BE ALL THAT YOU CAN BE?
AN ANALYSIS OF AND PROPOSED ALTERNATIVE TO MILITARY SPEECH REGULATIONS

Sarah N. Rosen[*]

The First Amendment has a special regard for those who swim against the current, for those who would shake us to our foundations, for those who reject prevailing authority.

—Steven H. Shiffrin[1]

On November 4, 2008, the American people elected Barack Hussein Obama the forty-fourth President of the United States. In the wake of a war in the Middle East and the collapse of the American economy, voters embraced Obama and his message of hope and change. Celebration erupted across the country and around the world. Electricity was in the air; the tide was turning.

Not everyone, of course, approved of Obama's election. Supporters of his opponent, Senator John McCain, voiced their disapproval. In Ohio, McCain supporter Angela Senters told reporters, "My boyfriend is so upset, he said he's going to go over to Kentucky and join the Ku Klux Klan . . . . My boyfriend said now the world is going to end in 2012 and that Obama is the antichrist."[2]

Yes, these comments express a racism generally frowned upon by modern American society. But, more importantly, his comments signify his disapproval with the official elected to lead his country—they exemplify political dissent. He may voice his criticisms of the newly elected administration without fear of prosecution for doing so. America's Founding Fathers adopted the First Amendment to the Constitution of the United States in part for that very purpose—to al-

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* J.D. Candidate 2010, University of Pennsylvania Law School; B.A. 2005, Cornell University. I would like to extend special thanks to Professor C. Edwin Baker for his guidance and advice over the course of this Comment's evolution. I also wish to thank my Comment Editor, Chris Lee, for his support throughout the writing process and the staff of the Journal of Constitutional Law for their helpful edits and suggestions.

1 STEVEN H. SHIFFRIN, DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA 10 (1999).

2 Posting of Christine Jindra to Openers: The Plain Dealer's Ohio Politics Blog, http://blog.cleveland.com/openers/2008/11/in_heavily_republican_butler_c.html (Nov. 5, 2008, 22:28 EST).

low the free flow of ideas and the clash of opinions without fear of government retaliation.

Not all American citizens, however, were free to participate in the robust debate surrounding Obama's election. On November 5, 2009, Captain Justin Robertson[3] of the United States Army woke up, donned his uniform, and drove to his Spanish class at the Defense Language Institute (DLI), the Department of Defense's linguist training school. DLI students are not actively assigned to any operating brigade, nor are they involved in any of the ongoing operations of the war in Iraq and Afghanistan.[4]

Upon arriving at DLI, he was informed that, as the highest ranking officer in his class, he needed to deliver a message to his classmates. The message indicated the kinds of comments about the election that were or were not "appropriate" for military personnel to make in their personal discussions. According to Robertson, he was to inform his classmates that Obama's official title was now "President-Elect Obama" and any disparaging remarks about him were forbidden by military commanders. Regardless of the political beliefs of any of the individual service members, the military would not allow criticism or disapproval of the new Commander-in-Chief. Just as soldiers were expected to support George W. Bush throughout his tenure as the head of U.S. military operations, they also were expected to support Obama as President-Elect. Political dissent, the cornerstone of the First Amendment, would not be tolerated.

Political speech, and dissent in particular, occupy a revered place in American ideology.[5] Steven H. Shiffrin defines dissent as "speech that criticizes existing customs, habits, traditions, institutions, or authorities."[6] Free speech functions as a "cultural symbol to promote tolerant attitudes in American society."[7] The ability to criticize the government was of particular importance to the Founding Fathers, who disliked the idea that the government might remain unchecked

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3 Name has been changed.

4 *See* Presidio of Monterey Tenant Units, http://www.monterey.army.mil/tenants/tenants.html (last visited Feb. 16, 2010).

5 *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 927–28 (3d ed. 2006) (noting scholars' criticisms of whether the marketplace of ideas was rational for freedom of speech (citing C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989) and LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988))).

6 SHIFFRIN, *supra* note 1, at xi.

7 STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 87 (1990) (citation omitted).

by popular opinion.[8] This idea remains entrenched in American minds. Political dissent provides an avenue for accountability of public officials, an inspiration for social change, and a way for individual citizens to define their personal identities—both by allowing them to express and to solidify their own opinions[9] and by exposing them to the opinions of others.[10] Those who work within the government are arguably in the best position to criticize that government because they are best acquainted with its policies and practices.

Similarly, the men and women of the American military are arguably in the best position to criticize the ongoing war in Iraq and Afghanistan. These men and women have been subject to multiple deployments and extended tours and have experienced firsthand what most of us only observe on television. But these men and women are the only members of American society prohibited from engaging in political dissent by critiquing the war or the Commander-in-Chief. Service members risk their lives to protect the freedoms guaranteed by the Constitution, and yet these freedoms are denied to them by military regulations.

In this Comment, I argue that current military regulations restricting free speech—in particular, those that prohibit political dissent—impermissibly infringe on the First Amendment rights of the men and women in the armed forces. The Uniform Code of Military Justice (UCMJ) and Department of Defense directives effectively eliminate a service member's right to participate in political discussion or dissent—in substance, if not in form.[11] The regulations prohibit even off-duty service members from voicing their opinion against an incumbent administration or protesting a war in which they must participate.[12]

I suggest that federal courts should review military free speech regulations through the public employee rubric. While public employees sacrifice some freedoms that citizens in the private sector enjoy by virtue of their public employment, First Amendment jurispru-

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8 *See, e.g.*, PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 71–75 (1999) (noting that members of the Constitutional Convention pushed for limits on governmental power in the form of the Bill of Rights and the First Amendment).

9 This view of the First Amendment is known as the "Liberty" or "Autonomy" theory, and will be discussed in further detail in Part III.B.2.

10 This view of the First Amendment is known as the "Marketplace of Ideas" theory and will be discussed in further detail in Part III.B.2.

11 U.S. DEP'T OF DEFENSE, DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY THE ARMED FORCES ON ACTIVE DUTY para. E3.2, E3.3 (2004) (listing certain activities that service members may or may not participate in while on active duty).

12 U.C.M.J. art. 88 (codified as amended at 10 U.S.C. § 888 (2006)).

dence indicates that the government cannot abridge its employees' right to speak unless that speech interferes with the function of the government entity.[13] If courts reviewed military regulations through this lens, only speech that directly affected the functioning of the American military could be silenced. For example, officers in a combat zone would not be allowed to tell their troops that they should not go into battle. But an off-duty officer would be allowed to attend a peace rally to express his dissatisfaction with the government's actions and express his dissent—a right that scholars and judges throughout American legal history have deemed fundamental.

In Part I of this Comment, I discuss the history of the UCMJ and the current status of military regulations on free speech. I also note the Supreme Court's highly deferential stance toward military regulations and its reluctance to implicate itself in such a controversial regulatory area.

Part II outlines public employee free speech doctrine. I explain how the Court has settled on the conclusion that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[14] While public employees' free speech rights are curtailed more than the rights of privately employed citizens, they generally are permitted to speak on public issues if their speech will not significantly affect their institutional employers' ability to do their jobs. This doctrine balances the interest of the employee in exercising his First Amendment rights and the interest of the United States in maintaining functioning governmental agencies.

In Part III, I discuss the implications of the Court's "hands-off" approach to military regulations that infringe on the rights of service members and argue that resolving these cases under the public employee doctrine would provide more just results by allowing the military to prohibit speech that directly interferes with military objectives but permitting speech that would not. I discuss the ways in which the military's arguments are undermined: by First Amendment theoretical principles, by the broad application of the public employee doctrine to agencies involved in national security, and by the dangers posed by taking too deferential a stance to military regulations.

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13 *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) (noting that restrictions on employee speech "must be directed at speech that has some potential to affect the entity's operations").

14 *Id.* at 417.

I. MILITARY RESTRICTIONS ON FREE SPEECH

In contrast to the free and uninhibited debate allowed to American civilians, the military has significantly curtailed the rights of men and women in the armed services to engage in political dissent. This section describes military speech regulations and cases in which the Supreme Court has reviewed those regulations. In almost all cases, the Supreme Court defers to military commanders, who claim that political dissent by service members poses a grave threat to national security and the efficiency of the military as a whole.

A. Summary of Military Regulations

1. Pre-UCMJ Regulations

Prior to World War I, members of the military and civilian communities alike generally accepted the authoritarian nature of military regulations.[15] The major weapon in the arsenal of military justice, the court-martial, existed separate and apart from the federal judiciary.[16] For years, the Supreme Court refrained from defining the scope of the court martial, allowing military tribunals to apply the Articles of War, the governing body of law, as they wished.[17]

Then came World War I. Brigadier General Samuel T. Ansell, the Acting Judge Advocate General, attacked military law as unconstitutional and began a two-year fight to protect the individual rights of soldiers.[18] Arguing that they were "courts all the same," deriving their authority from the U.S. Constitution, Ansell argued that the vision of military courts as executive branch puppets was an outdated carryover from the "British model of civil-military relations."[19] In his view,

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15 JOHN M. LINDLEY, "A SOLDIER IS ALSO A CITIZEN": THE CONTROVERSY OVER MILITARY JUSTICE, 1917–1920, at 8 (1990) (describing an incident where both civil and military leaders reluctantly agreed to the Army's insistence on a trial by court-martial for soldiers that participated in race riots).

