Taps for the Real Catch-22

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Notes

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A few months ago, two Navy wives accused a Navy chaplain of having illicit affairs with them. Rather than court-martial the chaplain for adultery (the prosecutor knew of no former prosecution for this offense), the Navy turned to a more serviceable weapon in its legal arsenal, charging the chaplain with violating Article 133 of the Uniform Code of Military Justice (UCMJ) by engaging in “conduct unbecoming an officer and a gentleman.” In another controversial case, an Army doctor who had criticized the Vietnam war was court-martialed for “conduct unbecoming” and for violating Article 134, which prohibits “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.” Just before his court-martial was to begin, the doctor sought an injunction from the civil courts challenging the constitutionality of these provisions. He lost.

Although never voided, Articles 133 and 134 present basic constitutional questions. At first glance, they appear to be unconstitutionally vague, and a closer analysis supports this impression. Yet such analysis may not end discussion, since special constitutional standards often apply in military law. Thus, in the past, concern for “the exigencies of the service,” “military necessity,” or “discipline” has largely silenced any examination of the constitutionality of the articles. The legality of the articles becomes much more dubious, however, when a critical examination of such phrases shows that no cogent military reason justi-

1. N.Y. Times, Mar. 18, 1972, at 14, col. 3. Reluctance to charge Navy personnel with adultery may have roots in, among other things, military necessity. According to a shore patrolman at the chaplain’s trial, “If they ever started busting sailors for adultery they couldn’t have enough men left to run a destroyer.” Id.
fies rejecting civilian tests of vagueness. Moreover, the availability of a viable, though less drastic, alternative to the articles virtually assures their unconstitutionality.

I. The Articles Within Military Law

To the Court of Military Appeals, the constitutionality of Article 133, the "conduct unbecoming" provision, has "seemingly never been in doubt." The court believes that a long tradition, predating the Revolution, sufficiently defines the present meaning of "conduct unbecoming." The court also notes that the First Congress, containing fifteen of the thirty-nine signers of the Constitution, enacted a precursor of Article 133 and that soon after the ratification of the Bill of Rights, another Congress reenacted substantially the same Article of War. Deferring to history, the court has always upheld Article 133.

The validity of Article 134 also strikes the Court of Military Appeals as "well-settled." In 1953, it upheld Article 134 on its face, but conceded the "conceivable presence of uncertainty" in the clauses dealing with "prejudicial" and "discrediting" conduct. Because Article 134 has been part of the United States military law since 1775, however, the court judged it "not in vacuo, but in the context in which the years have placed it." The numerous specific offenses listed under Article 134 in the Manual for Courts-Martial satisfied the court that its terms have "acquired the core of a settled and understandable content of meaning." A unanimous court therefore concluded that the article met constitutional standards of certainty.

As a result of such decisions, military judges no longer even seriously consider constitutional challenges to Articles 133 and 134. When the Army doctor, Captain Howard Levy, appealed his court-martial, an Army Board of Review quickly dismissed his contentions, stating, "Articles 133 and 134 have too many times withstood the overbreadth and vagueness attacks to warrant again a defense." Later military courts have repeated this assertion and eschewed analysis completely.

9. Id.
But Articles 133 and 134 do require another defense. The fixed attitude of military courts toward the articles contrasts sharply with a more critical approach recently taken by the Supreme Court. In *O'Callahan v. Parker*, decided in 1969, a soldier challenged the jurisdiction of a court-martial to try him for assaulting and attempting to rape a civilian while off post and on leave. The Court sustained the challenge, finding that the alleged crime was not "service connected." Inasmuch as a violation of Article 134 was one of the charges, the Court used the opportunity—albeit in dictum—to express its doubts about that statute under civilian standards. After describing military courts as "singularly inept in dealing with the nice subtleties of constitutional law," the Court cited the clause referring to "prejudicial conduct." "Does this satisfy the standards of vagueness as developed by civil courts?" asked the Court, and, like Jesting Pilate, did not wait for an answer.

Two months later, Justice Douglas, who had written the Court's opinion in *O'Callahan*, dealt again with Article 134's vagueness. In his order releasing the war-critic doctor pending further appeal, Justice Douglas specifically noted that the constitutionality of Article 134 was an unresolved question since the *O'Callahan* Court had "reserved decision on whether Article 134 satisfies the standards of vagueness required by due process."

II. Civilian Standards of Vagueness

The standards referred to by Justice Douglas demand precise wording in a penal statute. They have evolved over the years and are "premised upon the fundamental notion that due process requires governments to make explicit their choices among competing social policies." As a consequence, a criminal law must give a potential
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lawbreaker fair warning. Similarly, those who enforce the statute, administrators and judges alike, also need clear guidelines. Finally, criminal laws must not be so vague, or sweep so broadly, that they make legal as well as illegal conduct subject to prosecution, especially when such conduct deserves protection under the First Amendment. Measured by these traditional criteria, Articles 133 and 134 are surely unconstitutional.

A. Lack of Fair Warning

A simple reading of the articles demonstrates that they fail to warn potential offenders of what is prohibited. Article 133 never explains what conduct "unbecomes" an officer or a "gentleman." Rather than establishing rules of military or civilian etiquette, it imperils officers without real notice. Article 134 similarly fails to provide any meaningful warning. As every authority (including the military) now concedes, almost any improper or irregular act could somehow prejudice good order and discipline. Similarly, a serviceman can only speculate as to what conduct may discredit the armed forces.

