

8-1-2007

When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military

John Loran Kiel Jr.

Follow this and additional works at: <https://press.armywarcollege.edu/parameters>

Recommended Citation

John L. Kiel Jr., "When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military," *Parameters* 37, no. 3 (2007), doi:10.55540/0031-1723.2380.

This Article is brought to you for free and open access by USAWC Press. It has been accepted for inclusion in The US Army War College Quarterly: Parameters by an authorized editor of USAWC Press.

When Soldiers Speak Out: A Survey of Provisions Limiting Freedom of Speech in the Military

JOHN LORAN KIEL, JR.

© 2007 John Loran Kiel, Jr.

“The war in Iraq violates our democratic system of checks and balances. It usurps international treaties and conventions that by virtue of the Constitution become American law. The wholesale slaughter and mistreatment of the Iraqi people with only limited accountability is not only a terrible moral injustice, but a contradiction to the Army’s own Law of Land Warfare. My participation would make me a party to war crimes.”

— Lieutenant Ehren Watada¹

“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.”

— Justice Oliver Wendell Holmes, Jr.²

As America continues surging troops into Baghdad, a number of active-duty service members have publicly condemned President George W. Bush and criticized his handling of the war in Iraq. Remarks against the President have become more prevalent among service members because they communicate through a host of mediums unfathomable to yesterday’s generation

of fighting men and women. Soldiers frequently post digital journals, cell phone photos, and music videos on popular Internet sites such as YouTube and MySpace. A few techno-savvy troops even manage their own milblogs, or on-line personal diaries where they can communicate in cyberspace about virtually anything to virtually anyone. In fact, some military blogs and videos have become so popular that they garner tens of thousands of visits each day.

One 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. For instance, one particularly astute group of active-duty war protesters came to Capitol Hill to formally present a petition titled "Appeal for Redress" to Representatives Dennis Kucinich (D-Ohio) and Jim McGovern (D-Mass.). The group created their own Web site where they explained their purpose and posted a short petition calling for the immediate withdrawal of American military forces from Iraq. Over the course of three months, approximately 1,000 active-duty personnel, reservists, and National Guardsmen signed the online petition.³

In addition to Web-based technology, service members continue to rely on traditional methods of communication to vent frustrations. For example, members of the group Appeal for Redress appeared on the CBS program *60 Minutes* to discuss why they oppose the war and support a timeline for redeploying all US forces from Iraq. Army Lieutenant Ehren Watada is scheduled to be courts-martialed later this year for a series of damning statements he made about President Bush at an antiwar convention in Seattle, Washington, last year. Watada also published a series of contemptuous remarks about the President in a number of local newspapers following his refusal to deploy to Iraq.

As service members become more vocal about the war, commanders need to become more familiar with how freedom of speech is applied in a military context. For instance, when a company commander openly questions the futility of serving another tour in Iraq is his conduct heroic or is it conduct unbecoming an officer? When Corporal Smith posts a blog alleging that the war is the result of corporate greed and that none of the troops support it is he simply expressing a personal opinion or does his speech present a threat to the morale and discipline of his unit? Soldiers are citizens in uniform, after all, and the Con-

Major John L. Kiel, Jr., is attending the Army Judge Advocate General's Legal Center and School in Charlottesville, Virginia, where he is a candidate for an L. L. M. degree in Military Law. Major Kiel's last assignment was at the United States Military Academy as an Assistant Professor of Law teaching courses in Constitutional Law and Military Justice. He is a graduate of Brigham Young University and the Florida State University College of Law.

stitution they swear to defend bestows upon each of them the freedom of speech. But what happens when that speech has a detrimental impact on the good order, discipline, and morale of a particular unit or individual within the unit?

