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MILITARY JUSTICE

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

In *Parker v. Levy*,[1] the United States Supreme Court held that Articles 133 and 134 of the Uniform Code of Military Justice[2] are not constitutionally vague under the due process clause of the fifth amendment, nor facially invalid under the first amendment because of overbreadth.[3]

Levy entered the Army under the "Berry Plan,"[4] where he agreed to serve for two years in the armed forces if permitted first to complete his medical training. Throughout his tour of duty, he was stationed at an Army hospital as Chief of the Dermatological Service and assigned, as one of his functions, to train Special Forces aid men. Since Levy neglected his duty to conduct the training program, a court-martial convicted him of violating Article 90(2) by disobeying the hospital commandant's order to establish a training program for the aid men, and of violating Articles 133 and 134 by making public statements urging black enlisted men to refuse to obey orders to go to Vietnam, and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children."[5] After his conviction was sustained within the military, Levy petitioned for habeas corpus in the United States district court challenging his conviction on the grounds that both articles were "void for vagueness" under the due process clause of the fifth amendment, and overbroad in violation of the first amendment. The district court denied relief, citing in support decisions of the United States Court of Military Appeals. The Court of Appeals for the Third Circuit reversed,[6] holding that Articles 133 and 134 were void for vagueness.[7] It found that though Levy's conduct fell within an example of Article 134 violations contained in the Courts-Martial Manual,[8] the possibility that the articles would be applied in the future to the conduct of others and would not provide sufficient warning as to the scope of prohibited conduct, or would be applied to conduct protected by the first amendment, gave Levy standing to challenge the facial validity of both articles.[9] The court also ordered a new trial

[1] 417 U.S. 733 (1974).

[2] These two articles are popularly known as the General Articles.
10 U.S.C. § 933 (1970) provides:
> Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct.

10 U.S.C. § 934 (1970) provides:
> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of the court.

[3] In addition, the Court upheld Levy's conviction under Article 90, ruling that his contentions that the commandant's order constituted participation in a war crime and that the order was given solely to increase his punishment were not of constitutional significance and were beyond the scope of review since such defenses had been resolved against Levy on a factual basis by the convicting court-martial.
10 U.S.C. § 890(2) (1970) provides:
> Any person subject to this chapter who . . . (2) willfully disobeys a lawful command of his superior commissioned officer, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

[4] 50 U.S.C. § 454 (1970).

[5] 417 U.S. at 737.

[6] 478 F.2d 772 (3d Cir. 1973).

[7] The court of appeals held that the articles failed to meet the requirements at the heart of the vagueness doctrine. They did not provide the person of ordinary intelligence with a reasonable opportunity to know what was prohibited, and they did not set out explicit standards so as to prevent arbitrary and discriminatory enforcement. 478 F.2d at 778–79, citing Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[8] MANUAL FOR COURTS-MARTIAL, UNITED STATES (1969 Revised ed.). [Hereinafter cited as MANUAL.]

[9] The court relied extensively on Gooding v. Wilson, 405 U.S. 518 (1972), which involved a

since joint consideration of Article 90 charges gave rise to a reasonable possibility that Levy's right to a fair trial had been prejudiced. The government appealed to the Supreme Court pursuant to 28 U.S.C. § 1252 (1970).[10]

Mr. Justice Rehnquist, speaking for a five man majority, reversed.[11] The majority premised its opinion on what it saw as distinctions between the military and the civilian communities, and between the military and civilian law. The majority found that the Supreme Court had historically recognized that the military is, by necessity, a specialized society, separate from its civilian counterpart, whose primary business is to fight, or be ready to fight, wars. Governed by a separate discipline from that of the civilian, the "rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty."[12]

Justice Rehnquist traced the antecedents of Articles 133 and 134, noting that British military law contained the forebears of these two articles in remarkably similar language. In 1775, the Continental Congress adopted those two articles from the British Articles of War of 1765,[13] and they remained substantially the same through numerous re-enactments.[14] In 1951, they were enacted as Articles 133 and 134 of the military code.

