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The First Amendment versus Operational Security: Where Should the Milblogging Balance Lie?

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The First Amendment versus Operational Security: Where Should the Milblogging Balance Lie?

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The First Amendment versus Operational Security: Where Should the Milblogging Balance Lie?

Katherine C. Den Bleyker*

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INTRODUCTION

Lincoln once asked, “[Is] it possible to lose the nation and yet preserve the Constitution?” His rhetorical question called for a negative answer no less than its corollary: “Is it possible to lose the Constitution and yet preserve the Nation?” Our Constitution and Nation are one. Neither can exist without the other. It is with this thought in mind that we should gauge the claims of those of those who assert that national security requires what our Constitution appears to condemn.¹

These words are as applicable today as they were when first uttered in 1962 by Former Chief Justice Earl Warren. In a post-September 11th world, the government is constantly using the threat of terrorism to justify abrogating Americans’ civil liberties, especially their First Amendment rights.² In the military realm, the government is also limiting soldiers’ civil liberties, namely their First Amendment rights. Many active-duty soldiers post military blogs (“milblogs”) from the front lines of the Iraq War, accessible to anyone with an Internet connection. In an attempt to stem leaks

¹ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 200 (1962) (citation omitted).

² Paul Krugman, a columnist for the New York Times has noted that:
[T]he Bush administration and the movement it leads have been engaged in an authoritarian project, an effort to remove all the checks and balances that have heretofore constrained the executive branch. Much of this project involves the assertion of unprecedented executive authority—the right to imprison people indefinitely without charges (and torture them if the administration feels like it), the right to wiretap American citizens without court authorization, the right to declare, when signing laws passed by Congress, that the laws don’t really mean what they say. But an almost equally important aspect of the project has been the attempt to create a political environment in which nobody dares to criticize the administration or reveal inconvenient facts about its actions.

Paul Krugman, Op-Ed, *The Treason Card*, N.Y. TIMES, July 7, 2006, at A6.

of what it sees as information helpful to the enemy, the Department of Defense has promulgated a regulation requiring milbloggers to register their websites with commanders, limiting what milbloggers can post on their sites, and punishing authors who leak sensitive information.³

Typically, courts recognize that First Amendment rights are crucial to promoting public discourse in a democratic society.⁴ As such, the Supreme Court typically gives speech a high degree of protection, reviewing regulations limiting First Amendment rights through a lens of strict scrutiny.⁵ However, the military is an exception to this jurisprudence.⁶ In that context, the Court usually defers to the military's judgment on what degree of censorship is necessary to maintain the effectiveness of the armed forces and promote national security.⁷ However, the Court's justification for these differing degrees of review is unconvincing when applied to milblogs. The question then becomes: Where should the balance between national security and soldiers' free speech rights lie?

This Note argues that the balance should lie where it does in the civilian realm: through a lens of strict scrutiny. Part I chronicles the rise and popularity of milblogs. Part I also addresses the Department of Defense's authority to promulgate milblogging regulations, and introduces the Department of Defense's milblogging regulation. Part I also examines the military's enforcement of the Department of Defense's regulation by discussing three servicemen who have been punished for milblogging. Part II compares how civilian courts treat the First Amendment rights implicated by milblogs with military First Amendment jurisprudence. Part III argues that milblogs serve important societal interests and that courts' traditional justification for a different standard of First Amendment review in the military does not apply to milblogs. Part III also argues that the Department of Defense's milblogging regulation is either (i) a de

³ See *infra* Part I.B.

⁴ See, e.g., *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

⁵ See, e.g., *id.*

⁶ See *infra* Part II.B.

⁷ See *infra* Part II.B.

facto prior restraint that should be viewed by courts as presumptively unconstitutional; or, (ii) a regulation restricting soldiers' First Amendment rights that should be viewed by courts through a lens of strict scrutiny because true national security concerns will survive strict scrutiny while pretextual viewpoint discrimination will not. This Note concludes by reiterating the importance of the First Amendment and the need for stringent judicial review of regulations designed to limit soldiers' First Amendment rights.

I. THE MILBLOGGING QUANDARY:
THE DEPARTMENT OF DEFENSE'S ATTEMPTS TO
REGULATE A NEW FORM OF COMMUNICATION

The ability of active-duty soldiers to post milblogs from the front lines of the Iraq Conflict, accessible to anyone with an Internet connection, has given the armed forces new operational security problems.⁸ In an attempt to stem leaks of what it sees as information helpful to the enemy, military leaders have promulgated regulations censoring milblogs and punishing authors who leak sensitive information.⁹ This section describes the quandary milblogs pose to operational security by giving a brief overview and description of milblogs, an explanation of the Department of Defense's attempts to regulate this new form of communication, and an explanation of the Department of Defense's statutory authority to promulgate such restrictions on communication.

A. The Rise of Milblogging

The term "milblog" is short for "military blogs," which are "online journals run by active duty military or reservists who have returned to civilian life."¹⁰ Milbloggers include "a core group of about 100 regulars and hundreds more loosely organized activists, angry contrarians . . . self-appointed pundits, and would-be

⁸ See *infra* Part I.B.

⁹ See *infra* Part I.B.

¹⁰ Hugh Hewitt, *Rise of the Milblogs*, DAILY STANDARD, Mar. 12, 2004, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/840fvgmo.asp>.

poets.”¹¹ According to The Mudville Gazette,¹² a website devoted to information on military blogging administered by an Army veteran who goes by the screen name Greyhawk, “only about a dozen [milblogs] were in existence two years ago when the U.S. invaded Iraq.”¹³ Today, as many as 200 active-duty soldiers keep blogs,¹⁴ with a leading milblog search engine identifying “over 1,100 blogs from 24 [nations] by country, branch of service, gender and popularity.”¹⁵ Milblogs are thus becoming an increasingly-popular way for civilians to “‘listen in’ on the war zone.”¹⁶

Although some milbloggers identify themselves on their websites,¹⁷ other authors choose to remain anonymous, known only by a pen name.¹⁸ Whether anonymous or not, “[s]oldier bloggers encompass most ranks, jobs and locations.”¹⁹ These soldiers are “writing from Iraqi Internet cafés, barracks and anywhere else a soldier can log on to the Web.”²⁰ Some of their writings “feature practical news, photographs and advice.”²¹ Other milblogs “are openly political,” some questioning the war and

¹¹ John Hockenberry, *The Blogs of War*, WIRED, Aug. 2005, available at <http://www.wired.com/wired/archive/13.08/milblogs.html>.

¹² <http://www.mudvillegazette.com> (last visited Nov. 7, 2006).

¹³ Jonathan Finer, *The New Ernie Pyles: Sgtlizzie and 67cshdocs*, WASH. POST, Aug. 12, 2005, at A01. There are also many milblogs authored by soldiers not stationed in Iraq. See Millblogging.com, <http://www.milblogging.com> (last visited Nov. 7, 2006). However, since the Department of Defense regulations discussed below deal only with Iraq milblogs, non-Iraq milblogs and the regulations governing them are outside the scope of this Note.

¹⁴ Finer, *supra* note 13.

¹⁵ *Milblogging.com Joins Forces with Military.com; Leading Military Website Adds World's Largest Military Blog Portal to Accelerate Spread of Soldier-Journalism*, BUSINESS WIRE, Jan. 18, 2006.

¹⁶ *The Blogs of War*, ARMY TIMES, Mar. 14, 2004, available at <http://www.armytimes.com/print.php?f=0-ARMYPAPER-674310.php>.

¹⁷ See <http://www.milblogging.com> for a list of anonymous and non-anonymous milblogs.

¹⁸ See, e.g., THE MUDVILLE GAZETTE, <http://www.mudvillegazette.com> (last visited Oct. 17, 2006) (identifying its author only as Greyhawk). Greyhawk is also credited with “coining the term *milblogger* shortly after he started [The Mudville Gazette] in March 2003.” Hockenberry, *supra* note 11 (emphasis in original).

¹⁹ *The Blogs of War*, *supra* note 16.

²⁰ *Id.*

²¹ *Id.*

some cheering it.²² Some milbloggers view their sites as “a rebellion against mainstream media, which, they say, leave out of their newscasts and publications important stories about the war.”²³ Many other milbloggers say they started their blogs to keep friends and family members updated on what they are doing while stationed overseas.²⁴ Given this diversity of authorship and purpose, the only common characteristics of milblogs are their “casual, sometimes profane language”²⁵ and their ability to “give readers an unfiltered perspective on combat largely unavailable elsewhere.”²⁶

B. Balancing Operational Security with Civil Rights: The Department of Defense’s Campaign to Restrict Milblogging

As blogging becomes more popular among soldiers, the Department of Defense (“DOD”) has grown increasingly concerned that soldiers may be inadvertently posting information that could endanger troops embedded in war zones like Iraq. As such, the DOD has enacted restrictions on the type of information soldiers can and cannot post on the internet, as well as a

²² *Id.* For example, a blog written by National Guard Spec. Leonard Clark noted that “[a] growing number of [soldiers in Iraq] are starting to wonder why we should continue to risk our lives for this whole mess when we know that the government will probably pull out of here.” *Finer, supra* note 13. Clark was fined \$1,640 and demoted to private first class in July of 2005 for “posting what the military said was classified material on his blog.” *Id.*

²³ *The Blogs of War, supra* note 16. For example, a blog written by Sgt. Elizabeth Le Bel, known online as Sgtlizzie, described in harrowing detail her Humvee’s encounter with a roadside bomb:

I started to scream bloody murder, and one of the other females on the convoy came over, grabbed my hand and started to calm me down. She held on to me, allowing me to place my leg on her shoulder as it was hanging free. . . . I thought that my face had been blown off, so I made the remark that I wouldn’t be pretty again. . . . Of course the medics all rushed with reassurance which was quite amusing as I know what I look like now and I don’t even want to think about what I looked like then.