This statutory failure to distinguish between legal and illegal conduct may alone be fatal. The phrasing of the two articles closely resembles civil statutes already nullified for vagueness. Because they

21. For a view that these criteria are only aspects, not the core, of the vagueness doctrine, see McGautha v. California, 402 U.S. 185, 257-65 (1971) (Brennan, J., dissenting). See also Colten v. Kentucky, 407 U.S. 104 (1972).
22. "An officer is expected to be a gentleman, and a gentleman has been defined as a man who is never intentionally rude." D. REYNOLDS, THE OFFICER'S GUIDE 45 (1969).
25. See Ricks v. District of Columbia, 414 F.2d 1097, 1103 (D.C. Cir. 1969): "'Loitering' has not been defined legislatively. . . . In the complete absence of statutory criteria by which one [definition] can be objectively distinguished from the other, we find a fatal constitutional flaw." See also Shinall v. Worrell, 319 F. Supp. 485 (E.D.N.C. 1970).
were too vague, statutes penalizing "misconduct," conduct that was "annoying," "reprehensible," or "prejudicial to the best interests" of a city have been voided by the Supreme Court. For the same reason, lower federal courts have rejected prohibitions of conduct that "reflects discredit," or is "offensive," "immoral," or "demoralizing." Such phrases seem equivalent to those of the articles, and military courts have in fact used some of them interchangeably with conduct "unbecoming an officer and a gentleman," "prejudicial to good order and discipline," and "of a nature to bring discredit."

Rather than clarifying such indefinite language, military courts have adopted, verbatim, the equally uncertain definitions of an 1886 treatise. Winthrop's classic Military Law and Precedents defines "unbecoming" as "morally unbefitting and unworthy." It describes a "gentleman" as a "man of honor; . . . of high sense of justice, of an elevated standard of morals and manners, and of a corresponding general deportment." Hence, Article 133 reaches official conduct that, "in dishonoring or otherwise disgracing the individual as an officer, seriously compromises his character and standing as a gentleman"; or private conduct that, "in dishonoring or disgracing the individual personally as a gentleman, seriously compromises his position as an officer and exhibits him as morally unworthy to remain a member of the honorable profession of arms." Focusing on the predecessor of Article 134, Winthrop construed it to prohibit only conduct whose prejudice to good order and discipline is "reasonably direct and palpable," and conduct that tends to bring the service into disrepute or

32. See United States v. Howe, 17 U.S.C.M.A. 165, 37 C.M.R. 429 (1967); United States v. Giordano, 15 U.S.C.M.A. 163, 35 C.M.R. 125 (1964). The problems with this formulation are obvious: An offense is the limit of tolerance below the ideal standard that is compromising, taking all circumstances into consideration. . . . However, there would be as many opinions as there are officers as to where that level of tolerance converts to a tolerable standard, and finally where that level converts to a criminal act. Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 AFJAG L. REV. 124, 125 (1970).
lower it in the public esteem. But, as is obvious, Winthrop's treatise and decisions based on it provide little guidance, for they still force servicemen to guess as to the meaning of the articles. Indeed, Winthrop himself thought it "desirable that some of the Articles should be made more precise...

Nor does the Manual for Courts-Martial—which lists specific offenses punishable under the two articles—infuse the statutes with greater clarity. First, the Manual's "Form Specifications" are not exclusive, so that no amount of study will reveal all the possible offenses under the articles. Second, the Manual includes so many unrelated offenses that no "core" of settled meaning emerges. Finally, and most importantly, nothing in the Manual can define violations of Articles 133 and 134 without itself violating the constitutional separation of powers. The President promulgated the Manual after Congress requested him to establish rules of procedure and evidence for courts-martial and to fix maximum penalties for military offenses. Within those realms, therefore, the Manual has the force of law. But, as Justice Black stated in Reid v. Covert,

If the President can provide rules of substantive law as well as procedure, then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers. Thus, the Court of Military Appeals has repeatedly held that a substantive rule of law in the Manual is not always valid. More than


38. Winthrop at 24.


40. The list includes 58 different offenses ranging from abusing a public animal, criminal libel, to fleeing the scene of an accident, and assault with intent to commit murder.


43. 354 U.S. 1, 38-39 (1957). Thus, "neither can the President, in war more than in peace, intrude upon the proper authority of Congress..." Massachusetts v. Laird, 400 U.S. 886, 893 (1970) (Douglas, J., dissenting), quoting Ex Parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866). "No less than the war power—the greatest leveller of them all—is the power of the Commander-in-Chief subject to constitutional limitations." Id. at 897.

once, that court has disregarded the Manual's definition of an offense because it found no

basis for the proposition that the President may create an offense under the Code. To the contrary, our forefathers reposed in Congress alone the power "To make rules for the government and regulation of the land and naval forces." . . . The President's power as Commander-In-Chief does not embody legislative authority to provide crimes and offenses.45

Accordingly, insofar as it looks to the Manual for a definition of Article 134, the 1953 Court of Military Appeals decision is inconsistent with constitutional theory and that court's own later decisions.

B. Susceptibility to Arbitrary Enforcement

The vagueness that deprives servicemen of warning also precludes fathomable guidelines for applying Articles 133 and 134, thereby giving extraordinary latitude to the commanders who administer them. Such remarkable elasticity makes the articles the real "Catch-22" of American military law. A similar provision was dubbed the "Devil's Article" by British troops, who knew that it could embrace almost all conduct disapproved by superiors.46 In the United States, soldiers have always called 134 the "General Article," and recently began applying the same rubric to 133.47 Yet the vagueness doctrine is designed to insure that penal statutes cannot be enforced arbitrarily or discriminatorily.48

For the reasons noted above,49 it would be a mistake to think of the Manual for Courts-Martial as a bulwark against arbitrary and discriminatory enforcement of the General Articles. At most, the Manual reflects only tradition. Any objective usage discerned in it is illusory since the Manual itself disclaims any attempt to exhaust the list of pos-

49. See p. 1523 supra.
sible offenses. Moreover, as one military court has said, "In some cases even the Manual is mistaken as to what belongs under Article 134."50 Since the Manual merely lists offenses previously recognized, it thus looks ultimately to military courts and commanders to give the General Articles concrete meaning on a case-by-case basis.

