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FREE SPEECH ON THE BATTLEFIELD: PROTECTING THE USE OF SOCIAL MEDIA BY AMERICA'S SOLDIERS

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I. INTRODUCTION

> I don't care what the President says. We are not leaving Afghanistan anytime soon. The administration can spin it any way they want but the evidence is here in Afghanistan.[1]
>
> At 10:30 we gathered together and entered the CP to receive our brief from a Lieutenant Colonel Slusher [previously National Guard Bureau Pentagon seat shiner and five star REMF asshole] and another Captain. He kinda looks like a shorter, pudgier Telly Savalas albeit the lollypop and "who loves ya baby" smile.[2]

At first glance, it is difficult to discern that the first post is an allowable expression of free speech rights in the military, while the second is not.[3] These two blogs are only examples of the recent onslaught of social media used by soldiers to express their views on anything related to the military or War on Terror.[4] In turn, their usage of new technology creates novel challenges.[5] This new phenomenon, and the ambiguity evidenced in the posts above, presents the issue: To what extent are free speech rights extended to soldiers when they utilize social media? This Comment will argue that a new, more flexible constitutional test is needed for

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1. Troy Steward, *We Ain't Going Anywhere*, KEEPING AN EYE ON AFG.: BOUHAMMER'S AFGHAN BLOG (Sep. 7, 2010), http://www.bouha mmer.com.

2. *FOB Tombstone*, MY WAR STORIES (Nov. 9, 2007), http://mywarstories.blogspot.com.

3. *See generally id.* (establishing in a subheading on each page that he could only make these posts after he left combat).

4. *See* John Loran Kiel, Jr., *When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military*, PARAMETERS, Autumn 2007, at 69, 69-70, *available at* http://cape.army.mil/repository/materi als/WhenSoldiersSpeakOut.pdf (illustrating that it has become easier for soldiers to criticize superiors and the President because of the availability of social media).

5. *See generally* MIKE GODWIN, CYBER RIGHTS: DEFENDING FREE SPEECH IN THE DIGITAL AGE 1 (2003) (noting that the World Wide Web is the "newest frontier" for the exercise of free speech, and that coming to understand its protections in this new environment "will be one of the central challenges of our generation.").

such cases.

Part II of the Comment will provide a background history of general free speech principles and a brief background of social media use by the military. Part II will also illustrate relevant background law on military free speech, in turn revealing the inherent contradiction in the law that requires some clarity. Part III will discuss how the judicial branch has consistently deferred to the military, the use of strong rhetoric in allowing free speech infringement, the various arguments and analyses regarding the current test, and courts' willingness to protect other rights. Part III will also illustrate and analyze courts' willingness to protect other rights.

Part IV will conclude by arguing the need for a new, more flexible constitutional test. It will then propose a new test; one that will allow soldiers the flexibility to exercise their protected free speech rights in the social media context and still protect legitimate government interests.

II. BACKGROUND

A. Free Speech and its Ancient Roots[6]

Although the concept of free speech existed long before[7] his time, it first appears in glamorized Western culture in the dramatic trial of Socrates as he defends his use of speech, choosing death over a lack of freedom.[8] Socrates's defiant stand-in defense of free speech underscores the point that by the time of his death in 399 BCE, Greece had established at least an ideology of free speech.[9] This is best illustrated by Athens in this era, where free

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6. *See* David Smith & Luc Torres, *Timeline: A History of Free Speech*, THE OBSERVER, Feb. 5, 2006, http://www.guardian.co.uk/media /2006/feb/05/religion.news (providing an extensive timeline, from the days of Socrates to present day, of major events in free speech history).

7. *See generally* DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF SPEECH IN THE MARKETPLACE OF IDEALS 30-36 (1997) (outlining the various recognitions of freedom of speech principles before Ancient Greece in the era before written history, in Ancient Egypt, Ancient Sumeria, and Ancient Israel).

8. *See* SOCRATES: PLATO'S APOLOGY OF SOCRATES AND CRITO, WITH A PART OF HIS PHAEDO 42 (Benjamin Jewett trans., The Century Co. 1903) (stating that Socrates, when given the choice of freedom if he stopped his methods of free speech, proclaimed his belief in the fundamental right: "[I]f this was the condition on which you let me go, I should reply: Men of Athens, I honor and love you; but I shall obey God rather than you.").

9. *See* Robert W. Wallace, *Revolutions and a New Order in Solonian Athens and Archaic Greece, in* ORIGINS OF DEMOCRACY IN ANCIENT GREECE 49, 65 (Kurt A. Raaflaub et al. eds., 2007) (explaining that free speech in Athens may well have emerged by the early fifth century BCE). Socrates's death notwithstanding, historians recognize that "there may never have been a clear prohibition of the ordinary citizen addressing the assembly," and that

speech rights reflected a functioning direct democracy system of government.[10] This freedom was not, as the execution of Socrates shows, without its limits,[11] and subsequently the tension between freedom and restriction fluctuated for centuries[12] until the signing of the Magna Carta in England in 1215.[13] Yet, it was not until the Enlightenment era swept across Europe that prominent thinkers like Erasmus[14] and John Milton[15] openly supported free speech.

In the United States, freedom of speech was included in the Bill of Rights of the Constitution after great debate.[16] Even so, the high regard in which we now hold free speech solidified only after the debacle that was the Sedition Act of 1798.[17] With this understanding of the history and importance of free speech in mind, we now turn to its background within social media in a military context.

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in revolutionary times in Athens, citizens were not afraid to even speak out against their leaders, labeling some as "tyrants." *Id.*

10. FRALEIGH & TUMAN, *supra* note 7, at 36. The authors note that in Athens, citizens "prided themselves on living under laws of their own making," and that "freedom of speech for Athenian citizens extended beyond debates in the assembly" to areas like plays, where certain bureaucratic areas of Athenian society were heavily criticized. *Id.*

11. *See id.* at 36-39 (stating that freedom of speech was not extended to women, slaves, or non-citizen males; that the "threat of ostracism" inhibited the exercise of free speech; and that the right itself was not contained anywhere in the democratic process and was thus up for interpretation).

12. *See id.* at 39-48 (illustrating the various paths the right took in Ancient Rome, Ancient China, Ancient Islam, and early Europeans as time progressed).

13. *Id.* at 48. The signing of the Magna Carta, although not specifically proclaiming freedom of speech, established the vital premise that "law can create rights that even the king cannot take away." *Id.*

14. *See* ERASMUS, THE EDUCATION OF A CHRISTIAN PRINCE 88 (Lisa Jardine ed., Neil M. Cheshire & Michael J. Heath trans., Cambridge Univ. Press 1997) (1516) (stating, while offering his advice on how to govern, that "[i]n a free state, tongues too should be free.").