Finer, supra note 13. However, “[t]he Army [only] released a three-sentence statement about the incident in which her driver, a fellow soldier, was killed.” *Id.*

²⁴ *Finer, supra* note 13.

²⁵ *Id.*

²⁶ *Id.*

registration requirement for all milblogs operated by soldiers stationed in Iraq.²⁷

1. The Department of Defense's Authority to Promulgate Milblogging Regulations

The DOD's authority to promulgate restrictions on milblogging stems from Article I, sec. 8 of the U.S. Constitution, which gives Congress "the power to raise and support armies; provide and maintain a navy; and provide for organizing and disciplining them."²⁸ The Constitution also makes the President Commander in Chief of the Armed Forces of the United States, and, when called to Federal service, Commander in Chief of various state militias.²⁹ Based on "his powers as Commander in Chief, the President has the power to promulgate Executive orders and service regulations to govern the Armed Forces as long as they do not conflict with any basic constitutional or statutory provisions."³⁰ Both "[t]he President and Congress have authorized the Service secretaries and military commanders to . . . promulgate [the] orders and regulations" needed to maintain order and discipline in the armed forces.³¹ Pursuant to this grant of power by the President

²⁷ Memorandum from Lt. Gen. John R. Vines, MNC-I Policy #9 Unit and Soldier Owned and Maintained Websites (Feb. 5, 2004) [hereinafter Vines Memorandum], available at <http://www.mediabistro.com/fishbowlDC/original/iraqblogrules.pdf>.

²⁸ Estela I. Velez Pollack, *Military Courts-Martial: An Overview*, Cong. Research Service, May 26, 2004, www.fas.org/man/crs/RS21850. Using this authority, Congress has enacted the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. §§ 801–941 (2006), to govern soldiers' discipline and punishment. *Id.*

²⁹ Rod Powers, *Military Justice 101*, About.com, http://usmilitary.about.com/od/justicelawlegislation/a/miljustice_3.htm (last visited Oct. 10, 2006).

³⁰ *Id.*

³¹ *Id.* "Our courts have consistently held that military regulations have the force and effect of the law if they are consistent with the Constitution or statutes." *Id.*; see also *infra* Part II.B. "Regulations and orders issued at lower levels of command are enforceable by Article 92 [of the] UCMJ, [10 U.S.C. § 892,] which prescribes violations of general orders and regulations, and Articles 90, [10 U.S.C. § 890,] and 91, [10 U.S.C. § 891, of the] UCMJ, which prohibit disobedience of the commands of superiors." Powers, *supra* note 29. Military offenses are tried via either Special or General Courts-Martial, the trial level of the military court system. Pollack, *supra* note 28. Convictions can then be appealed to a military Court of Criminal Appeals. *Id.* "If the conviction is affirmed . . . the appellant may request review by the Court of Appeals for the Armed Forces [CAAF], and ultimately the U.S. Supreme Court." *Id.* Review by the CAAF and Supreme Court is discretionary and is usually how the constitutionality of military

and Congress, the DOD issues directives to “establish or describe policy, programs, and organizations; define missions; provide authority; and assign responsibilities.”³² Specifically, DOD Directives are “broad policy document[s] containing what is required by legislation, the President, or the Secretary of Defense to initiate, govern, or regulate actions or conduct by the DOD Components within their specific areas of responsibilities.”³³ DOD Directives thus govern all branches of the armed forces and are given the force of law via the UCMJ and the Department of Defense’s grant of power from the Legislative and Executive branches of government.

2. The Department of Defense’s Blogging Regulations

In its power as armed forces regulator, the Department of Defense has begun to crack down on what it sees as operational security (“OpSec”) risks that have increased with the popularity of milblogs. In an August 5, 2004 memorandum to all Army Leaders, Army Chief of Staff Peter A. Schoomaker noted that “some soldiers continue to post sensitive information to internet websites and blogs, e.g., photos depicting system vulnerabilities and tactics, techniques and procedures.”³⁴ Schoomaker cautioned that “such OpSec violations needlessly place lives at risk and degrade the effectiveness of [the Army’s] operations.”³⁵ Schoomaker further warned that putting such information on the Internet is dangerous because the enemy aggressively reads and exploits such

regulations is decided. *Id.*; see also *infra* Part II.B. So, unlike most other administrative agencies, whose decisions are reviewed through the normal federal court system, military law is reviewed by military-run courts until an appeal reaches the Supreme Court.

³² Department of Defense, Washington Headquarters Services, *What are the DoD Issuances?*, available at <http://www.dtic.mil/whs/directives/general.html> (last visited Oct. 10, 2006).

³³ *Id.*

³⁴ Memorandum from Gen. Peter A. Schoomaker, Army Chief of Staff, to Army Leaders (Aug. 5, 2005), available at <http://www.fas.org/sgp/news/2005/08/usa0805.html> [hereinafter Schoomaker Memorandum]; see also Memorandum from Gen. Richard A. Cody, Army Vice Chief of Staff, to Army Leaders (Feb. 5, 2005), available at <http://www.fas.org/sgp/news/2005/08/usa0805.html> [hereinafter Cody Memorandum] (noting that sensitive information, such as “annotated photos of an Abrams tank[’s vulnerabilities] are easily found on the internet”).

³⁵ Schoomaker Memorandum, *supra* note 34.

information.³⁶ Schoomaker's memorandum also referred back to an earlier memorandum from Gen. Richard A. Cody, Army Vice Chief of Staff, admonishing army leaders to "protect information that may have a negative impact on foreign relations with coalition allies or world opinion."³⁷

Schoomaker's memorandum was just a precursor to tighter restrictions on milblogging. On April 6, 2005 Lieutenant General John R. Vines issued Policy Memorandum #9, entitled "Unit and Soldier Owned and Maintained Websites" to members of the Multi-National Corps stationed in Iraq.³⁸ This policy now requires "all soldiers in Iraq [to] register their Web logs with their [unit] commanders"³⁹ by providing their unit, location, webmaster name, telephone number and IP address of their blog or website.⁴⁰ Unit commanders, in turn, are required to monitor their subordinates' websites "on a quarterly basis" to ensure that no prohibited material has been posted.⁴¹ Prohibited material includes classified information, the names of service members killed or wounded in action before their families are notified, and accounts of incidents still under investigation.⁴² Milbloggers also "must clear photos through their unit public affairs representative."⁴³ While individual posts need not be cleared ahead of time, it is an

³⁶ *See id.*

³⁷ Cody Memorandum, *supra* note 34.

³⁸ Vines Memorandum, *supra* note 27.

³⁹ Kelly Kennedy, *Blog Brother: Army Eyes What Troops Post; Soldiers Cited for Good, Bad Security Practices*, MARINE CORPS TIMES, Dec. 5, 2005, at 31; *see also* Finer, *supra* note 13 (noting that this policy, promulgated by Lt. Gen. John R. Vines, the top tactical commander in Iraq, was "the military's first policy memorandum on Web sites maintained by soldiers").

⁴⁰ Vines Memorandum, *supra* note 27. These regulations apply to both official military websites (those with a .mil address or those sponsored by military command) and unofficial ones (soldiers' personal websites and blogs). *Id.* While individual posts do not need to be cleared ahead of time, it is a soldier's responsibility to ensure that what he is posting to the Internet is permissible. *Id.*

⁴¹ *Id.*; *see also* *The Blogs of War*, *supra* note 16 (quoting Capt. Chris Karns, a spokesman for U.S. Central Command, which oversees operations in Iraq and Afghanistan).

⁴² Finer, *supra* note 13 (quoting Lt. Col. Steven Boylan, a military spokesman in Baghdad who defends the regulations as "nearly identical to those required of news organizations that cover the military"); *see id.*

⁴³ Kennedy, *supra* note 39.

individual soldier's responsibility to ensure that his website complies with these guidelines.⁴⁴ Vines' policy memorandum notes generally that "risks of the release of information must be weighed against the benefits of publishing to the Internet."⁴⁵ To make soldiers' assessments of this balance a bit easier, the Army has created a website with examples of milblogs that meet these regulations, and examples of those that do not.⁴⁶ Finally, Vines' memorandum notes that bloggers or website owners who publish prohibited information will be instructed by the Army Web Risk Assessment Cell (AWRAC) to close their website or link until the offending information has been removed.⁴⁷ Additionally, Vines' memorandum warns that violators "may be subject to adverse administrative action or punishment."⁴⁸

3. Enforcement: The Blogs of Private Leonard Clark, Army Reservist Jason Hartley, and Major Michael Cohen

The Department of Defense's new website regulations have been enforced by "targeting bloggers with warnings, punctuated by high-profile disciplinary action."⁴⁹ For example, Pfc. Leonard Clark, an Arizona national guardsman serving in Iraq, was demoted in rank and fined \$1,640 in August, 2005, for putting classified information on his blog.⁵⁰ Another soldier, Army National Guard Spec. Jason Hartley, was also demoted in rank and fined \$1,000.⁵¹ The Army claimed Hartley should not have posted information about his unit's flight route in Iraq, because it could help the enemy shoot down U.S. aircraft, or information about his rifle reloading pattern because it could help the enemy time an attack.⁵² Major Michael Cohen, a doctor on duty at the Forward Operating Base in Mosul, Iraq, was ordered to shut down his

⁴⁴ Vines Memorandum, *supra* note 27.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* para. 6d.

⁴⁸ *Id.* para. 6h.

