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The Serviceman's Right of Free Speech: An Analytical Approach

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Comments

THE SERVICEMAN'S RIGHT OF FREE SPEECH: AN ANALYTICAL APPROACH

> If men are to be precluded from offering their sentiments on a matter, which may involve the most serious and alarming consequences that can invite the consideration of mankind, reason is of no use to us; the freedom of speech may be taken away, and dumb and silent we may be led, like sheep to the slaughter.
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> —From an address by George Washington to the officers of the Army, March 15, 1783

I. INTRODUCTION

The past several years have seen a dramatic increase in the number of reported military free speech cases. The controversiality of the Vietnam War seems to be one basic reason; most of the recent cases involve to some degree the serviceman's dissatisfaction with our involvement in Vietnam.[1] Social unrest of minorities is a second factor seen in many of the cases.[2] Whatever the underlying reasons, both military and federal courts have rather suddenly been confronted with a large number of cases involving servicemen who dissent. Unfortunately, too many of these cases have been decided with a mechanistic application of a

1. *See, e.g.*, United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

2. *See, e.g.*, United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

legal formula rather than by sound analysis.[3] The purpose of this article is to explore the history of military free speech cases with the hope of developing analytical guidelines for the future.

Although the ultimate objective of this article is to develop an approach applicable to the military, civilian free speech cases will be explored and their principles examined for possible application to the military speech cases. Then the military cases will be examined in their historical context. Finally, using principles extracted from cases of both types, an approach to the military cases will be suggested.

II. Civilian Free Speech Cases

Although the subject of this note is military free speech, a preliminary discussion of landmark civilian speech cases is important for several reasons. Civilian speech concepts have been developing for more than fifty years, while the military First Amendment cases have a far shorter history.[4] The civilian cases are thus useful because of their relatively long tradition. Additionally, there is a growing tendency for the courts considering military cases to adopt civilian speech concepts.[5] Because of this, an examination of the civilian cases can aid in formulating new concepts for use within the military speech context.

The first major Supreme Court case dealing with free speech was *Schenck v. United States*,[6] involving a prosecution under the Espionage Act of 1917. Appellant had been convicted of distributing pamphlets which urged opposition to the draft. Justice Holmes delivered the opinion affirming the conviction, stating that the right of free speech was dependent upon the circumstances

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3. No matter how rapidly we utter the phrase "clear and present danger," or how closely we hyphenate the words, they are not a substitute for the weighing of values. They tend to convey a delusion of certitude when what is most certain is the complexity of the strands in the web of freedoms which the judge must disentangle.

Dennis v. United States, 341 U.S. 494, 542-43 (1950) (Frankfurter, J., concurring).

4. The Supreme Court has been deciding First Amendment cases since 1919. *See* Schenck v. United States, 249 U.S. 47 (1919). Since the Bill of Rights was not held applicable to servicemen until 1960, the military First Amendment cases are subsequent to that date. *See* United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

5. A version of the *clear and present danger* test, for example, is now frequently used in the military speech cases. *See, e.g.*, Dash v. Commanding General, Fort Jackson South Carolina, 307 F. Supp. 849 (D.S.C. 1969), *aff'd mem.*, 429 F.2d 427 (4th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971) [Hereinafter cited as *Dash*].

6. 249 U.S. 47 (1919).

surrounding its exercise.[7] In addition, Holmes used the now-famous *clear and present danger* phrase for the first time:

> The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.[8]

Schenck illustrates two themes which are seen throughout the civilian free speech cases. One principle is that the right of free speech is not absolute, but is dependent upon the circumstances surrounding its exercise. This rule has never been seriously questioned, and is often applied today in the military speech cases.[9]

The second principle, that of clear and present danger, has had a somewhat more confused history. It is interesting to note that Justice Holmes, the author of the test, failed to invoke it in a similar case decided only one week after *Schenck*.[10] One might surmise that Holmes never intended clear and present danger to become the pivotal phrase in later speech cases. Indeed, it has been suggested that Holmes tossed off the remark in the *Schenck* case, and later used it to dissent from similar judgments.[11]

