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A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests

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A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests

Tatum H. Lytle*

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I. INTRODUCTION

Technological advances occurring within the last two decades are shrinking the world and exposing America to heightened homeland security risks. Threats posed by terrorism and weapons of mass destruction have resulted in an increased American military presence in foreign nations. These recent military efforts toppled Saddam Hussein's regime, denied al-Qaida a safe haven in Afghanistan, and dismantled the repressive Taliban. Even though military victories have been accomplished, these military operations have created competing priorities between protecting personal freedoms versus national security interests. This Note addresses the issue of regulation of Web sites created by military personnel containing war experiences that may threaten national security.

Part II of the Note provides background on press coverage and press censorship of American wars. Part III of the Note generally addresses free speech in the military and discusses applicable case law governing freedom of speech claims within a military context. This Part discusses the unique regulations regarding conduct and speech that are placed specifically on soldiers rather than the civilian community. Part IV of the Note examines the revolution of blogging on the Internet. This Part contains a brief description of a weblog, illustrates the unique characteristics of a weblog compared to traditional media sources, and discusses the rise and popularity of weblogs. Part V examines the relevant articles of the Uniform Military Code of Justice which may subject soldiers to discipline for creating and maintaining a blog regarding their military conduct. Part V also addresses regulations implemented by the Department of Defense and general lawful orders given by military commanders which restrict a soldier's speech. Part VI of the Note describes stories of soldiers' personal experiences with blogging and the government and military's involvement with regulation of soldiers' blogs. Part VII sets forth suggested modifications regarding regulation of soldiers' blogs.

II. RESTRICTIONS ON PRESS COVERAGE DURING WAR

Throughout periods of conflict during American history, tension between national security interests and First Amendment freedoms has surfaced. A conflict exists between the military's need to protect the military's operational tactics and strategies versus the public's right of access to the status of military operations.

A. Pre-Vietnam Press Coverage During War

As communications technology has changed over time, information on military operations has become more accessible. As such, the regulation of this information becomes more complex. During the American Revolution, communications were limited to personal letters and official messages.¹ Due to the transitioning state of the government, censorship of this form of communication did not occur, and press coverage of military operations was nonexistent.² With the advent of the telegraph, press coverage of the Civil War was much more extensive.³ In turn, this led to the government's implementation of a "program of censorship 'imposed to prevent the publication of information of value to the enemy' and to 'stifle criticism of the conduct of war.'"⁴

In 1917, during the first World War, the "State, Navy, and War Departments established the Committee on Public Information to provide information and enforce censorship regulations."⁵ At this time, the Espionage Act was passed which prohibited publication of information useful to the enemy or any interference with military operations or war production.⁶ The Sedition Act of 1918 was passed which prohibited critical remarks about the conduct of operations, the United States Government, or its military forces, including the flag.⁷ The Espionage and Sedition Acts have since been repealed; however, the government continues to impose

1. Rana Jazayerli, *War and the First Amendment: A Call for Legislation to Protect A Press' Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT'L L. 131, 134 (1997).

2. *Id.*

3. PHILLIP KNIGHTLEY, *THE FIRST CASUALTY—FROM THE CRIME TO VIETNAM: THE WAR CORRESPONDENT AS HERO, PROPAGANDIST, AND MYTH MAKER* 20 (1975).

4. Jazayerli, *supra* note 1, at 134–35.

5. C. Robert Zelnick, *The Press and National Security: Military Secrets and First Amendment Values*, 1 J. NAT'L SECURITY L. 21, 24 (1997).

6. Espionage Act of 1917, ch. 30, 40 Stat. 219, *repealed by* Act of June 25, 1948, ch. 645, 62 Stat. 736.

7. Sedition Act of 1918, ch. 75, 40 Stat. 553, *repealed by* Act of Marc. 3, 1921, ch. 136, 41 Stat. 1359.

guidelines on the flow of information pertaining to military operations.

After the attack on Pearl Harbor during World War II, Congress enacted the War Powers Act⁸ which led to President Roosevelt's creation of the Office of Censorship.⁹ This office set up guidelines which were codified as the *Code of Wartime Practices*.¹⁰ Although this code imposed restrictions on press coverage of the war similar to those imposed during World War I, the relationship between journalists and the government regarding press coverage remained open and civil.¹¹ The press had access to battle zones and was even present at critical points of the war, including the invasion of Normandy.¹²

B. Open Access: Press Coverage During the Vietnam War

During Vietnam, relaxation of censorship occurred. The press had unprecedented access to military operations since there was no censorship of reports or television coverage.¹³ Journalists during Vietnam merely had to agree to the following basic ground rules: (1) there would be no casualty reports on a daily basis; (2) troop movements should not be announced and would not be confirmed until the enemy knows of the movements; (3) no united identifications should be given when reporting on battles; (4) similar specific information should not be released on air strikes; (5) next of kin should not learn of a death through a news photograph, and privacy rights of the wounded should be respected.¹⁴ The lack of formal censorship led to a conflict between the media's negative portrayal of the war and the government's push for gaining public support of the war. The press covered graphic and disturbing aspects of the war stifling public support.¹⁵ The public relations stance on Vietnam "ended the cooperative relationship between the press and the military, as the government came to believe that the 'lesson' of Vietnam was that the press had 'lost the war for America.'"¹⁶

8. First War Powers Act of 1941, ch. 593, 55 Stat. 838, *repealed by* Pub. L. No. 89-554, 80 Stat. 651 (1966).

9. Zelnick, *supra* note 5, at 25.

10. *Id.*

11. Jazayerli, *supra* note 1, at 136.

12. *Id.*

13. Michael D. Steger, *Slicing the Gordian Knot: A Proposal to Reform Military Regulation of Media Coverage of Combat Operations*, 28 U.S.F.L. REV. 957, 964 (1994).