15. *See* L.A. SCOT POWE, AMERICAN BROADCASTING AND THE FIRST AMENDMENT 2 (1987) (quoting Milton: "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties...[l]et [truth] and Falsehood grapple; whoever knew Truth put to the worse in a free and open encounter?").

16. *See* FRALEIGH & TUMAN, *supra* note 7, at 67-70 (noting that personal freedoms, including freedom of speech, were initially not included in the Constitution and then only included after resolutions, political pressure, debates in the House of Representatives and Senate, and State ratification).

17. *See* WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 85 (1970) (presenting the argument of historian Leonard Levy that the Founders inherited the thought processes of Enlightenment thinkers insofar as having "an unbridled passion for a bridled liberty of speech," and that as a result of the outcry against the Sedition Act of 1798, the "idea that government might justly punish its critics was squarely rejected.").

B. A New Weapon in a Soldier's Arsenal

At its very core, the concept of social media is to use the Internet to create a social connection within a group of people.[18] Soldiers frequently use social media to express their thoughts and ideas to others.[19] A growing number of soldiers have taken to publishing their own blogs,[20] dubbed "milblogs" in the military context.[21] However, the issue is that with the ease-of-use of the technology—a growing sector of these soldiers use milblogs to criticize their superiors.[22] Soldiers have now also taken to Facebook,[23] a social networking tool that epitomizes open communication.[24] Because Facebook allows soldiers to quickly make friends with other soldiers with the same viewpoints, and have the ability to send secret messages, the concern over military security is obvious.[25]

In this context, there are concerns as to just how much a soldier can say over these social media tools.[26] Underscoring the

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18. James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1142 (2009). *See also* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER MEDIATED COMM. 210, 211 (2007) (giving the full definition as: web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system; (2) articulate a list of other users with whom they share a connection; and (3) view and traverse their list of connections and those made by others within the system).

19. Kiel, *supra* note 4, at 70.

20. *See* Tatum H. Lytle, *A Soldier's Blog: Balancing Service Members' Personal Rights vs. National Security Interests*, 59 FED COMM. L.J. 593, 600 (2007) (defining a blog as a "user-generated website where entries are made in journal style and displayed in a reverse chronological order" that allow "the creator to express his individual personality via the Web site.").

21. Kiel, *supra* note 4, at 70.

22. *See id.* (stating that, "[o]ne byproduct of Internet-related technology is the growing number of soldiers, sailors, airmen, and Marines who use these tools as a means to publicly express their disapproval of the President and his foreign policy agenda.").

23. *See* Boyd, *supra* note 18, at 218 (explaining that beginning in September 2005, Facebook expanded to include everyone).

24. *See* Grimmelmann, *supra* note 18, at 1145-46 (explaining how Facebook's "pace of innovation" is "blisteringly fast").

25. *See id.* (explaining how users of Facebook can post messages on friends' profiles, send private messages, and upload photos that they can then label their friends in).

26. *See* Lytle, *supra* note 20, at 600 (stating that social media has "blurred the lines of private communication with the military's need to protect their operations leading to a regulatory conflict."). Lytle's paper focuses on the role of blogs in the free speech context, and proposes a balance between the competing interests of constitutional protection and military necessity, including amendments to the UCMJ, Department of Defense orders, and general orders by military commandments in enforcing this. *Id.* at 610-13. Her narrow focus on blogs, and her solutions proffered for that conflict, distinguish her work from this Comment.

confusion[27] and vagueness in the area, is the way the military has flipped from banning social media[28] to allowing it.[29] This inconsistency leads to some forms of social media being shut down, while other forms are left untouched.[30] Because of this uncertainty, some clarification is needed to determine the extent to which soldiers are afforded their constitutional free speech protection while utilizing social media.

C. Sources of Authority: Outflanking the Constitution

1. Constitutional[31] and Legislative Sources

Congress was expressly granted the power to "make Rules for the Government and Regulation of the land and naval Forces."[32] With this power, Congress created the Uniform Code of Military

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27. *See* Kevin Whitelaw, *In Today's Army, The GI Diary Is Written In Tweets*, WBUR & NPR (Sept. 15, 2009, 9:35 AM), http://www.wbur.org/npr/112823233 (noting that the "Defense Department has taken something of a schizophrenic approach to the evolving world of online social media, from blogging to sites like Facebook and Twitter.").

28. Sharon Gaudin, *Marines Solidify Ban on Facebook, Twitter*, COMPUTERWORLD (Aug. 4, 2009, 5:36 PM), http://www.computerworld.com/s/article/9136255/Marines_solidify_ban_on_Facebook_Twitter. *See also* UNITED STATES MARINE CORPS, IMMEDIATE BAN OF INTERNET SOCIAL NETWORKING SITES (SNS) ON MARINE CORPS ENTERPRISE NETWORK (MCEN) NIPRNET (2009) (effectively banning the use of social media on official Marine Corps networks).

29. *Military Gives OK to Twitter and Facebook*, CBS NEWS (Feb. 26, 2010), http://www.cbsnews.com/stories/2010/02/26/tech/main6247874.shtml.

30. *See generally* Jon R. Anderson, *The Rise and Fall of a Military Blogger*, MILITARY TIMES (Dec. 8, 2009), http://www.militarytimes.com/offduty/technology/offduty_blogger_120809/ (framing the inconsistency by showing how the blog lasted for years, but was then placed under restrictions, and by mentioning the bloggers viewpoint that the "Army does NOT want honest bloggers."). *See also* Jon R. Anderson, *Facebook Face-off*, MILITARY TIMES (Dec. 8, 2009), http://www.militarytimes.com/offduty/technology/offduty_social_media_12080/ (pointing out that the inconsistency could be a result of a different political party in the White House). The article notes that because a large portion of the military is conservative, their message could be seen as "supporting the mission. But now that their politics don't match the commander in chief's, it's made the picture much more complicated". *Id.*

31. The First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. Obviously, this acts as the base for all free speech discussions.

32. U.S. CONST. art. I, § 8. There is no question that this clause authorizes Congress to enact measures to govern the military. *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960) (stating emphatically that there is "no question but that Clause 14 [of Article I, section 8 of U.S. Constitution] grants the Congress power to adopt the Uniform Code of Military Justice.").

