and "Wall Street Imperialism." The court characterized these statements as "clearly disloyal and disaffecting as they present a completely false picture of our defense effort, its aims and objectives, tend to discourage faithful service to the country by members of the armed forces and unjustly malign our economic system." Id. at 530. Batchelor, 19 C.M.R. 452 (1954), upheld the conviction of an American prisoner of war held by the North Koreans for sending a letter to his hometown newspaper condemning alleged use of bacteriological warfare by the United States as a "deliberate attempt to cause the American people to alienate or diminish their affection for, belief in, and good will toward their government or those in authority, thereby to stimulate 'such a revulsion among the American people that the perfidious administration would be forced to' alter its policy." Id. at 483.
grips with the overbreadth problem in terms of a possible chilling effect on First Amendment rights, and since in both cases the Court of Military Appeals' grants of review omitted the assignments of error based on vagueness and overbreadth, those issues stand as decided by the two boards of review.

2. THE DECISIONS OF THE COURT OF MILITARY APPEALS

Although the Court of Military Appeals' decisions in Daniels and Harvey are lengthy, they leave a number of questions concerning servicemen's First Amendment rights unsettled. The court, in an opinion by Chief Judge Quinn, with Judge Ferguson concurring in the result only, reversed both convictions because of instructional error. It found that the law officer in Daniels had failed to instruct that the court-martial members must find that Daniel's statements had a natural tendency to lead to insubordination, disloyalty, or refusal of duty. In Harvey the law officer failed to instruct that the statements must be found to have been disloyal to the United States, not merely disloyal to the Marine Corps. In reversing, however, it found both Daniels and Harvey guilty of the offense of solicitation to disobey orders (carrying a maximum sentence of 4 months) which, with questionable support, it found to be a lesser included offense of the Smith Act allegation. Most significantly, however, the court indicated in broad dicta that the evidence was sufficient to support both convictions without violation of their First Amendment rights.

a) The Scope of the Serviceman's First Amendment Rights

In Daniels-Harvey the Court of Military Appeals reaffirmed the applicability of the First Amendment to servicemen. In its strongest language to date, the court stated:

The right to believe in a particular faith or philosophy and the right to express one's opinions or to complain about real or imaginary wrongs are legitimate activities in the military community as much as they are in the civilian community. . . . If the statements and the intent of the accused, as established by the evidence, constitute no more than commentary as to the tenets of his

180. In a habeas corpus action filed by Daniels after exhausting his military appellate remedies, he argued that the offense of solicitation to disobey orders is not a lesser included offense of the section 2387 offense charged and therefore that he did not have notice of such lesser included offense under the section 2387 charge. Daniels v. Laird, Civil No. HC 140-70 (D.D.C. 1970).
faith or declarations of private opinion as to the social and political state of the United States, he is guilty of no crime. 181

b) *The Court's View of "Clear and Present Danger"

In *Daniels*, the court adopted the analytical scheme used by the Supreme Court in *Hartzel v. United States* 182 wherein the Court found two elements necessary for a conviction under the similar Espionage Act of 1917: 183 a "subjective element" that the defendant possessed the requisite intent, and an "objective element" that there was a clear and present danger that the activities would bring about the substantive evils proscribed by the statute. In reviewing the record, the court found sufficient evidence of both elements. As to Daniels's intent, the court found that although his statements to other marines may have been expressions of personal beliefs and grievances, the court-martial could have found that "[h]is call for action in the form of a mass request mast was a subtle and skillful way of leading the black troopers in the company into insubordination and disloyalty." 184 The court emphasized that Daniels had addressed his statements specifically to other blacks who were engaged in military training for possible Vietnam duty, and that he propounded a racial doctrine that contemplated lack of cooperation between the races. Unfortunately the court failed to recognize that statements about separation of the races are standard Black Muslim rhetoric which, nevertheless, do not affect countless Black Muslims in their day-to-day dealings with whites.

