A Specialized Society: Speech Offenses in the Military

Major Michael C. Friess[*]

"The rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[1]

I. Introduction

Most Americans believe that they have the right to speak whatever words they choose, both publicly and privately. After all, the United States is a "free country," and Americans are taught that the First Amendment to the Constitution guarantees their right to free speech.[2] From political rallies to pornographic magazines, from political talk-shows to performance art, and from private e-mails to barroom debates, Americans exercise their right to express themselves without fear of persecution from the Government. This basic freedom is the bedrock of our democracy.[3]

This right is not, however, without limits. What happens when the exercise of a citizen's free speech rights puts others at risk? If the law states you cannot shout "Fire!" in a crowded theater,[4] what does the law say about statements that put the nation at risk by weakening the military? Do Soldiers, Sailors, Airmen, and Marines have the same rights and freedoms as ordinary citizens? Does the Constitution, which servicemembers are sworn to defend, apply to them in the way it does to civilians? For example, can a white Soldier publically state racist views when he has to work, train, and potentially fight alongside African-American teammates?[5] Would the hateful comments impair the unit's ability to accomplish its mission?

The First Amendment does apply to servicemembers.[6] The protection of a citizen's right to free speech does not, however, apply with equal scope or force to a member of the armed forces.[7] Some statements that are ordinarily protected in the civilian context are forbidden in the military. Speech by a servicemember that interferes with the accomplishment of the mission or decreases responsiveness to command poses a concrete and direct threat to the national security of the United States.[8] These statements, therefore, are not protected by the First Amendment, and they can and should be prosecuted to maintain an effective fighting force.[9]

Now more than ever military prosecutors need to be sensitive to this distinction and recognize the standards by which speech is judged in the "specialized society"[10] of the military. There have been few times in the nation's history when speech

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[*] Judge Advocate, U. S. Army. Presently assigned as Brigade Judge Advocate, 4th Brigade Combat Team, 1st Cavalry Div., Fort Hood, Tex.; J.D., 2000, University of Connecticut; B.A., 1997, Providence College. Previous assignments include Branch Chief, Government Appellate Division, Arlington, Va., 2007–2008; Appellate Attorney, Government Appellate Division, Arlington, Va., 2004–2007; Defense Counsel, Trial Defense Service, Taegu, Korea, 2003–2004; Office of the Staff Judge Advocate, 1st Cavalry Division, Fort Hood, Tex., 2001–2003 (Trial Counsel, 2002–2003; Tax Center Executive Officer, 2003; Legal Assistance Attorney, 2001–2002). Member of the bars of Connecticut, the Army Court of Criminal Appeals, the Court of Appeals for the Armed Forces (C.A.A.F.), and the United States Supreme Court. This article was submitted in partial completion of the Master of Laws requirements of the 57th Judge Advocate Officer Graduate Course.

[1] Parker v. Levy, 417 U.S. 733, 744 (1974) (citing Burns v. Wilson, 346 U.S. 137, 140 (1953)).

[2] U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

[3] United States v. Brown, 45 M.J. 389 (C.A.A.F. 1996) ("The right to express ideas is essential to a democratic government.") (citing McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995)); Chaplinsky v. New Hampshire, 315 U.S. 568, 570–71 (1942) ("Freedom of speech . . . [is] among the fundamental personal rights and liberties which are protected . . . from invasion by state action.").

[4] Schenck v. United States, 249 U.S. 47, 52 (1919).

[5] United States v. Wilcox, 66 M.J. 442, 445–46 (C.A.A.F. 2008).

[6] *Brown*, 45 M.J. at 395 ("Both military servicemembers and civilians have the right to criticize the government and to express ideas to influence the body politic.").

[7] *Wilcox*, 66 M.J. at 446 ("The sweep of this protection is less comprehensive in the military context, given the different character of the military community and mission." (citing Parker v. Levy, 417 U.S. 733, 758 (1974); United States v. Priest, 45 C.M.R. 338, 344-346 (C.M.A. 1972); United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970)).

[8] *See Priest*, 45 C.M.R.. at 340 ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected." (citing *Gray*, 42 C.M.R. at 258)).

[9] *Id.*

[10] *Parker*, 417 U.S. at 743.

issues were more relevant to the military than they are right now. Communication technology is at an all-time high.[11] Large portions of the American public disagree with a military presence in Iraq and Afghanistan, and politics in America are as divisive as ever.[12] Racial, ethnic, economic, and social issues continue to divide the country.

These sometimes incendiary issues motivate people from all walks of life to speak out, publicly and privately; military personnel are no different. Servicemembers have similar backgrounds, biases, and opinions as the general public. They come from the same families, go to the same schools, and watch the same television programs. The men and women in uniform are not immune to trends in public opinion, and many speak out about their beliefs.[13] It is not the motivation for speaking nor the content of the speech that differentiates the military speaker from the civilian, but rather the effect that speech might have. When the statements of a servicemember undermine the mission, the military has an obligation to stop it.

