# THE FIRST AMENDMENT: A SOLDIER'S RIGHT?

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# CHAPTER I

# INTRODUCTION

## The Freedom of Expression: Cornerstone of a Democracy

Contained in the United States Constitution is an amendment Americans have respected as the cornerstone of a democratic system of government. This cornerstone amendment in the Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

It is generally agreed that the First Amendment is recognized as the very lifeblood of democracy. A democratic society can endure pressures of economic, social, and political unrest, but it cannot withstand the absence of a meaningful system of free expression. The very nature of a democratic society dictates that the process of free speech is the mechanism through which a government is elected by the people and subject to the rule of the people. The language of the framers in the First Amendment at most meant "absolute" free speech, i.e., speech without any restrictions, and at the least, speech which is free from arbitrary restrictions.

The quality of our democracy depends in large measure upon the "free trade of ideas,"[2] the freedom to form political associations, the freedom to initiate political action and to critically assess to the point of opposition the existing governmental policies. These rights are specifically recognized by the First Amendment.

Yet every government has an obligation to reconcile the freedom of speech with other desirable social objectives such as maintenance of public order or national security.

The role of the federal judiciary.--It is the role of our judicial institutions to interpret the Constitution and the laws and apply them in a manner such that it guards against the erosion of a meaningful system of free expression. The development of legal doctrine for the freedom of speech from an ill-defined doctrine to the present "preferred position"[3] doctrine has been made possible by conscientious and fairminded men sitting on the Supreme Court.

A second, independent judiciary.--Apart from the numerous precedents set by the Supreme Court enunciating guidelines for protection of the First Amendment right to the freedom of expression, there exists another almost totally independent judiciary dictating the limitations on Constitutional liberties for nearly three and one-half million men.

As a political scientist, my interest in this separate

judiciary is warranted because of the substantially different treatment of constitutional rights—specifically the freedom of expression—and the autonomy with which this judiciary operates. The judicial system with which this study is concerned is the military court system and specifically that body of military law dealing with the restrictions on the soldier's right to the freedom of expression. Established by Congress under power enumerated in the Constitution, the military court system operates with immunity from civil court review except for the writ of habeas corpus. Working for the most part independently of the Supreme Court the military courts find their purpose in interpreting the military rules and regulations adjudicating in matters of military crime in such a way as to insure an effective well-disciplined military.

A study of the soldier's right of freedom of Expression.—

The purpose of this thesis is to examine the military court's treatment of the right to the freedom of speech as it applies to the soldier. Does the soldier possess the constitutional right to the freedom of expression? If so, what are the limitations recognized by the military courts born out of "military necessity?" What areas of expression are protected and well-defined? How does the soldier's area of protected speech compare with that of his civilian counterpart under federal court jurisdiction? These are the key questions guiding my study.

The study was conducted by examining the Constitution,

the military code, civilian and military rules and regulations in specific areas of speech, and related cases.

The results of my inquiry indicate that: first, the soldier is entitled to constitutional rights; second, the consideration of "military necessity"[4] places stringent limitations on the degree of free expression enjoyed by the soldier; third, the soldier's right to gripe[5] and the right to communicate with any congressman[6] is the only absolute area of protection; fourth, standards used by the military courts differ from the present civilian standards used in settling free speech conflicts; and fifth, in terms of the actual area of speech protected from arbitrary infringements the soldier possesses substantially less than what he would be afforded as a civilian.

The Functions of Free Expression in a Democratic Society

A man's right to the freedom of expression is deeply rooted in man's history. But the concept of free expression as we know it is the result of a developing liberal constitutional state. This development starting with the Renaissance has realized a shift in the Western World from a "fuedal and authoritarian society to one whose faith rested upon the dignity, the reason and the freedom of the individual."[7] The concept of free expression of ideas has evolved over the last 300 years. It is important to understand in a composite form the function of free expression as it applies to our contemporary democracy.

Thomas I. Emerson has provided a useful statement of the

values the American society seeks to perpetuate by protecting the right to freedom of expression. According to him a system of free expression is necessary, first, as a method of assuring individual self-fulfillment; second, as a means of attaining truth; third, as a method of securing participation by the members of the society in the social and political decision-making process; and fourth, as a moderating influence between stability and revolutionary change within the society.[8]

Self-fulfillment for the individual.--The right to freedom of expression is an essential aspect in an individual's realization of his character and capabilities marking him as unique in being. Man is different from other forms of life in that he possesses unique intellectual qualities. Man possesses the ability not only to reason and experience emotional feelings, but also the capacity to ponder abstract terms, to communicate through the use of language, his thoughts and feelings, and to develop and perpetuate a culture. The Western World believes that a man reaches his potential as an individual through the use of his powers to communicate, to imagine, to reason, to feel, and to express. Only by the unobstructed use of these powers can a man find a meaning unique to his existence.

Obviously, self-realization is rooted in the development of the mind. By its very nature the mind's conscious thought is limitless and unpredictable. It is a function that is totally an individual process. Man's behavior may be influenced by a

multitude of environmental factors, but the very process of thought is unique to the human individual.

If the process of thought is unique to every man, then it follows that he has the right to formulate his own beliefs and opinions. Furthermore, he must be granted the right to express these beliefs and opinions if they are to be given any meaning. Expression is, not only, an integral phase in the formulation of ideas, but also, a positive expression of one's own being. If we recognize the human as being capable of realizing unique potentialities then we must concede that suppression of personal belief, opinion, and expression is an affront to the dignity of man and an obstruction to the realization of his very nature. Milton expresses this sentiment criticizing the licensing of the press. He stated it is " . . . the greatest displeasure and indignity to a free and knowing spirit that can be put upon him."[9]

The Western World has also regarded the right to freedom of expression essential in the individual's role as a member of society. Man as a social animal lives in the company of fellow men. This interaction produces a common culture in which members are necessarily influenced by societal norms and subjected to the punitive aspects of laws promulgated by the state. There are two principles here that offer a basis for the right to freedom of expression. First, the purpose of society, or more specifically, the state, is to promote the general welfare of the individual. The Western World has chosen to view

the state, not as an end in itself, but, as a means to serve the individual. Second, the principle of egalitarianism grants every individual the right to an equal opportunity to partake in the common decisions which will affect his well being.

It follows that the right to the access information is necessary if the individual is to formulate his own views, communicate his and others needs and priorities, and to simply and meaningfully share in the responsibility for selecting social objectives for his society and state. To obstruct or curtail the individual's search for truth or prevent his expression of it, is to diminish the individual and his role in society and consequently to make him subject to the arbitrary and despotic will of the oligarchy in control.

To formulate, select, and achieve the goals a society wants for itself, a society must allow the use of expression and counterexpression. A general rule for a society respecting the sanctity of self-fulfillment of the individual is that the society not seek to suppress the beliefs or opinions of its individual members.

It is necessary to draw a distinction between belief, opinion and communication of ideas, i.e., expression, and "action." To achieve its goals a society may control the conduct of the latter but not tamper with expression because of the fundamental role it plays in a democratic society.

Attainment of "truth".--Freedom of expression provides

that many facts and arguments are advanced before a rational judgement on any proposition is made. Considering the frailty of human judgement, decisions made by a limited number of individuals are incomplete until subjected to "extension, refinement, rejection, or modification."[10] He who seeks the truth must consider all sides of an issue. Any suppression of information that hinders rational judgement also suppresses the generations of new ideas that may result from the exposure of adversary opinions.

The theory of free expression makes it essential that no single idea or opinion shall be immune to criticism regardless of the obvious falsity or motive of contradictory views. The right to challenge an established opinion is the heart and guts of any meaningful system of free expression. The presentation of opposing opinions functions to serve the goal of truth in three ways. First, as in many cases of past history, it may discredit and disprove a false theory which had been privileged to a consensus of approval and generally accepted as fact. Second, the presentation of opposing views may clarify an existing truth and give greater exposure and identify to the existing theory. Third, the very process of free expression causes men to pursue theories in an academic, perhaps more scientific manner so as to withstand the questioning and testing of the market place of ideas. This last function of free expression forces men to seek rational means in establishing theories, ideas, or opinions, rather than deal with them a priori.

Participation in decision-making.--A third function inherent in a system of free expression provides for a process of open discussion to all members of a community, and consequent influence on and participation in the decisions that affect them.[11] Participation in the decision-making process initially included only a wealthy or intellectual elite. The nineteenth century was witness to the acceptance of the notion that all men in a democratic society were entitled to the right to advance their beliefs and opinions concerning issues of a common nature. Moreover, free expression was viewed as an inherent right of the individual. This view of free expression goes beyond the right of a member of society to make his influence felt on the forces that affect him. Free expression as an individual right transcends considerations of governmental structures and focuses directly on the essential elements that provide and protect a "dignity" of man.

Our constitution accepts free expression as an inherent right of the individual and provides each individual the right to form his own beliefs and communicate them without fear of suppression. This is an essential principle in our democratic society.

In order for any system of social decision-making to work effectively it must provide a process wherein relevant facts, diverse opinions, and every insight can be presented for consideration. John Stuart Mill expressed the importance of allowing all men to participate when he stated, "If all mankind

minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[12]

Mill's statement holds a very significant meaning in the arena of political decisions. It is in this arena that decisions are made on the survival, welfare and progress of society. Decisions of this nature have both immediate and long range consequences on the individual members of a society, not only, on the role that he may play in that society, but also, on his personal life, i.e., education, mobility, and social norms. It is the democratic state that must effectively provide the safeguards for free expression. This responsibility of the state is complicated by the fact that the state itself controls the most effective mechanism of suppression and is frequently inclined to use it.