The Court of Military Appeals believes courts-martial can clear up any unavoidable ambiguity in the General Articles.51 But without a sufficiently ascertainable standard of guilt from the articles, court-martial panels can create their own measure in each case. According to civilian cases, such discretion is plainly impermissible.52 As the Supreme Court stated in 1966:

...It is established that a law fails to meet the requirement of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.53

The General Articles clearly vest local military commanders, who are primarily responsible for their enforcement, with at least as much discretion as unconstitutionally vague vagrancy or disorderly conduct statutes give policemen on the beat.54 Such discretion constitutes a prime vice of vagueness. As Judge Bazelon observed in the Levy case, "one of the evils" of a vague statute like Article 134 is "that it leaves the definition, and therefore the creation, of crimes to the discretion of minor executive or military officials."55

Thus, not surprisingly, the ambiguity of the General Articles allows selective enforcement against servicemen whose conduct offends current military mores. For example, when Brigadier General Billy Mitchell vigorously advocated use of air power after World War I, he be-

55. Levy v. Corcoran, 929 F.2d 929, 932 n.2 (D.C. Cir. 1991) (dissenting opinion).
came unpopular with his more conservative superiors and was court-martialed for conduct prejudicial to good order and discipline. Some forty years later, when an Army doctor quietly complained to General Westmoreland about working conditions in Vietnam, the doctor’s commanding officer used Article 133 to court-martial him for shaving at night instead of in the morning. Only on appeal was the doctor’s conviction reversed. But in light of past abuses, such safeguards of appellate or judicial review do not always ensure proper enforcement.

C. Overbreadth

Quite apart from the lack of fair notice and meaningful enforcement guidelines, the General Articles are also overbroad. They now cover certain activities associated with the First Amendment. During the Vietnam war, the armed forces have frequently court-martialed servicemen for “uttering disloyal statements,” a violation of Article 134. In 1967, a lieutenant, off duty and in civilian clothes, took part in an off-post demonstration, carrying a sign criticizing the war and the President. The lieutenant’s actions led to an Army court-martial for “conduct unbecoming an officer and a gentleman.” The General Articles also reach other First Amendment conduct beyond political speech. They make it illegal to use “insulting” language to women or children or about other servicemen even where “insulting” falls short of “obscene.” They may also impinge on freedom of association. For example, servicemen are not allowed to associate pub-

56. United States v. Wolfson, 36 C.M.R. 722 (ACMR 1966). The phrase “conduct of a nature to bring discredit upon the armed forces” has even more freakish possibilities. It could well threaten a field commander with court-martial whenever he lost a battle. Or perhaps the General Staffs during the Vietnam Era should fear charges against them for tarnishing the military’s image.

57. O’Callahan v. Parker, 355 U.S. 258, 266 (1969); see p. 1519 supra. But see Gaynor, supra note 11, at 289: “It is a tribute to those who have administered military justice through the years that there has been no great clamor to remove the vagueness.”


elicly with notorious prostitutes or other sexual deviates. Nor are officers permitted to fraternize with enlisted men.

Although the exigencies of military life may impose limits on a serviceman’s First Amendment rights, he certainly retains some of them. According to the Department of Defense, the service member’s right of expression should be preserved to the maximum extent possible, consistent with good order and discipline and the national security.

Thus a serviceman may sign petitions for specific legislative action or write to the editors of newspapers to express personal views on public issues. But fear of punishment under the General Articles may curtail free and full exercise of First Amendment rights.

[W]here a vague statute “abut[s] upon sensitive areas of basic First Amendment freedoms,” it “operates to inhibit the exercise of [those] freedoms.” Uncertain meanings inevitably lead citizens to “steer far wider of the unlawful zone” . . . than if the boundaries of the forbidden areas were clearly marked.

To avoid this “chilling effect,” civil statutes regulating conduct at or near the borders of the First Amendment must be more specific than other laws. Government may regulate in the area of First


64. DOD Directive 1325.6. But “the proper balancing of these interests will depend largely upon the calm and prudent judgment of the responsible commander.” Id.

65. DOD Directive 1344.10.


Amendment freedoms only with "narrow specificity." Otherwise, such laws may deter perfectly lawful conduct and lead to selective enforcement. Since the General Articles can reach protected conduct and are not at all specific, they are by civilian standards unconstitutionally overbroad.

Moreover, insofar as the General Articles implicate the First Amendment, they are void on their face. This conclusion is inescapable from recent Supreme Court decisions that refused to consider the precise conduct to which an overly broad statute had been applied. Only last year, in Coates v. Cincinnati, the Court voided on its face a statute prohibiting "annoying conduct." Since the statute might possibly reach First Amendment conduct, the Court did not inquire as to how it was applied.

These recent cases also confer standing to challenge the articles on any serviceman charged under them. He need not show that his own conduct could not be regulated by a more narrowly drawn statute. For if the law required such a showing, other servicemen might well refrain from exercising their constitutional rights for fear of court-martial provided by statutes susceptible of application to protected conduct. Thus, even where a serviceman is accused under Article 134 of an offense as clearly criminal as assault with intent to murder, he may properly assert that Article 134 is void on its face regardless of how it is applied in his case.

