

The Flag, the First Amendment, and the Military

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Introduction

Few issues invoke the heightened emotional response that defaming the American flag generates. Old Glory holds a special status in the United States. Our national anthem, the *Star-Spangled Banner*, was inspired by the sight of the American flag flying over Fort McHenry the morning after the 1814 British bombardment.¹ We pledge allegiance to the flag as the symbol of our Republic,² and when prominent citizens die, the flag is flown at half-staff.³

The national flag is equally, if not more, revered in the armed forces. The military drapes the American flag over the caskets of its honored dead⁴ and presents the flag to family members as a token of appreciation from a grateful nation.⁵ Soldiers going into harm's way have worn, and continue to wear, the American flag on their uniforms.⁶ Some of the most celebrated moments in American military history involved the flag.⁷ Unquestion-

ably, the best-known moment was the Marines raising the American flag over Mount Surabachi on the Pacific island of Iwo Jima during World War II.⁸

The nation is locked in an ongoing and longstanding debate about whether the flag may be the object of physical desecration as a vehicle for protest or whether the government should use the criminal system, or perhaps even amend the Constitution, to protect it. Societal efforts to protect the American flag from physical desecration through the civilian criminal justice system⁹ were severely hampered by two Supreme Court rulings issued a decade ago.¹⁰ Legislative initiatives to provide constitutional protection against desecration followed in the wake of these rulings. Constitutional amendments designed to outlaw desecration of the American flag have passed the House three times, but have failed to pass the Senate.¹¹

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1. ANN ARMBRUSTER, *THE AMERICAN FLAG* 41 (1991). The Star-Spangled Banner was not officially adopted as the U.S. national anthem until 1931. *Id.*
 2. The pledge is as follows: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands: one nation under God, indivisible, with liberty and justice for all." *Id.* at 47.
 3. U.S. DEP'T OF ARMY, REG. 600-25, SALUTES, HONORS, AND VISITS OF COURTESY app. B (1 Sept. 1983) [hereinafter AR 600-25] (listing occasions when the National Flag is at half staff); U.S. DEP'T OF ARMY, REG. 840-10, FLAGS, GUIDONS, STREAMERS, TABARDS, AND AUTOMOBILE AND AIRCRAFT PLATES, para. 2-4(g) (1 Nov. 1998) [hereinafter AR 840-10]; *THE OFFICER'S GUIDE* 194 (23d ed. 1958) ("The national flag is displayed at half-staff . . . as a salute to the honored dead . . .").
 4. AR 840-10, *supra* note 3, para. 2-4(j) (discussing use and display of internment flag on the casket of authorized military personnel); *cf.* ESTER WIER, *ARMY SOCIAL CUSTOMS* 93 (1958); *THE OFFICER'S GUIDE*, *supra* note 3, at 195-96 ("The national flag is used to cover the casket at the military funeral of present or former members of the military service.").
 5. *See* AR 600-25, *supra* note 3, para. 6-17(b) (burial honors include "present[ing] the flag to the designated recipient.").
 6. *See, e.g.,* R. Jeffrey Smith, *Rebels Demand Rights*, WASH. POST, Mar. 17, 2001, at A1, A17 (showing photo inset of American soldier on patrol in Kosovo wearing American flag patch on uniform); Lieutenant General Tommy R. Franks, *Third U.S. Army/U.S. Army Forces Central Command: Full Spectrum-Fully Engaged*, ARMY (Oct. 2000), at 181, 185 (showing photo inserts of U.S. soldiers in Kuwait wearing American flag on uniform); MARK BOWDEN, *BLACK HAWK DOWN* 349 (2000) (showing photo of U.S. Army Rangers before a 1993 mission in Mogadishu, Somalia, wearing the American flag on Desert Camouflage Uniform).
 7. During the Revolutionary War, the British ship *Serapis* signaled the American ship *Bonhomme Richard*, which was sinking after sustaining battle damage, to strike its colors. The American captain, John Paul Jones, replied "I have not yet begun to fight," and instead captured the British warship. After the battle, Jones is reputed to have written, "The very last vestige mortal eyes ever saw of the *Bonhomme Richard* was the defiant waving of her unconquered and unstricken Flag as she went down." ARMBRUSTER, *supra* note 1, at 30.
 8. The photograph was taken by Associated Press cameraman Joe Rosenthal during the February 1945 assault on Iwo Jima by the U.S. Marines. ROBERT H. SPECTOR, *EAGLE AGAINST THE SUN* 501 (1985). "Rosenthal was unaware that he had just taken the most famous photograph of the Pacific war and one of the best known war photos of all time." *Id.*
 9. The first federal statute designed to protect the American flag from "improper use" was enacted in 1917, but applied only to the District of Columbia. State v. Janssen, 580 N.W.2d 260, 269 (Wis. 1998). A nationwide act came into being in 1968. *Id.* In comparison, state desecration laws have existed since 1897 and almost every state (except Alaska) has enacted similar legislation since then. *Id.* at 269 n.14.
 10. United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989). *See infra* notes 61-84 and accompanying text (discussing these cases).

Proponents of such an amendment posit that the national flag is unique and deserving of special protection.¹² Senator Orrin Hatch, who sponsored the latest effort to prohibit the physical desecration of the flag, stated it is “not just a piece of cloth or a symbol . . . [i]t is the embodiment of our heritage, our liberties and indeed our sovereignty as a nation.”¹³ Some opponents of such an amendment argue that the flag’s unparalleled symbolism makes its desecration the ultimate act of political protest.¹⁴ Former Senator Charles Robb, a Marine combat veteran who opposes a constitutional amendment, believes “that the best way to honor the values embodied by the flag is to preserve the freedom of protesters to desecrate or destroy it—acts Robb considers political speech protected by the Bill of Rights.”¹⁵

Despite the Supreme Court rulings, the military justice system retains the ability to punish certain flag-related misconduct, even when the challenged conduct might otherwise be protected expressive conduct in the civilian sector. This article reviews relevant Supreme Court decisions, the history of flag-related court-martial cases, and the limited application of the First Amendment in the military context. Finally, this article attempts to define the permissible parameters of court-martial jurisdiction in this area.

Supreme Court Cases

During the last half century, the Supreme Court has issued a number of decisions addressing governmental attempts to regulate conduct involving the American flag. Because the

Supreme Court opinions may affect prosecutorial efforts for flag-related misconduct within the military justice system, they warrant review.

Forced Salutes

In *West Virginia State Board of Education v. Barnette*,¹⁶ the Supreme Court addressed the constitutionality of a state requirement that all public school teachers and students salute the American flag while reciting the pledge of allegiance. The state viewed failure to salute as an insubordinate act that constituted grounds for expulsion.¹⁷ A district court injunction restraining enforcement of the state law to Jehovah’s Witnesses was appealed to the Supreme Court.¹⁸ The Jehovah’s Witnesses considered the flag to be akin to a “graven image” and refused to salute it.¹⁹

The Court held the pledge and salute requirements to be constitutionally infirm and in violation of the First and Fourteenth Amendments.²⁰ In coming to its conclusion, the Court fully recognized the special place the national flag holds within American society:

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that the freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organiza-

11. Jim Abrams, *Senate Defeats Flag Amendments By 4 Votes*, ATLANTA J.-CONST., Mar. 30, 2000, at A10. Most recently, the Flag Protection Constitutional Amendment was reintroduced in the Senate on 13 March 2001. *Amendment Shielding Flag Hits Congress*, BIRMINGHAM NEWS (Birmingham, Ala.), Mar. 13, 2001, at 4A.

12. See, e.g., Adrian Cronauer, *Protect Flag, Respect Rights*, ARMY TIMES, Dec. 1, 1997, at 54 (“The flag is qualitatively different than any other symbol we have in this country.”).

13. Abrams, *supra* note 11, at A10; see also *Red, White & Dodger Blue*, WASH. POST, July 8, 1998, at D3 (noting that Los Angeles Dodgers’ Manager Tommy Lasorda testified before a Senate Judiciary Committee hearing in favor of the constitutional amendment that the 1989 Supreme Court ruling “treats the flag as ‘just another piece of cloth that can be burned and soiled with impunity.’”).

14. Pherabe Kolb, *Flag Burning Amendment Yet Waves*, CQ WEEKLY, May 29, 1999, at 1266 (“Opponents say that the amendment would curtail one of the bedrock liberties—freedom of political speech—that the flag embodies.”); Tom Teepen, *Burning Issue Keeps Coming Back*, ATLANTA J. CONST., May 16, 1999, at B2 (“Flag-burning is a noxious act, but it is precisely because the act is so heinous to most that it also carries such big political magic.”).

15. Craig Timber, *Robb’s True Colors on Defense Showing, Allen Says*, WASH. POST, Oct. 9, 2000, at B7; see *Flag Burning Amendment*, ATLANTA J. CONST., Mar. 28, 1999, at B4 (stating that Representative John Lewis “and other opponents argued that the amendment . . . would weaken First Amendment rights.”).

16. 319 U.S. 624 (1943).

17. *Id.* at 624, 626, 628. Expelled students were considered “unlawfully absent,” subject to being treated as delinquent, and their parents or guardians were subject to criminal prosecution. *Id.* at 629.

18. *Id.* at 630.

19. The Jehovah’s Witnesses followed a literal interpretation of the Bible, which commanded: “Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them.” *Id.* at 629 (citing *Exodus* 20:4-5).

20. *Id.* at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

tion. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.

. . . .