⁴⁹ Joseph Mallia, *Soldiers' Blogs U.S. Cracks Down: Tangled in the Web*, NEWSDAY, Jan. 2, 2006, at A04.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

milblog after he reported in graphic detail on the casualties he treated after the December 21, 2004, suicide bombing in Mosul that killed 22 people.⁵³

The cases of Clark, Hartley and Cohen illustrate the point that “[n]owadays, milbloggers ‘get shut down almost as fast as they’re set up[.]’”⁵⁴ As the armed services struggle to adopt policies to police milblogs, the question becomes in an unpopular war fighting a nebulous enemy, how much power should the armed services have to silence the voices of front-line soldiers, not all of whom have a positive view of the war? While this issue has certainly arisen before, most notably during the Vietnam War, the stakes are even higher in the milblogging context because of the potential for the Internet to amplify one soldier’s voice. In other words, shutting down one milblog may mean depriving thousands of civilians of a valuable source of information not only about the war, but what it really means to fight for your country. However, it is also extremely important to keep our soldiers safe by prohibiting disclosure of information that could be used to harm them.

This dilemma created by milblogs brings up obvious First Amendment issues. It is thus useful to examine the First Amendment both in a civilian context and as it is usually applied to the armed forces.

II. LIMITS ON THE FIRST AMENDMENT: CIVILIAN SPEECH JURISPRUDENCE COMPARED TO MILITARY APPLICATIONS OF THE FIRST AMENDMENT

The Department of Defense’s milblogging regulations implicate a number of core First Amendment issues, including freedom of speech, prior restraints, and the public’s right to know.⁵⁵ It is thus useful to examine how these issues are dealt

⁵³ Finer, *supra* note 13; *see also The Blogs of War*, *supra* note 16.

⁵⁴ Mallia, *supra* note 49 (quoting New York Army National Guard Spc. Jason Hartley).

⁵⁵ Ancillary First Amendment issues implicated by milblogs, including whether bloggers are journalists and whether the Internet can be considered a public forum, are beyond the scope of this Note.

with in civilian courts, and compare the civilian treatment of the First Amendment with its treatment in a military context.

A. *Civilian First Amendment Jurisprudence*

1. Freedom of Speech

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”⁵⁶ Throughout history, “the United States Supreme Court has consistently evidenced its willingness to staunchly protect the right to free speech” in the civilian realm.⁵⁷ However, “although the First Amendment appears to speak in absolutist terms” about the right to free speech, the Court has never adopted a literal approach to dealing with First Amendment issues.⁵⁸ Instead, “[t]he Court has adopted a view that seeks to strike a balance between individual rights and the good of the community.”⁵⁹ Courts “often take into account a variety of factors, such as the content of the speech, the context in which it was expressed, the type of restraint being employed, and the nature of the harm that the restraint is intended to prevent or punish.”⁶⁰ In First Amendment cases, this balance “favors the side of speech, so that the competing interest must be not merely weightier, but weightier in some specified degree.”⁶¹ The result is that “a restriction on speech may be unconstitutional, even though the interest the restriction serves is legitimate and even perhaps weightier than the competing speech interest[.]”⁶² The balancing tests courts use to determine which is weightier, free speech interests or the state’s regulatory interests, are known generally as “levels of scrutiny.”⁶³ Although courts give inconsistent labels to

⁵⁶ U.S. CONST. amend. I.

⁵⁷ Rafic H. Barrage, *Reno v. American Civil Liberties Union: First Amendment Free Speech Guarantee Extended to the Internet*, 49 MERCER L. REV. 625, 627–28 (1998).

⁵⁸ *Id.* at 628. *But see* Edmund Cahn, *Justice Black and First Amendment “Absolutes”*: *A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962) (quoting Justice Black’s opinion that the First Amendment “says ‘no law,’ and that is what I believe it means”).

⁵⁹ Barrage, *supra* note 57, at 628.

⁶⁰ MARC A. FRANKLIN ET AL., *MASS MEDIA LAW* 28 (7th ed. 2005).

⁶¹ *Id.* at 30–31.

⁶² *Id.* at 31.

⁶³ *Id.*

the methods they use to determine this balance, “three broad ‘levels of scrutiny’ have emerged”: strict, intermediate, and rational basis scrutiny.⁶⁴

Strict scrutiny requires the State to “show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”⁶⁵ In other words, the State must articulate an interest “of compelling importance that it cannot achieve” without the regulation.⁶⁶ Strict scrutiny “is applied to most ‘discriminatory restrictions or prohibitions on speech.’”⁶⁷ Intermediate scrutiny is a step down from strict scrutiny and only requires the State to show that the regulation is “closely related to an ‘important,’ ‘significant,’ or ‘substantial’ government interest.”⁶⁸ Courts often use intermediate scrutiny to “evaluate regulations that affect expression but are not targeted at expression, target only ‘low-value’ expression, or do not discriminate among types of expression.”⁶⁹ Courts also use intermediate scrutiny to evaluate “time, place and manner” regulations, holding that “[r]egulations of the time, place and manner of expression are constitutional if they . . . ‘are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’”⁷⁰ Rational basis scrutiny, the least restrictive scrutiny applied by courts, requires that State

⁶⁴ *Id.*

⁶⁵ *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987); *see also id.*

⁶⁶ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 598 (1983); *see also FRANKLIN ET AL.*, *supra* note 60, at 31.

⁶⁷ *FRANKLIN ET AL.*, *supra* note 60, at 31; *see also Ark. Writers’ Project*, 481 U.S. at 236 (Scalia, J., dissenting).

⁶⁸ *FRANKLIN ET AL.*, *supra* note 60, at 31.

⁶⁹ *Id.* For example, the Court has noted that:

[w]hen speech and non-speech elements are combined in the same course of conduct, government regulation of that conduct is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial government 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.

Id. (quoting *United States v. O’Brien*, 391 U.S. 367, 376–77 (1968)) (internal quotations omitted).

⁷⁰ *Id.* at 32 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983)).

regulations bear a rational relationship to a legitimate governmental purpose to be constitutional.⁷¹ “Rational basis scrutiny is rarely applied when First Amendment interests are at stake[;]” therefore, speech regulations are governed only by the strict and intermediate levels of scrutiny.⁷²

2. Prior Restraints

The concept of prior restraints on speech refers to governmental restrictions on or censorship of speech before publication.⁷³ Since the invention of the printing press, governments have tried to control its use.⁷⁴ In England, the government prohibited “printers from publishing works that had not been licensed by government officials, who could censor objectionable passages or deny a license altogether.”⁷⁵ However, “[e]ven before the First Amendment was adopted it was understood in both England and America that ‘prior restraints’ were inconsistent with freedom of speech.”⁷⁶ “[H]istorical evidence suggests that the framers saw that a free press would be essential to their vision of democracy and understood that it would have to mean more than freedom from prior restraint.”⁷⁷ Therefore, prior restraints are treated by courts as being presumptively unconstitutional.⁷⁸ In the Pentagon Papers case, *New York Times Co. v. United States*,⁷⁹ the government attempted to overcome this presumption by showing that a Department of Justice injunction against publication of the papers at issue was justified because publication would endanger national security. In a per curiam opinion, the Supreme Court noted that the

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 96–97 (noting the difficulty of defining “prior restraint” with any degree of precision).

⁷⁴ *Id.* at 89.

⁷⁵ *Id.* This licensing requirement “was codified by Parliament in a series of acts making it a criminal offense to print a work without a license[.]” *Id.*

⁷⁶ *Id.* at 89–90 (quoting William Blackstone’s opinion that “[t]he liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints on publications”).

⁷⁷ *Id.*

⁷⁸ *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697 (1931).

⁷⁹ 403 U.S. 713 (1971).

government had not met its “heavy burden of showing justification for the imposition of such a restraint.”⁸⁰

In contrast, one of the few cases upholding a prior restraint on the press in the interest of national security, *United States v. Progressive, Inc.*,⁸¹ involved an injunction under the Atomic Energy Act⁸² prohibiting *The Progressive* magazine from publishing an article entitled “The H Bomb Secret: How We Got It, Why We’re Telling It.”⁸³ The magazine contended that its article was merely a compendium of information already in the public domain.⁸⁴ The government argued that much of the information was not in the public domain and that even if the information was publicly available, publication of the compendium in an easily-accessible format could “help enemies who otherwise would not put all the pieces together.”⁸⁵ The court held that “publication of the technical information on the hydrogen bomb contained in the article is analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint.”⁸⁶ Although *Progressive* “is a product of the Cold War era, it is easy to transpose its security concerns” to the current post-September 11th climate.⁸⁷

3. The Public’s Right to Know

The public’s right to be informed about government activities was part of the founding rhetoric of the United States.⁸⁸ James

⁸⁰ *Id.* at 714 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

⁸¹ 467 F. Supp. 990 (W.D. Wis. 1979).

⁸² 42 U.S.C.A. § 2011 *et. seq.* (2003).

⁸³ *Progressive*, 467 F. Supp. 990.

⁸⁴ *Id.*

⁸⁵ FRANKLIN ET AL., *supra* note 60, at 101.

⁸⁶ *Progressive*, 467 F. Supp. at 996.

⁸⁷ FRANKLIN ET AL., *supra* note 60, at 102 (noting that “it is easy to imagine terrorists using information about weaknesses in our critical infrastructure . . . or information about chemical or biological weapons materials to harm . . . Americans” and further noting that governmental officials “essentially ‘classified’ the Ph.D dissertation of a George Mason University graduate student for security reasons”).

