MILITARY CENSORSHIP IS TO CENSORSHIP AS . . . : PRIOR RESTRAINT IN THE ARMED FORCES

I. INTRODUCTION

With dissent mushrooming in the armed forces, an increasing number of underground newspapers, blunt and outspoken in their distaste for the Vietnam War and the role of the military in American foreign and domestic policy, have appeared on military bases.[1] Frequently, the response of base commanders has been to delay,[2] or suppress[3] the publication, and occasionally to punish its sponsors.[4]

A number of sanctions are available to commanding officers which may be invoked to stifle distribution of dissident literature at military bases. Article 89 of the Uniform Code of Military Justice[5] prohibits disrespect towards a superior commissioned officer, which is defined by the Manual for Courts-Martial as "acts or language, however expressed," such as "opprobrious epithets or other contemptuous or denunciatory language."[6] Under the General Article of the U.C.M.J. condemning all disorders and neglects to the prejudice of good order and discipline,[7] the making of disloyal statements is included as a military offense.[8] Alternatively, federal law imposes a criminal penalty on the distribution of any written or printed matter which "advises, counsels, or urges insubordination, disloyalty, or mutiny or refusal of duty by any

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[1] Pilati, Underground G.I. Press, Commonweal, Sept. 19, 1969, at 559; Rechy, The Army Fights an Idea, Nation, January 12, 1970, at 8; Sherman, Buttons, Bumperstickers and the Soldier, New Republic, Aug. 17, 1968, at 15.

In June 1970, the Pentagon placed the estimated number of underground G.I. newspapers at 50. N.Y. Times, June 21, 1970, at 1, col. 5. The N.Y. Times reported that, by Fall 1971, the number of underground newspapers had declined from 60 to 30. Despite this decrease, morale was at an unprecedented low. N.Y. Times, Sept. 5, 1971, at 1, col. 1. However, Del Rosario, liaison officer of the Vietnam Veterans Against the War, claimed 75 to 80 on-going publications as of March, 1972. Telephone interview with Del Rosario, in New York City, N.Y., March 31, 1972.

[2] Dippel, Getting Nowhere Through the Channels, New Republic, May 22, 1971 at 13 (2 month delay), N.Y. Times, November 22, 1971, at 31, col. 4 (8 month delay).

[3] Official Pentagon sources report that the Department of the Army has received 50 requests for suppression from base commanders since June 1969, and that 27 of those requests have been cleared by the Pentagon. Letter from Lt. Col. Robert D. Reed, Chief, Policy Branch Policy and Plans Division, Office of the Chief of Information, April 4, 1972, on file at the office of the Review of Law and Social Change.

[4] The first editor of the underground newspaper, Gigline, received unexpected orders for Vietnam shortly after the publication of its first issue. Rechy, The Army Fights an Idea, Nation, January 12, 1970, at 8. Private W. Carson was sentenced to 5 months at hard labor and forfeiture of 5 months' pay for attempting to distribute literature without prior approval. N.Y. Times, Feb. 15, 1970, at 48, col. 5. See also Id., Dec. 10, 1971, at 49, col. 2.

[5] 10 U.S.C. § 889 (1970) [hereinafter cited as U.C.M.J.].

[6] Manual for Courts Martial, United States ¶ 168 (rev. ed. 1969) [hereinafter cited as M.C.M.].

[7] 10 U.S.C. § 934 (1970). It is interesting to note that under the M.C.M. the General Article has been designed to sweep within the scope of illegality language which would be inoffensive under federal law. "Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under 18 U.S.C. § 2385, 2387, 2389" but may nonetheless by punishable under the General Article. M.C.M. § 213(f)(5).

[8] M.C.M. § 213(f)(5).

member of the armed forces," with an intent "[t]o interfere with, impair, or influence the loyalty, morale, or discipline of the armed forces."[9]

In addition to formal sanctions, base authorities frequently impose extra duty burdens, make punitive transfers, revoke privileges, or institute harassment prosecutions for insubstantial violations of military rules.[10] Because of the informal manner in which these punishments are imposed, they often elude detection.

However, the most direct method of preventing the distribution of dissident publications on military bases is provided by regulation. Under Army Regulation 210-10, Paragraph 5-5,[11] military base commanders may establish a censorship system to prohibit the distribution of materials which, they determine, pose a clear danger to base loyalty, discipline and morale.

This Note will examine the constitutional issues raised by A.R. 210-10 (5-5).[12] Principally, it is submitted that, contrary to the first amendment, the regulation imposes a prior restraint on the distribution of ideas, incorporates a standard in conflict with leading civilian precedent, and fails to provide constitutionally guaranteed procedural protections. These deviations from well established constitutional principles have been justified primarily by the military's need to maintain discipline. This Note will evaluate that rationale to determine whether it provides a constitutionally sufficient basis for a military censorship system.

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[9] All noncapital federal crimes or offenses, when committed by soldiers, may be within the jurisdiction of the military courts. 10 U.S.C. § 934 (1970), M.C.M. § 213(a). Therefore, soldiers may be prosecuted for violations of 18 U.S.C. §§ 2385, 2387, and 2389 in courts-martial.

[10] In Cortright v. Resor, 325 F. Supp. 797, 824 (E.D. N.Y. 1971) rev'd., 44 F.2d 245 (2nd Cir. 1971), it was established that the commander had used informal sanctions to punish expressions of opposition to the war in Vietnam. The informal sanctions included the imposition of extra-duty burdens, punitive transfers, harassment prosecution for insubstantial violations of military rules and revocations of privileges.

[11] ¶ 5-5, Army Reg. 210-10, Sept. 30, 1968, rev. March 10, 1969 [hereinafter A.R. 210-10 (5-5)]. See also Dept. of Defense Directive 1325.6, Guideline for Handling Dissident and Protest Activities Among Members of he Armed Forces (Sept. 12, 1969) [Hereinafter, all Department of Defense Directives will be referred to as D.O.D. Directives]; Department of the Army, Guideline on Dissent (May 27, 1969). The Army Regulations and the Department of Defense Directives are available at the Pentagon Library.

[12] Since this Note is primarily addressed to the first amendment problems raised by the military's censorship system, the question of whether the regulation has been properly authorized is beyond its scope. However, it should be noted that the Supreme Court has ruled that when a governmental agency issues a regulation which adversely affects substantial constitutional rights, the regulation must be explicitly authorized. Greene v. McElroy, 360 U.S. 474, 506-07 (1969):

> But the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power; it is whether either the President or Congress exercised such a power and delegated to the Department of Defense the authority to fashion such a program. Id. at 496.

Lt. Col. Robert D. Reed, Chief of the Policy Branch Policy and Plans Division has stated that, to the best of his knowledge and that of Lt. Col. Donald K. Bradbury, Deputy Chief of Staff and author of A.R. 210-10 (5-5), no executive order served as a basis for the promulgation of A.R. 210-10 (5-5). Telephone interview with Lt. Col. Robert D. Reed, in Washington, D.C., March 31, 1972. The absence of specific authorization raises the question of whether the President's constitutional power as commander-in-chief provides a sufficient basis for the promulgation of the regulation. Perhaps, the promulgation of an order to men in the military can be distinguished from the facts of *McElroy*, which dealt with the establishment of a security review system affecting civilians in defense related work, on the basis of the President's powers as commander-in-chief of the armed forces.

II PRIOR RESTRAINT IN THE MILITARY

A. A.R. 210-10 (5-5): General Analysis

Unlike measures which punish expression after its utterance, through libel, sedition or similar laws, a prior restraint proscribes expression before its publication.[13] This proscription may take the form of injunctions sought on a case by case basis,[14] or may be effected by a censorship mechanism established to review all ideas, according to prescribed standards, before their dissemination.[15] In either case, the prior restraint provides a dragnet device which can be used to permit those in authority to prohibit the circulation of ideas that are objectionable to the censor. Obviously, material innocent on its face may be censored on the basis of mere speculation as to its impact[16] or its distributors punished for failure to submit material for review without regard to content.[17]

A.R. 210-10 (5-5) empowers military base commanders to issue orders requiring all unauthorized literature to be submitted for review and to delay distribution pending a final determination.[18] If higher authorities approve, the base commander may prohibit the distribution of the publication forever, prohibit distribution of a single issue or delete objectionable passages.[19]

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[13] Thomas Emerson has defined "prior restraint" in the following terms:

> The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official.

Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob. 648, 655 (1956).

[14] New York Times Co. v. United States, 403 U.S. 713 (1971).

[15] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1951); Voorhees v. United States, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

[16] Too often, the censor's judgments reflect those that are prevalent in society at large. In Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951), the Court stated:

> Under such a standard the most careful and tolerant censor would find it impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority.