After its initial invocation, the clear and present danger test was next used in Holmes' dissenting opinions. In a 1919 case, for example, Holmes declared that the clear and present danger test included a requirement that the utterances be protected unless they posed a threat so imminent that an immediate check was needed to save the country.[12] This requirement of imminency was often seen in the Holmes opinions of the 1920's, but was not expressly adopted by the Supreme Court until recently.[13]

Holmes' insistence on an imminency requirement led to a sharp division in the ranks of the Court during the 1920's. The two approaches are clearly seen in the 1925 case of *Gitlow v. New York*,[14]

7. *Id.* at 52.
8. *Id.*
9. *See, e.g., Dash, supra* note 5.
10. Frohwerk v. United States, 249 U.S. 204 (1919).
11. *See* Corwin, *Bowing Out "Clear and Present Danger"*, 27 NOTRE DAME LAWYER 325, 356 (1952). *See also* the dissenting opinion of Justice Holmes in Abrams v. United States, 250 U.S. 616, 624 (1919).
12. Abrams v. United States, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).
13. Brandenburg v. Ohio, 395 U.S. 444 (1969).
14. 268 U.S. 652 (1925).

involving the distribution of allegedly subversive literature. The majority approach was to first look to the statute in question to determine its constitutional validity. If the statute was valid, the words were then examined to determine if they came within the statute. If so, the words were, almost a fortiori, punishable. The Holmes approach, on the other hand, included the above analysis but went one step further. Assuming that the statute was constitutional and that the words came within the terms of the statute, there still had to be present an imminent threat of a substantive evil. Moreover, the imminency test was to be applied on an ad hoc basis; that is, the words were examined for their forseeable actual effect in the existing circumstances.[15]

By 1950, the Court had still not completely agreed upon an analytical approach to the free speech cases. To be sure, there was by now majority agreement that clear and present danger was a valid test; the confusion lay in the application of the doctrine. The 1950 case of *Dennis v. United States*[16] illustrates the various approaches taken in determining whether a clear and present danger does in fact exist. The case involved a conviction under the Smith Act. The appellant was convicted of organizing the Communist Party and of willfully advocating the duty and necessity of overthrowing the government.[17] The conviction was affirmed, with five justices submitting separate opinions.

The majority opinion, delivered by Justice Vinson relied on an interpretation of the clear and present danger test formulated by Learned Hand:

> In each case courts must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[18]

The Court found that the existence of a group which could spring into action when the time was ripe constituted a sufficient danger to come under Hand's rule.[19]

Justice Frankfurter introduced an interesting analytical concept in his concurring opinion, where he advocated a balancing between the government's interest in security and the right of free speech. This balancing was not for use by the judiciary on an ad hoc basis; Congress, Frankfurter felt, bore the responsibility of balancing the competing interests and arriving at a determination.

15. *Id.* at 673.
16. 341 U.S. 494 (1950).
17. *Id.* at 497.
18. *Id.* at 510.
19. *Id.* at 511.

As a practical matter, Frankfurter's test would result in a reversion to the majority rule seen in *Gitlow*: great deference would be given to the legislative determination, and appellant's conduct would then be examined to see if it fit within the terms of the statute. Thus, an ad hoc determination would not be made by the judiciary. The voice of Congress, unless patently unreasonable, would have the final say in free speech cases.

Also of interest in *Dennis* is Justice Douglas' dissenting opinion, where he argued that for the speech to be punishable, some immediate injury to society must be likely if the speech were allowed. This requirement of imminency could only be met by the introduction of evidence showing a substantial danger to society.