16 *Id.* at 8–9 (quoting William Winthrop defining the court-martial as an "agency of the executive department" and "instrumentalit[y] of the executive power").

17 *Id.* at 11 ("In the absence of a more definitive ruling from the Supreme Court, Winthrop's theory of courts-martial would continue to dominate American military law."); *see also id.* at 42 (discussing the Articles of War as the basis of American military justice).

18 *Id.* at ix (describing Ansell's criticisms of military law, believing that a soldier deserves all legal protections under civilian law).

19 *Id.* at 31.

a soldier did not sacrifice his right to constitutional protection simply by joining the military.[20]

Ansell was opposed fiercely by Major General Enoch H. Crowder, who argued that "the real purpose of the court-martial is to enable commanders to insure discipline in their forces."[21] The military interest in discipline outweighed the soldiers' interest in exercising their constitutional rights. Crowder's conservative view revived original ideas about the military's domination of its soldiers.[22] The War Department agreed with Crowder, unsurprisingly, and Congress rejected Ansell's progressive ideology based on the Department's recommendation.[23]

World War II marked the next occasion for public scrutiny of the American system of military justice.[24] Congress adopted the Uniform Code of Military Justice (UCMJ) in 1950, finally incorporating many of Ansell's proposals, in an attempt to ensure that soldiers might exercise their constitutional rights.[25]

2. The UCMJ's Prohibitions on Speech and Political Dissent

Despite the UCMJ's more expansive view of service members' rights, the military still infringes on the fundamental liberties guaranteed by the Constitution. The four main provisions used to curtail the freedom of speech are Article 88 (Contempt toward officials), Article 92 (Failure to obey order or regulation), Article 133 (Conduct unbecoming an officer and a gentleman), and Article 134 (General article).[26]

Article 88 is the most restrictive of the UCMJ's prohibitions on speech.[27] Rooted in seventeenth century British anti-treason laws,[28] its

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20 *Id.* at ix ("Ansell believed that the soldier, whether a long-service regular, a volunteer, or a draftee, was also a citizen who deserved all the legal protections possible under civilian law if he faced trial by court-martial.").

21 Emily Reuter, *Second Class Citizen Solders: A Proposal for Greater First Amendment Protection for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 318–19 (2007).

22 *Id.* at 319.

23 *Id.*

24 WILLIAM T. GENEROUS, JR., SWORDS AND SCALES: THE DEVELOPMENT OF THE UNIFORM CODE OF MILITARY JUSTICE 3 (1973) (discussing the context and history of public and governmental scrutiny of military law).

25 10 U.S.C. §§ 801–941 (2006) (armed forces legislation). For a discussion of how General Ansell's legal ideas and theories were incorporated into the Uniform Code, *see, e.g.*, LINDLEY, *supra* note 15, at 2.

26 *See* Reuter, *supra* note 21, at 319.

27 10 U.S.C. § 888 (2006). *See also* Reuter, *supra* note 21, at 320 (calling Article 88 "the article most offensive to the First Amendment").

initial manifestation in the U.S. military was as Article 19 of the Articles of War. Notably, all prosecutions under Article 19 were *political*—all focused on punishing comments critical of President Abraham Lincoln and his management of the Civil War.[29] In its modern form, Article 88 forbids commissioned officers from using "contemptuous words against" the President and other government officials.[30] The UCMJ does not define contemptuous.[31] Service members may even be prosecuted for opinions expressed *privately*.[32]

Thus, Article 88 essentially prohibits any man or woman in military service from voicing negative opinions of the President, his administration, or his handling of foreign policy. The military may prosecute "personally contemptuous" opinions expressed during political discussions.[33] Most importantly, Article 88 leaves soldiers unable to voice their criticism of a war in which they are forced to participate. Military officers fear retaliation if they express their opinions, and their speech is effectively chilled.[34] Also, there is no exception for comments made out of uniform; even comments made off-duty may be prosecuted.

Article 92 prohibits disobeying a general order or regulation.[35] Orders are presumed legal.[36] While the UCMJ notes that orders cannot infringe on the individual rights of soldiers without "valid military purpose," federal courts unquestioningly accept "maintaining good order and discipline" as a valid purpose.[37] As Emily Reuter notes, "[t]he focus of the military adjudicators is that the accused violated

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28 *See* John G. Kester, *Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice*, 81 HARV. L. REV. 1697, 1697–99 (1968) (tracing Article 88 back to the sixteenth century and describing the same offense prohibited by British treason laws as well as the UCMJ).

29 *See* MICHAEL J. DAVIDSON, A GUIDE TO MILITARY CRIMINAL LAW 73 (1999) (noting the political nature of Article 19 punishments for treason as the predecessor of Article 88).

30 *Id.* at 72–73. To convict a service member under this article, the government must prove only that the defendant was a commissioned officer and that he or she used "contemptuous words against an enumerated official or legislature" in office at the time the defendant spoke, "which became known to someone else." *Id.* at 73.

31 10 U.S.C. § 888 (2006).

32 DAVIDSON, *supra* note 29, at 73 (suggesting that while the UCMJ notes that private expressions "should not ordinarily be charged," it does not ban such prosecutions entirely).

33 *Id.* (noting that Article 88 does not usually apply to political opinions so long as the opinion is not "personally contemptuous").

34 *See* Reuter, *supra* note 21, at 322 (describing how Article 88 chills officers' free speech).

35 10 U.S.C. § 892 (2006) (prescribing court-martial punishment for service members who fail to obey orders or regulations).

36 DAVIDSON, *supra* note 29, at 67–68.

37 Reuter, *supra* note 21, at 322.

an order; scrutiny of whether the order or regulation's restriction of free speech is actually constitutional is lost."[38]

Article 133 prohibits conduct unbecoming an officer and a gentleman.[39] This article covers conduct that "dishonors and disgraces the officer, compromising that person's character or standing as an officer."[40] Like Article 92, Article 133 may also punish private conduct.[41]

Article 134 punishes all conduct that endangers military discipline or that could bring the armed forces into disrepute.[42] Military commanders use this catch-all provision, along with Article 133, to prosecute speech that might not specifically be prohibited by other UCMJ articles but that, in their view, is inappropriate for a military setting.[43] The military considers speech or conduct discrediting if it "has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[44] These provisions effectively give military prosecutors unlimited authority to charge any offense they deem "discrediting," without any checks and balances on their discretion. The military may argue that any speech critical of a war or of military policy "tends to lower it in public esteem," and courts, adopting their usual deferential standard, will not interfere.

3. Department of Defense Directives Aimed at Silencing Dissent

The military also impedes free speech rights through Department of Defense (DOD) orders.[45] For example, DOD Directive 1344.10 prohibits types of political speech, including: "participating in partisan political campaigns," working for partisan organizations, and participating in any broadcast or "group discussion" as "an advocate . . . of a partisan political party, candidate, or cause."[46] Service members may, under the Directive, "express a personal opinion on political candidates and issues," as long as expressions do not contain

38 *Id.* at 322–23.

39 10 U.S.C. § 933 (2006) ("[C]onduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.").

40 DAVIDSON, *supra* note 29, at 79.

41 *Id.*

42 10 U.S.C. § 934 (2006).

43 *See* Reuter, *supra* note 21, at 323.

44 DAVIDSON, *supra* note 29, at 80 (quoting MANUAL FOR COURTS-MARTIAL, UNITED STATES para. 60c(3) (1995)).

45 Reuter, *supra* note 21, at 323.

46 *Id.*

"contemptuous words against the officeholders" as defined under UCMJ Article 88.[47]

This Directive seems outrageous to any proponent of the First Amendment because the Directive orders, in substance if not form, all members of the armed services to voice their support for the incumbent administration. This type of direct manipulation of public opinion is usually seen in authoritarian dictatorships, not nations that take pride in their progressive democracies. The military justifies these regulations as necessary to maintain order and discipline and to keep the military in high esteem.[48] Arguably, however, the military would be viewed in greater esteem if it did not deny its members their basic constitutional rights.

B. Military Speech Cases

The Supreme Court takes a very deferential approach to military regulations that limit the rights of service members, generally refusing to sit in judgment on military actions. Claiming to use a balancing test when evaluating military speech regulations, the Court weighs the government's interest in ensuring effective military operations against the interest of the individual service member's right to speak. The military interest in maintaining order, discipline, and national security almost always triumphs, even when the regulations in question do not interfere with military operations. While a few decisions indicate that the Court may be open to a stance more compatible with the general public employee doctrine, the majority of Supreme Court decisions—or, just as notable, the Court's silence in the face of the regulations—allow the military a free reign over its operations. I will discuss the more deferential cases first, followed by cases where the Supreme Court has indicated an inclination to apply traditional First Amendment reasoning to the restrictions.

1. Cases in Which the Supreme Court Completely Defers to Military Judgment

The first, and only, case ever tried under UCMJ Article 88 is *United States v. Howe*.[49] While off-duty and out of uniform, Lieutenant Howe

47 *Id.* at 323–24 (quoting U.S. DEP'T OF DEFENSE, DIRECTIVE 1344.10, POLITICAL ACTIVITIES BY THE ARMED FORCES ON ACTIVE DUTY para. E3.2, E3.3 (2004)).

