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MILITARY JUSTICE

A REINFORCER OF DISCIPLINE

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The American involvement in Vietnam generated intense soul-searching, questioning, and argument among various segments of American society. In particular, the My Lai cases and other incidents focused public attention upon the existing system of military criminal law.[1] Many Americans, having little or no professional contact with the Armed Forces, were exposed to highly misleading and inaccurate generalizations and conceptualizations concerning a system that "is now a sophisticated system of justice."[2] The military justice system must enjoy public confidence and understanding, because "a system of justice is merely as good as the public believes it to be."[3] There is little, if any, value in the system if it is not trusted or understood by the American public.

Unfortunately, some observers wrongly perceive the military justice system as a system remote from American military ethical considerations, having no nexus to justice. They see it as one operating to the prejudice of the accused by failing to accord him the procedural and substantive protections of the judicial process under the Constitution and the Federal Rules of Criminal Procedure.[4] One writer has even erroneously asserted that: "None of the travesties of justice perpetuated under the UCMJ is really very surprising for military law has always been and continues to be primarily an instrument of discipline, not justice."[5]

The Uniform Code of Military Justice does not reflect a congressional desire to enforce discipline to the detri-

ment of American notions of justice.[6] Rather, it combines most of the judicial concepts relating to individual rights[7] in a code of conduct, the violation of which is proscribed and which reflects the military ethic. While the soldier, by joining the military, subjects himself to the limitation or curtailment of the scope of his basic freedoms (e.g., freedom of speech), he surrenders none of them. The military member continues to enjoy all of the basic rights and freedoms he enjoyed in civilian life. However, he or she must exercise these rights in a manner consistent with the overriding interests of the military. There was a time when joining the military meant the surrender of certain rights. This is no longer true. In order to highlight the role of law in a military environment, it is necessary to discuss the meaning of the military ethic, certain codal articles[8] as they implement the ethic, and some of the basic rights of an accused under military law.

THE MILITARY ETHIC

The military ethic is not a "theory" of military conduct. It is a code of behavior pertaining to a profession—the profession of arms. This code is consistent with the American tradition. It is empirically derived, and by its nature it is noncompulsory. Being noncompulsory, we should not be surprised that not all the members of American Armed Forces adhere to it at any given moment. In order to demand this adherence, the Congress enacted a Uniform Code of Military Justice—criminal laws—in an attempt to corporealize the ethic into concrete statutes, violations of which could lead to penal sanctions. In so doing, the Congress provided in the broadest sense the nexus between the military ethic and justice.

The term "military ethic" is rather amorphous when viewed in the abstract. Indeed, in attempting to define the term precisely, one generally thinks of "duty, honor, country," "loyalty," and "mission and men." There are many, no doubt, who would view the ethical conceptions of the American military forces as anachronistic. Nevertheless, "... it is in fact the very essence of military professionalism."[9] Today, the line between the military services, especially the Army, and civilian society has become blurred with the mobilization of thousands of citizens into uniformed citizen-soldiers. As a result, the possibilities exist that "... the patterns of military authority [may] shift from authoritarian command to organizational decisionmaking."[10] Under these conditions, the concepts embodied in the military ethic must be reinforced in order to insure adherence to standards which are still both viable and necessary in the American Armed Forces.

The Armed Forces constitute a unique and specialized society because their ultimate function is that of combat in the national defense. For this reason, military forces are separate and distinct in many aspects from the parent civilian society. They have developed their own traditions which have given rise to the military ethic, which, in turn, is based on a recognition that the purpose of our military forces is to fight wars, or to be ready to fight them, should the occasion arise.[11] The soldier's first duty is the accomplishment of his mission, and his second is to insure the welfare of his men. If this were not the basic principle, "any military operation involving a risk would not be undertaken, and in fact the military forces could be dispensed with."[12]

The military ethic consists of a code of behavior appropriate for an organization whose primary purpose is to fight if called upon to do so. Its practical effect is to provide or to account for the motives underlying military conduct.[13] Writers such as Ward Just fail to consider the military ethic as a system of

empirical norms which provides the guideposts for proper military conduct. He has opined that "the army has been corporatized. It has become something of a syndicate, a corporate state with its own laws and traditions and proceedings." Quite to the contrary, the military ethic, by regarding love of country, duty, honor, et cetera, as virtuous and by emphasizing them continuously, has enabled the Army to avoid succumbing to corporatization. For example, the military ethic requires the American Army to "maintain a nonpartisan posture, i.e., a nonparty affiliation."[14] Yet we have had obvious cases of members of the Army who openly and notoriously advocated particularistic political philosophy.[15] An extreme example is found in the case of *Parker* v. *Levy*,[16] where Army Captain Levy, stationed at Fort Jackson, declared he would not obey a written order to conduct training. In addition, he made several public statements to enlisted personnel indicating that the United States was wrong in being involved in the Vietnam war and that "Colored soldiers" should disobey orders to go to Vietnam.