⁸⁸ See Malla Pollack, Article, *The Right to Know?: Delimiting Database Protection at the Juncture of the Commerce Clause, the Intellectual Property Clause, and the First Amendment*, 17 *CARDOZO ARTS & ENT. L.J.* 47, 67 (1999) (citing Letter from James

Madison noted that “knowledge will forever govern ignorance” and “[a] popular government without popular information []or the means of acquiring it is but a prologue to a farce or a tragedy or perhaps both.”⁸⁹ Today, “[t]he public’s right to know is the philosophical basis of many statutes that force government entities to provide documents on request or to allow the public into meetings.”⁹⁰ However, there is no specific “right to know” enumerated in the United States Constitution.⁹¹ Some First Amendment theorists argue that the right to know can be created out of the First Amendment rights “to hear the views of others and to listen to their version of the facts,” “the right to inquire,” and “to a degree, the right of access to information.”⁹² However, others “read the Press Clause of the First Amendment to assure merely the existence of the free press as an institution[.]”⁹³ Justice Potter Stewart has noted that “[t]he press is free to do battle against secrecy and deception in government[,] [b]ut the press cannot expect from the Constitution any guarantee that it will succeed . . . [t]he Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”⁹⁴ Moreover, “[s]ome scholars find the concept of a ‘right to know’ absurd because it implies that government has a positive duty to keep the public informed[,]” even though “[n]egative rights, . . . like the public’s possible right not to have the government block access to information, are common in the Constitution.”⁹⁵

One notable case where the public’s right to know was invoked regarding military operations is *Flynt v. Rumsfeld*.⁹⁶ In *Flynt*, the

Madison to W.T. Berry (Aug. 4, 1822), in James Madison, *The Complete Madison* 337 (Saul K. Padover ed., 1953).

⁸⁹ *Id.* at 67.

⁹⁰ *Id.* at 70 (citing the Freedom of Information Act, 5 U.S.C. § 552–59, as an example). However, it is recognized that “[g]iving citizens unfettered access to government documents and processes . . . threatens other important values, such as privacy, national security, and administrative efficiency.” FRANKLIN ET AL., *supra* note 60, at 603.

⁹¹ See Pollack, *supra* note 88, at 73.

⁹² *Id.* at 70–71, n.116 (quoting Thomas I. Emerson and noting several cases in which he made similar statements).

⁹³ *Id.* at 73.

⁹⁴ *Id.*

⁹⁵ *Id.* at 73–74.

⁹⁶ 355 F.3d 697 (D.C. Cir. 2004).

publisher of *Hustler* magazine sought permission to accompany ground troops on combat missions in Afghanistan.⁹⁷ Although journalists had access to the fighting in Afghanistan via a pool system,⁹⁸ Flynt sought the “right to travel *with* military units into combat, with all of the accommodations and protections that entails[.]”⁹⁹ In support of this request, Flynt argued that “the military is obligated to accommodate the press because the press is what informs the electorate as to what our government is doing at war.”¹⁰⁰ However, the court felt differently, holding that “there is no constitutionally based right for the media to embed with U.S. military forces in combat[.]”¹⁰¹ *Flynt* is thus an example of the skepticism with which courts regard arguments involving the public’s right to know. Although the public may have a right to be informed about military operations, this right was not enough to trump the military’s right to control access by the press.¹⁰²

B. The Military’s Unique First Amendment Jurisprudence

Courts treat First Amendment claims with a higher degree of skepticism in the military context than the civilian context. From the beginning of American history, military servicemembers have had limited First Amendment rights.¹⁰³ “Persuasive scholarship has indicated that the founding fathers envisioned a limited, if not non-existent, role for the First Amendment in the armed services.”¹⁰⁴ These limited rights were a logical extension of America’s early sedition laws, since “drafters who supported doctrines of seditious libel in the civilian sphere [did not want to

⁹⁷ See *id.* at 699.

⁹⁸ The pool system of military journalism was created in conjunction with the Persian Gulf War. FRANKLIN ET AL., *supra* note 60, at 643. Under this system, “media organizations chosen by the [Defense] Department were allowed to select specific reporters to be transported to cover the early stages of military operations.” *Id.* “These reporters would then ‘pool’ their information, sharing it with other reporters who had not been selected.” *Id.*

⁹⁹ *Flynt*, 355 F.3d at 702 (emphasis in original).

¹⁰⁰ *Id.* (emphasis and internal quotations omitted).

¹⁰¹ *Id.* at 706.

¹⁰² See *id.*

¹⁰³ See Donald N. Zillman, *Free Speech and Military Command*, 1977 UTAH L. REV. 423, 429 (1977).

¹⁰⁴ *Id.*

protect similarly] disruptive speech by men in uniform.”¹⁰⁵ The view that the First Amendment was inapplicable to the military prevailed throughout the eighteen- and nineteen-hundreds.¹⁰⁶ As such, “[s]erious consideration of military First Amendment rights did not begin until the post-World War II era.”¹⁰⁷ By this time, the armed forces had evolved into a “vastly different [organization] from that of the 1790s or 1880s[.]”¹⁰⁸ Increasingly sophisticated warfare had led to a broadening of soldiers’ duties, thus requiring an “increase in the level and diversity of education among men and women in uniform.”¹⁰⁹ Additionally, “[t]he subtleties of the Cold War, nuclear weapons, and the emergence of third world powers . . . ended easy distinctions between military and political matters.”¹¹⁰ The burgeoning military-industrial complex thus served to convince constitutional scholars that First Amendment rights were a “relevant concern in the military[.]”¹¹¹

Although scholars first recognized the importance of the First Amendment to the military in the 1950s, unsurprisingly, most of the military’s modern First Amendment jurisprudence was shaped during the Vietnam War era.¹¹² Because the Vietnam War was unpopular among both civilians and many judges, “by 1974 federal courts had developed a willingness to review a variety of military actions on both procedural and substantive grounds.”¹¹³ First Amendment cases arising during this era demonstrate that “courts recognized that the military could not deny substantive constitutional rights *ipse dixit*, solely because the military is the

¹⁰⁵ *Id.*

¹⁰⁶ *See id.* at 429–430.

¹⁰⁷ *Id.*; *see also* Edward F. Sherman, *The Military Courts and Servicemen’s First Amendment Rights*, 22 HASTINGS L.J. 325, 330 (1971) (noting that “although substantial numbers of servicemen were court-martialed for speech which was critical of the President during the Civil War, World War I, World War II, and the Korean War, First Amendment issues were rarely raised and never found to constitute a bar to prosecution or conviction”).

¹⁰⁸ Zillman, *supra* note 103, at 430.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *See generally* Donald N. Zillman & Edward J. Imwinkelreid, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396 (1976).

¹¹³ *Id.* at 401.

military.”¹¹⁴ However, as one of these cases, *United States v. Priest*,¹¹⁵ demonstrates, the courts’ review of First Amendment issues was highly deferential to the military’s authority to promulgate rules promoting order and discipline. While servicemembers had First Amendment rights, their rights were subject to many more restrictions than those of civilians.¹¹⁶ This deferential review of policies restricting servicemen’s First Amendment rights was adopted by the Supreme Court in *Brown v. Glines*,¹¹⁷ and continues to this day.

It is thus useful to examine both *Priest* and *Glines* to determine what standard of review the Court would be likely to employ should it have occasion to rule on the constitutionality of the military’s current restrictions on blogging.

1. *United States v. Priest*

United States v. Priest involved charges against a serviceman who, while on active duty in the Navy, edited, published and distributed an on-base underground newspaper entitled “OM.”¹¹⁸ The purpose of OM was to protest the United States’ involvement in Vietnam and, more generally, to speak out against the military establishment.¹¹⁹ As such, issues of OM contained antiwar poems, quotations attributed to well-known antiwar advocates, and explicit instructions on how servicemen could desert the armed forces by going to Canada.¹²⁰ One issue also contained a quasi-violent antiwar sentiment, suggesting “the velocity with which the Vice President would strike the pavement if he was pushed or fell from the Empire State Building.”¹²¹ The *Priest* court noted that these words established the accused’s “abandonment of change by constitutional means and adoption of violence as the method by which his viewpoint is to be imposed on the United States.”¹²²

¹¹⁴ *Id.*

¹¹⁵ 21 C.M.A. 564 (1972).

¹¹⁶ *See, e.g., id.* at 570.

¹¹⁷ 444 U.S. 348 (1980).

¹¹⁸ *Priest*, 21 C.M.A. at 566.

¹¹⁹ *Id.*

¹²⁰ *See id.* at 566–67.

¹²¹ *Id.* at 567.

¹²² *Id.* at 568–69.

Ultimately, the court upheld Priest's punishment.¹²³ In doing so, the court recognized its duty to strike a "proper balance . . . between the essential needs of the armed services and the right to speak out as a free American."¹²⁴ The court emphasized that while "First Amendment rights of civilians and members of the armed forces are not necessarily coextensive . . . our national reluctance to inhibit free expression dictates that the connection between the statements or publications involved and their effect on military discipline be closely examined."¹²⁵ Despite these words, the court concluded that Priest's newspaper was improperly questioning authority because the role of a soldier is "to execute orders, not to debate the wisdom of decisions that the Constitution entrusts to the legislative and judicial branches of the Government and to the Commander-in-Chief."¹²⁶

The *Priest* court also noted that "[i]n the armed forces some restrictions exist for reasons that have no counterpart in the civilian community."¹²⁷ For example, disrespectful or contemptuous speech that may be tolerated in the civilian context is often constitutionally unprotected in the military community because it "may . . . undermine the effectiveness of response to command."¹²⁸ The *Priest* court concluded that the military was well within its authority to punish a single serviceman for publishing his criticism of the armed forces because such words could lead to larger dissent within the troops.¹²⁹ This rationale also underpins the Court's decision in *Brown v. Glines*.¹³⁰

2. *Brown v. Glines*

Decided eight years after *Priest*, *Brown v. Glines* involved challenges to a United States Air Force (U.S.A.F.) regulation "requir[ing] members of the service to obtain approval from their

¹²³ *Id.* at 573.

¹²⁴ *Id.* at 570.

¹²⁵ *Id.* at 569–70.

¹²⁶ *Id.* at 571.

¹²⁷ *Id.* at 570.

¹²⁸ *Id.*

¹²⁹ *See id.* at 569–71.