This article will first provide an overview of the seminal Supreme Court and military court cases regarding speech decided over the past century. The focus will be on those cases involving Article 134, the General Article, of the Uniform Code of Military Justice (UMCJ). Second, the article will examine the Court of Appeals for the Armed Forces' (CAAF) most recent test for military speech offenses as articulated in *United States v. Wilcox*.[14] Third, the article will identify those situations when the military can regulate speech for the sake of mission accomplishment or good order and discipline. Finally, it will provide helpful practice tips for trying speech cases in the military.

II. Review of the Law of Free Speech

The First Amendment to the Constitution reads in part, "Congress shall make no law . . . abridging the freedom of speech . . . [or] to petition the Government for a redress of grievances."[15] While this language appears clear and unqualified, the Supreme Court has repeatedly held that the protections afforded are not absolute.[16] In *Schenck v. United States*, the Court upheld the convictions of two men who circulated a leaflet advising young men to resist conscription during World War I.[17] Justice Oliver Wendell Holmes, writing for a unanimous Court, stated, "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."[18]

The Supreme Court has also held that the protections of the First Amendment may be secondary to the greater public good. In *Chaplinsky v. New Hampshire*, the Court unanimously upheld a statute outlawing the use of "fighting words," or those statements likely to "incite an immediate breach of peace."[19] In *Roth v. United States*, the Court approved prohibitions

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[11] *See, e.g.*, Pew Internet & American Life Project, Daily Internet Activities, 2000–2009, http://www.pewinternet.org/Static-Pages/Trend-Data/Daily-Internet-Activities-20002009.aspx (last visited Aug. 24, 2009).

[12] *E.g.*, Sharp Differences in Partisan Views of Economic Problems (June 26, 2009), http://www.gallup.com/poll/121262/Sharp-Differences-Partisan-Views-Economic-Problems.aspx; Constituents Divided, Highly Partisan on Healthcare Reform (Aug. 11, 2009), http://www.gallup.com/poll/122234/Constituents-Divided-Highly-Partisan-Healthcare-Reform.aspx; Partisan Politics (Aug. 14, 2009), http://www.rasmussenreports.com/public_content/politics/mood_of_america/partisan_politics.

[13] *See, e.g.*, Colby C. Buzzell, Letter to the Editor, *Return to Sender—Iraq Veteran Gets the Call Again*, S.F. CHRON., May 8, 2008, at B7 (Letter to the Editor from a disgruntled Army reservist who does not want to return to Iraq); Acute Politics, http://acutepolitics.blogspot.com (last visited Mar. 11, 2008) (blog from a U.S. Army Soldier in Iraq); ROBERT MCGOVERN, ALL AMERICAN: WHY I BELIEVE IN FOOTBALL, GOD, AND THE WAR IN IRAQ (Harper Collins 2007) (book by an active duty U.S. Army Judge Advocate chronicling his upbringing, his football career, his decision to join the Army, a high-profile murder case he prosecuted, and his thoughts on the war in Iraq).

[14] *Wilcox*, 66 M.J. 442 (C.A.A.F. 2008).

[15] U.S. CONST. amend. I.

[16] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942) ("[I]t is well understood that the right of free speech is not absolute at all times under all circumstances." (citations omitted)); *see also* Roth v. United States, 354 U.S. 476, 483 (1957) ("[I]t is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.").

[17] 249 U.S. 47, 49–51 (1919).

[18] *Id.* at 52.

[19] *Chaplinsky*, 315 U.S. at 569–74 The Court upheld a conviction under a New Hampshire statute where a Jehovah's Witness proselytizing on a city street told a police officer, "You are a God damned racketeer . . . [and] a damned Fascist and the whole government of [the town] are Fascists or agents of Fascists." *Id.* at 569. The Court based its holding on its decision that the statute did not hinder free expression but was narrowly tailored to prevent statements that might reasonably lead to a breach of peace. *Id.*

on obscenity.[20] In *Broadrick v. Oklahoma*, it upheld a law prohibiting state employees from openly and actively campaigning for a political candidate or party.[21] Whether maintaining community standards of decency, preventing violence in the streets, or isolating public employees from divisive political campaigns, the general needs of the community may outweigh one individual's right to free expression.

