NOTE

THE FIRST AMENDMENT AND MILITARY JUSTICE: THREATS TO POLITICAL NEUTRALITY

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INTRODUCTION

In his order in *U.S. Navy SEALs 1-26 v. Biden*, Judge Reed O'Connor opened by stating that "[o]ur nation asks the men and women in our military to serve, suffer, and sacrifice. But we do not ask them to lay aside their citizenry and give up the very rights they have sworn to protect."[1] He would go on to grant injunctive relief, enjoining the Navy's enforcement of COVID-19 vaccine mandates against thirty-five Navy Special Warfare servicemembers.[2] The unequivocal truth of Judge O'Connor's first assertion is matched only by the falsity of his second. While servicemembers do not surrender all constitutional protections when they decide to serve, they do in fact voluntarily relinquish the full breadth of the constitutional rights enjoyed by their civilian counterparts.

As a textual matter, this relinquishment is most clear in the context of the Fifth Amendment, explicitly excepting grand jury

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1 U.S. Navy SEALs 1–26 v. Biden, 578 F. Supp. 3d 822, 826 (N.D. Tex. 2022), *stay denied*, 27 F.4th 336 (5th Cir. 2022), *and stay granted in part*, 142 S. Ct. 1301 (2022).

2 *Id.* at 840.

protections for "cases arising in the land or naval forces."[3] Less clear in the constitutional text—but equally clear as a matter of precedent and practice—servicemembers are not provided the right to a jury trial in court-martial proceedings.[4] At base, justifying military distinctions across a variety of constitutional rights has come via a recognition that

> the military is, by necessity, a specialized society separate from civilian society . . . . The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise."[5]

These constitutional divergences are further backed by historical practice dating back to the Second Continental Congress,[6] and Article I's directive that "Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval forces. . . ."[7]

This backdrop illustrates a throughline that runs throughout, and creates tension within, the Military Justice system. On the one hand, there is a need to protect the individual rights of servicemembers. This concern is driven (in part) by the intuition reflected in Judge O'Connor's opening sentences—those sworn to protect constitutional liberties should surely enjoy the benefits of that which they protect.[8] On the other, individual rights protections must yield, to some degree, to

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3 U.S. CONST. amend. V. While servicemembers do not enjoy the right to a grand jury, Article 32, Uniform Code of Military Justice (UCMJ) provides a rough equivalent. "Except as provided in subparagraph (B), a preliminary hearing shall be held before referral of charges and specifications for trial by general court-martial." UCMJ art. 32, 10 U.S.C. § 832(a)(1)(A) (2018).

4 *See Ex parte* Milligan, 71 U.S. 2, 123 (1866) ("[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.").

5 Parker v. Levy, 417 U.S. 733, 743 (1974) (quoting United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 17 (1955)).

6 Major Norman Thompson, *Before We Had Wings*, 26 REPORTER 55, 56 (1999) (discussing the history of the British Articles of War and their nearly wholesale adoption for the regulation of the Continental Army in 1775).

7 U.S. CONST. art. 1, § 8, cl. 14.

8 Judge O'Connor's concern is shared by many across the ideological spectrum. *See, e.g.*, Emily Reuter, *Second Class Citizen Soldiers: A Proposal for Greater First Amendment Protections for America's Military Personnel*, 16 WM. & MARY BILL RTS. J. 315, 317 (2007) (arguing that "[a]s the defender of a free democratic society, the military should place more emphasis on protecting the First Amendment rights of its members"); *see also* Richard W. Aldrich, *Article 88 of the Uniform Code of Military Justice: A Military Muzzle or Just a Restraint on Military Muscle?*, 33 UCLA L. REV. 1189, 1189 (1985) ("It is ironic that the men and women who defend the constitutional rights enjoyed by Americans are themselves deprived of some of those rights."). In the First Amendment context, intense public scrutiny has come from LGBTQ advocates (criticizing "Don't Ask, Don't Tell") and evangelical Christians alike (criticizing prayer restrictions at military functions). Reuter, *supra*, at 316.

the needs of military life and military exigency.[9] Of course, "to some degree" is the space in which debate and maneuverability resides. But while discretionary space certainly exists (resting first and foremost with Congress), from World War I onward reform efforts have moved decidedly toward greater individual rights protections.[10]

Generally, and given that decided trend, staking out a position arguing for limitations on the constitutional rights of American citizens is not a likely landing spot—nor is it a drop zone into which I thought I would ever fall.[11] Moreover, the suggestion that servicemembers' constitutional protections (those they work tirelessly to protect) should be curtailed may seem like a perversion of the normal American course. But in the context of freedom of speech and expression,[12] that is precisely what this Note seeks to accomplish. This is not an argument for *increased* curtailment. Rather, in the face of frequent criticism, it offers a defense of a doctrine as currently constituted, and a call for heightened awareness and enforcement given modern challenges.

By way of comparison, before turning to its application to Military Justice, Part I provides an overview of freedom of speech jurisprudence in the civilian context. Part II delineates the constitutional tradition of a politically neutral military. In a world in which these lines are increasingly blurred, this foundational principle—inherent in a military speech doctrine that is grounded in text, history, structure, and precedent—bears reemphasis in the modern First Amendment context. Part III closes with a recent case study, representing an instance

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9 *See Parker*, 417 U.S. at 787 (Stewart, J., dissenting) ("A number of serviceman's individual rights must necessarily be subordinated to the overriding military mission, and I have no doubt that the military may constitutionally prohibit conduct that is quite permissible in civilian life . . . .").

10 While the full history of Military Justice reform is outside the scope of this Note, the most significant overhaul took place when the UCMJ was signed into law in 1951. "[S]een as a compromise between proponents of individual rights and those who wanted to retain the commander as a source of virtually unlimited control," in passing the UCMJ Congress addressed the "delicate task of balancing the rights of servicemen against the needs of the military." Victor Hansen, *Changes in Modern Military Codes and the Role of the Military Commander: What Should the United States Learn From This Revolution?*, 16 TUL. J. INT'L & COMP. L. 419, 427 (2008); Solorio v. United States, 483 U.S. 435, 447 (1987).