¹³⁰ 444 U.S. 348 (1980).

commanders before circulating petitions on Air Force bases.”¹³¹ Captain Glines, while on active duty at Travis Air Force Base in California, “drafted petitions to several Members of Congress and to the Secretary of Defense complaining about the Air Force’s grooming standards.”¹³² Because Glines knew he needed command approval to solicit signatures within the base, he first circulated the petitions off-base.¹³³ However, during a training flight at Anderson Air Force Base in Guam, Glines violated the U.S.A.F. regulation by giving “the petitions to an Air Force sergeant without seeking approval from the base commander.”¹³⁴ A majority of the Supreme Court voted to uphold the U.S.A.F. regulation under which Glines was punished.¹³⁵

a) The *Glines* majority

As in *Priest*, the *Glines* majority concluded that “while members of the military services are entitled to the protections of the First Amendment, ‘the different character of the military community and of the military mission requires a different application of those protections.’”¹³⁶ Servicemembers’ rights must, therefore, “yield somewhat to meet certain overriding demands of discipline and duty” to ensure that “[m]ilitary personnel [are] ready to perform their duty whenever the occasion arises.”¹³⁷ The *Glines* majority thus recognized that “[l]oyalty, morale and discipline are essential attributes of all military service.”¹³⁸ “Combat service obviously requires [these attributes,] [a]nd members of the Armed Services, wherever they are assigned, may be transferred to combat duty or called to deal with civil disorder or natural disaster.”¹³⁹ The *Glines* majority thus concluded that because the U.S.A.F. petition regulation was a prior approval requirement that supported commanders’ authority to

¹³¹ *Id.* at 349.

¹³² *Id.* at 351.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 361.

¹³⁶ *Id.* at 354 (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)).

¹³⁷ *Id.* (internal quotations omitted) (quoting *Parker v. Levy*, 417 U.S. 733, 744 (1974)).

¹³⁸ *Id.* at 356 n.14.

¹³⁹ *Id.*

maintain basic discipline on base, it “did not offend the First Amendment.”¹⁴⁰

b) Justice Brennan’s Dissent

Although the *Glines* majority felt that high deference was due the military in this context, Justice Brennan’s dissent argued that the majority was upholding a U.S.A.F. regulation that had established “an essentially discretionary regime of censorship that arbitrarily deprives [servicemembers] of precious communicative rights.”¹⁴¹ Justice Brennan noted that the circulation of petitions “is indisputably protected First Amendment activity” that implicates a number of related rights: “the right to express ideas, . . . the right to be exposed to ideas expressed by others, . . . the right to communicate with government, . . . and the right to associate with others in the expression of opinion.”¹⁴² The U.S.A.F. regulation, in Justice Brennan’s view, was an improper prior restraint on these rights because such restraints could only be exercised to “avert[] a virtually certain prospect of imminent, severe injury to the Nation in time of war.”¹⁴³

Furthermore, Justice Brennan felt that the command-approval procedure for petition circulation was “seriously flawed.”¹⁴⁴ Justice Brennan emphasized that “restraints upon communication must be hedged about by procedures that guarantee against infringement of protected expression and that eliminate the play of discretion that epitomizes arbitrary censorship.”¹⁴⁵ However, no such safeguards were in place for those denied the opportunity to petition under the U.S.A.F. regulation at issue in *Glines*.¹⁴⁶ There was also some evidence of viewpoint discrimination in *Glines* since two of the respondents individually submitted a single leaflet for approval by their base commander, who denied one of the two

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 362 (Brennan, J., dissenting).

¹⁴² *Id.* at 362–63 (internal citations omitted).

¹⁴³ *Id.* at 364. The activity at issue in *Brown* occurred during the late 1970s, which was not a time of war for the United States.

¹⁴⁴ *Id.* at 366.

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

requests because of the petition's "disrespectful and 'contemptuous' tone."¹⁴⁷

Justice Brennan further noted that the U.S.A.F. regulation was not narrowly tailored to serve a compelling government interest.¹⁴⁸ Assuming the majority correctly concluded that maintenance of military order and discipline were compelling government interests, Justice Brennan noted that "if the danger of incitement necessitates prior clearance of servicemen's messages, it would be logical for the military to mandate preclearance of all messages. . . ."¹⁴⁹ Also, "[t]he only rational basis for disparate treatment of petitioning and oral communication would be the presence of some danger *peculiar to the process of petitioning*."¹⁵⁰ Since no such danger existed, Justice Brennan concluded that the U.S.A.F. regulation should be found to violate servicemembers' First Amendment rights.¹⁵¹

3. Modern First Amendment Jurisprudence is Less Deferential in the Civilian Realm than in the Military

Despite Justice Brennan's pointed dissent, modern First Amendment military jurisprudence closely tracks the high level of deference given by the *Glines* majority.¹⁵² Modern civilian First Amendment cases are characterized by the "demand for content-neutrality absent overriding justification, the presumption against prior restraints, and the requirement of enhanced clarity and specificity. . . ."¹⁵³ In contrast, modern military First Amendment cases are characterized by such a high level of deference to military "judgments of necessity, efficiency, and appropriateness of means" that some commentators "question whether judicial review is even applicable."¹⁵⁴ More specifically,

¹⁴⁷ *Id.* at 367 n.10.

¹⁴⁸ *See id.* at 367.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 368 (emphasis in original).

¹⁵¹ *See id.*

¹⁵² *See* C. Thomas Dienes, *When the First Amendment is not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779 (1988).

¹⁵³ *Id.* at 798–99.

¹⁵⁴ *Id.* at 799.

there are . . . three major themes reflected in the deferential judicial posture adopted in the military cases. First, there is an effort to denigrate competing [F]irst [A]mendment concerns. Second, the courts invoke justiciability concerns, emphasizing the dominant constitutional roles of Congress and the Executive in controlling the military and the lack of judicial capabilities. Third . . . the courts stress the unique and special needs of the military . . .

as a separate community.¹⁵⁵ Courts defer to the armed forces in First Amendment cases and give the military's policies a high presumption of constitutionality.¹⁵⁶ As discussed below, this deferential standard of review is inappropriate in the milblogging context, where strict scrutiny should be used to preserve the important interests milblogs serve and protect against viewpoint discrimination.

III. PRESERVATION OF THE NATION VERSUS
PRESERVATION OF THE CONSTITUTION: WHERE THE BALANCE
BETWEEN DEFERENCE TO MILITARY JUDGMENT AND
PROTECTION OF SOLDIERS' FIRST AMENDMENT RIGHTS SHOULD LIE

Milblogging serves many important interests, including giving soldiers an outlet for their combat-related tension, serving as a check on unbridled military power, and informing Americans about events in Iraq not covered by the mainstream media. To preserve these interests while ensuring the safety of our nation, courts should review the Department of Defense's milblogging regulations using strict scrutiny. Utilization of this test by courts will allow for legitimate national security concerns to pass constitutional muster while preventing cloaked viewpoint discrimination.

¹⁵⁵ *Id.* at 815; *see also supra* notes 102–105, 114–117 and accompanying text.

¹⁵⁶ *See Dienes, supra* note 152, at 815.

A. *Milblogging Serves Important Interests*

Unlike low-value speech, such as obscenity,¹⁵⁷ milbloggers' speech serves important societal interests. Milblogs serve as therapeutic devices for many soldiers, allowing them to express themselves freely and relieve the tensions of war, while also informing milblog readers about events in Iraq not covered by the mainstream media.¹⁵⁸ In this way, milblogs also serve as a check on unbridled military power.¹⁵⁹ Milblogs thus contain valuable speech that is deserving of strict scrutiny review by the courts.

1. Milblogs Allow Soldiers to Relieve Their Tension

Milblogs are an important therapeutic tool for soldiers because they allow soldiers to freely vent their frustrations within a highly bureaucratic organization.¹⁶⁰ This may actually help to maintain order and discipline, allowing the military to act more cohesively.¹⁶¹ Although this premise may seem counterintuitive, given the American tendency towards free speech, it is "dangerous to prevent accumulated military discontent from being discharged through" milblogging.¹⁶² Moreover, "[i]f there is a lesson from Vietnam for military attorneys and commanders, it would be that mindless censorship often is the policy most disruptive of military discipline and morale."¹⁶³ Silencing dissent, then, is often more disruptive than allowing it, and will allow soldiers to express their frustrations in ways relatively harmless to the military. Having vented their tensions, these soldiers can then coalesce as an effective fighting unit.

¹⁵⁷ See, e.g., *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973) (holding that theaters could be enjoined from showing obscene films).

¹⁵⁸ Cf. Detlev F. Vagts, *Free Speech in the Armed Forces*, 57 COLUM. L. REV. 187, 190 (1957) (noting that "it seems dangerous to prevent accumulated military discontent from being discharged through the virtually harmless channels of griping to friends or writing letters to the editors of service or civilian papers or to families at home").

¹⁵⁹ *Id.* at 190.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ Zillman & Imwinkelreid, *supra* note 112, at 410; see also Zillman, *supra* note 103, at 433 (noting that "free speech can provide better officers and enlisted men [while] suppression of speech can foster low morale and narrow thinking").

In addition to being a way for soldiers to vent their frustrations, free speech also allows soldiers to achieve individual self-fulfillment.¹⁶⁴ Freedom of speech is “one of the individual’s most precious rights, a fundamental liberty rooted in our ethics, politics, and religion [that] . . . stands as an end in itself, deserving our defense against every encroachment not required by some competing interest critical to our survival.”¹⁶⁵ Although national security interests may dictate some encroachment on service members’ right to free speech, “[a] person who enters the armed services remains an individual, a possessor of rights as well as a subject of duties, and his sacrifices of basic liberties should [thus] be kept to a minimum.”¹⁶⁶ Strict scrutiny would allow censorship of information vital to national security interests while ensuring that millions of servicemen are not reduced to second-class citizens with fewer First Amendment rights than the civilian population.¹⁶⁷

2. Milblogs Inform Citizens and Serve as a Check on Military Power

While there is some skepticism about whether there is a constitutional “right to know,”¹⁶⁸ theorists and courts, alike, recognize that the First Amendment protections given to free speech and press serve as important checks on unbridled government power and inform the public about important issues.¹⁶⁹ Milblogs also accomplish these tasks and their soldier-authors’ words should thus be given the highest degree of First Amendment protection.

