

FREE SPEECH

Free Speech and Social Media Issues Affecting Military Members

You asked what discretion and options commanders have in addressing speech by servicemembers, especially with regards to speech which is aired to the public or large audiences via electronic means.

CONSTITUTIONAL PROTECTION

The importance of the right to free speech in a democratic society can hardly be overstated. The same can be said of the maintenance of good order and discipline in the armed forces that protect those rights. On occasion, the rights of a servicemember to speak his or her mind collide with military good order and discipline, and the courts have developed a variety of legal theories as to when and what standards should apply to servicemembers' free-speech rights. Although these legal theories have been inconsistently developed and applied, certain relevant parameters can be discerned.

First, when civilians join the armed forces and pull on their combat boots for the first time, they are not simultaneously stripped of their First Amendment rights. Their rights, however, are diminished, even though the courts have avoided specifically explaining how and to what degree.¹ When reminding us that servicemembers are protected by the First Amendment, courts have historically been quick to reiterate that servicemembers' rights are not the same as their civilian counterparts.² An oft-cited principle is that "First Amendment rights in the armed services are not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country."³

Pointing to the overriding concerns of maintaining that effective fighting force, courts have upheld criminal convictions for military members for conduct that would be legal in the civilian community:

- 1) Directly encouraging or attempting to encourage other military members to shirk their duty or making statements critical of war efforts to other military members,⁴
- 2) Distributing on-base newsletters critical of war effort,⁵

¹ In *United States v. Wilcox*, arguably the most expansive military court ruling in favor of free speech by servicemembers, CAAF described those rights as "potentially less protective" than those enjoyed by civilians and further commented that "servicemembers enjoy *some measure* of the right to free speech granted by the First Amendment." 66 M.J. 442, 446-47 (2008) (emphasis added).

² *United States v. Zimmerman*, 43 M.J. 782, 785 (ACCA 1996) (citing *United States v. Priest*, 45 C.M.R. 338 (CMA 1972)).

³*Id.*

⁴ *United States v. Daniels*, 42 C.M.R. 131 (CMA 1970) (UCMJ, Art. 134, federal treason statute); *United States v. Gray*, 42 C.M.R. 255 (CMA 1970) (Art. 134, disloyal statements prejudicial to good order and discipline); *Parker v. Levy*, 417 U.S. 733 (1974) (Art. 133 and Art. 134, disloyal statements prejudicial to good order and discipline); *Avrech v. Sec. of the Navy*, 520 F.2d 100 (D.C. Cir. 1975) (Art. 134, disloyal statements prejudicial to good order and discipline); *United States v. Brown*, 45 M.J. 389 (CAAF 1996) (Art. 134, federal anti-strike law).

⁵ *Priest*, 45 C.M.R. 338 (CMA 1972) (Art. 134, prejudice to good order and discipline).

- 3) Participating in an anti-war rally (in civilian clothes) and carrying a sign critical of the President,⁶
- 4) Participating in an overseas anti-war rally (in civilian clothes) in violation of a regulation against such activity,⁷
- 5) Disrespecting the flag while on duty,⁸
- 6) Disrespecting senior officers,⁹
- 7) Giving a false speech to high school students about fictitious battlefield accounts,¹⁰
- 8) Private, but indecent, speech (obscene),¹¹
- 9) Private, but suggestive, letter written to a 14-year-old girl (non-obscene),¹²
- 10) Speech amounting to sexual harassment or abuse of subordinates,¹³ and
- 11) Anonymously posting white supremacist recruiting materials in a public place.¹⁴

Courts have addressed and upheld adverse administrative actions for military members in the following circumstances:

- 1) Circulating a petition on base without first getting command approval¹⁵ and
- 2) Trying to convince other military members to refuse the anthrax vaccine.¹⁶

Courts have also upheld the military's authority to require obtaining base commander approval before circulating petitions on base¹⁷ and to restrict stickers and signs on vehicles demeaning to the President.¹⁸

UNPROTECTED SPEECH

Military speech issues essentially pose the question of whether, and to what degree, a military member's free speech rights are outweighed by military interests. This requires an analysis of the relative weight of each.