In general a system of free expression provides any political structure a process whereby the needs, wishes, and information on existing social programs are feed back to government officials. Every citizen has some degree of free expression when he conveys his thoughts on such issues.

The right to communicate needs to the government was recognized formally as a petition for redress of grievances which was recognized in the Magna Carta and the English Bill of Rights of 1689. It has been expressed that the greater the degree of discussion on social and political issues, the more

responsive is the governmental structure to the expressed needs of its members, and the harder it must work to retain a consensus of support for itself.

Moderating influence between stability and change.-- Open discussion on social issues, not only, provides a degree of grass-roots control of decision-making, it also insures a method of achieving an adaptable, yet, stable community. Open discussion moderates advocated change by limiting actions to those backed by a general consensus, sensing some desirable social good will result.

The suppression of ideas, opinions, and beliefs makes rational decision-making impossible. The effect is to substitute consensus decision-making with the force of a powerful oligarchy. It means that "might makes right" and the entrenched powerful will have a vested interest in maintaining the status quo. This situation promotes the inflexibility of institutions to respond to society's shifting needs. At best suppression causes suspicion and anomale; and at worst, a violent revolution to terminate the conditions of an intolerable social environment.

There is an argument that free expression is a stimulant for political legitimation. Granting dissidents the right to give exposure to their views performs two unique functions. First, all views are given a hearing. They may be true or false, practical or improbable in their application to social situations. In this manner we can approach man's limitations on approximately a rational decision while taking advantage of

any new ideas that may be borne out by seemingly trivial or disfunctional approaches to issues. Second, once dissidents are given the chance to release their energy through acceptable means of dissent, frustrations and anxieties with the system are motives for courses of action acceptable to the system. The assertion here is that persons who have been given the podium to freely express their views will more readily accept the majority view if their own are not consistent with the common judgement. Having been treated fairly, in accordance with the rational rules for social living, dissidents will experience a catharsis while working through the established political system.

It must be pointed out that the society permitting full discussion does encounter certain risks. There is no guarantee that all decisions will be rational and beneficial to society. The process may, in fact, divide the members into bitterly opposing positions on an issue. The classic issues generally at stake in simple terms are change versus stability. The process of change is inevitable. But there is a degree of security when diverse proposals are offered. This process involves the formulation and ranking of social priorities. Committed as we are to the proposition that man as a member of his society has the right to voice his ideas and opinions in the formulation and execution of common decisions, we must conclude that the benefits of a system of free expression outweighs the risks involved.

It can be argued that there is a greater risk to the state that does not permit full discussion of issues. As Mill

asserts, "beliefs not grounded on conviction are likely to give way before the slightest semblance of an argument."[13] Conviction results when one understands the criticisms attacking his position and can refute these with facts and observations drawn from extended discussions of his beliefs. The dictatorial state not permitting full discussion impedes true conviction by the people for its goals as an institution. When rational criticisms are finally heard, superficial loyalties crumble and expression, because it has been denied, gives way to forcible action as a means to confront the established authorities. Change in this context cannot be incremental, it is violent and wholistic because established leaders respond only to force.

The theory of free expression engulfs a way of life. It sprang from a belief that "man's mind is free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited."[14] Man comes to realize his fullest potentialities in a pattern of life that encourages toleration, skepticism, reason and initiative. The First Amendment to the Constitution embodies this pattern of life when it dictates that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment commands that "Congress shall make no law . . . ." It clearly protects a community that is creative, progressive, and intellectually alert. The First Amendment

guards against forces that are tyrannical, conformist, and irrational.

This nation is committed to the fundamental propositions embodied in the Constitution without exception. Our fundamental belief in free expression is grounded by our philosophy of man and expressed by historical events and documents. In the following section it becomes necessary to review the development of legal doctrines used in dealing with cases where free expression is limited.

Having established the standards used by the civilian courts in dealing with free speech restrictions, a comparison will then be made with the military standards for free speech restrictions.

NOTES

[1]U. S. CONST. Amend. I.

[2]Abrams v. U. S., 250 U. S. 616 (1919) Justice Douglas dissenting.

[3]Thomas v. Collins, 323 U. S. 516 (1945).

[4]In determining the question of military necessity the courts are reluctant to interfere with what they consider the executive's field and will regard an executive determination as of political question not within the jurisdiction of the court. See Luftig v. McNamara, 252 F. Supp. 819 (1966).

[5]U. S. v. Wolfson, 36 CMR 722 (1966).

[6]UCMJ Art. 138.

[7]Thomas I. Emerson, Toward a General Theory of the First Amendment (1967) at 3.

[8]Id.

[9]Milton, John, Areopagitica, Vol. 21 (New York, E. P. Dulton, 1927).

[10]Emerson, supra note 7, at 9.

[11]Id.

[12]John Stuart Mill, On Liberty and Other Essays, Vol. 20 (New York, The Book League of America, 1929).

[13]Id. at 42.

[14]Emerson, supra note 7, at 14.

## CHAPTER II

## FORMULATION OF LEGAL DOCTRINES REGARDING THE FREEDOM OF EXPRESSION

The basic source of the legal doctrines for free expression is found in the First Amendment of the Constitution. Our courts make the fundamental assumption that the framers of the Constitution intended the First Amendment to be the legal basis for preserving and promoting an effective system of free expression. It is assumed that the vital need for a system of free expression would transcend the effects of technological advances and remain a viable process in our democratic society. In formulating the principles of the First Amendment one must consider the diverse circumstances in which free expression precipitates special problems. These problem areas call for specific rules defining the limitations they make on an overall system of free expression. It is necessary to briefly explain the role of the federal judiciary in formulating legal doctrines and to review the doctrines. Having done this a more meaningful comparison can be made between civilian precedents and military precedents in the various areas of free expression.

### Role of the Federal Judiciary

The federal courts in general, and the Supreme Court in

particular, exercise the power of judicial review. Briefly stated, judicial review is the power of any court to "hold unconstitutional, and hence, unenforceable any law, any official action based upon a law, and any other action by a public official that it deems to be in conflict with the Basic Law, in the United States Constitution."[1] This significant instrument of power is noted as "the principled process of enunciating and applying certain enduring values of our society."[2] In formulating doctrines in the area of free expression the Court is cognizant that:

> The attainment of freedom of expression is not the sole aim of the good society. As the private right of the individual, freedom of expression is an end in itself, but it is not the only end of man as an individual. In its social and political aspects, freedom of expression is primarily a process or a method for reaching other goals.[3]

As has been explained in the first chapter, free expression functions as a vital process that determines the goals in a democratic society and more generally influences a whole life style. It must be understood that free expression does not operate in a vacuum to procure the ultimate goals of society. Other values within the society such as public order, justice, equality and morals and the need for substantive measures needed to obtain the ideals, limit the use of free expression short of its absolute concept. The concept of free expression in the absolute is not the same as the meaning of free expression as exercised within our multi-valued society where free expression is subjected to limitations upon reconciliation with other

social values. It is in reviewing these limitations that the Court makes pronouncements of free speech doctrine.

Before comparing specific rules and cases between civilian and military expression in various areas of expression, it is necessary to review the development of various "tests" used by the Court in reconciling free expression with other social values. Having accomplished this, a review of the doctrines used by the military courts will reveal the different approach towards free speech in the military.

Early Theories

Prevailing among early theories concerning the First Amendment was the belief that the right to free expression could be withheld from certain groups not meeting some criteria. Milton for example would have denied that Catholics, atheists, or non-Christians were entitled to the right.[4] Likewise Locke would have excluded Catholics the right. He viewed free expression as the exclusive political right of elitist groups.[5] In the 1950's this theory was reflected in the belief that the freedom of expression should be denied to "anti-democratic" factions.[6] The more liberal view current in the American society is that free expression is meaningful only if extended even those groups which would desire its overthrow.[7]

It is important to note that even this positive approach to free expression is qualified by defining it in terms of the nature and circumstances of the expression. Varying justifications have been proposed for limiting free speech.

Among these are the justifications for the law of seditious libel, that of: protecting true but not false statements, limitations based on a supposed evil motive and the prohibition of immoral or abusive communication.[8] These justifications were offered at various developmental stages of the doctrine of free expression.

Judicial Doctrines

Clear and present danger doctrine.--The clear and present danger doctrine was initially introduced by Justice Holmes in the case of United States v. Schenck.[9] In Schenck Justice Holmes stated:

> The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[10]

Schenck and his colleagues were indicted under provisions of the Espionage Act of 1917 for causing insubordination in the armed forces and for obstructing the recruiting and enlistment procedures during the war. Schenck, as the general secretary of the Socialist Party, had assisted in printing and mailing some 15,000 leaflets that asserted the draft was unconstitutional and that it constituted "a monstrous wrong against humanity in the interests of Wall Street's chosen few." The leaflet went on to urge recipients, many who were men called by the draft boards, to "assert your opposition to the draft." Writing for the Court, Justice Holmes began by recalling his own ruling in Patterson v. Colorado.[11] He stated, "It well may be that the prohibition of

laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado . . ."[12] For the Court, he admitted that the defendants in Schenck in "many places and in ordinary times . . . would have been within their constitutional rights."[13] The view was apparent that the nature or character of the expression depended entirely upon the nature of the words and the context of events and circumstances in each case. Justice Holmes went on to say:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.[14]

Justice Holmes went on:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[15]

Later Justice Brandeis elaborated Holmes' doctrine in his opinion in Whitney v. California.

