UNITED STATES ARMY TRIAL JUDICIARY
FOURTH JUDICIAL CIRCUIT
FORT LEWIS, WASHINGTON

UNITED STATES	)	
	)	
v.	)	**Ruling of the Court**
	)	**Defense Motion to Suppress**
1LT EHREN K. WATADA	)	**The Charge [sic] and All**
U.S. Army	)	**Specifications Alleging**
HHC, I Corps	)	**Violations of Article 133**
Fort Lewis, WA 98433	)	
	)	**16 January 2007**

During the motion session on 4 January 2007 to litigate all motions, both parties were given the opportunity to present evidence on this matter and to make oral argument on the motion. Following are the findings of fact, discussion of the law, and ruling of the court. This ruling will be entered into the Record of Trial as the next Appellate Exhibit in order.

I. Findings of Fact

1. In the Specifications of Charge II and the Specification of the Additional Charge, the accused is charged with statements he allegedly made at press conferences, to reporters, and to a "Veterans for Peace" national convention.

II. Conclusions of Law

1. The defense has moved to dismiss the Specifications of Charge II and the Specification of the Additional Charge, alleging the statements are protected by the First Amendment and that Article 133, UCMJ, is vague and overbroad. The defense bears the initial burden to show the speech is protected speech, and if met, the burden then shifts to the government to show a permissible application of the limitations or restraint upon the speech. Dombrowski v. Pfister, 380 U.S. 479 (1965). See also R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

2. The First Amendment to the Constitution provides that "Congress shall make no law … abridging the freedom of speech…." Amend. I, U.S. Const. However, the Supreme Court has held such freedoms are not absolute. See, Cohen v. California, 403 U.S. 15, (1971) (fighting words); Roth v. United States, 354 U.S. 476 (1957) (obscenity); Chaplinski v. New Hampshire, 315 U.S. 568 (1942) (dangerous speech).

3. In Parker v. Levy, 417 U.S. 733 (1969), the Supreme Court found a constitutionally significant difference between the free speech rights of a civilian and a servicemember, "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." Id. at 758.

4. The test for speech for civilians is found in Schenck v. United States, 249 U.S. 47 (1919). Schenck held that speech would not be protected if "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." Id. at 52. Brandenburg v Ohio, 395 U.S. 444 (1969), further defined "clear and present danger" as "directed to inciting or producing imminent lawless action . . . likely to incite or produce such action." Id. at 447.

5. The Court of Military Appeals, now Court of Appeals for the Armed Forces in United States v. Brown, 45 M.J. 389 (CMA 1986), explained the difference in the military as:

> The test in the military is whether the speech interferes with or prevents the orderly accomplishment of the mission or presents a clear danger to loyalty, discipline, mission, or morale of the troops. See, e.g., United States v. Hartwig, 39 M.J. 125, 128 (CMA 1994); United States v. Priest, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 344 (1972). This is a lower standard not requiring "an intent to incite" or an "imminent" danger.

Brown at 395.

6. Assuming for the purpose of deciding this motion that the accused made the statements charged and the defense has made a prima facie case that the speech is protected speech, the government has met its burden in showing the speech, by an Army officer, is not protected speech.

7. Specifications 2 and 3 of Charge II are recitations under Article 133, UCMJ of violations of Article 88, UCMJ. It is long settled under military law that prosecuting contemptuous speech by an officer directed at the President under Article 88 or Article 133 passes Constitutional muster. United States v. Howe, 17 U.S.C.M.A., 37 C.M.R. 429 165 (1967).

8. In Specification 1 of Charge II, the accused clearly identifies himself as an officer of the armed forces. An officer challenging the lawfulness of a war or combat action could tend to interfere with or prevent the orderly accomplishment of the mission or present a clear danger to loyalty, discipline, mission, or morale of the troops. In the Specification of the Additional Charge, the accused identifies himself as an officer and urges soldiers not to participate in the war. This could have a clear and present danger to the loyalty, discipline, mission, or morale of the troops. These are questions of fact for the members.

9. Finally, the defense assertion that Article 133 is unconstitutionally vague and overbroad is without merit. See Levy, 417 U.S. at 760-761.

Ruling of the Court: The defense motion to dismiss the Specifications of Charge II and the Specification of The Additional Charge is DENIED.

Done this 16th day of January, at Fort Lewis, Washington.

JOHN M. HEAD
LTC, JA
Circuit Judge