Paralleling this development, the majority cited *Dynes v. Hoover*,[15] *Smith v. Whitney*,[16] *United States v. Fletcher*,[17] and *Swaim v. United States*[18] for the consistently recognized proposition that the "customary military law" or "general usage of the military service," gave accepted meaning to the seemingly imprecise language of the two articles.[19] As a consequence, the civil courts, including the Supreme Court, had confined their review of the acts of a court-martial to the narrow question of

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Georgia statute providing that any person who, without provocation, "uses to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace" is guilty of a misdemeanor. GA. CODE ANN. § 26-2610 (1972).

The Supreme Court held that the statute on its face was unconstitutionally vague and overbroad under the first and fourteenth amendments. Even though the words Wilson used might have been constitutionally prohibited under a narrowly drawn statute, the possible chilling effect of constitutionally protected expression gave him standing to attack the statute.

[10] Justice Rehnquist first disposed of a question of jurisdiction involving 28 U.S.C. § 1252 (1970). Levy had urged a lack of jurisdiction in the Supreme Court because the attorneys filing and serving notice of appeal were not attorneys of record and because the attorneys effecting service failed to comply with Rule 33.3(c) of the Supreme Court. Alternatively, Levy contended that § 1252 was not intended to permit appeals from the court of appeals, but only from the district court. The Court held that "any court of the United States," as used in § 1252, included the court of appeals and that technical non-compliance with Rule 33 did not deprive the Court of jurisdiction. 417 U.S. at 742 n.10.

[11] Justice Rehnquist was joined by Chief Justice Burger and Justices White, Blackmun, and Powell. Justice Blackmun filed a concurring statement joined by the Chief Justice. *See* note 37 *infra*. Justice Douglas filed a dissenting opinion. *See* note 47 *infra*. Justice Stewart, joined by Justices Brennan and Douglas, filed a dissenting opinion. Justice Marshall took no part in the consideration or decision of the case.

[12] 417 U.S. at 744 citing Burns v. Wilson, 346 U.S. 137, 140 (1953). There is one express exemption of service personnel from the protections found in the Bill of Rights. The fifth amendment dispenses with the required presentment or indictment by a grand jury "in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger." In addition, by practice and construction, the words "all criminal prosecutions" in the sixth amendment do not necessarily cover all military trials such that the guarantee of trial "by an impartial jury" is not applicable to military trials.

See generally Quinn, *The United States Court of Military Appeals and Military Due Process*, 35 ST. JOHN'S L. REV. 225 (1961); Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 1 (1970).

[13] 417 U.S. at 745 nn. 11 & 12, citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 945-46 (2d ed. 1920). Justice Rehnquist also cited the Articles of the Earl of Essex (1642).

[14] The predecessor of Article 133 was included in a new set of articles adopted in 1776, readopted in 1786, and revised and expanded in 1806. The predecessor of Article 134 was also included in the 1776 articles, and revised once in 1916. Otherwise, substantially the same language of both articles was preserved throughout.

[15] 61 U.S. (20 How.) 65 (1857) (seaman charged with desertion but convicted instead of attemped desertion).

[16] 116 U.S. 167 (1886) (Navy Paymaster General charged with "scandalous conduct" and "culpable inefficiency" in carrying out his duties).

[17] 148 U.S. 84 (1893) (retired officer charged in connection with the incurrence and nonpayment of debts).

[18] 165 U.S. 553 (1897) (Judge-Advocate General of the Army accused of fraud, charged with conduct unbecoming an officer, but convicted of conduct prejudicial to good order and discipline).

[19] 417 U.S. at 747-48.

jurisdiction.[20] In *Dynes,* the Court had reasoned there would be little likelihood of abuse, notwithstanding the apparent vagueness of the General Articles because

> what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts-martial and the offenses of which the different courts-martial have cognizance.[21]

In addition, the Court had concluded in *Smith* that military men rather than civilian judicial officers were better able to judge any cases which might arise.[22] Those trained in civilian law lacked familiarity with the military's "higher code termed honor" which held its society to stricter accountability.[23] Cases involving conduct to the prejudice of good order and discipline were still further beyond the bounds of civilian judicial judgment because they required actual knowledge and experience of military life.[24]

[20] This court, although the question of issuing a writ of prohibition to a court-martial has not come before it for direct adjudication, has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts by writ of prohibition or otherwise.
Smith v. Whitney, 116 U.S. 167, 177 (1886) (citations omitted).