In *Daniels* the Court of Military Appeals accepted the "clear and present danger" test from the second "objective element" in the *Hartzel* scheme, but it did not discuss the constitutional dimensions of the requirement. Apparently it viewed the test as simply an element of the section 2387 offense as suggested by *Hartzel*. Thus, the court indicated its willingness to apply the test rather mechanically to the facts with little consideration of the underlying policy interests involved.

At the beginning of the opinion, the court cited *Howe* for the general proposition that certain speech is not protected by the Constitu-

182. 322 U.S. 680 (1944). *Hartzell* reversed a conviction of one who mailed 600 copies of a tract which strongly denounced the President, our English allies, and the Jews when only twenty-two of the tracts had been sent to military men. The court held that there was insufficient evidence that he intended to cause insubordination, disloyalty, mutiny, or refusal of duty.
tion,\textsuperscript{185} and so it appears that it did not intend to break with the Howe "clear and present danger" rationale. As has been discussed, however,\textsuperscript{186} Howe was particularly influenced by the Dennis ad hoc\textsuperscript{187} balancing approach, and this resulted in a determination that certain government interests are of such importance that the "clear and present danger" test is satisfied—despite the lack of immediacy in the danger presented. The court's approach in Daniels was not so obviously an ad hoc balancing determination, and apparently since "contemptuous words" by an officer were not involved, the "man on a white horse" rationale was not raised. In Daniels, the court was persuaded that, under the circumstances, both the loyalty and the obedience of the troops involved were actually in immediate danger; it assumed without discussion that these were sufficient government interests to overcome conflicting First Amendment rights.

c) Racial Rhetoric: A Clear and Present Danger?

The court's determination that there was sufficient evidence to meet the "clear and present danger" test especially emphasized the racial composition of the group to whom the statements were made and the racial content of the statements themselves. The court noted that the black marines were undergoing training to prepare them for duty in Vietnam, that many "didn't want to be there," that they were a particularly "susceptible" group, and that they were aware of race riots in large cities and were sensitive to tensions between blacks and whites.\textsuperscript{188} In this context, the court found that "[t]he joinder of the Vietnam War with racial violence in the cities was not mere rhetoric or political hyperbole, but a call for refusal of duty."\textsuperscript{189}

The court did recognize, however, that even if Daniels's statement in such a situation could be considered inflammatory, a conclusion strenuously attacked by appellant,\textsuperscript{190} nevertheless they were directed at only one goal—that the men request mast through the normal procedures established by the Marine Corps for presentation of grievances to the commander. Daniels's statements called for action that is not only law-

\textsuperscript{185} Id. at 532, 42 C.M.R. at 134.
\textsuperscript{186} See text accompanying note 123 supra.
\textsuperscript{187} Dennis v. United States, 341 U.S. 494 (1951).
\textsuperscript{189} Id., 42 C.M.R. at 137.
\textsuperscript{190} Daniels's statements, as shown in the record, were generally low-keyed recitations of Black Muslim teachings. There was no evidence that he was the type of speaker who tended to excite his listeners.
ful, but encouraged by the Marine Corps, and, in fact, this was the only action which resulted from his statements. The court resolved this problem by finding that Daniels was really attempting to misuse the lawful mast procedure. It found that his call for a request mast "did not contemplate reliance upon the ordinary and the usual reasons for separation from the service or excuse from duty but depended upon the implied force of the number of blacks who availed themselves of it."191

It is far from clear from the record that Daniels's acts were a misuse of the mast procedure. Some of the black marines, as Daniels was well aware, had legitimate grounds for favorable personnel action, such as a change in occupation specialty, reassignment, or discharge. Daniels himself claimed to be a conscientious objector, and had his request for assignment to noncombatant duties or discharge been processed, it might have received favorable action.102 Although there had been talk among the troops about seeing the commander and avoiding Vietnam because it was a white man's war, there seems to have been equally strong motivations of other types; most importantly, all the talk seemed to contemplate using the appropriate mast procedures. Since enlisted men have little technical knowledge of "[t]he ordinary and the usual reasons for separation from the service or excuse from duty,"193 they usually have only hazy notions that certain kinds of problems and conditions provide such grounds under the regulations. But they do know that request mast is an appropriate means for raising such questions. The fact that some strongly opposed the war and even that some may have resolved not to fight in "a white man's war" should not necessarily make an otherwise legal request for mast illegal.