Id. at 505. See also Times Film Corp. v. Chicago, 365 U.S. 43 (1960) (Warren, C.J., dissenting); Emerson, supra note 13, at 657-58.

[17] Emerson, supra note 13, at 656-57.

[18] A.R. 210-10 (5-5)(c) reads as follows:

> *Restrictions on dissemination of publications.* If it appears that the dissemination of a publication presents a clear danger to the loyalty, discipline, or morale of troops at his installation, the installation commander may, without prior approval of higher headquarters, delay the distribution of any publication which he considers undesirable, on property subject to his control. The commander will consider whether the act of restriction will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-post sources.

A.R. 210-10 (5-5)(e) provides:

> *Distribution outlets.* An installation commander may, in his discretion, impose a requirement that distribution of publications may not be made except through regularly established and approved outlets, unless prior approval is obtained from the commander or his authorized representative. The installation commander may, without informing higher headquarters or Department of the Army in advance, take appropriate action to prevent the distribution of publications by persons who have not obtained approval. Except where the publication in question is published primarily for advertising or promotional purposes, a denial of a request for permission to distribute a publication will be reported [to the next major commanders and Headquarters, Department of the Army.]

[19] A.R. 210-10 (5-5)(d) provides:

The publication review under A.R. 210-10 (5-5) may be suppressed if it presents a clear danger to the loyalty, discipline or morale of troops stationed at the installation.[20] The Judge Advocate General has declared that the "clear danger" standard applies whether the base commander exercises his right to require prior approval or whether he elects to suppress only certain publications on an ad hoc basis.[21]

Because it authorizes pre-distribution review and, possibly, proscription of ideas, A.R. 210-10 (5-5) sanctions prior restraints on expression. The Supreme Court has declared prior restraint an unconstitutional restriction of freedoms guaranteed by the first amendment. In *Near* v. *Minnesota*,[22] drawing on sources from English history and the American revolutionary period, the Court observed:[23]

> It has been generally, if not universally, considered that it is the chief purpose of the first amendment guarantee to prevent previous restraints upon publications.

In 1971, the Court reaffirmed this principle in *New York Times* v. *United States*.[24] In his dissent, Chief Justice Burger commented that the right of newspapers to publish and circulate without prior restraint had not been challenged in the forty

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> *Reports.* Concurrently with imposing a delay as authorized in *c* above, the installation commander will so inform the next major commander and Headquarters, Department of the Army (Chief of Public Information, extension 74200), and request from Headquarters, Department of the Army, approval to prohibit the *distribution of that publication or the particular issue thereof.* Telephonic communication will be used in each instance. If the publication in question is one which is unlikely to be available at Headquarters, Department of the Army, a copy of the publication or a transcript of the text of the portion giving rise to the dissemination restriction will be forwarded to Headquarters, Department of the Army, by the fastest available means. The delay in distribution will remain in force until the decision to approve or disapprove the request is made. . . .

While the excising of objectionable material is not specifically mentioned in the regulation, it would appear to be a lesser included remedy. The military has used this device in the past. Recently, at Lackland Air Force Base, 15 men spent a full day excising photographs of the commanding general from the base newspaper because a sergeant objected to the way the photograph was cropped. N.Y. Times, Aug. 18, 1970, at 70, col. 1.

[20] A.R. 210-10 (5-5)(a) provides:

> *Objectives.* the maintenance of loyalty, discipline and morale among Army troops is essential if the Army is to continue to provide a reliable and effective military force responsive to the national security missions assigned pursuant to lawful authority. At the same time, troops are generally entitled to the free access to news and publications which other citizens enjoy.

A.R. 210-10 (5-5)(b) provides:

> *Responsibilities.* Installation commanders will encourage and promote the availability to service personnal of books, periodicals, and other amusement media which present a wide range of viewpoints on public issues. Such media should include those emphasizing the standards of loyalty, patriotism, and discipline which are common to the armed forces. However, installation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that except in cases in which a publication constitutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

[21] Because there was some confusion as to whether the clear danger standard applied to the review systems authorized at the base level by 210-10 (5-5)(e), the Judge Advocate General issued a clarifying memorandum stating that the clear danger test applied, establishing a test for obscenity, and providing a narrower "materially interfere with the accomplishment of the military mission" test as being appropriate standards for evaluating whether to suppress a publication. U.S. Dept. of the Army, Judge Advocate General Legal Services, Pamphlet 27-69-9 (April 9, 1969). See also notes 18 and 19, supra.

[22] 283 U.S. 697 (1931).

[23] 283 U.S. at 713.

[24] 403 U.S. 713 (1971) (per curiam).

years since *Near*.[25] The Chief Justice reemphasized the Court's and this country's "universal abhorrence of prior restraint."[26] Hence, the prior restraint imposed by A.R. 210-10 (5-5) must be justified in the face of this entrenched constitutional policy favoring the right to publish.[27]

B. The Censorship Mechanism

The arguments supporting the Court's conclusion that "censorship through license ... strikes at the very heart"[28] of the first amendment are compelling. A censorship system pronounces subjective judgment on the contents of literature. Even the most tightly constructed standard permits a range of censorial discretion. For example, the phrase "national security," which, in the military context, provides the most frequent test of acceptability,[29] was denounced by Justice Black as a "broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the first amendment."[30] Moreover, the range of discretion may be broadened by a multiplicity of interpretive regulations formulated by different departments within the bureaucratic structure.[31]

In *United States v. Voorhees*,[32] the bureaucratic web woven by a military censorship mechanism was vividly illustrated. Voorhees, himself a former ranking officer in the Army's censorship system, was charged with failing to submit material, which he planned to have published for a civilian market, to the military authorities for review. Portions of his book allegedly failed to conform to military policy and propriety.[33] According to the majority opinion of the Court of Military Appeals, the most questionable passages revealed that General Douglas MacArthur had issued press communiques which telegraphed the strategic moves of the Eighth Army in Korea.[34]

In *Voorhees*, the court had difficulty determining the appropriate standard to be applied in determining the acceptability of speeches and writings of military personnel. The court was obliged to construe three separate legal documents containing contradictory standards.[35] Furthermore, testimony developed at trial was of little assistance to the court; it was unable to establish which standard was at that time being applied by military authorities.[36] To reach a decision, the Court of Military Appeals concluded that the standard permitted censorship only where a conflict with national security could be demonstrated.[37] Notably, the court did not decide whether

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25 Id. at 748.

26 Id. at 749 (1971) (dissenting opinion).

27 In Lovell v. Griffin, 303 U.S. 444, 451, (1937), the Supreme Court expressly condemned a system of licensing for the distribution of literature. For recent cases condemning prior restraints, see generally Brooks v. Auburn University, 412 F.2d 1171 (5th Cir. 1969); Antonelli v. Hammond, 308 F. Supp. 1328 (D. Mass. 1970); Snyder v. Board of Trustees of Univ. of Ill., 286 F. Supp. 927 (N.D. Ill. 1968).

28 Schneider v. New Jersey, 308 U.S. 141, 164 (1939).

29 United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

30 New York Times Co. v. United States, 403 U.S. 713, 719 (1971) (Black, J., concurring).

31 United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).

32 Id.

33 Id. at 516-19, 16 C.M.R. at 90-92.

34 Id. at 516, 16 C.M.R. at 90.

35 In *Voorhees*, the court referred to the Johnson Memorandum (June 7, 1949), the Truman Memorandum (Dec. 5, 1950), and Army Reg. 360-5. Id. at 519-20, 16 C.M.R. at 93-94. These documents are on file at the Pentagon Library.

36 The *Voorhees* court seemed to concede that the testimony was inconclusive. 4 U.S.C.M.A. at 522, 16 C.M.R. at 96.

37 Id. at 524, 16 C.M.R. at 98.

the military might ban material on grounds of conflict with military propriety and policy, considerations falling far short of the interests of national security.[38]

The evils of censorship are further complicated because the machinery established to screen material is too frequently designed to "restrict and restrain" ideas which are considered a threat to those who instituted the system.[39] The result is a tendency to enshrine those ideas in current prevalence and to condemn those which are novel and unorthodox.[40]

Finally, a censor may swiftly and directly infringe on constitutional rights without judicial intervention and procedural protections. A.R. 210-10 (5-5) permits the base commander to require *all* unauthorized publications (those not distributed through the post exchanges) to be submitted for review; no time period is provided within which a final decision must be made.[41] Even if judicial review is ultimately available,[42] those whose freedom of expression is curtailed must await a final administrative decision. Many will be deterred by the financial and intangible costs that will be necessary to vindicate their legal rights.