Even though the military ethic proscribes formal, public political advocacy, members of the military profession may hold political beliefs, show political preference, and vote in elections. One authority goes so far as to maintain that "Military personnel should be permitted to serve on local school boards, run in nonpartisan local elections, and be members of government advisory boards and public panels where they have qualifications and interests."[17]

Thus, the norms of "duty, honor, country," "loyalty," and "mission and men" provide the parameters as to how soldiers ought to behave.

When viewed from the perspective of a lawyer, these norms are seen to underlie the concept of discipline, which "is the very soul of Armies—difficult to acquire but capable of being lost immediately. There can be no disruption lest the armed forces disintegrate into a mere armed mob amid the stresses of peacetime hardship and war time fear."[18] This approach emphasizes that the end or purpose of a soldier's action is to obey and not to deliberate.[19]

MILITARY LAW

Military criminal law is concerned with many concepts that are not necessarily embraced within the character of the military ethic. Within the military legal framework the independence of the courts-martial[20] from command influence, the independence of the Court of Military Review[21] and the Court of Military Appeals, as well as the traditional limitation of their scope in making new law, are excellent examples of the separation of judicial and military ethical values in the military law.[22] Of all the ethical values encompassed in military law, the chief one is the maintenance of a disciplined force, which military law in turn reinforces.

As discipline must be maintained within the military, so breaches of discipline must be punished. Any breach of the military ethic-discipline could impair the fighting effectiveness of a military unit. Any infraction which would lessen a soldier's enthusiasm to respond to duty would necessarily impair the effectiveness of his unit. Should that unit be in combat, any reluctance, however slight, to respond to duty "could be disastrous, or even fatal."[23]

Certain aspects of this ethic, embodied in the concept of discipline, are peculiar to the Armed Forces. Three articles of the Uniform Code of Military Justice illustrate the importance of law in reinforcing the military ethic. The first is article 88,[24] which prohibits commissioned officers from using "contemptuous words" against the President,

Vice President, Congress, and other high civil officials. If convicted, an offender "shall be punished as the court-martial may direct."

The others are article 92, prohibiting disobedience to orders,[25] and article 134,[26] the so-called general article, which punishes, *inter alia*, "[A] 11 disorders and neglects to the prejudice of good order and discipline in the armed forces," not otherwise specifically mentioned in the UCMJ.

Article 88—Contemptuous Words. During the recently ended Vietnam era, a small but vocal group of servicemen emerged within the Military Establishment. They expressed in no uncertain terms their opposition to the war and the role of the United States in it. The case of 2d Lt. Henry H. Howe, Jr.,[27] is a classic example of a violation of professional ethics which resulted in judicial sanctions because the law, in this instance, reinforced the ethic. Howe, an Ordnance Corps officer in the Army Reserve, was serving on active duty at Fort Bliss, Tex. While there, he marched with demonstrating civilians in downtown El Paso, Tex., condemning the Vietnam war. Howe carried a placard indicating that the late President Johnson was a Fascist who was conducting an illegal war. In addition to being charged with using contemptuous words against President Johnson, Howe was charged with conduct unbecoming an officer and gentleman[28] and promoting disloyalty and disaffection among the troops and civilian populace to the prejudice of good order and military discipline.[29] He appeared before a general court-martial, was convicted, and sentenced to dismissal,[30] forfeiture of all pay and allowances, and confinement at hard labor for 2 years. The confinement was reduced to 1 year by the convening authority, and the sentence was eventually affirmed by the United States Court of Military Appeals. After serving approximately 3 months of his sentence, Howe was granted a parole.

Should Howe have been tried? Is not an American entitled to criticize his government as provided for and protected by the Constitution?[31] Howe was the first person to have been prosecuted under article 88 of the 1950 UCMJ. The restrictions of this article embrace not only loyalty, one of the fundamentals of the military ethic,[32] but also the premise that the American Armed Forces are subordinate to duly constituted civilian authority. After all, under the Constitution, the President is Commander in Chief of the Armed Forces, a point overlooked by some of Howe's defenders.

Limitation of this proscription to officers has been questioned,[33] and during World Wars I and II courts-martial for such an offense were infrequent. In cases where commanders did bring servicemen to trial for their remarks, courts would acquit if the remarks were casual statements made "in private conversations and political discussions."[34] Howe's case was far different than the cases of servicemen expressing contempt in private at the apex of duly constituted authority. He flagrantly and publicly abused his position and in so doing invited contentiousness among other personnel at Fort Bliss. Such "concerted political proselytizing in an attempt to cause general disaffection toward the President [was] rare."[35] Nevertheless, the military ethic demands that civil authority be protected against threats from those who are in military power, and if effect is to be given to this principle, then there must exist a legal proscription, the violation of which may be punished.