Even if Daniels's statements were intended to coerce the commander to grant personnel requests not justified under the regulations, it is still doubtful that this posed a clear and present danger of disloyalty and disobedience. Statutes,194 regulations,195 command directives,196

192. For discussion of the requirements of conscientious objector discharge, see Sherman, Military Law, supra note 1, at 505-26; Comment, God, the Army, and Judicial Review: The In-Service Conscientious Objector, 56 CALIF. L. REV. 379 (1968).
196. MARINE CORPS MANUAL ch. 1, § 1701, "Request Mast."
and decisions of the Court of Military Appeals have all emphasized that servicemen's channels to their commander should remain open for presentation of grievances, even if the grievances are unjustified, unfounded, or raised in bad faith. The reason for such a policy, quite apart from the possible constitutional implications, is that the military has found as a practical matter that it is best to provide an opportunity for men to get things off their chests. It is far better to encourage them to bring their complaints to the commander rather than to allow them to fester or grow outside the knowledge of the command. This does not mean, of course, that a commander must permit himself to be pressured improperly by his men; he has full authority to establish the form and nature of the mast. For example he may require, as did Daniels's commander, that the men be interviewed one at a time rather than as a group. Similarly, although a commander need not justify his orders or government policies to his men, he must at least consider their complaints concerning those orders or policies.

197. See cases stating that UCMJ art. 138, 10 U.S.C. § 938 (1964), permitting presentation of grievances to commander, provides a genuine remedy for servicemen: Dale v. United States, 19 U.S.C.M.A. 254, 41 C.M.R. 254 (1970); Walker v. United States, 19 U.S.C.M.A. 247, 41 C.M.R. 247 (1970). In Wolfson, 36 C.M.R. 722, 728 (1966), an army board of review reversed the article 133 conviction of a doctor who complained to General Westmoreland during an inspection tour. The court stated: "Complaining is indulged in by enlisted men and officers of all grades and rank. Complaints may 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 frequently been developed into a fine art. . . . The right to complain is undoubtedly within the protection of the first amendment of the Constitution of the United States guaranteeing freedom of speech." See also Schatten v. United States, 419 F.2d 187 (6th Cir. 1969); United States ex rel. Gaston v. Cassidy, 296 F. Supp. 986 (E.D.N.Y. 1969).

198. In Marine Corps Order 5216.10A (Aug. 16, 1968), the Chief of Staff of the Marine Corps emphasized that "commanders are required to endeavor to remove those causes which make for misunderstanding and dissatisfaction" and that "the right of an individual to request mast with his designated commanding officer is guaranteed . . . without fear of prejudice." On April 22, 1969, following racial trouble at Camp Lejeune, N.C., an ad hoc committee reported: "In the opinion of the black marine, he has no official channel available to him by and through which he can obtain redress for complaints of discrimination. In essence request mast is not accomplishing the purpose for which it was intended." N.Y. Times, Aug. 10, 1969, at 67, col. 5 (late city ed.). After race riots at a number of Marine bases, the Marine Corps Commandant issued a message on Sept. 3, 1969, ordering that "no harassment, either real or implied, will be permitted to occur at any level between the individual requesting mast and the commander. . . . I want to insure that channels of communication between every marine and his commanding officer are open, that every marine understands that they are open, and that legitimate grievances will receive sympathetic consideration and rapid response." N.Y. Times, Sept. 4, 1969, at 39, col. 4 (late city ed.).
If mast is to achieve its stated purposes, it must be contemplated that men may be angry in requesting it and that they will sometimes already seem to have their minds made up, perhaps even to do unlawful acts. Further, when they have a common grievance, they may wish to actively encourage others to join them in the request mast to make their case stronger. But so long as they continue to utilize the mast procedures, it appears that they are willing to abide by lawful procedures. The commander is still in a position to control the situation. Naturally, a request for mast accompanied by disruptive or threatening conduct might create a clear and present danger to the military, but that is an entirely different situation.