> With the sentences of courts-martial which have been convened regularly, and have proceeded legally, and by which punishments are directed, not forbidden by law, or which are according to the laws and customs of the sea, civil courts have nothing to do, nor are they in any way alterable by them. If it were otherwise, the civil courts would virtually administer the rules and articles of war irrespective of those to whom that duty and obligation have been confided by the laws of the United States, from whose decisions no appeal or jurisdiction of any kind has been given to the civil magistrates or civil courts.
Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857).

[21] Dynes v. Hoover, 61 U.S. (20 How.) 65, 82 (1857).

[22] 116 U.S. at 178.

[23] Fletcher v. United States, 26 Ct. Cl. 541, 563 (1891).

[24] Justice Rehnquist's statement here came from the Court of Claims decision in Swaim v. United States, 28 Ct. Cl. 173, 228 (1893). Interestingly enough, that court, though citing examples such as slapping a woman in the face or insulting an unprotected girl as conduct unbecoming an officer, did not cite examples of conduct prejudicial to good order and discipline.

The majority reasoned that the differences between the military and civilian communities and between military and civilian law continue to exist under the present military code. The code cannot be equated to the civilian criminal code for it "essays more varied regulation of a much larger segment of the activities of the more tightly knit military community." [25] At the same time, enforcement of minor offenses under the code is often by sanctions more administrative or civil in nature than criminal.[26] Justice Rehnquist proposed that this is due in part to the different relationship between the governmen and servicemen: not only that of law giver to citizen, but of employer to employee.[27] In sum, because of these differences between the military and civilian societies, military personnel cannot enjoy the same measure of autonomy as enjoyed by their counterparts in the larger civilian community.

Justice Rehnquist used *Smith v. Goguen*[28] as the reference point for a discussion of Levy's vagueness challenges to the constitutionality of Articles 133 and 134. In civilian law, notions of fair warning are paramount; moreover, legislatures must set reasonably clear guidelines to prevent arbitrary or discriminatory enforcement. Where a statute's literal scope, unaided by a narrowing interpretation, reaches first amendment protected expression, then even greater specificity is required.[29] The majority asserted that both articles met these requirements. The military courts had extensively construed each article, at least partially narrowing its scope. Article 134, for example, must be judged "not in vacuo, but in the context in which the years have placed it." [30] Not

[25] 417 U.S. at 749.

[26] Under 10 U.S.C. § 815 (1970), a commanding officer may impose certain disciplinary, non-judicial puninshments including withholding of privileges, restriction to certain specified limits, extra duty, reduction in grade under certain circumstances, forfeiture of pay, or confinement if the person is attached to or embarked in a vessel.

[27] 417 U.S. at 751.

[28] 415 U.S. 566 (1974). The case involved a conviction under the Massachusetts flag desecration statute where the defendant had sewn a small United States flag to the seat of his trousers. The Court found the challenged language, "treats contemptuously," to be unconstitutionally vague.

[29] 417 U.S. at 752, citing Smith v. Goguen, 415 U.S. 566, 572–73 (1974).

[30] 417 U.S. at 752, quoting United States v. Frantz, 2 U.S.C.M.A. 161, 163, 7 C.M.R. 37, 38 (1953).

every irregular or improper act is a court-martial offense but only conduct which is "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." [31] In addition, the Courts-Martial Manual restated these limitations and provided over sixty illustrative examples.[32]

The effect of these constructions was to both narrow the broad reach of the literal language of the articles, and simultaneously supply considerable specificity of application in the examples. If areas of uncertainty still remain, the majority felt that less formalized custom and usage would adequately provide further content.[33]

Levy's conduct clearly fell within the range of both articles. Admitting this, the Court found that the court of appeals erred in conferring standing on him to challenge the imprecise language of the articles as they might apply to other hypothetical situations.[34]

The majority noted that the Court had indeed invalidated statutes under the fifth or fourteenth due process clauses because they contained no standard whatever by which to judge criminality; but, Articles 133 and 134 did not fall within that group. Rather, similar to those in *Smith v. Goguen,* these are statutes that "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." [35]