Although Justice Douglas was alone in urging the Holmes-Brandeis imminency requirement in *Dennis*, the requirement was eventually adopted outright by the Supreme Court. The 1969 case of *Brandenburg v. Ohio*[20] reversed the conviction of a Ku Klux Klan member who had spoken at a rally. The Court declared Ohio's Criminal Syndicalism Statute unconstitutional because it failed to include an imminency requirement in its proscription of advocacy.[21]

Although *Brandenburg* settled the imminency question, the fate of the clear and present danger test was unclear. Strangely enough, the Court failed to even mention the test. Clearly troubled by this fact, Justices Douglas and Black submitted concurring opinions in which they urged the complete abolition of the troublesome test.[22]

Although the analytical concepts appropriate to civilian free speech cases are still not unanimously agreed upon, several definite conclusions can be drawn. First, after fifty years of grappling with the problem, the Supreme Court now requires something more than clear and present danger, if indeed that test is now applicable at all. Second, there is a requirement of imminency.[23] For a conviction to be within constitutional limits, there must be advocacy which is an incitement to imminent lawless action.

20. 395 U.S. 444 (1969).
21. *Id.* at 448-49.
22. *Id.* at 449-57.
23. But whether this requirement is a part of the clear and present danger test is still unsettled.

With the foregoing review of civilian cases in mind, let us now turn to the military cases.

III. The Military Speech Cases

> Not too many years ago if one were to have asked a military officer whether the Bill of Rights applies to the services, he most probably would have replied with a curt, "Certainly not!"[24]

Until 1960, the Bill of Rights was considered inapplicable to the military services. Although many free speech cases arose during World War I, World War II, and Korea, these were not based upon First Amendment considerations.[25] As recently as 1951 the Court of Military Appeals refused to consider the Bill of Rights applicable to servicemen.[26]

The view that servicemen were not protected by the Bill of Rights was finally abandoned in the 1960 case of *United States v. Jacoby*.[27] The Court of Military Appeals declared that servicemen were protected by the Bill except where expressly or implicitly prohibited by the Constitution.[28] In a sense, the decision brought the military cases to a stage of development similar to that faced by the Supreme Court in its early subversive speech decisions.[29] The question now faced by the military tribunals was how the First Amendment should be applied in individual cases. As will be seen, the military tribunals chose not to apply current Supreme Court doctrines in the early cases. Instead, the courts developed their own concepts in a manner analogous to the early civilian case development. That is, the First Amendment was initially applied quite restrictively, and then gradually liberalized as the number of cases increased.[30] In addition, the later military cases began to apply civilian constitutional concepts more freely, thus hastening the liberalization process.[31] To see how the military analysis of these cases has developed, let us now turn to a consideration of the military speech cases.

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24. Lewis, *Freedom of Speech—An Examination of the Civilian Test For Constitutionality and its Application to the Military*, 41 Mil. L. Rev. 55, 76 (1968).

25. *See* Kester, *Soldiers Who Insult the President: An Uneasy Look at the Uniform Code of Military Justice*, 81 Harv. L. Rev. 1697, 1724-32 (1968).

26. United States v. Clay, 1 U.S.C.M.A. 74, 1 C.M.R. 74 (1951).

27. 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

28. *Id.* at 430-31, 29 C.M.R. at 246-47.

29. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

30. *Compare* United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967) *with* United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970).

31. *See, e.g.*, United States v. Daniels, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970), where the Court applied constitutional principles from an analogous civilian speech case.

As has been noted, the First Amendment was not expressly held applicable to servicemen until 1960. Prior to that time, however, there had been some discussion of the scope of military speech rights; it was this discussion which finally led to the *Jacoby* decision. An interesting example is the 1954 case of *United States v. Voorhees.*[32] It involved a career army officer convicted of failing to submit a manuscript to Army censors prior to publication. While the Court affirmed the conviction by declaring prior restraints on publication necessary in the military, there was dictum concerning the scope of servicemen's speech rights. The dictum stated that servicemen should be given the same constitutional protection as their civilian counterparts, except where specifically limited or denied by the Constitution.[33] While this language is somewhat broader than that actually adopted in *Jacoby*,[34] it illustrates a growing sentiment that the Bill of Rights should be made applicable to servicemen.