This request mast incident in Daniels seems to be a good example of a situation not yet ripe enough to constitute a clear and present danger. None of the men had received their post-training orders, whether to Vietnam or elsewhere. The time selected would seem to be an especially appropriate one for utilizing the military grievance procedures while the festering and potentially explosive complaints could still be handled rationally and remedies were still possible. The fact that Daniels may have persuaded some of the men to view their dissatisfactions in terms of race and opposition to the war was understandably disturbing to the command, but there still seems to have been time and means to deal with them adequately.

Professor Paul Freund has observed that the "clear and present danger" limitation on First Amendment rights may only be "[a]ppropriate where the harm is such that a corrective could not be sought through countervailing speech."199 In this case, the men were still seeking redress through appropriate grievance channels,200 and the

199. Freund, supra note 10, at 44.
200. Testimony from the record concerning the request mast is as follows:
   Private White:
   Q. Did you go over to the company office?
   A. Yes, sir.
   Q. Could you tell me who you saw?
   A. Well, I didn't get to see the Captain. I saw the staff sergeant who was there.
   Q. What took place?
   A. He told me that he was going to run me up for mutiny, and I asked him, "I just came to talk about it. Not to spread mutiny."
   Q. Then what took place?
   A. Well, he threw me out of the office, sir. Transcript, supra note 158, at 287.
   Private Jones:
   Q. Did you tell him [the sergeant] the reason why you were there?
   A. I told him I was going to refuse to go and fight over in Vietnam because it was a white man's war, sir.
command still had reasonable means of dealing with the situation available. Subsequent events confirm the conclusion that there was no clear and present danger at the time of the request since there were no further incidents, and when Daniels and Harvey were finally arrested after graduation, the men involved were preparing to go to their new duty assignments.

d) The Lack of Interest Analysis

In applying the “clear and present danger” test in Daniels, the Court of Military Appeals did not clearly articulate the interests involved on each side. Presumably it viewed the Government’s interest in the terms of the statute itself, that is, the protection of the Marine Corps against insubordination, disloyalty and refusal of duty; but it did not feel it necessary to discuss the scope and dimensions of those interests. It seems to have viewed the countervailing interests solely as Daniels’s right under the First Amendment to free speech without considering the dimensions of that right. Its tacit assumption that the “clear and present danger” test can be applied simply by focusing on the possible results of the conduct leaves a great deal to be desired. Professor Freund has written, in an often-quoted comment on the test:

Even where it is appropriate, the clear-and-present-danger test is an oversimplified judgment unless it takes account also of a number of factors: the relative seriousness of the danger in comparison with the value of the occasion for speech or political activity; the availability of more moderate controls than those the state has imposed; and perhaps the specific intent with which the speech or activity is launched. No matter how rapidly we utter the phrase “clear and present danger,” or how closely we hyphenate the words, they are not a substitute for the weighing of values.201

Except for the element of specific intent, the court paid little attention to these values. For example, the court specifically considered two statements made by Daniels on which charges were based: (1) a reference to another black marine as an “Uncle Tom” and (2) a remark to another marine that he should not follow a sergeant’s instruc-

Q. Did he explain to you why you should go?...
A. No, he told me what—if I don’t go, what would happen.
Q. Now, has it ever been explained to you why it is not a white man’s war and why you should go?...
A. He told me I—one of the reasons that we were over there was because if we don’t stop Communism there, it will spread throughout other countries, so we had to stop it there.
Q. Did he explain to you that it was not a white man’s war?
A. He didn’t explain it to me, but he told me it wasn’t. Transcript, supra note 158, at 196-97.