Justice (UCMJ).[33] The pertinent sections for this Comment are Section 888, governing contemptuous words against superiors,[34] and Section 933, directing the course of punishment.[35] Securing convictions under Section 888 is rare, due to the vague nature of the final element, which requires that the words uttered be *per se* contemptuous or deemed contemptuous by the circumstances.[36] This Comment will discuss the vagueness element in full later. Under Section 933 there are numerous ways to be convicted,[37] but this rarely, if ever, includes political speech.[38] Also, because the statutes only list commissioned officers in the text,[39] there must be another basis for political speech punishment.[40]

2. Department of Defense Directives

Two Department of Defense ("DoD") Directives help govern political speech in the military:[41] Directive 1325.6 establishes guidelines for dealing with protest and dissident activities, and Directive 1344.10 specifies the types of political activities that may be appropriate for active-duty service members to engage in.[42] Directive 1325.6 contains a Section that addresses milblogs, allowing soldiers to write a blog while off-duty as long as it does

33. Uniform Code of Military Justice, 10 U.S.C. §§ 801-946 (2006).

34. *Id.* at § 888. The Section provides that a commissioned officer will be punished if the officer uses "contemptuous" words against the President or Vice President, members of Congress, secretaries of military related departments, or the leaders and legislatures of states. *Id.*

35. *Id.* at § 933. The Section in full: "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." *Id.*

36. Kiel, *supra* note 4, at 73. The elements in full: it must be proven that the accused is a commissioned officer, that the officer "used certain words against the official or legislature specified in the article; that a third party became aware of these words because of an act attributed to the accused; and that the words were contemptuous in themselves or by virtue of the circumstances in which they were used." *Id.*

37. *See id.* at 76 (giving various examples of activities that would garner conviction: "making false official statements or reports to superior officers; insulting or defaming another officer in the presence of other military members; giving false testimony before a courts-martial or board," etc.).

38. *Id.*

39. *See id.* at 78 (noting that regardless of the inclusion of commissioned officers in the statute only, it "would make little sense to allow a[n enlisted man] to make statements that have a detrimental impact upon the morale and discipline of the soldiers serving around them.").

40. *See id.* (stating that besides the Department of Defense Directives, military leaders will use Article 134 as a "catch-all" for offenses not listed). *See also* MILITARY LAW TASK FORCE, NAT'L LAWYER'S GUILD, FREE SPEECH IN THE MILITARY, http://www.nlgmltf.org/leaflets/GI_Rights_free_sp eech.html (last visited Oct. 10, 2011) [hereinafter FREE SPEECH IN THE MILITARY] (stating that the law under Article 134 is selectively enforced).

41. Kiel, *supra* note 4, at 71.

42. *Id.*

not violate another law or military regulation.[43] Directive 1344.10 allows participation in the political process, but prohibits the solicitation of one candidate over the other,[44] something a milblog or other social media tool could potentially allow.

In an effort to answer these concerns, the DoD issued Directive 09-026, the purpose of which was to establish official DoD policy on social media usage.[45] At first glance, this would appear to address the conflict at issue in this Comment. The directive, however, specifically mentions that the Assistant Secretary of Defense for Networks and Information Integration shall establish and implement procedures related to social media,[46] and that the Under Secretary of Defense for Intelligence will do the same in an operational security context.[47]

3. The Constitutional Test as It Stands Today

On a basic level, courts have recognized the controlling power of Congress in regards to military justice.[48] Courts have stated that because of the nature of military service, civilian courts should not be responsible for striking the balance between the demands of discipline and duty.[49] The judiciary has consistently

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43. *See* DEP'T OF DEFENSE, DIRECTIVE 1325.6, HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, Enclosure 3-4 (2009) (providing that publication of milblogs is not prohibited by soldiers on their own time and expense, yet if the publication contains language that is punishable under Federal law or any Department of Defense Directive, those involved will face discipline).

44. *See* DEP'T OF DEFENSE, DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY MEMBERS OF THE ARMED FORCES, Subparagraph 4.1.2.3 (2008) (stating that no member of the Armed Forces may "[a]llow or cause to be published partisan political articles, letters, or endorsements signed or written by the member that solicits votes for or against a partisan political party, candidate, or cause."). *See also* FREE SPEECH IN THE MILITARY, *supra* note 40 (reaffirming that it is unclear what the military means by "partisan political party," but theorizing that it "probably means a cause promoted by a political party.").

45. *See* DEP'T OF DEFENSE, DIRECTIVE 09-026, RESPONSIBLE AND EFFECTIVE USE OF INTERNET-BASED CAPABILITIES (2010) (establighing the DoD policy and assigning "responsibilities for responsible and effective use of Internet-based capabilities, including social networking services.").

46. *See id.* at Attachment 3-1(a)-(e) (dictating that the Assistant Secretary will also "[p]rovide implementation guidance for responsible and effective use of Internet-based capabilities," integrate this into training, and more importantly, "[e]stablish mechanisms to monitor emerging Internet-based capabilities in order to identify opportunities for use and assess risks.").

47. *See id.* at Attachment 3-2(a)-(d) (requiring the Under Secretary to develop procedures and guidelines related to operational security and "[d]evelop and maintain threat estimates on current and emerging Internet-based capabilities.").

48. *See* United States v. Howe, 37 C.M.R. 555, 558 (1966) (stating that, "[i]t is not for us to question the wisdom of Congress in enacting Articles 88 and 133 of the Uniform Code of Military Justice.").

49. Burns v. Wilson, 346 U.S. 137, 140, 142 (1953). However, while the

relied upon this purpose in deferring to Congress and the military.[50] As a result, on an initial level the right of free speech in the military is subject to reasonable limitations based on the aforementioned military necessity.[51] This is not to say that soldiers do not have free speech rights, just that the legal system has used a different rationale in applying them.[52]

This presupposes, then, that a different test exists in determining whether speech is protected for soldiers. For civilians, speech is unprotected if it presents a "clear and present danger" to the community.[53] The military-version of the test first came together in *United States v. Priest*, a case that involved a serviceman writing and publishing his thoughts on the Vietnam War in an extreme underground newspaper.[54] Not unlike many of the milblogs today, the articles portrayed the United States as an aggressor.[55] One of these articles, titled "A Call to Resist

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Supreme Court notes that they have "played no role in [the] development [of military law and] have exerted no supervisory power over the courts which enforce it," they still hold that "military courts, like the state courts, have the same responsibilities as do the federal courts to protect a person from a violation of his constitutional rights." *Id.*

50. *See Howe*, 37 C.M.R. at 559 (detailing the basic rationale behind this: "military standard of discipline demands obedience to orders and respect for legally constituted authority."). Moreover, the court stated, the reason the United States military exists in the first place is to be ready for and succeed in combat, and in order to achieve this, discipline and obedience are required. *Id.* The court continued, arguing that the demand for obedience and respect within military discipline is important in both peace and way, and that military discipline necessitates the sacrifice of personal liberties and ultimately human lives. *Id.*

51. *Id.* at 555. *See also* Parker v. Levy, 417 U.S. 733, 743 (1974) (stating that the Court has "long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history.").