Though *Smith v. Goguen* also teaches that more precision in drafting may be necessary in cases involving the regulation of expression, the majority concluded that because of the characteristics distinguishing military from civilian society, Congress should be permitted to legislate with greater breadth and flexibility when prescribing rules for the former. The proper standard of review of vagueness challenges to articles in the military code is that which applies to criminal statutes regulating economic affairs.[36] Thus, in determining the sufficiency of notice, the Court will scrutinize the application of the statute to the conduct with which the defendant was charged, rather than consider only the facial validity of the statute.[37] The Court reasoned that under the circumstances, Levy could have had no reasonable doubt that his statements violated Articles 133 and 134.[38]

Levy's contention that the two articles were facially invalid because of overbreadth fared no

[31] 417 U.S. at 753, quoting United States v. Sadinsky, 14 U.S.C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964).

[32] *See* text accompanying notes 62–66 *infra* for Justice Stewart's critical view of these "illustrative examples."

[33] Justice Rehnquist cited Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) to support this, but neither that case nor succeeding cases explicitly defined what was meant by "custom and usage."

[34] Justice Rehnquist surmised that the holding of the court of appeals stemmed from an erroneous blending of the doctrines of vagueness and overbreadth. 417 U.S. at 755–56.

[35] 4.5 U.S. at 578. This remark was part of a discussion of the status of "hard-core" violators under vague statutes. A "hard-core" violation connotes conduct which a statute, by its terms, plainly forbids. It would be difficult to find such violations in Article 134; conduct covered in the examples given is too disparate to allow for a coherent generalization.

[36] 417 U.S. at 756.

[37] Though the majority cited United States v. National Dairy Corp. 372 U.S. 29 (1963) in support, its reliance would appear to be misplaced in light of that Court's observation that the approach to "vagueness" governing a case such as *National Dairy* differs from that followed in first amendment cases where the concern is with the vagueness of a statute "on its face" because such vagueness may deter constitutionally protected and socially desirable conduct. No such factor would be present in the *National Dairy* case where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable. Thus, the application of the *National Dairy* rule to the *Parker v. Levy* type case would seem inappropriate.

[38] This conclusion was partially based on the fact that the military does not presume that every man knows the law, but rather requires that its personnel be advised of the contents of the military code. 10 U.S.C. § 937 (1970). However, Justice Stewart noted that only a minute portion of the training period was set aside for such education. 417 U.S. at 782 n.27 (Stewart, J., dissenting).

Justice Blackmun's short concurring opinion concentrated on this issue. Should Levy have known that his conduct violated Articles 133 and 134? Justice Blackmun asserted that what was at issue were fundamental concepts of "right" and "wrong" which had not changed over the centuries. The General Articles embodied these concepts and were necessary to maintain a disciplined and obedient fighting force. Justice Blackmun foresaw little problem with arbitrary enforcement because of the elaborate system of military justice. In addition, any arbitrary treatment would produce an ineffective military organization. He concluded that civilian law should accommodate, in special circumstances, law systems which expect more of the individual in a broader variety of relationships than one finds in civilian life.

better. Noting the Court's ruling in *Gooding v. Wilson*,[39] relied on extensively by the court of appeals, the majority observed that even though servicemen are protected by the first amendment, the necessity for obedience and discipline might "render permissible within the military that which would be constitutionally impermissible outside it."[40] First amendment doctrines are not exempt from this principle. The majority recalled the observation by the Court of Military Appeals that the military must rely on a command structure that at times sends men into combat, "not only hazarding their lives but ultimately involving the security of the Nation itself."[41] Speech, protected in the civilian arena, might undermine the effective response to command, and would therefore be constitutionally unprotected in the military arena.

The majority then considered standing in a claim of first amendment overbreadth. Traditionally, a litigant may not assert the rights of others not before the court. An exception, permitting a challenge of a statute as it might be applied in future hypothetical situations, has been recognized in first amendment cases because of the most "weighty countervailing policies."[42] However, the Court for various reasons concluded that such policies should be given considerably less weight in the military courts. Among these reasons was the Court's reluctance to invalidate a statute which might be validly applied in a substantial number of situations. In addition, where conduct as well as speech would be involved, the overbreadth should "not only be real but substantial as well, judged in relation to the statute's legitimate sweep."[43] Thus, even if there were marginal applications in which Articles 133 and 134 should infringe on first amendment values, facial invalidation would be inappropriate. The Court also found that Levy's conduct, in urging enlisted men to disobey orders, was clearly unprotected under the "most expansive notions"[44] of the first amendment, and just as clearly fell within the reach of both articles. Finally, the same reasons which dictated a different application of first amendment principles in the military context would apply in relation to the question of standing. Thus, Levy lacked the requisite standing to challenge the constitutionality of Articles 133 and 134.