But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.²¹

Significantly, however, the Court's opinion recognized limitations to the First Amendment's broad reach that affect the legitimacy of the military's requirement to display respect to the national colors. When discussing the role and function of symbols of the state, the Court opined that some gestures of respect were "appropriate," specifically citing the salute as an example.²² Further, in concluding that no circumstances were present justifying an exception to the protections of the First Amendment in *Barnette*, the Court recognized that such an exception may exist in the military context. As the Court noted, "The Nation may raise armies and compel citizens to give military service . . . [I]t follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."²³

Contemptuous Speech

The Supreme Court addressed the constitutionality of criminalizing contemptuous speech against the American flag in *Street v. New York*.²⁴ The Court reversed a state court malicious

mischief conviction, holding that the defendant could not constitutionally be "punished merely for speaking defiant or contemptuous words about the American flag."²⁵ In response to the murder of civil rights activist James Meredith, the defendant burned the American flag on a public street corner. When subsequently confronted about the burning by a police officer, the defendant stated, "We don't need no damn flag" and "Yes, that is my flag; I burned it. If they let that happen to Meredith we don't need an American flag."²⁶

The Court examined four governmental interests that could potentially justify the New York law and found all four wanting. First, the Court determined that Street's statement about the flag was not enough to incite onlookers to break the law. Even if the combined flag burning and language amounted to incitement, the statute was not narrowly tailored to address such conduct.²⁷ Second, albeit conceding that some listeners might be motivated to take action against Street upon hearing his remarks, his "comments were [not] so inherently inflammatory as to come within that small class of 'fighting words' which are 'likely to provoke the average person to retaliation, and thereby cause a breach of the peace.'"²⁸ Third, even if Street's comments did rise to the level of fighting words, the statute was "not narrowly drawn to punish only words of that character . . ."²⁹ Finally, Street's conviction could not be sustained because his comment was "likely to shock passers-by."³⁰ Where, as here, the shocking aspect of Street's comments were "attributed to the content of the ideas expressed," the Constitution protected the free expression of such ideas even if the ideas may be considered offensive by others.³¹

Finally, the Court considered whether Street's conviction could be justified because the defendant's remarks "failed to show the respect for our national symbol which may properly be demanded of every citizen."³² Relying heavily on the reasoning of *Barnette*, the Court characterized Street's conduct as

21. *Id.* at 641-42.

22. *Id.* at 632 ("Associated with many of these symbols are appropriate gestures of acceptance or respect: a salute, a bowed or bared head, a bended knee.").

23. *Id.* at 642 n.19.

24. 394 U.S. 576 (1969).

25. *Id.* at 581. The state statute "made it a crime not only publicly to mutilate a flag but also 'publicly [to] defy . . . or cast contempt upon [any American flag] by words.'" *Id.* at 583. The defendant had also burned the flag. *Id.*

26. *Id.* at 577.

27. *Id.* at 584.

28. *Id.* at 585.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

deplorable and distasteful, but nevertheless posited that “the constitutionally guaranteed ‘freedom to be intellectually . . . diverse or even contrary,’ and the ‘right to differ as to things that touch the heart of the existing order,’ encompass the freedom to express publicly one’s opinions about our flag, including those opinions which are defiant or contemptuous.”³³

In *Street*, the Court also had the opportunity to decide whether the deliberate burning of an American flag as an act of protest was constitutionally protected, but declined to do so.³⁴ The Court would not decide that particular issue for another two decades.³⁵

Symbolic Speech Analysis

Although not specifically addressing flag-related misconduct, in 1968 the Supreme Court decided an important First Amendment case that would impact on its constitutional analysis of subsequent flag cases. In *United States v. O’Brien*, a Vietnam anti-war protester, who had burned his Selective Service registration certificate, challenged his conviction for violating the Universal Military Training and Service Act (UMTSA) as an abridgment of his freedom of speech.³⁶ O’Brien’s misconduct was designed to encourage others to oppose the war. The Court determined that the Act did not curtail free speech on its face, but then examined O’Brien’s argument that burning his certificate constituted “symbolic speech” that enjoyed First Amendment protection.³⁷ O’Brien took the position that “freedom of expression . . . includes all modes of ‘communication of ideas by conduct,’ and that his conduct is within this definition because he did it in ‘demonstration against the war and against the draft.’”³⁸

The Court rejected O’Brien’s expansive view of what conduct constituted protected symbolic speech.³⁹ Assuming that O’Brien’s misconduct implicated the First Amendment, the Court determined that the UMTSA survived constitutional muster so long as “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”⁴⁰ The Court then formulated a four-part test to determine when the government may regulate (non-speech) conduct that causes a concomitant limitation on First Amendment freedoms. Such regulation is justified

if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.⁴¹

Sustaining O’Brien’s conviction, the Court determined that the USMTA met all four parts of the test. The USMTA and its implementing system of registration were a legitimate and reasonable exercise of Congress’s power “to raise and support armies and to make all laws necessary and proper to that end . . .”⁴² The registration certificate was merely “a legitimate and substantial administrative aid in the functioning of this system,”⁴³ and legislation designed to preserve the certificates served “a legitimate and substantial purpose in the system’s administration.”⁴⁴ Finally, the Court found “no alternative means” to ensure the availability of these documents and that the “governmental interest and the operation [of the statute were] limited to the noncommunicative aspects of O’Brien’s conduct.”⁴⁵

33. *Id.* at 586.

34. *Id.* at 578, 586-87 (Warren, C.J., dissenting).

35. *See* *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

36. 391 U.S. 367, 369-72 (1968).

37. *Id.* at 375-76.

38. *Id.* at 376.

39. *Id.* (“We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”).

40. *Id.* at 376.

41. *Id.* at 377.

42. *Id.*

43. *Id.*

44. *Id.* at 378. The Court reviewed several purposes for the certificates and concluded, “Congress has a legitimate and substantial interest in preventing their wanton and unrestrained destruction and assuring their continuing availability by punishing people who knowingly and willfully destroy or mutilate them.” *Id.* at 380.

Improper Flag Use and the Vagueness Doctrine

In 1973, another flag-related case, *Smith v. Goguen*,⁴⁶ came before the Supreme Court. In *Goguen*, a Massachusetts police officer filed a criminal complaint against the defendant under a state flag-misuse statute for wearing a small, cloth American flag on the seat of his trousers.⁴⁷ The statute provided a criminal penalty for anyone who mutilated, trampled, defaced, or treated “contemptuously the flag of the United States . . . , whether such flag is public or private property”⁴⁸ Goguen was charged with “publicly treat[ing] contemptuously the flag of the United States.”⁴⁹ Upholding the federal appeals court ruling that the statute was unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment and overbroad under the First Amendment, the Supreme Court resolved the case solely on vagueness grounds.⁵⁰

The Court reviewed the due process doctrine of vagueness, which requires “fair notice or warning,” “reasonably clear guidelines” for enforcement, and “that all ‘be informed as to what the State commands or forbids’ [so that] . . . ‘men of common intelligence’ not be forced to guess at the meaning of the criminal law.”⁵¹ Additionally, the Court noted that when a literal reading of a statute, “unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.”⁵²

With respect to the defendant, the Court found that the statutory language under which he was charged was impermissibly

vague, failing to draw a distinction “between the kinds of non-ceremonial treatment [of the flag] that are criminal and those that are not,” in light of the widespread, casual treatment of the flag as a clothing item.⁵³ As written, the statute did not permit “any public deviation from formal flag etiquette.”⁵⁴ The standard for defining what constituted contemptuous treatment was “so indefinite that police, a court, and jury were free to react to nothing more than their own preferences [sic] for treatment of the flag.”⁵⁵ Additionally, no narrowing, state-court interpretation of the phrase “treats contemptuously” was available to save the statute from constitutional infirmity.⁵⁶

In *Spence v. Washington*,⁵⁷ the Supreme Court easily reversed a state conviction for improper use of the flag where a protestor hung a flag, with a peace symbol on it, upside down from his window. Protesting the United States invasion of Cambodia and the Kent State shootings, the defendant had displayed his privately-owned flag, on his property, with the peace symbol made of removable tape, without inciting violence or risking a breach of the peace, and the display was observed only by the arresting officers.⁵⁸ In its opinion, the Court formulated a test to determine if the challenged conduct triggered application of the First Amendment. The test of the conduct examined “the factual content and environment in which it was undertaken,” and asked whether “[a]n intent to convey a particularized message . . . [was] present” and how great was the likelihood “that the message would be understood by those who viewed it.”⁵⁹

45. *Id.* at 381-82.

46. 415 U.S. 566 (1973).

47. *Id.* at 568.

48. *Id.* at 568-69.

49. *Id.* at 570.

50. *Id.* at 571-72, 582. In a concurring opinion, however, Justice White opined that the statute was not vague and that defendant should have known his conduct was contemptuous. *Id.* at 584-88 (White, J., concurring). However, Justice White upheld the lower court’s decision on First Amendment grounds because Goguen’s conviction, in essence, punished him for communicating an unpopular idea about the flag. *Id.* at 588. If, however, the defendant had mutilated, trampled or defaced the flag, then Justice White would have upheld the conviction on the theory that the “flag is a national property” and the government could permissibly regulate “those who would make, imitate, sell, possess, or use it.” *Id.* at 587.

51. *Id.* at 573-74.

52. *Id.* at 573.

53. *Id.* at 574.

54. *Id.* at 575.

55. *Id.* at 578.

56. *Id.* at 575.

57. 418 U.S. 405 (1974).

58. *Id.* at 408-09.