52. *See Parker* at 758 (stating that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military . . . requires a different application of those protections.").

53. *See* Schenck v. United States, 249 U.S. 47, 52 (1919) (providing the now infamous free speech test for civilians as whether the speech is such that it creates a clear and present danger that its utterance will bring about the substantive evils that Congress has a right to prevent). As the court says, "[i]t is a question of proximity and degree." *Id.*

54. United States v. Priest, 45 C.M.R. 338, 340 (1972). In the case, the court concerned themselves with two editions of the newspaper, both of which constitute a call of action and an attempt to incite other soldiers against the U.S. government. *Id.*

55. *Id.* In describing the articles the court stated that they accused the United States of "committing a horrendous crime against a peasant people fighting to expel foreign oppressors from their homeland," mentioned the abolition of the United States, and finally, suggested that "if we do not get justice in the rigged courts of this land; then we shall turn to the streets." *Id.*

Illegitimate Authority; An Indictment Against the U.S. Government, the Armed Services and Its Industrial Allies," accused the government of war crimes in Vietnam.[56] The court responded with the layout of the original military test for free speech: whether the gravity of the speech's effect on order and discipline justifies the conviction.[57] The serviceman was subsequently convicted.[58]

This basic test proved to be somewhat difficult to apply, so the issue was presented again in *United States v. Brown*, a case with a fact pattern not unlike *Priest*; the only difference was that the accused actually organized a strike with intent to incite.[59] Here, the court clarified the test, holding that the speech must present a clear danger to loyalty, discipline, mission, or morale of the troops.[60] The court also reaffirmed the "military necessity" rationale behind such a test,[61] and the deference in favor of the military.[62] Finally, the court decided that determining a violation of free speech in the military required balancing the secrecy and safety of the mission with the actual incident.[63]

The article claims that these streets are the final recourse for dealing with oppression. *Id.*

56. *Id.*

57. *Id.* at 344-45. The test in full: the "inquiry, therefore, is whether the gravity of the effect of accused's publications on good order and discipline in the armed forces, discounted by the improbability of their effectiveness on the audience he sought to reach, justifies his conviction." *Id.*

58. *Id.* at 346.

59. United States v. Brown, 45 M.J. 389, 392 (1996). In this case the defendant was accused of organizing a strike while in the military, and coercing or soliciting other soldiers to join him in the strike. *Id.*

60. *Id.* at 395. The test in full: "The test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops." The court also added that the test was a minimal standard that did not require intent or imminent harm. *Id. See also* United States v. Hartwig, 39 M.J. 125, 128 (1994) (outlining the test compared to *Schenck*, the court held in that case that speech may be restricted to prevent the substantive evils that Congress has a right to prevent applied in a military context as well, only that those "substantial violations" were violations of the UCMJ).

61. *See Brown*, 45 M.J. at 395 (setting forth the current rationale behind the rule by stating that "[i]n a democratic society there is competition between security and democracy . . . To ensure an adequate discussion of the competing interests, service members . . . have a right to voice their views so long as it does not impact on discipline, morale, esprit de corps, and civilian supremacy."). Furthermore, the court reiterated the military necessity argument, maintaining that the necessary government interest in promoting moral and discipline carries over from previous cases, like *Priest*. *Id.*

62. *See id.* at 396 (stating that courts should "not overturn a conviction unless it is clearly apparent that . . . the military lacks a legitimate interest in proscribing the defendant's conduct." (citing Avrech v. Sec'y of Navy, 520 F.2d 100, 103 (D.C. Cir. 1975))).

63. *See Brown*, 45 M.J. at 397 (stating that the military is lower in nature than their civilian superiors and that determining if there is an infringement

So what does this mean for soldiers using social media? Those in active combat face an even lower amount of protection.[64] The current test creates a hazy conflict area in military courts, which have been receptive in the past to soldiers' constitutional rights.[65] Regardless, the importance of social media to military personnel, combined with the desire for free speech, necessitates clarity on the subject, which is discussed in the next section.

III. ANALYSIS

This Comment will center its analysis on the test espoused in *Pierce* and *Brown* (referred to hereinafter as "the test"), and its applicability to social media use by military members. The first part of the analysis will discuss the notion that the test is too judicially deferential to the military. The second part will analyze the inherent vagueness of the test, while the third section will illustrate how courts have protected other similar rights.

A. The Judiciary's Deference to the Military Ultimately Avoids Its Constitutional Responsibilities Under the Guise of Federalism

There is a basic need for the judiciary to defer to military superiors on free speech matters in war zones.[66] Any challenge to this specific war zone policy should garner a minimal scrutiny analysis.[67] This should be limited to command decisions in combat,[68] yet the scrutiny extends across the entire spectrum of free speech challenges in the military and thus results in a system of judicial deference.[69] This established system of judicial deference to the military gives the military adjudication process almost unlimited power to deny claims.[70]

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on the free speech rights of a soldier requires balancing the nature of the offense, the nature of military necessity, and whether traditional democratic values can be upheld in any practical way).

64. *See* Carlson v. Schlesinger, 511 F.2d 1327, 1332 (1975) (holding that a "commanding officer must be afforded substantial latitude in balancing competing military needs and first amendment rights.").

65. United States v. Culp, 33 C.M.R. 411, 418 (1963).

66. *See Carlson*, 511 F.2d at 1332 (holding that general principle within the context of combat zone operations).

67. *See id.* (holding that because the judiciary is not able to second-guess military commanders, any combat zone decision that infringes free speech rights should not be overturned unless that infringement is "manifestly unrelated to legitimate military interests.").

68. *See id.* (stating that command decisions in combat should not be second-guessed).

69. *See Howe*, 37 C.M.R at 558 (stating that Congress has the power "to make Rules for the Government and Regulation of the land and naval Forces." (quoting U.S Const. art. 1, § 8, cl. 14)).

70. *See Avrech*, 520 F.2d at 103 (mirroring the language from *Carlson*, by granting the military "substantial latitude" in balancing first amendment rights within the military).