Justice Stewart, joined by Justices Douglas[45] and Brennan, authored the principal dissent, firing a broadside attack on the "patently unconstitutional" General Articles. The opinion, divided into two parts, is essentially an answer to the major points put forth by the majority.

In the first part of the dissent, Justice Stewart challenged the constitutionality of each article on its face. Vague statutes suffer from two fatal constitutional defects. First, they fail to

[39] 405 U.S. 518 (1972).

[40] 417 U.S. at 758.

[41] *Id.*, quoting United States v. Priest, 21 U.S.C.M.A. 564, 570, 45 C.M.R. 338, 342 (1972).

[42] A criminal prosecution under a statute regulating expression usually involved imponderables and contingencies that may themselves inhibit the full exercise of First Amendment freedoms. When statutes also have an overbroad sweep . . . the hazard of loss or substantial impairment of these rights may be critical. . . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendent value to all society, and not merely to those exercising their fights—might be the loser. Dombrowski v. Pfister, 380 U.S. 479, 486 (1964).

[43] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973). Justice Rehnquist relied on this case and United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973) to support this point. Both cases involved vagueness and overbreadth challenges to statutes forbidding employees, state and federal respectively, from actively engaging in partisan political activity. In contrast to the General Articles, however, the Oklahoma statute is more precise and specific, and the Hatch Act, held constitutional in United Public Workers v. Mitchell, 330 U.S. 75 (1947), is part of an extended and well-documented effort by the federal government to limit partisan political activities by its employees.

[44] Justice Rehnquist did not refer to any case or commentary to illustrate which expansive notion of the first amendment he referred to, but he probably was directing this remark to Justice Douglas who in his dissent stated that comment on one of the most controversial public issues of the day could not "by any stretch of the dictionary meaning" come within the prohibitions of Article 134.

[45] Justice Douglas' separate dissent emphasized the first amendment-free speech aspect of the case. Justice Douglas conceded the military's need for discipline and obedience with its inevitable curtailment of liberty, but maintained that the first amendment on its face recognized no exceptions. Even though the military's tendency to produce "homogenized" individuals had resulted in substantial limitation on expressions of opinion, to punish someone for uttering his or her beliefs was an abridgement of speech in the most fundamental sense.

provide fair notice of exactly which acts are forbidden, thereby requiring men of "common intelligence" to speculate as to their meaning.[46] Second, such statutes fail to provide explicit standards for the officials who enforce them, thereby inviting arbitrary and discriminatory enforcement.[47]

The dissent argued that the General Articles clearly suffered from facial vagueness. In fact, the majority admitted as much.[48] More significantly, the military courts, in describing the kinds of acts forbidden under Articles 133 and 134, had employed several terms found in civilian statutes which the Supreme Court had in the past held unconstitutional.[49] Nor had narrowing judicial constructions cured the facial vagueness. Instead, the Court of Military Appeals repeatedly cited Winthrop's *Military Law and Precedents*, a work which, in attempting to give some meaning to the articles, suffered from the same vagueness as the statutes it purportedly explained. Justice Stewart quoted Winthrop's description of "conduct unbecoming an officer" as an example:

> To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.[50]

In addition, Winthrop had interpreted the predecessor of Article 134 as applying to conduct whose prejudice to good order and discipline was "reasonably direct and palpable" as opposed to that which was "indirectly or remotely" prejudicial.[51] For the dissenters, these interpretations scarcely added substantive content.[52]

In the second part of the opinion, the dissent attacked the majority's proposition that the General Articles were "models of clarity to practical men in the services," and that Levy should have known his conduct fell within the proscriptions of the General Articles since the Courts-Martial Manual gave specific content to the imprecise statutes.