Therefore, it is not surprising that the Supreme Court has consistently condemned prior restraints, seeking to allow the free information flow essential to maintaining the vitality of democratic institutions.[43] The Court has recognized that without the constant influx of new ideas, there is a stifling tendency towards dogmatism. It has been determined that those in control should not be permitted to regulate the circulation of ideas, because to do so would be to risk the danger that thought would be suppressed on self-serving grounds.[44]

Procedural Requirements

The clear danger to military loyalty, discipline or morale test opens A.R. 210-10 (5-5) to attack on the ground that it is unconstitutionally vague[45] and overbroad.[46] In recent years the Court has often demonstrated its willingness to void statutes[47] which, because of either ambiguous or vague drafting, have the effect of causing conscientious individuals "to 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."[48] The malleability of the "clear danger" test

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38 Id.

39 Times Film Corp. v. Chicago, 365 U.S. 43, 68 (1961) (Warren, C.J., dissenting).

40 Joseph Bursteyn, Inc. v. Wilson, 343 U.S. 495, 505 (1951).

41 A.R. 210-10 (5-5)(c)(d) and (e).

42 See text accompanying notes 58 to 54 infra.

43 See generally Emerson, supra note 13.

44 Id. at 658. See also Brown, Must the Soldier Be a Silent Member of Our Society, 43 Mil. L.R. 71, 108 (Jan. 1969).

45 Vagueness has been considered an offshoot of the due process requirement of fair notice. A criminal statue "which either forbids or restrains the doing of an act so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. Conally v. General Construction Co., 269 U.S. 385, 391 (1925); see Baggett v. Bullitt, 377 U.S. 360, 367 (1963).

46 Overbreadth is closely tied to first amendment considerations which demand that the scope of the statutory language be closely tailored to legitimate legislative ends. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." N.A.A.C.P. v. Button, 371 U.S. 415, 438 (1962).

47 United States v. Robel, 389 U.S. 258 (1967); Dombrowski v. Pfister, 380 U.S. 479 (1965); Aptheker v. Sec. of State, 378 U.S. 500 (1964); N.A.A.C.P. v. Button, 371 U.S. 415 (1962); Shelton v. Tucker, 364 U.S. 479 (1960); Thornhill v. Alabama, 310 U.S. 88 (1940); Stromberg v. California 283 U.S. 359 (1931). See Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell 384 U.S. 11 (1966). See generally Note, the First Amendment Overbreadth Doctrine, 83 Harv. L.R. 844 (1970).

48 Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

will be discussed in detail.[49] For present purposes, it suffices to point out that the test is designed to screen out speech on the basis that its contents will have an adverse impact on base morale, discipline and loyalty. This use of the test directly violates the command of the Supreme Court that prior restraints may be invoked to regulate the time, place and manner of speech, but not content.[50] Recently, the Court in *Shuttlesworth v. Birmingham*[51] struck down a permit system, which operated as a prior restraint on marches and demonstrations, on the ground that the even-handed administration of a statute demands that the standard adopted by the legislation be "narrow, objective, and definite."[52] The clear danger test is susceptible to the same interpretive range as the "public welfare, peace, safety, health, decency, good order, morals or convenience" standard condemned in *Shuttlesworth.*

The Supreme Court enumerated further procedural protections in *Freedman v. Maryland.*[53] Specifically, the Court stated that the government has the burden of establishing that censorship is an appropriate course to take[54] and that prompt judicial review must be guaranteed by law.[55] Both elements are absent from the military scheme. Under A.R. 210-10 (5-5), the commander, subject to the approval of his superiors, makes an *ex parte* decision as to whether the proposed distribution falls within the scope of the clear danger test.[56] No hearing is held and, in fact, no method is provided by which an applicant may submit evidence of the anticipated effect of his proposed distribution.[57] The burden of proof requirement of *Freedman* is completely ignored by the *ex parte* decisional system provided for by A.R. 210-10 (5-5).

Given the reluctance of civilian courts to reverse the decisions of military commanders, the promise of judicial review held out in *Dash v. Commanding*

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[49] See text accompanying notes 79 to 91 infra.

[50] Cantwell v. Connecticut, 310 U.S. 396 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

[51] 394 U.S. 147 (1969).

[52] Id. at 151. See Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676 (1968); Staub v. Baxley, 355 U.S. 313 (1958); Kunz v. New York, 340 U.S. 290 (1951).

[53] 380 U.S. 51, 57-58 (1965).

[54] Id. Accord, Speiser v. Randall, 357 U.S. 513 (1958); Scoville v. Bd. of Educ., 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826 (1970); cf. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

[55] 380 U.S. 51, 57-58 (1965). In New York Times Co. v. United States, 403 U.S. 713, 724 (1971) (concurring opinion), Justice Brennan suggested that the invocation of even an interim injunction to permit final disposition of a case violated the first amendment where there was no immediate threat to national security. See also Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2nd Cir. 1971); Sostre v. Otis, Civil No. 70-1114 (S.D.N.Y., filed Nov. 8, 1971) (the court ruled that the prison censorship mechanism must render a decision on the acceptability of requested material within 6 weeks).

[56] A.R. 210-10 (5-5)(c)(d)(e).

[57] Sostre v. Otis, 330 F. Supp. 941 (S.D.N.Y. 1971). The court held that prison censorship schemes must afford inmates rudimentary due process including notice and a right to be heard either in person or in writing.

The due process problems raised by a censorship system lie outside the scope of this Note. Many commentators have pointed to the lack of due process inherent in a censorship system.

> To subject the press to the restrictive power of a licenser, as was formerly done ... is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government.

J. Story, The Commentaries on the Constitution of the United States § 1884 (4th ed. 1873). Furthermore, the Supreme Court has ruled that whenever an agency adjudicates important rights a hearing must be held. See Goldberg v. Kelly, 397 U.S. 254 (1970); Londoner v. Denver, 210 U.S. 373 (1908).

General[58], *Yahr v. Resor*[59], and the *United States v. Flower*[60], is likely to be elusive.[61] Even under the liberalized approach to judicial review of military decisions allowed in *Burns v. Wilson*[62] when an invasion of constitutional rights is alleged, review is limited to an examination of whether the military procedures accorded an opportunity for full consideration of the constitutional issues. In the recent case of *Cortright v. Resor*,[63] the Second Circuit refused to review orders for extra duty and undesirable transfers which, it was alleged, were imposed because members of the command had published an anti-war advertisement in the New York Times. The court refused review in spite of the extraordinary admission of the base commander in the record of the proceedings before the district court that the punitive transfers were being taken in retaliation for the soldiers' exercise of protected speech.[64]

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58 307 F. Supp. 849 (D.S.C. 1969) aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). In *Dash*, the district court, while it approved a system of prior review, explicitly stated that judicial review would be available if it were to be alleged that the base commander had abused his discretion in ordering the suppression literature. Id. at 856.

59 431 F.2d 690 (4th Cir. 1970), cert, denied, 401 U.S. 982 (1971). In *Yahr*, the Fourth Circuit upheld the district court's denial of an interim injunction to restrain a base commander from interfering with the distribution of "Bragg Briefs", an underground G.I. newspaper at Fort Bragg, North Carolina. However, the court ordered the district court to hear the case on its merits and to determine the appropriate standard of review.

60 452 F.2d 80, 86 (5th Cir. 1972). See note 148 infra.

61 See Orloff v. Willoughby, 345 U.S. 83 (1952). The *Orloff* case involved an Army physician who was not commissioned and was not assigned to the normal duties of an Army doctor because he refused to state whether or not he was a member of the Communist Party in his application for a commission. The Supreme Court refused to review the decision to refuse him his commission.

62 346 U.S. 137 (1953). In *Burns*, petitioners had been tried and convicted by a court-martial for the crimes of murder and rape and were sentenced to death. They had exhausted all appeals within the military structure. They sought federal review on the grounds, inter alia, of the following irregularities and allegations of violations of constitutional rights: 1) that they had been arrested and held incommunicado; 2) they were subjected to continuous questioning without being informed of their rights; 3) the military had planted real evidence; 4) the military coerced some witnesses; 5) petitioners were denied the right to counsel until shortly before trial; 6) coerced confessions were admitted at trial.

63 447 F.2d 245 (2nd Cir. 1971), rev'g 325 F. Supp. 797 (E.D.N.Y. 1971).