Freedom of speech in the military context, like in the civilian realm, acts as a check on the unmitigated power of government.¹⁷⁰ Criticism of government in the civilian context is valued “for its

¹⁶⁴ Zillman, *supra* note 103 (noting that “in the often confining circumstances of the military, freedom of expression is a reminder of individual uniqueness and worth”).

¹⁶⁵ Vagts, *supra* note 158, at 190.

¹⁶⁶ *Id.*; see also Zillman, *supra* note 103, at 433 (noting that “[f]reedom of expression can promote . . . ‘individual self-fulfillment’”).

¹⁶⁷ Vagts, *supra* note 158, at 190.

¹⁶⁸ See *infra* Part II.B.3.

¹⁶⁹ See *supra* notes 69–70, 76–77, 89–90 and accompanying text.

¹⁷⁰ See Zillman, *supra* note 103, at 431–433.

role in discouraging overreaching, arrogance and remoteness.”¹⁷¹ Likewise, in the military context, “[u]nrestricted speech reveals information and encourages wise policies.”¹⁷² Free speech “provides necessary insight into the policymakers as well as the policy itself.”¹⁷³ Suppression of free speech in the military would seal its members off from “potentially critical or unfavorable speech.”¹⁷⁴ A military “isolated from political debate and the winds of change can become a repressive force, out of touch with the values and ideals of the civilian society.”¹⁷⁵ A military that suppresses free speech could thus constitute “a serious danger to the American democratic and constitutional system.”¹⁷⁶ By blogging about their experiences in Iraq, soldiers are merely holding the military’s Iraqi policies up to the light, allowing citizens to judge their wisdom. Although milbloggers may not always portray the armed forces in a favorable light, it is crucial for Americans to receive more than a whitewashed view of the Iraq War. Moreover, insights citizens gain from milblogs can help fuel “uninhibited, robust, and wide-open”¹⁷⁷ public debate about Iraq, which is essential to democracy.

Beyond participation in the democratic system, Americans also should be informed about military policy because of its impact on every citizen’s safety. The value of speech increases “with the significance of the issue discussed.”¹⁷⁸ Therefore, “[t]he relevance of defense issues to each citizen’s physical security should encourage a substantial release of information.”¹⁷⁹ Moreover, “[t]he value of speech also increases with the knowledge of the speaker.”¹⁸⁰ As stated throughout this Note, milblogs written by soldiers fighting in the front lines of the Iraq War provide Americans thousands of miles away with invaluable insights into

¹⁷¹ *Id.* at 431.

¹⁷² *Id.* at 432.

¹⁷³ *Id.* at 433.

¹⁷⁴ Sherman, *supra* note 107, at 367 (1971).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269–70 (1964).

¹⁷⁸ Zillman, *supra* note 103, at 432.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

the war.¹⁸¹ Milbloggers may portray the Iraq War differently than the mainstream media,¹⁸² but this divergence makes their writings even more valuable.¹⁸³ Moreover, “[t]he military penchant for internal secrecy and its often remote overseas locations”¹⁸⁴ make writings from front-line soldiers “even more valuable” to the public discourse.¹⁸⁵ Milbloggers’ impressions of the war, anecdotes about their experiences in Iraq, and vivid portrayals of events only glossed over by the mainstream media thus all provide crucial information to both fuel the public discourse about the Iraq war and inform the citizenry about issues relevant to national security.

B. Courts Should Evaluate the Department of Defense’s Milblogging Regulations Using Strict Scrutiny

Despite the important interests discussed above,¹⁸⁶ under current military jurisprudence, a court would scrutinize the Department of Defense’s milblogging regulations with more deference given to the military than is common under strict scrutiny.¹⁸⁷ However, courts’ previous justification for applying a lesser degree of scrutiny to military laws restricting servicemembers’ First Amendment rights are unconvincing in the milblogging context.¹⁸⁸ Moreover, the nature of the DOD’s milblogging regulations dictates that a court should either view them either as presumptively unconstitutional or through a lens of strict scrutiny.

1. Milbloggers Are *Not* a Separate Community

Courts generally defer to military judgment on speech issues because they view the military as a separate community, distinct

¹⁸¹ See *supra* Part I.A.

¹⁸² See *supra* note 23.

¹⁸³ Cf. Zillman, *supra* note 103, at 432 (noting that while citizens “may not believe the dissenting expert, the fact that discussion exists may change [the] perspective on the matter in controversy”).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *supra* Part III.

¹⁸⁷ See *supra* Part II.B.

¹⁸⁸ See *infra* Part III.B.3.

from the civilian world.¹⁸⁹ The *Glines* majority's conclusion that the "different character" of the military justifies lower First Amendment protections is an example of this type of thinking.¹⁹⁰ There are five characteristics of the military that set it apart from the civilian realm:

First, the primary purpose of the military, fighting wars, is hard and dangerous. Thousands of years of military history have not changed this basic fact. Second, the work of the military, defending national interests or even the nation itself, is a vital national activity. Third, despite rhetoric over the glory of the military, the great bulk of soldiers suffering casualties are from the lower social classes, generally poorly paid, and often lightly rewarded in prestige. Fourth, the military is by nature an emergency force. National affairs are in their most satisfactory state when the nation is at peace—when the military is not performing its distinctive function. In peacetime, problems arise in maintaining employee preparedness and motivation. Fifth, in many cases, the objective of battle or war is only dimly perceived or even actively opposed by the combat troops. Sophisticated political, geographic, and economic theories are lost on the soldier concerned with personal survival.¹⁹¹

Moreover, "the military fulfills a unique purpose and mission."¹⁹² We entrust the military with "a vast array of weapons systems and technologies, capable of destroying not only towns and countries, but human civilization as we know it."¹⁹³ Courts thus hold that the military's "awesome responsibilit[ies]"

¹⁸⁹ See Zillman & Imwinkelreid, *supra* note 112, at 397.

¹⁹⁰ *Brown v. Glines*, 444 U.S. 348, 354 (1980) (quoting *Parker v. Levy*, 417 U.S. 733, 758 (1974)); see also Zillman & Imwinkelreid, *supra* note 112, at 397 (noting that "[m]ilitary proponents . . . argue[] that the special nature of the Armed Forces as an organization devoted to national defense justify[es] legal standards different from those normally applied to constitutional rights").

¹⁹¹ See Zillman & Imwinkelreid, *supra* note 112, at 402.

¹⁹² John A. Carr, *Free Speech in the Military Community Striking a Balance Between Personal Rights and Military Necessity*, 45 A.F.L. REV. 303, 345 (1998).

¹⁹³ *Id.*

distinguish it from other civilian organizations where speech is protected more stringently.¹⁹⁴

However, the modern military is not really a separate community that justifies judicial deference to military self-government.¹⁹⁵

The “society apart” was a valid description of the small, 19th century, regular Army fighting Indians on the frontier. The description was still largely valid when forces stood garrison or shipboard duty in the 1930s. But by 1974 the military had become a multimillion-person employer involved in almost every aspect of American life.¹⁹⁶

In addition to growing larger in size, the modern military has changed its recruitment tactics to emphasize the development of skills that can be carried over into the civilian realm.¹⁹⁷ The modern military has become increasingly specialized and technology-based, meaning that “many servicemen pursue careers little different from and no more strenuous or dangerous than numerous civilian pursuits.”¹⁹⁸ Data technicians, statisticians, JAG lawyers and army doctors are all examples of the increasingly-common non-combat soldier. The line between civilian and soldier has blurred in the modern military, to the extent that a separate standard of review for military policies that abridge First Amendment rights is no longer justified.

Milblogs, in particular, illustrate this blurring of the civilian and military realms. In the Internet Age, it can hardly be argued that milbloggers are a separate community, set apart from their civilian readers. On the contrary, milbloggers are part of a Web community consisting of both civilians and servicemen, and it is this interconnectedness that has military officials worried. The Army claims operational security is at risk not because milblogs are seen only by servicemen, but because “anyone with access to the Internet can read many first-hand accounts of life in a war zone

¹⁹⁴ *Id.*

¹⁹⁵ *See* Zillman & Imwinkelreid, *supra* note 112, at 400.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 403.

within seconds after they're finished.”¹⁹⁹ Milblogs are narrowing the “increasing distance between the civilian and military worlds, and the divergence in values of both.”²⁰⁰ Instead of being part of a separate community, then, milblogs are merging two communities together. To be sure, the military still has unique security and disciplinary needs that set it apart from many other organizations. However, the experience of “para-military forces, such as police and fire departments,” indicates that servicemembers can be given First Amendment rights while still performing their duties with a high degree of loyalty and discipline.²⁰¹ The Supreme Court’s traditional deference to military censorship authority based on the separateness of the armed forces is thus inapplicable in the milblogging context.

2. The Department of Defense’s Milblogging Regulations are a De Facto Prior Restraint and Should Thus Be Presumptively Unconstitutional

Because of their potential chilling effect on soldiers’ speech, the Department of Defense’s milblogging regulations are a de facto prior restraint and should thus be viewed as presumptively unconstitutional. De facto prior restraints are notoriously hard to define,²⁰² but are essentially regulations that have the same censoring effect as an injunction or a licensing scheme.²⁰³ De facto prior restraints are distinct from regulations mandating a subsequent punishment for unlawful activity.²⁰⁴ However, “in some instances the operation and effect of a particular enforcement scheme, though not in the form of a traditional prior restraint, may . . . raise the same concerns which inform all of [the Supreme

¹⁹⁹ Mark Memmott, ‘Milbloggers’ Are Typing Their Place in History, USA TODAY, May 12, 2005, available at http://www.strykernews.com/archives/2005/05/12/milbloggers_are_typing_their_place_in_history.html.