Consequently, by civilian standards, the General Articles have several defects. They do not give fair notice; nor can any warning be found

69. Gooding v. Wilson, 405 U.S. 518, 521 (1972). The Court of Military Appeals misconstrued the Button line of cases to mean that a law is void only if it is applied solely to interfere with First Amendment rights. United States v. Howe, 17 U.S.C.M.A. 165, 176, 37 C.M.R. 429, 440 (1967). But the cases contain no such limitation.
73. Even if the cases do not require voiding the General Articles on their face, it is easy to imagine a case in which the Articles were applied in such an unappealing fashion that they cried out for voiding. Such a case would involve an offense not listed in the Table of Maximum Punishments or Form Specifications, or discussed in the Manual. The offense might be unprecedented or raise a serious First Amendment question, perhaps one that offends prevailing constitutional sensibilities. Finally, the offense could have little or no effect on military discipline, so that it would not be malum in se.
74. Article 134 convictions have the additional defect of being based on vague instructions to the triers of fact. A court-martial can convict a serviceman of violating Article
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in limiting judicial constructions or usage as codified by the Manual. Moreover, they contain no ascertainable criteria for guilt and thus give undue discretion to enforcement officials. Of perhaps even greater significance, the articles may reach conduct protected by the Constitution. By both civilian theory and precedent, therefore, the General Articles are unconstitutional.76

III. Applicability of Civilian Standards

Before a court considers which standards are appropriate for judging the General Articles, it must decide the threshold question of jurisdiction. O'Callahan's jurisdictional requirement of "service-connection" may well eliminate some abuses of vagueness. Because O'Callahan necessitates a close nexus between the acts and the service, it has probably made a dead letter of the "discreditable conduct" clause of Article 134.76 As a result, most off-post conduct is no longer subject to the "discredit" clause, or for that matter to any other section in the UCMJ.77 On-post conduct, although obviously more likely to be

134 if it believes his conduct was "prejudicial to good order and discipline or of such a nature to bring discredit on the armed forces." MANUAL FOR COURTS-MARTIAL UNITED STATES 215(d); MILITARY JUDGE'S GUIDE, DA Pam 27-9 (May 1969); United States v. Vara, 27 C.M.R. 825 (NCMR 1958); United States v. French, 25 C.M.R. 851 (AFCMR 1958). Under several cases, if one of the possible reasons for a finding of guilty is vague, then the entire conviction must be reversed. Bachellar v. Maryland, 597 U.S. 564 (1970); Street v. New York, 394 U.S. 576 (1968); Stromberg v. California, 283 U.S. 539 (1931).


76. See Note, supra note 24, at 822 n.6; cf. Note, Imprisonment for Debt: In the Military Tradition, 80 YALE L.J. 1679 (1971). The discredit clause was not part of the original General Article; it was added in 1916, supposedly for the sole purpose of reaching retired servicemen.

77. Because O'Callahan has been limited to offenses committed on United States territory, servicemen committing civilian-type offenses off post while in a foreign country are still tried by court-martial. See, e.g., United States v. Keaton, 19 U.S.C.M.A. 64, 41 C.M.R. 64 (1969).
“service-connected,” still may lack the necessary nexus. Like a civilian government employee, a serviceman should have some right of privacy that precludes a court-martial for wrongful cohabitation, pandering, indecent acts with another, bigamy, or adultery, all of which are still listed as offenses under Article 134. Rather than embarrassment or transitory discomfort to institutions caused by unconventional conduct, only a specific connection between the discrediting conduct and accomplishment of the service’s mission should now trigger military jurisdiction. The same considerations should also apply to “conduct unbecoming.”

If such jurisdictional prerequisites are met, the General Articles should still survive the test of constitutionality only if some excuse exists for not applying civilian standards. This question has received little critical analysis. The Court of Military Appeals has assumed that civilian standards are appropriate, but has not applied them stringently to the General Articles. The lack of close scrutiny results in part from an interpretation of an old line of Supreme Court cases. A superficial reading of those decisions may suggest that the Court has approved less exacting vagueness standards for military statutes. But placing them in historical perspective and analyzing the possible reasons for special military standards demonstrates that, in fact, no peculiarity of military life justifies lenient tests for vague statutes.

In Dynes v. Hoover, decided in 1858, the Supreme Court held that an old Navy counterpart of Article 134 covered attempted desertion. Moreover, any acts condemned “by the usages in the navy of all nations” also came under this “comprehensive enactment.” The “apparent indeterminateness” of the statute never impressed the Court as liable to abuse, for what those crimes are and how they are to be punished, is well known by practical men in the navy and the army, and by those who have studied the law of courts-martial.

81. 61 U.S. (20 How.) 65 (1858).
82. Id. at 65.
83. Id. Paradoxically, but most significantly, the Court of Military Appeals has disregarded such traditional deference to military men (Swaim v. United States, 165 U.S. 553, 562 (1897); Smith v. Whitney, 116 U.S. 167, 178-79 (1886)). In United States v. Sudinsky, 14 U.S.C.M.A. 569, 34 C.M.R. 243 (1964), the accused did a backflip off an aircraft carrier, but no order or regulation forbade such unusual conduct. Since the accused violated no prohibition, the Board of Review, composed of Navy officers on active duty, dismissed the charges for failing to state an offense under Article 134. But the civilian judges on the Court of Military Appeals reversed the “practical men in the navy” who are supposedly more aware of what conduct violates unwritten military law.
Dynes thus appears to settle the vagueness issue, and for a time the Court decided subsequent Article 134 cases without defending the statute's breadth or lack of precision. But the Court may now be ready to reconsider its approach to Articles 133 and 134, as the rhetorical question in O'Callahan strongly suggests. The Court could easily explain away Dynes as decided in a far distant constitutional era, many years before the void-for-vagueness doctrine developed its present contours. Since the cases following Dynes contain no discussion of the vagueness issue, the Court last considered the question one hundred and fifteen years ago, and even then in a rather conclusory fashion. If, on the other hand, the Court wants to uphold long-standing practices without mechanically deferring to precedent, it might join the unusual features of military law with the history of Articles 133 and 134 to analogize offenses under them to state common law crimes. In 1953, for instance, the Court said,

Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.