The Supreme Court has consistently favored the public good over free expression when speech threatens the national security of the United States. In *Schenck*, the Court upheld the guilt of two men who tried to obstruct the draft during World War I.[22] Justice Holmes wrote, "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."[23] The *Schenck* Court held that speech which interferes with the nation's ability to defend itself is less worthy of protection.[24] Under the "clear and present danger" test, speech does not have to actually hinder national defense to be unprotected; it need only *threaten* such harm.[25]

The Court came to a similar conclusion five decades later with *Parker v. Levy*.[26] In 1966, Captain (CPT) Howard Levy, an Army doctor stationed at Fort Jackson who opposed the Vietnam War,[27] made several public statements to enlisted Soldiers advising them to refuse to go to Vietnam.[28] The Army convicted CPT Levy of violating Article 134 arguing he had done so "with design to promote disloyalty and disaffection among the troops, publicly utter[ing] [certain] statements to divers enlisted personnel at divers times."[29]

After exhausting his military appeals, Levy sought federal habeas corpus relief, challenging the constitutionality of Article 134.[30] His case made its way to the Supreme Court, which denied his habeas petition. Justice William Rehnquist wrote the opinion for the 6-3 majority.[31] His analysis begins,

> This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[32]

The Court found that the military was different than the rest of American society and, because of the military's unique obligation to defend the nation, the rights of its individual members could be subordinated.[33] Justice Rehnquist stressed this

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[20] 354 U.S. 476, 483–85 (1957). The Court affirmed the convictions of two proprietors of adult bookstores who possessed or distributed obscene material in violation of federal or state law. The Court held obscenity is "utterly without redeeming social importance" and therefore unprotected by the First Amendment. *Id.* at 484.

[21] 413 U.S. 601 (1973). Three Oklahoma state employees sued in federal court to enjoin the State from enforcing a prohibition against state employees from actively participating in a political campaign, arguing the statute was vague and overbroad. The Supreme Court affirmed the district court's decision denying relief. *Id.*

[22] 249 U.S. at 49–52. During World War I, members of the Socialist Party produced and distributed thousands of leaflets to young men who had been drafted and accepted for service in the armed forces. The leaflets argued that the draft was illegal and immoral and that the young men should do everything they could to "uphold [their] rights" and oppose conscription. *Id.* at 51. The Court upheld their subsequent conviction of conspiracy to obstruct the draft, based on the fact that the nation was currently at war and the statements posed a "clear and present danger" to the nation's ability to defend itself. *Id.* at 52.

[23] *Id.* at 52.

[24] *Id.* ("It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced.").

[25] *Id.* ("It is a question of proximity and degree.").

[26] Parker v. Levy, 417 U.S. 733 (1974).

[27] *Id.* at 736.

[28] *Id.* at 737.

[29] *Id.* at 738.

[30] *Id.* at 740–41.

[31] *Id.* at 762.

[32] *Id.* at 743.

[33] *Id.* at 744 ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." (citation omitted)).

fundamental difference by addressing servicemembers' right to free expression. "[T]he different character of the military community and of the military mission requires a different application of [First Amendment] protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."[34]

Justice Rehnquist concluded, "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[35] With the decision, the Supreme Court enunciated the standard allowing the military to prohibit certain types of speech. If the speech or expression of a servicemember undermines the effectiveness of response to command, it is not protected. Read together with the military cases cited in *Parker v. Levy*,[36] the military could prohibit speech that was prejudicial to good order and discipline or service discrediting, so long as it created a clear and present danger.

III. Military Treatment of Speech Cases

While 1964's *United States v. Sadinsky* did not involve speech, its holding set the stage for most speech cases to follow.[37] In *Sadinsky*, a naval recruit jumped off the deck of an aircraft carrier.[38] The Navy charged and convicted him under Article 134, and he appealed, claiming his act was not specifically prohibited by the text of Article 134.[39] The Court of Military Appeals (CMA)[40] disagreed, holding, "the critical inquiry, with regard to the first category of offenses covered by Article 134,[41] was whether the act was palpably and directly prejudicial to the good order and discipline of the service—this notwithstanding that the act was not otherwise denounced."[42]

The CMA's holding in *Sadinsky* was critical for two reasons. First, it upheld the notion that the UCMJ need not specifically prohibit conduct for it to be proscribed by the military.[43] Second, it stated that for conduct to be lawfully prohibited under the first prong of Article 134, it must be "palpably and directly" prejudicial.[44] The court stated, "[T]he General Article is not such a catchall as to make every irregular, mischievous, or improper act a court-martial offense."[45] "[T]he Article contemplates only the punishment of that type of misconduct which is directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline."[46]

The *Sadinsky* decision, in requiring more than a mere tendency towards prejudice, appeared to conflict with the *Schenck* holding that speech need only *threaten* national defense to be unprotected. The CMA did not directly address this inconsistency when they decided *United States v. Daniels*.[47] In *Daniels*, an African-American Marine conducted several private meetings with other African-American Marines wherein he advised them to not participate in the Vietnam War

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[34] *Id.* at 758.