48 *See, e.g.*, DAVIDSON, *supra* note 29, at 80 (noting that these Articles punish acts that "tend[] to lower [the military] in public esteem").

49 17 C.M.A. 165 (1967).

attended an anti-war rally.[50] According to the court, he carried a sign that read "'Let's Have More Than a Choice Between Petty Ignorant Facists in 1968' and on the other side of the sign the words 'End Johnson's Facist Aggression in Viet Nam,' or words to that effect."[51] Comparing Article 88 to laws against mutiny employed by the British Royal Forces, the Military Court of Appeals held that Article 88 did not impermissibly infringe Howe's First Amendment rights.[52] This case did not even get to the Supreme Court; the limits of the constitutional rights of service members were left in the hands of the military itself.

Many military speech cases, like Lieutenant Howe's, do not even make it into the federal appeals system. The military has sole discretion over most speech issues, and prosecution of service members for political speech remains rampant.[53] As the Supreme Court has deferred to the military in evaluating speech regulations, the military's test involves essentially the same interests as the Supreme Court's test. Military courts ask whether the speech in question "interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to the loyalty, discipline, mission, or morale of the troops."[54] Unsurprisingly, military courts almost always find against service members when evaluating free speech claims.

The first case dealing with service members' First Amendment rights to reach the Supreme Court was *Parker v. Levy*.[55] The "landmark decision for deference in the context of servicemembers' First Amendment rights," *Parker* solidified the Supreme Court's "hands-off" approach to military regulations during the height of the Vietnam War.[56] Captain Howard Levy, an army physician, refused to train Special Forces (SF) medics.[57] Calling the SF members "liars and thieves and killers of peasants and murderers of women and children," Levy vehemently criticized the war and *specifically* urged black

50 *Howe*, 17 C.M.A. at 168; *see also* Reuter, *supra* note 21, at 320.

51 *Howe*, 17 C.M.A. at 168.

52 *Id.* at 174.

53 *See, e.g.*, United States v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008) (prosecuting soldier under Article 134 for wrongfully advocating anti-government and disloyal statements); United States v. Blair, 67 M.J. 566 (C.G. Ct. Crim. App. 2008) (upholding conviction of member of armed forces for promoting Ku Klux Klan); United States v. Ogren, 54 M.J. 481 (C.A.A.F. 2001) (upholding conviction of officer under UCMJ who said he wanted to harm the President); United States v. Priest, 21 C.M.A. 564 (1972) (upholding conviction of officer under Article 134 for circulating pamphlets critical of Vietnam policy).

54 United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996).

55 417 U.S. 733 (1974).

56 Reuter, *supra* note 21, at 330.

57 *See Parker*, 417 U.S. at 736.

soldiers to *disobey direct orders* from commanders and to refuse to fight the war.[58] The military prosecuted Levy under UCMJ Articles 90, 133, and 134.[59]

Declaring the military to be an entity unto itself,[60] the Court applied a miraculously brief First Amendment analysis.[61] Justice William Rehnquist quoted an earlier case's reasoning for limiting the free speech rights of service members:

> In military life . . . other considerations must be weighed. The armed forces depend on a command structure that . . . must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may . . . undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.[62]

Applying this reasoning, the Court found Levy's speech unprotected because it interfered with the effective operation of the military.[63] To allow officers to disobey their commanders and to tell their men not to fight an ongoing war would contravene the most fundamental goals of the American military machine.

Goldman v. Weinberger also exemplifies the Supreme Court's deferential attitude toward military regulations.[64] Simcha Goldman, an Orthodox Jew and ordained rabbi, joined the Air Force as a clinical psychologist.[65] Air Force Regulation (AFR) 35-10 prohibited wearing "headgear" indoors, and Goldman was prohibited from wearing a

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58 *Id.* at 737. Levy's comments were quoted at length by the Court:

> The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight.

Id. at 736–37.

59 *See id.* at 737–38.

60 Justice William Rehnquist's analysis began by declaring military society as unique: "This 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." *Id.* at 743.

61 *See* Reuter, *supra* note 21, at 331.

62 *Parker*, 417 U.S. at 759 (quoting United States v. Priest, 21 C.M.A. 564, 570 (1972)).

63 *Id.* at 761.

64 475 U.S. 503 (1986). *Goldman* focused on the Free Exercise Clause of the First Amendment rather than the Free Speech Clause, but the Court's deferential stance did not change.

65 *Id.* at 504–05.

yarmulke.[66] Goldman challenged the regulation under the First Amendment.[67]

The Court flatly rejected Goldman's claim. It noted that the military has a specific interest in establishing uniformity because soldiers need to feel as though they are a part of something bigger; they must be able to sacrifice their lives for the greater good, and the military believes that eliminating individuality makes this easier.[68] Justice Rehnquist completely deferred to the military for the wisdom of this idea, writing:

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps. The essence of military service "is the subordination of the desires and interests of the individual to the needs of the service."[69]

The Court essentially adopted the military's justifications without hesitation or even a brief analysis of whether the justifications had any merit. The opinion, however, did acknowledge that the need for uniformity does not eliminate all First Amendment rights of service members.[70]

Most recently, the Army prosecuted Lieutenant Ehren Watada under Article 133 for criticizing the Bush administration and for publicly refusing orders to deploy in Iraq.[71] Watada called the war "manifestly illegal" and claimed that joining the deployed forces would make him guilty of committing war crimes.[72] The Army prosecuted Watada under Article 133 in a military court, but the proceedings ended in a mistrial after the judge rejected a pre-trial stipulation.[73] The Army initiated new trial proceedings against Watada based on the same statements, which Watada challenged as double jeopardy.[74] Solicitor General Elena Kagan recently withdrew the appeal,[75] likely

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66 *Id.* at 505.

67 *Id.* at 506.

68 *Id.* at 508.

69 *Id.* at 507 (citations omitted).

70 *Id.*

71 *See* Reuter, *supra* note 21, at 320–21. The Watada case has received a lot of attention in the press, with journalists across the country rallying for less restrictive speech regulations. *See, e.g.*, Sarah Olson, *Army Attempts to Redefine Free Speech*, ALTERNET, Jan. 2, 2007, http://www.alternet.org/story/46142/.

72 Olson, *supra* note 71.

73 *See* Reuter, *supra* note 21, at 321. *See also* Kim Murphy, *Army to Discharge Officer Who Refused Iraq Duty*, L.A. TIMES, Sept. 29, 2009, at A14.

74 *See* Reuter, *supra* note 21, at 321.

75 *See* Jeremy Brecher & Brendan Smith, *The Trials of Ehren Watada*, THE NATION, May 19, 2009, http://www.thenation.com/doc/20090601/brecher_smith?rel=hp_picks.

because of double jeopardy considerations. Watada's case has reignited the debate over military speech regulations[76] and provides proof that the military's overzealous prohibitions of political dissent still operate to chill the speech of service members.

The First Circuit recently applied the "hands-off" stance to 10 U.S.C. § 654 (2000), commonly known as the controversial "Don't Ask, Don't Tell" policy (DADT), in *Cook v. Gates*.[77] Under DADT, the military may discharge service members for engaging, or possessing the propensity to engage in, homosexual conduct.[78] While not a case about political speech, the Court's treatment of DADT exemplifies the Court's deferential approach to speech regulations. The military justifies the policy for similar reasons to those advanced in *Goldman*: uniformity and cohesiveness among troops is necessary to an efficient military and, therefore, the protection of national security.[79] The First Circuit held for the military.[80]

Discussing the plaintiffs' First Amendment claim, the court noted that "our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[81] The court proceeded to find for the military, despite the fact that the government had produced no evidence showing that the presence of homosexual soldiers in combat situations has any impact on military operations.

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76 *See, e.g.*, Hal Bernton, *Officer at Fort Lewis Calls Iraq War Illegal, Refuses Order to Go*, SEATTLE TIMES, June 7, 2006, at A1 (reporting on Watada case); John Kifner & Timothy Egan, *Officer Faces Court-Martial for Refusing to Deploy to Iraq*, N.Y. TIMES, July 23, 2006, at 19 ("Critics say the lieutenant's move is an orchestrated act of defiance that will cause chaos in the military if repeated by others."); Olson, *supra* note 71 (discussing restrictiveness of military speech regulations in light of the Watada prosecution).

77 528 F.3d 42 (1st Cir. 2008).

78 *See* Shannon Gilreath, *Sexually Speaking: "Don't Ask, Don't Tell" and the First Amendment after* Lawrence v. Texas, 14 DUKE J. GENDER L. & POL'Y 953, 954 n.7 (2007) (citing U.S. DEP'T OF DEFENSE, DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS, at encl. 3, para. E3.A1.1.8.1.1 (1994)).

79 *Cook*, 528 F.3d at 60. The regulation allows military members to use some "expressive conduct" as an "evidentiary apparatus to measure an individual's likelihood of engaging in homosexual sex acts." Gilreath, *supra* note 78, at 957. Thus, if a service member says the words "I am gay," the military may take that statement as indicative of future homosexual conduct and discharge the service member. *See Cook*, 528 F.3d at 64.