64 The testimony upon cross-examination of General Ciccollela (Chief of Staff of the United States First Army) on the question of the motivation for the transfer of Specialist David Cortright was as follows:

> [Cortright] came to my attention early as being the more vocal, the more active dissident in the band, the one who apparently had made himself the leader of a little gang that had organized itself in the band, was very active in their dissenting activities, and was what was considered to be a troublemaker in the band.
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> Q. Did you form any conclusions about the effect of Specialist Cortright's activities on the band?
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> A. Yes. It was my judgment that what he was doing in the band was weakening its general morale, its discipline and effectiveness.
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> Q. Did you take any action regarding Specialist Cortright regarding those reports and your conclusions?
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> A. I called the staff in and asked them to look into it and let me have their recommendation. And the first recommendation they made was to the effect the band had not been drawn down to their authorized strength, that there were still ten or twelve over their authorized strength.
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> I asked them if Cortright was eligible for transfer, and they said he was, and I told them to move him.

325 F. Supp. at 802.

D. The "Clear Danger" Test

The constitutional infirmity of A.R. 210-10 (5-5) as a prior restraint is aggravated by the "clear danger" test which the regulation provides to guide the censor and the reviewing court. Even when speaking of a clear *and present* danger, the military courts have predicated the constitutionality of military regulations on a danger more remote than the Supreme Court has contemplated, even in its most permissive interpretation of the "clear and present danger" test.[65] A brief review of military opinions in the area of restraints on the expression of ideas will serve three purposes. First, it will disclose the range of speech which may be censored by military officials under authority of A.R. 210-10 (5-5). Secondly, it will demonstrate the extent of the problems of vagueness and overbreadth created by the military's mutated version of the "clear and present danger" test. Finally, it will highlight the difficulty, if not impossibility, of reconciling the test incorporated in A.R. 210-10 (5-5) with Supreme Court precedent.

In the *United States* v. *Howe*,[66] the defendant, an Army lieutenant, was convicted of conduct unbecoming an officer and using contemptuous words toward the President.[67] He was sentenced to dismissal, forfeiture of all military benefits, and confinement to hard labor for one year.[68] The act for which the defendant was charged was his participation in an anti-war demonstration at which he carried a placard reading: "End Johnson's Facist (sic) Aggression in Vietnam" and "Let's Have More Than a Choice Between Petty Ignorant Facists (sic) in 1968."[69]

After reciting some commonly known facts about the Vietnam War, the court concluded that "in the present times and circumstances such conduct by an officer constitutes a clear and present danger to the discipline within the armed services."[70] Notably, there was no discussion of the immediacy of the danger in this specific situation.[71] Instead, the *Howe* Court asserted that the defendant's conduct threatened the continued civilian control over the military.[72]

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65 For an exhaustive history of the Supreme Court's treatment of the clear and present danger test, see McKay, The Preference for Freedom, 34 N.Y.U.L. Rev. 1182, 1203-12 (1959).

66 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1965).

67 Id. at 167, 37 C.M.R. at 431.

68 Id.

69 Id. at 168, 37 C.M.R. at 432.

70 Id. at 173-74, 37 C.M.R. at 437-38.

71 The *Howe* court's analysis was abbreviated:

> We do judicially know that hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court, seems to require no argument.

Id.

72 The court quoted extensively from the James Madison Lecture of Chief Justice Earl Warren delivered at the New York University Law Center on February 1, 1962, in 37 N.Y.U.L. Rev. 181 (1962), in which Warren stated that civilian control of the military was uppermost in the minds of the founding fathers. 17 U.S.C.M.A. at 174-75, 37 C.M.R. at 438-39.

In *United States v. Amick Stolte*,[73] under facts similar to *Howe*,[74] the military court relied heavily on *Howe*, declaring that "organizing dissent" presented "a clear and present danger to maintaining the military discipline essential to an effective fighting force."[75] The defendants were sentenced to three years at hard labor. The court offered no rationale, apparently satisfied that an imminent threat was established on the facts.[76] The same pattern of upholding convictions on the basis of an implicit, remote danger was followed in *United States v. Daniels*,[77] a case prosecuted under the General Article of the Military Code.[78]

These cases have several common elements. In each, the punished action went no further than advocacy, and the feared danger had yet to crystalize. In *Howe*, the court hinted that considerations of military discipline and civilian control of the military would make a wide variety of expressed ideas imminently dangerous, though not demonstrably so. The other cases followed suit as though the present danger were self-evident from the facts.

In the civilian courts, the "clear and present danger" test has been subjected to varied interpretation since its first declaration in *Schenck v. United States*.[79] Yet, however the Supreme Court has construed the first amendment guarantee, it has always recognized that advocacy, with nothing more, is protected by the Constitution. In *Yates v. United States*,[80] the Supreme Court distinguished between advocacy of action and advocacy of ideas. For speech to be punishable, "those to whom advocacy is addressed must be urged to do something, now or in the future, rather than merely believe in something."[81] In *Brandenburg v. Ohio*,[83] the Court reaffirmed *Yates* against a poignant factual setting. The defendant had addressed a group of hooded and armed members of the Ku Klux Klan, warning that, unless the government stopped suppressing the Caucasian race, "it's possible that there might have to be some vengence taken."[83] The Court reversed the conviction, ruling that a state may not punish advocacy of the use of force or the violation of law, except where such advocacy is intended to produce "imminent lawless action and such a result is likely to occur."[84]

In *Tinker v. Des Moines School District*,[85] the Court was faced with a conflict between a student's right to express opposition to the war in Vietnam by wearing a

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73 40 C.M.R. 720, petition for review by U.S.C.M.A. denied, 40 C.M.R. 327 (1969).

74 Amick and Stolte published and distributed a leaflet entitled "We Protest," which advocated an end to the war in Vietnam and called upon soldiers to join a union to work for peace and express grievances. Id. at 721-22.

75 Id. at 723.

76 The court stated that the nation is engaged in a war in Vietnam, that any deliberate efforts to promote disloyalty or disaffection must be curtailed, that the appellants' pamphlet was designed to undermine the war effort, and that, therefore, a clear and present danger existed justifying the actions taken against the appellants. 40 C.M.R. at 000. The court, however, made no attempt to assay the conditions then existing on base or to examine the likelihood that the distribution of appellants' flier would or did cause any disruption of base routine.

77 19 U.S.C.M.A. 529, 532-36, 42 C.M.R. 131, 134-37 (1970). Daniels was charged with making a number of statements over a two month period on the topics of race relations and the war in Vietnam. The basic theme of Daniels' remarks was that the Vietnam war is a white man's war and blacks should not go to Vietnam to fight a white man's war. Daniels was also charged with issuing a call to a group of black soldiers to join a call for a mass (a grievance procedure authorized under 10 U.S.C. § 938 (1970)). None of the soldiers ever actually did request a mass and then refuse to serve in Vietnam.

78 Daniels was charged under a specification of 10 U.S.C. § 934 (1970) (the General Article) alleging a violation of 18 U.S.C. § 2387 (1970). See note 9 supra.

79 249 U.S. 47 (1919).

80 354 U.S. 298 (1957).

81 Id. at 325.

82 395 U.S. 444 (1969).

83 Id. at 446.

84 Id. at 447.

85 393 U.S. 503 (1969).

black armband and the school authorities' claim of the need to maintain classroom discipline. The Court reiterated the importance of the imminency requirement. "In our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression."[86] Under this standard, the recitation of such generalities as "hundreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, in our armed forces"[87] is not a sufficient basis, standing alone, to support the restriction of protected speech.[88] Rather, evidence ought to be amassed establishing that speech of the type sought to be proscribed is likely to provoke a prohibited result in view of present conditions on base and a past history of similar incidents. To require less would sanction the punishment of speech on the basis of "vague fears extrapolated beyond any forseeable threat."[89]

Nevertheless, in *Daniels* the military court reduced the "mere advocacy" doctrine to a faint image of its intended purpose, placing the first amendment guarantee in an academic context:

> If the statements and the intent of the accused, as established by the evidence, constitute no more than commentary as to the tenets of his faith or declarations of private opinion as to the social and political state of the United States, he is guilty of no crime.[90]

This view of the *Schenck* test justifies the admonition of Justice Douglas, concurring in Brandenburg, that the "clear and present danger" test can be easily "manipulated to crush what Brandeis called 'the fundamental right of free men to strive for better conditions through new legislation and institutions' . . . even in time of war."[91]

As noted above,[92] the military court in *Howe* advanced two reasons for its holding: 1) the defendant's action represented a threat to civilian control of the armed services; and 2) his action threatened military discipline. One commentator has noted that the first objection may bear some validity where a high ranking military officer defies policy directives issued or approved by Congress and the President.[93] However, the punishment of dissident statements made by low-ranking officers and enlisted men only promotes the public image of the army as a monolith and of military leaders as men whose military and political expertise is vainly claimed as unassailable.