11 Note too that this trend continued with the passage of National Defense Authorization Act (NDAA) for Fiscal year 2022. Most notably, in the interest of protecting the rights of servicemembers, these new reforms create an independent Office of the Special Trial Counsel for each service. How these changes will play out on the ground remains to be seen. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117–81, 135 Stat. 1541 (2021).

12 In the interest of brevity, "expression" is impliedly included in "freedom of speech" moving forward, though the important distinctions are explained more fully in Section I.A.

in which a servicemember was exposed to penalties for conduct and speech that would be fully protected had he been a civilian. This Part demonstrates the modern (pragmatic) need for Uniform Code of Military Justice (UCMJ) speech restrictions, backed by a doctrine already well-grounded in constitutional principles. The Note concludes with a nod toward the many vitally important legal protections that servicemembers *do* enjoy, but it calls for military leadership to police the boundaries of UCMJ violations given modern challenges.[13] Freedom of speech rightly occupies a cherished place in any democracy; in the U.S. it represents a "fixed star in our constitutional constellation."[14] But as throughout history, in modern Military Justice that star does—and should—lose some of its shine.

I. FREEDOM OF SPEECH AND EXPRESSION: PROTECTIONS AND LIMITATIONS

A. Overarching Doctrine and the Civilian Approach

The full scope of freedom of speech jurisprudence (as applied to civilians) is outside the scope of this Note. However, this Section will outline the contours of current doctrine insofar as necessary to frame speech-based restrictions in the UCMJ and the broader Military Justice approach. Because "political speech protection forms the heart of the First Amendment"[15] and is most relevant for the purposes of this Note, this Section will proceed through a free speech framework based primarily on the facts laid out in *Texas v. Johnson*.[16] There, in the midst of a political demonstration protesting the Republican National Convention, Gregory Lee Johnson publicly burned an American flag and was convicted under Texas law.[17] While Johnson was engaged in conduct (as opposed to speech as speech),[18] the Court ultimately reversed his conviction on the ground that Texas's "desecration of a venerated object" statute, as applied, was unconstitutional under the First Amendment.[19]

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13 This Note is primarily focused on Article 88, UCMJ, 10 U.S.C. § 888 (2018) (contempt toward officials); Article 133, UCMJ, 10 U.S.C. § 933 (2018) (conduct unbecoming an officer); and Article 134, UCMJ, 10 U.S.C. § 934 (2018) (general article).

14 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

15 Lieutenant Colonel Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 96 (2013).

16 491 U.S. 397 (1989).

17 *Id.* at 399–400.

18 Note too that the "government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word." *Id.* at 406.

19 *Id.* at 420.

Proceeding through a given claim, the Court first asks whether the speech (here, conduct as speech) in question constitutes First Amendment activity. In clearing this initial threshold, "expressive conduct" is that in which "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[20] In *Johnson*, the flag burning in question satisfied this two-part inquiry without challenge.[21] But First Amendment activity does not equal First Amendment protection. While the scope of the right is broader in the civilian context, it too is subject to qualification, with categories of unprotected speech ranging from obscenity to child pornography.[22]

Clearing these initial hurdles—protected expressive conduct—Johnson has a case grounded in freedom of speech. Only now entering the fray (and at its most general level at that), the doctrine gets considerably more complicated. The analysis then proceeds to ask whether the government's regulation is related to the suppression of free expression.[23] Put another way, whether the regulation is content-based or content-neutral.[24] If the former, "exacting scrutiny" is required, and a strict scrutiny analysis follows.[25] If the latter, "the less stringent standard . . . announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls."[26] In making this determination the Court will look past whether the expression comes in the form of speech or conduct, considering whether the government has

20 *Id.* at 404 (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

21 For a fuller picture of what constitutes First Amendment activity in the context of expressive conduct, see Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (regulation prohibiting wearing armbands to school is an unconstitutional denial of students' right of expression of opinion); Brown v. Louisiana, 383 U.S. 131 (1966) (First Amendment encompasses non-verbal expression when Blacks "sit-in" an unconstitutionally segregated library); Schacht v. United States, 398 U.S. 58 (1970) (criminal punishment for wearing a military uniform in a street skit, while protesting American involvement in Vietnam, is an unconstitutional restraint on the right of free speech). *See generally Johnson*, 491 U.S. at 404 (distilling the cases previously discussed while expanding on the two-part test for expressive conduct).

22 *See* United States v. Alvarez, 567 U.S. 709, 717–18 (2012) (plurality opinion) (compiling a list of "categories where the law allows content-based regulation of speech" and citing to their associated caselaw. These include defamation, fraud, incitement, fighting words, true threats, and speech presenting some grave and imminent threats that the government has the power to prevent).

23 *Johnson*, 491 U.S. at 403.

24 *See Alvarez*, 567 U.S. at 715 (plurality opinion) (holding that the Stolen Valor Act constituted a content-based restriction on free speech).

25 *Id.*

26 *Johnson*, 491 U.S. at 403; *see* United States v. O'Brien, 391 U.S. 367, 377 (1968).

asserted an interest that "is unrelated to the suppression of expression."[27]

Texas's asserted interests in *Johnson*—preventing breaches of the peace and preserving the flag as a symbol—yielded a finding that "Johnson's political expression was restricted because of the *content* of the message he conveyed."[28] As a result, the content-based regulation was subject to the "most exacting scrutiny,"[29] a burden the government could not meet. More clearly articulated in *United States v. Alvarez*,[30] this "strict scrutiny" approach requires the government to demonstrate that it has a compelling interest in the restriction, that it is "'actually necessary' to achieve its interest," [31] and that it is the "least restrictive means among available, effective alternatives."[32] In short, the exacting scrutiny required in the context of content-based regulation creates a high bar for the government to clear,[33] and affords a wide berth to a "bedrock principle" of the First Amendment. "[T]he government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[34]

The Court has, on occasion, found restrictive regulations to be "content-neutral,"[35] triggering the *O'Brien* test and an "intermediate level of First Amendment scrutiny."[36] Expressed differently, the "Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[37] On *O'Brien*'s

27 *Johnson*, 491 U.S. at 407.