This article will examine the dilemma of dissension in the ranks—a dilemma that has largely remained dormant for more than 40 years. The last time soldiers lashed out against the President in any noticeable degree was during the Vietnam War. More recently, a number of commissioned officers publicly ridiculed President William J. Clinton after his affair with Monica Lewinsky came to light. The article will discuss these examples and a handful of seminal cases that comprise the body of law governing free speech in the military. What the cases and statutes indicate is that the content of the message itself and the nature in which it was delivered will ultimately determine its lawfulness. The more contemptuous and public the remark, the more likely punishment will be prescribed for the messenger.

DOD Directives

There are two pertinent Department of Defense directives (DODD) that govern political speech in the military. 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. The directives establish principles that are intended to help commanders balance the free speech rights of their troops with their own command obligations. For instance, DODD 1325.6 counsels commanders to preserve the service member's right of expression to the utmost extent on the one-hand while on the other they are cautioned not to ignore conduct that could destroy the effectiveness of their units.⁴ The directives also presuppose that commanders will exercise calm and prudent judgment when trying to properly reconcile these two interests when they clash.

Although the directives are primarily consulted for the list of activities that they prohibit, they also openly encourage service members to participate in a number of political activities. These activities include voting, contributing money to partisan campaigns and causes, attending rallies, meetings, and conventions as a spectator, joining a political club, and expressing personal opinions on candidates and political issues.⁵ Members may also serve as nonpartisan election officials, display a political sticker on their car, and encourage their peers to register and vote.⁶ While this list is by no means exhaustive it is representative of the types of civic responsibilities the Department of Defense hopes military members will take advantage of as citizens.

There is, however, one caveat when it comes to engaging in most of these activities. Department of Defense Instruction 1334.01 generally for-

bids wearing a uniform while participating in any personal, professional, or political activity where an inference of official sponsorship may be drawn.⁷ Examples include giving an unofficial public speech or interview and participating in a march, picket, or any other form of public demonstration.⁸ A good rule of thumb is that members may never wear a uniform while engaging in any activity that would tend to bring discredit upon the armed forces or create an inference of official endorsement on behalf of the military.

It is also important to note that unlike the *Uniform Code of Military Justice* (UCMJ), the directives do not distinguish service members who publicly criticize a President and oppose a war from those who openly support both. The directives were intended to preserve in part the long-standing tradition that the military remain an apolitical body whose duty is to obey the orders of its civilian leaders. Just as soldiers are prohibited from airing their grievances in public, so too should they refrain from delivering speeches, granting interviews, and publishing statements that tend to show partisan support for any cause and political leader.

There are a number of prohibited activities outlined in the provisions of DODD 1325.6 and DODD 1344.10, but for the sake of brevity this article will focus on the three or four that service members are most likely to violate. The first of these provisions deals with speaking in public at a political gathering. Army Lieutenant Ehren Watada was charged in part because of comments he made in a speech last year to an audience at an antiwar convention in Seattle, Washington. Directive 1344.10 specifically prohibits service members from speaking before any political gathering that promotes a partisan party, candidate, or cause. The directive defines a partisan political activity as one that supports issues specifically identified with a national or state political party and associated or ancillary organizations.⁹ Veterans for Peace, the national organization that sponsored Watada's speech, arguably qualifies as an ancillary organization as defined by the regulation. Even though Watada was ultimately charged for using contemptuous language toward the President, he could have also been charged with violating a lawful general regulation under Article 92 of the UCMJ for delivering the speech to begin with in violation of Army regulations.

The group Appeal for Redress's online petition was proper in the sense that group members have every right to communicate with their legislators without fear of retribution, but their appearance on the CBS news program *60 Minutes* was another matter. Members of the group appeared on the program to discuss their opposition to the Iraq War. Although most of the interviewees spoke in vague generalities, they still violated the provisions of DODD 1344.10 barring participation in any radio or television program as an advocate for or against a partisan political party or cause. Because the group presented its petition to selected Democratic representatives in Congress in the hopes that

Democrats would deliver on their campaign promise to redeploy forces from Iraq, it was promoting a partisan cause in violation of the directive.