201. Freund, supra note 10, at 44.
tions to get a haircut. It stated that the "Uncle Tom" comment was itself grounds for conviction under section 2387 because "in appropriate circumstances, insult, derision, or coarse epithet can be as effective a cause of insubordination, disloyalty, and refusal of duty as direct incitement."

It also found actionable the remark about the haircut on the ground that from all the evidence, the court-martial could reason that urging [the marine] to disobey the order to get a hair cut [sic] was an integral part of accused's intention and effort to influence [him] to disobedience and disloyalty.

Although the court says that these statements created a danger of disobedience, refusal of duty, and disloyalty, it appears unlikely, even based upon its reading of the record, that the court seriously believed that disobedience or refusal of duty was likely to follow. The remarks were made in informal discussions, and it was admitted that they were made at least in part in jest and in the spirit of give-and-take surrounding barracks-room arguments. Nothing in the record indicated that either marine ever had any inclination to follow Daniels's advice or was affected by his words, and in fact, no disobedience or refusal of duty resulted.

What the court actually seems to be concerned about is not the possibility of disobedience or refusal of duty but of "disloyalty." It did not seem so much concerned that the marines to whom Daniels made the "Uncle Tom" and "haircut" remarks would be led into "disloyalty" in the sense of treason (the record provides little support for such an assumption). Rather, it was concerned in the sense of a lessening of proper military attitudes, willingness to cooperate fully, and espirit de corps. The Government's interest in protecting against disobedience, refusal of duty, and disloyalty is obvious, but its interest in shielding its men from speech which might affect their "loyalty" in the sense of proper military attitudes is more questionable. Despite the obvious concern of a commander who feels that the morale and espirit de corps of his men are diminishing because of statements made to them by a fellow serviceman, it is not so obvious that the military should be allowed to deal with this problem by court-martialing the individual who made the statements. This question poses profound issues as to the function and role of the military in our democracy. The military interest in insulating its men from speech that might affect their attitudes and morale is clearly in conflict with the interest expressed by the First

203. Id. at 536, 42 C.M.R. at 138.
Amendment and our democratic tradition that a “free trade in ideas” is the “best test of truth.” 204

e) Social Interests in Free Speech within the Military

A military whose members are sealed-off from potentially critical or unfavorable speech in the interest of maintaining high morale and efficiency may very well constitute a serious danger to the American democratic and constitutional system. A military isolated from political debate and the winds of change can become a repressive force, out of touch with the values and ideals of the civilian society. Furthermore, a military which attempts to deny conscripted servicemen the right to engage in the political and social debates of the country is likely to encounter resistance and dissent which can by its very existence adversely affect their efficiency and the military’s ability to provide for the defense of the nation. In a day when members of the military are better educated than ever before and persuasion has become a recognized instrument of social control within the military, 205 it appears unrealistic to attempt to exact strict attitudinal conformity from all servicemen.

The experience of our para-military forces, such as police and fire departments, indicates that men can be permitted a wide latitude of freedom as to their personal, political, and social beliefs and yet still perform loyally on the job. That experience also shows that men can function efficiently and bravely in jobs involving a high degree of personal danger without being subjected to rigid conformity as to beliefs and attitudes. In fact, recent liberalization of rules concerning length of hair, dress, 206 and basic training techniques 207 indicates a growing recognition that in our highly specialized and technological military, greater consideration must be given to personal liberties.