28 *Id.* at 412 (emphasis added).

29 *Id.* (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

30 567 U.S. 709 (2012) (plurality opinion).

31 *Id.* at 725, 724–29 (quoting Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011) (providing a fact-based analysis in the context of false statements, and ultimately concluding that the government failed to meet its burden under the exacting scrutiny required for content-based regulations)).

32 *Id.* at 729 (quoting Ashcroft v. Am. C.L. Union, 542 U.S. 656, 666 (2004)).

33 Justice Breyer, concurring in *Alvarez*, would extend this a step further, contending that this "strict categorical analysis" yields "near-automatic condemnation (as 'strict scrutiny' implies)." *Id.* at 730–31 (Breyer, J., concurring).

34 *Johnson*, 491 U.S. at 414. For an example of this "bedrock principle" adhered to in the context of the Ku Klux Klan and hate speech, see Brandenburg v. Ohio, 395 U.S. 444, 448 (1969).

35 In the interest of remaining consistent with the broad framework delineated in *Johnson*, "content-neutral" regulation (in *Johnson* terms) is "not related to expression." *Johnson*, 491 U.S. at 403.

36 Barnes v. Glen Theatre, Inc., 501 U.S. 560, 579 (Scalia, J., concurring) (characterizing the plurality's approach as applying an "intermediate level" of scrutiny pursuant to *O'Brien*); *see supra* note 26 and accompanying text.

37 United States v. O'Brien, 391 U.S. 367, 376 (1968).

facts, the burning of a selective service registration certificate was "in no respect inevitably or necessarily expressive [conduct]."[38] Likewise, in *Barnes v. Glen Theatre, Inc.*,[39] the Court applied the "less stringent standard"[40] and four-part test announced in *O'Brien*, holding that an Indiana statute regulating totally nude dancing entertainment was justified "despite its incidental limitations on some expressive activity."[41]

Generally, despite certain exempted categories of unprotected speech,[42] and *O'Brien*'s "intermediate level" of scrutiny, the framework above represents the Court's expansive view of freedom of speech protections in the civilian context. While the same cannot be said of the rights generally available to servicemembers, both lines of precedent have moved toward greater individual protections over time. From the "clear and present danger" test and the "marketplace of ideas" concept—articulated as the Court upheld convictions under the Espionage and Sedition Acts—the doctrine has moved a great deal.[43] Today, "ever more speech is protected [and] government regulation of speech has become ever harder to justify."[44] Faced with criticism, First Amendment restrictions under the UCMJ (and associated caselaw) may be susceptible to a similar shift, but with the potential for different and more troubling consequences.

B. A "Separate Society"

"This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also

38 *Id.* at 385.

39 501 U.S. 560 (1991).

40 *Johnson*, 491 U.S. at 403.

41 *Barnes*, 501 U.S. at 567 (plurality opinion). As announced in *O'Brien*, a "government regulation is sufficiently 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." *O'Brien*, 391 U.S. at 377.

42 *See supra* note 22 and accompanying text.

43 *See* Eric A. Haskell, *The Free Speech Century*, 101 MASS. L. REV. 59, 59–60 (2020) (reviewing THE FREE SPEECH CENTURY (Lee C. Bollinger & Geoffrey R. Stone eds. 2019)); Schenck v. United States, 249 U.S. 47, 52 (1919) ("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."); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing that "the best test of truth is the power of the thought to get itself accepted in the competition of the market").

44 Haskell, *supra* note 43, at 64 (articulating a concern that, in today's jurisprudential environment, the "law's role in vouchsafing an environment that ensures . . . freedom of speech is [susceptible to being] overwhelmed by our postmodern times").

recognized that the military has, again by necessity, developed laws and traditions of its own during its long history."[45]

No matter what level of scrutiny is appropriate, the doctrinal framework above offers room for the government to justify free speech restrictions through a sufficient showing that the regulation is narrowly tailored to serve a compelling state interest. The doctrine can present a near insurmountable obstacle to free speech restrictions (deliberately so); however, in the Military Justice context the balance shifts. Congressional regulation via the UCMJ is afforded far more latitude when faced with the competing interests of servicemembers' individual rights. Framed differently, restrictive regulations could be seen as per se more compelling when Congress is "mak[ing] Rules for the Government and Regulation of the land and naval Forces" before highly deferential civilian courts.[46] "No one could deny that . . . the Government's interest in raising and supporting armies is an 'important governmental interest.'"[47]

Several provisions of the UCMJ have the capacity to impose burdens on free speech protections, directly or indirectly.[48] This Section will focus on three, with most of the attention concentrating on the third: articles 88, 133, and 134. All three have proved controversial, but Article 88 is unique among them. Though limited to commissioned officers and infrequently invoked, it is—by design—intended to directly punish speech.[49] Although clearly antithetical to civilian

45 Parker v. Levy, 417 U.S. 733, 743 (1974).

46 U.S. CONST. art. I, § 8, cl. 14; *see* Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("Nor can it be denied that the imposing number of cases from this Court previously cited suggest that judicial deference to such congressional exercise of authority is at its apogee when legislative action under the congressional authority to . . . make rules and regulations for [military] governance is challenged."); *see also* Austin v. U.S. Navy SEALs 1–26, 142 S. Ct. 1301, 1302 (2022) ("As the Court has long emphasized . . . the 'complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments.'" (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973))).