²⁰⁰ Hugh Hewitt, *supra* note 10.

²⁰¹ Sherman, *supra* note 107, at 367 (1971).

²⁰² See FRANKLIN ET AL., *supra* note 60, at 96–97 (discussing the ambiguity between de facto prior restraints and subsequent punishment).

²⁰³ *Id.* at 96.

²⁰⁴ See *Alexander v. United States*, 509 U.S. 544, 553–54 (1993) (holding that the plaintiff’s forfeiture of obscene materials under the Racketeer Influenced and Corrupt Organizations Act (RICO) was a subsequent punishment, not a prior restraint on his First Amendment rights).

Court's] prior restraint cases: the evils of state censorship and the unacceptable chilling of protected speech."²⁰⁵

The Department of Defense's milblogging regulations contain several elements that will potentially chill speech. The requirement that milbloggers and website hosts register their blogs with unit commanders²⁰⁶ has the chilling effect of removing the Internet's anonymity. Milbloggers now know that their unit, location, webmaster name, telephone number and IP address of their blog or website are all on file with their commanders.²⁰⁷ Moreover, milbloggers know that these commanders will be reading and monitoring their blogs for possible operational security breaches.²⁰⁸ Their lack of anonymity combined with the knowledge that their commanders may be reading every post will surely cause most milbloggers to think twice about posting things critical of the war or of their units. Moreover, the knowledge that under this policy other soldiers have been punished for blogs critical of the Iraq War²⁰⁹ might cause many milbloggers to change the tone of their writing to advocate a more pro-Iraq view. As one commentator has noted, "[t]he necessity of submitting to censorship will of itself deter many prospective authors from publishing their views,"²¹⁰ especially given the fact that "[c]ensors are apt to be hyper-cautious, particularly at lower military echelons."²¹¹ Moreover, "[t]he delays occurring 'while the censor ponders moodily on 'policy and propriety'' may serve to nullify the impact of a communication because the public's interest in military matters is particularly evanescent."²¹² The appeal of milblogs is largely based on the ability to read real-time accounts of the fighting in Iraq, so without up-to-date postings, the uniqueness of the genre is lost. While the enforcement of the

²⁰⁵ *Id.* at 572 (Kennedy, Blackmun, & Stevens, JJ., dissenting).

²⁰⁶ Kennedy, *supra* note 39, at 31; *see also* Finer, *supra* note 13 (noting that this policy, promulgated by Lt. Gen. John R. Vines, the top tactical commander in Iraq, was "the military's first policy memorandum on Web sites maintained by soldiers").

²⁰⁷ Vines' Memorandum, *supra* note 27.

²⁰⁸ *Id.*

²⁰⁹ *See infra* Part IV.B.3.b.

²¹⁰ Vagts, *supra* note 158, at 213.

²¹¹ *Id.*

²¹² *Id.*

Department of Defense's milblogging regulations could be characterized as a subsequent punishment, the burdens posed by these regulations are a de facto prior restraint because they unacceptably chill protected speech. The registration requirement and loss of anonymity make it more than likely that potential milbloggers will conclude that posting their experiences in an online diary is simply not worth the hassle and risk. Countless viewpoints of the Iraq War will thus be lost, as will civilians' ability to vicariously experience the Iraq war via milblogs.

3. Courts Should Apply Strict Scrutiny to the Department of Defense's Milblogging Regulations

Even if the Department of Defense's milblogging regulations are not an unconstitutional prior restraint, courts still should not defer to military censorship authority. Instead, courts should utilize strict scrutiny to ensure that servicemembers' First Amendment rights are being protected to the greatest extent possible. While it is true that "[a] sad paradox requires that the serviceman sacrifice some of the liberties which he is called upon to protect,"²¹³ it is the job of the courts to police the Constitution. "[I]f judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum."²¹⁴ One only need look at *Korematsu v. United States*²¹⁵ to be reminded that high deference to military judgment in the interest of national security can allow atrocities to take place. Certainly, "[m]ilitary (or national) security is a weighty interest . . ."²¹⁶ However, "the concept of military necessity is seductively broad, and has a dangerous plasticity"²¹⁷ that can be invoked to "justify an encroachment upon civil liberties."²¹⁸

²¹³ *Id.* at 189.

²¹⁴ Warren, *supra* note 1, at 193.

²¹⁵ 323 U.S. 214 (1944) (deferring to the military's judgment that it was necessary, for national security reasons, to exclude thousands of Japanese-American citizens from certain areas of the West Coast following the Pearl Harbor bombing).

²¹⁶ *Brown v. Glines*, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).

²¹⁷ *Id.*

²¹⁸ *Id.*

Therefore, “the military-security argument must be approached with a healthy skepticism: its very gravity counsels that courts be cautious when military necessity is invoked by the Government to justify a trespass on First Amendment rights.”²¹⁹ True national security concerns will survive strict scrutiny, as discussed below, while cloaked viewpoint discrimination will not. In this way, strict scrutiny will ensure that milbloggers’ First Amendment rights are being stringently protected while still allowing the military to guard against the release of information dangerous to operational security.

a) The Lessons of the Pentagon Papers and *The Progressive*: True National Security Concerns Will Withstand Strict Scrutiny

True national security concerns will survive a strict scrutiny review of the Department of Defense regulation abridging milbloggers’ First Amendment rights. While the Supreme Court ultimately ruled in favor of publication in *New York Times Co. v. United States*,²²⁰ it did so by noting that the government had not met its heavy burden of showing a valid national security concern that would justify enjoining publication of the Pentagon Papers.²²¹ The government had not shown that publication of the Pentagon Papers would obstruct military recruiting, disclose the sailing dates of military transports, or disclose the number and location of troops.²²² The *New York Times* Court thus implied that a valid national security concern would overcome the presumption against prior restraints.²²³ It follows, then, that valid national security concerns would also be enough to survive the slightly less rigorous strict scrutiny analysis.

²¹⁹ *Id.*

²²⁰ 403 U.S. 713 (1971).

²²¹ *Id.* at 714 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) and noting that there is a presumption of unconstitutionality regarding prior restraints).

²²² See *Near v. Minnesota*, 283 U.S. 697, 716 (1931) (“No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”).

²²³ See 403 U.S. 713.

The national security concerns cited by military officials when justifying the blogging regulations are very similar to those cited in *United States v. Progressive, Inc.*²²⁴ There, the government argued that publication of an article about hydrogen bombs was a threat to national security because, even though most of the article's information was in the public domain, publication of that information in an easily-accessible format could "help enemies who otherwise would not put all the pieces together."²²⁵ Similarly, in regards to milblogs, the military claims that "revealing a minor aspect of strategy or tactics may seem insignificant . . . but [i]f the bad guys take a piece from me, and a piece from you, and a piece from another guy, pretty soon they can gather some pretty good intel[ligence]."²²⁶ The *Progressive* court ruled in favor of censorship, noting that publication of the hydrogen bomb article was "analogous to publication of troop movements or locations in time of war and falls within the extremely narrow exception to the rule against prior restraint."²²⁷ If the Department of Defense could show a valid national security concern stemming from terrorists' piecemeal assembly of data gleaned from milblogs, this would arguably be a valid enough national security concern to survive a strict scrutiny analysis of its milblogging regulations.²²⁸

In addition to concerns about information compiled by terrorists, the military may also be able to show a valid national security concern by arguing that censorship of milblogs is necessary to maintain friendly foreign relations in a time of growing anti-American sentiment. Soldiers' words may endanger relations with foreign allies, especially if an individual servicemember's words are mistaken for official military policy.²²⁹ In the era of a global war on terror "there is . . . a very real danger that blustering speeches might upset the often delicate relationships

²²⁴ 467 F. Supp. 990 (W.D. Wis. 1979); see also *supra* notes 81–87 and accompanying text.

²²⁵ FRANKLIN ET AL., *supra* note 60, at 101; see also *supra* notes 81–87 and accompanying text.

²²⁶ Mallia, *supra* note 49 (quoting Marine Capt. Don Caetano).

²²⁷ *Progressive*, 467 F. Supp. at 996; see also *supra* notes 81–87 and accompanying text.

²²⁸ See *N.Y. Times*, 403 U.S. at 731–41 (White, J., concurring).

²²⁹ Vagts, *supra* note 158, at 189.

between [the United States] and our allies and antagonists.”²³⁰ This is especially true of speeches made by troops stationed overseas because “[t]he presence of foreign troops in a country inevitably grates on local sensitivities.”²³¹ Troops “protesting policies of [their] own government may incidentally be challenging those of the host country as well[,]”²³² and when servicemen “inject themselves into the domestic politics, the local citizens’ displeasure can turn into outrage.”²³³ Moreover, “[f]oreign citizens unfamiliar with American traditions may resent the protest or confuse the individual serviceman’s views with those of the United States.”²³⁴ Speech by troops stationed in foreign countries, left uncensored, could thus create an international conflict or fan the flames of an already-volatile foreign occupation. Avoiding such a conflagration may, therefore, be justification enough for the Department of Defense’s milblogging policies under strict scrutiny analysis.

i. Maintaining the Military’s Functionality

In addition to concerns about compilation of data by terrorists and maintenance of foreign relations, in a time of war the military may also have a compelling interest in restricting speech so that the hierarchical structure and discipline of the military is preserved. The military’s pyramidal hierarchy starts with low-level “privates, seamen, and airmen bound to respect their noncommissioned officers” and “culminates in generals and admirals bound to respect civilian secretaries and the President.”²³⁵ Traditionally, “significant military decisions are made by [the] civilian political leaders, not [lower-level] military personnel.”²³⁶ The civilian political leaders thus bear the ultimate responsibility for military decisions. “Extra restraints on speech in the armed

²³⁰ *Id.*

²³¹ Zillman & Imwinkelreid, *supra* note 112, at 406.