Certain speech is entirely unprotected by the First Amendment. In other words, courts have ruled that military interests outweigh speech that has little to no value, and such speech may be freely regulated and punished in appropriate cases. Although military courts have not

⁶ *United States v. Howe*, 37 C.M.R. 1967 (CMA 1967) (Arts. 88 and 133).

⁷ *Culver v. Sec. of the Air Force*, 559 F.2d 622 (D.C. Cir. 1977) (Arts. 92 and 133).

⁸ *United States v. Wilson*, 33 M.J. 797 (ACMR 1991) (Art. 92).

⁹ *United States v. Claytor*, 34 M.J. 1030 (NMCMR 1992).

¹⁰ *United States v. Stone*, 37 M.J. 558 (ACMR 1993), *aff'd*, 40 M.J. 420 (CMA 1994) (Art. 134, service discrediting conduct).

¹¹ *United States v. Moore*, 38 M.J. 490 (CMA 1994) (Art. 133).

¹² *United States v. Hartwig*, 39 M.J. 125 (CMA 1994) (Art. 133).

¹³ *United States v. Gill*, 40 M.J. 835 (AFCMR 1994) (Art. 134, indecent language prejudicial to good order and discipline); *United States v. Caver*, 41 M.J. 556 (NMCCA 1994) (same).

¹⁴ *United States v. Blair*, 67 M.J. 566 (CGCCA 2008) (Art. 134, service discrediting conduct).

¹⁵ *Brown v. Glines*, 444 U.S. 348 (1980) (Art. 92).

¹⁶ *Millican v. United States*, 744 F.Supp.2d. 296 (D.D.C. 2010). *See also*, Air Force Board for Correction of Military Records, Docket No. BC-2003-02505 (2004).

¹⁷ *Carlson v. Schlesinger*, 511 F.2d 1327 (D.C.Cir. 1975).

¹⁸ *Etheridge v. Hail*, 56 F.3d 1324 (11th Cir. 1995).

consistently applied the “protected” and “unprotected” labels,¹⁹ there is a body of language courts have generally agreed is “unprotected.” In both the civilian and military legal systems, unprotected speech has historically included fighting words, obscenity, and dangerous speech.²⁰ At least two military cases have determined that indecent language under the UCMJ qualifies as obscenity, and therefore, is unprotected by the First Amendment.²¹

The standard for “dangerous speech” in the civilian community has evolved from the “clear and present danger” test²² to the “incitement rule.”²³ Dangerous speech is defined more broadly for military members than it is for civilians. In military law, dangerous speech is speech which “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops.”²⁴ When there is evidence that the speech in question falls into this military definition of dangerous speech, the speech does not qualify for First Amendment protections and may be regulated or prohibited by the command. Commanders have the greatest amount of discretion to prohibit, restrict, and punish speech when the courts have determined that the particular category of speech is unprotected.

Courts have also found that speech, which undermines the effectiveness of response to command, is unprotected by the First Amendment. These cases have involved such offenses as distributing anti-war newsletters,²⁵ denigrating the war effort to other military members,²⁶ and using indecent language to address a subordinate.²⁷

Furthermore, courts have declined to extend First Amendment protections to speech or expressive conduct that either meets the elements of, or presents a clear and present danger of, violating a specific offense, such as UCMJ Article 88 (contempt toward officials), Article 89 (disrespect toward a superior commissioned officer), Article 92 (failure to obey order or regulation), Article 133 (conduct unbecoming) and specific provisions of Article 134 (such as disloyal statements).²⁸ The courts have not clearly explained whether such speech is unprotected

¹⁹ For example, the Court of Military Appeals concluded that “The First Amendment does not protect false statements about military operations made by a soldier in uniform to a public audience of high school students during wartime” without explaining how or why this is true (the Army Court of Military Review had simply concluded that the conduct amounted to a valid offense under Article 134). *Stone*, 40 M.J. at 424-25.