> . . . although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economic or moral. That the necessity which is essential to a valid restriction does not exist unless speech would produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled. (in Schenck)[16]

But the Court weakened the clear and present danger doctrine considerably in the case of Gitlow v. New York.[17] The

Court took the new position that the legislature could restrict any expression which it reasonably viewed would lead to a substantial evil or which had a "tendency" to do so. In the Gitlow opinion the Court stated: "That a State in the exercise of its police power may punish those who abuse this freedom (of speech) by utterance inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question."[18] Gitlow had been indicted under a New York statute for criminal anarchy. He was charged with having advocated the overthrow of the government by force by publishing a pamphlet entitled "The Left Wing Manifesto." Mr. Justice Sanford for the Court delivered the opinion of the Court. He stated that what the criminal anarchy statute prohibits, "is language advocating, advising or teaching the overthrow of organized government by unlawful means."[19] He went on to determine that:

> These words imply urging to action. Advocacy is defined in the Century Dictionary as: '1. The act of pleading for, supporting, or recommending; active espousal.' It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose . .[20]

In reference to issues of the nature before it, the Court ruled that where speech was thought to endanger the public peace or safety the legislature was empowered if not bound by duty to "extinguish the spark without waiting until it has enkindled the flame or blazed into conflagration."[21]

One notes thatthis test renders any system of free

expression totally unprotected and meaningless. Free expression is readily sacrificed for other social values disguised in the vague terminology of "public safety or public good." This doctrine in practice can be interpreted so as to render any form of expression unprotected if the speech is or is believed to be of any consequence. Any significant opposition to the form of government or its policies is left without constitutional protection.

The clear and present danger test in theory, does protect some expression that may be critical of or in opposition to the attainment of other social objectives so long as the danger to the other objectives is not immediate and clear. It did, in effect, narrow the area of action, and thus, more precisely distinguish between protected expression and action which is susceptible to restriction.

There are several objections to the theory and the practice of its application. It assumes that at the point where expression becomes influencial in altering social objectives that that expression is then by nature counter-productive and thus must be susceptible to state restriction. To allow a state to restrict expression when it is or is becoming effective and of some consequence is to permit only abstract and meaningless expression.

Also, the test is vague and has not been applied by the Court as to give substance and clarity to any meaningful system of protected expression. For the individual there is little

security in expression before a judicial decision is made by a court of law.

Furthermore, it is extremely difficult to imagine a court capable of assessing all the historical, political, economic, psychological, and social data necessary to rationally conclude that the expression in question did indeed constitute a clear and present danger. This doctrine was the result of cases in which the restriction was sought to prevent a specific danger. Its application and implementation to other areas of speech is not warranted and if applied would severely endanger any viable system of free expression.

Ad Hoc Balancing.--It is the ad hoc balancing test that purports to give substance to the values of free speech. The formula here directs the court to balance the individual and social importance of free expression against the importance of the conflicting social objective. This test was clearly stated by Chief Justice Vinson in the Douds[22] case and subsequently used by the court in a number of other cases.

> When particular conduct is regulated in the interest of public order, and the regulation results in an indirect, conditional, partial abridgement of speech, the duty of the courts is to determine which of these two conflicting interests demands the greater protection under the particular circumstances presented. . . . In essence, the problem is one of weighing the probable effects of the statute upon the free exercise of the right of speech and assembly against the congressional determination that particular conduct may 'cause substantial harm . . . to that public interest . . .'[23]

The Court's reliance on the ad hoc balancing test reveals that there is no hard core doctrine to guide the courts

in reaching a decision on a First Amendment question. The ad hoc balancing enunciated in Douds makes it realistically impossible for the judicial institutions to apply accepted and impartial rules to curb the forces that would limit or destroy free expression. Furthermore, the factual data necessary here exceeds that which is called for in the clear and present danger test.

This test falls short of giving equal weight to the values of free expression. One of the judicial axioms is to assume the constitutionality of legislation until such a case can be presented and proven the contrary. The inherent assumption is that the Congress would not enact legislation unless it had rationally concluded that a public interest was paramount to the value of free expression. Unfortunately, individual conduct is restricted when a law is enacted. He cannot be given relief until his case has been heard in a court of law. This process in itself raises the issue of prior restraint on a system of free expression in that many are not willing or able to contest a potentially unconstitutional restriction on free expression.

Absolutist doctrine.--There is another test that is less understood than the "ad hoc balancing" or the "clear and present danger" test, but still is referred to by the Justices as an important influence on the Court's present doctrine. Although there is some disagreement among the supporters of the so-called "absolute" test, two things are clear. First, the test does not

advocate that all words, writing or other communication are fully protected from all governmental restraints. Second, the test is not necessarily derived from the "literal meaning" of the First Amendment and applied in all cases that way.

Two components are involved in the "absolute" doctrine. First, the language of the First Amendment is "absolute" in that it commands that "no law" which "abridges" "the freedom of expression" is constitutionally valid. The point of interest here is that attention is shifted from a scheme of balancing to focusing upon the definition of the terms used, e.g., "abridge," "freedom of speech" and "law." The Court's responsibility in "defining" as opposed to "balancing" is more practical and consistent with the purpose of the judiciary. Second, under an absolute approach a greater area of protection is intended. This is done by broadening the definitions of language in the First Amendment and thus limiting the area of expression susceptible to restraint.[24] The inadequacies of other doctrines in protecting a system of free expression has motivated the Justices to inquire into this largely unresolved approach. The influence of the absolutist approach is to some extent influential in the Court's guidelines on prior restraint, vagueness, and finally, the overall "preferred position" doctrine. It will be later noted that the tendency of the civilian courts to lean toward the absolutist theory in issues of free expression is quite different from the military court's approach.

Prior restraint.--The Supreme Court's attitude toward the unconstitutionality of prior restraint is well established in Near v. Minnesota.[25] The defendants here were enjoined from printing articles declared by state officials as being "malicious, scandalous and defamatory"[26] all of which was prohibited by a Minnesota statute. In declaring the statute unconstitutional the Supreme Court stated:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischevious or illegal, he must take the consequence of his own temerity.[27]

The Court's position in regard to prior restraint is that any administrative or judicial measures used to restrict or prevent publication of material is inconsistent with the principles of the First Amendment. The Court does make it clear that the publisher of material must take the "consequence" if his material was indeed malicious and improper. But the latter restriction on free expression would be for a court to decide after publication.

Here it must be noted that the military courts condone both statutory and administrative prior restraints on speech and the publication of material. The military approach will be demonstrated in the following sections of this paper.

Void for vagueness.--Still another guideline in constitutional questions is the vagueness test as stated by the Court in Connally v. General Construction Company:[28]

> A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[29]

In numerous cases involving the First Amendment the Court has consistently ruled that statutes or administrative regulations with vague references to loyalty oaths, disloyal statements and other like statements were unconstitutional.[30]

The interest in the civilian standard for vagueness is an element not to be found in the body of military law regarding free expression. As will be indicated, both statutes and administrative directives in the military are purposefully vague and punishable by court-martial.

Preferred position for free expression.--This brings us to the prevailing notion that the freedom of expression is so vital in its relationship to the purposes of the Constitution that it must undoubtedly be given a preferred position. Justice Rutledge in Thomas v. Collins[31] states the case for the preferred position:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the state's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment.[32]

The evolution of the preferred position doctrine can be seen as early as 1937 in the Herndon v. Lowry[33] case. The Court opinion read in part:

> The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterance of a defined character must find its justification in a reasonable apprehension of danger to organized government . . . The limitation upon individual liberty must have appropriate relation to the safety of the state.[34]

A year later in a footnote in the United States v. Carolene Products Co.[35] case the Court reiterated and expanded what it had introduced in Herndon. The Court initiated an inquiry as to whether cases involving First Amendment principles should be dealt with using a "narrower scope for operations of the presumption of constitutionality" and legislative restrictions in such cases "to be subjected to more exacting judicial scrutiny."[36]

In 1939 in Schneider v. Irvington[37] the Court stated:

> In every case, therefore, where legislative abridgement of (freedom of speech and of the press) is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.[38]

What emerges from the "clear and present danger" cases is a guideline for the courts that emphasize that the "substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[39]

In Thomas v. Collins[40] in 1945 the Court clarified the doctrine when it stated:

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack

> on due process grounds, will not suffice. These rights rest on firmer foundation. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations."[41]

The whole concept of the preferred position for First Amendment rights is derived from opinions written by Justice Holmes. The search for truth through open expression is best expressed by Justice Holmes in his dissenting opinion in Abrams v. United States.[42]

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[43]

An important aspect of the preferred position taken by the Court is that it is extended to circumstances, where fear or apprehension that authority and discipline may be disturbed is used as a basis to restrict expression. In 1969 the Court's in Tinker v. DesMoines School District[44] considered the suspension of junior high students for wearing black armbands to publicize their objections to the Vietnam conflict and their advocacy of a truce. In the course of writing the opinion the court stated:

> In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression . . . Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline is not constitutionally permissible.[45]

The fulfillment of the objective of the preferred position doctrine requires the employment of a variety of devices.

> Among these are the clear and present danger test; narrowing of the presumption of constitutionality; strict construction of statutes to avoid limitation of First Amendment freedoms; the prohibitions against prior restraint and subsequent punishment; relaxation of the requirement of standing to sue where First Amendment issues are involved; and generally higher standards of procedural due process where these freedoms are in jeopardy.[46]

The sum total of these devices as applied to the First Amendment issues constitute the concept of the preferred position. The judicial response embodied in the devices represents a judiciary guarding and preserving of the guts of a democratic system—the freedom of expression. Issues raised in the context of free expression are examined by the most critical standards.