Given the importance of freedom of speech[71] in this country and the strict scrutiny test for civilian free speech infringement,[72] it seems odd that balancing free speech in the military would lead to such judicial deference to the military and a test of minimal scrutiny.[73] The courts have traditionally provided two primary reasons for their significant deference to the military. First, the judiciary argues that deference is necessary because they are unqualified to determine such matters[74] due to their lack of military expertise.[75] However, not everyone finds the argument persuasive that because many of the cases that involve infringement of military members' rights are held in military court, the members of the court have the necessary military expertise to competently rule on the case. Therefore, it is argued that under such circumstances soldiers should be afforded at least some heightened protection of their free speech rights.[76]

The second justification for judicial deference cited by the courts is the Constitution's express grant of military power to the Congressional and Executive branches.[77] However these separation of powers arguments only go so far, for it is the ultimate responsibility of reviewing courts to provide redress for alleged Constitutional violations.[78]

Moreover, it is the high regard that our society holds for free speech that raises concerns with its lowered application within the

71. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 606 (1980).

72. *Schenck*, 249 U.S. at 52.

73. *See* Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 317 (2007) (arguing that "[d]eference is not the equivalent of a blank check for the military to make policies that suppress First Amendment rights-specifically that of free speech-for convenient organizational control.").

74. *See id.* (arguing that Courts are "reluctant to determine whether a military policy violates the First Amendment because the issue ultimately requires an analysis of whether the policy itself is so vital to military operations that it justifies the restraint on First Amendment freedoms-something the courts consider themselves unqualified to do.").

75. Kalyani Robbins, *Framers' Intent and Military Power: Has Supreme Court Deference to the Military Gone Too Far?*, 78 OR. L. REV. 767, 775 (1999).

76. *See Reuter, supra* note 73 (arguing that military judges should be able to competently perform review and analysis of First Amendment cases within the military context must easier than federal judges because of their specialized military knowledge).

77. *See id.* (noting that the judiciary is quick and never hesitates when illustrating that control of the military is specifically granted by the Constitution to the President, as Commander in Chief, and also to Congress, in terms of oversight, maintenance, and regulation).

78. *See* Marbury v. Madison, 5 U.S. 137, 177-78 (1803) (providing the foundation for the concept of judicial review in the United States).

military.[79] Because free speech is vitally important, as reflected in its strict scrutiny analysis,[80] there are those who feel strongly that the judiciary caters too easily to military policy.[81] Keeping in mind that the standard for reviewing challenges of free speech within the military is so low that any violation of the UCMJ is sufficient to pass the test,[82] it is clear that judicial deference has dramatically lowered the standards for infringing on free speech in a military context.[83] Thus, regardless of any rationalization[84] for a test designed to support judicial deference, there are strong arguments[85] against such acquiescence sufficient enough to raise genuine issues that require resolution—especially in the new arena of social media.

B. Fiery Rhetoric as Justification for Minimal Scrutiny

Courts will also often use strong rhetoric in utilizing minimal scrutiny to uphold infringement on free speech of military members. In *U.S. v. Voorhees*, the Court of Military Appeals overturned a dismissal of the conviction of a serviceman who had sought to publish his account of the Korean War.[86] Although the test in its current form had not yet been articulated, the court reinstated the conviction, with the aid of a lengthy and fiery

79. *See* Captain John A. Carr, USAF, *Free Speech in the Military Community: Striking A Balance Between Personal Rights and Military Necessity*, 45 A.F. L. REV. 303, 308 (1998) (explaining that judicial deference has supporters and critics).

80. *See* C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 782 (1988) (stating that the foundation of free speech is reflected in the heavy burden to restrict it).

81. *See id.* at 799 (calling judicial deference of free speech challenges to the military the "most extreme judicial abdication.").

82. *See Hartwig*, 39 M.J. at 128 (noting that the test is upheld with any violation, deeming any such violation to be "substantial" enough to uphold the infringment).

83. *See* Dienes, *supra* note 80, at 811 (endorsing "a mode of judicial deference in first amendment review far removed from the standards for political speech reflected in the principle of freedom of speech.").

84. *See* Hon. Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, Jan. 1995 ARMY L. 27, 33 (stating that Congress and the Executive Branch have over the years developed a test of "considerable flexibility" that can meet the "changing needs of the armed forces without undermining the fundamental needs of morale, good order, and discipline."). Furthermore, judicial deference shows that "over the years Congress has acted responsibly in addressing the constitutional rights of military personnel." *Id.*

85. *See* Dienes, *supra* note 80, at 823 (arguing that the "judicial deference reflected in the cases [and] the alteration of traditional first amendment review standards" has "increasingly give the courts' verbal invocation of the first amendment a rather hollow ring.").

86. United States v. Voorhees, 16 C.M.R. 83, 90 (1954) (Latimer, J., concurring).

concurrence from Judge Latimer.[87] Addressing the principle of free speech by military members, Judge Latimer wrote that any "principle which interferes with preparing for war may interfere with its successful prosecution; and a privilege given unwittingly in peace may be a death knell in war."[88] The opinion warns us of the dangers of free speech in the military, in that it "could cost us all those we possess," so much so that "hostility to prior restraints on communications should not be permitted to endanger our nation."[89]

Considering that earlier in the opinion it was proffered that military members should enjoy the same constitutional rights as civilians,[90] it would seem odd to agree with the majority but then claim that military free speech should be suppressed.[91] Although the opinion would have one believe otherwise, it is hardly likely that the vast majority of social media used by soldiers would cost us all that we possess or endanger our nation.[92] Yet this is the rhetoric used to reinforce a test that certainly would allow infringements on such use.[93] The use of the rhetoric itself acts as a way to deter criticism of the decision and the test itself—it is, in effect, the easy way out.

Imagine a scenario where an officer posts on his blog some disparaging comments about the President's remarks.[94] It is entirely possible, even though the remarks did not negatively

87. *Id.* at 105.

88. *Id.* at 106.

89. *Id.* at 109.

90. *See id.* at 105 (stating that every soldier or other military personnel should be entitled to the same rights constitutional rights as every other citizen, besides situations where those rights and privileges have been specifically denied or limited in the Constitution itself).

91. *Id.* at 106. Judge Latimer in his concurrence states that the rigors of military service demand the limitations placed on the right of free speech, and also the quashing of publications that undermine morale, discipline, and the safety of troops. *Id.*

92. *See* Stole v. Laird, 353 F. Supp. 1392, 1403, 1404 (D.D.C. 1972) (opposing Judge Latimer in that his "rationale would support restriction of all dissent on war aims, even by civilians and elected officials" and that Judge Latimer's "view must also be appraised in light of a realistic analysis of the military role in modern warfare.").

93. *See Howe*, 37 C.M.R. at 559 (exhibiting the same strong rhetoric in holding that an officer is not extended the full privilege of free speech: "Military discipline, in peace as well as in war, does more than expect obedience and respect-it demands both. The sacrifice, not only of personal liberties but that of human life, is demanded by the stern necessity of military discipline.").