14. *News Policies in Vietnam: Hearings Before the S. Comm. on Foreign Relations*, 89th Cong. 32, 73-75 (1966).

15. Jazayerli, *supra* note 1, at 137.

16. *Id.* at 138.

C. Post-Vietnam War Coverage: Striking a Balance

After Vietnam, the next military operation involving U.S. troops was Grenada. During Grenada, American journalists were not allowed to join the military invasion force for the first two days.¹⁷ As a result of the pressure on government from the press regarding denial of access to the Grenada invasion, the government implemented a panel to study military-press relations.¹⁸ Although this panel suggested recommendations for press coverage of future military operations, the press was nonetheless denied access to future military operations.¹⁹ For instance, no journalists were present when the United States bombed Libya or during the invasion in Panama until the military operations had ceased.²⁰

Before the start of the first Persian Gulf War, the Department of Defense's Secretary for Public Affairs issued guidelines restricting press coverage of military operations. The guidelines restricted coverage of the following:

- (1) specific numbers of troops, aircraft, weapons systems;
- (2) details of figure plans, operations or strikes;
- (3) information on the specific location of military forces or security arrangements in effect;
- (4) rules of engagement;
- (5) intelligence collection activities;
- (6) troop movements;
- (7) identification of aircraft origin;
- (8) effectiveness or ineffectiveness of enemy camouflage, cover, deception, targeting, etc;
- (9) specific information on downed aircraft or damage ships while search-and-rescue missions were planned or underway; and
- (10) information on operational or support vulnerabilities of U.S. and allied forces.²¹

After the Persian Gulf War, the press severely criticized the government's restrictions of the press as to reporting on military operations.²² Such criticism led to the formation of a committee aimed at reaching a compromise between the government and press correspondents. The nine principles agreed upon included: (1) open reporting would be the norm in covering military combat; (2) pools²³ should be used where they are the only feasible means of obtaining early access; (3) pools may sometimes be required for specific events due to logistical constraints; (4) a system of

17. Steger, *supra* note 13, at 967-68.

18. Jazayerli, *supra* note 1, at 138.

19. *Id.* at 139.

20. *Id.*

21. Zelnick, *supra* note 5, at 36-37.

22. Steger, *supra* note 13, at 978.

23. The Pentagon selects a limited number of members from the media by lottery to serve in press pools during wartime. The pool reporters write accounts of the wartime events and share this information with other media members. See Pool Coverage, The Museum of Broadcast Communications, <http://www.museum.tv/archives/etv/P/htmlP/poolcoverage/poolcoverage.htm> (last visited Mar. 29, 2007).

credentials would be implemented for journalists and violators of the ground rules would be expelled; (5) reporters would have access to major military units; (6) military public affairs officers should act as liaisons between the military and the press but should not interfere with reporting; (7) military commanders would allow reporters to ride on military equipment wherever feasible; (8) the military would facilitate the filing of timely and secure reports from the field; and (9) these principles would also apply to the standing Pentagon Pool.²⁴

III. FREE SPEECH WITHIN THE MILITARY FORUM

The regulation of speech of military personnel is much more stringent than the regulation of speech imposed on the general public. The United States Constitution states that Congress "shall make no law abridging the freedom of speech or press."²⁵ However, within a military context, courts institute a stricter standard in determining whether a violation of a personal right has occurred. This Part will examine case law interpreting the stricter regulation of freedom of speech for military personnel.

A. Clear and Present Danger Standard

In *Schenck v. United States*, the Supreme Court held that Schenck's "free speech" rights undermined Congress' right to prevent threats to national security.²⁶ The *Schenck* Court established the clear and present danger standard, meaning that courts consider 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."²⁷ Accordingly, if civilians and military members wish to distribute material on base, a commander may prohibit such material if it presents a clear danger to loyalty, discipline, or morale.

B. Military Bases are Generally Nonpublic Forums

In *Flower v. United States*, the Supreme Court held that a civilian peace protester could not be forced to vacate a public thoroughfare that ran through an army base where he was distributing anti-Vietnam leaflets.²⁸

24. Zelnick, *supra* note 5, at 40-41. See also Steger, *supra* note 13, at 978-79.

25. U.S. CONST. amend. I.

26. See *Schenck v. U.S.*, 249 U.S. 47 (1919) (a civilian distributed antidraft leaflets through the U.S. mail in an attempt to persuade men to ignore the 1917 wartime draft).