²⁰ *See, e.g., Wilcox*, 66 M.J. at 448.

²¹ *Moore*, 38 M.J. 490; *Gill*, 40 M.J. 835.

²² *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“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.”)

²³ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*) (The government may not “forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

²⁴ *Wilcox*, 66 M.J. at 448 (citing *Brown*, 45 M.J. at 395); *Millican*, 744 F.Supp.2d. 296; *Greer v. Spock*, 424 U.S. 828, 840 (1976) (military may prohibit political campaigning on installations and require command review and approval prior to distribution of literature).

²⁵ *Priest*, 45 C.M.R. 338 (CMA 1972)

²⁶ *Gray*, 42 C.M.R. at 258; *Levy*, 417 U.S. at 759.

²⁷ *Caver*, 41 M.J. 556.

²⁸ *Howe*, 37 C.M.R. 429 (UCMJ Arts. 88 and 133 for participating in an anti-war protest and carrying a sign calling the president a fascist); *Claytor*, 34 M.J. 1030 (Art. 89); *Daniels*, 42 C.M.R. 131 (federal treason statute); *Stone*, 40 M.J. 420 (Art. 134 – false speech was service discrediting); *Hartwig*, 39 M.J. 125 (Art. 133 for writing a suggestive, but not indecent, letter to a 14-year-old girl).

because the speech qualifies as “dangerous,” if the government interest in enforcing the law trumps free-speech rights, or for some other reason. In the Court of Appeals for the Armed Forces’ most-recent case on free speech – *United States v. Wilcox* – the court suggests that speech which is not dangerous, obscene, or fighting words is protected under the First Amendment, regardless of how charged. As such, it would be prudent to confine the prior holdings of speech being “unprotected” to the facts of those particular cases.

PROTECTED SPEECH

At the other end of the spectrum are content-based restrictions on the speech of the American public at large. In the civilian sector, such restrictions are only permissible if they meet the high hurdle of strict scrutiny (the restriction must promote a compelling government interest; the restriction must be narrowly tailored; and there is no less-restrictive alternative available).²⁹ Valid compelling government interests have included things like remedying past discrimination, protecting the integrity of the electoral system, and protecting minors from adult media.³⁰ Protecting national security interests is also a compelling interest.³¹ We have not found any court rulings where strict scrutiny has clearly been applied to a military restriction on speech.³²

Even when speech is protected, military commanders may restrict that speech in certain circumstances. The main overarching variable to consider is whether the restriction is based on the content of the speech (“content-based”) or content-neutral.

Content-neutral restrictions, which regulate the time, manner, and place of speech without regard to the content of the speech, have a lower burden than content-based restrictions. Content-neutral cases typically involve regulations requiring commander approval before (or outright prohibition of) on-base circulation of petitions, requiring protection of the flag, limits on signs in on-base housing, and so on. Courts have not been consistent in describing what burden the government must overcome with respect to content-neutral speech. In some cases, the military must strike a balance between military needs and First Amendment rights, and a military commander’s decision will be upheld unless it amounts to an abuse of discretion.³³ Others call for identifying a “legitimate”³⁴ or a “substantial” government interest.³⁵ In general, a legitimate or substantial government interest in regulating the time, manner, and place of speech will override servicemembers’ free speech rights, as long as the restriction is content-neutral, reasonable, and is designed to address a legitimate, identifiable government interest. Examples of military interests recognized by courts include, but are not limited to, mission, loyalty, good order, discipline, morale, obedience, unity, uniformity, unit cohesion, commitment, esprit de

²⁹ *United States v. Playboy Entertainment Group, Inc.*, 120 S.Ct. 1878 (2000) (rejecting a blanket prohibition on certain types of broadcasts when a technological method of restricting the broadcasts is a less-restrictive means for meeting the government’s interest of protecting children from adult broadcasts).

³⁰ *Id.*

³¹ See, e.g., *United States v. Lonetree*, 35 M.J. 396 (CMA 1992).