Later cases of the 1950's added some important concepts to the growing body of military free speech law. For example, the Court of Military Appeals in one case declared an order invalid because it was so vague as to restrict appellant's freedom of speech.[35] While the case did not state the legal basis for appellant's right of free speech, it is interesting to note the military use of the void for vagueness doctrine, a concept often seen in the civilian free speech cases.[36] In another case, the Court held that a young soldier could not be prosecuted for communicating a threat when he had merely exercised his right to transmit grievances to his Senator.[37] Again, however, the legal basis for the right of free speech was not reached by the Court.

By 1960, when *Jacoby* was decided, there was thus a small body of military speech law already in existence. Compared with its civilian counterpart, however, the military law was quite unsophisticated. This can be clearly seen by a comparison with the Su-

32. 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954).
33. *Id.* at 530-31, 16 C.M.R. at 104-05.
34. Here, the restriction is based upon specific limitations within the Constitution. In *Jacoby,* the Court speaks of those rights which are by *necessary implication* inapplicable to servicemen.
35. United States v. Wysong, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958).
36. *See, e.g.,* Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).
37. United States v. Schmidt, 16 U.S.C.M.A. 57, 36 C.M.R. 213 (1966).

preme Court case of *United States v. Dennis*,[38] which dealt with complex questions of application, and used legal concepts which had undergone thirty years of development. The military cases, on the other hand, were still cautiously probing for applicable legal concepts.

The 1967 case of *United States v. Howe*[39] illustrates both the progress made by the military tribunals since 1960, and the remaining problem of application. Lt. Howe had participated in an anti-war rally while off duty and not in uniform. He was charged under Article 88 of the Uniform Code of Military Justice[40] for using contemptuous words againt the President. In addition, he was charged under Article 133 of the Code[41] for conduct unbecoming an officer and a gentleman. The Court of Military Appeals affirmed the conviction, holding that both Artices were *exceptions* to the Bill of Rights, since they both antedated the Constitution. The Court thus never actually reached the question of First Amendment application, although the clear and present danger test was in fact mentioned.[42]

An additional ground for upholding Article 88 was the *man on a white horse theory*.[43] This argument says that the Founding Fathers wanted to keep the military in check by having civilians exercise ultimate control over the services. Disrespectful acts by the military, the theory goes, create the danger of the military hero, the man on a white horse, attempting a military coup. Thus, words disrespectful of the President are punishable because of their potential danger to civilian supremacy in the military services.

Howe raises several intriguing questions. For example, what would the result have been had the Court seriously attempted to use some form of clear and present danger or imminency test. Had this been done, a sustained conviction would be difficult to imagine. To say that Howe's conduct constituted a clear and pres-

38. 341 U.S. 494 (1950).
39. 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).
40. Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of the Treasury, or the Governor or legislature of any State, Territory, Commonwealth, or possession in which he is on duty or present shall be punished as a court-martial may direct.
10 U.S.C. § 888 (1970).
41. Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.
10 U.S.C. § 933 (1970).
42. 17 U.S.C.M.A. at 172, 37 C.M.R. at 436.
43. *Id.* at 175, 37 C.M.R. at 439.

ent danger to military discipline, morale or loyalty, is a conclusion unsupported by the facts. Lt. Howe was off base, off duty, and in civilian clothes. The likelihood that his conduct would have a measureable effect on military morale or discipline seems very slight indeed. If Howe had directly attempted to influence the men under his command, or had appeared in uniform as a representative of the armed forces, the danger would certainly have been greater than in the instant case. In fact, one might argue that the court-martial of Lt. Howe only served to make matters worse because of the publicity surrounding his trial.

The man on a white horse argument has been vigorously criticized on the grounds that a military coup is extremely unlikely in the United States today. Furthermore, it is argued, the real danger of a man on a white horse comes not from the lower-ranking officers, but from generals and other military leaders who conceivably could exert great influence on public opinion. Thus, the utterances of low-ranking officers should be permitted because their possible effect will be minimal.[44]

The *Howe* approach is reminiscent of some of the early Supreme Court civilian speech decisions, where the legislation was first examined to determine its validity, and the utterance was then examined to see if it came within the terms of the statute.[45] Clearly, this was the approach used in *Howe*, for circumstances surrounding the utterance were not examined in any great detail. Unlike the early civilian cases, however, the military court at this point has no latter-day Justice Holmes to furnish an argument for some form of imminency test.