27. *Id.* at 52. The Court noted that "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Id.*

28. *Flower v. United States*, 407 U.S. 197 (1972).

The Supreme Court's holding has since been narrowly interpreted with courts recognizing that military bases are generally nonpublic forums and military commanders traditionally maintain the right to restrict access to their bases. For example, in *Greer v. Spock*, the Supreme Court held that *Flower* should be narrowly construed and did not allow minor presidential and vice-presidential candidates to enter army bases for the purpose of campaigning.²⁹

C. Subordination of Personal Rights for Military Personnel

Courts strongly advocate a subordination of personal rights for soldiers in an effort to maintain a disciplined and united military front. In *United States v. Priest*, the United States Court of Military Appeals distinguished between the right to freedom of speech enjoyed by civilians versus military personnel.³⁰ The *Priest* court emphasized that other considerations must be weighed in military life, and that speech which may undermine the effectiveness of response to command is constitutionally unprotected.³¹ The Supreme Court has made a similar distinction by noting:

Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society. The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."³²

In *United States v. Wilson*, the U.S. Army Court of Military Review held that appellant's First Amendment claim was without merit where he blew his nose on the American flag while he was a member of the flag-raising detail.³³ The court noted that the military judge "correctly balanced the needs of the government in promoting a disciplined military force with the rights of the appellant under the First Amendment."³⁴ Traditionally, the military has triumphed when soldiers raise First Amendment protests.

29. *Greer v. Spock*, 424 U.S. 828 (1976). The Court further noted that the base regulation prohibiting political speeches was acceptable because it is intended to maintain the military's political neutrality. *See id.* at 839.

30. *U.S. v. Priest*, 45 C.M.R. 338, 344 (CMA 1972) (involving an enlisted Navy member who distributed an anti-Vietnam war newspaper call "OM" which called for disobeying military authority and emphasized the government was wrong about the war).

31. *Id.* at 344. The Supreme Court further stated "[T]he right of free speech in the armed services is not unlimited and must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country." *Id.*

32. *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (citations omitted).

33. *United States v. Wilson*, 33 M.J. 797, 800 (1991).

34. *Id.* at 800-01.

IV. REVOLUTION OF BLOGGING ON THE INTERNET

Weblogs are a relatively recent phenomenon. As the popularity of weblogs increased, it was only a matter of time before the use of blogging extended into the military sphere. Weblogs have created greater ability for soldiers to communicate with the public while engaged in military operations. This new form of communication has blurred the lines of private communication with the military's need to protect their operations leading to a regulatory conflict.

A. A Brief Description of a Blog

"A blog is a user-generated website where entries are made in journal style and displayed in a reverse chronological order."³⁵ The popularity of blogs is created by the ability of the creator to express his individual personality via the Web site. This personal expression is of particular importance to soldiers who are forced to spend months or years away from their family and friends while upholding their military commitments.

Weblogs are not a traditional source of media but a modernized source of personal expression where individual bloggers can state their opinions or feelings on any topic. One author describes a blog as the following: "A blog is a collection of digital content, that when examined over a period of time, exposes the intellectual soul of its author or authors. Blogging is the act of creating, composing, and publishing this content; and a blogger is the person behind the curtain."³⁶

A defining characteristic of a blog is when a blogger refers to an online source, then he links his blog to that source.³⁷ This system of linking is what distinguishes a weblog from traditional media writing on the Internet.³⁸ Blogs, an untraditional communication source, have "restore[d] a real voice and personality to the citizenry at large—locally, nationally, globally."³⁹

B. The Rise of Warblogs

Blogging began in 1999, and within years blogging became an industry.⁴⁰ As blogging became more popular and accessible to ordinary

35. Blog, Wikipedia, <http://en.wikipedia.org/wiki/Blog> (last visited Mar. 29, 2007).

36. BIZ STONE, A HYPERCONNECTED PEEK AT THE WORLD OF WEBLOGS: WHO LET THE BLOGS OUT? 35 (2004).

37. REBECCA BLOOD, THE WEBLOG HANDBOOK: PRACTICAL ADVICE ON CREATING AND MAINTAINING YOUR BLOG 19 (2002).

38. *Id.*

39. DAVID KLINE & DAN BURSTEIN, BLOG!: HOW THE NEWEST MEDIA REVOLUTION IS CHANGING POLITICS, BUSINESS, AND CULTURE XXI (2005).

40. STONE, *supra* note 36, at 13.

citizens, the content covered on blogs expanded. Topics covered expanded to include political concerns, including blogs discussing America's involvement in overseas conflicts.

Immediately following the September 11, 2001 attack, people used blogs to let loved ones know they were alive, to find out more information on the attack, and to provide first-hand accounts of the terrorist attack.⁴¹ Since September 11, 2001, warblogs have only become more prominent.⁴² Warblogs have developed, and their content has broadened to address wartime issues as well as various political issues.⁴³

V. MILITARY REGULATION OF FREE SPEECH

Traditionally, the military has been treated as a separate community subject to a different set of rules and regulations as compared to the civilian community. Enlisted soldiers have to uphold their patriotic duty and must obey the orders of their superiors in order to ensure successful military operations. There are three areas of regulation for military speech. First, the Uniform Code of Military Justice ("UCMJ") contains articles setting forth acts punishable by court-martial.⁴⁴ Second, the Department of Defense has regulations governing speech in the military. Lastly, individual military commanders may implement general orders to soldiers regulating their speech.