Contempt Toward Officials

Using contemptuous language against the President or other officials is a unique proscription within the law that is rarely charged by military prosecutors. Article 88 of the UCMJ is rooted in the British Articles of War of 1765.¹⁰ The British Articles of War forbade any officer or soldier from using traitorous or disrespectful words against the King or members of the royal family.¹¹ The articles also forbade British troops from behaving with contempt or disrespect toward a general or other commander-in-chief of the British forces and from using words tending to hurt or dishonor them.¹²

In June 1775, the Continental Congress adopted this provision and slightly modified the language to make it applicable to the Continental Army during the Revolutionary War.¹³ In 1776, Congress amended the provision to prohibit the use of traitorous or disrespectful words against the United States Congress or any state legislature in which a soldier or officer may be quartered.¹⁴ The provision was modified again in 1806 to preclude the President and Vice President from being treated as objects of disrespect.¹⁵ The provision remained unchanged until Congress incorporated it into Article 88 of the UCMJ in 1950.

In order to secure an Article 88 conviction, the government must prove that the accused was a commissioned officer; that he or she 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.¹⁶ The government may not charge expressions of opinion made during the course of a private conversation or adverse criticism of a protected official or legislature if it was not personally contemptuous and was done during the course of a political discussion. Punishment for this offense includes dismissal from the service, forfeiture of all pay and allowances, and confinement for one year.

One reason why prosecutions under this article are extremely rare is because of the “you know it when you see it” approach Congress adopted in attempting to define the term “contemptuous.” The *Manual for Courts-Martial* asserts that contemptuous language is either so obvious that it amounts to contempt per se or it may be inferred by examining the circumstances surrounding the making of the accused’s statement. The *Military Judges’ Benchbook* (Department of the Army Pamphlet 27-9) is a companion text to the *Manual for Courts-Martial*, and it provides limited definitions for certain enumerated offenses under the UCMJ. The *Benchbook* defines contemptuous as “insulting,

rude, disdainful, or otherwise disrespectfully attributing to another qualities of meanness, disreputableness, or worthlessness.”¹⁷ Besides the limited guidance these two references provide, the best examples of this offense can be gleaned from cases where officers were either courts-martialed or administratively punished for using contemptuous language toward the President.

Approximately 115 general courts-martial were convened during the Civil War and the two World Wars to punish perceived Article 88 violations.¹⁸ During the Civil War, soldiers were convicted for calling President Abraham Lincoln “‘a loafer,’ ‘a thief,’ ‘a damned tyrant,’ and a ‘damned black republican abolitionist.’”¹⁹ Soldiers who mockingly referred to President Woodrow Wilson as “the laughing stock of Germany” and “a God damn fool” were also tried and convicted during the First World War.²⁰ Officers who referred to President Franklin D. Roosevelt during World War II as “the biggest gangster in the world next to Stalin,” “Deceiving Delano,” and “a crooked, lying hypocrite” were also courts-martialed for using contemptuous language against the Commander-in-Chief.²¹

Since the UCMJ was enacted in 1950 the military has prosecuted only one officer for violating the provisions of Article 88.²² On 6 November 1965, Lieutenant Henry Howe, Jr., marched in a peaceful war protest in El Paso, Texas, where he joined a group of professors and students who had organized a demonstration against the Vietnam War. On the day of the protest, Howe slipped into the back of a picket line wearing his civilian clothes and carrying a sign that read: “Let’s Have More Than a ‘Choice’ Between Petty, Ignorant, Facists (sic) in 1968” on one side and “End Johnson’s Facist (sic) Aggression in Vietnam” on the other.²³ Howe was convicted of using contemptuous words against the President and for conduct unbecoming an officer.