47 *Rostker*, 453 U.S. at 70 (quoting Craig v. Boren, 429 U.S. 190 (1976)).

48 *See, e.g.*, Article 88, UCMJ, 10 U.S.C. § 888 (contempt toward officials); Article 89, UCMJ, 10 U.S.C. § 889 (disrespect toward superior commissioned officer); Article 117, UCMJ, 10 U.S.C. § 917 (wrongful broadcast or distribution of intimate visual images); Article 133, UCMJ, 10 U.S.C. § 933 (conduct unbecoming an officer); Article 134, UCMJ, 10 U.S.C. § 934 (general article).

49 Article 88, UCMJ, 10 U.S.C. § 888 ("Any commissioned officer who uses contemptuous words against [certain officials or legislatures] shall be punished as a court-martial may direct."); *see* Aldrich, *supra* note 8, at 1218 (arguing for the elimination of Article 88 as an unjustified limitation on free speech). Note that Aldrich's article, published in 1986, relies in part on the "service-connected" test announced in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which was overruled by *Solorio v. United States*, 483 U.S. 435 (1987), a year after the article's publication. *Id.* at 1219. His argument for a heightened level of scrutiny, based

free speech doctrine, in *United States v. Howe*,[50] the Court of Military Appeals held that the provision was consistent with the First Amendment.[51] The court grounded its holding in historical text dating back to the British Articles of War, the historical tradition of civilian control over the military, and Justice Holmes's limiting principles announced in the midst of World War I.[52] Ultimately, despite protesting the Vietnam War *off duty* and in *civilian clothes*, Howe nevertheless fell within Article 88's ambit.

In a nod to potential deterrent effects, the court further suggested that to grant an exception in this case would "inevitably inure to the advantage of the recalcitrant professional military man by providing an entering wedge for incipient mutiny and sedition."[53] But on these facts, with deterrence as a stated goal, it appears that very few individuals knew that Howe was a commissioned officer when he was protesting.[54] Yet, his conviction met the elements of Article 88 under the UCMJ and ultimately survived First Amendment scrutiny.[55]

Article 88 presents the most facially obvious and significant speech restriction in the UCMJ. But given its limited reach and application, Articles 133 and 134 offer greater insight into free speech doctrine in the Military Justice system. Due to their seemingly limitless ability to criminalize conduct of any kind, both are likely to shock the sensibilities of someone legally trained but unfamiliar with military law.[56] But

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on Article 88's *direct* restriction on speech and consistent with the framework outlined in Section I.A., could still be made today.

50 37 C.M.R. 429 (C.M.A. 1967). The Court of Military Appeals (CMA) is the predecessor to the Court of Appeals for the Armed Forces (CAAF). *Howe* is the only case ever to be tried under Article 88. Aldrich, *supra* note 8, at 1199. For an analysis of recent charges brought under this provision, see *infra* Part III.

51 *Howe*, 37 C.M.R. at 438 ("That Article 88 . . . does not violate the First Amendment is clear." (citation omitted)).

52 *Id.* at 436–39; *see supra* note 43 and accompanying text.

53 *Howe*, 37 C.M.R. at 439. During the protest, Howe was marching on a picket line, *id.* at 433, expressive conduct expressly acknowledged as protected in the civilian context under the First Amendment in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968).

54 Rapid and wide-ranging communication technology available today would enable similar, deterrence-based rationales to carry additional weight.

55 The Manual for Courts-Martial (MCM) clarifies that, under Article 88, UCMJ, 10 U.S.C. § 888, "[i]t is immaterial whether the words are used against the official in an official or private capacity." MANUAL FOR COURTS-MARTIAL art. 88, at IV–21 (2019).

56 *See* Weber, *supra* note 15, at 108 (quoting Edward J. Imwinkelried & Donald N. Zillman, *An Evolution in the First Amendment: Overbreadth Analysis and Free Speech Within the Military Community*, 54 TEX. L. REV. 42, 43 (1975) ("Articles 133 and 134—the 'general articles' . . . have been criticized for their vagueness and potential of abuse.") (footnote omitted)). The statutory text of Article 133, UCMJ, 10 U.S.C. § 933 provides that "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer

both survived void-for-vagueness challenges in *Parker v. Levy* because, in the Court's view, the UCMJ constitutes a separate body of military law, military tribunals have (in part) narrowed their scope, and the Manual for Courts-Martial (MCM) restates these limitations while providing example violations via Executive Order.[57] Also grounded in the uniqueness of military life and the military mission, the Court simultaneously rejected Levy's First Amendment overbreadth challenge.[58]

United States v. Priest,[59] approved by the Supreme Court in *Parker*, began to distill the judicial approach to military speech doctrine. Distinguishing the civil approach set out in *Brandenburg*,[60] the Court of Military Appeals (CMA) again relied on the need to protect good order and discipline to hearken back to Justice Holmes's "clear and present danger" test.[61] Thus, "[t]he 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. It is a question of proximity and degree."[62] From there, a balancing test follows, weighing "the gravity of the effect of the speech, discounted by the improbability of its effectiveness on the audience the speaker sought to reach, to determine whether the conviction is warranted."[63]

But in *United States v. Wilcox*, the Court of Appeals for the Armed Forces (CAAF) did not reach this balancing test. Two threshold inquiries must initially be satisfied for speech cases under Article 134.

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shall be punished as a court-martial may direct." Article 134, UCMJ, 10 U.S.C. § 934 provides, in short, that "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces . . . shall be punished . . . ." The MCM supplements the statutory text with elements, explanation, examples, sentencing guidelines, and sample specifications.

57 417 U.S. 733 (1974).

58 *See id.* at 758 ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. . . . Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of these principles.").

59 45 C.M.R. 338 (C.M.A. 1972).