[35] *Id.* at 759 (citing United States v. Gray, 42 C.M.R. 255 (C.M.A. 1970)).

[36] *See* United States v. Priest, 45 C.M.R. 338 (C.M.A. 1972); *Gray*, 42 C.M.R. 255.

[37] 34 C.M.R. 343 (C.M.A. 1964).

[38] *Id*. at 345.

[39] *Id.* at 344.

[40] The U. S. Court of Military Appeals was renamed the U. S. Court of Appeals for the Armed Forces in 1994 by Act of Congress. *See* Establishment of the Court, http://www.armfor.uscourts.gov/Establis.htm (last visited Jan. 12, 2009).

[41] Article 134, Uniform Code of Military Justice prohibits three different categories of offenses. UCMJ art. 134 (2008). These three separate theories of liability are often called the "prongs" or "clauses" of Article 134. Specifically, Article 134 criminalizes, "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital." *Id.*

[42] *Sadinsky*, 34 C.M.R. at 346.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 345.

[46] *Id.* (citing United States v. Holliday, 16 C.M.R. 28, 30 (C.M.A. 1954)).

[47] 42 C.M.R. 131 (C.M.A. 1970).

because it was "The White Man's War."[48] At one point, he organized several other Marines in his unit to join him in refusing to go to Vietnam and requesting discharge from the Marine Corps.[49]

Daniels was charged under the third prong of Article 134, assimilating 18 U.S.C. § 2387. Section 2387 was a successor statute to the Espionage Act of 1917, the very statute at issue in *Schenck*.[50] The Government's evidence at trial included testimony by another Marine, Private Jones, whom Daniels had urged to refuse to go to Vietnam and request a discharge.[51] The Court utilized the *Schenck* "clear and present danger" test and found that Daniels's statements had caused "an impairment of the loyalty and obedience" of Private Jones and several other Marines in his unit.[52] Despite the fact that his statements did not accomplish what he had intended (Jones did not refuse to go to Vietnam), the Court was satisfied that he had intended to impair loyalty, morale, and discipline and that there was a clear and present danger that his activities would cause disloyalty and insubordination.[53]

The court in *Daniels*, which applied the *Schenck* test and found "[t]he failure did not immunize the accused from prosecution," seemed to require less than a showing of actual prejudice to uphold a conviction under Article 134.[54] The facts of *Daniels*, however, indicate that there was in fact an impact on unit morale and discipline: several Marines were apparently incited to refuse to fight in the war even though they did not ultimately refuse. As of 1970, then, the law in the military was still unclear. Was actual prejudice, as envisioned by *Sadinsky* necessary for speech to be illegal? The court attempted to answer that question two years later in *United States v. Priest*.[55]

In 1969, Journalist Seaman Apprentice (JOSA) Roger Priest, stationed in Washington, D.C., edited and published a newsletter called "OM," which he distributed around Washington and mailed to servicemembers nationwide.[56] Several articles in OM were highly critical of U.S. policy, especially the war in Vietnam.[57] Priest encouraged his readers to resist U.S. policy by refusing to go to Vietnam, and he even gave detailed instructions on how to desert and flee to Canada.[58] At times, his language espoused violence. He advocated the violent end to several prominent officials and threatened the use of violence to achieve his goals.[59]

The Navy convicted JOSA Priest under prong one of Article 134.[60] On appeal, his counsel argued that his conduct was not prejudicial to good order and discipline.[61] In addressing JOSA Priest's claim, the court first repeated the *Sadinsky* holding that Article 134 requires conduct to be "palpably prejudicial to good order and discipline, and not merely prejudicial in an indirect and remote sense."[62] The court next reiterated that servicemembers were entitled to less First Amendment protection than civilians because restrictions on speech exist in the military for reasons that do not apply to the civilian community.[63] "Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[64]

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[48] *Id.* at 135.

[49] *Id.* at 135–136.

[50] *Id.* at 134; *see* United States v. Schenck, 249 U.S. 47, 48 (1919).

[51] *Daniels*, 42 C.M.R. at 136–137.

[52] *Id.* at 137.

[53] *Id.* at 136–38.

[54] *Id.* at 138.

[55] 45 C.M.R. 338 (1972).

[56] *Id.* at 339-40, 343. He distributed 800 free copies in Washington alone, to locations including the Navy Exchange, the Washington Navy Yard, and the Pentagon newsstand. *Id.*

[57] *Id.* at 340.

[58] *Id.* at 340–41.

[59] *Id.* at 341.

[60] 45 C.M.R. 338.

[61] *Id.* at 341–42.

[62] *Id.* at 343 (citing United States v. Snyder, 4 C.M.R. 15, 18 (C.M.A. 1952)).

[63] *Id.* at 343–44.

[64] *Id.* at 344 (citing United States v. Gray, 42 C.M.R. 255, 258 (C.M.A. 1970)).