Lieutenant Howe contested his conviction on a number of legal grounds, including an argument that the antiwar rally where he carried his sign constituted a political discussion. The *Manual for Courts-Martial* specifically states that officers may not be prosecuted for adversely criticizing a designated official or legislature if the criticism itself was not personally contemptuous and it was done during the course of a political discussion.²⁴ The United States Court of Military Appeals rejected this argument on the grounds that adverse criticism could never equate to the kind of contemptuous language prohibited by the article.²⁵ Furthermore, the court noted that the provision also made perfectly clear, “Giving broad circulation to a written publication containing contemptuous words of the kind made punishable by this article, or the utterance of contemptuous words of this kind in the presence of military subordinates, aggravates the offense.”²⁶

Howe also argued that the charges violated his free speech rights under the First Amendment. After considering the fact that the prohibition

against using contemptuous language predated the Revolutionary War, the Constitution, and the Bill of Rights, the Court rejected this argument outright. The Court also analyzed Howe's free speech argument in the context of the clear and present danger test set forth in *Schenk v. United States*. The *Schenk* court held, "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."²⁷ The Court ultimately determined that the language Howe publicly displayed on his sign constituted such an evil and was therefore afforded no protection under the First Amendment.

Lieutenant Watada is the only other officer to be charged for violating Article 88 since Howe's conviction in 1967. Watada was charged with two specifications of using contemptuous language toward President Bush for making the following remarks in an interview he gave on 7 June 2006:

As I read about the level of deception the Bush Administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such time-honored tradition, knowing we waged war based on a misrepresentation and lies?²⁸

Watada has thus far vigorously defended his comments on the grounds that he was merely expressing his personal opinion which is considered protected speech under the First Amendment. If Watada is ultimately convicted of this charge, the appellate court may reject this argument given the Supreme Court's holding in the *Howe* case—that punishing Watada for publicly displaying his contempt for the President furthers the government's compelling interest of maintaining good order and discipline in the armed forces. The appellate court may also conclude that Watada's adverse criticism was exactly the kind proscribed by the article and that the public manner in which he delivered his comments aggravates his offense.

In most of these cases, however, officers who unwisely air their grievances in public risk receiving career-ending reprimands in their personnel files. At the height of Kenneth Starr's investigation into the Monica Lewinsky affair, public criticism of President Clinton became so frequent and blatant among the officer corps that both the Air Force and Marine Corps delivered stern warnings about using contemptuous language against the President.²⁹ Shortly after the Marine Corps issued its warning, Major Shane Sellers, a 20-year Marine veteran, published an article in *The Navy Times* where he said among other things "what Clinton and Monica did as consenting adults boils down to adultery. And one should call an adulterous liar exactly what he is—a criminal."³⁰ After several readers complained about Sellers' comments, the Marine Corps issued him a letter of concern and placed it in his personnel file.

The most notorious case involving criticism of President Clinton took place in 1993 shortly after his election. Air Force Major General Harold Campbell delivered a speech at a NATO banquet where he called Clinton a “dope smoking,” “skirt chasing,” and “draft dodging” Commander-in-Chief.³¹ For that, General Campbell was reprimanded, fined \$7,000, and forced to retire.³² Lieutenant Colonel Steve Butler called President Bush’s decision to invade Iraq “sleazy and contemptible” and asserted, “Of course Bush knew about the impending attacks on America. He did nothing to warn the American people because he needed this war on terrorism. His daddy had Saddam and he needed Osama.”³³ Lieutenant Colonel Butler was immediately reprimanded and relieved of his position as Vice Chancellor of the Defense Language Institute, forcing him into retirement after a distinguished 24-year career.³⁴