The trend in civilian judicial treatment of free speech is to expand that area of expression protected by the First Amendment. A like expansion in the military courts has not taken place, as the next two chapters shall reveal.

At this point it is necessary to address the overall question of whether or not constitutional rights are viewed as being extended to the soldier. And if they are, what standards are used by the military courts and what restrictions are tolerated?

NOTES

[1]Henry J. Abraham, The Judicial Process (2nd ed. 1968) at 283.

[2]Id. at 284 citing Keyishian v. Board of Regents, 385 U. S. 589 (1967).

[3]Thomas I. Emerson, Toward a General Theory of the First Amendment (1967) at 47.

[4]Id. at 48.

[5]Id.

[6]Id.

[7]Zechariah Chafee, Jr., Free Speech in the United States (Cambridge, Mass.: Harvard University Press, 1948) at 30-35

[8]Emerson, supra note 3, at 50.

[9]249 U. S. 47 (1919).

[10]Id.

[11]205 U. S. 454, 462 (1907).

[12]United States v. Schenck, 249 U. S. 47 (1919).

[13]Id.

[14]Id.

[15]Id.

[16]Whitney v. California, 274 U. S. 357 (1927).

[17]268 U. S. 652 (1925).

[18]Id.

[19]Id.

[20]Id.

[21]Id.

[22]Am. Communications Ass'n, C. I. O. v. Douds, 339 U. S. 382 (1950).

[23]Id.

[24]C. Black, Jr., "Mr. Justice Black, the Supreme Court, and the Bill of Rights," Harper's Magazine, Feb. 1961, at 63.

[25]283 U. S. 697 (1931).

[26]Id.

[27]Id.

[28]269 U. S. 385, 391 (1926).

[29]Lovell v. Griffin, 303 U. S. 444 (1938).

[30]Staub v. Baxley, 355 U. S. 313 (1958).

[31]323 U. S. 516 (1945).

[32]Id.

[33]301 U. S. 242 (1937).

[34]Id.

[35]304 U. S. 144 (1938).

[36]Id.

[37]308 U. S. 147 (1939).

[38]Id.

[39]314 U. S. 252, 262 (1941).

[40]323 U. S. 516 (1945).

[41]Id.

[42]205 U. S. 616, 624 (1919).

[43]Id.

[44]393 U. S. 503 (1969).

[45]Id.

[46]Robert B. McKay, "The Preference For Freedom," 34 N.Y.U.L. Rev. 1182 (1959).

## CHAPTER III

## APPLICABILITY OF CONSTITUTIONAL RIGHTS TO THE SOLDIER

### Authority for the Military Code

The American soldier from the days of the Revolutionary War has been subject to a system of rules and regulations administered by military authorities with the stated purpose of maintaining discipline, honor and security within the armed forces.[1] The Articles of War were adopted from international custom and British precedent and supported by such notable statesmen as John Adams, George Washington, and Thomas Jefferson.[2] In drafting our Constitution, the framers recognized a need for a system of military justice. In Article I, Section 8 of that document Congress is empowered "to make rules for the Government and regulations of the land and naval forces." Under this authority Congress over the years has enacted Articles of War, Articles for the Government of the Navy, and the Uniform Code of Military Justice (UCMJ). In addition to the military code enacted by Congress, the President as Commander-in-Chief of all the armed forces has issued various Executive Orders pertaining to military justice by virtue of the power granted to him in Article II, Section 2 of the Constitution. The power of the Chief Executive in the field of military justice is evident in that the Manual for Courts-Martial, which, among other things,

prescribes the rules of evidence and procedure to be used by courts-martial and maximum punishments for specific crimes, is itself an Executive Order.[3]

The fact that the Executive Branch is delegated the power to draft and execute administrative directives is of no small consequence when a case from a military court is considered in the civilian courts.[4] The effect is that the civilian courts are reluctant to entangle themselves with what they view as a "political question."[5] Military infringements of constitutional rights and military court decisions sanctioning such infringements are thus shielded from civilian court review.. This is an important feature about the whole system of military justice that should preface the discussion of the applicability of constitutional rights to the soldier.

The present Uniform Code of Military Justice[6] evolved after voiced criticisms of ex-servicemen following World War II.[7] The objective of the UCMJ was to balance the necessity of optimum military performance with maximum justice.[8] It is no secret that emphasis on obtaining organizational efficiency has resulted in a degree of sacrifice of individual rights in obtaining justice. It was this phenomena that Justice Black referred to when he stated that military law "emphasizes the iron hand of discipline more than it does the even scales of justice" and that "[i]n the military, by necessity, emphasis must be placed on the security and order of the group rather than on the value and integrity of the individual."[9]

In discussing the freedom of speech under the First Amendment in relation to the soldier, first we must determine whether constitutional guarantees extend to members of the armed forces.

## Views on the Applicability of Constitutional Rights to the Soldier

Contemporary writers on this subject can be categorized in three groups. The first group contends that the First Amendment right to freedom of speech does not extend to the military. The second group is of the opinion that the right does apply but in a partially restricted fashion. Finally, the third group takes the opposite position from the first, contending that the Constitution's protections were intended to apply to the armed forces without exception or restriction.

The view that no rights apply.--Supporters of the opinion that the soldier is afforded no constitutional rights or protections give for the basis of their view three points: the history and tradition of preceding military codes in relation to the Constitution; the provisions contained in the present UCMJ; and the wording of the Constitution itself.

Illustrating the first point is Frederick Wiener.[10] In his book he notes that shortly after the adoption of the Bill of Rights, Secretary of War Knox ordered the code then in effect[11] to be changed to conform to the new Constitution.[12] Mr. Wiener submits that no change was made and reasons that the present military code, as a successor to the earlier code, follows the

precedent affirmed in the Continental Articles and Rules for the Better Government of the Troops.[13]

On the second point Mr. Wiener submits that at the time of the adoption of the Bill of Rights soldiers were volunteers and that military crimes were within the total jurisdiction of the military courts. His overall conclusion from this is that the military codes were never intended to conform to constitutional standards or to extend constitutional rights to the soldier. He cites from the UCMJ, Article 88, prohibiting a soldier from expressing "contemptuous words against the President, Vice President, Congress, Secretary of Defense or a Secretary of a Department, a Governor or a legislature of any state, territory, or other possession of the United States in which he is on duty or present;" article 89, prohibiting disrespect towards a superior officer; and article 91, in that it prohibits contempt or disrespect towards a warrant officer, noncommissioned officer or petty officer in the execution of his office, are unquestionably abridgements of the right to free speech. The use of contemptuous words as restricted by the Sedition Act of 1798 was declared unconstitutional in its application to civilians.[14] But in 1798 President Jefferson signed a similar bill that placed the same restraints on the soldier.[15] Because this act is left intact, Mr. Weiner concludes that the right to free speech was not meant to be extended to the soldier. Under articles 88, 89, and 91 the soldier cannot claim the violation of his right to free speech because it is not recognized as a

right to which he is entitled.

The third point on which this first group relies is the wording of the Constitution. They cite Article I, clause 14, giving Congress the power "to make rules for the Government and regulation of the land and naval forces," and reason that the Constitution delegates power to Congress to determine if rights inherent in the Constitution are to be made applicable to the soldier.

The view that rights apply in part.--Proponents of this view also refer to an analysis of the same three points to arrive at their view: the history of early military codes to the Constitution; the wording of the Constitution itself; and the relationship of the soldier's duties to his rights.

On the first point it is submitted that earlier military codes dealt specifically with military crimes and that crimes of a civilian nature were handled by civilian courts in which the defendant was extended all constitutional protections. Therefore, when later military codes were expanded to include civilian type offenses, the constitutional rights previously recognized by the civilian authority also should be granted to the soldier.

In considering the wording of the Constitution, this group points to the precise language in the Fifth Amendment. They note that it is specifically the right to indictment that is not extended to the military. They reason that if the framers intended to exclude other constitutional rights from the

military, then they would have made that intention known as is the exclusion of the right to indictment by a grand jury. The stance that this second group takes would limit the degree of freedom to soldiers by submitting that such limitations are necessary because of the nature and purpose of the military.[16] Some areas of military life would justify more or less freedom of speech, depending on the extent to which it would run contrary to the purposes of the military. Limitations in different areas of speech and the extent of the limitations has been a subject of controversy. Limitations have been permitted in cases involving: national security, disrespect toward superiors, contemptuous language towards government leaders,[17] in the case where the need for discipline is paramount, and the need to present a solid front to the public.[18] One writer, Detlev Vagts, would extend the allowable restraints on speech to include military statements that would "strain" foreign relations, degrade the other armed services, oppose established Presidential policy or call for the displacement of civil authority to military authority.[19] All these restrictions that go far beyond civilian restraints are permissible when the soldier's rights are "balanced" against the need for a strong and well-disciplined armed force. Proponents of the second view hold that the soldier has the right, but, that the degree to which he can clain protection from it depends on the area of speech.

The areas for restrictions are broad and obviously

encompass almost every phase of the soldier's life. The areas of speech to which a soldier could claim protection would be extremely narrow in scope.