Flag Desecration

The Supreme Court recently had the opportunity to comment on the constitutionality of the laws designed to protect the flag from desecration.⁶⁰ First, in *Texas v. Johnson*,⁶¹ the Court reviewed a state conviction for flag desecration of a defendant who burned a stolen American flag as part of a political protest during the 1984 Republican National Convention. Protesters chanted “America, red, white, and blue, we spit on you” as the flag burned.⁶²

Holding that Johnson’s conviction was inconsistent with the protections of the First Amendment,⁶³ the Court determined first that the defendant’s challenged actions constituted expressive conduct,⁶⁴ which justified his First Amendment challenge. Next, the Court examined the Texas statute to determine if it was related to the suppression of free speech. If it was related, then the standard of review would be “demanding.” If not connected to expression, however, the Court would scrutinize the Texas law under the less stringent *O’Brien* standard for restrictions on “noncommunicative conduct.”⁶⁵ Ultimately, the Court determined that the state’s interest in protecting the flag—“preserving the flag as a symbol of nationhood and national unity”—was related to the suppression of free speech,⁶⁶ and after subjecting that interest to “the most exacting scrutiny,”⁶⁷

found the state’s interest in protecting the flag insufficient to support Johnson’s conviction.⁶⁸

The Court reasoned that the state’s articulated interest in protecting the flag as a national symbol necessarily “assume[d] that there is only one proper view of the flag.”⁶⁹ The Court opined that such a position was constitutionally infirm and unsupported by legal precedent.⁷⁰ Indeed, the Court stated, “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”⁷¹ Further, the state’s flag desecration law did not survive judicial scrutiny merely because it targeted physical desecration of the flag rather than prohibited verbal attacks upon it. Such a distinction “is of no moment where the nonverbal conduct is expressive . . . and where the regulation of that conduct is related to expression”⁷² Lastly, the Court rejected any suggestion that the flag’s uniqueness served as an exception to its constitutional analysis.⁷³ While recognizing the “cherished place” the American flag holds in our society, the “special place reserved for the flag in this Nation . . . ,” and “the special role played by our flag [and] the feelings it inspires” the Supreme Court, nevertheless, determined that no “separate judicial category exists for the American flag alone.”⁷⁴

59. *Id.* at 410-11; *see also* *Texas v. Johnson*, 491 U.S. 397, 404 (1989).

60. One researcher found that less than forty-five reported flag burnings occurred between 1777, when the U.S. flag was officially adopted, and the Supreme Court’s 1989 decision in *Texas v. Johnson*. Professor Robert Justin Goldstein, *Two Centuries of Flag Burnings In The United States*, FLAG BULL. 65 (Mar.-Apr. 1995). Approximately one half of the recorded flag burnings occurred between 1966-70 as part of protests against the Vietnam War. *Id.*

61. 491 U.S. 397 (1989).

62. *Id.* at 399.

63. *Id.*

64. *Id.* at 404-45. The State of Texas conceded this point during oral argument. *Id.* at 405. Notwithstanding this concession, the Court noted that it had “little difficulty in identifying an expressive element in conduct relating to flags” and characterized the American flag as “[p]regnant with expressive content.” *Id.*

65. *Id.* at 403, 406.

66. *Id.* at 406-07. The Court rejected a second state interest, preventing a breach of the peace, as “not implicated on this record.” *Id.* at 407.

67. *Id.* at 412. If the state’s interest were unrelated to the suppression of free speech, then “*O’Brien’s* relatively lenient standard” would have applied. *Id.* at 407.

68. *Id.* at 420.

69. *Id.* at 413 n.9.

70. “In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.” *Id.* at 415.

71. *Id.* at 414.

72. *Id.* at 416. The Court elaborated further: “Texas’s focus on the precise nature of Johnson’s expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea.” *Id.*

73. “We decline to create for the flag an exception to the joust of principles protected by the First Amendment.” *Id.* at 418.

74. *Id.* at 417-19. Justice Kennedy’s concurring opinion emphasized the difficulty the majority had in reaching such a personally unpopular decision. *Id.* at 420-21 (Kennedy, J., concurring).

Significantly, the Court distinguished its opinion from other forms of flag-related misconduct. The Court pointed out that “[t]here was no evidence that Johnson himself stole the flag he burned,” and admonished that “nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea.”⁷⁵ The Court “also emphasize[d] that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson,”⁷⁶ clearly suggesting that the government would be free to prosecute Johnson under those theories even when such misconduct occurred during the defendant’s exercise of his First Amendment rights.

In the second flag desecration case, *United States v. Eichman*,⁷⁷ the Supreme Court heard a First Amendment challenge to a federal statute, the Flag Protection Act of 1989 (FPA), following several convictions of protestors under the FPA for burning the American flag.⁷⁸ The government conceded that the act of flag burning constituted expressive conduct and unsuccessfully attempted to persuade the Court to reconsider its prior rejection of the argument that flag burning should be treated like obscenity and fighting words—modes of expression not entitled to complete First Amendment protection.⁷⁹

The United States then attempted to distinguish the federal FPA from the state statute rejected in *Johnson* by arguing that the federal statute did “not target expressive conduct on the basis of the *content* of the message;” rather, it merely focused on protecting the flag’s physical integrity, “without regard to the actor’s motive, his intended message, or the likely effect of his conduct on onlookers.”⁸⁰ In comparison, the Texas statute had criminalized “only those acts of physical flag desecration ‘that the actor knows will seriously offend’ onlookers”⁸¹

Rejecting the government’s attempt to distinguish the two statutes, the Court determined that, although the language of the

FPA did not contain an “explicit content-based limitation,” it was clear that the underlying governmental interest in enacting the FPA was related to, and concerned with placing limitations on content.⁸² Although rejecting the government’s attempt to protect “the ‘physical integrity’ of a *privately* owned flag,” the Court was quick to point out that its decision did “not affect the extent to which the Government’s interest in protecting *publicly* owned flags might justify special measures on their behalf.”⁸³ Further, in another footnote, the Court noted that its decision did not affect the constitutionality of a related charge for “causing willful injury to federal property,” which was still pending.⁸⁴

Flag-Related Courts-Martial

Only a handful of reported military cases have addressed flag-related misconduct, and of those cases only one has addressed such misconduct in the context of a First Amendment challenge.

The Early Cases

The earliest cases arose during the Civil War. In 1862, Union occupation forces in Louisiana hanged William B. Mumford after a military tribunal convicted him of treason for “pulling down, dragging in the mud, and shredding an American flag”⁸⁵ During the same year, Colonel John McClusky, commander of the 15th Maine, was court-martialed for conduct unbecoming an officer and gentleman after he threw the regimental flag into the ocean while intoxicated.⁸⁶ Some members of the regiment had objected to fighting under “an Irish flag,” one containing images of a harp and a shamrock. McClusky testified that he threw the regimental colors into the sea so that

75. *Id.* at 412-13 n.8.

76. *Id.* The Court’s holding also appeared to leave open the possibility that the state’s interest in preventing a breach of the peace could legitimately prevent flag-desecration, even in the context of a political protest, if the desecration were to occur under different circumstances. *Id.* at 420.

77. 496 U.S. 310 (1990).

78. Ironically, the enactment of the FPA “sparked a wave of flag burnings unprecedented in the country with approximately three dozen such incidents reported between June 1989 and May 1990. That figure approached the total of all previously reported flag burning incidents in American history.” Goldstein, *supra* note 49, at 66.

79. *Eichmann*, 496 U.S. at 315.

80. *Id.*

81. *Id.*

82. *Id.* See also *id.* at 317 (“[T]he precise language of the Act’s prohibitions confirms Congress’s interest in the communicative impact of flag destruction.”) (“[T]he Act still suffers from the same fundamental flaw [as in *Johnson*]: It suppresses expression out of concern for its communicative impact.”).

83. *Id.* at 315-16 (emphasis added), n.5 (emphasis added).

84. *Id.* at 313 n.1.

85. DESECRATING THE AMERICAN FLAG I (Robert J. Goldstein ed., 1996).

it would not be “dishonored, nor will it be a subject for dissension or dispute”⁸⁷ The court acquitted McClusky on the rationale that the flag “was not an *official* regimental flag, ‘as defined by the Army regulations and that since the accused acted under the impression that its possession by the regiment was productive of discord,’ such actions may have been ‘injudicious,’ but no criminality could be attributed to the act itself.”⁸⁸

The earliest reported court-martial, *United States v. Martin*, is more illustrative of a terrible sense of timing than any salient legal point. In *Martin*, a Navy sailor who used obscene language against the U.S. flag was convicted of conduct prejudicial to good order and discipline.⁸⁹ Martin made the particularly poor decision to verbally defame the national flag in November 1941—only weeks before the Japanese attack on Pearl Harbor—and found himself standing trial in the wake of that attack⁹⁰ when feelings of patriotism were at a fevered pitch.

Courts-Martial Arising Under the UCMJ

In *United States v. Cramer*, a Marine private first class (PFC) was convicted of wrongfully and dishonorably defiling the United States flag.⁹¹ Rather than addressing any First Amendment issues, the analysis by the U.S. Court of Military Appeals (COMA) was limited to determining the maximum permissible punishment for PFC Cramer’s misconduct, which it ultimately determined to be a fine of \$100, thirty days confinement, or both. Of note, the court elected not to provide a description of the specific act of defilement or Cramer’s motivation, opining that “recitation of the evidence [would be] neither necessary or desirable.”⁹²

In *United States v. Lewis*,⁹³ a Marine Corps PFC fell out of a morning physical training run and was found by his platoon leader walking along the road and reading a comic book while morning colors played, which accompanied the raising of the American flag.⁹⁴ In response to the lieutenant’s order to “stop and stand at attention,” Lewis stopped but failed to stand at attention, and turned his back to the flag.⁹⁵ Following the ceremony, the Marine platoon leader questioned the accused’s failure to stand at attention, to which Lewis replied, “I don’t have to stand at attention and I don’t care what you say.”⁹⁶ The Marine Corps subsequently charged Lewis with disrespect to his platoon leader, willful disobedience of an order to stand at attention and honor the flag, and dereliction of duty by failing to come to attention and face the direction of the flag during the raising ceremony. Lewis was convicted of all but the disobedience charge.⁹⁷

On appeal, the U.S. Navy Court of Military Review set aside the findings of guilty for the disrespect and dereliction charges because the platoon leader did not first advise Lewis of his Article 31 rights before questioning him about his failure to display proper respect to the flag.⁹⁸ The COMA partially reversed, permitting Lewis’s statement to be used for purposes of the disrespect charge, but not for the dereliction charge.⁹⁹ Neither appellate court was required to address any First Amendment challenges.

