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Constitutional Law—Uniform Code of Military Justice—General Article Void for Vagueness?

James W. Hewitt
University of Nebraska College of Law

CONSTITUTIONAL LAW—UNIFORM CODE OF MILITARY JUSTICE—GENERAL ARTICLE VOID FOR VAGUENESS?

Much has been said or written about the rights of servicemen under the new Uniform Code of Military Justice,[1] which is the source of American written military law. Some of the major criticisms of military law have been that it is too harsh, too vague, and too careless of the right to due process of law. A large portion of this criticism has been leveled at Article 134,[2] the general, catch-all article of the Code. Article 134 provides:

35 Alabama. Connecticut, Delaware, Florida, Georgia, Illinois, Louisiana, Maine, Maryland, Masschusetts, New Hampshire, New Jersey, Tennessee, Texas, Virginia, and Vermont. South Carolina has the privilege by case decision. See note 4 supra.

1 64 Stat. 107 (1950), 50 U.S.C. §§ 551-736 (1952). The Code was enacted in May, 1950, and went into effect May 31, 1951. It was a result of the criticism which descended upon military justice during World War II. See Mullally, Military Justice: The Uniform Code in Action, 53 Col. L. Rev. 1 (1953).

2 64 Stat. 142, 143 (1950), 50 U.S.C. § 728 (1952).

> Though not specifically mentioned in this code, 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 code may be guilty shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

The purpose of this note is to explain the sources and functions of Article 134, and to discuss some of its attendant problems.

I. Standards In Civilian Criminal Laws

The vagueness of this article raises a question of due process of law. In order to understand the problem of the Constitutionality of Article 134, it is necessary to point out generally accepted standards used in construing unclear civilian criminal laws.

The famous *Cohen Grocery*[3] case set the standard to be followed in nonmilitary cases concerning the vagueness doctrine. A criminal statute cannot rest upon an uncertain foundation. To satisfy the Due Process clause, a criminal statute must clearly spell out to men of reasonable intelligence the acts which it makes criminal.[4] A criminal statute which falls short of this standard is void for vagueness.

Statutes creating crimes are to be strictly construed in favor of the accused; they may not be held to extend to those cases not covered by the words used;[5] the statute alone is the source of criminal conduct, and the public must look to the statute alone to discover what is proscribed.[6] No act, however wrongful, can be punished under a statute unless clearly within its terms.[7]

Custom of a community or industry is of importance in interpreting vague statutes. If knowledge of an industry or community will give meaning to an otherwise vague statute, the statute will not fall;[8] if the custom does not dispel the vagueness, the

[3] United States v. Cohen Grocery Co., 255 U.S. 81 (1921).

[4] Id. at 89; cf. Winters v. New York, 333 U.S. 507 (1948); Champlin Refining Co. v. Corp. Commission of Okla., 286 U.S. 210 (1932); Connally v. General Construction Co., 269 U.S. 385 (1926); National Association of Manufacturers v. McGrath, 103 F. Supp. 510 (D.D.C. 1952); United States v. Capital Traction Co., 34 App. D.C. 592 (1910).

[5] United States v. Wiltberger, 5 Wheat. 76 (U.S. 1820).

[6] United States v. Resnick, 299 U.S. 207 (1936).

[7] Todd v. United States, 158 U.S. 278 (1895); United States v. Brewer, 139 U.S. 278 (1891).

[8] Omaechevarria v. Idaho, 246 U.S. 343 (1918).

opposite conclusion will result.[9] The custom must be well known and easily ascertainable. If definitions by subordinates empowered to fill in details do not meet the above standards, not even the subordinates' interpretations will save the statute.[10]

The expressed intent of the legislature should not be defeated by a strict, forced construction, but the intent of the legislature cannot save an unconstitutional statute.[11] No more than a reasonable degree of certainty is demanded, however, since the practical necessities of discharging the business of government limits the specificity with which legislators can spell out prohibitions.[12]

Article 134 has been upheld by military courts,[13] in spite of the fact that the constitutional guaranties of due process are applicable to servicemen as well as civilians.[14] In order to understand this holding, and gauge its correctness, the history and requirements of our military law must be considered.