The view that all rights apply.--Those who hold the view that all rights under the Constitution apply to soldiers reach this conclusion by reasoning that either all apply or none apply. Since it has been established that the soldier does have some rights, he therefore is entitled to all rights without exception or limitations not applicable to the civilian.[20]

## Court Rulings on Applicability of Rights

The divergence of opinion in the applicability of the right to the freedom of speech is reflected in the ill-defined character of judicial decisions handed down in cases where the right was claimed. An example is found in Burns v. Wilson[21] in which the Supreme Court wrote an opinion passing on the application for a writ of habeas corpus from a military court-martial. Chief Justice Vinson cited views in conflict. He stated: "Military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[22] Justice Vinson qualified his statement by adding: "The military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights."[23]

Unfortunately, the Supreme Court did not take the opportunity to set down specific guidelines. The opinion in citing both views as having merit may have given an indication

that a compromise was necessary. The opinion fell short of prescribing any definite formula for balancing the soldiers rights against the need for an efficient, well disciplined armed force.

To find out whether the right to free speech is extended to the soldier, and if so, to what extent, one must look to the highest military appellate court, the Court of Military Appeals. In 1967 this court set a precedent in the case of United States v. Howe[24] in that it rejected both the approach that all constitutional rights apply equally to soldier and civilian and the view that no constitutional rights are guaranteed to the soldier. In a unanimous opinion relating the reasons for the court's denial of Lieutenant Howe's petition for reconsideration of his case, the Court of Military Appeals accepted the principle that the First Amendment applied to the military. Howe is the first case coming before the Cou t of Military Appeals that specifically recognized the applicability of the freedom of speech right to the soldier.[25] Recognition of this right, however, was not without the confirmation that the military could impose allowable restrictions on this right which could not be applied to civilians by the federal judiciary. The court addressed the right of free speech to the soldier when it stated: "That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, . . ."[26]

It is enough to note here that the right did indeed apply

to the soldier. By using the clear and present danger test the court assumed there was speech that did not constitute a clear and present danger that was protected by the First Amendment.

The official court precedent here contradicted the Navy's Judge Advocate General's view that "Military law is in nowise affected by constitutional limitations" . . . The Court of Military Appeals answered:

> Time is . . . past when this court will lend an attentive ear to the argument that members of the armed forces are not . . . entitled to the constitutional protections as their civilian counterpart.[27]

With military justices holding such views one can readily understand Justice Douglas' appraisal that the military system is "marked by the age-old manifest destiny of retributive justice and singularly inept in dealing with the nice subleties of constitutional law."[28]

Like most organizations, the military forces find pride in the maintenance of an internal complaint system. But outside scrutiny or publicity of this feed-back is not appreciated. Filing complaints with the Inspector General has been accepted as a vital part of the military leaders process for evaluation of overall moral and preparedness. It is by means of this method of communication that those in command have an opportunity to recognize or ignore deficiencies within the system. One becomes suspicious and somewhat reluctant to use this channel for dissent when one learns that claims that cannot be substantiated are considered a military offense punishable by court-martial.[29] Given the rules for following the chain of command, susceptibility to command influence, and the frequent

uncooperative attitude of non-commissioned officers to assist in substantiating claims, one is reluctant to file complaints with the Inspector General.

Statutory right to communicate with congressmen.--Fortunately for the soldier, Congress has passed two statutes which remove the responsibility to act out of the grasp of the military. One statute is article 138 of the UCMJ, which requires that an official report be forwarded to the Secretary of the Army by the commanding general. The other is a federal statute that grants any soldier the right to communicate with any member of Congress about any subject.

Cases on free speech upheld.--The majority of cases involving the right to free expression that were upheld by Boards of Review had been upheld because it was the right to gripe that was at issue. The following two cases demonstrate the effect of the Congressional statutes on free speech when a complaint is made about poor living conditions and inadequate management.

The first case involves the threat to pursue one's rights as established by Congress. An Army enlisted man had written his congressman about poor food and inadequate living conditions at Fort Riley, Kansas, and was subsequently told that he would be punished under Article 15[30] of the UCMJ for having complained to his congressman.[31] The soldier drew up a news release which proclaimed: "Fort Riley Soldier Received Punishment for Exercising Rights."

He took the news release to his commanding officer and told him he would release it to the press if he were punished under Article 15. The commanding officer was furious and court-martialed the soldier for extortion and wrongful communication of a threat. In reversing the conviction the Court of Military Appeals denounced the practice of punishing soldiers for exercising their right to complain to Congress or to the press. Judge Ferguson in a concurring opinion said:

> When, therefore, it appears that an accused has announced he intends to expose to public view the unlawful and unjust measures which have been taken against him in reprisal for his resort to a right expressly granted by statute, his fair statement of the course he intends to pursue . . . does not amount to an unlawful threat or an extortionate communication . . .
>
> It 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.[32]

A second case in which the Court of Military Appeals recognized the soldier's right to complain was United States v. Wolfson.[33] Dr. Wolfson had repeatedly complained to his commanding officer about the inadequacy of both medical facilities and supplies furnished him in Vietnam. During an inspection tour conducted by General Westmoreland, Commander of American forces in Vietnam, Dr. Wolfson took it upon himself to personally relate his problem to the general. The report to the general embarrassed Dr. Wolfson's commanding officer who subsequently brought charges against him for conduct unbecoming an officer and breaking the chain of command. In reversing the conviction the Court of Military Appeals stated: "The right to complain is

undoubtedly within the protection of the First Amendment of the Constitution of the United States guaranteeing freedom of speech."[34]

The defined area of protected speech for the soldier not subject to arbitrary limitations seems only to be the soldier's "mini-right" to gripe as outlined in the Congressional statutes and military court opinions in the Wolfson and Schmidt cases.

The extent to which free expression is recognized in areas beyond the right to gripe[35] and the right to communicate with a congressman[36] will be discussed in the following chapter. Now that it has been established that the right to free expression does extend to the soldier, particular attention will be given to note the standards used by the court in various areas of speech, the extent to which limitations are tolerated, and the basic differences between civilian and military rules and court opinions in these areas.

NOTES

[1]W. Aycock & S. Wurfel, Military Law Under the Uniform Code of Military Justice (1955) at 9-15.

[2]W. Winthrop, Military Law & Precedent (2nd ed. 1920) at 21-24.

[3]UCMJ Art. 56, 118, 126, 127.

[4]A soldier must exhaust all military court remedies before submitting a petition of habeas corpus to a federal district court. The federal judge will rule on the legality of the detention. It is a rare case that reaches the civilian courts for there is still disagreement on whether grounds other than jurisdiction can be reviewed by the federal courts.

[5]In Baker v. Carr 369 U. S. 186 (1962) the Supreme Court in summing up its stand on a "political question" stated it would not rule on a question that existed the "impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government . . ." Because "military necessity" is considered an executive determination it is a rare case that is reviewed by civilian courts.

[6]10 U.S.C. 801-940 (hereafter called the Code and cited as UCMJ).

[7]J. Snedeker, A Brief History of Courts-Martial (1954) at 64-65.

[8]Id., Military Justice Under the Uniform Code (1953) at 4.

[9]Reid v. Covert 354 U. S. 1 (1957).

[10]Wiener, "Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266 (1958).

[11]The Continental Articles and Rules for the Better Government of the Troops, adopted 20 Sept. 1776, 1 Jour. Cong. 4 (1776) at 82.

[12]Michael A. Brown, "Must the Soldier be a Silent Member of Our Society?" 43 Mil. L. Rev. 71 (1971) at 73.

[13]See supra note 11.

[14]Act of 14 Jul. 1798, 1 Stat. 596.

[15]Code of 1806, Act of 10 Apr. 1806, ch. 20, 2 Stat. 359.

[16]Brown, supra note 12 at 76.

[17]Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181 (1962).

[18]Detlev Vagts, "Free Speech in the Armed Forces, 57 Colum. L. Rev. 187 (1957).

[19]Id.

[20]Brown, Supra Note 12 at 77.

[21]346 U. S. 137 (1953).

[22]Id.

[23]Id.

[24]17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[25]Brown, supra note 12 at 77 citing United States v. Wysong, 9 U.S.C.M.A. 29 (1958); United States v. Voorhees, 4 U.S.C.M.A. 509 (1954).

[26]Robert Rivkin, GI Rights and Army Justice: The Draftee's Guide to Military Life and Law (1970) at 100 citing United States v. Howe, U.S.C.M.A. 165 (1967).

[27]"Military Law," Time, May 5, 1967 at 50.

[28]"Curbing Courts-Martial," Time, June 13, 1969 at 66.

[29]Rivkin, supra note 26 at 103 citing AR 20-1 (rev. 22 Aug. 1968), Inspections and Investigations, para. 3-4, "Liability of Individuals Knowingly Making Untruthful Statements."

[30]Within the power granted by Article 15 (UCMJ) a commanding officer may exercise limited power in proscribing punishments for non-judicial offenses.

[31]Rivkin, supra note 26 at 105 citing United States v. Schmidt, 16 U.S.C.M.A. 57, 36 C.M.R. 216 (1966).

[32]United States v. Schmidt, 16 U.S.C.M.A. 57, 36 C.M.R. 216 (1966).

[33]Rivkin supra note 26 at 105 citing United States v. Wolfson, 36 C.M.R. 722 (1966).

[34]United States v. Wolfson, 36 C.M.R. 722 (1966).

[35]Id.

[36]UCMJ Art. 138.