94. *See, e.g.*, *Obama Sees Heavy Fighting Ahead in Afghanistan, Like Duuhhh!*, BOUHAMMER'S AFGHAN BLOG, *supra* note 1 (providing an example of disparaging comments towards the President that the hypothetical would include). These types of comments are exactly the type that soldiers make on many different types of social media.

impact combat operations, that a court upon review would uphold any infringement by the officer's superiors on his blog, with the use of strong rhetoric to support the decision.[95] With a right as fundamental as free speech, it should take more than strong rhetoric and minimal scrutiny to allow any infringement on it.

C. A Catch-All: Vagueness Leads to Unconstitutionality

It is established that any *per se* violation of the UCMJ will be seen as a reason to uphold free speech infringement.[96] At the same time, the Code is arguably too vague.[97] In *Parker v. Levy*, the majority decision upheld the constitutionality of the Code, overruling a unanimous Court of Appeals decision and sparking a rigorous dissent from Justice Stewart.[98] The Justice's opinion argued that Articles 133 and 134 (relevant to our discussion here) are obviously vague, unconstitutional on their face, and thus courts should narrowly construct the articles.[99] Justice Stewart continued his argument by positing that any doubt about the vagueness of the articles is lost when the wide spectrum of offenses found guilty under them are examined.[100] In the end, his argument states that the articles are so broad that they construct a catch-all for nearly every offense—something that should invalidate the articles.[101] In our context, the current test directly

95. *See generally Howe*, 37 C.M.R. at 559 (providing an example of strong language a court might use to support allowing the infringement: "[P]reservation of the necessary subordinate-superior relationship in the military service permits no such privilege or impunity, especially where, as here, a military officer notoriously and ignominiously vilifies the very superior authority to whom a duty of respect is owing and who appointed him to military office."). In this situation, the use of the words "notorious" and "ignominious" serve to make the officer's words appear worse than they really are.

96. *Hartwig*, 39 M.J. at 128.

97. *Parker*, 417 U.S. at 773 (Stewart, J., dissenting); Dienes, *supra* note 80, at 813; and Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just A Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1198 (1986).

98. *Parker*, 417 U.S. at 773 (Stewart, J., dissenting).

99. *Id.* at 776-77. Justice Stewart argues that "[m]en of common intelligence—including judges of both military and civilian courts-must necessarily speculate" over certain terms of the articles as a result of their vagueness and concludes that "facial vagueness of the general articles has [not] been cured by the relevant opinions of either the Court of Military Appeals or any other military tribunal." *Id.*

100. *Id.* at 778-79. Justice Stewart outlines several wide-ranging offenses that servicemen have been found guilty of under the articles: dishonorable failure to repay debts, selling whiskey at an unconscionable price to an enlisted man, cheating at cards, having an extramarital affair, sexual acts with a chicken, window peeping in a trailer park, and cheating while calling bingo numbers.

101. *Id.* at 779-80. Justice Stewart notes that these catch-alls are "designed

supports the articles, which have drawn much controversy as to their constitutionality. Having a test for free speech in the military based on controversial statutes is questionable at best.

A statute is unconstitutionally vague if it fails to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden."[102] This would seem to apply to the Code, but the majority opinion in *Parker* held otherwise.[103] In the social media context, the average soldier blogging about his experiences or posting his feelings on Facebook would not likely know of any infringement on his free speech by some article of the Military Code, but yet he would still be punished.[104]

The real problem, then, is in the vagueness of the term "military necessity," which is the overall justification for a test of such minimal scrutiny.[105] This term by its own language is vague and does not proscribe a specific definition of military necessity.[106] Because this justification would play a major role in allowing the infringement of the free speech rights of a soldier using social media, it is reasonable that enforcing the justification for the test, along with the test itself, could do more harm than good.[107]

Inherent in the vagueness of the test are the confusing and different ways in which courts have either upheld or rejected claims by military members.[108] In *Stolte v. Laird*, the plaintiffs

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to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander." The Justice warns of the dangers of such a statute by citing United States v. Reese: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." United States v. Reese, 92 U.S. 214, 221 (1875).

102. Aldrich, *supra* note 97, at 1198 (citing Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)).

103. *See* Dienes, *supra* note 80, at 811-12 (stating that it is truly blind faith for the *Parker* majority to argue that common military personnel and reviewing courts know exactly what falls within the boundaries of the UCMJ).

104. *See id.* at 812 (using the example of the defendant Levy in the *Parker* case and stating that it is "difficult to believe that Levy, or other members of the military, could know the parameters of making statements 'disloyal to the United States,' for which Levy was indicted.").

105. *See* United States v. Wilson, 33 M.J. 797, 799 (1991) (holding that "[m]ilitary necessity, including the fundamental necessity for discipline, can be a compelling government interest warranting the limitation of the right of freedom of speech.").

106. *See Parker*, 417 U.S. at 788 (Stewart, J., dissenting) (arguing that even though it is possible that military necessity creates a situation requiring special laws, Justice Stewart fails to see how legitimate military goals are accomplished by enacting the special laws with vague language that even those military personnel who are governed by it cannot understand).

107. *See id.* (Justice Stewart arguing that "vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and esprit de corps.").

108. *See* Kimberly J. Winbush, *First Amendment Protection for Members of*

were soldiers who were convicted under Article 134 of the UCMJ for disloyal statements when they distributed over one hundred copies of a leaflet that expressed their disproval of the Vietnam War.[109] The soldiers protested that their statements were not disloyal and the court agreed, detailing a process to determine whether the statement was disloyal: a showing of a public utterance which is disloyal to the United States and uttered with design to promote disloyalty and disaffection among the troops and the civilian populace.[110] In extending protection to the soldiers, the court held that not every method of speech that goes against morale can be infringed upon,[111] and the soldiers had access to communications in the civilian world where antiwar dissent was common.[112]

Contrast that situation with *Brown v. Glines*, where protection was not extended to an officer who circulated a petition criticizing grooming standards.[113] The Court denied First Amendment protection for reasons of judicial deference and military necessity.[114] At first glance these cases are very similar, and one could even argue that both were wrongly decided. But therein lies the point. The test is conflicting and vague. Imagine a situation today where a soldier using social media has access to civilian communications to write about a vastly unpopular war in

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Military Subjected to Discharge, Transfer, or Discipline Because of Speech, 40 A.L.R. Fed.2d 229 (2009) (outlining various case examples where protection for free speech right was extended or rejected).

109. *Id.* at § 12; *Stolte*, 353 F. Supp. at 1393-94.