In five decisions[53] spanning the last half of the nineteenth century, the Supreme Court had upheld against constitutional attack the ancestors of Articles 133 and 134. But, Justice Stewart pointed out, those cases were decided in an environment vastly different from the present one. At that time, the army and navy were small, professional, and composed of career volunteers. The military was a unique society, isolated from the mainstream of civilian life. It would

[46] Justice Stewart cited two leading cases which had held statutes void for vagueness: Lanzetta v. New Jersey, 306 U.S. 451 (1939) (New Jersey statute defining gangster in terms of membership in a gang and previous conviction); Connally v. General Construction Co., 269 U.S. 385 (1926) (Oklahoma statutes imposing cumulative penalties on contractors doing business with the state who paid workmen less than the current rate).

[47] As support, Justice Stewart cited Papachristou v. City of Jacksonville, 405 U.S. 156 (1971) and Grayned v. City of Rockford, 408 U.S. 104 (1972). The former involved a vagrancy ordinance which the Court viewed as an open invitation to arbitrary and erratic arrests (and which failed to provide fair notice as well). In the latter, however, the Court upheld an anti-noise ordinance relating to schools because the requirements of the ordinance defined sufficiently distinct boundaries by which to guide enforcement officials.

[48] 417 U.S. at 776. Justice Stewart is technically correct; but, the majority was not bothered by this since it found that any facial imprecision had been cured by judicial interpretation, or could be cured by application of less formalized military custom.

[49] *Id. See, e.g.*, Coates v. City of Cincinnati, 402 U.S. 611 (1971) ("annoying" conduct); Giaccio v. Pennsylvania, 382 U.S. 399 (1969) ("misconduct"); Gelling v. Texas, 343 U.S. 960 (1952) (conduct "prejudicial to the best interests" of a city).

[50] 417 U.S. at 777, quoting W. WINTHROP, MILITARY LAW AND PRECEDENTS 711–12 (2d ed. 1920). Justice Rehnquist cites precisely the same quotation for the opposite conclusion; neither Justice, however, analyzes the passage in any detail in attempting to support his position.

[51] W. WINTHROP, MILITARY LAW AND PRECEDENTS 723 (2d ed. 1920).

[52] In sum, the dissent charged that the General Articles are, in practice as well as theory, catchalls designed to permit prosecution for practically any conduct offending a military commander. One commentator noted that an amazing variety of conduct could be made subject to court-martial under these articles, "limited only by the scope of a commander's creativity or spleen." Sherman, *The Civilianization of Military Law*, 22 MAINE L. REV. 3, 80 (1970).

[53] Carter v. McClaughry, 183 U.S. 365 (1902); Swaim v. United States, 165 U.S. 553 (1897); United States v. Fletcher, 148 U.S. 84 (1893); Smith v. Whitney, 116 U.S. 167 (1886); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

at least be plausible for one to assume that its volunteers knew, through custom and instinct, what kinds of acts fell within the range of the General Articles. The armed forces of the 1960's, on the other hand, numbered in the millions, a large percentage being conscripts or draft-induced volunteers with no prior military experience and little prospect of remaining beyond their initial period of obligation. Dr. Levy was just such an individual,[54] and it would be little short of judicial fantasy to assume that he, and others like him, were so instilled with the traditions of the military as to comprehend the meaning of the General Articles. In sum, *Dynes* and its progeny were ready for retirement from active service.

Though the Courts-Martial Manual contained an appendix of "Forms for Charges and Specifications," [55] they did not provide the kind of specific, definitive interpretation necessary to save the articles from unconstitutionality. The list of specifications covering the General Articles was not exclusive, continued to grow, and failed to contain any unifying theme which would give generic definition to the articles' vague terms. Most significantly, the fact that certain conduct was listed in the appendix did not guarantee that it violated either article. The sample specifications, in effect, were procedural guides only, not intended to create offenses. Thus, the Court of Military Appeals had on occasion disapproved Article 134 convictions even though the conduct in question was listed in the form specifications.[56]

But, facial invalidity was not the only problem. The dissent could not see how Levy could possibly have known that his conduct violated Article 134. In fact, the specification relating to the making of statements "disloyal to the United States," [57] was itself so vague that one federal district court had declared it unconstitutional.[58] Even if a consensus as to the meaning of "disloyal" could be obtained, the dissent was not prepared to characterize Dr. Levy's conduct as such. "Whatever the accuracy of these views. I would be loath to impute 'disloyalty' to those who honestly held them." [59] Indeed, Justice Stewart noted that many Americans shared Dr. Levy's viewpoint.