60 395 U.S. 444 (1969); *see supra* note 34 and accompanying text. In contrast to the approach in *Brandenburg*, "[a] lower standard pertains in the military context, where dangerous speech is that speech 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.'" United States v. Wilcox, 66 M.J. 442, 448 (C.A.A.F. 2008) (quoting United States v. Brown, 45 M.J. 389, 395 (1996)).

61 *See Priest*, 45 C.M.R. at 344.

62 *Id.* (quoting Schenck v. United States, 249 U.S. 47, 52 (1919)).

63 *Wilcox*, 66 M.J. at 449.

First, as in the civilian framework, the speech must be protected First Amendment activity. Here, Wilcox's racist online communication and conduct, "while repugnant," could not be classified as dangerous speech, legally obscene, fighting words, or any other identified category of unprotected speech.[64] Second, and more importantly in this case, the government must prove each element of the charged offense.[65] Here, the government failed to produce legally sufficient evidence satisfying either of two available terminal elements: that Wilcox's conduct was "to the prejudice of good order and discipline" or "of a nature to bring discredit upon the armed forces."[66] Extending *Priest*, the court in *Wilcox* held that for conduct charged under either terminal element, the government must show a "'reasonably direct and palpable' connection" between the statements and the military mission or military environment.[67] Should either threshold inquiry fail—as in *Wilcox*—the balancing test is mooted.[68]

There remains debate around whether *Wilcox* represented a significant shift in military speech doctrine. Some commentators initially suggested that, through the "direct and palpable" requirement, it "greatly eroded the legacy of *Priest*, *Parker*, and *Schenck*, and ushered in a new and more restrictive test for speech crimes in the military" by "essentially requiring [a showing of] actual prejudice."[69] But as articulated in *Wilcox*, proving—beyond a reasonable doubt—every element of a charged offense is a constitutional due process requirement under the Fifth Amendment.[70] More recent commentary, with time to assess the opinion, suggests that commanders' ability to enforce speech restrictions has not been significantly impacted. First, by its own terms and due to its unique procedural history, *Wilcox* was deciding a "narrow issue." Second, despite the First Amendment implications, the case was decided on legal sufficiency grounds narrowed to Article

64 *Wilcox*, 66 M.J. at 449. Wilcox's conduct consisted of posts on websites with racist and anarchist views, and online profiles that both identified him as a Soldier and as aligned with the white supremacist movement. *Id.* at 445–46. Had a been a civilian, all of his conduct would have been unquestionably lawful.

65 *Id.* at 447.

66 *Id.* at 448–51.

67 *Id.* at 448 (quoting United States v. Priest, 45 C.M.R. 338, 343 (C.M.A. 1972)).

68 *Id.* at 449.

69 Michael C. Friess, *A Specialized Society: Speech Offenses in the Military*, ARMY LAW., Sept. 2009, at 23–24. Despite this criticism, Major Friess lays out a concise (necessarily oversimplified) test for speech cases under Article 134. "Is the speech 'otherwise protected under the First Amendment'? Did the Government prove all the elements of Article 134?" If yes to both, the court then balances the needs of the military against the servicemember's right to speak freely. *Id.* at 25 (quoting *Wilcox*, 66 M.J. at 447).

70 *Wilcox*, 66 M.J. at 448.

134.[71] Finally, with *Wilcox* in place and understood throughout the military's legal community, sufficiently proving the terminal elements of Article 134 as applied to speech restrictions—in an age of rapidly transmissible media—does not present an insurmountable obstacle. Given the Court's reasoning in *Parker*, suggesting that judicial narrowing helped the general articles survive the void-for-vagueness challenge, the reasoning in *Wilcox* may help secure the future of these routinely criticized provisions.

II. THE MILITARY AND POLITICAL NEUTRALITY: A CONSTITUTIONAL TRADITION

"The tradition of keeping the military subordinate to civilian authority may not be so strong in the minds of this generation as it was in the minds of those who wrote the Constitution."[72]

Written in an opinion policing the constitutional limits of court-martial jurisdiction, Justice Black's timely reminder in 1957 bears reemphasis today. Part I of this Note sketched the contours of free speech doctrines in the civilian context and in Military Justice. As they developed concurrently the two diverged; however, guiding principles crossed between the two as seminal cases in both often came to the Court in the context of a wartime environment.[73] Both are well-grounded in text,[74] history,[75] structure,[76] and precedent.[77] But equally (in some cases jointly) well-grounded in our constitutional fiber is the demand for an apolitical military. "[C]ivilian control of the military is

71 Weber, *supra* note 15, at 149–50.

72 Reid v. Covert, 354 U.S. 1, 23 (1957).

73 *See supra* note 43 and accompanying text (discussing *Schenck* and *Abrams* in the World War I era). For additional cases animating concerns in both doctrines, see *Flower v. United States*, 407 U.S. 197 (1972) (holding that the military must allow for the distribution of pamphlets when the street is a public forum), and *Greer v. Spock*, 424 U.S. 828 (1976) (holding that there was no generalized constitutional right to make political speeches or distribute leaflets on Fort Dix).

74 *See, e.g.*, United States v. Howe, 37 C.M.R. 429 (C.M.A. 1967) (upholding the constitutionality of Article 88, in part, by tracing the relatively constant text from the British Articles of War, through the Continental Congress, and ultimately through the passage of the UCMJ); *see also* Parker v. Levy, 417 U.S. 733 (1974) (applying the same text-based reasoning in an analysis of Article 133).

75 *See, e.g.*, *Parker*, 417 U.S. at 743 (grounding the foundational principle of the "separate society" on historical tradition).

76 *See, e.g.*, *Greer*, 424 U.S. 845–46 (Powell, J., concurring) ("Command of the Armed Forces placed in the political head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one.").