Between 1967, when *Howe* was decided, and 1969, growing disenchantment with the Vietnam War gave rise to several important military free speech cases. While the military courts rarely attempted in-depth analysis of the constitutional factors involved, there was at least some assimilation of analogous civilian free speech concepts. With First Amendment rights now clearly applicable to servicemen, the military courts began to gradually adopt

44. *See* Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L. J. 325, 344-50 (1970) [Hereinafter cited as *Sherman*].
45. *See, e.g.*, Gitlow v. New York, 268 U.S. 652 (1925).

the language of the Supreme Court; the clear and present danger test, for example, was finding its way into the military cases with increasing frequency.[46] Unfortunately, however, the test was often applied mechanically without a consideration of the surrounding circumstances.[47]

The year 1969 also saw the First Amendment question approached from a somewhat different angle. In *United States v. Locks*,[48] appellant was convicted of failing to obey a lawful order when he wore his uniform at an anti-war rally. The Board of Review affirmed the conviction, holding that the order was valid from a constitutional standpoint. Appellant was sentenced to one year at hard labor.

Locks is interesting from several aspects. The case involved *symbolic* as opposed to *pure* speech. This form of expression has been constitutionally less protected than pure speech by the Supreme Court.[49] Additionally, appellant here was convicted not for the form of expression actually used, but for disobeying a lawful order. The situation is somewhat analogous to the case of the public employee who disobeys an order to disclose past political affiliations. The Supreme Court has held that dismissal of the employee who disobeys is justified under some circumstances.[50] The punishment in the military, however, is typically not mere dismissal; in *Locks*, for example, the punishment was the equivalent of a felony conviction. This seems unduly harsh in light of Locks' offense and its probable effect upon the military. It is submitted that some type of administrative remedy would have been far more appropriate.[51]

The problem of applying a complex legal principle such as clear and present danger was finally faced squarely in the 1970 case of *United States v. Daniels*.[52] The appellant was a black Marine who had made statements such as, "Viet Nam is a white man's war," and, "blacks did not belong over there."[53] Daniels had also urged a group of black troopers to attend a request mast, a method of

46. *See, e.g.*, United States v. Amick, 40 C.M.R. 720 (1969).
47. *Id.*
48. 40 C.M.R. 1022 (1969).
49. *See, e.g.*, Street v. New York, 394 U.S. 576 (1969).
50. Garner v. Los Angeles Board, 341 U.S. 716 (1951).
51. Other writers have suggested various administrative remedies as an alternative to the felony conviction in military speech cases. *See, e.g., Sherman, supra* note 44, at 340.
52. 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). *See also* the companion case of United States v. Harvey, 19 U.S.C.M.A. 539, 42 C.M.R. 141 (1970).
53. 19 U.S.C.M.A. at 533, 42 C.M.R. at 135.

airing grievances in the Marine Corps.[54] Daniels was charged under the Smith Act for urging insubordination, disloyalty, and refusal of duty.

Surprisingly enough, the Court used a civilian free speech case as the basis for its analysis.[55] While this concept is not new, it demonstrates the increasing importance of civilian concepts in the military cases. The Court, using this rationale, declared that two elements in addition to the alleged acts needed proof. First, the *intent* of the accused to cause disloyalty had to be shown; this was the subjective element. Second, there was an objective requirement that there be a clear and present danger of a substantive evil prohibited by statute.[56]

As to intent, defense counsel had urged that Daniels' utterances were nothing more than harmless bull sessions. The Court rejected this contention by finding that Daniels' exhortations were a subtle method of leading his fellow black Marines into insubordination.[57]

Turning to the question of clear and present danger, the court noted the circumstances existing at the time the statements by Daniels were made. There had been racial unrest in major cities, many of the black Marines were discontented, and the blacks were a "particularly susceptible group."[58] Taking these factors into account, the Court concluded that Daniels' activity constituted a clear and present danger to the loyalty of the blacks in the company.[59]