80 *Cook*, 528 F.3d at 65.

81 *Id.* at 62 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).

2. *Supreme Court Cases Applying Less Deferential First Amendment Analysis*

A few instances exist where the Court adopted an approach more compatible with general First Amendment analysis and more in line with the public employee doctrine. In *Greer v. Spock*, the Court upheld a restriction banning political candidates from campaigning on a military base because the regulation did not discriminate based on the individual candidates' political beliefs.[82] The Court analyzed this ban as it would a similar ban posed by any institution. While this case did not directly involve the rights of service members, it does indicate that the Court is willing to apply standard First Amendment analysis to cases involving the military.

The Court also applied a public employee-type of analysis to military regulations in *Brown v. Glines*.[83] The regulation at issue in *Brown* required Air Force members to get commander approval before circulating petitions criticizing Air Force policies.[84] The Court found that the regulation was not intended to infringe on freedom of speech and did not restrict speech any more than necessary to achieve the important government interest of an effective military and the unique demands of "discipline and duty" required by military life.[85] The Court recognized that a commander should have some control over the distribution of materials that might undermine his ability to maintain morale, discipline, and readiness.[86] The opinion, however, "preserved civilian spaces and the political process as avenues of expression for servicemembers."[87] The Court recognized that speech prohibited by the regulation *would not interfere with military objectives if it took place in a civilian context.* Thus, the Court implicitly accepted that the government's interest in maintaining effective military operations is not necessarily implicated by the criticisms of off-duty service members.

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82 424 U.S. 828, 839 (1976).

83 444 U.S. 348 (1980).

84 Air Force Reg. 35-15(3)(a)(1) (June 12, 1970).

85 *Brown*, 444 U.S. at 354–55 (quoting Parker v. Levy, 417 U.S. 733, 744 (1974)).

86 *Id.* at 356.

87 Brief for Tobias Barrington Wolff et al. as Amici Curiae Constitutional Law Professors in Support of Appellants at 21, Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (Nos. 06-2313 & 06-2381).

II. PUBLIC EMPLOYEE SPEECH DOCTRINE

Generally, public employee speech doctrine holds that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."[88] First Amendment jurisprudence limits public employee speech rights more than it limits the rights of citizens not so employed.[89] By entering the public service, a public employee voluntarily relinquishes some of the freedoms retained by citizens working in the private sector[90] because the government has a vital interest in "the effective and efficient fulfillment of its responsibilities to the public."[91] Traditionally, the Supreme Court viewed this interest as paramount to any interest held by a public employee and afforded no remedy to public employees when their employers infringed upon their constitutional rights.[92] Justice Holmes, writing for the Supreme Court of Massachusetts in 1892, declared, "[a policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[93]

The Supreme Court has repudiated this view in a series of decisions handed down over the last sixty years.[94] Culminating in *Pickering v. Board of Education* and its progeny, the Court has delineated a test that adequately represents the government's interests while simultaneously recognizing and protecting a public employee's First Amendment right to freedom of speech.[95] Recognizing that an American does not relinquish his citizenship by joining the public service,[96]

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88 Garcetti v. Ceballos, 547 U.S. 410, 417 (2006).

89 *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568–73 (1968) (articulating balancing test for evaluating employee speech); *see also* United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 94 (1947) (noting that public employees' rights must be balanced against the state's interest in "orderly management" of personnel).

90 *See Garcetti*, 547 U.S. at 418 ("When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.").

91 Connick v. Myers, 461 U.S. 138, 150 (1983).

92 *See* McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 518 (Mass. 1892) (asserting that a police officer cannot challenge the terms on which he voluntarily accepted employment).

93 *Id.* at 517.

94 This series of decisions began with cases involving loyalty oaths in the wake of the Red Scare and expanded to cover a wide range of public employee speech. *See, e.g.*, *Pickering*, 391 U.S. at 573 (finding teacher's free speech interest outweighed school's concerns); Wieman v. Updegraff, 344 U.S. 183, 190–92 (1952) (holding that public employers cannot require employees to take an oath denying prior involvement with the Communist Party).

95 *See Pickering*, 391 U.S. at 568 (holding that teachers still retain their First Amendment rights to comment on matters of public interest).

96 *See* Garcetti v. Ceballos, 547 U.S. 410, 419 (2006) ("[A] citizen who works for the government is nonetheless a citizen.").

the current test seeks to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[97] At the heart of the test lies the fear that speech about sensitive public issues—speech which lies at the very center of First Amendment protection—will be chilled because employees fear retaliatory dismissal for their actions by employers who view such speech as "subversive."[98]

As a threshold consideration, the court determines whether the employee spoke as a citizen on a matter of public concern.[99] A matter of public concern is one of "political, social, or other concern to the community,"[100] and the employee must not be speaking in his official capacity.[101] If the court answers this question in the affirmative, then the court considers whether the government agency has a valid reason for silencing the employee in question.[102] Any restrictions imposed "must be directed at speech that has some potential to affect the entity's operations."[103] If the Court finds that the employee did not speak as a citizen on a matter of public concern, then the government has more discretion over what speech it may prohibit to efficiently manage its offices.[104]

While the Supreme Court has not specifically defined "matters of public concern," the term seems to refer to topics that are important to public debate.[105] The Court has recognized taxes, the functioning of the school system, and whether employees feel pressured to sup-

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97 *Pickering*, 391 U.S. at 568.

98 Connick v. Myers, 461 U.S. 138, 145 (1983).

99 *See Garcetti*, 547 U.S. at 418 (outlining test for determination of public employee free speech rights); *see also* Rankin v. McPherson, 483 U.S. 378, 384 (1987) (noting that whether a citizen speaks as matter of public concern is a threshold inquiry).

100 *Connick*, 461 U.S. at 146.

101 *See Garcetti*, 547 U.S. at 421–22 (noting that employees' speech is not protected from employer discipline if made pursuant to their "official duties").

102 *See id.* at 418 (outlining the second step of analysis as determining that the "relevant government entity had an adequate justification for treating the employee differently from any other member of the general public").

103 *Id.*

104 *See Connick*, 461 U.S. at 146.

105 *See, e.g.*, *id.* at 149 (noting that the issue of whether public employees are pressured to work for political campaigns in their workplace is a matter of public concern); Pickering v. Bd. of Educ., 391 U.S. 563, 571–72 (1968) (finding that a school funding scheme is a matter of public concern and "vital to informed decision-making by the electorate"). Additionally, the *Connick* Court listed a few topics which might qualify as matters of public concern: whether the DA's office was not competently completing its duties to investigate and prosecute criminals, government corruption, or "breach of public trust." *Connick*, 461 U.S. at 147–48.

port political candidates as such.[106] Whatever the precise definition, the Court has left no doubt that political dissent qualifies as a "matter of public concern."

A. Public Employee Speech Cases

1. Public Employee Doctrine, Generally

Public employee free speech doctrine as it now stands began to coalesce in *Pickering*.[107] Pickering, a teacher at a local public school, wrote a letter to a local newspaper criticizing a series of proposed tax increases to pay for building new schools.[108] The letter also accused the superintendent of the school district of trying to silence teachers' opposition to the project.[109] The School Board fired Pickering after the newspaper ran the letter.[110] Pickering challenged the dismissal as an unconstitutional violation of the First and Fourteenth Amendments.[111] Recognizing that public employees are citizens as well as agents of the state, the Supreme Court adopted a balancing approach to accommodate both Pickering's interest in freedom of speech and the State's interest in effectively providing a public service. Focusing on the context in which Pickering spoke (publicly, in a newspaper) and the content of his speech (criticism of a school board policy), the Court found that Pickering's letter did not compromise the State's interest in maintaining an effective school system. Central to the Court's decision were the facts that (1) Pickering spoke outside the workplace, so his speech was less likely to have a direct effect on the operation of the school[112] and (2) his speech concerned school funding, an issue of general public concern.[113] The Court called "[t]he public interest in having free and unhindered debate on matters of public importance" the "core value of the Free Speech Clause of the First Amendment."[114]

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106 *See Connick*, 461 U.S. at 149 (finding pressure to work for campaigns matter of public concern); *Pickering*, 391 U.S. at 571–72 (discussing taxes and school funding).

107 391 U.S. 563.

108 *Id.* at 566.

109 *Id.*

110 *Id.*

111 *Id.* at 565.

112 *Id.* at 574 ("[When] the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.").

113 *Id.* at 571.

114 *Id.* at 573; *see also* Ross G. Shank, *Speech, Service, and Sex: The Limits of First Amendment Protection of Sexual Expression in the Military*, 51 VAND. L. REV. 1093, 1132 (1998).