77 *See, e.g.*, United States v. Wilcox, 66 M.J. 442, 449 (C.A.A.F. 2008) (reaching back to *Schenck* and *Priest* in articulating foundational principles in military speech doctrine).

[as] equally vital [as free speech to American liberal democracy], if not more so, for without the ability to control the military's power, the democratic form of government that best ensures freedom of speech is placed in peril."[78] The necessary "corollary" to elected officials maintaining civil control is that the military remain apolitical.[79]

The insurrection at the U.S. Capitol on January 6th, 2021 (in which one in five defendants charged over alleged involvement had a military history);[80] General Milley, in uniform, accompanying President Trump through Lafayette Square in 2020;[81] and the illustrative case study highlighted in Part III, should all serve to refocus our attention on this foundational principle. This is not to suggest that these are isolated incidents. Rather, they are some of the more visible (and recent) representations that mark the outer edge of a more widespread trend.[82] And yet, criticism of current military speech doctrine

78 Weber, *supra* note 15, at 99.

79 *Id.* at 101 (citing *Greer*, 424 U.S. at 841 (Burger, C.J., concurring)) ("asserting that the military's political neutrality is 'a tradition that in my view is a constitutional corollary to the express [constitutional] provision for civilian control of the military'").

80 Tom Dreisbach & Meg Anderson, *Nearly 1 in 5 Defendants in Capitol Riot Cases Served in the Military*, NPR (Jan. 21, 2021, 3:01 PM), https://www.npr.org/2021/01/21/958915267/nearly-one-in-five-defendants-in-capitol-riot-cases-served-in-the-military/ [https://perma.cc/8USB-SEVE].

81 *See* Helene Cooper, *Milley Apologizes for Role in Trump Photo Op: 'I Should Not Have Been There'*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/2020/06/11/us/politics/trump-milley-military-protests-lafayette-square.html [https://perma.cc/HWY9-5TDZ]. General Milley—then (and currently) Chairman of the Joint Chiefs of Staff—later apologized for his role in the incident, saying, "I should not have been there. . . . My presence in that moment and in that environment created a perception of the military involved in domestic politics." *Id.*

82 *See infra* Part III. This trend has continued into 2022 on both sides of the ideological spectrum, at times interacting directly with American politics. *See, e.g.*, Abdallah Fayyad, Opinion, *The Extremist in New Hampshire Who Might Flip the Senate*, BOS. GLOBE (Nov. 3, 2022, 5:35 PM), https: //www.bostonglobe.com/2022/11/03/opinion/extremist-new-hampshire-who-might-flip-senate/ [https: //perma.cc/5MSR-PJYE] (discussing Republican Senate candidate Don Bolduc (a retired Army general) and suggesting that when you "[p]ut aside his litany of lies . . . [h]e has the look of a general out of a made-for-TV war movie"); Natasha Anderson, *'How Am I Supposed to Swear to Support and Defend the Constitution of a Country That Treats Its Women Like Second-Class Citizens?' Army Medic's Blistering TikTok Blasting End of* Roe v. Wade *Blows Up Online*, DAILY MAIL (July 10, 2022, 1:34 PM), https://www.dailymail.co.uk/news/article-10999863/Female-Army-medics-blistering-TikTok-blasting-end-Roe-v-Wade-sweeps-internet.html [https: //perma.cc/5DRV-36TC] (describing an Army medic's viral social media post reacting to the Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), in which she discussed her continued ability to serve while forcefully criticizing the Court and broader political positions more generally). The perceived (or real) rise of partisanship in the military has now moved directly into the political discourse. *See, e.g.*, Thomas Spoehr, *The Rise of Wokeness in the Military*, HERITAGE FOUND. (Sep. 30, 2022), https://www.heritage.org/defense/commentary/the-rise-wokeness-the-military/ [https://perma.cc/3CM2-THW7]

persists, urging courts to "hold the [UCMJ's] speech crimes to the same constitutional standards applied to the rest of the nation."[83] Should these high-visibility incidents not provide the requisite motivation to justify the restrictions present in the UCMJ, thankfully the Founders were exceedingly transparent in providing their own justifications in the constitutional scheme.

At the risk of stating the obvious, the grants of power laid out in the constitutional text are clear. Article I grants Congress the power to "declare War," to "raise and support Armies," to "provide and maintain a Navy" and to "make Rules for the Government and Regulation of the land and naval Forces" (among others).[84] Article II provides that the "President shall be Commander in Chief of the Army and Navy of the United States."[85] Though the text itself evinces a clear structural intent to subordinate the military to its elected leaders while further dividing military power among two coequal political branches, history adds additional clarity to this deliberate effort. The Founders conceived of the military as necessary but "dangerous to liberty," a fear rooted in historical understanding and personal experience.[86] James Madison, writing in Federalist No. 41, explained the obvious need for a military before recognizing that "the liberties of Rome proved the final victim to her military triumphs."[87] And in recognition of several grievances related to military abuses, the authors of the Declaration of Independence noted that the King had "affected to render the Military independent of and superior to the Civil Power."[88] As an animating factor motivating the push for independence, concerns protecting against this dangerous inversion of the proper governmental order

(suggesting that "wokeness in the military . . . undermines wholehearted support for the military by a significant portion of the American public").

83 Rachel E. VanLandingham, *The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech*, 80 OHIO ST. L.J. 73, 131 (2019). This assertion comes post-*Ortiz*, in which Justice Kagan noted that "courts-martial are now subject to several tiers of appellate review, thus forming part of an integrated 'court-martial system' that *closely resembles* civilian structures of justice." Ortiz v. United States, 138 S. Ct. 2165, 2170–71 (2018) (emphasis added).