## CHAPTER IV

## MILITARY STANDARDS USED TO MEASURE FREE SPEECH

As noted in Chapter III, the Court of Military Appeals in Howe ruled that the right to constitutionally protected freedom of speech does apply to the soldier. This opinion followed a number of other cases in which the court had given recognition to soldier's rights.[1] The question remaining is: what weight is given to the right of free expression when balanced against other considerations? Whether or not the right to free speech will be meaningful (i.e., an area of absolute protection) will depend on the standards the court uses in settling conflicts between free speech and military considerations. The right to free expression is, of little importance if a soldier does not know what limitations or restrictions the court will tolerate. There are no Supreme Court decisions that directly deal with this problem. The chief judicial body in this area has been the Court of Military Appeals. In past decisions concerning freedom of speech the court has relied on a test which balances the interest of the military against the soldier's right to free speech.[2] In Howe the test used to balance the conflicting interests was the ill-defined clear and present danger doctrine as it was applied by the Supreme Court in Dennis. Judge Kilday in his opinion for the court in Howe stated:

> 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 precedents established by the Supreme Court, seems to require no argument.3

In weighing the interests in this "balancing" process the court followed the Supreme Court considerations in Dennis but with one more important consideration—military necessity. To date cases appealed by writ of habeas corpus to the civilian courts have been rejected as a political question if the balancing involved a determination of military necessity. The courts are reluctant to intrude into what is considered to be the executive's determination.

It is essentially the added consideration of military necessity that is used to justify severe limitations on the soldier's free speech right. A review of cases in different areas of speech will indicate the nature of the standard used by the Court of Military Appeals and the extent to which restrictions on speech are permitted. To aid the discussion of the specific areas of free speech the following subtopics and their related cases will be offered.

1. Speech that affects national security;

2. Speech that is critical of the American society, the military, and the war;

3. Speech that advocates or incites others to unlawful acts;

4. Speech that threatens, insults, or shows disrespect towards governmental officials or military superiors;

5. Expression of views by participation in protest demonstrations.

At times the boundaries of these subtopics overlap, but the divisions indicated will help facilitate a meaningful discussion. An attempt will be made to set forth the military and civilian rules and indicate the difference in impact that the military rules have on the soldier's right to expression.

Speech That Affects National Security

The first area of speech to be considered is speech that affects the national security. Primary concern here is with information described as classified defense material.

The military organization must impose many prohibitions against speech in the classified information area because of the possible danger to the national security. Looking to the UCMJ the soldier discovers that he is specifically prohibited from disclosing a countersign to one not authorized to receive it,[4] communicating with members of the enemy force,[5] or to relate information in any way to an enemy obtained by espionage.[6] The basis for these prohibitions is Article 3, Section 3 of the Constitution which contains the prohibition against treason.

In addition to explicit restrictions found in the UCMJ, all federal laws establishing restrictions on speech to protect national security[7] are applicable to the soldier by the provisions of Article 134, the "general" article providing for punishment of "crimes and offenses not capital" not otherwise prohibited in the UCMJ.

Augmenting the statutory restrictions on the soldier's right to speech in the national security area are administrative

regulations. Specific regulations enunciated by the Secretary of Defense requires the submission of all proposed speeches and written material by personnel in the Department of Defense to the Director of Security Review for censorship of content that could possibly result in a conflict between the national security and official governmental policies.[8] Material determined to be detrimental to the national security is barred from spoken or written communication.

Judicial review of this type of restriction can be found in United States v. Voorhees.[9] In this case Lieutenant Colonel Voorhees was charged and convicted by court martial for publishing a book about his experiences during the Korean War as a public information officer. The colonel according to army regulations had submitted his manuscript for review but refused to delete uncomplimentary sections making reference to his commander, General Douglas MacArthur. Despite the refusal of the Department of Defense to grant permission, Lieutenant Colonel Voorhees published his book. The Court of Military Appeals ruled that the Army has the right to require submission for censorship on the grounds that national security may be jeopardized.

The extent to which regulations in this area affect free speech is seen in the power of the military to punish the author of a proposed speech or written material if it is not submitted for censorship, apart from the fact that it may or may not contain classified information.[10]

Regarding classified defense information the civilian is subjected to statutes similar to those governing the soldier.

The major difference is in the test the military and civilian courts employ in trying a case. The Supreme Court test in this area considers the effect of the speech on the national security and how severe or immediate the threat. In the words of Justice Holmes:

> . . ."The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right.[11]

The Supreme Court also shifts the burden of proof so that the state must prove the restriction a necessity for the safety of the state. The effect is to give the right of free expression a "preferred position" as discussed in Chapter III in Thomas v. Collins.[12]

Army regulations make no allowance for the "nature" of the words or the degree of substantive evils, but flatly prohibit release of "sensitive" materials. As seen in Voorhees this included refusal to grant permission to publish material merely uncomplimentary to a commanding officer. During wartime the civilian has indeed been subjected to the same treatment,[13] but these are temporary prohibitions.

In summary it can be stated that any direct divulgence of security information is prohibited and punishable by law. But, for the soldier there is the added element of submitting

all communication for censorship whether or not it contains classified information. The element of prior restraint by censorship indicates the greater degree of restriction on a soldier's right to freedom of speech. The restrictions encompass speech far beyond the boundaries of classified defense information and make vulnerable virtually all communication beyond a purely private and personal nature.

Speech That Is Critical of the American Society, The Military, or The War

Generalized criticism of the American society, the military or the war policy would seem to be something less than a clear and present danger to an effective, well disciplined military. A soldier should be relatively free to make mild political statements, but many soldiers have been charged and convicted for supposedly "disloyal statements which intend to promote disaffection among the troops.[14] Article 134 of the UCMJ known as the catch-all article has been used to bring charges against soldiers expressing opinions other than those supported by the governmental or military leaders. There seems to be two broad reasons why expression contrary to the official policy results in a court-martial offense. First, governmental leaders are alarmed that statements by soldiers will be accepted by the public and foreign powers as a pronouncement of official military and government policy. Second, when it is understood that the individual speaks only on his own convictions, the monolithic frong of the military is dissolved and possible dissention among the ranks is open for public scrutiny.

Punishment for critical statements in this area depends on the nature of the subject and the rank and position of the person expressing the opinion. Statements critical of the Vietnam War made by Marine General Shoup have not resulted in court-martial charges while statements made by enlisted men expressing essentially the same concern as that of General Shoup have resulted in long jail sentences and dishonorable discharges.[15] The following case will demonstrate the scope of prohibitions on the right to free speech in expressing a personal opinion on the Vietnam War.

PFC Daniel Amick and Private Kenneth Stotle, Jr. were stationed at Fort Ord, California. Their common interest in spiritual matters and general concern for the direction of the Vietnam War motivated them to mimeograph and distribute on their own time a one page protest expressing their views. The protest read in part:

> We protest the war in Vietnam. . . . War cannot be rationalized, justified, or condoned. If you want to fight for peace, stop killing people . . . You as a human being with a free will have the right, if not the obligation, to speak out against these atrocities . . . If you really want to work for peace and freedom, then join us in our opposition. We are organizing a union in order to express our dissension and grievances.[16]

Their statement did not call for "victory" for North Vietnam. Nowhere in the statement did they refuse duty or advocate that others do the same. Their statement expressed their concern with war in general and its consequences. Statements made from the pulpit or by prominent military or government leaders such as Generals Shoup and Gavin or Senator Eugene McCarthy brought

into question the same issues. Amick and Stotle for their concern were arrested and charged with two separate violations of the UCMJ. The first alleged that in violation of Article 81 they had conspired to "publicly utter disloyal statements." The second alleged that under Article 134 Amick and Stotle had designed "to promote disloyalty and disaffection among the troops and the civilian populace" with a statement which was "disloyal to the United States."

It was sufficient for the prosecution to establish that Amick and Stotle had printed and distributed the pamphlets. The court never considered whether the actions of Amick and Stotle would actually bring about a clear and present danger. The field commander administratively determined that the discipline and moral of his unit was endangered. In this case there was no judicial test balancing free speech against "military necessity." Because the local commander had determined disaffection and discontent would result from free speech Amick and Stotle received sentences of dishonorable discharge, four years at hard labor, and forfeiture of all pay and allowances. Upon review the hard labor was reduced from four years to three years. The handling of Amick and Stotle's case on free speech follows the standard set out in Voorhees:

> Undoubtedly we should not deny to servicemen any right that can be given reasonably. But in measuring reasonableness, we should bear in mind that military units have one major purpose justifying their existence: to prepare themselves for war and to wage it successfully.[17]

Standards of this nature make it possible for the court to justify

virtually any limitation on free speech. As indicated in Chapter III the only area of speech favorably ruled upon by the Court of Military Appeals is the soldier's right to complain and to communicate with his congressman. This particular right is established by a Congressional statute and could not be infringed upon by the court because of a military necessity.