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86 Id. at 508.

87 See note 76 supra.

88 The circuits are divided over the question of whether a showing of an imminent, clearly definable injury is necessary to a finding of a clear and present danger in the military context. In Kiiskila v. Nichols, 433 F.2d 745 (7th Cir. 1970), the court overturned a base commander's order denying a civilian employee access to the base because of her political activities, holding:

> Defendants have failed to present evidence to demonstrate that military discipline is actually affected by the plaintiff's presence on the base or even by her anti-war activities. . . . Their assertion is instead, a broad claim . . . [of] undefined military and national defense considerations.

Id. at 750.

This view has yet to gain acceptance in other circuits and the law in this area continues to be in a state of flux. In Locks v. Laird, 300 F. Supp. 915 (N.D. Cal. 1969), the district court refused to evaluate the damage to morale caused by the wearing of a military uniform at an off-base demonstration, stating that "it cannot help but have some adverse and detrimental effect on the loyalty, discipline and efficiency of the Armed Forces. . . . The extent of such adverse effect this court need not decide." Id. at 919-20.

89 A Quaker Action Group v. Hickel, 421 F.2d 1111, 1117 (D.C. Cir. 1970).

90 19 U.S.C.M.A. at 532, 42 C.M.R. at 134.

91 395 U.S. at 452.

92 See text accompanying notes 70 and 72.

93 Sherman, The Military Courts and Servicemen's First Amendment Rights, 22 Hastings L.J. 325 (1970).

Furthermore, the suppression of dissent, coupled with the frequent use of uniformed soldiers to galvanize public support for official policy,[94] poses a more realistic threat to civilian control.

The second argument is unique to the military. Rigid disciplinarians might assert that the slightest murmer of dissent presents a clear threat to the military operation, and that such danger is always imminent because once a minor breach has occurred the effect may snowball beyond repair. This rationale is crystallized in the leading case on A.R. 210-10 (5-5), *Dash v. Commanding General*,[95] and is best examined in light of that opinion.

III. PRIOR RESTRAINTS ON THE DISTRIBUTION OF LITERATURE: THE DASH CASE:

In *Dash v. Commanding General*, a base regulation issued by the post commander at Fort Jackson, South Carolina, requiring all unauthorized publications to be submitted to him for approval prior to their distribution, was held not to be violative of the first amendment.[96] Although none of the plaintiffs had been denied the right to distribute any pamphlet on base, the court reviewed the constitutionality of the regulation.[97] The court observed that "[t]he issues posed are continuing ones, involving restraints not alone on the plaintiffs but on all non-commissioned personnel, present or future, at the base."[98]

Although the post commander failed to identify the standard to be relied on in judging any literature, the district court incorporated into the regulation the requirement of the Judge Advocate General[99] that specific findings be made that a publication "present[s] a clear danger to the loyalty and discipline or morale of [the] troops" before distribution may be proscribed.[100]

A. The *Dash* Rationale and the Exception in *Near*

To justify its holding, the district court reviewed civilian court decisions endorsing the balancing of individual rights to expression against the state's interest in curtailing dangerous speech. There is some question whether the *Dash* court actually employed the balancing approach to sustain a system of military prior restraint. The court failed to make even passing reference to the long line of civilian precedent condemning prior restraints.[101] Only recently the Supreme Court has observed, in view of the past decisions, that "[a]ny system of prior restraints of expression . . .

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94 Id. at 348-50. Sherman describes the military's public relations program which uses uniformed soldiers to present the "official" point of view to civilians.

95 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971). Schneider v. Laird, 453 F.2d 345 (10th Cir. 1972), petition for cert. filed, 40 U.S.L.W. 3514 (U.S. April 5, 1972) (No. 71-1271) also dealt with a challenge to the constitutionality of A.R. 210-10 (5-5).

96 Id. at 851.

97 Id.

98 Id.

99 Id. at 855 n.20.

100 Dept. of Army, Office of Adjutant General, Subject: Guidance on Dissent (May 28, 1969) (cited in *Dash*, 307 F. Supp. at 851).

101 See text accompanying notes 22-27 supra.

bear[s] a heavy presumption against its constitutional validity."[102] even where "national security" is advanced as to the opposing state interest. Instead of weighing interests, the district court in *Dash* relied on a passage from Thomas Emerson's "Toward a General Theory of the First Amendment,"[103] noting that servicemen have traditionally been deprived of the full strength of the first amendment guarantees.[104]

In his article, Professor Emerson was, in part, referring to the "time of war" exception from the ban on prior restraint carved out by the Supreme Court in *Near v. Minnesota*:[105]

> ... the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hinderance to its efforts 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."[106]

However, by its own examples, the Court in *Near* demonstrated that the limitations are not intended to license military censorship in any but the most extraordinary circumstances. The Court said that prior restraint would be permissable to "prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."[107] On its face, the exception relates to actual obstructions, action which may include "symbolic" speech,[108] and the publication of classified information.

The public injury in these examples results from the fact of publication alone, not from some feared evil which the exercise of speech may cause. The speech is so closely intertwined with a course of illegal conduct that it is impossible to determine whether the speech or the action results in injury. Much like an act of extortion, espionage,[109] or a verbal threat,[110] there is no room for conjecture as to whether a prohibited result will follow. Support for the use of an injuction, a more limited form of censorship, where illegal action accompanies speech, can be drawn from *Giboney v. Empire Storage and Ice Co.*[111] In *Giboney*, the Supreme Court approved the use of an injunction to prohibit picketing which was found to be an integral part of a scheme to force a company to violate state anti-trust laws. Ruling that picketing when exercised in this fashion was not protected by the first amendment, the Supreme Court stated:

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102 New York Times Co. v. United States, 403 U.S. 713 (1971), quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

103 Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 935-36 (1963).

104 Id.

> Nevertheless, in the sphere of war and defense an important factor originating outside the area of free expression must be recognized: military operations cannot be conducted strictly in accordance with democratic principles. A military organization is not constructed along democratic lines and military activity cannot be governed by democratic procedures. To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression.

105 283 U.S. 697 (1931).

106 Id. at 716.

107 Id.

108 See United States v. O'Brien, 391 U.S. 367 (1968).

109 See United States v. Rosenberg, 195 F.2d 583, 591 (2d Cir. 1950).

110 Watts v. United States, 394 U.S. 705 (1960).

111 336 U.S. 490 (1948).

> But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language either spoken, written, or printed.[112]

The *Near* exception, construed in view of *Giboney*,[113] affects only words that, because of the context of their utterance, have the same immediate impact as an action.

It is clear that the censorship system established by A.R. 210-10 (5-5) is not aimed at speech which is illegal in and of itself because it is closely intertwined with a course of illegal conduct. Rather any illegality which might result from "disloyal" speech stems from the potentially disruptive impact of such speech as opposed to the revelation of state secrets where the evil lies in the fact of disclosure. The ultimate objective sought to be secured by the A.R. 210-10 (5-5) censorship scheme is military performance. Thus speech and the feared evil are separated by a two-fold cause-effect analysis. The speech must be detrimental to loyalty and morale, which detriment must, in turn, be demonstrably injurious to the maintenance of a high level of military performance. Thus, the A.R. 210-10 (5-5) scheme cannot find constitutional shelter within the *Near* "wartime" exception because that exception is limited, by the examples given in *Near*, to either speech which is an integral part of an illegal course of conduct or speech which effects the feared evil as a result of its utterance alone.

Conceivably, support for such an exception may be gleaned from the exemption to the rule against prior restraints extended by *Near* to "incitements to acts of violence and the overthrow by force of orderly government."[114] However, in this passage, the *Near* Court was proscribing incitements to activites which may affect maintenance of military discipline but bear little direct relationship to the preservation of such amorphous concepts as military loyalty and morale.[115] Furthermore, the *Near* reference to incitement must be read in light of the Court's declaration in *Brandenburg* that the incitement must pose an imminent danger that the prohibited result will follow.[116]

Finally, Professor Emerson's views on the military exceptions to the prohibitions on prior restraints must be read together with an article in which he reviewed the extraordinary constitutional and practical problems raised by a system of prior restraint.[117] Even in the article relied on by Judge Russell in his *Dash* opinion, Emerson indicates that a court should be restrictive in justifying limitations on the first amendment in the interests of external security:[118]

> In attempting to formulate the legal doctrine by which the interest in freedom of expression must be reconciled with the social interest in carrying on a war or maintaining an effective defense, we start with the general principle already enunciated with respect to internal order – that expression must be protected and only other conduct prohibited. Full and open discussion of matters relating

112 Id. at 502.

113 See also Drivers Union v. Meadowmor Co., 312 U.S. 287, 293 (1941).

114 283 U.S. at 716.