The Supreme Court extended *Pickering* to apply to private communications of grievances as well as public ones in *Givhan v. Western Line Consolidated School District*.[115] The Court stated that the constitutional freedom of speech is not "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment."[116]

The Court refined public employees' speech rights in *Connick v. Myers*.[117] Assistant District Attorney Sheila Myers was informed she would be transferred to another section of the criminal court.[118] Myers opposed the transfer and voiced her objections to it.[119] She distributed a questionnaire to fifteen fellow ADAs to gauge opinions on office policies, including whether employees felt pressured to work in political campaigns.[120] Subsequently, Harry Connick, the District Attorney, fired Myers, who challenged the dismissal on the grounds that it violated her First Amendment right to free speech.[121]

The Court stated that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[122] The opinion loosely defined what constitutes a matter of public concern: "[M]atter[s] of political, social, or other concern to the community."[123] Viewing the record in its entirety, the Court held that most of Myers's questions related purely to private grievances.[124] The Court concluded that Connick was justified in firing Myers because he reasonably believed her actions would significantly impair his ability to run the DA's office efficiently.[125]

The *Connick* Court also recognized that the time, place, and manner in which an employee speaks bears relevance to its constitutional-

115 439 U.S. 410 (1979).

116 *Id.* at 415–16.

117 461 U.S. 138 (1983).

118 *Id.* at 140.

119 *Id.*

120 Other topics included in the questionnaire included the office transfer policy, office morale, the need for a grievance committee, and the level of confidence in office superiors. *Id.* at 141.

121 *Id.*

122 *Id.* at 147–48.

123 *Id.* at 146.

124 *See id.* at 154.

125 *Id.* (declaring that the First Amendment interest does not require the employer to tolerate employee actions that "would disrupt the office, undermine his authority, and destroy close working relationships").

ity.[126] In a footnote, the Court stated that "[e]mployee speech which transpires entirely on the employee's own time, and in nonwork areas of the office, bring different factors into the *Pickering* calculus, and might lead to a different conclusion."[127]

The latest development of public employee doctrine is *Garcetti v. Ceballos*.[128] Ceballos, a Deputy District Attorney, wrote a memo recommending dismissal of a case because a search warrant had been authorized on false representations.[129] Ceballos then was transferred, and he claimed that this action was in retaliation for his memo.[130] The Court found that Ceballos wrote the memo pursuant to his official duties, and therefore the memo was not protected under the First Amendment.[131] The opinion also recognized that restrictions on employee speech must be narrowly tailored to the government interest of maintaining effective operations, and that any restriction must be aimed at speech that would impair the agency's execution of its duties.[132]

2. *Employee Speech Cases and Political Dissent*

Restrictions designed to silence political dissent are impermissible infringements on the First Amendment rights of public employees. In a cluster of cases following *Pickering*, the Court held that discrimination against public employees specifically because they express political beliefs violates the First Amendment. In *Elrod v. Burns*, the Supreme Court held that dismissal of nonpolicymaking and nonconfidential state employees solely because of their political affiliation is unconstitutional.[133] The Court later extended *Elrod* to apply to public defenders[134] and to hiring decisions.[135] A public employee's private political beliefs only may be considered as grounds for dismissal if those beliefs would interfere with the discharge of his

126 *Id.* at 152.

127 *Id.* at 153 n.13.

128 547 U.S. 410 (2006).

129 *Id.* at 414.

130 *Id.* at 415.

131 *Id.* at 421 ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

132 *Id.* at 418 ("[T]he restrictions . . . must be directed at speech that has some potential to affect the entity's operations.").

133 427 U.S. 347, 375 (1976).

134 Branti v. Finkel, 445 U.S. 507 (1980).

135 Rutan v. Republican Party of Ill., 497 U.S. 62 (1990).

workplace obligations and this would likely only occur if an employee's position focused on policymaking.[136]

The Supreme Court specifically protected expression of personal political opinions in *Rankin v. McPherson*.[137] McPherson and other employees in the office of the Constable of Harris County, Texas discussed the assassination attempt on Ronald Reagan. McPherson stated: "[I]f they go for him again, I hope they get him."[138] Rankin, the Constable, did not share McPherson's political sentiments and fired her.[139] The Court found the speech protected—despite the fact that the speech occurred in the office, the Court found that she was speaking as a citizen, not a member of the Constable's office.[140] The opinion noted that Rankin had produced no evidence that the comments impacted the function of the office and stated that disparaging comments made about the President would not impede law enforcement.[141]

By creating a protected zone around political speech, these cases show that the Court recognizes the right to political speech in the workplace as a fundamental one and will only allow it to be infringed in extreme circumstances.

Also relevant is the fact that police and other state and municipal law enforcement officers are generally subject to the same regulations as other public employees.[142] Local law enforcement bodies are the civilian or domestic equivalent of the military: smaller in scale, certainly, but generally providing the similar services of protecting citizens and societal order. Notably, courts have found that the public employee doctrine serves both the interests of the officers in protecting their First Amendment rights and the interest of the state in maintaining an effective police force.

3. The Hatch Act

The Hatch Act, enacted in 1940 and amended in 1993, restricts political activity of citizens employed in the executive branch of the federal government or the District of Columbia government, as well

136 *Branti*, 445 U.S. at 517, 519. *Branti* also confirmed that *Elrod*'s holding is not so limited to only apply to cases of political coercion. *Id.* at 516.

137 483 U.S. 378 (1987).

138 *Id.* at 381.

139 *Id.* at 381–82.

140 *Id.* at 392 (holding that the employee engaged in private speech, and since her duties were mainly clerical, it would not affect the employer's functions).

141 *Id.* at 388–89.

142 63C AM. JUR. 2D *Public Officers and Employees* §§ 227–28 (2008).

as some state and local employees who work in federally funded programs.[143] The Hatch Act distinguishes between employees who may participate in partisan political activity and those who may not.[144] Employees prohibited from engaging in partisan activity may not take an active role in a partisan campaign, such as making campaign speeches, collecting funds for a particular candidate, or circulating nominating petitions.[145] Agencies in charge of national security fall in the latter category.[146]

Congress justifies this prohibition on political expression by declaring that partisan ties disrupt the efficient operation of government bodies by leading to favoritism, bias, and animosity within government offices.[147] The Supreme Court has upheld this reasoning against First Amendment challenges.[148] The cases upholding the Hatch Act, however, have dealt almost exclusively with direct involvement in partisan elections. The Act allows even employees subject to heightened requirements as a result of their involvement in sensitive security matters to engage in political discussions, express opinions about candidates and issues, and attend political rallies.[149] Through the Hatch Act, Congress has *specifically* recognized the right for government employees to engage in political dissent because such activity does not impair the efficient functioning of governmental agencies. Additionally, it indicates that Congress does not believe such dissent will impede the function of agencies charged with defending national security.

While the Hatch Act does not apply to military personnel, Congress's determination that political dissent does not impede government functions lends support to the argument that the public employee doctrine embraces all forms of political dissent.

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143 *See* 5 U.S.C. §§ 7321–26 (2006) (applying provisions to federal employees); *see also* 5 U.S.C. §§ 1501–08 (2006) (applying provisions to state and local employees).

144 *Id.*

145 U.S. OFFICE OF SPECIAL COUNSEL, POLITICAL ACTIVITY AND THE FEDERAL EMPLOYEE 7 (2005).

146 *See id.* at 3 (listing the Central Intelligence Agency, Defense Intelligence Agency, Federal Bureau of Investigation, National Security Agency, and National Security Council as some of the agencies subject to heightened speech restrictions).

147 *See, e.g.*, U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) (stating that government entities must "enforce the law and execute the programs of the Government without bias or favoritism for or against any political party or group or the members thereof").

148 *See, e.g.*, *id.* at 568 (holding prohibition on political management or participation in political campaigns constitutional); United Pub. Workers of Am. v. Mitchell, 330 U.S. 75, 97 (1947) (finding prohibition on campaigning constitutional).

149 U.S. OFFICE OF SPECIAL COUNSEL, *supra* note 145, at 7.

III. DISCUSSION

A. Summary of Deference to Military Regulations

The Supreme Court has intense reservations about making judgments in the realm of military regulations. The Court has rarely intervened or attempted to stay the hand of the military in any way, even in the face of regulations that, without adequate justification, infringe on constitutional liberties. Why has the Court been so deferential?

The most frequent reason the Court cites for deferring to military judgment is what Shannon Gilreath calls the "Defense is Different" explanation.[150] As Gilreath points out, the Court upholds otherwise unconstitutional regulations in part because "(1) the military is a very special environment requiring an especial surrender of personal liberty and (2) military officials have superior expertise to determine how the proper balance between uniformity and personal liberty is struck."[151] The Court consistently declares the military as a separate society, distinct from civilian life, that requires its own set of rules and regulations.[152] Because the military's central objective is to fight wars and to be prepared for attacks against the homeland, greater restrictions on military personnel are tolerated than would be on civilians. Military generals have much more experience with military discipline and with hostile situations than Supreme Court justices do, and the justices believe they should not substitute their inexperience for those of military commanders when making decisions that affect the nation's security.[153] Using inflammatory language about the necessity of defending the country and the importance of national security,[154] the Court seems to portray nearly every military regulation as essential to American safety.[155]

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150 Gilreath, *supra* note 78, at 963.

151 *Id.*

152 *See* Parker v. Levy, 417 U.S. 733, 743 (1974); *see also* Shank, *supra* note 114, at 1118–19 & n.128.

153 *See Parker*, 417 U.S. at 748–49.