It is important to note a distinct feature about Article 134 under which many convictions are made. The crime of making "disloyal statements with a design to promote disaffection among the troops" is so vague as to mean anything a commander and court want it to mean. It has long been recognized that in a civilian case this type of statute violates the basic notions of fairness and justice. The Supreme Court has long recognized:

> . . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[18]

The impossibility of defining the scope of "disloyal statements" has been argued by the American Civil Liberties Union (ACLU). Considering the present administration of the law in cases of this type, what can the soldier do? He can keep quiet, voice only opinions acceptable to the military establishment, or risk life, liberty and happiness in a prolonged political court battle which he is more than likely to lose. The "drilling effect" that such vague regulations has in the area of free speech is precisely what the Supreme Court has tried to discourage.[19]

Speech That Advocates or Incites Others to Unlawful Acts

As to speech that incites or provokes unlawful acts, the rights of the soldier are governed basically by restrictions found in the UCMJ. The most general prohibition is Article 117 prohibiting the use of provoking or reproachful words against another person subject to the Code. Other articles prohibit communication of a threat,[20] incitement of a breach of the peace or a riot,[21] and solicitation of specific crimes[22] and other unlawful acts.[23]

The military in handling cases of this nature recognizes the rule enunciated by the Supreme Court in Chaplinsky v. New Hampshire[24] that:

> It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[25]

In pointing solely to the Chaplinsky case the military court ignores the contemporary commitment to free speech found in New York Times v. Sullivan:[26]

> A profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[27]

Since the Court of Military Appeals has determined that "the protections in the Bill of Rights, except those . . . expressly or by necessary implication inapplicable, are available to members of our Armed Forces,"[28] the soldier should have the right to say or write anything the civilian does unless

there exists a genuine military necessity to restrict that right. The effect of actual inciting or advocating unlawful acts is detrimental to the discipline and moral of the military. Even for civilians the Smith Act of 1940 makes it illegal . . . "for any person, with intent to interfere with" or "impair . . . the loyalty, morale or discipline of the military . . ." by advising, counseling or urging "insubordination, disloyalty, mutiny, or refusal of duty . . ." or to distribute any written material for the same purpose. The difference between the Supreme Court handling of such a case and the military approach is that the Supreme Court has set up high standards of proof to prevent defendants from being convicted for speech which is unpopular but not prohibited.[29] As recently noted by the Court even outright advocacy of violence is not always prohibited:

> The constitutional guarantee of free speech and press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation except when such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such actions . . . The mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steering it to such action.[30]

Consider the difference in treatment two black Marines may have received in a civilian court. PFC Daniels and L/Cpl. Harvey were court-martialed and convicted for making "disloyal statements" to other Marines and received jail sentences of ten and six years. They had expressed their anger at having been ordered to Vietnam to fight what they considered to be a white man's war, and suggested vaguely that no blacks should fight

there. They urged everyone at the bull session to "request mast"—to demand the right to complain to the commanding officer. By civilian standards this speech would have been constitutionally protected. By military standards it is a punishable offense. Again the point is that the element of military necessity makes a system of free expression in the military an impossibility. Under military law it is presently applied, any statement which suggests or implies that at some indefinite future time soldiers should refuse duty, go AWOL, commit insubordination, violence, mutiny, or any other illegal act can be made the basis for a court-martial.

Speech That Threatens, Insults, or Shows Disrespect Towards Governmental Officials or Military Superiors

Here is another category of speech which receives far different treatment in civilian as opposed to military cases. As noted in the preceeding section the Court has advanced from the narrow view in Chaplinsky to the commitment of uninhibited debate including "vehement, caustic and sometimes unpleasantly sharp attacks on governmental and public officials."[31]

The soldier does not enjoy such a system of free expression in this area as does the civilian. Under Articles 88 and 134 officers and enlisted men alike can be convicted for any expression that is considered insulting or disrespectful. What is insulting and disrespectful is determined arbitrarily by the commanding officer in charge. Take for example the charges against Seaman Priest under Article 134. Priest had printed a political cartoon depicting Congressman L. Mendel Rivers as

part of the power structure polluting the political "stream." To this cartoon Priest had authored the caption: "L. Mendel Rivers, Get Your Ass Out of that Stream, You Hear, Boy?"[32] The charges were initiated but later dropped because of the pure political nature of both the words and the objective of the words. This case would have resulted in a conviction had the reference been made toward any member of the armed forces above the lower four echelons in the rank structure.

Almost any personal opinion can be construed to mean disrespectful or disloyal comment, all of which is viewed as "conduct unbecoming" for officers. This is a far cry from the civilian standards permitting all speech short of libel.

Expression of Views by Participation in Protest Demonstrations

Another precious right enumerated in the First Amendment is "the right of the people peaceably to assemble." This right has been reaffirmed many times by the Supreme Court and includes access to such public areas as bus terminals,[33] state capitol grounds,[34] streets and parks.[35] Reasonable restrictions may be placed on time and place, and a permit required. But the restriction must clearly be based on a valid consideration of community health, safety and convenience. In deciding reasonableness the civilian courts weigh the degree of public inconvenience that would result from the exercise of the right. As precedents in this area indicate the right to peaceably assemble to voice an opinion is a strong and secure liberty of the civilian.

On the other hand the soldier is given only the token right to assemble. Army Regulations in this area can be found in AR 600-20, paragraph 46:

> Participation in picket lines or any other public demonstration . . . is prohibited —
>
> a. During the hours they (soldiers) are required to be present for duty.
>
> b. When they are in uniform.
>
> c. When they are on a military reservation.
>
> d. When they are in a foreign country.
>
> e. When their activities constitute a breach of law and order.
>
> f. When violence is reasonably likely to result.

With respect to the restrictions in the Army Regulations, the prohibition against demonstrating during duty hours is legitimate. But it can be manipulated in such a way as to prevent soldiers from participating in civilian-organized protests. Military manipulation by scheduling inspections and drill or rescinding all weekend passes raises doubts about the constitutionality of the practice and the superficiality right of the soldier to peacefully participate in a demonstration. A case earlier discussed in this paper[36] demonstrates the unlimited power of the military to control expression. When in need of a control mechanism military authorities call upon Article 88, prohibiting conduct unbecoming an officer, or Article 134, disloyal statements or actions that may cause disaffection or discontent among the troops.

As has been indicated in other areas of free expression the military standards permit military authorities to go far beyond what would be an unconstitutional infringement upon expression for the civilian. So long as the military courts pay only lip service to the right of free expression, the soldier has little hope of being able to express himself like his civilian counterpart.

NOTES

[1]United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Wysong 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).

[2]United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954); United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[3]United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[4]UCMJ Art. 101.

[5]Id. Art. 104.

[6]Id. Art. 106.

[7]18 U.S.C. 793, 794, 798 (1964).

[8]Dep't. of Defense Directive No. 5230.9 (24 Dec. 1966).

[9]4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

[10]UCMJ Art. 92.

[11]Schenck v. United States, 249 U. S. 47 (1919).

[12]323 U. S. 516 (1945).

[13]Office of Censorship established during World War II by Exec. Order No. 8985. See Price, "Government Censorship in Wartime," 36 Am. Polit. Sci. Rev. 837 (1942).

[14]UCMJ Art. 134.

[15]Peter Barnes, "The Army and the First Amendment," The New Republic, (24 May 1969) at 13-14.

[16]Id.

[17]United States v. Amick & Stotle, 22 C.M.R. 490 (1968).

[18]Connally v. General Construction Co., 269 U. S. 385, 391 (1926).

[19]United States v. Robel, 389 U. S. 258 (1967); Dombrowski v. Pfister, 380 U. S. 479 (1965).

[20]UCMJ Art. 134.

[21]UCMJ Art. 116.

[22]UCMJ Art. 82.

[23]UCMJ Art 134.

[24]315 U. S. 568, 572 (1942).

[25]Id.

[26]376 U. S. 254 (1964).

[27]Id.

[28]United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

[29]Robert Rivkin, GI Rights and Army Justice: The Draftee's Guide to Military Life and Law (1970) at 119 citing Yates v. United States 354 U. S. 298 (1957); United States v. Spock, 2 SSLR 3090 (1969).

[30]Id. citing Brandenburg v. Ohio, 395 U. S. 444, 447-48 (1969), reaffirming Noto v. United States, 367 U. S. 290 (1961).

[31]New York Times v. Sullivan, 376 U. S. 254 (1964).

[32]Rivkin, supra note 29 at 111.

[33]Id. at 128 citing Wolin v. Port of New York Authority, 392 F. 2d 83 (2nd Cir., 1968).

[34]Id. citing Edwards v. South Carolina, 372 U. S. 229 (1963).

[35]Id. citing Hague v. C.I.O., 307 U. S. 496 (1939).

[36]United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

# CHAPTER V

# CONCLUSION

## Distinctions Between Military and Civilian Judicial Treatment of Free Speech

When attempting to draw a comparison as complex as the one in this thesis—the distinction between the meaning of the First Amendment for the American soldier as opposed to his civilian counterpart—many things beyond the letter of the law must be considered. The following conclusions are drawn from both formal law and the actual practices used in administering that law.

In Chapter I, the First Amendment was recognized as providing vital avenues through which ideas are expressed, political associations formed, political action initiated, and critical opposition given birth. The role of the federal judiciary, in interpreting and applying the laws in such a way as to preserve and promote this vital process, has given substance in practice to the First Amendment. That the rights guaranteed by the First Amendment are cherished is evident in the development of legal doctrine from abstract guidelines to the present "preferred position" for First Amendment liberties.

The view that the soldier was entitled to any constitutional rights was for many years an issue much debated. The Court of Military Appeals did formally recognize the overall

applicability of the Bill of Rights in United States v. Tempia:[1]

> The time is long since past—as, indeed, the United States recognizes—when this Court will lend an attentive ear to the argument that members of the armed services are, by reason of their status, ipso facto deprived of all protections of the Bill of Rights . . . The military courts, like the state courts have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional right.[2]

In the Howe case the military court specifically considered a soldier's right to free expression by using the clear and present danger doctrine as enunciated in Dennis by the Supreme Court. But, to grant a right is not enough to insure that its practice at large will be tolerated.

The development of civilian legal doctrine for measuring the First Amendment rights increased the area of speech guaranteed protection. Consider the Supreme Court precedents on prior restraint,[3] vagueness,[4] and fighting words.[5] Like rulings have not been handed down in military cases. It is essentially these that would give meaning to the right of free expression for the soldier. To say a soldier possesses the right is to say nothing at all, unless it is in "practice" protected by the courts.