But military law, while concededly unique in many respects, is nevertheless federal law; courts-martial result in federal convictions. Even

84. Carter v. McClaughry, 183 U.S. 365 (1902); Swaim v. United States, 163 U.S. 523 (1897); Fletcher v. United States, 148 U.S. 84 (1893); Smith v. Whitney, 116 U.S. 167 (1886); Ex Parte Mason, 105 U.S. 596 (1882). But see Swaim v. United States, 28 Ct. Cl. 173 (1893); Fletcher v. United States, 26 Ct. Cl. 541 (1891). In Ex Parte Quirin, 317 U.S. 1, 30 (1942), the Court relied on Dynes to uphold another vague law. A military commission had tried Nazi saboteurs under that statute for violating the "law of war." Forsaking any conventional vagueness criteria, the Court said Congress could properly choose between spelling out every specific offense under the "law of war" or enacting a broad statute that would include all such offenses. But the Court based its decision on the fact that the Constitution itself allows Congress to "define and punish" offenses against the "law of nations." U.S. CONST. art. I, § 8, cl. 9. In contrast, Articles 133 and 134 come from another constitutional provision: the power to "make rules for the government and regulation of the land and naval forces." Id. at cl. 14.

85. See p. 1520 supra.


87. "This conclusory assertion, unreasoned and unaccompanied by citation, surely cannot foreclose consideration of the question in a case that squarely presents the issue." United States v. Welsh, 398 U.S. 333, 359 (1970) (Harlan, J., concurring) (question of non-religious conscientious objectors not considered in earlier cases). See also Furman v. Georgia, 92 S. Ct. 2726, 2750 (1972) (Brennan, J., concurring): "Past assumptions, however, are not sufficient to limit the scope of our examination of this [question] today. . . . [W]e cannot avoid the question by recalling past cases that never directly considered it."

88. "If a thing has been practiced for two hundred years by common consent, it will need a strong case" for the Constitution to affect it. Waltz v. Tax Comm'n, 397 U.S. 654, 678 (1970), quoting Jackman v. Rosenbaum Co., 260 U.S. 22, 31 (1921) (Holmes, J.). But see Furman v. Georgia, 92 S. Ct. 2726 (1972) (death penalty unconstitutional).

in the civilian field, modern criminal law has retreated from common law crimes.\textsuperscript{90} Both the ordinary federal rule against common law crimes and the void-for-vagueness doctrine reflect a fear of arbitrary power.\textsuperscript{91} In the military sphere, where commanders have almost absolute power, these considerations should have particular force.

An even more telling objection to \textit{Dynes} is that it completely ignores the only permissible reasons for treating constitutional rights of soldiers differently from those of civilians. It stops its inquiry precisely where critical analysis should begin, for it is no longer enough to say that civilian life is different from military life.\textsuperscript{92} Rather, as the Court of Military Appeals has often stated in recent years, a soldier retains all his civilian constitutional rights except those expressly withheld or impliedly withdrawn.\textsuperscript{93} The constitutional right implicit in the vagueness doctrine—the right to precise penal statutes—belongs to neither class. It is not expressly withheld by the Constitution nor impliedly withdrawn by a contemporary construction or military necessity.

For servicemen, the vagueness doctrine finds its constitutional source in the Due Process Clause of the Fifth Amendment. In the classic case of \textit{Connally v. General Construction Co.}, the Supreme Court termed that doctrine the "first essential of due process."\textsuperscript{94} Of course, not all the guarantees of the Fifth Amendment apply to servicemen. The right to grand jury indictment in the Amendment is explicitly excepted from those "cases arising in the land or naval forces or the militia, when in time of war or actual public danger."\textsuperscript{95} But "due

\begin{enumerate}
\item Id.; see Papachristou \textit{v. Jacksonville}, 405 U.S. 156 (1972) (vagrancy statute declared void for failure to give fair notice and encouraging arbitrary arrests). Moreover, the Articles reflect a tradition at odds with respect for individual soldiers: "[F]rom the time of the Colonies, this country has despised pressgangs, floggings, martinetism, and all of the other Old World military practices which demeaned the rank and file. Its military system was founded on the dignity of man, just as was its constitution." \textit{The Armed Forces Officer} 4, DA Pam 600-2 (1968).
\item To justify the General Articles, one leading commentator stresses the differences between an armed force and civilian society, invoking the advice of Holmes that "we need education in the obvious." Weiner, \textit{supra} note 3, at 361. In another context, the same advice provoked the following response: "On the contrary, . . . it is the superficially 'obvious' which prevents any significant progress in our understanding of the criminal law. . . . Surely that sort of knowledge of the 'obvious' has demonstrated its bankruptcy by now." Griffiths, \textit{The Limits of Criminal Law Scholarship}, 79 \textit{Yale L.J.} 1388, 1467 (1970).
\item 269 U.S. 385, 391 (1926). Only last term, the Court referred to the vagueness doctrine as a "basic principle of due process." \textit{Grayned v. Rockford}, 408 U.S. 108 (1972).
\end{enumerate}
process of law" occurs in a different, completely unrelated clause. Thus nothing in the Constitution restricts "due process" to civilians.