The court had to determine if JOSA Priest's actions legally amounted to conduct prejudicial to good order and discipline when it did not appear anyone was influenced by his statements to desert or to refuse to fight in Vietnam, or that his words caused a disruption in any of the units of the people who read his newsletter. Essentially, the Government proved that JOSA Priest made the statements and that they were disloyal. But did they prove that the statements had a tendency to disrupt good order and discipline, and did they have to?

The CMA addressed the question stating, "[T]he danger resulting from an erosion of military morale and discipline is too great to require that discipline must already have been impaired before a prosecution for uttering statements can be sustained."[65] The court established a new test: "Our inquiry . . . is whether the gravity of the effect of [an] accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction."[66]

In upholding JOSA Priest's conviction, the court found, "[T]he Government is entitled to protect itself in advance against a calculated call for revolution," and it ruled the statements' tendency was such that they could palpably and directly affect military order and discipline.[67] Therefore, JOSA Priest could be punished under Article 134.[68] After *Priest*, it appeared that the government could simply prove that an accused had used certain speech, and if the words were so offensive or dangerous as to speak for themselves, the fact-finder could reasonably infer that their tendency was prejudicial to good order and discipline or service discrediting.

IV. *United States v. Wilcox*[69] and the Current State of the Law

The first case since *Priest* to significantly change the military's treatment of speech offenses was *United States v. Wilcox*.[70] In *Wilcox*, the CAAF addressed the conviction of an Army paratrooper who was convicted under Article 134, in part, for espousing racist, anti-Semitic, and disloyal viewpoints during private Internet "chats" with an undercover military investigator.[71] In overturning his conviction,[72] the court ruled that the Government had failed to present any evidence to show that his conduct was prejudicial to good order and discipline or service discrediting.[73] Along the way, the court greatly eroded the legacy of *Priest*, *Parker*, and *Schenck*, and ushered in a new and more restrictive test for speech crimes in the military.

Private First Class (PFC) Jeremy Wilcox, on active duty with the Army's 82d Airborne Division at Fort Bragg, created two America Online (AOL) Internet profiles.[74] Each profile announced he was a member of the Army stationed at Fort Bragg and contained statements and phrases that made it clear he was a white supremacist.[75] After a civilian police officer noticed the profiles describing PFC Wilcox's racist views and identifying him as an Army paratrooper, he alerted the Army's Criminal Investigation Command (CID).[76] An agent with CID, Investigator Sturm, posed as a young female with an interest in white supremacy and created her own AOL account to communicate with PFC Wilcox.[77] During their online "chats," PFC Wilcox made several racist and anarchistic statements to Sturm[78] and encouraged her to visit racist websites.[79]

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[65] *Id.*

[66] *Id.* at 344–45.

[67] *Id.* at 345.

[68] *Id.* at 345–46.

[69] 66 M.J. 442 (C.A.A.F. 2008). The author acted as government appellate counsel on this case the first time it went before the Court of Appeals for the Armed Forces and the second time it went before the Army Court of Criminal Appeals. In addition, the author supervised the attorney who represented the Government the second time it went before the Court of Appeals for the Armed Forces.

[70] *Id.* at 442.

[71] *Id.* at 445.

[72] *Id.* at 452.

[73] *Id.*

[74] *Id.* at 445.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

Private First Class Wilcox was tried and convicted of several offenses, including a specification under prongs one and two of Article 134.[80] The single specification accused him of making racist, anti-government, and disloyal statements and advocating racial intolerance by advising others on racist views, which "conduct was to the prejudice of good order and discipline in the armed forces *or* was of a nature to bring discredit to the armed forces."[81] At trial, the Government produced Wilcox's online profiles, including their racist language; Investigator Sturm, who testified regarding the online conversations she had with PFC Wilcox; and expert testimony that PFC Wilcox's words were consistent with the white supremacy movement.[82]

The court began its analysis by re-examining the holding in *Parker*.[83] It stated that the Supreme Court in *Parker* upheld the constitutional viability of Article 134 only because of the limitations military case law had placed on it.[84] In essence, the Supreme Court did not nullify Article 134 as overbroad or vague because the military had always used it responsibly and had a body of law in place to ensure that it would continue to do so. Therefore, the court stated, it was important for military courts to narrowly limit conduct proscribed by Article 134.[85]

The court then employed an interesting interpretation of the *Priest* opinion to determine that, in speech cases charged under Article 134, the Government must show a "'reasonably direct and palpable' connection between an appellant's statements and the military mission."[86] Significantly, the *Priest* decision never required this. The language the CAAF relied on from *Priest* actually stated, "[T]his Court has construed Article 134 . . . as requiring punishable conduct to be 'palpably prejudicial to good order and discipline and not merely prejudicial in an indirect and remote sense.'"[87]