Military regulations mentioned in Chapter III specifically require all proposed speeches and written material to be submitted for censorship. Articles within the UCMJ and regulations contained in administrative directives are phrased in such a way as to give local commanders discretion in what constitutes a crime punishable by court-martial. Most convictions result from charges brought under Articles 88, 89, 91, and 134 of the UCMJ.

Federal, state and city statutes or ordinances containing like language would be struck down by civilian courts as "void for vagueness."[6] This is not so in the military system of free expression.

The standard most often referred to by the military court is the clear and present danger doctrine as it was enunciated by the Supreme Court in Dennis. Only the considerations used by the military court includes the added element of "military necessity"[7] which the Supreme Court does not consider. This additional element of military necessity is present at all times for both military courts and civilian courts considering a review of military action.[8] It is this element that prevents many military convictions from being reviewed by civilian courts applying contemporary legal doctrine in the area of free speech.

When confronted by a petition of writ of habeas corpus testing the jurisdiction of a military case, the civilian courts are reluctant to act.[9] Military necessity is determined by executive discretion and consequently review by civilian courts is rejected on the grounds that it presents a political, thus non-justiciable, question.[10] The result is that the freedom of speech becomes the victim of many arbitrary prohibitions not necessary to the military necessity.

What protected area of speech is the soldier left with? Arbitrary military transgressions on free expression are effectively shielded from civilian standards and subsequent relief. This raises the question of whether there actually

exists the right of free expression for the soldier. At most, open expression becomes very risky indeed.

As noted earlier the only cases receiving a favorable ruling upholding the soldier's right to free expression have been the right to gripe and the right to communicate with any congressman. The former, although upheld in a number of cases, does not offer the soldier any protection from other administrative consequences that may result from "griping." Also, the process for griping is to be reasonable in nature. The latter right—of communicating with any congressman—is a statutory guarantee which the military court cannot ignore.

In considering the military treatment of free expression within the confines of the subtopics listed in Chapter IV it is difficult to conclude that any meaningful system of free expression exists for the soldier. In all areas military necessity is given the "preferred position" rendering the right to free expression vulnerable to arbitrary and unnecessary prohibitions. To the author's satisfaction, the comparison between military and civilian treatment of the freedom of expression indicates a substantial difference in what is protected speech in each respective instance. By virtue of the consideration for military necessity, the autonomy of the military court system, and indifference to federal standards the soldier posses considerably less protection for his expression than does the civilian.

This thesis does not address itself directly to the consideration of "military necessity" in maintaining an effective, well-disciplined army. Rather, it is hoped that "military

necessity" is seen as the prevailing element preventing a system of free expression in the military comparable to the civilian system.

Trends in the Military Right to Free Speech

Up to this point the emphasis has been on the past and current status of the soldier's right to the freedom of speech. But, what of the future of this right? The turbulent times this nation has experienced in its Vietnam commitment has caused many American soldiers to speak his mind on an issue in which his very life may be at stake. Just as Thomas Paine observed in 1776 that those were "the times that try men's souls."[11] So too are these trying times for the American soldier opposing the Vietnam War. Mounting civilian pressure to oppose the war is reflected by a growing frustration among soldiers unable to effectively voice their opinions. Because some soldiers have dared to test their right to the freedom of expression, the suppressive nature of the military system of justice has itself been made an issue.

Civilian courts are showing an increasing awareness of the soldier's plight. Traditional review of the court-martial on petition for habeas corpus is now being extended beyond the tests of jurisdiction, i.e., whether the court-martial was properly convened, whether it had jurisdiction over the person and the alleged offense, and whether it acted within its lawful powers in adjudging the sentence.[12] Now the test may include whether the military has dealt "fully and fairly" with the accused.[13] Some federal courts have gone on to re-examine the

facts and rulings of the court-martial,[14] and others have submitted that the final arbitrator of constitutional rights of the soldier should be the Supreme Court.[15]

The key to any change in the disposition of cases involving restraints on the soldier's right to free expression lies in the civilian and military interpretation of military necessity. The present armed services is composed largely of draftees, some of whom have refused to be totally intimidated by military restrictions on free speech. Certainly, the present treatment of free speech cases has a "chilling" effect on many who would otherwise voice their opinions.

But, what about the time when the armed services is composed largely of career people. Are these soldiers going to be willing to risk their careers to court tests of their inherent right to free expression? At present, the answer to whether any particular speech is punishable by court-martial is, "It depends." It depends on the weight the commander and the court gives to the consideration of military necessity. Can a more definite answer be found?

And what of the administrative consequences a soldier would suffer even if his case was won. The military has a multitude of subtle techniques that can be used to persuade a soldier to conform to his commander's stereotype of a good soldier.

With the prospect that the professionalized army concept will become a reality, it is this student's opinion that the soldier's right to freedom of speech will gain no appreciative

area of protection. This student in closing is reminded of the pragmatic approach Justice Douglas implies in this statement: "Man's capacity for justice makes democracy possible, man's inclination for intolerance makes it an absolute necessity.[16]

NOTES

[1]16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967).

[2]Id.

[3]Near v. Minnesota, 283 U.S. 697 (1931).

[4]Connally v. General Construction Co., 269 U. S. 385, 391 (1926).

[5]New York Times v. Sullivan, 376 U. S. 254 (1964).

[6]See supra note 4.

[7]A determination by a commanding officer that a form or forms of behavior will be detrimental to the maintenance of an effective, well disciplined fighting unit.

[8]Earl Warren, "The Bill of Rights and the Military," 37 N.Y.U.L. Rev. 181 (1962).

[9]There has been some disagreement among civilian justices in determining the extent of service-connected crimes falling within the jurisdiction of the military court system.

[10]Because "military necessity" is determined under the shield of the executive's power the civilian courts have rejected many petitions on the grounds that it constituted a "political" question.

[11]The Complete Writings of Thomas Paine (P. Fonder ed. 1945) at 50.

[12]Manual for Courts-Martial United States (revised ed. 1969) by Executive Order 11476 at Chapter XX.

[13]Id.

[14]Burns v. Wilson, 376 U.S. 137 (1953).

[15]Michael Brown, Must a Soldier be a Silent Member of Our Society, 43 Mil. L. Rev. 106 (1968) citing Gallagher v. Quinn, 363 F. 2d 301 (D.C. Cir. 1966).

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# THE FIRST AMENDMENT: A SOLDIER'S RIGHT?

by

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ABSTRACT

## INTRODUCTION

### THE FREEDOM OF EXPRESSION: CORNERSTONE OF A DEMOCRACY

Contained in the United States Constitution is an amendment Americans have respected as the cornerstone of a democratic system of government. This cornerstone amendment in the Constitution reads:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

It is generally agreed that the First Amendment is recognized as the very lifeblood of democracy. A democratic society can endure pressures of economic, social, and political unrest, but it cannot withstand the absence of a meaningful system of free expression. The very nature of a democratic society dictates that the process of free speech is the mechanism through which a government is elected by the people and subject to the rule of the people. The language of the framers in the First Amendment at most meant "absolute" free speech, i.e., speech without any restrictions, and at the least, speech which is free from arbitrary restrictions.

The quality of our democracy depends in large measure upon the "free trade of ideas," the freedom to form political associations, the freedom to initiate political action and to critically assess to the point of opposition the existing governmental policies. These rights are specifically recognized by the First Amendment.

Yet every government has an obligation to reconcile the freedom of speech with other desirable social objectives such as maintenance of public order or national security.

The Role of the Federal Judiciary

It is the role of our judicial institutions to interpret the Constitution and the laws and apply them in a manner such that it guards against the erosion of a meaningful system of free expression. The development of legal doctrine for the freedom of speech from an ill-defined doctrine to the present "preferred position" doctrine has been made possible by conscientious and fairminded men sitting on the Supreme Court.

A Second, Independent Judiciary

Apart from the numerous precedents set by the Supreme Court enunciating guidelines for protection of the First Amendment right to the freedom of expression, there exists another almost totally independent judiciary dictating the limitations on Constitutional liberties for nearly three and one-half million men.

As a political scientist, my interest in this separate

judiciary is warranted because of the substantially different treatment of constitutional rights—specifically the freedom of expression—and the autonomy with which this judiciary operates. The judicial system with which this study is concerned is the military court system and specifically that body of military law dealing with the restrictions on the soldier's right to the freedom of expression. Established by Congress under power enumerated in the Constitution, the military court system operates with immunity from civil court review except for the writ of habeas corpus. Working for the most part independently of the Supreme Court the military courts find their purpose in interpreting the military rules and regulations adjudicating in matters of military crime in such a way as to insure an effective, well-disciplined military.

A Study of the Soldier's Right of Freedom of Expression

The purpose of this thesis is to examine the military court's treatment of the right to the freedom of speech as it applies to the soldier. Does the soldier possess the constitutional right to the freedom of expression? If so, what are the limitations recognized by the military courts born out of "military necessity?" What areas of expression are protected and well-defined? How does the soldier's area of protected speech compare with that of his civilian counterpart under federal court jurisdiction? These are the key questions guiding my study.

The study was conducted by examining the Constitution,

the military code, civilian and military rules and regulations in specific areas of speech, and related cases.

The results of my inquiry indicate that: first, the soldier is entitled to constitutional rights; second, the consideration of "military necessity" places stringent limitations on the degree of free expression enjoyed by the soldier; third, the soldier's right to gripe and right to communicate with any congressman is the only absolute area of protection; fourth, standards used by the military courts differ from the present civilian standards used in settling free speech conflicts; and fifth, in terms of the actual area of speech protected from arbitrary infringements the soldier possesses substantially less than what he would be afforded as a civilian.