To view the General Articles as implied exceptions because they are contemporary constructions of the Constitution oversimplifies history. In initially enacting the articles, the First Congress merely copied them from the British Articles of War. Clearly, however, basic principles of British military law clash with American political theory. Long before 1776, England paid less heed to the separation of powers, allowing the monarch to issue all military law and to define military crimes. Nevertheless, in borrowing the British General Articles the First Congress overlooked these unusual factors. The oversight is understandable, for the Constitution and the Bill of Rights—with their doctrines of separation of powers and of due process—had not yet been written. But no happenstance of timing ought to count more than actual consideration of the problem, lest contemporary construction (an unreliable guide at best) become a treacherous shorthand label that eliminates factual examination.

In addition to an alleged contemporary construction of the Constitution, "military necessity" might also imply an exception. Indeed, of all the arguments for limiting a serviceman's constitutional rights, "military necessity" is the one most often made and accepted. Although Justice Douglas has said that "the rules of due process which [military tribunals] apply are constitutional rules which we, not they, formulate," the Court of Military Appeals has considered "military necessity" in its definition of "military due process." However, the particular necessity at issue is rarely, if ever, examined. On the contrary, "military necessity" has turned into a trump phrase, a quick way to stifle debate. Thus, in upholding Article 134, the Court of Military Appeals alluded to special military considerations, but

96. Wiener, supra note 3, at 358. However, "the Founders shared a deep fear of an unchecked military branch. But what they feared was a military branch unchecked by the legislature, and susceptible of use by an arbitrary executive power." Reid v. Covert, 354 U.S. 1, 68 (1957) (Harlan, J., concurring).

97. "It is clear from the text of the Constitution, writings contemporaneous with its adoption, commentaries on it, and decisions of the Supreme Court subsequent to its adoption that, in the military field, the powers attributed to the King by Blackstone were distributed to the President and to the Congress... But the King's power... to make rules for the government and regulation of the land and naval forces, was transferred from the Executive to the Legislative branch of government." United States v. Smith, 13 U.S.C.M.A. 105, 117, 32 C.M.R. 105, 117 (1962). See Nichols, supra note 46, at 114.

98. If "contemporary construction" were always foolproof, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), would not have turned out the way it did.


100. Id. at 154 (Douglas, J., dissenting).

identified none. According to the court, military exigencies "are at once so patent and so compelling as to dispense with the necessity for their enumeration—much less their argumentative development." But such an approach obviously begs the question. Upon further inquiry, only three general military considerations exist; and they by no means "compel" an elimination of the first essential of due process.

One consideration involves maintaining high standards of conduct in the armed forces. The General Articles supposedly attain this objective by imposing high standards of conduct. According to the articles' defenders, a strict code of honor prevents military standards from declining to the level of a mere criminal code. But the need for high standards has not been persuasive to federal courts in analogous situations. Within the last three years, two federal courts have voided police department regulations patterned after the General Articles. These decisions are analytically significant because police departments are quasi-military organizations that depend on military-like discipline and esprit de corps. Moreover, the Supreme Court stated in \textit{NAACP v. Button}, in 1963, that:

\begin{quote}
It is no answer to the constitutional claims [of vagueness and overbreadth] to say . . . that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.
\end{quote}

Thus, an interest in maintaining professional standards is not so "compelling" that a government may "under the guise of prohibiting professional misconduct, ignore constitutional rights." 

\begin{itemize}
\item \textit{Id.}
In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code. \textit{Fletcher v. United States}, 26 Ct. Cl. 541, 563 (1891), aff'd, 148 U.S. 84 (1893).
\item \textit{711 U.S. 415, 498-99 (1963).}
\item \textit{Id. at 489.}
\end{itemize}
A second possible military interest might be ease of conviction. If military discipline were necessary at any cost, commanders might think conviction and punishment should follow perfunctorily. Vague, catch-all statutes do make convictions easier to obtain. But ease of conviction can no longer justify inadequate judicial procedures in the military. Indeed, an accused serviceman now is guaranteed procedural safeguards that in some respects compare quite favorably to their civilian counterparts. Furthermore, if ease of conviction were the prime goal, the UCMJ would need only two articles, 133 and 134. Certainly their language could include every other offense under the Code. Yet the vagueness of the General Articles differs markedly from the relative specificity of the other punitive articles.

Finally, the military may claim that the General Articles are necessary as a means of justifying punishment for servicemen who commit unforeseen crimes. Man's ingenuity precludes any penal code, civilian or military, from explicitly covering every potential offense. But this justification for vagueness is given short shrift by civilian courts. The crucial question is whether military life demands a different result. Few military crimes are unprecedented or original. Armies and navies have existed long enough to catalogue the prime sources of trouble, especially those posing a real threat to military discipline. The most extreme military situations, such as charging an enemy position, do not provide countervailing examples. In such cases, if a serviceman commits some hitherto unknown offense, one of his military superiors has only to order him to stop. If the culprit continues, he can be court-martialled for willfully disobeying an order. Those especially rare cases where a serviceman commits an unforeseen offense, before a superior can order him to stop, pit a supposed military need against the fundamental rights of all servicemen. But this threat to discipline is rather remote and unlikely, while the deprivation of fundamental rights is real and continual. Believing such a threat to individual servicemen outweighs the danger to the military organization, the Acting Judge Advocate General of

111. With a novelist's help, the mind's eye can picture the following bizarre exchange: "[W]e accuse you also of the commission of crimes and infractions we don't even know about yet. Guilty or innocent?"
"I don't know, sir. How can I say if you don't tell me what they are?"
"How can we tell you if we don't know?" J. Heller, Catch-22 400 (1961).
the Army told Congress after World War I that any military code of law

should be in keeping with the progress of enlightened government and should not be inconsistent with those fundamental principles of law which have ever characterized Anglo-American jurisprudence. The Military Code . . . should be specific with respect to the definition of the offenses denounced.113

Just recently, the Chief Judge of the Army Court of Military Review, himself a former Judge Advocate General, came out for abolishing Article 134. “We don’t really need it,” he said, “and we can’t defend our use of it in this modern world.”114

Thus, there appears to be no compelling reason for allowing the military to violate civilian standards of vagueness.