Conduct Unbecoming an Officer and a Gentleman

Article 133 of the *Uniform Code of Military Justice* proscribes officers from engaging in unbecoming conduct. It too was adopted from the British Articles of War of 1765.³⁵ The British version provided: “Whatsoever commissioned officer shall be convicted before a general courts-martial of behaving in a scandalous, infamous manner, such as is unbecoming the character of an officer and gentleman, shall be discharged from the service.”³⁶ The Continental Congress adopted this provision in 1775, 1776, and once again in 1786 without making any modifications to the text.³⁷ In 1806, Congress revised the language by omitting the terms “scandalous” and “infamous,” leaving the provision to read: “Any commissioned officer convicted before a general courts-martial of conduct unbecoming an officer and a gentleman, shall be dismissed [from] the service.”³⁸ Congress ultimately incorporated the provision into the UCMJ in 1951 and enacted it as Article 133.³⁹ The current version of the article renders the provision applicable to officers, cadets, and midshipmen and authorizes any punishment that a courts-martial may direct including but not limited to dismissal from the service.⁴⁰

There are literally dozens of activities that may comprise the conduct prohibited by the provisions of Article 133. Some of these activities include 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; neglecting to discharge pecuniary obligations; cruelty toward or maltreatment of subordinates; getting drunk in the presence of military inferiors; commission of a felony or crime; and gross disrespect or defiance of civil authorities, to name a few.⁴¹ Much like Article 88, prosecutions for political speech under Article 133 are extremely rare. The last known trial involved an Army doctor who publicly opposed the Vietnam War and openly encouraged enlisted soldiers to disobey their deployment orders.

Captain Howard Levy refused to set up a program for training Special Forces medics in simple dermatology procedures in preparation for their deployment to Vietnam. Upset that Levy had disobeyed his original order, the hospital commander ordered Levy a second time to conduct the training. Levy refused and then began making public statements denouncing the Vietnam War and Special Forces personnel in front of several enlistees assigned to Fort Jackson, S. C., for basic training. Levy was prosecuted for violating his commander's orders and for making intemperate, defamatory, disloyal, and provoking statements in violation of Articles 133 and 134 of the UCMJ.⁴²

Levy's commander originally considered issuing him an Article 15 but decided to courts-martial him instead largely because of the public nature and circumstances surrounding his statements.⁴³ Levy stood in front of a group of black enlisted personnel and openly encouraged them to refuse to deploy to Vietnam because of perceived racial discrimination.⁴⁴ He also told a group of enlisted soldiers that he would not train Special Forces personnel because he considered them "liars and thieves," "killers of peasants," and "murderers of women and children."⁴⁵ On another occasion, Levy unapologetically told a group of soldiers, "I hope when you get to Vietnam something happens to you and you are injured."⁴⁶

The United States Supreme Court ultimately reviewed Levy's conviction in 1974. Levy argued to the Court that the provisions of Articles 133 and 134 were unconstitutionally vague in the sense that he could not reasonably be expected to realize that his conduct was proscribed by law. The Court rejected this argument on the grounds, "His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment."⁴⁷

Levy also argued that the provisions were overly broad to the extent that they violated his First Amendment rights. In the process of rejecting this assertion, the Court made a series of statements that indicated its willingness to give great deference to the military when it comes to First Amendment protections. Justice William H. Rehnquist, writing for the majority, stated that the unique nature of the military requires a different application of free speech protections than civilians generally enjoy.⁴⁸ The Court held, "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."⁴⁹ The military must rely on a command structure that is crucial to commanding troops in combat and affects overall national security, Rehnquist reasoned.⁵⁰ He also noted that while disrespectful and contemptuous speech may be tolerated in the civilian community, it may undermine the effectiveness of response to command in

the military.⁵¹ The Court concluded that the free speech protections contemplated by the Constitution did not extend to Captain Levy's conduct.

Lieutenant Watada was also charged for conduct unbecoming an officer and gentleman for publicly disparaging President Bush in the statement he issued 7 June 2006, the same comments that formed the basis of his Article 88 charge. If convicted of this charge, Watada will likely appeal on the ground that his comments are protected speech because they simply reflect his personal opinion. Considering the extreme deference the Supreme Court gave the military in *Parker v. Levy*, the appellate court may reject this argument after taking into account that Watada is a commissioned officer, that he had command responsibility for a platoon of soldiers, and that his conduct undermined the fundamental necessity of discipline, obedience, and the effectiveness of response to command in his unit.