II. History Of Military Law

A separate body of military law is not a new venture in American jurisprudence. As early as 1775, Congress adopted a series of rules and regulations for the government of the Army.[15] Patterned after the existing British Articles of War, the Articles underwent periodic revision,[16] but the Uniform Code was the first major change in their structure since 1920,[17] and was the first set of laws applicable to *all* our armed forces.

Military law is a code of criminal law and procedure. It differs from federal criminal law, and from Anglo-American common law with respect to content and those whom it governs. But

[9] Champlin Refining Co. v. Corp. Commission of Okla., 286 U.S. 210 (1932).

[10] Kraus & Bros. v. United States, 327 U.S. 614 (1946).

[11] United States v. Hartwell, 6 Wall. 385 (U.S. 1868); United States v. Morris, 14 Pet. 464 (U.S. 1840).

[12] Boyce Motor Lines v. United States, 342 U.S. 337 (1952).

[13] United States v. Lee, 4 C.M.R. 185 (1951).

[14] See Mr. Justice Douglas' dissent in Burns v. Wilson. 346 U.S. 137 (1953); cf. Burns v. Lovett, 202 F.2d 335 (D.C. Cir. 1952); United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); Schita v. King, 133 F.2d 283 (8th Cir. 1943), cert. denied sub nom., Schita v. Pescor, 322 U.S. 761 (1944); Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946); Schapiro v. United States, 69 F. Supp. 205 (Ct. Cl. 1947).

[15] Winthrop, Military Law and Precedents 17 (2d ed. 1920). The first written military law in Europe was that of the Salic chiefs, drafted in the Fifth Century.

[16] Id. at 22.

[17] Walker, Military Law 108 (1954).

its presence does not release military personnel from obedience to the higher law of the land. Military law merely imposes new obligations upon those who come within its purview.[18] Our present military law, like that in the past, consists of a written Code, regulations of the various services, and customs of the services.[19]

III. Constitutional Source Of Military Law

Constitutional sanction for a separate system of military law is found in Article I, Section 8, Clause 14 of the Constitution which grants Congress the power "to make rules for the government and regulation of the land and naval forces." Congress, under this grant, may set up a judicial system for the armed forces,[20] and may make such rules as are necessary for the system to function; such rules, of course, are subject to the other provisions of the Constitution.

The major constitutional problem raised by the Code is whether or not servicemen retain their right to procedural due process of law, as guaranteed by the Fifth and Sixth Amendments. The Fifth and Sixth Amendments *are* applicable to servicemen. Many recent cases,[21] in habeas corpus proceedings, have closely scrutinized military justice, and have imposed on the courts-martial the duty of zealously protecting rights of due process. The specific limitation in the Fifth Amendment of a serviceman's right to presentment and indictment by a grand jury has been narrowly construed. Since only this right of presentment and indictment is forbidden, the interpretative tool of *expressio unius* leads to the conclusion that all other guaranties of the amendment are granted to those in the service.[22] As early as 1907, it was

[18] Snedeker, Military Justice Under the Uniform Code 446 (1953).

[19] Winthrop, op. cit. supra note 15, at 17, 41.

[20] Snedeker, op. cit. supra note 18, at 44.

[21] See note 14 supra. Burns v. Wilson, 346 U.S. 137 (1953), the most recent Supreme Court pronouncement on this subject, established a "fair consideration" test. If the military court has fully and fairly dealt with the allegations of a denial of due process, the civil courts will not review the constitutional question, but the civil courts will protect the rights of servicemen where it is apparent on the record that the military courts denied them due process. Most federal courts feel the case broadened the scope of habeas corpus review. See Suttles v. Davis, 215 F.2d 760 (9th Cir. 1954); Talbot v. United States ex rel. Toth, 215 F.2d 22 (D.C. Cir. 1954); White v. Humphrey, 212 F.2d 503 (3d Cir. 1954); Easley v. Hunter, 209 F.2d 483 (10th Cir. 1953).