A. *Uniform Code of Military Justice*

Under the United States Constitution, Congress has the power to raise and support armies; provide and maintain an army; and provide for organizing and disciplining them.⁴⁵ Based on this authority, Congress has enacted the UCMJ, codified at 10 U.S.C. §§ 880–934. Under the UCMJ, the military has jurisdiction over "active duty personnel; . . . certain retired personnel and; members of Reserve components not on active duty under some circumstances."⁴⁶ Thus, jurisdiction is based on the active status of the service member.⁴⁷ The military most often utilizes a court-martial in regulating active duty personnel.⁴⁸ This Note focuses on soldiers who are

41. *Id.* at 171.

42. *Id.* at 47.

43. *Id.*

44. Uniform Code of Military Justice, 10 U.S.C. §§ 880–934 (Supp. IV 2004), available at <http://usmilitary.about.com/library/pdf/mcm2000.pdf>.

45. U.S. CONST. art. I, § 8.

46. MANUAL FOR COURTS-MARTIAL R.C.M. 202(a)(1) (2005), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf> [hereinafter MCM] (citations omitted).

47. *See Solorio v. United States*, 483 U.S. 435, 447 (1987).

48. *See MCM, supra* note 46, at R.C.M. 202(a)(2).

subject to discipline under the UCMJ.

The UCMJ allows for jurisdiction of court-martial over any offense under the Code as long as the Constitution permits.⁴⁹ Thus, military members may bring constitutional objections to punishment given under the Code; however, case law indicates that a military member's free speech challenges are rarely upheld.

If jurisdiction is established, several articles of the UCMJ may restrict a soldier's freedom of speech. Three articles that may relate to regulation of a soldier's blog are Article 134,⁵⁰ Article 92,⁵¹ and Article 88.⁵² Article 134, known as the "General Article", provides:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."⁵³

"[C]rimes and offenses not capital" refers only to crimes under federal law. Thus, this section is not applicable for purposes of this Note unless the content utilized by the soldier constitutes a violation of federal law. However, the phrases "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces" may be relevant to the military's regulation of blogging.⁵⁴ The specifics regarding offenses that may be charged under this article are provided in the Manual for Courts-Martial ("MCM"). One relevant provision forbids disloyal statements which may include either political or moral objections to governmental actions or policies.⁵⁵

Many argue that Article 134 is too vague; however, the Article has withstood constitutional challenges.⁵⁶ The Supreme Court has reasoned that "the different character of the military community and of the military mission," based upon the "fundamental necessity for obedience" and "necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."⁵⁷

49. *Id.* at § 203(a).

50. 10 U.S.C. § 934 (2000).

51. *Id.* § 892.

52. *Id.* § 888.

53. *Id.* § 934.

54. *Id.*

55. See MCM, *supra* note 46, at Art. 134, para. 72(c).

56. See *United States v. Frantz*, 2 C.M.A. 161, 163 (1953) (holding that the Article was not vague or uncertain "to an unconstitutional degree").

57. *Parker v. Levy*, 417 U.S. 733, 758 (1974).

Article 92 of the UCMJ is entitled "Failure to obey order or regulation." This Article states:

Any person subject to this chapter who—(1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.⁵⁸

In sum, soldiers may be subject to a court-martial if they fail to obey the lawful general orders of their military commanders. The orders given by military commanders may take two forms: (1) base-wide restrictions; or (2) orders directed at the conduct or speech of an individual soldier.⁵⁹

Article 88 of the UCMJ forbids a commissioned officer from using "contemptuous words against the President, the Vice-President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Transportation, or the Governor or legislature of any State, Territory, Commonwealth."⁶⁰ This article only prohibits "contemptuous" words against the listed persons or bodies of people, and such words can be used against said individuals in a private or official capacity.⁶¹ Furthermore, Article 88 does not prohibit adverse criticism against the listed persons or bodies as long as the words are not contemptuous.⁶² Violations under this article are subject to First Amendment restraints.⁶³

B. Regulations Proffered by the Department of Defense

Since the military is viewed as a separate community from the civilian world, there are specific regulations placed on military personnel to ensure that the mission of the military is fulfilled. For example, there are measures contained in the Air Force Instructions ("AFI") which impact a soldier's right to blog, including restrictions on Internet use and political activities.⁶⁴ The purpose behind these regulations is to ensure an orderly military where soldiers are required to obey the orders given by their

58. 10 U.S.C. § 892 (2000).

59. Captain John A. Carr, *Free Speech in the Military Community: Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 313 (1998).

60. 10 U.S.C. § 888 (2000).