Conduct Prejudicial to Good Order and Discipline

Although Congress limited the application of Articles 88 and 133 to commissioned officers, enlisted personnel who publicly attack the Commander-in-Chief, the United States, or its policy aims are also subject to prosecution under the UCMJ. It would make little sense to allow a first sergeant or squad leader to make statements that have a detrimental impact upon the morale and discipline of the soldiers serving around them. For instance, what should become of the staff sergeant who calls the President a war criminal in a sermon he delivers at the local parish while home on leave from Iraq? How should the command handle the corporal who claims on a major newspaper's Web site that the soldiers fighting in Iraq no longer support the war and urges readers to put pressure on their elected representatives to bring the troops home? What should happen to the group of privates who don their uniforms and march in an antiwar rally on the National Mall?

One possible course of action is to punish these troops for violating the provisions of the Department of Defense directives discussed earlier as they have been incorporated by their respective services' regulations. Another is to punish them for violating the tenets of Article 134 of the UCMJ. Article 134 is commonly known as the "general article" in that it typically serves as a "catch-all" provision for charging a wide array of criminal offenses. Military prosecutors will typically rely on Article 134 to charge crimes that are not otherwise covered in other provisions of the UCMJ. In order to secure a conviction under the article, prosecutors must prove that the accused's conduct under the circumstances "was to the prejudice of good order and discipline in the armed forces" or "was of a nature to bring discredit upon the armed forces."⁵² The prosecutor may literally bring charges against an accused for engaging in any political activity or speech that he can prove

amounted to either one of those two things. Arguably, the sermon, speech, and antiwar rally discussed above could qualify as service-discrediting conduct and under certain circumstances may also amount to conduct prejudicial to good order and discipline in the armed forces.

One of the provisions of Article 134 is the offense of making disloyal statements. An accused may generally commit this offense by making a statement disloyal to the United States with the intent to promote disloyalty or disaffection by any member of the armed forces. For instance, praising the enemy, denouncing America's form of government with the intent to promote disaffection or disloyalty among military members, and attacking the war aims of the United States are types of disloyal statements specifically contemplated by the provision.⁵³ The following two cases illustrate this provision.

The first case involves a soldier who was opposed to the idea of waging a "cold war" against the Soviet Union. Private First Class Allen McQuaid was assigned to Elmendorf Air Force Base, Alaska, in October 1952 when he made a series of damning statements about the United States and its foreign policy objectives. McQuaid claimed among other things that the war was waged by the banking industry to make money at his expense and to protect an economic system that he considered unfair and unjust.⁵⁴ McQuaid also inferred that service members who excelled in the military did so not by merit but by compromising their integrity while pandering to the "capitalists and their henchmen" who stood to gain the most from the war.⁵⁵ He then actively encouraged members who were disaffected with the service to "follow the dictates of their own consciences."⁵⁶ McQuaid uttered these statements vocally on a number of occasions and later posted them in writing on the front door of the officers' club and on the bulletin board of the Air Base Group headquarters.

The Air Force Board of Review concluded that McQuaid's statement about the banking industry profiting from the war was disloyal and disaffecting because it falsely portrayed the aims and objectives of the defense effort, it unjustly maligned the American economic system, and it tended to discourage faithful service to the United States by members of the armed forces.⁵⁷ The court held that the comment about certain service members compromising their ideals and oaths to further their careers was disloyal in that it undermined confidence by members of the armed forces in some of its other members.⁵⁸ Lastly, the court held that McQuaid's statement urging members to follow the dictates of their consciences was self evidently disloyal as it openly fostered disobedience.⁵⁹ The court ultimately concluded that none of the statements were protected by the First Amendment because of their seditious nature.