Even though Justice Stewart found both articles unconstitutionally vague under the standards normally applied by the Court, he looked at the military's peculiar situation to see if any considerations might require the application of a more relaxed standard of judicial review. He found none.

The dissent protested that the issue was not whether the military might, under the Constitution, adopt substantive rules different from those governing civilian society, but whether a serviceman had "the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them." [60] Even though the military might justify substantive rules of law wholly foreign to civilian life, if such rules were so vague as to be incomprehensible and allow for arbitrary or discriminatory enforcement, then such laws can "in the end only hamper the military's objectives of high morale and esprit de corps." [61]

Parker v. Levy is not a Supreme Court case which can be characterized as the "latest in a long line." In *Dynes,* the Court held that military courts were not part of the federal judiciary under article III, but rather established pursuant to articles I and II.[62] As a result, federal courts were limited in their review of military court decisions to narrow jurisdictional grounds, turning aside all other challenges to the articles.[63] The court-martial sys-

[54] Justice Stewart noted that Dr. Levy, unlike many other medical officers entering active service, had not attended a basic orientation course, and while at his duty post had received little military training, only a small part of which concerned military justice. 417 U.S. at 782 n.26.

[55] MANUAL, App. 6c.

[56] Though the Court in Reid v. Covert, 354 U.S. 1, 38 (1957), appeared to leave open the question as to what extent the executive had the inherent power to promulgate, supplement, or change substantive military law, Justice Stewart noted that the Court of Military Appeals in United States v. Smith, 13 U.S.C.M.A. 105, 32 C.M.R. 105 (1962), and United States v. McCormick, 12 U.S.C.M.A. 26, 30 C.M.R. 26 (1960), had indicated its belief that the Congress did not and could not give the President this power. 417 U.S. at 784–85 and n.36.

[57] MANUAL, App. 6c, spec. 139.

[58] Stolte v. Laird, 353 F. Supp. 1392 (D.D.C. 1970).

[59] 417 U.S. at 786.

[60] *Id.* at 787.

[61] *Id.* at 788.

[62] 61 U.S. (20 How.) 65, 78–9 (1857).

[63] *Id.* at 82. *Accord,* Swaim v. United States, 165 U.S. at 561 ("... the court-martial having jur-

tem was allowed to develop as an autonomous legal system with procedures and statutes largely unaffected by civilian notions of criminal law and of procedural and substantive due process. Only recently, the Supreme Court has held that military courts, like all other courts, must protect a person's constitutional rights.[64] But, civilian review through habeas corpus petitions has not expanded significantly and the Court still maintains a healthy respect for the military and its ways.[65]

Accordingly, few cases have come to the civilian courts in which the constitutionality of the General Articles has been challenged and fewer still in which the challenge was based on vagueness or overbreadth grounds.[66] Most cases involving constitutional challenges to the General Articles have arisen within the military justice system. Unfortunately, the efforts of the military courts in this area have been undistinguished, marked by too little familiarity with civilian precedents and too little appreciation of the issues.[67] Three cases on which the *Parker v. Levy* majority relied illustrate this point.

In *United States v. Howe*,[68] the defendant challenged both articles as vague and overbroad, but the military court rejected these arguments and concluded that the constitutionality of Article 133 had "seemingly never been in doubt." [69] The Court of Military Appeals dealt with vagueness challenges to Article 134 in *United States v. Frantz*[70] and *United States v. Sadinsky*.[71] In *Frantz*, the court dismissed the constitutional challenge in light of considerations "so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentive development." [72] Eleven years later, the *Sadinsky* court cited this reasoning for the "well-settled" proposition that Article 134 is not void for vagueness.[73]

Parker v. Levy is significant if only because the Supreme Court has for the first time measured the constitutionality of the General Articles against standards of vagueness and overbreadth. In holding them constitutional, though, the Court has established a disturbing precedent. The Court began by measuring both articles against traditional civilian standards of vagueness and overbreadth, and found them constitutional, but then proceeded to adapt these standards to the special situation of the military in such a way as to make them all but meaningless. Though the case should not be seen as signaling a general erosion of vagueness or overbreadth standards, it does indicate that the Court will manipulate traditional standards of vagueness and overbreadth in special circumstances.