61. Carr, *supra* note 59, at 334.

62. *Id.*

63. *Id.*

64. SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 33-129, WEB MANAGEMENT AND INTERNET USE 1 (2005), available at <http://www.e-publishing.af.mil/pubfiles/af/33/afi33-129/afi33-129.pdf> [hereinafter AFI 33-129]. See also SEC'Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-902, POLITICAL ACTIVITIES BY MEMBERS OF THE US AIR FORCE 1 (2005), available at <http://www.e-publishing.af.mil/pubfiles/af/51/afi51-902/afi51-902.pdf> [hereinafter AFI 51-902].

superior military commanders. Additionally, the regulations help ensure a politically disinterested military which will act based on orders rather than their own political motivations.⁶⁵

Political restrictions imposed by the AFI include prohibiting military personnel from hosting political activities or from influencing elections by soliciting votes or contributions for specific candidates.⁶⁶ However, Air Force members are allowed to vote, attend political activities out of uniform, and express views on nonpartisan issues in a letter to the newspaper.⁶⁷

Ultimately, the AFI provides that “commanders must preserve the service member’s right of expression, to the maximum extent possible, consistent with good order, discipline, and national security.”⁶⁸ Even though commanders are required to preserve military personnel’s personal expression, commanders still maintain “the inherent authority and responsibility to take action to ensure the mission is performed and to maintain good order and discipline.”⁶⁹ The specific reference of preserving personal rights in the AFI indicates the importance of striking a balance between maintaining military order and preserving personal expression. Unfortunately, the preservation of military order often trumps the right to personal expression.

C. General Orders Given by Military Commanders

Military commanders may also implement specific orders regulating the speech of the soldiers under their command. The case law relating to specific orders regulating speech of military personnel is limited. In *Ethredge v. Hail*, the commander of an Air Force base implemented an order prohibiting bumper stickers that “embarrass or disparage the Commander in Chief.”⁷⁰ A soldier refused to remove a bumper sticker from his vehicle that read “HELL WITH CLINTON AND RUSSIAN AID” and challenged the order as violating his protected speech under the First Amendment.⁷¹ The court held that since the air force base is a nonpublic forum, officials can impose speech regulations as long as the regulation is “reasonable and not an effort to suppress expression merely

65. Carr, *supra* note 59, at 336.

66. AFI 51-902, *supra* note 64, at paras. 3, 3.1, 3.10, 3.20.

67. *Id.*, at paras. 4.1, 4.3, 4.7.

68. SEC’Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 51-903, DISSIDENT AND PROTEST ACTIVITIES para. 1.1 (2005), available at <http://www.e-publishing.af.mil/pubfiles/af/51/afi51-903/afi51-903.pdf> [hereinafter AFI 51-903].

69. *Id.* at para. 1.

70. See *Ethredge v. Hail*, 56 F.3d 1324, 1325 (11th Cir. 1995).

71. *Id.* at 1325–26.

because the public officials oppose the speaker's view."⁷² The court also found that the order was neutral, applying to both supporters and nonsupporters of the President.⁷³ A commander does not have to show actual harm before implementing an order regulating speech.⁷⁴ Commanders may implement orders regulating speech if they can demonstrate a "clear danger to military order and morale."⁷⁵ Ultimately, federal courts give deference to military officials in regulating speech because of the military's role in society and the military's necessity in carrying out their missions. Thus, soldiers are afforded a lower degree of free speech protection upon enlistment in military service.

VI. SOLDIERS' PERSONAL BLOGGING STORIES

The military and our country demand soldiers to surrender personal freedom when they disrobe their civilian clothing and enlist in the military. Military personnel are asked to surrender time with family, security, stability, and for some, the ultimate price, his or her life. If a soldier knowingly surrenders so much to serve his country, should he also have to give up his freedom of speech?

During war time, journalists have traditionally provided the most immediate first-hand depictions of war. But in the new technological era, service members are delivering their first-hand accounts through real-time dispatches on their blogs. This phenomenon, called "milblogging," is defined as military men and women who write blogs about their wartime experiences.⁷⁶ The utilization of blogging by soldiers is fueling the free speech debate because this new form of free expression poses risks to military operational security.

The power of blogs becomes more apparent after reviewing numerous blogs regarding a soldier's life. Blogs bring the war to the homefront so that a soldier may tell his story, share his strife, and communicate with loved ones. The blogs contain photographs, diary entries, memorials dedicated to fallen soldiers, and any content the soldier wishes, although such content is subject to strict regulation.⁷⁷

72. *Id.* at 1327 (quoting *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 46 (1983)).

73. *Id.*

74. *Id.* at 1328.

75. *Id.*

76. Milblogging, Wikipedia, <http://en.wikipedia.org/wiki/Milblogging.com> (last visited Mar. 29, 2007).

77. See, e.g., A Soldiers Blog, <http://asoldiersblog.blogspot.com> (last visited Mar. 29, 2007); A Soldier's blog, http://shawn_richardson.typepad.com (last visited Mar. 29, 2007); American Soldier, <http://www.soldierlife.com> (last visited Mar. 29, 2007).