Another case involved two Army privates who authored a manifesto outlining their reasons for protesting the Vietnam War. Privates Daniel Amick and Kenneth Stolte published some 200 leaflets in the base library and

then posted them in various locations around Fort Ord, California. The leaflets contained a number of statements alleging among other things that the war was stupid, illegal, and foolish. The privates wrote, "We are tired of all the lies about the war, the false ideals, the empty reasoning. We see the reality of war; it is pointless, meaningless, and [a] tragic battle between two differing factions of human beings."⁶⁰ The manifesto concluded by urging those who wanted to work for peace and freedom to join them in their opposition to the war. The two signed the statement identifying themselves by name, rank, unit, and serial number.

The trial court sentenced both soldiers to confinement for four years and to be dishonorably discharged from the service.⁶¹ On appeal, the Army Board of Review held that soldiers have to expect that there are certain free speech restrictions that must be imposed on them because of the unique nature of the military. The court observed, "An Army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier."⁶² The court concluded that the duo specifically intended to undermine the war effort by fostering dissent and by jeopardizing the discipline required of an effective fighting force.⁶³

Conclusion

As President Bush and the Congress continue jousting over the decision to withdraw US forces from Iraq, some service members will continue to publicly voice their disdain for the President and opposition to the war. In light of such events, commanders need to have a better understanding of the free speech restrictions imposed upon service members by the UCMJ. Senior leaders rarely courts-martial service members for voicing their political views in public for any number of reasons. Perhaps the most important reason is that commanders understand that their soldiers enjoy, for the most part, the same free speech rights that civilians are afforded under the Constitution.

Major Sellers, Colonel Butler, and General Campbell never spent a day behind bars for the things that they said about Presidents Clinton and Bush, but their commanders sent a clear message that such conduct will not be tolerated by commissioned officers serving on active duty. The private, corporal, and sergeant who publicly refer to the President as a liar, a war criminal, or worse should also be punished appropriately for their inappropriate conduct.

Much like any other criminal matter, commanders have a host of options when it comes to disposing of these types of cases. Options range from doing nothing to recommending a general courts-martial. The proper response likely lies somewhere in between. Commanders can always resort to

letters of reprimand and poor evaluation reports to get the desired response without the crippling stigma of jail time or a federal conviction. Of course, administrative measures like these may also be used in conjunction with a courts-martial or an Article 15. Article 15s would be appropriate where the accused's comments were flagrant enough to warrant loss of pay, rank, or other privileges, including confinement up to 30 days. Officers may also receive Article 15s, usually, from a general officer whereby they may be fined or placed under house arrest.

Harsher measures like a courts-martial should be reserved for egregious offenders who take their criminal conduct to greater heights. Lieutenant Watada, for example, would likely have received a formal reprimand for expressing his contempt for the war and for President Bush had he gotten on a plane and deployed to Iraq. Instead, he opted to intentionally miss movement with the rest of his brigade and thus risks the possibility of a conviction at a general courts-martial. Because Captain Levy's comments presented a clear and present danger to the morale and readiness of black soldiers preparing to deploy to Vietnam, his commander appropriately chose to prosecute rather than give him the Article 15 originally intended.

Regardless of the form of punishment a particular commander may choose to impose on a service member for unlawfully expressing political views, all commanders should remember to prudently balance and preserve the free speech rights of their soldiers with their own professional command obligations, ensuring one never jeopardizes the other. When a commander does determine that certain speech or behavior is having a detrimental impact on unit discipline, readiness, and morale, the UCMJ provides plenty of tools to ensure that timely, fair, and appropriate discipline is administered in the best interests of justice.