154 *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 508 (1986) (justifying regulation that prohibited a Jewish Air Force psychologist from wearing a yarmulke in violation of his religious beliefs because "[t]he inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection" (quoting Chappell v. Wallace, 462 U.S. 296, 300 (1983) (alteration in original))).

155 It is worth noting that the Supreme Court has rejected the general "national security" interest as too vague a basis on which to restrict the free press under the First Amendment. N.Y. Times v. United States, 403 U.S. 713, 719 (1971) (per curiam) (Black, J., concurring).

Another reason for judicial deference, which complements the "defense is different" idea, is that the consequences of a judge's wrong decision in the area of military regulations could have drastic consequences.[156] Denying a citizen his constitutional rights is a terrible thing, but an ineffective military might have catastrophic consequences for the entire nation. These concerns are real, and they are serious. However, they do not justify the infringement of rights that have nothing to do with the function of the military, its training, or its operations.

The "defense is different" argument clearly applies to many military situations. Judges, despite their wealth of knowledge, cannot possibly understand the necessities of a war zone or the best way to train troops. However, the Court should take a much closer look at the regulations imposed on service members. Some of the regulations the Court reviews have little or nothing to do with military operations. Most importantly for this Comment, the Court ignores the fact that speech that occurs *outside* of the military, when soldiers are out of uniform, in discussions with friends or classmates, may also be penalized by military rules.

Judges also claim that they are really deferring to Congress, not to the military.[157] Article I, section 8, clause 14 of the Constitution gives Congress the power to create laws governing the military.[158] The Court claims that its "hands-off" attitude toward the military is a result of its desire to avoid infringing the lawmaking powers of Congress.[159] This justification is entirely manufactured. Congress does *not* have the power to create laws that infringe the constitutional rights of American citizens. The Court has repeatedly struck down laws that restrict free speech rights, holding that Congress cannot enact legislation that impermissibly prohibits the exercise of the First Amendment.[160] The Court's claim that it does not want to get in Congress's way in the case of military regulations that restrict these very rights is incongruous with its prior First Amendment holdings.

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156 *See* Shank, *supra* note 114, at 1121.

157 *See Parker*, 417 U.S. at 756; *see also* Shank, *supra* note 114, at 1119.

158 U.S. CONST. art. I, § 8, cl. 14.

159 *Parker*, 417 U.S. at 756.

160 *See, e.g.*, Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002) (declaring federal Child Pornography Act of 1996 unconstitutional because it impermissibly infringed on free speech rights).

B. Criticism of Deference: Applying Public Employee Doctrine Would Allow the Court to Be Less Deferential While Still Serving Military Interests

As a consequence of the judicial "hands-off" policy toward military regulations, the rights of men and women in uniform are impermissibly infringed. The government interest used to justify the myriad regulations in place is to have an effective military. I do not attempt to undermine the seriousness of this goal or the importance of having a strong, efficient military to protect the interests of the nation. What I do question is the Court's justifications for how the regulations achieve this end. Regulations that prohibit military personnel from engaging in off-duty, out-of-uniform, non-combat-zone political commentary outside of their official capacity as soldiers in no way serve the interest of promoting military efficiency. On the other hand, regulations that prohibit speech that *does* interfere with military operations—speech like that in *Parker*, which directly encourages soldiers to refuse to fight a war, or that encourages mutiny—do support this interest.[161]

By removing discretion over speech cases from military courts and viewing military regulations through the public employment rubric, the Court would weigh the interest of the employer—the military—in maintaining a functioning agency, against the interest of the speaker. Regulations that directly impact the function of the military can, and should, be upheld.[162] But regulations that do not implicate the military should not—especially those that restrict soldiers' ability to engage in political dissent, speech the First Amendment strongly protects.

Applying this test to military speech regulations will achieve more just results in many ways. First, this type of review is more consistent with First Amendment theory, which suggests that dissent is invaluable to society and should be suppressed only in extreme circumstances. Second, courts already apply the public employee doctrine to practically every government employer, including other agencies charged with protecting national security interests. In these deci-

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161 *Parker*, 417 U.S. at 736.

162 *See* Danley K. Cornyn, Note, *The Military, Freedom of Speech, and the Internet: Preserving Operational Security and Servicemembers' Right of Free Speech*, 87 TEX. L. REV. 463, 483 (2008). Cornyn suggests applying a balancing test "similar" to that of public employees when dealing with electronic military communications. *Id.* Cornyn's suggestion is a good starting point for improving military speech regulations, but she merely skims the surface of the issues at stake. She does not discuss the theoretical or practical implications of applying public employee doctrine exactly as it is, nor does she recognize the dangers that accompany the Court's current deferential stance.

sions, lower courts recognize that political agreement will not lead to insubordination or jeopardize national security. To extend similar protection to the military would not be a drastic measure; rather, it is a logical extension of current judicial practices. Third, deference to the military has backfired in the past. The military must be held accountable to ensure that it does not abuse its power.

1. Practical Application of the Public Employee Doctrine to Military Regulation

If the Court were to apply the public employee doctrine to military speech regulations, the Court would first decide whether the service member in question was speaking as a citizen on a matter of public concern. If a service member was not in uniform, not actively in combat, or not on a military base, prior decisions indicate that the Court would find that he was speaking as a citizen. An ongoing war certainly qualifies as a matter of "political, social, or other concern to the community," which is how the Court has defined "public concern" under the public employee doctrine.[163] Additionally, if off-duty or not in combat, any political statements cannot be deemed as made "pursuant to [his] official duties," so he would satisfy the first prong of the public employment test.[164] In cases like *Parker*, where the speaker was in the military and speaking in his capacity as a military doctor, the Court could permissibly find that he had no right to speak.[165] In cases like *Howe*, however, where the speaker was not speaking in his military capacity, the Court would move on to the second prong.[166]

Next, the Court would decide whether the "relevant government entity had an adequate justification for treating the employee differently from . . . the general public."[167] Any restrictions imposed "must be directed at speech that has some potential to affect the entity's operations."[168] Political dissent by off-duty, non-uniformed officers does not have the potential to derail the military from its objectives,

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163 Connick v. Myers, 461 U.S. 138, 146 (1983).

164 Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

165 Parker v. Levy, 417 U.S. 733 (1974).

166 United States v. Howe, 17 C.M.A. 165 (1967). It is of course possible for speech that occurs in a non-military capacity to affect the function of the military; for example, an off-duty officer could divulge classified information. I would argue that the First Amendment would not protect this speech. For purposes of this Comment, however, I focus on speech that will not affect the function of the military and therefore should be protected.

167 *Garcetti*, 547 U.S. at 418.

168 *Id.*

so the military could not constitutionally prohibit this type of speech. The Supreme Court has long abandoned the idea that speaking against an ongoing war effort is dangerous enough to justify infringing on the First Amendment.[169] Also, this speech would not imply that soldiers are bringing discredit on the military under Article 134.[170] If a soldier attends a rally out of uniform, who is going to know he is a soldier? But again, under this prong, the military could rightly prohibit speech like that in *Parker* because it would impact his employer's ability to conduct business.

By applying the public employee doctrine to military speech regulations, the Supreme Court could adequately balance the interests of service members in exercising their free speech rights with the interests of the military in ensuring effective operations. The Court could then intelligently determine those cases in which they should defer to military judgment—for example, cases which implicate combat situations—and those in which they should not. By doing so, the Court would be serving the interests of the American people by ensuring both the protection of civil liberties and the safety of the nation.

Illustrative of how this rubric would lead to more just results by punishing only speech relevant to military operations is the contrast between the Supreme Court's decision in *Rankin v. McPherson*[171] and a military court's decision in *United States v. Ogren*.[172] The facts of the cases are similar. Both involved employees—in *Rankin*, a clerical employee of the police department, in *Ogren*, a naval officer—who spoke in favor of a presidential assassination.[173] In *Rankin*, the Court applied the public employee doctrine and found that the speech was protected political discussion.[174] In *Ogren*, the military declared the

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169 The evolution of the "clear and present danger" doctrine tracks the status of protection of political dissent under the First Amendment. The Supreme Court initially endorsed the prohibition of political dissent in wartime because it might jeopardize the war effort. Schenck v. United States, 249 U.S. 47, 52 (1919). The Court's more recent decision in *Brandenburg v. Ohio*, however, discredited this reasoning and held that an individual's speech may be restricted only if the individual intends to, and his speech is likely to, produce imminent lawless action. 395 U.S. 444, 447 (1969). The *Brandenburg* decision incorporated the ideas Justice Oliver Wendell Holmes expressed in his dissent in *Abrams v. United States*, an earlier case discussing free speech in wartime, that, while wartime dangers justify increased government power, Congress cannot manipulate public opinion by outlawing political dissent. 250 U.S. 616, 628 (1919) (Holmes, J., dissenting). Recognizing the dangers of restrictions on political dissent, Holmes stated: "Congress certainly cannot forbid all effort to change the mind of the country." *Id.*

170 U.C.M.J. art. 134 (codified at 10 U.S.C. § 934 (2006)).

171 483 U.S. 378 (1987).

172 54 M.J. 481 (C.A.A.F. 2001).

173 *Rankin*, 483 U.S. at 380; *Ogren*, 54 M.J. at 481.