A. Popularity Killed the Soldier's Blog

U.S. Army Specialist Colby Buzzell, a Stryker Brigade gunner formerly based in Mosul, Iraq, created a blog during his participation in the most recent war with Iraq.⁷⁸ Buzzell began writing a blog to escape the boredom and monotony that he feels is ninety-nine percent of a soldier's life in a war zone; however, the blog also addressed situations where his platoon came under fire.⁷⁹ Buzzell's blog recounting his time in Iraq received much attention, especially his piece entitled "Men in Black," which recounted an insurgent ambush on his patrol.⁸⁰

In this new digital communication era, the military appears reluctant to give up the traditional control they have maintained over information released from the war front. When word about Buzzell's blog reached his battalion commander, Buzzell was ordered to clear all his blog postings with his platoon sergeant because Buzzell had come "dangerously close to violating operational security by mentioning that his unit had run low on water during the hours-long firefight and describing some of the steps he took to get more ammunition as the battle raged on."⁸¹

Buzzell emphasized that most responses to his blog were positive, and he received emails from war veterans. Additionally, people with children in the military found Buzzell's blog as a source of information for what their children were experiencing during their service in Iraq.⁸²

B. A Soldier's Punishment for Blogging

Soldiers may be penalized for blogging if the blog contains information the military deems classified. It is common policy within the military to demote and fine service members for unauthorized release of military information. For example, Arizona National Guardsmen Leonard Clark was demoted and fined by the Army for posting on his blog information that the Army deemed classified.⁸³ The military alleged that Clark disseminated information about troop movement or location, soldiers who had been hit or attacked, and military strategy.⁸⁴

78. KLINE & BURSTEIN, *supra* note 39, at 264.

79. *Id.*

80. *Id.*

81. *Id.* at 265.

82. *Id.* at 266.

83. Anne Broache, *Army Punishes Soldier for Blog Posts*, CNET NEWS.COM, Aug. 2, 2005, http://news.com.com/Army+punishes+soldier+for+blog+posts/2100-1028_3-5815812.html.

84. *Id.*

C. *Reigning in Blogs*

Military commanders may issue lawful general orders that impose strict regulations on a soldier's right to blog. The military seeks to protect military security while promoting free expression. In September 2005, Army Chief-of-Staff General Peter Schoomaker circulated a memorandum stating, "The enemy aggressively 'reads' our open source and continues to exploit such information for use against our forces."⁸⁵ General Schoomaker further noted that "[s]ome soldiers continue to post sensitive information to Internet Websites and blogs, e.g., photos depicting weapon system vulnerabilities and tactics, techniques and procedures."⁸⁶

Another example of a lawful general order regulating speech is when Lieutenant General John R. Vines issued an order regulating blogs created by soldiers under his command. "The memo prohibited posting of certain classes of information, including casualty information before the next of kin has been notified, information protected by the Privacy Act, matters that are the subject of ongoing investigations, and information designated as 'for official use only.'"⁸⁷ In the memorandum, soldiers were also ordered to register their Web sites with the chain of command and had to also list any contributions to other Web sites besides their own personal blogs.⁸⁸ This memorandum mirrors restrictions placed on press coverage during war established over fifty years ago.

There has been an effort by the Department of Defense to regulate soldiers' blogs; however, the Army regulators do not want to shut down soldiers' blogs completely.⁸⁹ Military commanders desire to regulate only sensitive military information—for example, photographs that expose weapon systems vulnerabilities or techniques. Notably, the regulation of sensitive information could lead to unequal imposition of regulation and punishment on soldiers who express dissenting views of the war on their blogs.

D. *Is Military Regulation of Blogging One-Sided?*

Many soldiers voice their discontent regarding the military's regulation of their personal expressions via their blogs. One infantryman, named Kevin, wrote on his blog:

A three-star general approved an 'order' that all milbloggers have to

85. Peter A. Buxbaum, *Reigning in the Blogs of War*, MIL. INFO. TECH. (Online Edition), Nov. 21, 2005, <http://www.military-information-technology.com/article.cfm?DocID=1242>.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

tell their chain of command about their blog . . . This is very unfortunate [because] a lot of people want to see the soldier's side and plus see a lot of what is going on that the news cannot and will not cover. I think the newspapers do a better job at revealing U.S. military tactics and strategy to insurgents than our blogs could ever do. I, and many other people, even many civilians I know, say there shouldn't be any reporters⁹⁰ embedded with U.S. troops or that they don't even belong there.

In response to Kevin's posting, an anonymous writer responded:

This is a WAR, not some game designed for your pleasure so you can sit on the sidelines and watch, or, worse yet, live vicariously through our actions. Milbloggers need to remember their purpose is to accomplish the mission and not act like self-absorbed quasi-tabloid journalists. With any luck milblogs will be banned entirely, and these so-called⁹¹ military personnel can rededicate themselves to the mission.

Another soldier, named Grey Eagle, wrote:

I am in total disbelief and angry over the fact that my Web site was shut down . . . They have to this date failed to explain why, and I can only assume that it had to do with being a milblogger. To anyone who has ever seen⁹² the Web site, you know that it didn't violate operational security . . .