110. Winbush, *supra* note 108, at § 12; *Stolte*, 353 F. Supp. at 1401-02. The court in *Stolte* held further that the alleged disloyalty must be to the United States as a sovereign political entity and the utterance must have a palpable and direct effect on good order and discipline. *Id.*

111. *Stolte*, 353 F. Supp. at 1403. The court impliedly recognizes the vagueness of the article, noting that theoretically any statement critical of the military can affect the moral and overall attitude of soldiers. *Id.* As a result, "military authorities [could], therefore, punish all statements deemed to adversely affect 'motivation' or 'morale' in a general sense," and this "would render meaningless even that limited freedom of speech recognized by the military as a soldier's constitutional right." *Id.*

112. *Id.* at 1404.

113. Winbush, *supra* note 108, at § 13. Brown v. Glines, 444 U.S. 348, 350 (1980). Like *Stolte*, the regulations in this case were designed to allow superiors to prevent spreading the petition if the commander determines that distribution would pose a clear danger to basic discipline or morale of soldiers or if the distribution would materially interfere with soldiers' military duties. *Id.* at 379.

114. *Glines*, 444 U.S. at 354. The Court emphasized many of the ideals that have become synonymous with the minimal scrutiny test in our discussion, holding that the regulations further a substantial government interest, that the military is necessarily a specialized society apart from civilian life, and to ensure that military servicemen can perform their duty, the services must have respect for duty and discipline. *Id.*

Iraq.[115] Would the court hearing the challenge extend protection under the theories in *Stolte*, or reject them under the view in *Glines*? The current test is too vague to accurately tell.

D. Undervaluing the Importance of Free Speech

Courts have seemingly granted some protection to other basic rights. These include Due Process, the protection from self-incrimination, and the right against unreasonable searches and seizures.[116] It has even been held that military courts have the same responsibility to protect constitutional rights as state courts.[117] Moreover, it can be extrapolated that freedom of expression in the same context garners at least intermediate scrutiny, or at the least a test that requires more to pass it than the one we currently have for military free speech.[118]

The current test for military free speech does not rise to these levels of protection, and with the now-prevalent use of social media, the scrutiny must be raised in some way. The next part of this Comment will reflect on these concerns and present a proposal for a new constitutional test for infringements on the free speech rights of military members. It will also discuss specifically how this test will work in the emerging areas of speech that social media has brought to the attention of U.S. military personnel.

IV. PROPOSAL

This section proposes a revised test to utilize when determining whether an infringement on the free speech rights of soldiers in a social media context is constitutional. Here, it will be explained that a new, more flexible and lenient test must strike a balance somewhere above minimal scrutiny, but at a level that does not overrule the entire system of military jurisprudence in the area of free speech.[119]

The new test for infringing on free speech in a social media context in the military should be that when the use of social media interferes with active combat operations, represents open disloyalty to the military, or undermines the chain of command

115. *See generally* Gary Langer, *The Numbers: Iraq and the Costs of War*, ABC NEWS (Aug. 31, 2010, 5:46 PM), http://blogs.abcnews.com/thenumbers/2010/08/iraq-and-the-costs-of-war.html (noting the extreme unpopularity of the war in Iraq).

116. *See Culp*, 33 C.M.R. at 418 (recognizing cases that dictate the requirement to "examine each claim of deprivation of right as it has been presented to us.").

117. *Burns*, 346 U.S. at 142.

118. United States v. O'Brien, 391 U.S. 367, 377 (1968).

119. *See* Lytle, *supra* note 20, at 594 (providing a roadmap for the article that includes modifications to current free speech doctrines involving social media that would represent a major upheaval of the system).

through specific criticism of military officials, infringing on the free speech rights of an individual soldier will be allowed. The key is that it must interfere with active combat operations. There need not be any actual harm caused, but there should be a heightened burden for the government and military to prove that the alleged infringement was in the furtherance of a legitimate purpose, not simply a rational or incidental one.

Looking at the different arguments for changing the approach to infringements on free speech in the military provides support to the new test above. Various opinions on the issue of free-speech reform within the context of social media consider a sweeping change to the system. Although these arguments maintain some of the same goals as this Comment,[120] the directions taken are too far to the extreme in both over and under protection. The need for a balanced test is emphasized in these tests' extremes in both directions.

One of the first arguments is that the military should amend the UCMJ.[121] This argument at first embraces and acknowledges the notion of judicial deference to the military, but then states that the military should be forced to amend the UCMJ.[122] The argument recognizes that the provisions in the Code are outdated and that their drafters did not foresee the advent of social media.[123] Yet, this position only illustrates the danger of changing too much, for there is seemingly no way outside of Congress doing so to force the military to change. Considering the explosive and constantly evolving nature of social media use, it seems unlikely that going so far as amending the UCMJ is the correct solution. Any solution for social media use requires flexibility.

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120. *See id.* at 611 (pointing out that 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."). Along those same lines, although Lytle argues that "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," much like this Comment does, that article goes much further than this Comment argues is necessary. *Id.* at 610.

121. *Id.* Lytle's article, although similar to this Comment, is used as an example of the arguments that go too far in changing the way free speech is treated in the military within a social media context. This serves two purposes: to add support to this proposal that strikes a balance, and to distance the arguments made in that article from the present arguments.

122. *See id.* (stating that because "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.").

123. *See id.* (noting that the articles "apply to speech generally and were formulated before the advent of blogging" [and] "[t]he military should update the UCMJ to include specific provisions regulating the content of blogs.").

Similar to amending the UCMJ, the next argument is to change the Department of Defense directives that govern much of the military's practices.[124] Theoretically, because the directives demonstrate the only real flexibility in military law, this is where the balance can be struck.[125] Although it is true that a balance should be struck, this again is the wrong approach. An argument to change Department of Defense directives faces the same issues as previous arguments, and additionally presupposes that the military would be open to such changes in the first place.[126] It is only with the last argument, regarding orders by military officials, that we see an argument more on point with the proposal in this section to shift away from minimal scrutiny.[127]

First, however, it is worth emphasizing the other end of the spectrum—that of a test that is too lenient. A test that is too lenient is best emphasized in *Tinker v. Des Moines Independent Community School District*.[128] This case offered, in the public school context, an argument for strict scrutiny of any infringement on free speech, one that required a school seeking to censor speech to show that the speech would materially and substantially affect school discipline.[129] *Tinker* is relevant in a military sense because of the adherence to discipline that justifies much of the military's policy on free speech. The case noted that students are not "close-minded circuits" that can only say or do that which is officially

124. *See id.* at 612 (arguing that like the supposed new amendments to the UCMJ, there should be new amendments to the directives that govern military practice).