Daniels was a step forward in several respects. The clear and present danger test was found applicable in a military setting, and the Court made some effort to taking the surrounding circumstances into account. However, when compared with Supreme Court decisions of the same period, *Daniels* is quite far behind conceptually. The Supreme Court had decided *Brandenburg* v. *Ohio*[60] just before *Daniels*, declaring that there must be an *immi-*

54. For an excellent discussion of this case, written by one of Daniels' defense attorneys, *see Sherman, supra* note 45.
55. Hartzel v. United States, 322 U.S. 680 (1944).
56. 19 U.S.C.M.A. at 532, 42 C.M.R. at 134.
57. *Id.* at 535, 42 C.M.R. at 137.
58. *Id.*
59. *Id.*
60. 395 U.S. 444 (1969).

nent danger to the country before a speech conviction could stand.[61] Had this rationale been used in *Daniels*, the result might have been quite different. The actual effect of Daniels' speech was to cause a handful of men to request mast, an action which of itself was perfectly legal. Had any of the men actually refused to fight, they could have been dealt with at the proper time. Taking into account the vocal nature of Black Muslim rhetoric and the fact that the case involved only a handful of men, it appears unlikely that there was an imminent danger of a serious evil.

Thus far, the military free speech cases discussed have been limited to those decided by military tribunals. Although the military cases decided by civilian courts are relatively few in number because of the hesitancy of federal tribunals to intervene in military matters,[62] a few district courts have allowed free speech challenges. Let us now turn to a consideration of these cases.

While it might be anticipated that the federal courts would readily use the civilian free speech concepts in military controversies, this has not been the case. In fact, the courts have been somewhat disappointing in their failure to attempt a true analytical approach. This is undoubtedly attributable in part to the traditional unwillingness of federal courts to interfere with internal military affairs. While this reluctance is understandable, it is submitted that the federal courts, once jurisdiction is assumed, have an obligation to critically analyze the facts and circumstances of each case.[63]

The Federal Court approach toward free speech in the military is well illustrated by the 1969 case of *Dash v. Commanding General, Fort Jackson, South Carolina.*[64] The case involved an action for declaratory judgment brought by servicemen stationed at Fort Jackson. They claimed that their constitutional rights were infringed when the commanding officer of the post refused to allow public debate and distribution of pamphlets concerning the Vietnam War.

The Court began its analysis by defining the scope of servicemen's speech rights. The Court declared that these rights were not absolute, but were limited by the peculiar circumstances of the military. Also noted was the traditional reluctance of civilian

61. *Id.* at 447.
62. For an enlightening discussion of this issue, *see* Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971).
63. *See* note 3 *supra.*
64. *See* note 5 *supra.*

courts to interfere with internal military affairs. Using these two restrictions, the Court concluded that post commanders did have authority to limit on-base distribution of handbills and regulate meetings, as long as the authority was exercised "reasonably." The question of reasonableness, moreover, was one which the Federal District Courts had jurisdiction to pass on.[65]

The question of reasonableness was decided by the Court based on a variation of the clear and present danger test: whether the conduct in question constituted a clear danger to the loyalty, discipline, or morale of the troops.[66] Regrettably, the Court did not attempt a hard analysis of the circumstances surrounding the utterances, or their foreseeable consequences. Instead, the Court merely concluded that the proposed conduct would constitute a clear danger; no explanation of this result was attempted.

It will be noted that *Dash* was decided the same year as *Brandenburg v. Ohio.*[67] It is not surprising, then, that the Court in *Dash* doesn't speak of an imminency requirement, since that issue was not clearly decided until *Brandenburg.* It is disappointing to note, however, the reluctance of the court in *Dash* to even *attempt* an analytical approach to clear and present danger, particularly since one might assume that Federal District Courts would quite freely adopt the techniques found in the civilian cases. It is submitted that even the confusion left by *United States v. Dennis,*[68] with its five different approaches to the free speech problem, would be preferable to the mechanistic application of one test or another.