IV. “Least Possible Power Adequate to the End Proposed”

But even if court-martialing all possible troublemakers were a military necessity, Congress must achieve its objective by granting courts-martial the “least possible power adequate to the end proposed.”115 In O’Callahan, the “least possible power” rule limited military jurisdiction to service-connected offenses.116 In Toth v. Quarles, it prohibited court-martialing men separated from the service.117 Even Relford v. Commandant, the most recent Supreme Court decision on military jurisdiction, followed the “least possible power” test, allowing military jurisdiction over on-post civilian-type offenses only because a post commander has a legitimate concern for maintaining the peace on a military reservation.118 The “least possible power” test is thus the military equivalent of the familiar “less drastic means” test in constitutional law. In the civilian context, courts have often voided vague or overbroad statutes when less drastic means existed for accomplishing the statutes’ legitimate goals.119 The “least possible power” test means that military laws require the same scrutiny.

The most obvious alternative is strong legislative action. Congress

114. Hodson, supra note 75, at 12.
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could repeal Articles 133 and 134, and enact each of the offenses listed in the *Manual for Courts-Martial* as separate articles.\textsuperscript{120} While this proposal would eliminate vagueness, however, it would make no allowance for unforeseen offenses. Also, it would fail to satisfy the overall need for high professional standards in the military. For these reasons, such an alternative has never attracted congressional favor.

But recent congressional dissatisfaction with Articles 133 and 134 has spurred other legislative proposals.\textsuperscript{121} Rather than attacking the vagueness problem directly, they have sought to minimize punishment or remove jurisdiction to civilian courts. Senate bills introduced last year called for violators of Articles 133 and 134 to be punished under Article 15, which allows a commanding officer to determine summarily the offender's guilt or innocence and to impose a slight punishment.\textsuperscript{122} A soldier can always refuse an "Article 15" and choose a court-martial.\textsuperscript{123} Under the bills presently before Congress, a soldier who chooses court-martial for violating the General Articles gets no benefit. Moreover, Article 134 now includes several aggravated offenses that legitimately warrant severe punishment.\textsuperscript{124} A bill introduced in the House last year would shift trials under the General Articles to federal district courts unless the offenses occurred overseas.\textsuperscript{125} Such a bill might reduce abuse, but it still leaves the vagueness question unanswered.

The best solution would be for the armed forces themselves to utilize Article 92, which punishes a soldier who "violates or fails to obey any lawful general order or regulation."\textsuperscript{126} Each service could issue regulations covering offenses now listed under Articles 133 and 134. For example, each branch need only promulgate a regulation prohibiting assault with intent to commit murder to make it an offense punishable under Article 92. Moreover, promulgating regulations is something the services can do without waiting for congressional action. The Army has already used Article 92 for some offenses not greatly different from those prosecuted under Article 134.

\textsuperscript{120} Such legislation has been suggested by Gaynor, *supra* note 11, at 387; Hagan, *supra* note 45, at 114; Nichols, *supra* note 46, at 136.


\textsuperscript{123} 10 U.S.C. § 815 (Supp. 1972); see also Remarks of Robinson Everett at Meeting of Federal Bar Ass'n, September 17, 1970, 7 Crim. L. Rep. 2529.

\textsuperscript{124} Among them are assault with intent to commit murder and other aggravated assaults.

\textsuperscript{125} H.R. 579, 92d Cong., 1st Sess. § 819 (1971).

Thus, all marihuana offenses fall under Article 134, whereas LSD offenses are violations of a regulation and, curiously, entail a lesser maximum punishment.

Reliance on Article 92 could solve the vagueness problem almost entirely, by substituting precise regulations for the indefiniteness of the General Articles. Of course, if the regulations themselves were vague, the problem would remain. Thus, those offenses that are vaguely stated in the Manual—such as "uttering disloyal statements"—would remain equally obnoxious if promulgated as regulations. A vague regulation would be as susceptible to constitutional attack as a vague statute. At any rate, the vast majority of offenses listed in the Manual are precise enough for regulations.

Article 92 also enables an adequate response to unanticipated offenses. As soon as a serviceman commits an unforeseen offense, the local command could issue a new regulation prohibiting it. Only the very first offender would go unpunished, and his example would seem to be a negligible burden on military discipline. By exchanging information at the Judge Advocate General's level, the services could profit by each other's experience.