84 U.S. CONST. art. I, § 8.

85 U.S. CONST. art. II, § 2.

86 Reid v. Covert, 354 U.S. 1, 24, 24–28 (1957) (plurality opinion). Nor are military overthrows of democratic governments a vestige of history. This is, of course, not intended as a modern American parallel, but in 2021 Myanmar's military staged a coup and returned the country to full military rule. Russell Goldman, *Myanmar's Coup, Explained*, N.Y. TIMES (Apr. 27, 2022), https://www.nytimes.com/article/myanmar-news-protests-coup.html [https://perma.cc/QR4F-QMM5].

87 THE FEDERALIST NO. 41, at 271 (James Madison) (Jacob E. Cooke ed., 1961).

88 THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

were naturally baked in to the Constitution at the time of the Founding.

While precedent was slow to develop this founding principle in caselaw,[89] "[b]y the 1970s, the Supreme Court . . . held that . . . policies that restrict political speech toward [avoiding the reality and appearance of military partisanship] are 'wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control.'"[90] Today, text, history, structure, and precedent are all in line with the constitutional requirement of an apolitical military. However, attempts to meet that requirement have not always been successful, and the examples offered above do not imply that political neutrality is only a modern concern.[91] The problem has not changed in kind, but with the increasing possibility that the conduct or speech of servicemembers will gain massive audiences via social media platforms, it has certainly changed in degree.

III. CASE STUDY: LIEUTENANT COLONEL STUART SCHELLER

With Parts I and II in place, this Section will briefly address Lieutenant Colonel (LTC) Scheller's case as an example of how the political neutrality problem has "certainly changed in degree." While his case is not unique in its relative recency or its applicability to military speech restrictions,[92] it is exceptional in its scope. It provides a window into the rising issues surrounding the potential for servicemembers' restricted, often political, speech to gain a massive audience via viral communication.[93] At minimum, it requires the increased attention of military leadership.

LTC Scheller's case arose when—like many others—he looked on as thirteen U.S. servicemembers were killed in Afghanistan during the

89 *See* Weber, *supra* note 15, at 100–01 (illustrating that while the need for civilian control of the military was largely agreed upon, its exact dimensions were slow to develop).

90 *Id.* at 102 (quoting Greer v. Spock, 424 U.S. 828, 839 (1976)).

91 *See supra* notes 80–81 and accompanying text (discussing the Capitol Riot and General Milley's involvement in Lafayette Square); *see also* Weber, *supra* note 15, at 101–03 (highlighting past examples of political neutrality issues "where both parties seek to ride the coattails of [the military's] prestige").

92 *See, e.g.*, Alex Horton, *A West Point Grad Wrote 'Communism Will Win' in His Cap. The Army Kicked Him Out.*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/checkpoint/wp/2018/06/19/a-west-point-grad-wrote-communism-will-win-in-his-cap-the-army-kicked-him-out/ [https://perma.cc/7PDG-V7CN]; Heather Mongilio, *Midshipman Settles Case Against Naval Academy Superintendent, Former Navy Secretary*, CAP. GAZETTE (Feb. 25, 2021), https://www.capitalgazette.com/education/naval-academy/ac-cn-standage-naval-academy-settlement-20210225-yhx6qfrct5ehvkmwjy7v7ygheq-story.html [https://perma.cc/UT7V-RFV8].

93 *See generally* Weber, *supra* note 15.

recent American withdrawal.[94] Like many others, he took to social media to express his frustration. But after facing disciplinary action and being relieved from command, LTC Scheller's first video—posted from his office and in uniform—was viewed more than 800,000 times on Facebook in the span of four days.[95] LTC Scheller continued to post videos, varying in content and in degree of vitriol. As of this writing, one video providing an update on his case had amassed over 2,000,000 views.[96] By this point, given the number of interviews, reproductions, and social media platforms, the number of Americans that have been exposed to his story is incalculable. Suffice it to say the level of exposure is enormous.

LTC Scheller ultimately pled guilty to offenses under Articles 88, 89, 90, 92, and 133.[97] Per a plea agreement in a special court-martial, he received a letter of reprimand, forfeited $5,000, and resigned his commission.[98] Among the more colorful specifications on his charge sheet, in addressing a general officer, LTC Scheller stated that "[y]our problem right now . . . is that I am moving faster than you. I'm out maneuvering you."[99] In one of the many social media posts covered later in his charging document, he wrote, "[i]t's the system that's going to break. Not me . . . . They only have the power because we allow it. Every generation needs a revolution."[100] In many other comments and

94 James R. Webb, *Marine Officer Who Publicly Demanded Accountability Discharged*, MARINE CORPS TIMES (Dec. 24, 2021), https://www.marinecorpstimes.com/news/your-marine-corps/2021/12/24/outspoken-officer-who-publicly-demanded-accountability-discharged-from-the-marine-corps/ [https://perma.cc/QF9S-F224].

95 James R. Webb & Andrea Scott, *Marine Relieved for Viral Video Now Says He's Resigning His Commission*, MARINE CORPS TIMES (Aug. 30, 2021), https://www.marinecorpstimes.com/news/your-marine-corps/2021/08/30/marine-relieved-for-viral-video-now-says-hes-resigning-his-commission/ [https://perma.cc/Q3F5-PPES].

96 Fox News, *Marine Officer Who Went Viral for Afghanistan Rant Now Jailed: Report*, YOUTUBE (Sep. 28, 2021), https://www.youtube.com/watch?v=eDNVUtIjwsE.

97 Davis Winkie & Andrea Scott, *Marine Who Demanded 'Accountability' Via Social Media Pleads Guilty to All Charges*, MARINE CORPS TIMES (Oct. 14, 2021), https://www.marinecorpstimes.com/news/your-marine-corps/2021/10/14/marine-who-took-to-social-media-to-demand-accountability-pleads-guilty-to-all-charges/ [https://perma.cc/CCK7-FN9E].

98 Eleanor Watson & Anisah Jabar, *Marine Pleads Guilty After Viral Video Criticized Afghanistan Withdrawal*, CBS NEWS (Oct. 15, 2021), https://www.cbsnews.com/news/stuart-scheller-marine-pleads-guilty-afghanistan-viral-video/ [https://perma.cc/3726-P7AL].