²³² *Id.* at 409.

²³³ *Id.* at 406.

²³⁴ *Id.* at 409; *see also* Vagts, *supra* note 158, at 189 (“For many listeners an officer’s words have a peculiar aura of responsibility and officiality. Many find it hard to believe the standard disclaimer that a general or admiral is speaking only for himself and ‘not necessarily’ for the service as a whole.”).

²³⁵ Vagts, *supra* note 158, at 188.

²³⁶ Zillman & Imwinkelreid, *supra* note 112, at 406.

services are ultimately rooted in the need for a rigid and thoroughgoing attitude of subordination”²³⁷ towards these leaders, who “need protection from irresponsible abuse[.]”²³⁸ Additionally, commanders should be able to rely on the “silent support, if not enthusiasm,” of their subordinates.²³⁹ Beyond a need for loyal troops, there is also a fear that “[a]ny expression of disagreement [with military policy] by servicemen might move the military into politics, or prompt a military coup.”²⁴⁰

Milblogs, however, allow dissent to be expressed and disseminated easily. While it seems unlikely that a milblogger’s words will prompt a military coup, they could undermine the discipline of other soldiers. We entrust the military with “a vast array of weapons systems and technologies, capable of destroying not only towns and countries, but human civilization as we know it.”²⁴¹ Because of these onerous responsibilities, it is crucial to maintain support and discipline within the armed forces. General H. Norman Schwarzkopf explained before Congress “that in [his] forty years of Army service in three different wars, [he is] convinced that soldier cohesion is the single most important factor in a unit’s ability to succeed on the battlefield.”²⁴² Moreover, while serving as Chairman of the Joints Chiefs of Staff, General Colin Powell argued that:

We create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group and for their individual

²³⁷ Vagts, *supra* note 158, at 188.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ Zillman & Imwinkelreid, *supra* note 112, at 406; *see also* United States v. Priest, 21 C.M.A. 564, 571 (1972) (noting that one possible harm of the underground newsletter published by the defendant “is the effect on others if the impression becomes widespread that revolution, smashing the state, murdering policemen, and assassination of public officials are acceptable conduct”). *But see* Sherman, *supra* note 107, at 344–45 (1971) (noting that throughout the twentieth century generals have been involved in politics while still on active duty, and citing the battle between Generals Eisenhower and MacArthur for the 1952 Republican Presidential nomination as a prominent example of politicking while still on active duty).

²⁴¹ John A. Carr, *supra* note 192, at 345.

²⁴² *Id.* at 347.

buddies. We cannot allow anything to happen which would disrupt that feeling of cohesion within the force.²⁴³

Certain types of free speech “may subtly undermine the loyalty, discipline, and morale of servicemen.”²⁴⁴ Moreover, “[f]irst amendment activity questioning military and national policies may lead to violence and a loss of disciplinary control” because “[s]ervicemen trained in physical response are often eager to relieve tensions and are frequently intolerant of ‘different’ viewpoints.”²⁴⁵ The Department of Defense may thus be able to show it has a compelling interest in maintaining soldiers’ discipline, and their respect for superior officers. In addition to national security concerns, these arguments may also be enough to allow the milblogging regulations to survive strict scrutiny.

b) Strict Scrutiny is Needed to Protect against Viewpoint Discrimination

The justifications for the Department of Defense’s milblogging policy certainly seem compelling: the need to guard against terrorists’ compilation of information dangerous to America, and the need to maintain the military’s functionality. Arguably then, a content-neutral milblogging policy would withstand strict scrutiny. However, while the Department of Defense’s milblogging policy is content-neutral on its face, there is evidence that it is being used as a pretext for viewpoint discrimination.²⁴⁶ The question thus remains as to whether the DOD’s compelling interests are enough to justify viewpoint discrimination.²⁴⁷

²⁴³ *Id.* at 347 n.283.

²⁴⁴ Zillman & Imwinkelreid, *supra* note 112, at 405.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Erwin Chemerinsky, *The Fifty-Fifth Cleveland-Marshall Fund Lecture: The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 213 (1994).

[E]ven viewpoint restrictions will be allowed if there is a sufficiently compelling government interest. For example, a school system likely would have a compelling interest in choosing not to spend scarce library dollars for racist propaganda. There, of course, is no formula for deciding what is a compelling interest; but that is a problem throughout constitutional law

Id.

Under the current Department of Defense policy, unit commanders in Iraq are given the burden of ensuring milbloggers' compliance with regulations.²⁴⁸ This means that "many commanders may abuse [their authority to balance First Amendment expression values] and continue to overreact to servicemen's expression of unpopular views."²⁴⁹ There is evidence of this type of viewpoint discrimination occurring in Iraq, where authors of blogs critical of the war are censored while pro-Iraq blogs remain untouched. For example, Leonard Clark's blog contained descriptions of his company's captain as a "glory seeker," characterized his battalion sergeant as an "inhuman monster," and suggested that "his fellow soldiers were becoming opposed to the U.S. mission in Iraq."²⁵⁰ Clark's punishment, discussed above, constituted "every possible punishment" available for violating OpSec in his politically-liberal blog.²⁵¹ Jason Hartley's blog was also written in a notoriously sarcastic and critical style.²⁵² In his blog, Hartley wrote accounts of the frat-boy like antics of his fellow soldiers, described his unit's missions in a sarcastic manner, and characterized his time in Iraq as "a constant state of suck."²⁵³ While the Army contends that these postings violated OpSec,²⁵⁴ Hartley feels that "the Army's real concern was his satiric tone."²⁵⁵ Hartley contends that "[the blogs] that stay up are completely patriotic and innocuous, and they're fine if you want to read the flag-waving and how everything's peachy keen in Iraq[.]"²⁵⁶ At least one commentator agrees with this assertion that military officials are trying to muffle dissent from troops in the

²⁴⁸ See Vines' Memorandum, *supra* note 27.

²⁴⁹ Zillman & Imwinkelreid, *supra* note 112, at 409.

²⁵⁰ Finer, *supra* note 13 (quoting an entry where Clark wrote that "[a] growing number of men [stationed in Iraq] are starting to wonder why we should continue to risk our lives for this whole mess when we know that the government will probably pull out of here").

²⁵¹ Thomas Claburn, *Army Chief of Staff Calls For More Oversight of Military Bloggers*, INFO. WEEK, Sept. 1, 2005, available at <http://informationweek.com/story/showArticle.jhtml?articleID=170102708>.

²⁵² John Hockenberry, *supra* note 11.

²⁵³ *Id.*

²⁵⁴ See *supra* notes 35–36 and accompanying text.

²⁵⁵ Mallia, *supra* note 49.

²⁵⁶ *Id.*

field.²⁵⁷ Michael O'Hanlon, a senior fellow at the Brookings Institution in Washington, has commented that censorship of milblogs "has much less to do with operational security and classified secrets and more to do with American politics and how the war is seen by a public that is getting increasingly shaky about the overall venture[.]"²⁵⁸ This assertion is also supported by memoranda from top military officials cautioning against posting information that would negatively affect the public's perception of the war.²⁵⁹

This evidence of viewpoint discrimination is problematic because while the Department of Defense may have legitimate security concerns, those concerns do not justify their political control of information about the Iraq war. If Hartley and Clark's blogs did contain information that could be used by the enemy, then their punishments are justified. However, if Hartley's assertion is correct that the military shut down his blog because he portrayed the war in a negative light, then this is something that must be dealt with by the courts. Under *Glines*,²⁶⁰ soldiers like Hartley who claim viewpoint discrimination still have a cause of action for violation of their First Amendment rights. These soldiers can assert that commanders applied the Department of Defense's milblogging regulation "irrationally, invidiously, or arbitrarily."²⁶¹ However, the Supreme Court should also use strict scrutiny to conduct a substantive review of the military's decision to censor milbloggers, to ensure that the underlying security concerns cited by the government are legitimate, and not merely a pretext for the Department of Defense to gain public relations control of the Iraq war. In this way, the Court can ensure that national security is maintained while the rights guaranteed to servicemen by the Constitution are also preserved.²⁶²

²⁵⁷ Eric Magnell, *Soldiers' Blogs to Face Military Scrutiny*, Aug. 24, 2004, available at <http://www.npr.org/templates/story/story.php?storyId=3867981>.

²⁵⁸ *Id.*

²⁵⁹ See *supra* note 37 and accompanying text.

²⁶⁰ See *Brown v. Glines*, 444 U.S. 348, 351 (1980).

²⁶¹ *Id.* at 358 n.15.

²⁶² See Warren, *supra* note 1, at 200.

IV. CONCLUSION

Milblogs have created new operational security risks for the military, and as the Department of Defense struggles to deal with these risks, it is up to the courts to police their actions to ensure servicemembers' First Amendment rights are being protected. Milblogs serve important societal interests: they are both a therapeutic tool that let soldiers write about the trauma of combat and a democratic tool that let Americans thousands of miles away have a bird's-eye, hopefully uncensored, view of the Iraq War. Milbloggers are thus contributing to the political dialogue by allowing anyone with an Internet connection to read about their experiences in Iraq. Because anyone can access milblogs, the Court's deference to the military as a separate community is inapplicable here. Instead, the Court should view the Department of Defense's milblogging regulation as a prior restraint or, alternatively, view it through the lens of strict scrutiny. Either of these standards of review will allow true national security concerns to pass constitutional muster while invalidating any pretextual viewpoint discrimination. Given the military's attempts to gain public relations control of the Iraq War, strict scrutiny is necessary to ensure that servicemembers are not unjustly being denied the very rights they are fighting to protect. To answer Former Chief Justice Warren's question,²⁶³ it is possible to preserve the Nation and the Constitution at the same time, and in the milblogging context it is up to the Court to strike this balance.

²⁶³ See *supra* note 1 and accompanying text.