[22] United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944); see dissent of Justice Douglas in Burns v. Wilson, 346 U.S. 137, 150 (1953); Wade v. Hunter, 336 U.S. 684 (1948).

decided that servicemen could not be subjected to double jeopardy.[23]

Certain leading cases have been said to hold that constitutional rights of due process are not available to servicemen, but a careful study of their language, with consideration of their peculiar fact situations, renders them readily distinguishable. *Ex Parte Milligan*,[24] most frequently cited for the proposition that servicemen may be denied due process, involved a *civilian* who was tried by a military commission. The Court held the commission had no jurisdiction, and, in effect, struck a blow for due process. It is only in the concurring opinion of Chief Justice Chase that language capable of being interpreted as denying due process can be found, and it seems clear that he was referring to the Fifth Amendment's specific requirement of the right to indictment by a grand jury.

Ex Parte Quirin,[25] involved the rights of *enemy aliens* (Nazi saboteurs) who unlawfully entered the United States during wartime. In a dictum, the Court said that only trial by jury and the right to indictment by grand jury were not available.

In the well-known case of *In Re Yamashita*[26] the Supreme Court reviewed the trial of a *Japanese general* by a military commission. The Court held that civil courts would not review military decisions, even if erroneous, if the military tribunal was properly constituted. The holding was attacked by two dissents, has been severely criticized,[27] and has been considerably weakened by more recent cases which have delved deeply into denial of due process in the course of habeas corpus proceedings.[28]

The more recent cases which examine due process seem to be following a salutary trend, and tend to expunge the blot of

23 Grafton v. United States, 206 U.S. 333 (1907).
24 4 Wall. 2 (U.S. 1866).
25 317 U.S. 1 (1942).
26 327 U.S. 1 (1946).
27 Reel, The Case of General Yamashita (1949).
28 In United States ex rel. Innes v. Hiatt, 141 F.2d 664 (3d Cir. 1944), the court stated that a civil court in a habeas corpus proceeding may consider the circumstances of a courts-martial proceeding to determine whether it ran afoul of the basic standard of fairness embodied in due process of law; if the court finds that it violated due process, then it must discharge the prisoner. In Hicks v. Hiatt, 64 F. Supp. 238 (M.D. Pa. 1946), the petitioner claimed that deprivation of due process resulted from a cursory pre-trial investigation of the facts, and that he was denied certain important witnesses at the trial. The court, in discharging the prisoner because of a denial of due process, pointed out the defects of the courts-martial as contrasted with the procedure in a civilian trial.

victor's justice, as set out in the *Quirin* and *Yamashita* cases, from our jurisprudence. The fact that both *Quirin* and *Yamashita* were war-time cases has further weakened them.

IV. History Of The General Article

The first historical use of a general article in any system of military law occurred in 1621.[29] That article empowered the military commander to punish acts not specifically proscribed by the other provisions of the law, if, in his opinion, such acts were wrongful offenses against discipline. Shortly thereafter, the British Army and Navy adopted similar articles,[30] and the first American code in 1775 adopted the British versions.

Until the adoption of the Uniform Code most of the charges preferred against enlisted men, and a great percentage of those preferred against officers were brought under the general article.[31]

General articles in the past have not specifically mentioned crimes within their scope, and Article 134 of the present Code is no exception. It sets out as crimes acts which are prejudicial to good order and discipline, which are disorders or neglects, and which constitute crimes not capital.

V. Article 134 Dissected: Delegation To The President Examined

A. CRIMES AND OFFENSES NOT CAPITAL

"Crimes and offenses not capital" are rather difficult of ascertainment. From the face of the article, crimes of any sovereign could be included in its purview. Crimes of Japan, Iran, and Afghanistan might be included in a literal interpretation, but such does not seem to be the practice. The Manual for Courts Martial explains these crimes as those United States federal crimes which do not demand the death penalty as punishment.[32] The question arises under what authority the Manual makes such a definition.