Not until 1989 did the military justice system face a First Amendment inquiry involving a court-martial conviction for flag-related misconduct. In *United States v. Hadlick*,¹⁰⁰ a soldier who had committed a number of crimes while intoxicated was taken to a civilian police station where he spat on the American flag.¹⁰¹ The police officer escorting Hadlick

86. THOMAS P. LOWRY, TARNISHED EAGLES: THE COURTS-MARTIAL OF FIFTY UNION COLONELS AND LIEUTENANT COLONELS 98-99 (1997). McClusky also faced charges for threatening language and gestures, neglect (dereliction) of duty, and conduct unbecoming after threatening to slap two junior officers. *Id.* at 99.

87. *Id.* at 101-02.

88. *Id.* at 103.

89. No. 411226, C.M.O.1, 274 (1942).

90. *Id.* at 274-75.

91. 24 C.M.R. 31 (C.M.A. 1957).

92. *Id.* at 32.

93. 9 M.J. 936 (N.M.C.M.R. 1980).

94. *Id.* at 937.

95. *Id.* The accused “appeared to continue reading his comic book.” *United States v. Lewis*, 12 M.J. 205, 206 (C.M.A. 1982).

96. *Lewis*, 9 M.J. at 937.

97. *Id.* at 937. Lewis was also convicted of unrelated charged involving unauthorized absences and disrespect to a noncommissioned officer.

98. *Id.* at 938-39.

99. *Lewis*, 12 M.J. at 209.

described “a big glob of mucus on the flag.”¹⁰² The soldier’s misconduct was meant as an expression of his displeasure with his treatment and with life in general.¹⁰³ In addition to other crimes, a court-martial subsequently convicted Hadlick of a violation of Article 134, Uniform Code of Military Justice (UCMJ), in that his desecration of the flag was prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces. Hadlick pleaded guilty to the Article 134 offense.¹⁰⁴

On appeal to the COMA, the court granted *Hadlick’s* petition for review, returning the case to the Army Court of Military Review (ACMR) to determine whether the conviction could stand in light of *Texas v. Johnson*.¹⁰⁵ In an unpublished decision, the Army appellate court avoided the First Amendment issue by finding that the soldier had “spit on the flag for ‘no particular reason,’” was not exercising his First Amendment right to free speech at the time and, accordingly, *Texas v. Johnson* was inapplicable.¹⁰⁶ The Army appellate court still overturned the conviction, finding that the providence inquiry failed to establish that the misconduct was “observed by anyone in the armed forces, was in fact a deliberate act of desecration, or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting.”¹⁰⁷

Only one reported military case has directly confronted the issue of flag-related expressive conduct in a military criminal scenario. In *United States v. Wilson*,¹⁰⁸ an Army military policeman (MP) preparing for a flag-raising ceremony remarked to a

fellow soldier that the Army “sucked,” prompting his companion to suggest that Wilson move to a communist country.¹⁰⁹ Wilson responded by stating, “This is what I think” and blew his nose on the American flag.¹¹⁰ As a consequence, Wilson was tried and convicted of dereliction of duty pursuant to Article 92 of the UCMJ, “in that he ‘willfully failed to ensure that the United States flag was treated with proper respect by blowing his nose on the flag when it was his duty as a military policeman on flag call to safeguard and protect the flag.’”¹¹¹

On appeal, Wilson argued that the act of blowing his nose on the flag was expressive conduct protected by the First Amendment. The ACMR rejected Wilson’s constitutional challenge. The court acknowledged that, like their civilian contemporaries, members of the armed forces enjoyed the protections of the First Amendment protection, including freedom of speech and expressive conduct, and that expressive conduct such as flag desecration cannot be prohibited merely because it may be viewed as “offensive or disagreeable.”¹¹² The unique needs of the military may justify certain restraints on its members that would not be permissible in civilian society, however, and the government enjoys greater latitude in limiting expressive conduct than when restricting freedom of speech.¹¹³ After determining that Wilson’s conduct was expressive in nature and that the applicable law was “only incidentally related to the suppression of free speech,”¹¹⁴ the Army appellate court applied the four-part test dictated in *United States v. O’Brien* to Article 92(3) and determined that the government had satisfied its burden.¹¹⁵

100. No. 8900080 (A.C.M.R. 30 Nov. 1989).

101. Captain Gregory A. Gross, *Flag Desecration in the Army*, ARMY LAW., Apr. 1990, at 25; Captain Jonathan F. Potter, *Flag Burning: An Offense Under The Uniform Code of Military Justice?*, ARMY LAW., Nov. 1990, at 21, 24.

102. Potter, *supra* note 101, at 24.

103. Gross, *supra* note 101, at 25 (“His actions were meant to express his displeasure with the way he had been treated and with the way his life had been for the past year.”).

104. Potter, *supra* note 101, at 24.

105. 29 M.J. 280 (C.M.A. 1989).

106. Potter, *supra* note 101, at 24 (citing *United States v. Hadlick*, No. 8900080, slip op. 3, 4 (A.C.M.R. Nov. 30, 1989)).

107. *Id.* (citing *Hadlick*, No. 8900080, slip op. at 4).

108. 33 M.J. 797 (A.C.M.R. 1991).

109. *Id.* at 798.

110. *Id.*

111. *Id.*

112. *Id.* at 799.

113. *Id.*

114. The court viewed these two questions as the initial inquiry required under the analysis of *Texas v. Johnson*. *Id.* (citing *Texas v. Johnson*, 491 U.S. 397, 397 (1989)).

More specifically, the ACMR first determined that Article 92 was within Congress's power to regulate a soldier's conduct and agreed with the military judge that "the government may regulate a soldier's conduct while on duty and in uniform."¹¹⁶ Second, the court determined that Article 92 promoted the effectiveness of the force, "an important and substantial governmental interest."¹¹⁷ Third, the court found the punitive provision's purpose—to "prescrib[e] failures to perform military duty"—was facially unrelated to the suppression of free expression.¹¹⁸ Fourth, parroting the language of *O'Brien's* fourth prong, the ACMR concluded that "the incidental restriction of alleged First Amendment freedoms is no greater than is essential to further the government interest in promoting the disciplined performance of military duties."¹¹⁹ Finally, the ACMR commended the military judge for balancing the military's need for a disciplined force against the accused's First Amendment rights, and for considering several factors supporting the military prosecution, including the fact that the flag was publicly owned.¹²⁰

Application of the First Amendment to Flag-Related Misconduct in the Military

The courts have traditionally afforded the armed forces a large measure of deference when reviewing military requirements in the light of First Amendment challenges.¹²¹ The Vietnam-era case of *Parker v. Levy*,¹²² in which the Supreme Court specifically addressed the application of the First Amendment to the military, and its seminal military predecessor, *United States v. Howe*,¹²³ provide an excellent framework to address the parameters of potential UCMJ action in response to flag-related misconduct.

In *Parker v. Levy*, an Army officer-doctor made public statements contemptuous of the Special Forces. He made the statements to enlisted soldiers, and he discouraged African-American soldiers from serving in Vietnam. Levy challenged his court-martial convictions for conduct unbecoming an officer and for conduct prejudicial to good order and discipline based, in part, on the First Amendment.¹²⁴ The Supreme Court began its analysis by pointing out that, although First Amendment protections existed in the armed forces, they were subject to a different application. "The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."¹²⁵ Specifically, the Court noted that speech tending to "undermine the effectiveness of response to command" was not constitutionally protected in the military even if the same speech would have enjoyed First Amendment protection in the civilian sector.¹²⁶

Captain Levy also argued that Article 133, conduct unbecoming an officer and gentleman, and Article 134, conduct prejudicial to good order and discipline, were overbroad and facially invalid. Rejecting this argument, the Court reiterated its earlier position that, even if the challenged law could be applied in some marginal or fringe instances such that it would be violative of the First Amendment, the Court would let the statute stand if "there were a substantial number of situations to which it might be validly applied."¹²⁷ Because the two punitive articles could be legitimately applied to "a wide range of conduct" and because Levy's comments were "unprotected under the most expansive notions of the First Amendment," the Court rejected the defendant's overbreadth challenge.¹²⁸

115. *Id.* at 800.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* ("Whether the flag is publicly or privately owned is a factor to consider.")

121. *See, e.g.,* *Goldman v. Weinberger*, 475 U.S. 503, 507 (1985) ("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."); *Gen. Media Comm. Inc. v. Cohen*, 131 F.3d 273, 283 (2d Cir. 1997) ("[T]his deference arises from the long-recognized distinctive conditions of military life.")

122. 417 U.S. 733 (1974).

123. 37 C.M.R. 429 (1967).

124. *Levy*, 417 U.S. at 736-38.