The Court of Military Appeals in Daniels never articulated the prevailing societal interests in the preservation of free speech; rather it de-

205. See note 90 supra.
scribed Daniels's interest solely in terms of his individual right to free speech. It viewed the competing interests as the right of a private to say what he pleases on one hand against the military's right to self-preservation (by preventing disobedience, refusal of duty, and disloyalty) on the other. It is not surprising that, with the interests stated in this way, it found that the military interests were paramount. The court's formulation of the interests involved recalls Justice Black's objection to such stacked interest-balancing in his dissent in *Barenblatt*:

But even assuming what I cannot assume, that some balancing is proper in this case, I feel that the Court after stating the test ignores it completely. At most it balances the right of the Government to preserve itself, against Barenblatt's right to refrain from revealing Communist affiliations. Such a balance, however, mistakes the factors to be weighed. In the first place, it completely leaves out the real interest in Barenblatt's silence, the interest of the people as a whole in being able to join organizations, advocate causes and make political “mistakes” without later being subjected to governmental penalties for having dared to think for themselves.208

As Justice Black indicates, the identification and definition of the interests involved, like the premises in a syllogism, are critical to the outcome of the balancing test. Once one defines the military interest as self-preservation and the free speech interest as simply the right of an individual to speak, a finding in favor of the military is inevitable. Alternatively, if the military's interest were to be viewed as simply the rather remote threat of disobedience or possible deleterious affects on the “loyalty” of servicemen and if Daniels's interest is seen as the preservation of critical comment necessary to a democratic society, then the balance shifts considerably. Both formulations, of course, are overly simplistic, but at least the latter begins to come to grips with the type of policy analysis that is essential to First Amendment rights. This is particularly true if the balancing test is to serve as more than a mechanical syllogism cranking out an answer already ordained by the assumptions incorporated in the premises. The *Daniels* decision, unfortunately, has something of this quality. Until the Court of Military Appeals is willing to address the difficult policy issues squarely, military free speech cases are likely to continue to confuse rather than enlighten.209

209. Daniels was also the subject of other litigation raising First Amendment questions concerning military confinement of prisoners pending appeal. After he had been confined almost two years and his military appeals had not yet been completed, he was released from confinement pursuant to the newly-enacted article 57(d) of the Uniform Code of Military Justice. This article permits commanders to defer confinement pending completion of appeals. He was assigned to a unit at the Marine Corps
b) Disloyal Statements in Harvey

The court's shorter opinion in Harvey also leaves a number of First Amendment issues unresolved. The court opened with the conclusion, not otherwise explained, that the error in Daniels in failing to instruct that the statements must have had a "natural tendency" to produce the forbidden consequences\(^{210}\) does not apply to the Harvey case because Harvey was convicted of "disloyal statements" rather than the section 2387 offense.\(^{211}\) The court also failed to consider whether there was the degree of "immediacy" of danger which the "clear and present danger" test requires. Apparently the court felt that the "clear and present danger" requirement arose only as an element of the statutory offense in Smith Act cases\(^{212}\) rather than from constitutional compulsions,\(^{213}\) but this is surely a curious limitation of the test. Although the "clear and present danger" formulation may have fallen into some disfavor with the Supreme Court in recent years,\(^{214}\) it has been generally recognized that tests such as "clear and present danger" or "balancing" insure proper consideration of First Amendment policies in free speech cases. The Court of Military Appeals decision in Harvey simply analyzed the charges in terms of the elements of the military offense of "disloyal statements;" that is, whether the statements made were disloyal to the United States and were made with design to promote disloyalty. In not considering whether the statements in fact constituted a "clear and present danger" or had a "natural tendency" towards forbidden consequences, the court failed to focus on the "immediacy" danger (which

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\(^{210}\) See text accompanying note 179 \textit{supra}.


\(^{212}\) See text accompanying note 182 \textit{supra}.

\(^{213}\) Yates v. United States, 354 U.S. 298, 319 (1957) seems to suggest that the finding that the words had a "natural tendency" to incite to unlawful action was constitutionally compelled.

has been required in varying degrees for 50 years since *Schenck*)\(^{215}\) that must be shown before speech can be made criminal.