174 *Rankin*, 483 U.S. at 392.

speech devoid of political meaning and held that it constituted a true threat to the President, despite the fact that Ogren, like the plaintiff in *Rankin*, had no means or intention of actually harming the Commander-in-Chief.[175]

2. *Reviewing Speech Regulations Through the Public Employee Rubric is More Consistent with First Amendment Theory*

Reviewing military speech regulations from a public employee doctrine perspective would lead to results much more compatible with First Amendment theory. The public employee doctrine would allow service members to engage in political discussion or protest while off-duty and out of uniform, thereby facilitating the free flow of ideas into society. This type of discussion is protected expressly under a marketplace of ideas view of the First Amendment.[176]

Political dissent serves the marketplace of ideas theory by contributing beliefs and information to the public discourse. The best way for the public to determine the truth on an issue, political or not, is to hear information supporting all sides.[177] Justice William Brennan recognized that the United States has always embraced a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[178] Only through this sort of de-

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175 *Ogren*, 54 M.J. at 484, 488.

176 The "marketplace of ideas" theory, sometimes called the "search for truth" theory, argues that the most effective way to determine "truth" is to allow the unrestricted flow of ideas into the market—a type of "laissez faire" economics of ideas. The truth, proponents of the theory argue, emerges from the clash of conflicting opinions. *See* JOHN STUART MILL, ON LIBERTY (London, John W. Parker and Son 1859). Alexander Meiklejohn takes a slightly different stance on this theory, applying it to the democratic sphere. He argues that political dissent is essential to a democratic society—because democracy is, by definition, about self-government, speech relating to issues with which voters deal should be privileged above all other speech. In his view, political dissent is required for voters to effectively determine the truth about the issues with which they are concerned. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948) (referenced in KATHLEEN M. SULLIVAN & GERALD GUNTHER, FIRST AMENDMENT LAW 6 (1st ed. 1999)). While academics have criticized Meiklejohn's view as too narrow to encompass the entirety of the First Amendment, Zechariah Chafee, Jr., Book Review, 62 HARV. L. REV. 891 (1949) (reviewing MEIKLEJOHN, *supra*), the notion that political dissent is vital to the health of a democratic society has long been a bedrock of First Amendment jurisprudence. *See* SHIFFRIN, *supra* note 7, at 47.

177 *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

178 N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

bate will the truth about the current political climate emerge, making it incredibly important to allow everyone access to the marketplace.

If the point of protecting free speech is the search for truth, then no better way exists to achieve this end than to allow free flow of opinions from those who have firsthand knowledge of an important issue. Soldiers understand, more than any civilian ever could, the fundamental problems with the administration's logic and planning. Therefore, they are best situated to inform the rest of the public about the problems with the current administration. By putting these thoughts into the marketplace of ideas, they can inspire others. If other citizens are persuaded, they can voice their opinions through their votes and maybe make the government more responsive. Similarly, speech about wartime policy or wartime politics is essential to an informed electorate, particularly during contentious times, like the 2008 election, where a war became the focal point of both candidates' campaigns. Restricting those most informed from speaking out on such central issues runs contrary to the most fundamental ideas of the First Amendment.

Political dissent also strongly implicates the First Amendment liberty interest. Speech is a powerful tool in an individual's quest for self-definition. As Edwin Baker observes, war protestors do not march or chant in opposition to a war because they assume that doing so will end the conflict—or even because they assume that the government will take notice of their protest.[179] They protest in order to "*define* [themselves] publicly . . . in opposition to the war."[180] These war protestors provide an "illustration of the importance of this self-expressive use of speech, independent of any expected communication to others, for self-fulfillment or self-realization."[181]

Similarly, if a service member does not believe in the policies of his nation, he should not be forced to adopt those policies as his own. Like Baker's protester, the soldier does not expect the war to end as a result of his speech,[182] nor is he actively trying to impede the military efforts. Rather, he is establishing himself as someone who does not believe in the direction the President is steering the country. There-

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179 C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 53 (1989).

180 *Id.* (emphasis added).

181 *Id.* Additionally, people define themselves by the groups which they join. According to Shiffrin, "[d]issent is predominantly a form of social engagement . . . . [T]o promote dissent is to promote engaged association." SHIFFRIN, *supra* note 7, at 91. Dissent provides a means for individuals to express their innermost selves and present their beliefs to society. To prohibit such behavior would eliminate much of the wonderful diversity of American society, as well as damper the enthusiasm of activists across the nation. *See id.*

182 *See* BAKER, *supra* note 179, at 53.

fore, his speech does not actively interfere with the government's operations, but it allows him to establish his own person and present that person to the world, unencumbered by beliefs that he does not hold as his own.

Take, for example, Lieutenant Howe's case.[183] By protesting the war, Howe did not directly encourage his fellow soldiers to drop their arms. He publicly questioned the government's policy choices, rather than the movements of the military itself. Just as civilians can support the troops in Iraq but not the Bush administration's policy for going to war in the country, members of the military can execute their jobs without subscribing to the policies of the Commander-in-Chief. The military encourages discipline, loyalty, and duty above all else, and soldiers take these principles very seriously. That they may have political feelings that differ from those of the President, and the desire to express those feelings as a means of self-definition, does not mean that they will renounce all of their military training.

3. Courts Already Apply Public Employee Doctrine Across the Board to Government Employees, Including Those Involved in National Security

Both federal courts and state courts have applied the public employee doctrine to employees in every public agency, except for the military. These courts have invoked the doctrine to decide free speech cases related to almost every single public office. This across-the-board application of the doctrine significantly undermines the Supreme Court's claim that the government's security interests justify a complete political dissent in the case of the military.

Circuit courts and state courts have applied the doctrine to cover cases involving public employees from practically every government entity.[184] Most importantly for purposes of this Comment, lower

183 *See* United States v. Howe, 17 C.M.A. 165 (1967).

184 *See* Emergency Coal. to Defend Educ. Travel v. U.S. Dept. of the Treasury, 545 F.3d 4 (D.C. Cir. 2008) (declaring that public employee doctrine applied to employees in higher education); Philip v. Cronin, 537 F.3d 26 (1st Cir. 2008) (holding that public employee doctrine applied to physician in Office of the Chief Medical Examiner for Massachusetts); Jordan v. Ector County, 516 F.3d 290 (5th Cir. 2008) (holding that public employee doctrine protected political speech made by county clerk); Am. Fed'n of Gov't Employees Local 1 v. Stone, 502 F.3d 1027 (9th Cir. 2007) (applying doctrine to labor union and member of Transportation Security Administration); McFall v. Bednar, 407 F.3d 1081 (10th Cir. 2005) (using public employee doctrine to decide case involving Oklahoma Indigent Defense System); Melzer v. Bd. of Educ., 336 F.3d 185 (2d Cir. 2003) (reviewing claim of public high school teacher under public employee doctrine); Yniguez v. Arizonans for Official English, 42 F.3d 1217 (9th Cir. 1994) (applying public employee doc-

courts have applied the public employee doctrine to cases involving other government agencies charged with protecting America's national security interests. In *M.K. v. Tenet*, the Court of Appeals for the D.C. Circuit recognized that the public employee doctrine applies to cases involving the Central Intelligence Agency (CIA).[185] The same court applied the doctrine to a case brought by a teacher hired by the United States Navy against the Department of Defense and actually found for the teacher.[186] The teacher had been hired to teach military dependents and was not officially a member of the armed services, but the court used the public employee doctrine to find against the United States Navy.[187] In *Lister v. Defense Logistics Agency* (DLA), a federal district court applied the public employee doctrine to find that the DLA's policy restricting speech on religious and political issues violated the First Amendment.[188] And in *Wright v. FBI*, the District Court for the District of Columbia applied *Pickering* and its progeny to a case brought by current and former FBI agents.[189]

Courts have protected political speech by other government employees, as well.[190] For example, the Fifth Circuit noted that the First Amendment prohibits the government from penalizing its employees "solely for not being supporters of the political party in power, unless party affiliation is an appropriate requirement for the position in-

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trine to employees in Department of Administration); Jackson v. Bair, 851 F.2d 714 (4th Cir. 1988) (applying public employee doctrine to prison official fighting transfer); *In re* Gonzalez, 964 A.2d 811 (N.J. Super. Ct. App. Div. 2009) (using public employee doctrine to decide case brought by detective employed by state government agency); Alderman v. Pocahontas County Bd. of Ed., 675 S.E.2d 907 (W. Va. 2009) (applying doctrine to member of Board of Education); Snelling v. City of Claremont, 931 A.2d 1272 (N.H. 2007) (applying public employee doctrine to decide case brought by city assessor against city and city manager).

185 216 F.R.D. 133, 138 n.5 (D.D.C. 2002) (noting that, while not applicable at this stage of litigation, the court would apply public employee doctrine to member of the CIA); *see also* United States v. Marchetti, 466 F.2d 1309 (4th Cir. 1972) (stating that CIA employee retained right to criticize the Agency but was precluded from publishing a book about his experiences because of confidentiality agreement signed as condition of employment). Lower courts have also applied the doctrine to cases brought against the CIA by employees of other government agencies. *See, e.g.*, Hall v. Dworkin, 829 F. Supp. 1403 (N.D.N.Y. 1993) (applying public employee doctrine to case brought against CIA).