115 See United States v. Voorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1952) (Brosman, J., dissenting).

> Balancing, on the one hand, the Congressionally authorized deterrents available for conduct which undermines discipline against the amorphism of the Army's censorship on the other, I cannot descry the overriding necessity that I would require to sustain the legality of the restrictions the latter imposes.

Id. at 548, 16 C.M.R. at 122.

116 Brandenburg v. Ohio, 395 U.S. 444 (1969).

117 Emerson, supra note 13.

118 Emerson, supra note 103, at 935.

to war and defense are, if anything, more vital to the life of a democracy than in any other area. And the reasons for not attempting to draw a line cutting off expression at any point short of overt action are, generally speaking, equally persuasive in this sphere. Accepting this prior balance, it is clear that full freedom of expression must be allowed with respect to such matters as general opposition to war, criticism of war or defense policies, and discussion of particular measures whether related to direct military or supporting action.[119]

B. Balancing

Hence, if Judge Russell resorted to balancing interests, he predicated his efforts upon a heavy presumption in favor of prior restraint, based on a misreading of *Near* and contrary to the Supreme Court's vigorous condemnation of such restraint. Balancing has itself been criticized as a method of adjudicating first amendment cases,[120] although the Supreme Court has continually employed it in a variety of situations.[121]

The most frequent criticism of balancing is that it is a case by case approach, containing "no hard core of doctrine to guide a court in reaching its decision."[122] The courts are allowed a broad range of discretion to fashion decisions on the basis of personal value judgments. If, as in *Dash*, the court places a sufficiently high value on the maintenance of military discipline, it has no difficulty in permitting deviations from the first amendment, even in the absence of clear precedent for its result.

Even if balancing is a valid approach to constitutional adjudication, the Supreme Court has used it only to permit limitations as to the time, place and manner of expression, and not to regulate the content of speech.[123] The theoretical basis for these restrictions allowed by the Court rests on the assertion that regulation is permissable where physical acts perform an integral role in the expression of an idea. Thus, in *United States v. O'Brien*,[124] the Supreme Court upheld a law condemning the burning of draft cards. The Court reasoned that when elements of speech and nonspeech are combined the government may validly regulate the nonspeech elements despite incidental limitations on the freedom of expression.[125] In *Cox v. Louisiana*[126] the Court approved, in principal, limitations on the place and manner of speech. Nevertheless it recognized that the limitations must be carefully circumscribed, voiding a statute giving overly broad discretion to local authorities to regulate the content of permissible speech.[127]

119 Id.

120 Barenblatt v. United States, 360 U.S. 109, 141 (1959) (Black J., dissenting opinion); Franz, The First Amendment in the Balance, 71 Yale L.J. 1424 (1962); Meiklejohn, The Balancing of Self-Preservation Against Political Freedom, 40 Calif. L. Rev. 4 (1961).

121 See United States v. O'Brien, 391 U.S. 367 (1968) (symbolic speech, i.e. draft card burning); Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961) (registration of Communist organizations); Barenblatt v. United States, 360 U.S. 109 (1959) (legislative investigations); N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958) (disclosure of membership lists); United States v. Dennis, 341 U.S. 857 (1951) (advocacy of violent overthrow). In *Dennis*, the Court stated that it was applying the clear and present danger test but its reliance on Justice Learned Hand's statement that the "gravity of the evil [must be] discounted by its improbability" indicated that it was, in fact, using a balancing approach. And see American Communication Ass'n., C.I.O. v. Douds, 339 U.S. 382 (1951) (loyalty oaths); Schneider v. New Jersey 308 U.S. 147 (1939) (distribution of handbills and door-to-door solicitation).

122 Emerson, supra note 103.

123 E.g., Adderly v. Florida, 385 U.S. 39 (1966), Cox v. Louisiana 379 U.S. 536 (1965); Cantwell v. Connecticut, 310 U.S. 296 (1940); Lovell v. Griffin, 303 U.S. 444 (1938).

124 391 U.S. 367 (1968).

125 Id. at 376-77.

126 379 U.S. 536 (1964).

127 Id. at 557-58.

A.R. 210-10 (5-5) authorizes the monitoring and control of the contents of literature, as well as of the incidental actions involved in the distribution process. Yet, the distribution of literature, in contrast to other forms of political activity such as picketing, demonstrating, and marching, all of which combine both speech and physical action, disturbs relatively few societal interests.

The Fourth Circuit in *United States v. Bradley*,[128] when considering a prohibition of on-base demonstrations, recognized that leafletting disturbed governmental interests which could at best be characterized as minimal:

> Distribution of newspapers, for example, contrasts with the prohibited conduct [demonstrations] in that the consumer may choose whether or not to avail himself of the profer ... These activities are less intrusive and substantially different in kind from those enumerated in the regulation.[129]

In *Dash*, Judge Russell concluded that the balance of individual and societal interests favored the military censorship system, relying on two lines of precedent. First, Judge Russell cited *Pickering v. Board of Education*[130] for the proposition that balancing may be used to determine the extent of first amendment rights of public employees. In *Pickering*, the Supreme Court reversed the dismissal of a school teacher who had written a letter to the local newspaper critical of the school board's financial policy. The Court reasoned that the critical statements must have been false and made knowingly and recklessly before a public employee could be deprived of his occupation.[131]

Support for Judge Russell's reliance on *Pickering* can be found in dicta in which the *Pickering* Court suggested that dismissal might be an appropriate remedy where the public statement disrupts internal institutional discipline and harmony, or breaches a justifiable need for confidentiality.[132] By analogy, Judge Russell applied the same justification where military discipline is threatened. However, *Pickering* is distinguishable from the *Dash* situation in several critical respects. First, *Pickering* sanctions dismissal only where a hearing is conducted to determine whether a valid state interest has been breached.[133] Secondly, the form of punishment, dismissal, is not criminal in nature and would not contemplate assertion of control measures prior to the exercise of free expression. Moreover, a person dismissed from public employment would still be free to express his views as a private citizen. In contrast, suppression of a serviceman's right to express or receive views and ideas would completely stifle his freedom for the entire tenure of his service.[134]

Finally, the military has ample authority to punish, after the fact, breaches of discipline similar to those considered in *Pickering*. For example, the military can punish disrespect toward a superior commissioned officer,[135] wilful disobedience of a superior commissioned officer,[136] insubordinate conduct toward a superior officer,[137]

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[128] 418 F.2d 688 (4th Cir. 1969).

[129] Id. at 690.

[130] 391 U.S. 563 (1968).

[131] The Court applied the standard formulated in New York Times v. Sullivan, 376 U.S. 254 (1964), for determining whether damages should lie for libelous statements made about public officials, to the question of whether administrative sanctions such as dismissal could be taken against a school teacher. Id. at 573-74.

[132] Id. at 570 n.3.

[133] Id. at 566.

[134] Applying the balancing test in considering the extent of police officers' first amendment rights, two recent cases have extended such rights in a paramilitary context. Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970) and Brukiewa v. Police Commissioner, 257 Md. 36, 263 A.2d 210 (1970).

[135] 10 U.S.C. § 889 (1970).

[136] Id. § 890.

[137] Id. § 891.

failure to obey an order,[138] and provoking speeches and gestures.[139] In addition, military authorities may punish disloyal speech under the General Article.[140]

Secondly, Judge Russell impliedly approved the observations of the Supreme Court in *Cox v. Louisiana*[141] and *United States v. Adderley*,[142] that there is no right to "propagandize protests or views ... whenever and however and wherever" desired.[143] By implication, a military installation is precisely the type of place where such limitations should apply.

However, the views of the Supreme Court do not support a blanket condemnation of freedom of expression on military bases on the ground that such bases are per se improper places for the exercise of freedoms otherwise protected by the first amendment. Over two and a half million Americans live and work on military bases. Many of these people are not in the military by choice; none are free to leave the base at will and express their views elsewhere.[144] Moreover, these Americans are entitled to exercise their right to vote in local and federal elections[145] and, presumably, should be expected to make the same type of informed decision as they would were they civilians.

Because many military installations are as large and complex as cities, it might be argued that the rulings of the Supreme Court in *Marsh v. Alabama*[146] and *Amalgamated Food Employees Union v. Logan Valley Plaza, Inc.*[147] apply to military installations. In those cases the Court held that first amendment rights are fully applicable to privately owned company-towns and shopping centers because those places are "public" in nature.[148] The military base is closer to being a city than a highly specialized building such as the jail house and courthouse obstructed by the defendants in *Adderley* and *Cox* respectively. It should also be noted that those two cases involved actions incidental to speech, which actions interfered with the orderly

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138 Id. § 892.