The court betrayed not the slightest doubt that the military may prosecute servicemen for making disloyal statements, saying: "The Vietnam war has evoked a vast outpouring of written and oral comment. The language of many of the comments is poised on a thin line between rhetoric and disloyalty to the United States."\(^{216}\) Citing *New York Times Co. v. Sullivan*,\(^{217}\) however, it went on to note that "[d]isagreement with, or objection to, a policy of the Government is not necessarily indicative of disloyalty to the United States."\(^{218}\) It cited as an example the act of Captain Dale Noyd in refusing to obey an order to train fighter pilots for Vietnam after being denied conscientious objector status or discharge.\(^{219}\) It concluded that Captain Noyd's refusal to obey could possibly have had the effect of reducing the military effectiveness of the United States in the Vietnam War, but that on the record of his court-martial, he was not disloyal to the United States.\(^{220}\) Apparently this was because Noyd "demonstrated a genuine dedication to the United States as a political entity, but scruples of conscience about the Vietnam war compelled him to refuse to obey."\(^{221}\) In contrast, the court said, Harvey's statements could properly have been found to be disloyal to the United States itself since he urged others not to go to Vietnam when he could reasonably expect that they would soon be transferred there.

It is difficult to find any basis for the court's distinction between *Harvey* and *Noyd*. If, as the court said, Noyd's refusal to obey the order reduced the military effectiveness of the United States in the Vietnam war surely the effect upon the United States was as great as Harvey's relatively inconsequential statements about not going to Vietnam and requesting mast. Both Harvey and Noyd would seem to have been "disloyal" to the United States in the sense that they indicated their unwillingness to support the administration's policy on the war, and "loyal" in the sense that they demonstrated a genuine concern for their country and attempted to take action, in their own way, to contribute to a change in the war policy. The court seems to be caught in the


\(^{217}\) 376 U.S. 254 (1964).

\(^{218}\) 19 U.S.C.M.A. at 544, 42 C.M.R. at 146.


\(^{220}\) 19 U.S.C.M.A. at 544, 42 C.M.R. at 146.

\(^{221}\) *Id.*, 42 C.M.R. at 146.
hopeless web of trying to label actions resulting from complex motivations as "loyal" and "disloyal" when the terms have no clearly definable legal meaning and the distinction between them does not seem to elucidate the relevant policy considerations involved. The distinction between disloyalty to the military and disloyalty to the United States does at least provide some limitation on the "disloyal statements" offense. But, unfortunately, it provides little assistance in identifying and weighing the relevant interests involved in such free speech cases.

C. United States v. Gray: Reaffirming the "Disloyalty to Country" Distinction

The Court of Military Appeals’s only "disloyal statements" case since Harvey, United States v. Gray, decided in August, 1970, clearly demonstrates the unsatisfactory nature of the analytical framework developed in Harvey for servicemen’s speech prosecutions. Gray, a young marine stationed in Hawaii, was convicted of making "disloyal statements" on two occasions: the first, in a short handwritten note in a unit log book addressed to the other members of his unit before he went AWOL; the second, a two-page statement issued by him and another marine at the University of Hawaii where they had taken "sanctuary" with members of a peace group.

In the first note Gray said that he was leaving with hopes of going to Canada and other foreign countries, that the Constitution of the United States was a farce, that he was participating in "A Struggle for Humanity," and that "we must all fight." The second statement issued from "sanctuary" described his gradual disenchantment with the Marine Corps. It also called for an immediate end to the war, a volunteer army, abolition of article 134 of the UCMJ, liberalization of conscientious objector status, and a "greater say" by servicemen. It stated:

We can no longer cooperate with these practices or with the war in Vietnam. We are not deserting; we are simply taking a stand to help others like us. . . . This is where we stand, and we hope that other men in the Armed Forces who know that we speak the truth will stand with us.