(1) Presidential Power from Congress

The Manual was published under a Presidential Executive

[29] Snedeker, op. cit. supra note 18, at 898. Gustavus Adolphus of Sweden included a general article in his Articles of War which were issued in 1621.

[30] Snedeker, op. cit. supra note 18, at 898, 899. The British Army adopted such an article in 1642, the Navy in 1649. The articles were so broad and vague that they were known to the Army as "the Devil's article." and to the Navy as "the Captain's cloak."

[31] Winthrop, op. cit. supra. note 15, at 720.

[32] Manual for Courts Martial ¶ 213(c) (1951).

Order to supplement and explain the Code. President Truman promulgated the Manual "By virtue of the authority vested in me by the Act of Congress entitled 'An act to unify, consolidate, revise, and codify the Articles of War....'"[33] The Act does not specifically grant the President the right to issue such an explanatory Manual.

Various sections of the Code grant the President the power, among others, to prescribe rules of procedure for courts-martial,[34] to commute sentences extending to death or involving a general or flag officer,[35] and to convene general courts-marital,[36] but apparently no article in the present Code, or any statute unrepealed by the present Code, grants him the power to issue a Manual, or to define what constitutes a crime; nor could he be given such power, except as an adjunct to filling in details of a validly delegated legislative standard.[37] The closest the Code comes to granting such power is in Article 56, which gives the President power to set maximum limits for punishment of offenses triable by courts martial. In establishing the table of maximum punishments, the President set out forty-seven different offenses as falling within the scope of Article 134, all of which are offenses not falling under any other article of the Code.[38]

(2) President's Power as Commander-In-Chief

The issuance of the Manual might be explained as a valid exercise of the President's power as Commander-in-Chief, although the Constitution specifically grants the power to make

[33] Exec. Order No. 10214, 16 Fed. Reg. 1303 (1951). President Calvin Coolidge, when issuing a Manual in 1928, stated, "By virtue of the powers in me vested as President of the United States, and pursuant to Chapter II of an Act...," thus referring to what some call the inherent powers of the President as Commander-in-Chief.

[34] 64 Stat. 120 (1950), 50 U.S.C. § 611 (1952).

[35] 64 Stat. 131 (1950), 50 U.S.C. § 658 (1952).

[36] 64 Stat. 115 (1950), 50 U.S.C. § 586 (1952).

[37] It may be that Congress intended Article 134 to be a standard to guide the President, and that Congress intended the President to delineate acts as violations of the statutory provision. If the Manual is the President's attempt to fill in the details of the standard, the stigma of unconstitutionality might still attach, for the Manual's explanation of Article 134 is nearly as fuzzy as the Article itself. Under the case of Kraus & Bros. v. United States, 327 U.S. 614 (1946), a vague explanation of a standard by one empowered to explain the standard will fall, even though the one who made the explanation offers an interpretation of it. As to the President's power to make regulations concerning subjects which he has been given express delegation to control. see McCall's Case, 15 Fed. Cas. 1225, No. 8,669 (E.D. Pa. 1863).

[38] Manual for Courts Martial ¶ 127(c) (1951).

rules and regulations for the armed forces to Congress.[39] It may be questioned whether the power as Commander-in-Chief gives the President the right to determine what constitutes crimes in the armed forces.[40]

The President, as Commander-in-Chief, possesses power which is difficult of definition or identification. There is little case law as to his power to make regulations in the field of military justice when Congress has not granted him specific power to make such regulations. The one recent decision most nearly in point held that the President could not authorize a subordinate to extend the jurisdiction of a courts-martial.[41] Other cases[42] concerning the President's power as Commander-in-Chief are not too helpful, since the President's power in those cases does not conflict with the constitutional power of Congress to make rules and regulations for the government of the armed forces.