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isdiction... and having acted within the scope of its lawful powers, its proceedings and sentence cannot be reviewed or set aside by the civil courts"). United States v. Fletcher, 148 U.S. at 92 ("As the court-martial had jurisdiction, errors in its exercise, if any, cannot be reviewed in this proceeding."); Smith v. Whitney, 116 U.S. at 177 ("And this court... has repeatedly recognized the general rule that the acts of a court-martial, within the scope of its jurisdiction and duty, cannot be controlled or reviewed in the civil courts...").

[64] O'Callahan v. Parker, 395 U.S. 258, 273 (1969); Burns v. Wilson, 346 U.S. 137, 140 (1953).

[65] For a discussion of the scope of military habeas corpus review, see Comment, *Habeas Corpus and the Military: The Crippled Attack on Courts-Martial*, 61 KY. L.J. 333 (1972); Note, *Federal Jurisdiction—An Apparent Expansion of the Scope of Military Habeas Corpus Review*, 80 N.C. L. REV. 173 (1971); Note, *Federal Habeas Corpus Jurisdiction over Courts-Martial Proceedings*, 20 WAYNE L. REV. 919 (1974).

[66] Justice Douglas' opinion in O'Callahan v. Parker, 395 U.S. 258 (1969), touched briefly on the vagueness issue in relation to Article 134, questioning whether the article's imprecise language satisfied vagueness standards developed by the civilian courts. In Stolte v. Laird, 353 F.Supp. 1392 (D.D.C. 1970) the plaintiffs, convicted of uttering statements disloyal to the United States, asserted and the district court so held, that the "disloyal statement" specification under Article 134 was unconstitutionally vague and overbroad on its face and as applied.

[67] United States v. Vorhees, 4 U.S.C.M.A. 509, 16 C.M.R. 83 (1954) was one of the first cases recognizing the application of the first amendment to the military. The principal opinion held that servicemen's first amendment rights were limited by the requirements of military necessity, and the concurring opinion gave only grudging recognition to the applicability of the first amendment. Only the third judge, in dissent, displayed an awareness of the broad first amendment precedents of the Supreme Court including the preferred position of free speech, the constitutional prohibition on prior restraint and the problems of vagueness and overbreadth. *See generally* Sherman, *The Military Courts and Servicemen's First Amendment Rights*, 22 HASTINGS L.J. 325 (1971).

[68] 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967).

[69] 17 U.S.C.M.A. at 176.

[70] 2 U.C.M.A. 161, 7 C.M.R. 37 (1953).

[71] 14 U.S.C.M.A. 563, 34 C.M.R. 343 (1964).

[72] 2 U.S.C.M.A. at 163–64.

[73] 14 U.S.C.M.A. at 364.

Further, though previous Supreme Court cases have recognized differences between military and civilian law, this case explicitly fashions a distinct rule for the military. This was done on the basis of an uncritical analysis of the conflicting interests of personal freedoms and the military need for obedience and discipline. Few would question the need for discipline and obedience in the military, but the parameters of those requirements must be defined. There is a difference between the desire to establish an environment where only officially popular opinion may be expressed, and the need for obedience to legitimate authority.[74]

[74] *See* Note, *Dissenting Servicemen and the First Amendment*, 58 GEO. L.J. 534 (1970).

The effects of *Parker v. Levy* are already discernible.[75] In all likelihood, the courts will decide future cases in much the same fashion as the Supreme Court dealt with *Parker*, turning aside constitutional challenges of vagueness and overbreadth on the basis of the military's special situation. The question remains whether further exceptions to traditional vagueness and overbreadth standards can be carved out because of the existence of a "special situation."

[75] Three weeks after its decision in *Parker v. Levy*, the Supreme Court decided Navy v. Avrech, ___ U.S. ___ (1974), reversing the court of appeals on the authority of *Parker*. In that case, Avrech had been charged under the disloyal statement specification under Article 134 and had challenged it on vagueness and overbreadth grounds.