125. *Id.* at 758.

126. *Id.* at 759 (citing *United States v. Priest*, 45 C.M.R. 338, 344 (1972)).

127. *Id.* at 760 (citation omitted).

Relying in large part on *Levy*, the COMA rejected a First Amendment challenge to convictions for a contemptuous speech against the President and conduct unbecoming an officer and gentleman. In *United States v. Howe*, an Army officer, who had participated in an anti-war demonstration, was convicted of violating Articles 88 and 133 after carrying a sign that read “Let’s Have More Than a Choice Between Petty Ignorant Fascists in 1968” and “End Johnson’s Fascist Aggression in Viet Nam.”¹²⁹ The Army lieutenant had not organized the demonstration; he participated in it while off-post, off-duty and in civilian clothes; and no one at the demonstration was even aware that Howe was in the military.¹³⁰

Relying on a “contemporary construction of the Constitution” and Article 88’s predecessor, the COMA rejected Howe’s argument that the punitive provision violated the First Amendment.¹³¹ The court pointed out that an earlier version of Article 88 predated the First Amendment; it was adopted by the nation’s first Congress and readopted on several occasions since then.¹³² Turning to Article 133, the COMA held that it too survived First Amendment scrutiny; indeed, the court characterized that punitive article as “a constitutionally permissible exercise of statutory restraint” on an officer’s abuse of the right to free expression.¹³³ Further, the COMA declined to accept Howe’s position that Article 133 was limited to conduct committed by an officer in his official capacity: “an officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133 . . . insofar as an abuse of the right of free expression is concerned.”¹³⁴

Collectively, *Levy* and *Howe* establish a reduced application of the First Amendment to the armed forces. Hence, the military justice system enjoys a greater reach over flag-related misconduct than does the civilian criminal system. And while the

area remains somewhat unsettled, courts-martial convictions for flag-related misconduct should survive judicial scrutiny in many instances where the same misconduct would not sustain a conviction in civilian courts.

The Spectrum of Potentially Permissible Prosecutions

On the spectrum of potential prosecutions based on flag-related misconduct, the government stands on its most solid ground when the accused commits misconduct against an American flag that is publicly owned.¹³⁵ Under such circumstances the courts will view the flag as simply another item of government property, even it is used as part of a political protest or other act of free expression.¹³⁶ Accordingly, the military justice system can legitimately punish a publicly-owned flag’s theft or destruction, as well as any related offenses, such as trespass.¹³⁷ Further, as established in *Wilson*, military law reaches a service member’s failure to safeguard the flag if the accused has a duty to do so.¹³⁸

The law is largely unsettled once the circumstances progress beyond behavior targeting publicly owned flags. Here, the legitimacy of any military court-martial will depend on the particular circumstances in which the challenged conduct occurs. The greater the military nexus to the challenged conduct, the greater the likelihood of the prosecution passing constitutional muster, and conversely, the fewer links between the accused and his military status and duties, the less likely the court-martial charges will survive.¹³⁹

For example, may a member of the armed forces be prosecuted for failure to salute the American flag? The Supreme Court has clearly held that, as a general rule, the government

128. *Id.* at 760-61.

129. 37 C.M.R. 429, 432 (1967).

130. *Id.* at 433; ROBERT SHERRILL, *MILITARY JUSTICE IS TO JUSTICE AS MILITARY MUSIC IS TO MUSIC* 178-79 (1970).

131. *Howe*, 37 C.M.R. at 438.

132. *Id.* at 438-39. Further, reflecting the nation’s historic concerns with a standing army, Article 88, UCMJ, ensured civilian control over the military. *Id.* at 439.

133. *Id.* at 440-41.

134. *Id.* at 442.

135. *Spence v. Washington*, 418 U.S. 405, 409 (1973) (“We have no doubt that the State or National Governments constitutionally may forbid anyone from mishandling in any manner a flag that is public property.”).

136. *See United States v. Wilson*, 33 M.J. 797, 800 n.5 (A.C.M.R. 1991).

137. *See United States v. Eichman*, 496 U.S. 310, 313 n.1 (1990) (“[N]othing in today’s decision affects the constitutionality of this prosecution” for “causing willful injury to federal property.”); *Texas v. Johnson*, 491 U.S. 397, 413 n.8 (1989) (“nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted *only* for flag desecration—not for trespass, disorderly conduct, or arson.”); *cf. State v. Janssen*, 580 N.W.2d 260 (Wisc. 1998) (holding a state flag desecration law overbroad but theft of flag charges not challenged.); William B. Ketter, *Flag-Protection Amendment Will Infringe on Protests of All Stripes*, ARIZ. REPUBLIC, Oct. 10, 1995, at B4 (stating that of the four reported cases of flag burning in 1994, all were prosecuted under “laws prohibiting theft, vandalism or inciting riot.”).

138. *Wilson*, 33 M.J. at 798-99.

may not “compel conduct that would evince respect for the flag.”¹⁴⁰ In *Barnette*, however, the Court recognized the appropriateness of gestures of respect, like a salute, rendered to symbols of the state, such as a flag, and recognized that there may exist occasions within the military context that justify involuntary displays of obedience.¹⁴¹ If the display of respect is linked to the requirements of military discipline, such as a salute rendered during a unit formation or parade,¹⁴² the prosecution has a greater likelihood of surviving judicial scrutiny.¹⁴³

Further, a dereliction of duty charge may be brought against a member of the armed forces who fails to render proper respect to the flag when that person has a duty to do so.¹⁴⁴ In *Wilson*, the duty of “a military policeman on flag call to safeguard and

protect the flag” and ensure that it was “treated with proper respect,”¹⁴⁵ was based on a custom of the service.¹⁴⁶ The charge was proven by reference to a drill and ceremonies field manual and an Army regulation;¹⁴⁷ however, long-standing service customs have required displays of respect from service members in circumstances much broader than those presented in *Wilson*.¹⁴⁸

After *Texas v. Johnson*, the Supreme Court appeared to leave open the possibility that, under the proper set of circumstances, a flag desecration law could be used to make a protestor, who burned the flag, subject to prosecution for breach of the peace;¹⁴⁹ however, the mere potential for a breach of the peace as a result of a flag burning was insufficient, the Court believed,

139. Cf. *Spence*, 418 U.S. at 408-09 (discussing various factors to consider); *Wilson*, 33 M.J. at 798 (“If the accused was a soldier but off duty, out of uniform, procured a [privately owned] flag, decided to burn it or blow his nose on it or perhaps spit on it . . . arguably then that expression of a position might be protected, that issue has yet to be decided.”).

140. *Johnson*, 491 U.S. at 414.

141. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632, 642 n.19 (1943); cf. *McCord v. Page*, 124 F.2d 68, 70 (5th Cir. 1941) (“Military regulations requiring a soldier to salute his superior officers and his flag are not intended to interfere with religious liberties, and the enforcement of the regulations by a proper military tribunal does not violate the Constitution of the United States.”).

142. THE ARMED FORCES OFFICER 50 (1950) (“Saluting is an expression of courtesy, alertness, and discipline.”); Lieutenant Commander Leland P. Lovette, NAVAL CUSTOMS, TRADITIONS, AND USAGE 8 (1939) (“Ceremonies . . . are accepted today in military organizations as regulations of dignified respect to the symbols of the state . . . [and] are a function of discipline . . .”), 24 (“Salutes: Nothing gives a better indication of the state of discipline than the observance of the forms of military courtesy.”).

143. See *Goldman v. Weinberger*, 475 U.S. 503, 507 (1985) (“[T]he military must insist upon a respect for duty and a discipline without counterpart in civilian life.”); *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.”); *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (“The need for obedience and discipline within the military necessitates an application of the First Amendment different from that in civilian society.”); *Wilson*, 33 M.J. at 799 (“Military necessity, including the fundamental necessity for discipline, can be a compelling government interest, warranting the limitation of the right of freedom of speech.”); cf. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) (“The military constitutes a specialized community governed by a separate discipline from that of the civilian.”). When the challenged conviction is rooted in a governmental interest in maintaining good order and discipline “courts will ‘not overturn a conviction unless it is clearly apparent that, in the face of a First Amendment claim, the military lacks a legitimate interest in proscribing the defendant’s conduct.’” *United States v. Brown*, 45 M.J. 389, 396 (1996) (citing *Avrech v. Sec’y of the Navy*, 520 F.2d 100, 103 (D.C. Cir. 1975)).

144. *Wilson*, 33 M.J. at 798-99; *United States v. Lewis*, 12 M.J. 205, 207 (C.M.A. 1982) (characterizing, in dicta, the failure “to show respect to the colors” during a morning flag raising ceremony by a Marine who had fallen out of a physical training session, while in his platoon area, as a “possible violation of the Uniform Code”).

145. *Wilson*, 33 M.J. at 798.

146. Military customs have long served as a basis of military law. A MANUAL FOR COURTS-MARTIAL, COURTS OF INQUIRY, AND RETIRING BOARDS, AND OF OTHER PROCEDURE UNDER MILITARY LAW 6 (1901) (“The *unwritten source* [on military law] is the ‘custom of war,’ consisting of the customs of the service both in peace and in war.”); see *Parker*, 417 U.S. at 744 (“And to maintain the discipline essential to perform its mission effectively, the military has developed what ‘might not unfitly be called the customary military law’ or ‘general usage of the military service.’”) (citing *Martin v. Mott*, 12 Wheat 19, 35, 6 L. Ed. 537 (1827)).

147. *Wilson*, 33 M.J. at 798 n.1.