The shortcomings seen in *Dash* have unfortunately not been remedied by the very recent cases. An example is the 1972 case of *Schneider v. Laird,*[69] involving the refusal of a post commander to allow publication of an underground newspaper, *The Daisy.* The Court affirmed the District Court in refusing to enjoin the post commander, using the same test found in *Dash:* whether there exists a clear danger to troop discipline, loyalty or morale.[70] As

65. *Id.* at 854.
66. *See* note 5 *supra* at 855-56.
67. 395 U.S. 444 (1969).
68. 341 U.S. 494 (1950).
69. 453 F.2d 345 (10th Cir. 1972).
70. *Id.* at 347.

in *Dash*, an analysis of what constitutes a clear danger was not attempted.

The cases decided by the federal courts have thus far added relatively little to the military free speech doctrine developed by military tribunals. While it may be hoped that the federal courts will quickly adopt Supreme Court concepts in the future, the outlook is rather bleak. The reluctance of federal courts to interfere with internal military matters will probably continue to act as a restriction in the district court cases. Additionally, the cessation of hostilities in Viet Nam will undoubtedly remove a major cause of dissent among servicemen.

IV. Conclusion

The preceding discussion of military speech cases discloses a strong trend toward adoption of the analytical principles used in civilian free speech controversies. Remembering that the First Amendment has been expressly applicable to servicemen for only ten years, the progress made has been substantial.

It is now generally conceded that the First Amendment applies to servicemen. Also unquestioned is the premise that these rights are not absolute, and that they may be restricted by the peculiar needs and interests of the military service. One method of defining these rights in a particular case is to use some type of balancing test, a concept impliedly utilized in some of the recent military cases.[71] Under this theory, the social interest in free speech is balanced against the government's interest in security, discipline, and morale. The extent to which speech will be protected is determined on an ad hoc basis, using such factors as the type of speech in question, whether the speech is pure or involves conduct, the circumstances surrounding the utterance, the nature of the government's interest, and so on.

It has been noted that the clear and present danger test is now of questionable validity.[72] Perhaps this test should be abandoned completely, for there has been a traditionally mechanistic application of the rule. Assuming, however, that the test is retained in some form, certain guidelines should be observed by the courts. Before a clear danger is deemed to exist, the circumstances surrounding an utterance should be carefully examined. An utterance made in the barracks, for example, might bear different inferences than a statement made on the battlefield.

71. *See, e.g., Dash, supra*, note 5.
72. *See* discussion of Brandenburg v. Ohio at 147, *supra*.

As we have seen, the requirement that there be imminent danger of a substantive evil has now been fully accepted by the Supreme Court for civilian speech cases.[73] Unfortunately, however, this requirement has not as yet been expressly applied to the military cases. There seems to be general agreement that the actual occurrence of a particular evil need not be shown; the examination of past cases to see what actually happened, however, furnishes insight into what is or is not imminent danger. A case in point is *United States v. Daniels*,[74] where the rhetoric sounded quite dangerous, but the actual result was that a handful of blacks requested mast. A court faced with a problem similar to *Daniels* might well use that case as an aid in determining imminency.

Putting the above-mentioned principles together to form a coherent analysis is concededly difficult; however, some attempt at analysis is preferable to a mechanical application of the clear and present danger test. The overall analytical scheme might look like this: first, the competing interests of the government and free speech would be weighed. Then, some type of imminency test would be applied. The tests would be dependent upon each other; if, for example, the government interest was found to be extremely high and the free speech interest quite low, the proof requirement for imminency would be correspondingly low.

The legal system has made significant progress in its approach to free speech among civilians. While there has been no final resolution of the many complex issues involved, the courts have gradually moved away from a mechanical application of one test or another.

This has unfortunately not been the case in the military speech cases. While substantial progress has been made in affirming the serviceman's identity as a citizen as well as a soldier, the courts have retained the practice of mechanically applying a rule to a wide variety of facts. Only when this approach is finally abandoned will the serviceman who dissents be afforded true justice.

ALFRED J. WALDCHEN

73. *Id.*
74. 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970), discussed *supra* at 152.