When the President is acting within his own executive realm, it appears that his executive power will be upheld.[43] But military justice is placed by the Constitution in Congress so it would seem that it cannot be contended that the power falls within the President's emergency or war-time power as Commander-in-Chief.[44]

Since military justice is in the legislative area, any power which the President has to make regulations must come from Congress. And Congress does not seem to have specifically granted the President the power either to issue a Manual, or to determine new crimes. Even assuming that the Manual is merely the

[39] U.S. Const. Art. I, § 8.

[40] Congress has granted the President vast powers in the time of war, Martin v. Mott, 12 Wheat. 19 (U.S. 1827), and in the field of international relations, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), but the power to determine crimes is a legislative act, and a delegation of such power to an administrative agency has been disallowed, People v. Grant, 242 App. Div. 310, 275 N.Y. Supp. 74 (3d Dep't 1934), aff'd per curiam, 267 N.Y. 508, 196 N.E. 553 (1935); cf. Davis, Administrative Law 66 (1951). The recent trend of decisions has been aimed at the abolition of the non-delegation doctrine, as it is wholly judge-made. Davis, op. cit. supra, at 43.

[41] Hirshberg v. Cooke, 336 U.S. 210 (1949).

[42] Hirabayashi v. United States, 320 U.S. 81 (1943); United States v. Montgomery Ward, 150 F.2d 369 (7th Cir. 1945); Weightman v. United States, 142 F.2d 188 (1st. Cir. 1944).

[43] Myers v. United States, 272 U.S. 52 (1926).

[44] See general discussion of the President's power as Commander-in-Chief by Cohen and Cohen, The Divine Right of Presidents, 29 Neb. L. Rev. 416 (1950). The area of the President's power is indeterminate, and often the decisions rest on the policy arguments advanced in favor of granting or denying power.

outgrowth of the President's power to prescribe rules of procedure,[45] and maximum punishments,[46] and assuming further that the President may make regulations not incidental to these subjects,[47] there is much in the Manual that could hardly be explained under this theory.[48] Also, the President, in issuing the Manual, made reference only to the Code as a source of his power to so act, and did not refer to his power as Commander-in-Chief.

Assuming arguendo, however, that the President had the power to set out specific crimes as an adjunct to his power to determine maximum punishments, could other crimes charged under the Article but not listed in the table of maximum punishments meet the void for vagueness test? Although the forty-seven crimes might be within the scope of the Article, all other crimes not mentioned in the Code or the table would be unknown to those who sought to discover them. And it is no answer to argue that the "unknown Laws" are actually known because they are customs of the service. So much of the custom of the service is unwritten and impossible to ascertain.

B. THE CRIME OF "... ALL DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES, [AND] ALL CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES ...."

Turning from "crimes and offenses not capital," it is readily seen that the other two provisions of Article 134 are boundless. They have been broadly construed to include acts not sufficiently well-known to be custom.[49] As a result of these "unknown" crimes, a person subject to the Code is in the position of deciding at his peril whether his prospective conduct is punishable.[50]

The Court of Military Appeals[51] has held that the general

[45] 64 Stat. 120 (1950), 50 U.S.C. § 611 (1952).

[46] 64 Stat. 126 (1950), 50 U.S.C. § 637 (1952).

[47] See note 37 supra.

[48] For examples, see Manual For Courts Martial c. 5, c. 23, c. 26 (1951). All the definitions of the punitive Articles would seem to fall outside the President's power.

[49] Snedeker, op. cit. supra note 18, at 448.

[50] But cf. Justice Holmes in Nash v. United States, 229 U.S. 373 (1913). See the table of maximum punishments, set out in paragraph 127(c) of the Manual for Courts Martial. Such acts as communicating insulting language to a female and abusing a public animal are listed. It is submitted that a decision as to what constitutes a violation of acts such as these rests solely on the moral values of the convening authority who institutes the action.