148. See, e.g., THE OFFICER’S GUIDE, *supra* note 3, at 194 (“Members of the military service are meticulous in observing the courtesies which are required to be rendered on prescribed occasions or circumstances with respect to the National flag . . .”) (“During reveille and retreat, military personnel not in formation will face the flag and salute it and maintain the salute until the music ends.”); THE ARMED FORCES OFFICER, *supra* note 140, at 52 (“The hand salute is required . . . in honoring the National Anthem, or color . . .”), 55 (Salute colors during retreat and during a parade or review); COLONEL JAMES A. MOSS, OFFICER’S MANUAL 70 (1943) (“Whenever or wherever ‘The Star Spangled Banner’ is played or ‘To the Color’ (Standard) is sounded, at the first note all officers and enlisted men present in uniform, but not in formation, stand at attention, facing the music, and render the prescribed salute, except that at ‘Escort of the Color’ or at ‘retreat’ they face toward the Color or Flag.”); Lovette, *supra* note 140, at 178 (“During the ceremony of hoisting or lowering the Flag, or when the Flag is passing in parade or in a review, all persons present should face the Flag, stand at attention, and salute.”); *id.* at 332 (similar Army custom). See also AR 600-25, *supra* note 3, app. A (listing various saluting requirements); U.S. DEP’T OF ARMY, FIELD MANUAL 22-5, DRILL AND CEREMONIES apps. A, E (8 Dec. 1986) (listing flag saluting requirements) [hereinafter FM 22-5].

149. *Texas v. Johnson*, 491 U.S. 397, 408 n.4 (1989) (“Because we find that the State’s interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.”); see *Spence v. Washington*, 418 U.S. 405, 409 (1973) (noting the absence of “disorderly conduct” and any “proof of any risk of breach of the peace” as factors to consider in its First Amendment analysis).

to sustain a conviction. The Court in *Johnson* indicated that, under the circumstances, the challenged expressive conduct must be “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁵⁰

In *United States v. Cary*,¹⁵¹ the U.S. Court of Appeals for the Eighth Circuit upheld a conviction,¹⁵² under the federal FPA, of a person who burned the American flag during a protest opposing United States forces being sent to Honduras. The defendant, while “wearing a slit American flag as a poncho,” burned a second flag after the demonstration became violent.¹⁵³ Distinguishing *Texas v. Johnson*, the appellate court found that “the government’s interest in preventing breaches of the peace [was] implicated by the facts in this case” because the defendant’s conduct posed “an immediate threat that the burning would encourage the violence to continue.”¹⁵⁴ The court held that the government’s interest in precluding breaches of the peace was unrelated to the suppression of free expression and also satisfied *O’Brien*’s lenient standard of review.¹⁵⁵

In a cryptic memorandum opinion, the Supreme Court vacated the *Johnson* judgment and remanded the case to the Eighth Circuit for further consideration in light of *United States v. Eichman*.¹⁵⁶ The Eighth Circuit court then remanded the case to the district court.¹⁵⁷ In *Eichman*, however, the Court never specifically addressed the government’s interest in preventing a breach of the peace,¹⁵⁸ but it did make clear that legislation not specifically content-based may be found infirm when the government’s interest is concerned with content and “related” to its suppression,¹⁵⁹ which appeared to be the case in *Carey*.

In the wake of *O’Brien*, *Eichman*, and *Wilson*, the law in this area remains a fertile field for litigation, but it clearly appears that members of the armed forces do not enjoy the same level of First Amendment protection as their civilian contemporaries and that flag-related misconduct will not be insulated from the reach of the military justice system in many instances. The rationale for these conclusions are two-fold as noted below.

First, depending upon the circumstances, flag burning as a form of expressive conduct might not be constitutionally protected in the armed forces. The Supreme Court has held that the First Amendment does not protect “dangerous speech.”¹⁶⁰ However, the military employs a “lower standard not requiring ‘an intent to incite’ or an ‘imminent’ danger.”¹⁶¹ Rather, the military’s test “is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops.”¹⁶²

Constitutionally unprotected “speech is measured by ‘its tendency,’ not its actual effect.”¹⁶³ Given the proper circumstances, desecrating the American flag may satisfy this test and fall outside the First Amendment’s protective umbrella. For example, a uniformed member of the military who burns the flag in the presence of his unit to protest an imminent deployment into a hostile area overseas should be viewed as inhibiting the orderly accomplishment of the deployment and presenting a clear danger to the morale of the viewing soldiers who are about to be sent into harm’s way. The higher the rank of the protesting soldier, the greater the danger.

150. *Johnson*, 491 U.S. at 409. *But cf.* *United States v. Brown*, 45 M.J. 389, 395 (1996) (holding that a lower standard applied in the military); *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972) (adopting a “clear and present danger” standard).

151. 897 F.2d 917 (8th Cir. 1990).

152. Cary was convicted of “knowingly casting contempt upon a flag of the United States by publicly burning it in violation of 18 U.S.C. § 700 (1988).” *Id.* at 918.

153. *Id.* at 920.

154. *Id.* at 922.

155. *Id.* at 922-26.

156. *Cary v. United States*, 498 U.S. 288 (1990).

157. *United States v. Carey*, 920 F.2d 1422 (8th Cir. 1990) (judgment vacated and remanded to district court).

158. The Court refused to reconsider its position that “flag burning as a mode of expression” was not “like obscenity or ‘fighting words,’” in that it would “not enjoy the full protection of the First Amendment.” *Id.* at 315.

159. *United States v. Eichman*, 496 U.S. 310, 315 (1990).

160. *United States v. Brown*, 45 M.J. 389, 395 (1996) (citing *Chaplinsky v. New Hampshire*, 314 U.S. 568 (1942)).

161. *Id.* at 395.

162. *Id.* (citations omitted).

163. *United States v. Hartwig*, 39 M.J. 125, 130 (C.M.A. 1994).

Second, assuming *arguendo* that the First Amendment is triggered, prosecution of various forms of disorderly conduct involving the desecration of the American flag should survive judicial scrutiny under the appropriate circumstances. A punitive provision such as Article 116, riot or breach of peace, may fairly be characterized as only incidentally related to the regulation of such expressive conduct and subject to only the more lenient standard of review articulated in *O'Brien*. Article 116 is not directed at communicative content, but it is primarily concerned with preventing “violent or turbulent” conduct. The government’s interest would be the same with or without the occurrence of flag desecration. Congress’s power to regulate a soldier’s conduct extends to Article 116. It promotes order and discourages violent behavior, which is an important government interest. The purpose of Article 116 is facially unrelated to the suppression of flag-related free expression. Therefore, the Article’s restrictive effect on such expression is no greater than is necessary to further that governmental interest.

An unsettled issue is how far Articles 133 and 134 reach to punish flag-related misconduct. Article 133 punishes conduct unbecoming an officer and gentleman. In *Howe*, if another officer in civilian clothing had burned an American flag during the protest—as opposed to carrying a contemptuous placard—

it seems unlikely that the COMA would have had difficulty in finding the second officer guilty of violating Article 133. Existing case law arguably supports a similar result today. First, Article 133 reaches off-duty conduct.¹⁶⁴ Second, there is no requirement that such “conduct of the officer, itself, otherwise be a crime.”¹⁶⁵ Indeed, the impermissible conduct may simply violate a custom of the service.¹⁶⁶

To sustain an Article 133 conviction under the scenario above, the government would first need to prove the existence and violation of an actionable custom prohibiting burning the flag.¹⁶⁷ The accused officer must have “notice from custom, regulation or otherwise . . . that his conduct is unbecoming.”¹⁶⁸ Notice is measured by an objective standard; actual notice is not an element of proof.¹⁶⁹ Further, Article 133 requires that the act of burning the American flag dishonor or disgrace the officer personally, to such an extent that the conduct “seriously compromises the person’s standing as an officer.”¹⁷⁰ This requirement distinguishes the officer who violates a lesser custom or tradition that does not trigger the UCMJ.¹⁷¹ One factor to consider in this legal calculus is the effect the conduct has, or could have, on others who become aware of the behavior.¹⁷²

164. *United States v. Howe*, 37 C.M.R. 429, 442 (1967) (“[A]n officer on active duty is not a civilian and his off-duty activities do not fall outside the orbit of Article 133”); see also *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, pt. IV, ¶ 59c(2) (2000) [hereinafter MCM] (“[A]ction or behavior in an unofficial or private capacity”); see *Hartwig*, 39 M.J. at 128 (sexually suggestive letter to fourteen year old student); *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (“The conduct of an officer may be unbecoming even when it is in private”).

165. *United States v. Bilby*, 39 M.J. 467, 470 (C.M.A. 1994); see *United States v. Norvell*, 26 M.J. 477, 481 (C.M.A. 1988); *Howe*, 37 C.M.R. at 441; Colonel William Winthrop, *MILITARY LAW AND PRECEDENTS* 711 (2d ed. 1920 reprint) (“it need not amount to a crime”).

166. MCM, *supra* note 162, para. 59c(2) (“[T]here is a limit of tolerance based on customs of the service and military necessity below which the personal standards of an officer . . . cannot fall without seriously compromising the person’s standing as an officer This article prohibits conduct . . . which, taking all the circumstances into consideration, is thus compromising.”); see also *United States v. Lewis*, 28 M.J. 179 (C.M.A. 1989) (charging tuition to teach leadership skills to fellow officer).

167. MCM, *supra* note 162, para. 59c(2).

168. *United States v. Guaglione*, 27 M.J. 268, 272 (C.M.A. 1988).