On some occasions, soldiers have been required to shut down their blogs and post messages stating they are supporters of the administration.⁹³ For example, one blogger posted the following message after his blog was silenced:

I thank all of you who have been so supportive recently. I have never before received so much positive feedback, and it was very heart-warming to know that so many people out there care. Having said that, it breaks my heart to say that this will be my last post on this blog. I wish I could just stop there, but I can not. The following also needs to be said:

For the record, I am officially a supporter of the administration and of her policies. I am a proponent for the war against terror and I believe in the mission in Iraq. I understand my role in that mission, and I accept it. I understand that I signed the contract which makes stop loss legal, and I retract any statements I made in the past that contradict this one. Furthermore, I have the utmost confidence in the leadership of my chain of command, including (but not limited to) the president George Bush and the honorable secretary of defense Rumsfeld. If I have ever written anything on this site or on others that lead the reader to believe

90. *Id.*

91. Buxbaum, *supra* note 85.

92. *Id.*

93. See Posting of Matt to The Tattered Coat, (Oct. 23, 2005, 02:00 EST), <http://www.tatteredcoat.com/archives/2005/10/23/another-military-blogger-silenced/> (reposting the Oct. 22, 2005, blog by Daniel).

otherwise, please consider this a full and complete retraction.

I apologize for any misunderstandings that might understandably arise from this. Should you continue to have questions, please feel free to contact me through e-mail. I promise to respond personally to each, but it may take some time; my internet access has become restricted. posted by Daniel at Saturday, October 22, 2005.⁹⁴

Daniel, the blogger who was silenced, reportedly is a stop-lossed soldier who was upset that he was still serving in Iraq seven months past his original enlistment agreement.⁹⁵ Daniel emphasized the fear of receiving too much attention for his blog on his second-to-last post, stating:

Operation Truth has published my story as their Veteran of the Week profile. I am excited and nervous for the extra attention this will attract. Excited because the army is trying very hard to muffle the cries of battered soldiers, abused by the system they are sworn to protect. Each time our story is heard by someone new, the country comes that much closer⁹⁶ to understanding what is happening to us in Iraq and Afghanistan.

Blog postings demonstrate the frustration on the part of soldiers regarding the regulation of their free expression. Although the military maintains a strong interest in protecting operational security, a strong interest in the free flow of information also exists.

E. Military Spreading the Good Stories

The conflict over who controls military information continues and was heightened when news reports were released that the "U.S. military was paying Iraqi journalists and news organizations to publish favorable stories written by soldiers, sometimes without disclosing the military's role in producing them."⁹⁷ One soldier, Bill Roggio, was recruited by the Marines to come to the front lines in Iraq to report on his blog due to their frustration of coverage they were receiving by the news media.⁹⁸ The article notes that Roggio's arrival to cover the combat via his blog comes at a time of conflict regarding power to control the flow of information regarding the war.⁹⁹

Furthermore, United States Central Command ("CENTCOM") officials responsible for security interests in numerous nations have taken

94. *Id.*

95. *Id.*

96. Posting of Daniel to La Nouvelle Feuille, (Oct. 14, 2005), http://goetzit.blogspot.com/2005_10_01_archive.html.

97. Jonathan Finer & Doug Struck, *Bloggers, Money Now Weapons in Information War*, WASH. POST, Dec. 26, 2005, at A24, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/25/AR2005122500659.html>.

98. *Id.*

99. *Id.*

notice of the wide use of blogs. These officials have created a team responsible for contacting numerous bloggers who post inaccurate or incomplete information regarding military operations regarding the United States global war on terror. This CENTCOM team contacts bloggers to invite them to visit CENTCOM's Web site for complete information on the global war on terror, including news releases, data, or imagery.¹⁰⁰ CENTCOM officials state that this effort allows readers to hear the good stories regarding the global war on terror, and the officials emphasize that the news stories contained on the Web site are very factual.¹⁰¹

Understandably, the United States government and military have a strong interest in distributing positive communications regarding wartime efforts and advancements. The theory underlying regulation of soldiers' communications is that allowing soldiers to share dissenting opinions on the war diminishes unit cohesion and encumbers the effectiveness of military missions and goals. This interest is too strong to ignore. Obviously, maintaining harmony, cohesion, and morale among troops engaged in war is a key factor to attaining military goals and positive outcomes. However, a balance must be struck between protecting free speech and promoting troop cohesion and military morale. A soldier's free speech can not be completely sacrificed upon enrollment in the military.

A soldier's enlistment in the military is analogous to a standard employment contract. As such, the soldiers are expected to fulfill the terms of their enlistment much like an employee must fulfill the requirements imposed by their employment contracts. Employees under a standard employee contract are required to fulfill their job duties; however, employees may also voice dissention considering most employees are never 100 percent satisfied with their employers. Comparably, soldiers should not be prohibited from communicating their disagreement with certain military practices or policies. Soldiers, upon enlistment in the military, already forego so much normalcy that they should not have to forego their right to free speech.

VII. MODIFICATIONS AND ADDITIONS TO REGULATION OF SOLDIERS' BLOGS

With the advancement of communications technology and the increased accessibility to easy forms of communication, regulations imposing restrictions on speech must be modified to adapt to technological advancements. Regulations restricting a soldier's right to blog must be uniformly applied to all soldiers who exercise this right regardless of

100. See Captain Steve Alvarez, *CENTCOM Team Engages 'Bloggers,'* DEFENSELINK NEWS, Mar. 2, 2006, http://www.defenselink.mil/news/Mar2006/20060302_4370.html.