The difference between the language of *Priest* and the interpretation in *Wilcox* is subtle but important. The original language said only that the military nexus between the conduct and good order and discipline must be more than speculative, indirect, or remote.[88] The CAAF's opinion in *Wilcox*, however, elevated that standard. By requiring the Government to prove beyond a reasonable doubt that an accused's speech have a "reasonably direct and palpable connection to the military mission," the court established a new test, essentially requiring actual prejudice.[89] In fact, it went on to extend this heightened standard to include speech cases charged under clause two of Article 134: "We conclude that a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory."[90]

The court relied on this new standard throughout its opinion.[91] It examined the facts to determine if the conduct resulted in a "direct and palpable effect on the military mission or military environment."[92] The court found no evidence that PFC Wilcox's statements had actually affected unit morale, discipline, or cohesion. Likewise, they found no evidence that someone had read the statements, believed the speaker to be in the military, and, as a result, held the military in lower esteem. Therefore, the CAAF ruled the Government had not met its burden under the new standard, and the evidence was legally insufficient to sustain a finding of guilty under Article 134.[93]

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[79] *Id.*

[80] *Id.* at 443–44.

[81] *Id.* at 444 (emphasis added).

[82] *Id.* at 445–46.

[83] *Id.* at 447.

[84] *Id.*

[85] *Id.*

[86] *Id.* at 448 (citing United States v. Priest, 45 C.M.R. 338, 343 (1972)).

[87] *Priest*, 45 C.M.R. at 343 (citations omitted).

[88] *Id.*

[89] *Wilcox*, 66 M.J. at 448 (citing *Priest*, 45 C.M.R. at 343).

[90] *Id.*

[91] *Id.* at 448–51.

[92] *Id.* at 450.

[93] *Id.* at 451–52.

The court in *Wilcox* created two new tests for speech cases charged under Article 134. First, it established a three-part analysis for reviewing speech convictions.[94] Is the speech "otherwise protected under the First Amendment"?[95] Did the Government prove all the elements of Article 134?[96] If both these questions are answered in the affirmative, the court must then balance the needs of the military against the servicemember's right to speak freely.[97] In addition to this three-part analysis, the court created a new test for determining the quantum of evidence necessary to satisfy the final element of Article 134.[98] The court essentially stated, relying on their interpretation (or misinterpretation) of *Priest*, that the Government needed to show an actual connection between the conduct and the prejudice to the mission or discredit to service.[99]

This second test enunciated in *Wilcox* represents a paradigm shift in military law regarding speech offenses. As discussed earlier, by elevating the quantum of proof required by *Schenck* and *Priest*, it heightened the standard for criminalizing speech cases under either the first or second prong of Article 134. No longer could the Government argue the tendency of words. From *Wilcox* forward, the Government would have to prove it. The CAAF had created an actual prejudice and discredit test for speech cases charged under Article 134.

One of the first cases to employ the new *Wilcox* test was the Coast Guard case of *United States v. Blair*.[100] In *Blair*, Storekeeper Third Class (SK3) Blair drove to a public airport twice in a Government vehicle.[101] Both times, while there, he posted Ku Klux Klan recruiting flyers on the mirror in the men's restroom.[102] On both occasions, SK3 Blair was dressed in civilian clothes, but several people at the airport knew him and knew that he was in the Coast Guard.[103] No one ever saw SK3 Blair post the flyers.[104]

The Coast Guard charged SK3 Blair with several offenses, including a specification under Article 134 for "wrongfully recruiting for, soliciting membership in, and promoting activities of the Ku Klux Klan while publicly displaying an affiliation with the Armed Services."[105] At his general court-martial, SK3 Blair pled guilty and admitted that his public conduct had a tendency to bring the service into disrepute or lower it in public esteem.[106] The military judge accepted his plea, and convicted and sentenced him.[107]

On appeal, SK3 Blair argued that his plea should not have been accepted by the military judge because the facts he admitted did not amount to a "public display of affiliation with the Armed Services," especially since he was not seen posting the flyers.[108] The Coast Guard Court of Criminal Appeals relied on the new *Wilcox* test to analyze SK3 Blair's claim.[109] First, the court recognized that the case was different than *Wilcox* because it was a guilty plea where the appellant had acknowledged the service-discrediting nature of his conduct under oath.[110] In addition, albeit during the sentencing case, evidence in the record demonstrated actual service discredit. The director of the airport, an Air Force retiree, testified that when he found out a Coast Guardsman had posted the flyers, "it just made [him] sick."[111]

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[94] *Id.* at 447.

[95] *Id.*

[96] *Id.*

[97] *Id.* (citing United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972)).

[98] *Id.* at 448–51. The first element is that the accused committed some act, and the second element is that the act was prejudicial or service discrediting. UCMJ art. 134 (2008).