169. *United States v. Frazier*, 34 M.J. 194, 198 (C.M.A. 1992) (“[A] reasonable military officer would have no doubt that the activities charged in this case constituted conduct unbecoming an officer.”); see *Hartwig*, 39 M.J. at 130 (“reasonable officer would know”); *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1994) (“reasonable military officer”); *United States v. Miller*, 37 M.J. 133, 138 (C.M.A. 1993) (reasonable officer standard).

170. MCM, *supra* note 162, para. 59c(2) (conduct in “an unofficial or private capacity”). Conduct that “undermines [the officer’s] leadership position is equally punishable” under Article 133, UCMJ. *Frazier*, 34 M.J. at 198.

171. See *THE OFFICER’S GUIDE*, *supra* note 3, at 206 (“The breach of some Army customs merely brands the offender as ignorant, or careless, or ill-bred; but there are others the violation of which would bring official censure or disciplinary action.”). To illustrate, a service member who jogs on post while wearing shorts patterned on the U.S. flag probably has violated a custom or tradition concerning treating the national flag with respect. Cf. Command Sergeant Major (Retired) Robert S. Rush, *NCO GUIDE* 320 (6th ed. 1999) (“The flag should never be used as part of a costume or dress”); *WIER*, *supra* note 4, at 93 (“The national flag is always accorded courtesy and reverence. It should never . . . be used as part of a costume.”); *THE OFFICER’S GUIDE*, *supra* note 3, at 195 (The national flag “should not be used as a portion of . . . a man’s athletic clothing.”). However, such conduct is unlikely to be viewed as so egregious as to seriously compromise that person’s status as an officer.

172. *United States v. Lewis*, 28 M.J. 179, 180 (1989) (stating that under the circumstances, charging a fellow officer tuition for leadership skills training “undermined not only the commander’s trust in him, but that of a fellow officer as well”); see *Miller*, 37 M.J. at 138 (“The repugnancy of this type of conduct was demonstrated by Mrs. Russ’s (a civilian apartment complex manager) reaction”); cf. *Hartwig*, 39 M.J. at 130 (noting the effect on the victim of sexually suggestive letter); *United States v. Adames*, 21 M.J. 465 (C.M.A. 1986) (holding that fraternization by officers at training installation with female trainees “diminishes the respect with which they are viewed by the trainees—a respect essential for inculcating discipline” and the accused’s “tactics he employed in seeking their companionship would—and did—directly tend to lower him in the esteem of the various female trainees”); *Winthrop*, *supra* note 163, at 716 n.44 (“[P]usillanimously submitting to public insult or chastisement by inferiors or others, without taking any measure to vindicate themselves.”).

To be actionable under Article 133, the custom must attain “the force of law.”¹⁷³ An actionable custom is typically one that is longstanding and commonly observed.¹⁷⁴ It is insufficient to serve as the basis of a charge if the custom is merely “a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence.”¹⁷⁵ Many customs are memorialized in service regulations.¹⁷⁶ For example, long-established military custom requires officers to respect the national colors.¹⁷⁷ Indeed, one military author characterized the act of “honoring the nation’s flag” as an old custom, one “originating in antiquity [and] observed in our Army.”¹⁷⁸ Further, as a matter of longstanding custom, members of the armed forces have defended the flag from capture or harm.¹⁷⁹

An active duty officer that publicly burns the national flag as an act of protest or other form of expression should be seen as both personally and professionally discredited within the military. The conduct violates longstanding military customs requiring military personnel to safeguard and render respect to the national colors. Indeed, such conduct by an officer would be completely alien to established military culture and expected standards of behavior and decorum. Further, given the unique role the flag plays within the military,¹⁸⁰ and the accentuated emotional attachment to it by current and former members of the armed forces,¹⁸¹ such conduct invariably will have a profound impact on other members of the armed forces who witness or become aware of the behavior.

173. See MCM, *supra* note 162, para. 60c(2)(b) (Art. 134); *United States v. Smart*, 12 C.M.R. 826 (A.B.R. 1953) (discussing Article 134). There appears to be no substantive difference between the customs referenced in Articles 133 and 134. Cf. *Parker v. Levy*, 417 U.S. 733, 746-47 (1974) (“Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134.”), 754 (“But even though sizable areas of uncertainty as to the coverage of [Articles 133 and 134] may remain . . . further content may be supplied even in these areas by less formalized custom and usage.”).

174. See MCM, *supra* note 162, para. 60c(2)(b).

Before a usage, combining numerous repetitions of acts extending over a considerable length of time may be denominated a custom, it is essential that it be certain, continuous, uniform and notorious . . . [I]t must be generally known and must be proven by evidence so clear, uncontradictory and distinct as to leave no doubt as to its nature or character.

Smart, 12 C.M.R. at 828. See also Lovette, *supra* note 140, at 334 (“To render [an Army] custom valid and to qualify it for incorporation in this unwritten law, the following qualities are considered requisite: (1) Habitual or long-established custom; (2) Continuance without interruption; (3) Acceptance without dispute; (4) Reasonableness; (5) Exactitude; (6) Compulsory compliance; (7) Consistency with other customs.”); Winthrop, *supra* note 163, at 423 (“As to what constitutes a usage or custom in law . . . it must consist of a uniform known practice of long standing, which is also certain and reasonable and is not in conflict with existing statute or constitutional provisions.”); cf. Lieutenant Colonel (Retired) Lawrence P. Crocker, ARMY OFFICER’S GUIDE 92 (45th ed. 1990) (“A custom is an established usage.”).

175. See MCM, *supra* note 162, para. 60c(2)(b).

176. See *id.*; see, e.g., AR 600-25, *supra* note 3 (saluting requirements); FM 22-5, *supra* note 146 (same).

177. See *supra* note 146; cf. WIER, *supra* note 4, at 93 (“The national flag is always accorded courtesy and reverence.”).

178. Crocker, *supra* note 172, at 93.

179. *Texas v. Wilson*, 33 M.J. 797, 798 (A.C.M.R. 1991) (including an MP on flag detail who had duty to “safeguard and protect” the flag); Lovette, *supra* note 140, at 172 (“[T]he Service has been educated and trained ‘under the flag,’ . . . and as in the past, so in the future, the service will consider it the highest and most solemn duty to defend the flag against all enemies.”); *id.* at 177 (“Do not permit disrespect to be shown to the Flag of the United States of America.”); see *Clinton Honors Ex-President, Ex-Slave*, WASH. POST, Jan. 17, 2000, at 10 (Posthumous Medal of Honor awarded to Civil War soldier who “saved his units’s colors after the flag-bearer was killed in a bloody charge.”).

180. For example, the flag flies over all military installations, is worn on the uniforms of military personnel and flown on Navy vessels going into harm’s way, is the subject of numerous ceremonial displays of respect, has historically served as a motivational symbol to rally troops in battle (for example, Iwo Jima) and drapes the coffins of our honored dead. See *supra* notes 3-4, 6, 8, 146 and accompanying text; see also TOM BROKAW, THE GREATEST GENERATION 336 (1998) (stating that Mark Hatfield, a Naval officer at Iwo Jima and later a Senator from Oregon, recalled the raising of the American flag on Iwo Jima: “One of the guys said, Hey Look! At the top of the rock—Suribachi—we saw the American flag being raised. It was a thrilling moment. When we saw that flag go up it really did give us a sense of victory, even though we still fought on for some time.”).

181. See, e.g., Bill Gertel & Rowan Scarborough, *Inside The Ring: USS Cole*, WASH. TIMES, Oct. 20, 2000, at A9 (noting that a Navy pilot flying relief mission to damaged warship has emotional reaction to seeing U.S. Flag: “[T]he first thing that jumped out at me [was] the Stars and Stripes flying. I can’t tell you how that made me feel . . . even in this God-forsaken hell hole our flag was more beautiful than words can describe.”); Specialist Joseph L. Campbell, *Flag Burning: Political Disagreement—Or Crime?*, ARMY TIMES, Sept. 21, 1998, at 3 (“Burning the flag is extremely offensive to those of us in uniform . . .” but posits that “[t]rampling on freedom while protecting the symbol of that freedom is hollow patriotism.”); cf. Petula Dvorak, *Salute Offered to Unknown Rescuer of Flags*, WASH. POST, Jan. 23, 2001, at B3 (Unknown “20-year veteran of the Coast Guard” rescued two U.S. flags from protestors during President Bush’s inaugural parade, telling police “he was ‘outraged’ that the flags were taken down . . .”); Martin Van Der Werf, *Freedom Rings Loudly in New Protest on Flag Show*, ARIZ. REPUBLIC, Apr. 29, 1996, at B1 (quoting Senator Dole: “As one who fought for our flag, I feel personally offended when I see it denigrated.”); *No Charges for Using Flag as Rag*, ARIZ. REPUBLIC, Sept. 24, 1995, at A15 (stating that an Army veteran angry over the failure of local authorities to prosecute a teenager who used an American flag to clean his car’s dipstick pointed out: “You go into battle behind the American flag . . .”); Thomas Begay, *Protecting the Flag of All Americans*, ARIZ. REPUBLIC, May 28, 1995, at E3 (noting that former Navajo Code Talkers from World War II supported a constitutional amendment and stated, “too many good men and women, over too many years, have returned to this country in flag draped coffins, having given their all in its defense, to be ignored.”).