101. *Id.*

whether a blogger supports the presidential administration. If the government continuously favors patriotic blogs, shuts down unpatriotic blogs, and financially rewards journalists who report favorable stories regarding the war on terror, then an obvious bias exists towards soldiers who align with the presidential administration and its policies. In order to protect those soldiers who disagree with an administration's policies on war, regulations must be implemented to protect their freedom of speech and to ensure uniform application between all soldiers. This Note is in no manner advocating a completely open form of communication for military personnel that is subject to no regulation. The nation and military must be protected, and under some circumstances a soldier's speech must be prohibited to ensure the protection of military personnel and America's home front. Ultimately, a balance must be struck between protecting national security interests, allowing a soldier to tell his story, and the public's right to know the truth about war.

A. Amendments to the Uniform Code of Military Justice

Since courts allow great deference to military officials with regard to regulating speech, the military should be required to implement regulations that adequately protect a soldier's right to speech and should be forced to apply these regulations uniformly. Understandably, the military needs to protect its strategies, weapons systems, troop movements, and other tactical information. However, this need should not completely trump a soldier's right to present a dissenting view against the war or share personal opinions regarding his or her military experience as long as the soldier refrains from disclosing military secrets.

Currently, the UCMJ contains articles that may be pertinent to the regulation of soldiers' blogs. These articles penalize soldiers for behavior disrupting the good order and discipline of the military, for failing to obey any lawful order, and for using contemptuous words against the President or his administration. All pertinent articles are vague in relation to the regulation of blogging. These articles apply to speech generally and were formulated before the advent of blogging. The military should update the UCMJ to include specific provisions regulating the content of blogs. These provisions should specifically outline military information that a soldier is not free to publicize. However, such restriction also must protect a soldier's right to free speech. A soldier who posts unfavorable information regarding personal experience during the war or unfavorable content regarding the presidential administration's policies should not be regulated or shut down merely for voicing a dissenting opinion. Thus, application of these new provisions should fall equally on soldiers who support the administration and those who voice dissenting opinions regarding actions taken by the

administration in the global war on terror.

B. Orders Proffered by the Department of Defense

There is an obvious need to ensure that soldiers act according to military orders rather than their own personal political motivations. At times, the military's need to protect military order supersedes a soldier's right to political speech. However, a soldier maintains a right to voice his opinions through a blog as long as such opinions pose no threat to military order. There remains a need to protect a soldier's right of personal expression. Similar to the new provisions in the UCMJ, the AFI should be amended to speak directly to the content a soldier is allowed to post on his or her blog. Speech should only be forbidden to the extent that it poses a threat to national security or to revealing military secrets, troop locations, or weapons vulnerabilities. Soldiers should be allowed to express their political views and opinions even if such speech contradicts the administration's views or policies.

Even though the AFI provides that military commanders must protect the service member's right of expression,¹⁰² in practice, military officials err on the side of protecting national security and maintaining good order and discipline. Thus, specific written regulations regarding blogging content will lessen the discretion available to individual military commanders in the regulation of their soldiers' blogs; in turn, this will also promote wartime communication, providing a real portrait of the truths of war to the American public.

C. General Orders Given by Military Commanders

Military commanders are given great deference in implementation of specific orders regulating the speech of soldiers under their command. Military commanders must only show that such order is necessary to prevent a "clear danger to military order and morale."¹⁰³ This standard allows for great deference and promotes suppression of a soldier's right to speech in exchange for promoting order and morale. Few will argue against the necessity of promoting order and morale within the military sphere; however, few will also suggest that a soldier's right of speech is not worth protecting. Courts should emphasize the reasonableness standard of the regulation and focus on striking down orders that merely suppress a soldier's speech because it is dissident to the view of public officials or military commanders. Ultimately, soldiers provide a service to protect this country and the set of rules and values implemented by our Founding

102. AFI 51-903, *supra* note 68, at para. 1.1.

103. See *Ethredge*, 56 F.3d at 1328.

Fathers. As the First Amendment reads: "Congress shall make no law . . . abridging the freedom of speech."¹⁰⁴ Thus, the right of speech which soldiers serve to protect for American citizens and to promote for citizens of other nations should not be restricted to the point of nonexistence for military personnel.

VIII. CONCLUSION

Over the centuries, restrictions on the accessibility of military information during war time have changed. Such changes are necessary due to various intervening factors, such as increased weapons capabilities, better computer technology, and speedier communication devices. When changes occur, the government and military's policies regarding restrictions on a soldier's right to speech must be adapted to balance competing interests.

There is a delicate balance between protecting military interests and a soldier's right to freedom of speech. Interests of the military, including protecting national security, promoting order and discipline within the military, and safeguarding military secrets must be balanced with a soldier's right to tell his or her story and the public's right to know the truth about the war on terror. The government should not be allowed to restrict a soldier's right to tell his or her story because it is unfavorable to continuation of the war or the administration's policies. Such restrictions not only violate the soldier's right to free speech, they also limit the public's access to information received directly from active participants in the war.

104. U.S. CONST. amend. I.