[99] *Id.* at 448–49.

[100] 67 M.J. 566 (C.G. Ct. Crim. App. 2008).

[101] *Id.* at 569.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* at 567.

[106] *Id.* at 569.

[107] *Id.* at 567.

[108] *Id.* at 569.

[109] *Id.* at 570.

[110] *Id.*

[111] *Id.* at 571.

Still, the court in *Blair* did discuss the *potentially* service-discrediting effect of SK3 Blair's actions. In reciting the facts of the case, the court stated that SK3 Blair "*could* have been seen posting the flyer if anyone had walked into the restroom."[112] In comparing its case to *Wilcox*, the court stated, "Surely the *possibility* of a member of the public observing [SK3 Blair's] conduct and taking it seriously was much greater than such a possibility in the *Wilcox* case."[113] Thus, the *Blair* court seemed to rely on something far more speculative and remote than the "reasonably direct and palpable connection" required by *Wilcox*.

Blair will withstand scrutiny by the CAAF because the appellant pled guilty and testified that his conduct was *in fact* service discrediting. The pains the *Blair* court had to go through, however, to uphold his guilty plea point out the potential difficulty military courts and practitioners may have with the new *Wilcox* standard.

V. Regulating Speech in the Military

While all of the examples cited thus far have involved political or "hate" speech charged under the General Article, there are several other forms of speech the military can regulate. These other offenses should not ordinarily be subject to the type of scrutiny the courts used in cases like *Priest* and *Wilcox*. The first group of these type of offenses contained in the UCMJ can be referred to as "verbal acts." These offenses involve speech as the medium of the conduct, but are not designed to criminalize expression. Examples include solicitation,[114] false official statement,[115] perjury,[116] false swearing,[117] and communicating a threat.[118] Another group of offenses contained in the UCMJ involving speech are purely military offenses—crimes that have no comparable offense in civilian criminal law and are uniquely designed to preserve the military rank structure, obedience to command, and good order within the ranks. These offenses include contempt toward officials,[119] disrespect toward a superior commissioned officer,[120] insubordinate conduct,[121] and disloyal statements.[122]

Next, speech offenses can be charged as a violation of a lawful regulation. For example, Army Regulation 600-20 prohibits Soldiers from participating in public rallies or demonstrations, recruiting, or distributing literature for any extremist organization.[123] Accordingly, a Soldier who tries to recruit other members of his unit to join the Ku Klux Klan or marches in a demonstration protesting the burial of fallen servicemembers could be prosecuted under Article 92 for disobeying a lawful general regulation. In the Army, mere membership in an extremist organization can result in a negative performance evaluation, loss of security clearance, or even a bar to reenlistment.[124]

Commanders can also order servicemembers not to engage in certain types of speech. For example, to increase operational security, a unit deploying to a theater of contingency operations could order its members not to keep an Internet blog of their activities in the area of operations. A Soldier who violates such an order could be prosecuted under Article 92 for disobeying a lawful order.

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[112] *Id.* at 569 (emphasis added).

[113] *Id.* at 570 (emphasis added).

[114] UCMJ art. 82 (2008).

[115] *Id*. art. 107.

[116] *Id*. art. 131.

[117] *Id*. art. 134.

[118] *Id*.

[119] *Id*. art. 88.

[120] *Id*. art. 89.

[121] *Id*. art. 91.

[122] *Id*. art. 134.

[123] U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY para. 4-12 (18 Mar. 2008) [hereinafter AR 600-20] ("Participation in extremist organizations and activities by Army personnel is inconsistent with the responsibilities of military service.").

[124] *Id.*

Of course, the main focus of this article, and the most controversial form of restriction on speech, involves those cases charged under the General Article.[125] Like any other class of misconduct, speech offenses charged under Article 134 are often the most susceptible to abuse, challenge, and scrutiny. Article 134 can still be used, however, to charge several different forms of speech, so long as they pose a clear danger to the military mission or environment under the *Wilcox* test.

VI. Practice Tips for Trying Speech Cases in the Military

Military prosecutors need to be aware of the difficulty of trying speech cases. Unlike a murder, fraud, or larceny case, the line between "legally protected" and "criminal" in speech cases is particularly blurry. Civilian and military courts alike are reluctant to circumscribe an individual's freedom of expression. Military prosecutors need to recognize criminal speech when they see it and prosecute it correctly.

Remembering four simple rules will help trial counsel avoid acquittal or reversal.

Rule 1: *Anything but 134*. When faced with dangerous speech, trial counsel should endeavor to find some article of the Code, or some regulation or order, which proscribes the speech, other than Article 134. Other articles have defined elements and evidentiary standards that judges, panels, and practitioners may feel more comfortable following than the General Article. In addition, using these other offenses negates the need to go through the "mental gymnastics"[126] of the *Wilcox* test.