The Court of Military Appeals cited Daniels and Harvey for the amazing proposition that "disloyal statements" are not speech protected by the First Amendment and thus, with the constitutional issues out of the way, it proceeded to determine whether the statements were

223. Id. app. A, at 69, 42 C.M.R. at —.
224. Id. app. B, at 70, 42 C.M.R. at —.
actually disloyal to the United States. It found that the statements made in the log book were disloyal to the United States, but that the statements in the “sanctuary” notice were not. Thus it reversed the conviction on the “sanctuary” statement and remanded for reassessment of sentence. The court seems to have felt that the language in the log book about hoping to go to Canada and that “we all must fight” evidenced “disloyalty” to country, while the emphasis upon denunciations of the Marine Corps and the disavowal of desertion in the “sanctuary” statement limited the “disloyalty” only to the military.

This distinction is not persuasive. Both statements were aimed primarily at one target, the war in Vietnam, and their tone is not appreciably different. The language about Canada and “we all must fight” in the log book appears to be typical overblown rhetoric, especially since Gray made no attempt either to flee to Canada or forcibly to resist. The distinction is even more difficult to sustain when one notes that the statement in the log book was not likely to reach very many, if any, servicemen, while the “sanctuary” statement was printed, distributed, and publicized in the media.

The disturbing aspect of the Court of Military Appeals’ new pattern for handling “disloyal statement” cases is not so much that the “disloyal to the United States” test can result in inconsistent and absurd distinctions, but that this test clearly disregards the First Amendment issues involved. Disloyalty to the United States is simply an element of the military offense; it provides no standards for making the necessary constitutional judgments concerning First Amendment rights as provided in such inquiries as the “clear and present danger” and “balancing” tests and the “natural tendency” requirement. The Harvey and Gray cases, with their perplexing distinctions between permissible and nonpermissible disloyal statements, unfortunately never reach the level of issue analysis necessary for resolution of the constitutional issues involved.

Although the Court of Military Appeals’ definitional approach in Harvey and Gray does not provide a very satisfactory vehicle for considering the policies at stake in military speech cases, it has imposed a significant limitation on the use of the “disloyal statements” offense by the military. Clearly, merely critical statements about the military or war policies are no longer to be considered disloyal to the United States. If Captain Noyd’s refusal to participate in activities associated with the war and Gray’s criticisms of the military and the war while in “sanctuary” are not disloyal to the United States, then “disloyalty
to the United States” seems to require something close to treason, giving aid to the enemy, or outright rejection of one’s country. This narrow definition of “disloyalty to the United States” should considerably limit the ability of the military to punish servicemen for dissenting speech under the “disloyal statements” specification.

III. Conclusion

Now that the Court of Military Appeals has reaffirmed its approach in Daniels-Harvey, it appears that the military courts do not offer much hope in the immediate future for altering the present limitations on servicemen’s First Amendment rights. As a result the focus may shift to the federal courts where a number of military free speech cases are now pending on petitions for collateral review. Howe, Levy, Daniels and Stolte-Amick have all filed federal court actions seeking review of their court-martial convictions which raise questions concerning the vagueness and overbreadth of the military offenses as well as the constitutionality of their convictions.

Application of the First Amendment to the military is still a developing area of the law, but much more careful attention by judges, attorneys, and academians is badly needed. Disappointing as the opinions of the military courts have been in providing a workable structure for dealing with the First Amendment in the military context, they have at least affirmed the applicability of the First Amendment to servicemen’s speech and have at least established distinct limitations upon certain types of military speech prosecutions. It is now vitally important that consideration be given to civilian law precedents in related areas, such as rights of students and government employees, and to the competing interests involved in these military speech cases, especially in terms of a realistic assessment of the nature and role of the military in our contemporary society. The importance of the issues at stake to the 3.5 million serving in the military and to our democratic society as a whole surely warrant that attention.