125. *See id.* (arguing that within these directives, the balance should be that "[s]peech 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.").

126. *See id.* (offering little direction on how to achieve these goals, going this route would simply require more written regulations directed to blogs that remove some discretion commanders have in regulating the blogs). In essence, this would create a system that requires new directives to be issued constantly in order to address many different forms of social media.

127. *See id.* (reaffirming the current conflict in that the "standard allows for great deference and promotes suppression of a soldier's right to speech in exchange for promoting order and morale," and suggesting that "[c]ourts 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."). Although it does not directly say, this is the only argument that can be said to come towards a new balancing test that is proposed in this section.

128. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

129. *Id.* at 509. The rule promulgated here is that for a state to justify prohibiting certain speech it must show that it did so for a reason more than just to avoid and silence an unpopular opinion. *Id.*

approved.[130] The comparison to the military in this argument is obvious; it compares soldiers to being close-minded drones who only do that which their superiors previously approve. Any argument fully supporting a test similar to the one in *Tinker* completely undermines any judicial deference to the military,[131] for requiring such protection of freedom of speech essentially makes the court system the unofficial watchdog of the military.

The argument for such freedom in the military context of social media, then, is that removing such deference does not hamper bureaucratic efficiency.[132] Raskin argues that the "[a]gencies implementing our laws do not judge their own cases and are not left to their own devices in protecting constitutional rights and values along the way."[133] Yet this is not the case in the military, which judges its own cases under the UCMJ. Raskin even goes so far as to apply the *Tinker* standard to the decision in *Parker*, and argues that under the strict scrutiny standard the plaintiff would not have been punished.[134] Strict scrutiny essentially allows nearly any form of speech in a social media context.[135] This highly strict approach is a result, the argument goes, of the deeply authoritarian nature of military discipline against free speech.[136]

The problem with this approach is that there is a need for

130. *Id.* at 511. Students "may not be regarded as closed-circuit recipients of only that which the State chooses to communicate [and] [t]hey may not be confined to the expression of those sentiments that are officially approved." *Id.*

131. *See* Jamin B. Raskin, *No Enclaves of Totalitarianism: The Triumph and Unrealized Promise of the Tinker Decision*, 58 AM. U. L. REV. 1193, 1214 (2009) (arguing that "this claim about essentially unreviewable institutional prerogatives is precisely the argument for complete deference to local school authorities and principals that . . . Justice Black made unsuccessfully in dissent in Tinker.").

132. *Id.* Raskin notes that the majority in *Tinker* did not "understand constitutional liberty to be a presumptive threat to bureaucratic efficiency." *Id.*

133. *Id.*

134. *Id.* at 1215. Raskin notes here that the rule from *Tinker* hints that the Army would not be able to punish a soldier for political statements about a war unless the speech threatens a "substantial and material" disruption of the war effort. *Id.* This illustrates the dangers of implementing such a broad and sweeping standard into the military ranks; the result would undermine even the most basic sort of discipline that is required within military service.

135. *See generally id.* (noting that under this standard, the plaintiff "cannot be punished simply for disagreeing with the government or the war or because his speech made superiors feel uncomfortable or vaguely apprehensive that it would somehow undermine military morale or the war effort.").

136. *See id.* at 1216 (arguing that applying the *Tinker* standard is a result of decisions by the Supreme Court that essentially mean that "the armed services must, at all times, be a total authoritarian institution where soldiers operate in a command system that excludes their identity as citizens of a constitutional democracy.").

some basic deference to the military within combat operations[137] for decisions that should not be second-guessed.[138] Raskin argues against this idea, stating that utilizing military discipline as the rationale behind such a stifling of constitutional rights "presupposes" that a military institution can have only one purpose (fighting wars).[139] He then merely compares this situation to *Tinker*,[140] and calmly dictates that such a standard does not undermine military discipline and doctrine.[141] All of Raskin's rhetoric notwithstanding, even he recognizes the reality of the situation,[142] underscoring the need for a balance between the arguments posited earlier in this section and the strict scrutiny suggested by Raskin as a take on the standard in *Tinker*.

The new test illustrated in this Comment will accomplish a balancing of the constitutional rights of a soldier to freely speak via the fora of social media. Soldiers can use Facebook, milblogs, Twitter, or any other platform to deliver their constitutionally protected messages as long as they do not interfere with active combat operations. In an effort to provide clarity to that phrase of the test (an area which understandably could create confusion in various courts), the phrase "active combat" presumes that the soldier is actually engaged in active combat. This test uses "active combat" as a presumption that the soldier be actually engaged in such. Allowing infringement on these rights only if the infringement furthers a legitimate military or government purpose paves the middle road of the two arguments presented previously in this section and does well to balance the competing interests of

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137. *Carlson*, 511 F.2d at 1332. This case reiterates that commanding officers in combat zones must be allowed considerable latitude in balancing the needs of the military and the First Amendment rights of each subordinate. *Id.* Obviously, this extraordinary latitude is not up for dispute and is considered to be presumed throughout the entire Comment.

138. *Id.* at 1333. The court holds that "[b]ecause judges are ill-equipped to second guess command decisions made under the difficult circumstances of maintaining morale and discipline in a combat zone, we should not upset such determinations unless the military's infringement upon first amendment rights is manifestly unrelated to legitimate military interests." *Id.*

139. Raskin, *supra* note 131, at 1216.

140. *See id.* (noting that it "would be as if the *Tinker* Court had decided that 'the primary business of public education is to impart official curricular materials to students, and it is consequently the business of a school to train students, not to provide a public forum.'").

141. *See id.* at 1217 (suggesting that "anti-war activists on the base should be no more presumptively disruptive of military functioning than the appearance to speak of Members of Congress and other routine guests on military bases," and that regardless, "all of the soldiers remain subject to their military duties and orders.").

142. *See id.* (noting that the "*Tinker* standard has not touched the whole system of speech regulation in the armed services [and] [s]oldiers, like public employees more generally, have fewer rights of expressive dissent than students do in school.").

both.

V. CONCLUSION

The meteoric rise of the use of social media by American soldiers has muddied the waters of the already-controversial area of military free speech. There is serious tension between the need for discipline in the ranks of the military and the protection for free speech that the Constitution affords every American. Courts are now increasingly faced with how to resolve this tension, due in no small part to the easy access every soldier has to social media. Archaic tests formulated to quash dissent in wars long past can no longer apply. This Comment proffers a flexible test to resolve these issues—a test that in the end will only foster a more secure and motivated armed forces, one that more ably goes to the battlefield to protect the very rights at issue in this case.