[51] 64 Stat. 129, 130 (1950), 50 U.S.C. § 654 (1952). The Court of Military Appeals is the highest court in the military judicial system, and

article is not intended to set up a moral standard for the conduct of an individual's private affairs.[52] To be the subject of proscription under the Article, acts, as a general rule, must touch or involve other persons.[53] In regard to those acts to the prejudice of good order and discipline referred to in Article 134, the Manual states:

> To the prejudice of good order and discipline refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. An irregular or improper act can scarcely be conceived which may not be regarded as in some indirect or remote sense prejudicing discipline, but the article does not contemplate such distant effects, and is confined to cases in which the prejudice is reasonably direct and palpable.[54]

This definition can be analogized to the broad and vague regulation of an administrator who has been given power to fill in details of a legislative policy. Under prevailing case law, such an indefinite regulation by a civilian administrator would be in grave danger of being stricken as void for vagueness, and further clarification by the issuing agency or administrator would be of no avail.[55] Since civil standards of due process are granted servicemen, it would seem that the explanatory material in the Manual is also void for being too vague.

VI. Customs Of The Service And The General Article

Customs of the service have always been used to explain and determine violations of former versions of the general article,[56] just as they have been applied to Article 134.[57] Violation of such custom is a violation of the Article. This is true even though Article 134, like its predecessors, makes no mention of custom being controlling.

A. WHAT IS "MILITARY CUSTOM"?

Military custom must be of long standing, certain, uniform,

is a product of the new Code. It consists of three judges, appointed by the President for 15 years. The court has the power to prescribe its own procedure. The court reviews all cases forwarded to it by the Judge Advocate General of the various services, and those other general courts-marital cases which it desires to hear.

[52] United States v. Snyder, 4 C.M.R. 15 (1952).
[53] Ibid.
[54] Manual for Courts Martial ¶ 213(a) (1951).
[55] Kraus & Bros. v. United States, 327 U.S. 614 (1946).
[56] Winthrop, op. cit. supra note 15, at 41.
[57] United States v. Snyder, 4 C.M.R. 15 (1952).

compulsory, consistent, general, well-known, and not in opposition to the Constitution, United States statutes, or military regulations.[58] Once such a custom has been established, it has the force of law, and controls in the absence of statute.[59] Usage, however, has no weight. Usage is the preliminary formation of custom, and consists merely of the repetition of the act.[60]

B. HISTORICAL USE OF CUSTOM TO INTERPRET THE GENERAL ARTICLE

The general article in the first American Naval code read: "All other faults, disorders, and misdemeanors which shall be committed on board any ship belonging to the Thirteen United Colonies, and which are not herein mentioned, shall be punished according to the laws *and customs in such cases used at sea.*"[61] The first Army general article read: "All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, although not mentioned in the Articles of War, are to be taken cognizance of by a general or regimental court-marital, according to the nature and degree of the offense, and be punished at their discretion."[62]

The Naval article contained a direct reference to custom until 1862. The Army articles have never contained such a reference. The leading case on the use of custom as an aid in interpreting the general article is *Dynes v. Hoover*.[63] This case interpreted the naval article at a time when custom was mentioned therein, and allowed its use to clarify the statute. In *Smith v. Whitney*,[64] the Court dismissed the fact that the language of the Naval article no longer included a reference to custom, and held that custom and usage were capable of pointing out a violation of the general article. This holding was a result of a tenacious adherence to the doctrine of stare decisis.

It could be argued that Congress intended to do away with the use of custom by removing any language mentioning it from

[58] Winthrop, op. cit. supra note 15, at 42, 43, citing United States v. Buchanan, 8 How. 82 (U.S. 1850); Thompson v. Riggs. 5 Wall. 680 (U.S. 1867). See also Walker, op. cit. supra note 17, at 56.

[59] Winthrop, op. cit. supra note 15, at 42, 43.

[60] Winthrop, op. cit. supra note 15, at 42, 43.

[61] Art. 38, Rules for the Regulation of the Navy of the United Colonies (1775).

[62] Art. L, Articles of War of 1775, collected in Winthrop, op. cit. supra note 15, at 957.