139 Id. § 917.

140 Id. § 934.

141 379 U.S. 536 (1965).

142 385 U.S. 39 (1966).

143 The *Dash* court quoted from *Cox*:

> Moreover, "The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time.

Cox v. Louisiana, 379 U.S. 536, 554 (1965). From this language, the *Dash* court concluded:

> In short, where First Amendment rights are involved, whether of civilian or servicemen, the issue always involves the balancing by the Courts of the competing private and public interests at stake in the particular circumstances.

307 F. Supp. at 853.

144 See Frain v. Baron, 307 F. Supp. 27, 32 (E.D.N.Y. 1969), where the court upheld the right to refuse to stand during the pledge of allegiance in public schools even though it accepted the validity of a law requiring spectators to stand in a courtroom. The court distinguished the two cases on the ground that school attendance is compulsory.

145 D.O.D. Directive 1344.10 (IV)(A)(I)(G) (Sept. 23, 1969).

146 326 U.S. 501 (1946).

147 391 U.S. 308 (1968).

148 326 U.S. at 506-08. In United States v. Flower, 452 F.2d 80 (5th Cir. 1972), rev'd 40 U.S.L.W. 3585 (Per Curiam) (June 12, 1972) the court considered the relevance of *Marsh* and *Logan Valley* to military bases and A.R. 210-10 (5-5). The court concluded that military bases were not "public" in nature even though a strong record of open access had been developed at trial. See 452 F.2d at 90 (dissenting opinion). The Supreme Court reversed on a summary finding that the public had, in fact, been granted access to the road in question which ran through Fort Sam Houston. *Flower* can be distinguished from *Dash* because it considered A.R. 210-10 (5-5) in relation to civilians coming onto a military base to distribute literature. A.R. 210-10 (5-5) has a much more drastic impact on the liberties of servicemen who do not have the option to express their views any place other than among the military society, to which they are virtually confined.

administration of justice. The state interest there was substantial, and the application of first amendment protection to physical action doubtful.[149] The activity in *Dash* was the circulation of ideas, the distribution of which would have caused only minimal physical inconvenience, if it had any effect at all.[150]

Hence, Judge Russell's failure to carefully examine the precedents on which he relied permitted him to ignore their significant distinctions from the facts in *Dash*. If the military base and the serviceman are held to be unique in a manner requiring curtailment of the first amendment, the underlying rationale is ultimately the need for military discipline. That rationale may not be as conclusive on the issues in *Dash* as Judge Russell presumed it to be.

C. The Military Discipline Rationale

The application of first amendment protection to the military must recognize the military's need to maintain discipline. This need has consistently been cited by the courts, military and civilian, as a rationale either for precluding civilian review of military decisions,[151] or for affording servicemen less rigorous first amendment protections than are afforded civilians.[152] The observation of the Supreme Court in *In re Grimley*[153] has been frequently reiterated:

> An Army is not a deliberative body . . . Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.[154]

However, the conclusion that discipline requires curtailment of first amendment rights is not self-evident. The tension between the first amendment and the requirements of military discipline closely parallels the conflict between the need to preserve law and order among civilians and the citizen's basic constitutional rights.[155] The reluctance of the Supreme Court to condone abridgement of first amendment rights unless an immediate danger to civilian law and order is demonstrated[156] suggests

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149 See text accompanying notes 118-20 supra.

150 United States v. Bradley, 418 F.2d 688 (4th Cir. 1969); see text accompanying notes 128 and 129 supra.

151 E.g., Orloff v. Willoughby, 345 U.S. 83 (1953); Cortright v. Resor, 447 F.2d 245 (2nd Cir. 1971), rev'g, 325 F. Supp. 797 (E.D.N.Y. 1971).

152 E.g., United States v. Flower, 452 F.2d 80 (5th Cir. 1972); Dash v. Commanding General, 307 F. Supp. 849 (D.S.C. 1969), aff'd, 429 F.2d 427 (4th Cir. 1970), cert. denied, 401 U.S. 981 (1971).

153 137 U.S. 147 (1890).

154 Id. at 153. See also Orloff v. Willoughby, 345 U.S. 83, 93 (1952); United States v. Voorhees, 4 U.S.C.M.A. 509, 531, 16 C.M.R. 83, 105 (1954).

155 Gregory v. Chicago, 394 U.S. 111 (1969); Feiner v. New York, 340 U.S. 315 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949).

156 See Terminiello v. Chicago, 337 U.S. 1 (1949):

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of

that those who favor a more lenient rule with respect to the military must prove two points: 1) that the military's need for discipline is so much greater than the civilian need for law and order as to justify imposition of prior restraint even where the danger is remote or hypothetical;[157] and 2) that prior restraint is an effective method of preserving discipline. An examination of several studies of the performance of servicemen and an analysis of the contemporary nature of military service reveals that neither assertion supporting prior restraint is sound.[158] Moreover, a system of censorship may even be detrimental to military discipline and may impair the serviceman's function as a citizen.[159]

1. The Importance of Discipline to Military Performance

The defenders of a punitive, authoritarian system of assuring military discipline generally argue the importance of guaranteeing that troops will obey orders and react in an orderly fashion even when subjected to the fear, deprivation, and stress of a combat situation. The Army Field Manual declares that "[d]iscipline helps the individual to withstand the shock of battle and face difficult situations without faltering."[160] However, a body of sociological and psychological literature has emerged since World War II which suggests that a more complex set of factors contributes to positive combat performance than discipline alone.[161]

The findings of a committee headed by Samuel A. Stouffer, published in *The American Soldier*,[162] reveal that a number of informal group and individual pressures significantly affect combat performance, including a group sense of mutual dependency, loyalty to one's platoon, a desire to end the war, a group belief in the masculine ideal, a desire for survival, a personal sense of loyalty and respect for immediate superiors,[163] and personal religious beliefs.[164] These factors also reinforce the effect of the military's formal punishments. While no single factor is deemed most important, the study emphasizes the high correlation between a sense of duty to one's "buddies" and combat performance:[165]

> "The sense of power and security which the combat soldier derived from being among buddies on whom he could depend and from being part of a strong and winning team should not be regarded as a combat incentive. But as one way in

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speech, though not absolute ... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance, or unrest.... There is no room under our Constitution for a more restrictive view.

Id. at 4 (citations omitted).

157 See text accompanying notes 85 to 89 supra.

158 See generally Note, Military Discipline and Political Expression: A New Look at an Old Bugbear, 6 Har. Civ. Rights-Civ. Lib. L. Rev. 525 (1971).

159 See text accompanying notes 178 to 185 infra.

160 Dept. of the Army, Field Manual 22-100, Military Leadership § 69(a) (1969), cited in Note, supra note 158, at 534 n.56.

161 See generally, Note, supra note 158.

162 Samuel A. Stouffer et al., The American Soldier (1949).

163 Id. at 130-42.

164 Id. at 117, 118, 130.

165 Id. at 149.

which the resources of the individual were maintained at a level at which he remained capable of coping with the stresses of combat, it was surely as important as more positive factors in combat motivation."

Additionally, a survey of battle hardened officers and enlisted men revealed that only 1 per cent of the enlisted men regarded leadership and discipline as an important motivating factor. In contrast, 19 per cent of the officers questioned selected leadership and discipline as being important.[166]

Moreover, a recent study by two Army officers indicates that a punitive approach to discipline may have a detrimental effect on morale, and concludes that a system of positive reinforcement utilizing the manipulation of rewards would yield a more beneficial result.[167] This conclusion is supported by the observation of one military commentator that the traditional approach to discipline produces an unhealthy conformity which can stagnate innovation and flexibility within the military.[168] He noted:

> This concept of a machine, rather than an individual, is alien to American Military thinking because of our national reluctance to maintain a large standing army and the individual character of the U.S. citizen as a soldier. Because our military philosophy has reached the point that the soldier is to be informed of not only what he is to do but also why, the next step of allowing the soldier to freely express his views follows naturally.[169]

Although these studies do not completely negate the role of formal disciplinary sanctions, in effecting favorable combat performance, they do present a more comprehensive picture of the forces motivating such performance. Despite the emphasis placed by the courts on rigid military discipline, even the armed forces have moderated their response to morale and discipline problems.[170] Specifically, the Army has taken

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166 Id. at 108. The authors warn that these figures may be suspect because of the somewhat slanted phrasing of the questions.