³² But see the dissenting opinion in *Wilcox*, 66 M.J. 448

³³ See, e.g., *Carlson*, 511 F.2d at 1333; *Wilson*, 33 M.J. at 798 (“... words and actions are entitled to protection unless there is a greater countervailing government interest in suppressing the particular speech or expressions in question.”).

³⁴ *Carlson*, 511 F.2d at 1332; *Avrech*, 520 F.2d at 103; *Brown*, 45 M.J. at 396.

³⁵ *Glines*, 444 U.S. at 354.

corps, and civilian supremacy. An arbitrary restriction with no relationship to any identifiable military interest would likely fail.

Content-based restrictions have a higher burden to meet in order to be valid. These cases often involve things like espousing racial supremacy, disparaging other servicemembers, undermining unit cohesion, bringing discredit on the service, and other cases where it is the particular message that is problematic. If the speech falls outside a previously identified “unprotected” category, the commander should presume the speech is protected by the First Amendment to some degree, no matter how offensive it may be. This is the approach CAAF calls for in *Wilcox*.³⁶ One example of protected speech would be where a member makes statements belittling fellow Airmen in a purely private conversation between two friends, and there is no evidence of either mission impact or danger to loyalty, discipline, mission, or morale of the troops.

CRIMINAL SANCTION

In order for protected speech to be punishable under the UCMJ, not only do all the elements of a particular article in the UCMJ have to be met, but emphasis should be placed on identifying the specific military need to restrict the speech. If the offense falls under Article 92, failure to obey order or regulation, the validity of the underlying order must be scrutinized by identifying the military interests the order or regulation is intended to protect. If the order or regulation is a content-neutral time/place/manner restriction, the military interests should be clearly identifiable, but need not necessarily be as strong as those required to support an order prohibiting content-based speech. For example, an order prohibiting personal phone calls at a customer-service desk could be a valid restriction if the purpose is to protect the military interest of maintaining a professional appearance. When dealing with content-based restrictions, however, the military interest must be more closely tied to the mission and good order and discipline. For example, an order prohibiting demeaning break-room gossip about fellow Airmen would have to be based on the more crucial military interests of maintaining unit cohesion, morale, and esprit de corps.

In order to punish protected speech under UCMJ Article 134, the evidence must either show an actual direct and palpable connection between the speech and the military mission or military environment. This is true whether the speech is described as of a nature to bring discredit on the service or prejudicial to good order and discipline.³⁷ Speech that has only an indirect, remote, or hypothetical connection to the military will therefore generally not support a conviction under Article 134. Commanders should consider such factors as whether any members have heard the speech, whether the speech was communicated privately, the foreseeability of the speech impacting or reflecting on the service (*e.g.*, is the topic unrelated to the military or a current widespread topic of discussion?), and/or the degree of impact or threatened impact on the mission.

³⁶ In *Wilcox*, the appellant had set up an online profile in which he identified himself as a “US Army Paratrooper” stationed at Fort Bragg. He also identified himself as a white supremacist who did not support the U.S. government. CAAF determined this speech was “protected.” The court then found the evidence was insufficient to support an Article 134 offense due to the absence of proof of a direct and palpable connection between the speech and the military. 66 M.J. at 445-46, 449-51.

³⁷ *Brown*, 66 M.J. at 448-49.

ADMINISTRATIVE SANCTION

It is critical to distinguish between criminal sanctions and administrative sanctions. Although a commander may not be able to prohibit a subordinate from making certain protected speech, the content of the speech may form the basis for administrative actions including counselings, comments on performance reports, and the like when the otherwise protected speech calls into question his/her judgment; willingness to support the constitution and obey lawful orders and regulations; and ability to faithfully discharge duties. It can also diminish his/her utility as an Airman. Air Force leaders have an obligation to Airmen to make sure commanders and supervisors treat all of their subordinates fairly and in accordance with the law, policy, and regulation. For example, if an Airman makes a racist statement that becomes public knowledge, it could impact his/her ability to lead an organization and people. In such a case, a commander could have a responsibility to act; however, the actions taken should be no more than is necessary to protect the important military interest of ensuring all current and future subordinates are treated fairly. Such speech may support assignment decisions (e.g., unsuitability for a command billet), downgraded performance ratings, adverse promotion recommendations, promotion propriety actions and other similar actions.