NOTES

1. Ehren Watada, "Statement of Lt. Ehren Watada," 7 June 2006, <http://www.couragetoresist.org/x/content/view/82/39/>.
2. *Schenk v. United States*, 249 U.S. 47, 52 (1919).
3. Noam N. Levey, "Military Members Make an Antiwar Plea on Capitol Hill," *Los Angeles Times*, 17 January 2007, A8.
4. Department of Defense Directive 1325.6, *Guidelines for Handling Dissident and Protest Activities Among Members of the Armed Forces*, 1 October 1996, 2.
5. Department of Defense Directive 1344.10, *Political Activities by Members of the Armed Forces on Active Duty*, 2 August 2004, 2, 10.
6. *Ibid.*, 10-11.
7. Department of Defense Instruction 1334.01, *Wearing of the Uniform*, 26 October 2005, 2.
8. *Ibid.*
9. DODD 1344.10, 9.
10. *United States v. Howe*, 37 C.M.R. 429, 434 (U.S.C.M.A 1967).
11. *Ibid.*, 434.
12. *Ibid.*
13. *Ibid.*

14. *Ibid.*, 434-35.
15. *Ibid.*, 435.
16. Joint Service Committee on Military Justice, *Manual for Courts-Martial United States* (Washington: US Government Printing Office, 2005), IV-17.
17. Department of the Army, *Military Judges' Benchbook*, Pamphlet 27-9, 15 September 2002, para. 3-12-1(d).
18. John G. Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," *Harvard Law Review*, 81 (June 1968), 1720-21.
19. *Ibid.*, 1722.
20. *Ibid.*, 1724-25.
21. *Ibid.*, 1730-31.
22. See *United States v. Howe*, 37 C.M.R. 429 (1967).
23. *Ibid.*
24. *Ibid.*, 444. Citing the *Manual for Courts-Martial*.
25. *Ibid.*
26. *Ibid.*
27. *Schenk v. United States*, 52.
28. Department of the Army Form 458, *Charge Sheet*, http://seattletimes.nwsourc.com/news/local/charge_sheet.pdf.
29. Steven Lee Myers, "Military Warns Soldiers of Failure to Hail Chief," *The New York Times*, 21 October 1998, A22.
30. *Ibid.*
31. *Ibid.*
32. *Ibid.*
33. Kevin Howe, "DLI Official Removed for Criticizing Bush," *Monterey County Herald*, 3 June 2002, <http://www.mindfully.org/Reform/2002/Bush-Critic-Suspended5jun02.htm>.
34. *Ibid.*
35. William Winthrop, *Military Law* (Washington: Press of Thomas McGill & Co., 1886), 1020.
36. *Ibid.*
37. *Parker v. Levy*, 417 U.S. 733, 745 (1974).
38. *Ibid.*, 746.
39. *Ibid.*
40. *Manual for Courts-Martial United States*, IV-94, 95. The maximum punishment authorized for this offense is a dismissal from the service; total forfeiture of all pay and allowances; and confinement for one year or for a period not in excess of that authorized for the most analogous offense punishable by the UCMJ.
41. *Ibid.*, 1025-32.
42. *Parker v. Levy*, 739.
43. *Ibid.*, 737.
44. *Ibid.*, 739.
45. *Ibid.*
46. *Ibid.*
47. *Ibid.*, 761.
48. *Ibid.*, 758.
49. *Ibid.*
50. *Ibid.*, 759.
51. *Ibid.*
52. *Manual for Courts-Martial United States*, IV-95.
53. *Ibid.*, IV-104. The *Manual* provides that the disloyalty involved must be to the United States as a political entity and not to one of its departments or agencies that are part of its administration.
54. *United States v. McQuaid*, 5 C.M.R. 525, 528 (A.F.B.R. 1952).
55. *Ibid.*, 530.
56. *Ibid.*
57. *Ibid.*
58. *Ibid.*
59. *Ibid.*
60. *United States v. Amick*, 40 C.M.R. 720, 722 (A.B.R. 1969).
61. *Ibid.*, 721.
62. *Ibid.*, 723. Citing to *In re Grimley*, 137 U.S. 147, 153 (1890).
63. *Ibid.*