99 Charge Sheet, Supp. at 2, United States v. Scheller (Spec. Ct.-Martial, Navy–Marine Corps Trial Judiciary Oct. 27, 2021). Although LTC Scheller's plea agreement is not publicly available, a record of his case file, complete with Convening Order, Charge Sheet, and Entry of Judgment is available at: https://jag.navylive.dodlive.mil/Portals/58/Documents/records/us_v_scheller_jr_stuart_usmc.pdf?ver=p5E9lncQlyIg9Jrm9HKt6w%3d%3d.

100 *Id.*

social media posts LTC Scheller made disparaging remarks about a variety of senior military leaders in his chain of command.[101]

Ultimately, had this case been tried, it appears the prosecution could have produced guilty verdicts under each charged offense, and the convictions would have assuredly survived scrutiny under military speech doctrines outlined in Part I. But unlike in *Priest*, where the issue centered on the circulation of a newsletter, here the distribution of LTC Scheller's ideas reached millions of Americans in less than a week. Even there, the court acknowledged that "the success of some modern advertising methods tend[s] to prove that statements often repeated become accepted as the truth, regardless of their inaccuracy."[102] Taken as true, the potential damage of servicemembers' speech in this modern context is a problem that requires increased attention from military leadership.

Anecdotally, videos of LTC Scheller were shared with me (an individual with *one* social media platform) dozens of times, with many Soldiers not recognizing that they posed a problem, and certainly not recognizing that they violated the UCMJ. Past the service-specific directives issued from each branch, the first step in addressing a novel and ever-growing problem is meaningful leadership education down to the lowest echelons and across the military.[103] Ultimately, in the face of what will surely be significant blowback, courts need to be ready to enforce constitutional military speech restrictions in this evolving context should the need arise.

CONCLUSION

This Note is not meant to sound an alarm signaling an imminent breakdown in our military and civilian power divides. But as it stands, partisanship is pervasive[104] and online communication is ubiquitous.[105]

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101 *Id.*

102 United States v. Priest, 45 C.M.R. 338, 345 (C.M.A. 1972).

103 For an initial first step prior to additional enforcement, Lieutenant Colonel Weber suggests "[a] vigorous training and education plan" on social media usage in the military. Weber, *supra* note 15, at 146. As a first step, this both increases awareness and alleviates any notice concerns should the need for significant enforcement of free speech restrictions arise.

104 Michael Dimock & Richard Wike, *America Is Exceptional in Its Political Divide: The Pandemic Has Revealed How Pervasive the Divide in American Politics Is Relative to Other Nations*, PEW (Mar. 29, 2021), https://www.pewtrusts.org/en/trust/archive/winter-2021/america-is-exceptional-in-its-political-divide [https://perma.cc/2JVS-DZ3U].

105 This communication is so inescapable, and its potential for harm so insidious, that civilian-led social media companies have entered the free speech restriction battle. This issue is well outside the scope of this Note; I acknowledge it only as a contrasting instance of (what appears to be) a bipartisan effort for reform. *See* Ja'han Jones, *New Bill Targets Your*

Our servicemembers—from the newly minted Private to the Chairman of the Joint Chiefs of Staff—cannot avoid these developments. If we do not work diligently to identify and maintain the carefully crafted constitutional foundation upon which our governmental structures are built, we risk limiting their capacity to operate as originally designed.

This Note seeks to recognize that a crack in a foundational principle appears to be developing: the erosion of the political neutrality of our military. At minimum, we should recognize it is there, and strengthen—not weaken—the mechanisms already in place to ensure it does not spread. Thankfully, the Framers understood this threat and imbedded it in the text, history, and structure of the Constitution. Better still, through (and in conjunction with) the development of freedom of speech principles in American law, the UCMJ and military speech doctrine now provide a framework through which military leaders at every echelon can work to address this evolving issue.[106] First, and of course, they need to realize that it is there.

This conflict, as with most in Military Justice, is fueled by two competing concerns. The military's primary responsibility is to fight and win our nation's wars. This reality necessitates a "separate society," and calls for a system of justice that can account for military exigencies and the uniqueness of military life. But the system must also be just; both as a constitutional matter and to maintain morale. Given that this latter concern has taken a backseat in this Note, I will close by emphasizing how vitally important it is. Servicemembers are afforded a variety of legal and constitutional protections;[107] strengthening them is always a goal worth pursuing. And as Justice Kagan recently noted, courts-martial now form "part of an integrated 'court-martial system' that closely resembles civilian structures of justice."[108] As a general matter, this has been a welcome (and in many cases much-needed) development.

Conspiracy Theory-Laden Social Media Feed, MSNBC (Feb. 11, 2022), https://www.msnbc.com/the-reidout/reidout-blog/facebook-social-media-klobuchar-lummis-rcna15874 [https://perma.cc/Z2ZS-U8P3].

106 While the focus of this Note has been on political speech, military speech restrictions are also justifiable (as with most everything in Military Justice) insofar as they seek to promote good order and discipline.

107 *See, e.g.*, Article 27, UCMJ, 10 U.S.C. § 827 (2018) (detail of trial counsel and defense counsel); 10 U.S.C. § 1044e (2018) (Special Victims' Counsel for victims of sex-related offenses); Article 37, UCMJ, 10 U.S.C. § 837 (2018) (unlawfully influencing action of court).

108 Ortiz v. United States, 138 S. Ct. 2615, 2170 (2018) (quoting United States v. Denedo, 556 U.S. 904, 920 (2009) (Roberts, C.J., concurring in part and dissenting in part)).

But when the countervailing interest is preserving integrity in the constitutional structure, conformity with the civilian system cannot—and should not—be the motivating goal.