186 Ring v. Schlesinger, 502 F.2d 479 (D.C. Cir. 1974) (applying public employee doctrine to case brought against the Department of Defense).

187 *Id.*

188 482 F. Supp. 2d 1003 (S.D. Ohio 2007) (holding that public employee doctrine prohibited DLA from denying plaintiff ability to express views on abortion and religious preference).

189 613 F. Supp. 2d 13 (D.D.C. 2009).

190 *See* Jordan v. Ector County, 516 F.3d 290, 301 (5th Cir. 2008) (holding that public employee doctrine protected political speech in county clerk's office).

volved."[191] The military has never indicated that political affiliation is a prerequisite for serving in the armed forces.

These courts also use the public employee doctrine to decide free speech cases brought by and against local law enforcement, the civilian version of the military.[192] Specifically, the Fourth Circuit has concluded that a police officer's speech criticizing the policies implemented by her commanding officers is protected under the First Amendment, recognizing that criticism does not automatically lead to insubordination.[193]

In the aforementioned cases, the courts did not always find that the plaintiffs' speech interests outweighed the government's interest in protecting national security. Nevertheless, these cases indicate that federal courts have consistently applied the public employee doctrine to decide whether that security interest really does outweigh an employee's right to exercise political dissent and to criticize his or her superiors. The military remains the lone unit of government exempt from the public employee doctrine, and the wealth of cases applying the doctrine to other security agencies greatly undermines the weight of the "defense is different" rationale.

4. Deference Gone Awry: Too Deferential a Stance Leads to Corruption and Abuse of Power

The government's interest in national security is a vital one. This interest, however, is not best served by leaving the military with complete control over every aspect of its operations and without any accountability to other branches of government. The military may not use the fear of terrorist attacks to hold the Supreme Court hostage, to silence all opposition to military objectives, or to stifle all information that might cast the military in a poor light. The government must not only maintain the safety of the American people, but it must act in people's best interest while doing so. National security interests do not justify an abuse of the public trust, which has previously occurred when the Supreme Court has taken too deferential a stance on mili-

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191 *Id.* at 295.

192 *See, e.g.*, Reilly v. City of Atlantic City, 532 F.3d 216, 231 (3d Cir. 2008) (holding that city police officer's testimony regarding corruption in higher ranks is protected under public employee doctrine); Locurto v. Giuliani, 447 F.3d 159 (2d Cir. 2006) (applying public employee doctrine to police department's involvement in parade); McFall v. Bednar, 407 F.3d 1081 (10th Cir. 2005) (using public employee doctrine to decide case involving Oklahoma Indigent Defense System).

193 *See* Campbell v. Galloway, 483 F.3d 258, 270 (4th Cir. 2007).

tary regulations.[194] The Supreme Court should hold the military to a higher standard, and one way to achieve this is to apply the public employee doctrine.

United States v. Reynolds exemplifies this principle.[195] In *Reynolds*, the Supreme Court first recognized the "state secrets" privilege.[196] This privilege allows the government to get a claim dismissed or to keep evidence out of a trial if entertaining either would jeopardize military secrets or national security.[197] The Supreme Court has been incredibly deferential to military claims under the state secrets doctrine as well as in cases involving speech restrictions.[198] This deferential policy, however, has backfired on the Court, with the military abusing its power and claiming privilege over information crucial to public discourse.[199]

The military manipulated the Supreme Court in order to gain protection in the very case upon which the state secrets doctrine is based—*Reynolds*.[200] That case involved an investigation into the crash of an Air Force plane in the dawn of the Cold War.[201] The Secretary of the Air Force refused to turn over information on the plane, claiming that doing so would jeopardize the security of the United States.[202] The Court suppressed the report based on the military's claim that secrecy was vital to national security.[203] The Air Force declassified the report fifty years later, and it contained not a single reference to national security.[204] Rather, it suggested that the crash occurred because the Air Force negligently maintained the aircraft.[205]

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194 *See, e.g.*, Jack B. Weinstein, *The Role of Judges in a Government of, by, and for the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1 (2008) (explaining how, fifty years after the Supreme Court deferred to military judgment about the dangers to national security of releasing information about an Air Force plane crash, the public discovered that the military had been lying to cover its mistakes).

195 345 U.S. 1 (1953).

196 *Id.* at 7–8.

197 *See Compensating Victims of Wrongful Detention, Torture, and Abuse in the U.S. War on Terror*, 122 HARV. L. REV. 1158, 1163 (2009).

198 *See id.*

199 *See* Weinstein, *supra* note 194, at 95 ("[T]he Executive Branch of our people's government has used the privilege to hide critical information from the people.").

200 United States v. Reynolds, 345 U.S. 1 (1953).

201 *Id.* at 2.

202 *See generally id.*

203 *Id.* at 3–4.

204 *See* Edward Lazarus, Book Review, *'Claim of Privilege: A Mysterious Plane Crash, a Landmark Supreme Court Case, and the Rise of State Secrets' by Barry Siegel*, L.A. TIMES, June 22, 2008, *available at* http://www.latimes.com/features/books/la-bk-barrysiegel22-2008jun22,0,6702113.story.

205 *Id.*

The military's claim that national security interests justify state secrets privilege has proven fraudulent in other cases, as well. Recently, the military has used the state secrets doctrine to dismiss lawsuits brought by innocent men who were tortured as terror suspects.[206] The military and the CIA justified their interrogation procedures in the name of national security.[207] But when the details of the programs were revealed, it became clear that the military was exaggerating the threat to national security to gain judicial approval of its practices.[208]

The Supreme Court recently has recognized the danger of allowing the government to use national security to justify practices that infringe on civil liberties. The Court heard arguments on *Hamdi v. Rumsfeld* on April 28, 2004.[209] *Hamdi* discussed the right to habeas corpus proceedings in the wake of a 2001 statute[210] authorizing the government to use any means necessary to find and jail members of Al-Qaeda. That same day, photos surfaced of American soldiers torturing prisoners of war at the Abu Ghraib Prison in Iraq.[211] The Court ruled against the government, stating that the government's desire to protect the American people did not justify denying prisoners their constitutional right to receive notice of the factual basis for their imprisonment.[212] While the *Hamdi* opinion did not specifically mention Abu Ghraib, Steven Shapiro, national legal director for the American Civil Liberties Union, declared that "it is hard to believe that [Abu Ghraib] did not affect the court and reinforce its view that unchecked power invites abuse."[213]

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206 *See, e.g.*, El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007), *cert denied* 128 S. Ct. 373 (2007) (challenging privilege as extended to extraordinary rendition program allowing military to torture innocent terror suspects); Arar v. Ashcroft, 414 F. Supp. 2d 250 (E.D.N.Y. 2006) (claiming privilege in instance of deportation of innocent terror suspect to Syrian prison for interrogation); *see also* Editorial, *A Judicial Green Light for Torture*, N.Y. TIMES, Feb. 26, 2006, at C11 (discussing Arar case as example of "[t]he administration's tendency to dodge accountability for lawless actions by resorting to secrecy and claims of national security").

207 *See supra* note 206.

208 *See, e.g.*, Editorial, *Too Many Secrets*, N.Y. TIMES, Mar. 10, 2007, at A12 (discussing how government exaggerated threat to national security that would come from allowing challenge to extraordinary rendition to proceed).

209 542 U.S. 507 (2004).

210 Authorization for Use of Military Force, 50 U.S.C. § 1541 (2001).

211 *See* Joan Biskupic, *High Court Protected Liberties by Limiting Presidential Power*, USA TODAY, July 2, 2004, at 4A.

212 *See Hamdi*, 542 U.S. at 532 (stating that, after weighing government's security concerns, government program does not "strike[] the proper constitutional balance").

213 Biskupic, *supra* note 211.

These cases illustrate some of the dangers that arise when the Supreme Court permits the government to use national security concerns as a basis for infringing on constitutional liberties. The government must be accountable for its actions, and it should not be allowed to use fears of a national security catastrophe to justify regulations that prohibit activities that do not implicate the security interest. If the Court were to apply the public employee doctrine to military speech regulations, it would be able to siphon out cases in which the security interest is, in fact, implicated and deprive service members of the right to free speech when, and only when, it would be necessary to do so to ensure national security.

IV. CONCLUSION

Military speech regulations prohibit service members from engaging in political dissent. Political dissent is speech that remains at the heart of the First Amendment and that is most entitled to its protection. While members of the armed services do sacrifice some of the freedoms that civilians enjoy for the sake of the military's objectives, freedoms that do not inhibit those objective should not be restricted. General public employee doctrine indicates that employees, when speaking as citizens on a matter of public concern, are free to discuss any topic they wish unless their speech will impact their employer's ability to function. By applying this model to military speech regulations, federal courts will achieve more just results.

Many employees do not like their jobs or the career path that they have chosen, but this sentiment does not mean that their employers can fire them for saying so. Members of the armed forces, the very citizens who make the ultimate sacrifice and place their lives in jeopardy to preserve American freedoms, should not be denied those freedoms, except under circumstances that would jeopardize the efforts of the military.

Our security surely depends, in part, on our free speech tradition of dissent. As the Supreme Court has said, "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[214]

214 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).