PERCENTAGE OF COMMENTS NAMING EACH INCENTIVE AS BEING MOST IMPORTANT

Incentives	Enlisted Men Question: "Generally, from your combat experience what was most important to you in making you want to keep going and do as well as you could?	Officers Question: "When the going is tough for your men what do you think are the incentives that keep them going?"
Ending the task	39%	14%
Solidarity with group	14%	15%
Sense of duty and self-respect	9%	15%
Thoughts of home and loved ones	10%	3%
Self-preservation	6%	9%
Idealistic reasons	5%	2%
Vindictiveness	2%	12%
Leadership and discipline	1%	19%
Miscellaneous	14%	11%

167 Datel and Letger, The Psychology of the Army Recruit, an unpublished paper read before the American Medical Association In Chicago, June 22, 1970. N.Y. Times, June 23, 1970, at 15, col. 2.

168 Brown, Must the Soldier Be a Silent Member of our Society, 43 Mil. L. Rev. 71, 108 (1969).

169 Id.

170 N.Y. Times, Sept. 5, 1971, at 1, col. 1; Id., Sept. 13, 1971, at 1, col. 3.

a conciliatory position on the problems of drug use,[171] racial tension[172] and refusal to enter battle.[173] In addition, several branches of the armed services[174] have taken steps to minimize the harassment of enlisted and conscripted men by eliminating reveille, curtailing make-work activities such as K.P., and allowing men to grow sideburns, mustaches and longer hair.[175]

These efforts to ease the approach to military discipline can be expected to continue as the Vietnam conflict is reduced.[176] Perhaps the military recognizes that strict discipline, by conditioning the soldier to respond to orders without hesitation or thought, may have led to battle atrocities such as those inflicted on the population of My Lai.[177] Whatever the reason, two conclusions emerge. First, a rigid approach to discipline ignores other important factors contributing to optimal combat performance. Secondly, such discipline is being eased by the military in recognition of the counterproductive effect of authoritarian sanctions.

2. *The Effectiveness of Prior Restraints on Military Bases*

In a society committed to the principle "that debate on public issues should be uninhibited, robust, and wide open,"[178] it is unrealistic to attempt to isolate military personnel from ideas circulating in the civilian society. With the widespread doubt about the American involvement in Vietnam, it is to be anticipated that some segments of the military will be divided on the direction of military policy. Under the present system of conscription, the armed services are dependent upon a civilian source for manpower supply. It is unimaginable that the military could ever screen out dissenters from its recruits and conscripts.[179]

Nor can the base perimeter be fenced to prevent entry of undesirable ideas circulated in the popular media. Reports of and comments on the general disagreement with American military policy in the popular media have been extensive; in some cases, they have been emotionally evocative.[180] These media enter military bases in the form of publications available at post exchanges and television and radio broadcasts. Acquiescing partially to this presence of dissident information, a Department of Defense directive has been issued, permitting "the mere possession" of literature on base, including "unauthorized literature."[181]

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[171] Id., Nov. 23, 1970, at 1, col. 6.

[172] Id., Feb. 4, 1970, at 24, col. 1; Id., March 6, 1971, at 14, col. 1.

[173] Id., Sept. 5, 1971, at 1, col. 1.

[174] Id., Nov. 13, 1970, at 11, col. 1 (Navy); Id., Dec. 9, 1970, at 1, col. 5 (Army); Id., Jan. 10, 1971, at § 4, p. 4, col. 2 (General Leonard F. Chapman, Marine Corps Commandant, says Marines will maintain strict disciplinary system.)

[175] Id., May 11, 1971, at 35, col. 3.

[176] If consciption ends, a strict disciplinary approach cannot be justified on the grounds that, since soldiers are in the armed forces against their will, they must be compelled to maintain military routine.

[177] It is possible that the military's strict disciplinary system is to some degree responsible for the massacre at My Lai. S. Hersh, My Lai 4 (1970). It has been suggested that because the present disciplinary system is designed to produce an automatic response of obedience when orders are given, the infantryman is ill-prepared to recognize an order as being illegal and to refuse to obey a command to commit an atrocity. Rivkin, The Need to Eliminate Blind Obedience in the Army, N.Y. Times, Dec. 21, 1970 at 35, col. 4.

[178] New York Times Co. v. Sullivan, 376 U.S. 255, 270 (1964).

[179] The Army has attempted to prevent addicts from entering the army and has administered tests to detect drug use by potential conscripts. This program, however, has not been very successful. It was recently reported that increasingly growing numbers of inductees are bringing their drug habits into the armed forces with them. N.Y. Times, July 22, 1971 at 8, col. 3. If the Army has been unsuccessful in screening out addicts, it is difficult to imagine how it could successfully exclude dissidents.

[180] E.g., The Faces of the American Dead in Vietnam. (A Photo Essay of the War's Toll for a Single Week), Life, June 27, 1969, at 20-32.

[181] D.O.D. Directive 1326.5 (Sept. 12, 1969).

Since A.R. 210-10 (5-5) affects all publications except those distributed through regularly established and approved outlets, the military system of prior restraints is primarily directed at "underground" publications. Unlike the established periodicals available through normal channels, the "underground" papers and circulars are likely to have an unimpressive appearance, lack a reputation for veracity in their reportage, be unknown to the reader and to compensate for lack of factual content with invective and polemic. Only those servicemen who have already adopted a dissident attitude are likely to believe such opinionated material. For these men, a censorship system comes too late to have any meaningful effect.

In addition, it should be noted that the Army has expressly recognized the soldier's right to "vote and express his personal opinion on political candidates *and issues*, but not as a representative of the armed forces."[182] This right is without substance if the soldier is deprived of access to conflicting ideas. The system of prior restraint, by seeking to cut the soldier off from the dissident opinions of others, attempts to defeat the military's own policy.

Finally, a censorship system may even aggravate the discipline problem. A.R. 210-10 (5-5) cautions base commanders to consider whether the suppression of publications "will in itself result in the publication in question achieving notoriety and increased circulation to military personnel through off-base sources."[183] Moreover, the Army has recognized the possibility that "severe disciplinary action in response to a relatively insignificant manifestation of dissent can have a counter-productive effect . . . Thus, rather than serving as a deterrent, such disproportionate actions may stimulate further breaches of discipline."[184] Considering the nature of "underground" publications and the availablity of critical material to the soldier through the established media,[185] the use of A.R. 210-10 (5-5) might be a harsh response to a largely imaginary danger.

Therefore, a less restrictive approach to military dissent is more sound than a policy of suppression of ideas, especially in view of the widespread disenchantment with American military policy in the society which provides the military with its manpower. The bludgeon in such circumstances only serves to augment the opposition, proving the wisdom of Judge Brandeis' advice:

> It is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies. . . .[186]

IV. CONCLUSION

The factors in an analysis of the constitutional validity of a system of prior restraint to preserve military discipline, loyalty, and morale are the societal and individual value accorded freedom of expression, the importance of discipline to the military, and the utility of a prior restraint in securing these military objectives. This society's commitment to first amendment ideals is beyond question. It has long been recognized that the first amendment embodies "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."[187] Both

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182 D.O.D. Directive 1344.10 (Iv)(A)(1)(a) (Sept. 23, 1969).

183 A.R. 210-10 (5-5)(c).

184 D.O.D. Directive 1326.5 (Sept. 12, 1969).

185 See text accompanying note 184 supra.

186 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

187 De Jonge V. Oregon, 299 U.S. 353, 364 (1937).

procedurally and substantively a system of prior restraint conflicts with the mainstream of constitutional adjudication. The censorship system of A.R. 210-10 (5-5) is inconsistent with a tradition of judicial condemnation of prior restraints, fails to incorporate appropriate procedural safeguards for a hearing and speedy judicial review, and incorporates an elastic standard which fails to square with contemporary requirements for specificity. Because of its prophylactic nature, a system of prior restraint brings within the ambit of official scrutiny all literature regardless of its content. Since the military has at its disposal an arsenal of criminal statutes capable of reaching deviant expression, the censorship approach must be justified over the constitutional obligation to use measures that are least burdensome on first amendment freedoms.[188]

The military is operating a censorship system designed to preserve loyalty and morale as well as discipline. Any censorship system is suspect, but one which by its own terms seeks to reinforce official dogma is particularly repugnant to the first amendment. When the military seeks to preserve loyalty and morale, it is concerned with controlling men's minds and their thoughts. This the military cannot and ought not be permitted to do. The observation of Justice Jackson in *West Virginia Board of Education v. Barnett*[189] is a cornerstone of our system of constitutional adjudication.

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism or other matters of opinion . . .[190]

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188 Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. Irvington, 308 U.S. 147 (1939).
189 319 U.S. 624 (1938).
190 Id. at 624.