The particularly offensive nature of such conduct would not, by itself, sustain a conviction against a First Amendment challenge in either the civilian or military sector.¹⁸² The same cannot be said with certainty in the military context when the circumstances under which the conduct occurs violates long-standing military customs and seriously undermines the officer's ability to function as a military leader. An Article 133 charge should withstand First Amendment scrutiny where the accused officer's conduct discredits him within the officer corps and in relationships with enlisted personnel, thereby undermining his position within both groups.¹⁸³

Additionally, flag-related misconduct may be the subject of prosecution under Article 134, the general article. This punitive provision punishes, in part, "disorders and neglects to the prejudice of good order and discipline in the armed forces" (Clause 1) and "conduct of a nature to bring discredit upon the armed forces" (Clause 2).¹⁸⁴ As with Article 133, before a member of the military may be prosecuted under this article, "the servicemember must be on 'fair notice' that his conduct was punishable under the Uniform Code."¹⁸⁵ To some extent such notice is provided by *Army Regulation 600-20, Army Command Policy*, which states: "[I]ntentional disrespect to the National Colors or National Anthem is conduct prejudicial to good order and discipline and discredits the military service."¹⁸⁶ Violations of a custom of the service may also serve as the basis

for an Article 134 charge, under Clause 1's "prejudicial to good order and discipline" provision.¹⁸⁷

One legal commentator has opined that a soldier, in civilian garb, who publicly burns the American flag at the entrance to a military installation violates Article 134 because such conduct "strikes at the very heart of good order and discipline."¹⁸⁸ The commentator opined that an Article 134 charge should survive because of the traditional deference afforded "the military's professional judgment concerning the need for regulation," and the likely disruption of such conduct within the ranks. Moreover, the charge should survive on the same rationale as Article 134 convictions for similar types of misconduct. "[I]f the military may suppress dissent and disloyal statements communicated by the written or spoken word, as it did in *Levy, Priest*, and other cases, then it obviously may suppress dissent and disloyal activity communicated through expressive conduct such as burning the flag."¹⁸⁹

Within a year of that Article being published, however, the ACMR in *Wilson* failed to embrace the commentator's position. Instead, the court opined that, with respect to a flag burning under a similar factual scenario, the issue remained unresolved and that such challenged conduct "might be protected."¹⁹⁰ Significantly, the court's opinion in *Wilson* seemed to suggest that the same soldier's conduct could be the subject of punitive action if committed "while on duty and in uniform."¹⁹¹ Further,

182. *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Spence v. Washington*, 418 U.S. 405, 412 (1973); *Wilson*, 33 M.J. at 799 ("Such conduct (desecration of the flag) cannot be prohibited simply because society may find the idea embodied in the symbolic act offensive or disagreeable.").

183. *Cf. Parker v. Levy*, 417 U.S. 733, 759 (1974) ("Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does it is constitutionally unprotected.") (citing *United States v. Priest*, 45 C.M.R. 338, 344 (C.M.A. 1972)); Potter, *supra* note 101, at 26 (Art. 134 context).

184. MCM, *supra* note 162, para. 60c(1).

185. *United States v. Bivens*, 49 M.J. 328, 330 (1998) (citing *Parker*, 417 U.S. at 756 (1974)).

186. U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 4.3(b) (15 July 1999).

187. MCM, *supra* note 162, para. 60(c)(2)(b).

188. Potter, *supra* note 101, at 26. However, the Judge Advocate General commentator also noted the Army appellate court's hesitancy in letting an Article 134 conviction for flag desecration stand in *Hadlick*. Although the court found the First Amendment was not implicated and despite the accused's admission that his conduct was service discrediting and of a nature to be prejudicial to good order and discipline, the ACMR determined that the providence inquiry was infirm "because the inquiry failed to indicate that Hadlick's conduct was 'observed by anyone in the armed forces, was in fact a deliberate act of desecration or was likely to be considered by anyone to be a deliberate act of desecration or service discrediting.'" *Id.* at 24 n.27. Presumably, based on the limited discussion of the issue available in *Hadlick*, the ACMR would have agreed with Captain Potter, under his scenario, that flag desecration was actionable under Article 134 because the accused was observed by others in the armed forces or the act of desecration was deliberate. *But cf. United States v. Wilson*, 33 M.J. 797, 798 (A.C.M.R. 1991) (unresolved issue); Potter, *supra* note 101, at 24 ("question still left unanswered").

189. Potter, *supra* note 101, at 26.

190. *Wilson*, 33 M.J. at 798. Even if the courts ultimately determine that such conduct by enlisted personnel does not violate Article 134, the same conduct by officers may still be actionable given that officers have traditionally been held to a higher standard of conduct. *United States v. Moore*, 38 M.J. 490, 493 (C.M.A. 1993) ("It has long been recognized that a 'higher code termed honor' holds military officers 'to stricter accountability.'"); *cf. United States v. Court*, 24 M.J. 11, 17 n.2 (C.M.A. 1987) (Cox, J, concurring in part and dissenting in part) ("[T]he citizens of this great Nation have a right to expect that persons who serve as commissioned officers within the armed forces will conduct themselves in accordance with the very highest standards of behavior and honor."). Further, the effect on the military may be more profound when committed by an officer. Congress's decision to limit Article 88 to officers arguably reflects this notion. *See Major Michael A. Brown, Must the Soldier Be a Silent Member of Our Society?*, 43 MIL. L. REV. 71, 101 (1969) ("[I]t is probable that the drafters of the Code realized that the detrimental effect upon morale and discipline because of an enlisted man's contemptuous reference to high-level government officials would be much less than that of an officer, whom the enlisted men and subordinate officers have been taught to respect and obey.").

the court did not directly contradict—nor even mention—the *Levy/Priest/Brown* line of cases.

The ACMR left undisturbed the legal proposition that conduct remains punishable under the UCMJ if it progresses beyond mere protest to a call for active opposition to U.S. policies or to an action that “interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission or morale of the troops.”¹⁹² Accordingly, an act of flag desecration by a service member as an expression of disagreement with, or protest of, some particular U.S. policy may still be constitutionally protected, so long as the protester invokes minimal connections with the military, and the activity does not rise to a higher level of misconduct, such as an intentional effort to promote disloyalty among the force or an active call for civil disobedience.¹⁹³

Clearly, the parameters for a permissible prosecution of flag-related misconduct under Article 134, Clause 1, remain unsettled. The weakest grounds for prosecution are when the accused’s only connection with the armed forces is his military status; that is, when he is off duty, off post, out of uniform, desecrating a privately owned flag, and unobserved by others in the military or unknown by observers to be a member of the armed forces.¹⁹⁴ A prosecution under such circumstances seems unlikely to survive a First Amendment challenge. Conversely, as the number of factual links with the military increases, so does the likelihood that the Article 134, Clause 1 charge will survive judicial scrutiny.

Normally, a prosecution under Article 134, Clause 2’s service-discrediting provision will not sustain a First Amendment challenge. This portion of Article 134 is concerned primarily with the effect the accused’s conduct has on the military’s rep-

utation within the civilian sector.¹⁹⁵ The Supreme Court, however, made it clear that government regulation of flag-related misconduct that triggers First Amendment protections cannot be sustained merely because others find the conduct offensive or disagreeable.¹⁹⁶ This is the fundamental underpinning to a charge under Clause 2. Similarly, this legal proposition should extend to, and defeat the argument that prosecution under Clause 2 is appropriate when the reputation of the service is lowered in the public’s eye because flag-related misconduct casts doubt on the loyalty and subservience to civilian control of the military. This argument merely recasts the subjective reaction of the public from “offensive or disagreeable” to “disloyal or nonsubservient.”

Conclusion

Flag-related misconduct will remain an emotional and divisive issue in this country and any efforts to control such conduct will come under First Amendment scrutiny. Conduct that is acceptable within the civilian sector may, however, still be the legitimate object of prosecution within the military, and this principle applies with no less vigor to flag-related misconduct. The unique needs and mission of the armed forces, coupled with the courts’ traditional deference to professional military judgment in this area, greatly expands the parameters of permissible governmental regulation of this form of expressive conduct. While the military justice system enjoys greater latitude than the civilian criminal systems, the exact parameters of UCMJ action are unknown, and the area remains a fertile ground for litigation. This article has endeavored to review the applicable case law, to identify issues that may arise in a flag-misconduct court-martial, and to provide some definition to the uncertain limitations of the law.

191. *Id.* at 800.

192. *United States v. Brown*, 45 M.J. 389, 395 (1996); *see United States v. Priest*, 45 C.M.R. 338, 344 (1972); *see also Parker v. Levy*, 417 U.S. 733, 753 (1974); *United States v. Harvey*, 42 C.M.R. 141, 145 (1970).

193. *See Parker*, 417 U.S. at 753 (Article 134 “applies only to calls for active opposition to the military policy of the United States . . . and does not reach all [d]isagreement with, or objection to, a policy of the Government.”). The *MCM* includes an Article 134 offense for “disloyal statements,” which contains a *mens rea* element distinguishing a disloyal statement from one merely designed to object to a U.S. policy: “That the statement was made with the intent to promote disloyalty or disaffection toward the United States by any member of the armed forces or to interfere with or impair the loyalty to the United States or good order and discipline of any member of the armed forces” *MCM*, *supra* note 162, para. 72(b)(4).

194. *See Gross*, *supra* note 101, at 26 (“Given the facts in *Hadlick* . . . [i]t is difficult to imagine how spitting on the flag in a civilian latrine facility would undermine discipline in the Army.”).

195. *MCM*, *supra* note 162, para. 60(c)(3) (“This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem.”); DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 78, § 2-6(B) (3rd ed. 1992 and 1995 Supp.) (“Key here, is the fact that certain acts may lower the civilian community’s esteem or may bring the armed forces into disrepute.”).

196. *See supra* note 180; *see also Sons of the Confederate Veterans v. Glendening*, 954 F. Supp. 1099, 1104 (D. Md. 1997) (Confederate flag).