Rule 2: *Pass the* Wilcox *Test*. If Article 134 is the only option, trial counsel should ensure that the facts of the case are sufficient to pass the *Wilcox* test. Is the speech otherwise protected? Can the Government prove the elements of Article 134, especially the prejudice or discredit element, beyond a reasonable doubt? Will the facts of the case withstand a judicial balancing test between the needs of the military and the rights of the individual servicemember?[127] Can the trial counsel articulate a compelling governmental interest in suppressing an individual's First Amendment rights?[128]

Rule 3: *Exigencies of Proof*. The prosecutors in *Wilcox* prudently charged in the alternative. By charging his speech as prejudicial *or* service discrediting, they allowed for exigencies of proof. If they were unable to provide evidence, or if the fact-finder was unwilling to make an inference as to one theory under Article 134, they always had another basis of liability. Practitioners should consider charging in the alternative in Article 134 prosecutions.

Rule 4: *Put It on the Record*. *Wilcox* may have survived appeal if evidence had been presented that Wilcox's speech had actually impacted unit morale, discipline, or preparedness, or that it had actually reduced the public esteem for the armed forces. Imagine if a Soldier had testified that he read PFC Wilcox's comments and did not want to serve anymore, or if the police officer who discovered PFC Wilcox's AOL profile testified that he thought less of the Army after discovering it. While the language of the *Wilcox* opinion does not formally demand proof of *actual* impact, the restrictions imposed therein cannot realistically be satisfied without it. The trial counsel who can provide evidence of an actual impact on good order and discipline or service discredit will have a stronger case on appeal.

In addition, trial counsel should be prepared for likely defense tactics. Defense counsel representing an accused charged with a speech offense will likely begin their defense with motions, including motions to dismiss based on failure to state an offense and on constitutional grounds. Defense counsel will attempt to show that their client's statements did not *actually* impact unit mission or morale. Put another way, they will keep the Government from proving the final element of Article 134. Armed with *Wilcox*, the defense counsel could argue for a dismissal under Rule for Court-Martial 917.[129]

Defense counsel will also likely be selective in agreeing to panel instructions. For cases charged under Article 134, the Government is not entitled to an instruction on all three theories of liability; rather, they are entitled only to the one (or ones) specifically charged. For example, if the Government charges that the accused made a statement that brought discredit upon the armed forces, the defense will likely not agree to an instruction regarding prejudice to good order and discipline. By

[125] A similar analysis can be used for cases against officers charged under Article 133 (conduct unbecoming an officer and gentleman), although the elements of that offense are distinct from those of Article 134.

[126] See *supra* Part IV, at 23.

[127] United States v. Wilcox, 66 M.J. 442, 447 (C.A.A.F. 2008).

[128] See *supra* Part IV, at 23.

[129] MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 917 (2008).

opposing an instruction on this issue, the defense counsel can more effectively hold the Government to its burden during closing argument. Trial counsel need to be mindful of these defense strategies and plan accordingly.

Trial counsel prosecuting speech offenses face unique challenges in this evolving area of the law. It is difficult to imagine an area of American law where society is more hesitant to call a particular act a crime. In addition, these cases are rife with constitutional pitfalls and evidentiary hurdles. To prevail in the face of these obstacles, trial counsel must examine the relevant case law[130] and focus on what is required to sustain a conviction.

VII. Conclusion

The right to free expression, for all Americans, is limited—limited to those situations where the speech has some potential value to society. That value can be negligible in some cases, but nonetheless, a free democracy will scrupulously protect the freedom to express such thoughts. "A society that tolerates [distasteful] speech is a strong society."[131] The military is no different in their its zeal to defend free expression, but there is a difference between the citizen and the Soldier. An ordinary citizen does not hold the safety and security of the entire nation in his hands. Because of this awesome responsibility, the Soldier is asked to sacrifice portions of his liberty for the greater good.

The twenty-first century marks the height of the "information superhighway." Between the Internet, e-mail, and cellular or satellite phones, individuals are able to communicate with the entire world from their desktop, their barracks room, or even their foxhole. With the ability to speak at an all-time high, the dangers inherent to speech are likewise on the rise. Both military prosecutors and commanders need to be aware of the restrictions on speech in the military. *United States v. Wilcox* changed the landscape for speech cases and made it harder to restrict speech that could impair the military, and by extension, the nation. By understanding this area of the law, the judge advocate can better protect the future of both.

[130] Counsel at all levels, representing both sides, need to recognize the shift in the law that *United States v. Wilcox* represents. Counsel should therefore apply "pre-*Wilcox*" case law with caution.

[131] *Wilcox*, 66 M.J. at 457 (Baker, J., dissenting).