FEDERAL CIVILIAN EMPLOYEES

Although not directly applicable to servicemembers' speech, it is worthwhile to consider the permissible manner in which the government can take appropriate actions to hold civilian employees accountable for the consequences of their exercise of free speech rights. Generally, the government may take adverse personnel action against a civilian employee who engages in speech disruptive of the workplace. The Supreme Court has pointed out that, "When someone who is paid a salary so that she will contribute to an agency's effective operation, begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her. ... The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate."³⁸ In these cases, it's important to understand the government is not restricting the speech based on content, but instead, on the impact the speech (whatever was said) has on the workplace. It is also important to know the government employer need only show "potential disruptiveness" of the speech in question – not an actual disruption – before taking action.³⁹

RELIGION/SPEECH AND THE FY 13 NDAA

One important caveat outside the scope of this opinion is speech which amounts to the exercise of religion. Although speech couched in religious terms doesn't always amount to the exercise of religion, some speech may, and additional considerations must be weighed.

³⁸ *Waters v. Churchill*, 511 U.S. 661, 675 (1994).

³⁹ *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995), cert. denied, 116 S.Ct. 173 (1995). See also: *Connick v. Myers*, 461 U.S. 138, 154 (1983); *Sigman v. Dept. of Air Force*, 37 MSPR 352 (MSPB 1988), aff'd, 868 F.2d 1278 (Fed.Cir. 1989); *Johnson v. Dept. of Justice*, 65 MSPR 46 (MSPB 1994); *Means v. Dept. of Labor* 60 MSPR 108 (MSPB 1993), aff'd, 1994 WL 735411 (EEOC 1994).

Section 533 of the National Defense Authorization Act (NDAA) for Fiscal Year 2013 includes a provision regarding the protection of rights of conscience of members of the armed forces. This provision states: “The Armed Forces shall accommodate the beliefs of a member of the armed forces reflecting the conscience, moral principles, or religious beliefs of the member and, in so far as practicable, may not use such beliefs as the basis of any adverse personnel action, discrimination, or denial of promotion, schooling, training, or assignment.”⁴⁰

We do not believe §533 changes the analysis set forth in this opinion. The section includes an important caveat, which is that nothing precludes disciplinary or administrative action for conduct proscribed by the UCMJ, including actions and speech that threaten good order and discipline.⁴¹ We are currently awaiting DoD implementation guidance for this provision, which should provide greater clarity with respect to this provision. Nonetheless, the plain language of §533 pertains to the accommodation of beliefs, something we do not routinely take action upon (unless a particular belief is relevant to an offense, such as establishing intent). Actions and speech, however, are distinct from beliefs, and may serve as bases for administrative and punitive action. Notably, the President issued a “signing statement” addressing §533:

Section 533 is an unnecessary and ill-advised provision, as the military already appropriately protects the freedom of conscience of chaplains and service members. The Secretary of Defense will ensure that the implementing regulations do not permit or condone discriminatory actions that compromise good order and discipline or otherwise violate military codes of conduct. My Administration remains fully committed to continuing the successful implementation of the repeal of Don’t Ask, Don’t Tell, and to protecting the rights of gay and lesbian servicemembers; Section 533 will not alter that.⁴²

CONCLUSION

The bottom line is that the right to free speech is an important one, and restrictions of servicemembers’ speech rights should not be undertaken without carefully balancing those rights against identifiable and important military interests. SAF/GC concurs with this opinion.

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⁴⁰ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, §533(a)(1), 126 Stat. 1632 (2013).

⁴¹ *Id.* §533(a)(2).

⁴² Statement by the President, Jan. 3, 2013.