Although the military could adopt this proposal even if Congress refuses to act, Congress could improve the situation by deleting references to conduct "unbecoming to an officer and a gentleman," "to the prejudice of good order and discipline," or "of such a nature as to bring discredit," from the specific list of articles, and amalgamating them into a statement of purpose introducing the punitive articles. In so doing, legislators would recognize the unique nature

128. MANUAL FOR COURTS-MARTIAL UNITED STATES ¶ 127(c) (rev. ed. 1969). In order to use Article 92 effectively, the Table of Maximum Punishments would have to be changed slightly. As the Table now reads, an offense under Article 92 carries a maximum penalty of two years confinement at hard labor, dishonorable discharge, and forfeiture of all pay and allowances. Violators of Articles 133 and 134, on the other hand, now face maximum penalties from one month to twenty years confinement at hard labor. Since some Article 134 offenses are quite serious, the Table's two year maximum for Article 92 will be inappropriate in some cases. Footnote 5 to the Table of Maximum Punishments foresees part of the problem:

The punishment for this offense [i.e., violation of Article 92] does not apply in those cases wherein the accused is found guilty of an offense which, although involving a failure to obey a lawful order, is specifically listed elsewhere in this table. As a result, existing 134 offenses need only be listed as specific offenses carrying special maximum penalties under Article 92. Since the President issues the Table of Maximum Punishments on the recommendation of a joint service committee, the armed forces could quickly facilitate the minor change. Another way to solve this problem would be to list all forms of assault under Article 128. Gaynor, supra note 11, at 287. But this solution would not allow for some new serious offense arising, unless Article 128 were used in addition to Article 92. See Hodson, supra note 75, at 12.

of the General Articles. Unlike all the other punitive articles, which proscribe relatively specific conduct like murder, robbery, or disobedience of an order, the General Articles aim at general standards of conduct, not particular acts.\footnote{130} The entire goal of military law is, after all, to prevent conduct prejudicial to good order and discipline.\footnote{131} "Conduct unbecoming" and "discreditable conduct" are offenses solely because of the opinions of other people. The crux of those offenses is that when people learn of the conduct, they think less of the actor and perhaps of the institution with which he is associated. Using the language of Articles 133 and 134 as an introduction to specific punitive articles would allow military law to maintain its cherished standards.

Admittedly, the proposed solution using Article 92 may raise problems of its own. First, it might not have much practical benefit for the average serviceman. Most servicemen do not read every regulation any more than they read the Manual for Courts-Martial. As a consequence, it might be objected that using Article 92 solves academic problems while not truly helping the GI. But this objection constitutes an attack on the vagueness doctrine itself, since that doctrine is premised on the fiction that potential criminals consult the law before they act. For the general run of cases, of course, notice is something of a fiction. But the vagueness doctrine does more than guarantee notice. By compelling government to make an explicit choice, it eliminates or greatly reduces the area for arbitrary or discriminatory enforcement. As the Court said in one of its most recent vagueness cases, "The root of the vagueness doctrine is a rough idea of fairness."

A precise list of offenses under Article 92 should similarly afford some protection for the ordinary serviceman.

Second, the Article 92 proposal still leaves a separation of powers problem, since the power to issue regulations is to some extent equivalent to the power to define offenses.\footnote{132} But this is not a serious flaw. Commanders (from the President on down) have always had inherent...
power to promulgate military regulations. The proposed solution neither increases nor reduces that power; its attraction is that it would eliminate vagueness without aggravating any other constitutional problem.

The true value of the proposal is that it provides a reasonable, less drastic alternative for accomplishing the same goals that Articles 133 and 134 supposedly achieve.\textsuperscript{3} For the serviceman, it creates a complete and precise list of offenses.\textsuperscript{4} From the point of view of the military, it continues to impose high standards of conduct on officers and enlisted men, and to provide an effective means of dealing with unforeseen crimes.

Beyond these immediate benefits, this alternative should also serve the armed forces in other ways. Relying on Article 92, instead of Articles 133 and 134, would eliminate a recurring object of criticism.\textsuperscript{5} In addition, it would avoid the inevitable embarrassment associated with a possible future court decision holding Articles 133 and 134 unconstitutionally vague and overbroad. And effecting the suggested change without public, congressional, or judicial pressure could only enhance the military's public image. Indeed, the apparent commitment to a volunteer army suggests that those who join deserve a code of justice that at a minimum would not be unconstitutionally vague when applied to common criminals. Like other reforms brought about by the volunteer army,\textsuperscript{6} rejecting the General Articles in favor of an Article 92 approach might well boost morale and make servicemen more effective. Hence, far from reducing discipline, the proposal might well aid military units in accomplishing their missions.

For the past twenty years, the constitutional shortcomings of military law have offended the Supreme Court.\textsuperscript{7} Discussing these deficiencies in \textit{Reid v. Covert}, Justice Black referred to Article 134 to

\textsuperscript{3} Such a proposal even has the backing of history. Usages or customs of the service, according to Winthrop, "are now, as such, not numerous, a large proportion, in obedience to a natural law, having changed their form by becoming merged in written regulations embraced in the General Regulations of the Army," \textit{Winthrop} at 41.

\textsuperscript{4} In place of Article 134, the Chief Judge of the Army Court of Military Review "would substitute three classes of offenses under Article 92, providing a separate punishment for each class, depending on whether the order is issued by DOD, a Military Department, or a military commander. Thus, a set of military ordinances would be published by DOD to govern the people in the armed forces, and all would know what the law is." \textit{Hodson, supra} note 75, at 12.


\textsuperscript{6} See \textit{N.Y. Times}, July 1, 1972, at 1, cols. 6-7.

show that, "Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms."\textsuperscript{139} In \textit{O'Callahan v. Parker}, the court-martial struck the Court not as an unbiased "instrument of justice" but as "a specialized part of the overall mechanism by which military discipline is preserved."\textsuperscript{140} At the same time, civilian courts more readily and more frequently strike down vague statutes. The expanded vagueness doctrine and the Supreme Court's close scrutiny of military law undercut the usual justifications for the General Articles. Together with the fact that Article 92 makes the General Articles unnecessary, these are the notes that may truly sound taps for the real Catch-22.

\textsuperscript{139} 354 U.S. at 83, n.69.
\textsuperscript{140} 395 U.S. at 265.