[63] 20 How. 65 (U.S. 1858).

[64] 116 U.S. 167 (1886).

the article.[65] However, the acquiesence of Congress in later years, as recently demonstrated in the enactment of the Code, may throw doubt upon this argument.

Nonetheless, the use of custom still prevails in military law. Its existence can only be explained by arguing that it has become a part of the military common law.

C. CUSTOM AS A DEVICE TO AVOID THE VOID FOR VAGUENESS DOCTRINE

If all custom were written, it seems clear that it could be used to clarify the general Article and thus avoid constitutional attack under the void for vagueness doctrine. But custom is almost wholly unwritten.[66] How many new recruits, or how many seasoned veterans know the complicated customs of the army? It is not enough to argue that every person is presumed to know the law. In civilian law a person, or his attorney, has the opportunity to examine the written laws and opinions. But where there are no written customs a person can only speculate whether his planned conduct will be violation of unwritten custom and thus a violation of Article 134.

However, Article 137[67] of the Code provides that the general article, among others, shall be read and explained to all enlisted men within six days after their entrance upon active duty, and again after they have completed six months of active duty. Yet in actual practice, the perfunctory explanation which is performed does not come close to setting out all the customs of the service,[68] and it would be well-nigh impossible for the most careful explanation to set out all the myriad of customs.

It would seem that unwritten custom could not be used to avoid a constitutional attack against Article 134 under the void for vagueness doctrine.

VII. Inconsistency Of Recent Decisions Regarding Article 134

A recent case in the Court of Military Appeals, *United States*

[65] Legislative history is silent as to the reason for the change in the wording. See discussion on S. 348, Cong. Globe, 37th Cong., 2d Sess. 2866 (1862).

[66] Winthrop, op. cit. supra note 15, at 42.

[67] 64 Stat. 144 (1950), 50 U.S.C. § 733 (1952).

[68] Statements obtained in discussions and interviews with selected officers of the United States Army and Air Force, who did not wish to divulge their identity. The same sources stated that few servicemen realized they were entitled to a copy of the explanatory Manual by so asking. Indeed, not all servicemen are even aware of the existence of the Manual.

v. Clay,[69] categorically stated that the court would require courts-martial to give servicemen rights and privileges parallel to those granted to civilians in civil courts. The court also turned to decisions of federal courts in civilian cases as exemplifying the requirements of due process.

This holding seems inconsistent with the decision of the Court of Military Appeals in *United States v. Frantz*.[70] The court admitted the patent ambiguity of Article 134, but decided that the long usage of general articles in the service, coupled with the disciplinary needs of the service, justified the clean bill of health which the court gave the Article.

Comparison of the two cases illustrates that in the *Clay* case, the court was following the recent and well-reasoned trend of civilian courts in according the rights of due process to servicemen.[71] The court inferred that the safeguards of civilian procedure were more capable than military standards of providing to servicemen the rights to which they were entitled. In the *Frantz* case, the court seemed fettered by tradition, and manifested an unwillingness to depart from the constriction of the doctrine of stare decisis.

Conclusion

Anyone attempting to evaluate the present system of military justice must decide whether it is more desirable to have the system be an instrument for meting out punishment and maintaining discipline at any cost, or whether it is better to have strong, effective and impartial courts within the fighting forces.

Since the constitutional guaranty of due process is applicable to servicemen, the outmoded argument that the overriding military function necessitates a judicial system which dispenses discipline and not justice should be disregarded. Military and civilian courts alike should strive to grant to servicemen the rights to which they are entitled.

Article 134 should be amended to conform to civilian standards in criminal statutes, and to set out clearly and specifically the acts which fall within its scope. And although the use of custom is deeply embedded in military law, perhaps its use should be re-examined, in spite of the fact that it is a peg on which the military can hang its disciplinary measures.

James W. Hewitt, '56

[69] 1 C.M.R. 74 (1951).
[70] 7 C.M.R. 37 (1953).
[71] See note 15 supra.