No doubt restricting the speech of military members invites constitutional attack, and article 88 has been criticized on this ground.[36] Even though members of the Armed Forces do retain certain basic rights,[37] the military "constitutes a specialized community

governed by a separate discipline from that of the civilian."[38] If the military ethic were to deny this distinction by removing the restrictions embraced in article 88, it would not only create "new forms of tension"[39] but might start the process of seriously eroding respect for and the sanctity of authority. The United States Supreme Court appears to reinforce this view. In *Parker* v. *Levy*, the court said:

> While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community, there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian commander-in-chief. . . .[40]

In this case, the majority of the Supreme Court limited the constitutional right of free speech as it applies to servicemen. The Supreme Court is beginning a process of defining constitutional areas which would not be open to the military community, because of the uniqueness of that community and because of the importance of preserving the superior-subordinate relationship. This limitation which was implicitly recognized in *Levy* particularly applies to Howe because more was involved in that case. True, the President is the Commander in Chief of the Military Establishment and, as such, he was Howe's superior in the chain of command. Howe's conviction could be sustained on that issue alone. The major premise underlying article 88 is to reinforce that portion of the military ethic which emphatically accepts civilian control of the military. Thus, if the Howe case had been argued before the Supreme Court, it is unlikely that the Court would have accepted the view that all of the rights and privileges guaranteed by the first amendment to all persons, especially in the political arena, apply in a military context. Indeed, at "the time the Bill of Rights was adopted, little if any thought was given to whether those provisions had direct relevance to the military context, and courts-martial from the beginning assumed they did not."[41] Further, some authorities consider the military as an "alien sector" of American society which "fall[s] outside the area in which . . . freedom of expression must be maintained."[42] It is "alien," of course, because there is a separate ethic for the military society.

To someone who does not appreciate the difference between civil and military society, there is an inconsistency between the military ethic (and military attitudes) and the civilian values embodied in the first amendment.[43] There are three ways to view the relationship of the military ethic to first amendment values: (1) the first amendment right to free speech does not apply to the military, (2) the protections apply fully, without any restrictions,[44] and (3) there are compatible areas permitting a convergence of civilian notions of free speech to be applied so long as no violation of the military ethic occurs, which is serious enough to erode discipline.[45] I subscribe to this latter view. The *Howe* case acutely highlighted this relationship. It is unlikely that the Supreme Court would conclude that first amendment coverage is irrelevant to servicemen and that only Congress can legislate the scope of constitutional application to the military. Congressional power concerning the military is not free from judicial scrutiny.[46] In our society the relationship between the military and the rest of society with respect to political actions is not ambiguous, so long as there is a judicially reinforced ethic guiding the actions of military personnel. Of course, "the fact that a man is a member of the armed forces, and therefore in some situations a servant to the state and its commanders, does not obliterate the fact that as a citizen he has certain

rights which remain."[47] But, on balance, article 88 is an example of the military ethic judicially enforced on the military segment of society.[48]

Article 92—Failure to Obey Lawful Orders. The paramount article of the Uniform Code of Military Justice which highlights and enforces the heart of the military ethic is article 92:

> Any person subject to this chapter who (1) violates or fails to obey any lawful general order or regulation; (2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or (3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.[49]

Obedience to orders is the *sine qua non* to discipline; and without discipline all aspects of the military ethic fail. To a military lawyer, the military ethic and its conceptual underpinnings are embodied in the term "discipline." Field Marshall Slim has stated the necessity for discipline in a military organization:

> The more modern war becomes, the more essential appear the basic qualities that from the beginnings of history have distinguished armies from mobs. The first of these is discipline. We very soon learned in Burma that strict discipline in battle and in bivouac was vital, not only for success, but for survival. Nothing is easier in jungle or dispersed fighting than for a man to shirk. If he has no stomach for advancing, all he has to do is to flop into the undergrowth; in retreat, he can slink out of the rear guard, join up later, and swear he was the last to leave. A patrol leader can take his men a mile into the jungle, hide there and return with any report he fancies. Only discipline . . . can stop that sort of thing; the real discipline that a man holds to because it is a refusal to betray his comrades. The discipline that makes a sentry, whose whole body is tortured for sleep, rest his chin on the point of his bayonet because he knows, if he nods, he risks the lives of the men sleeping behind him . . . at some stage in all wars, armies have let their discipline sag, but they have never won victory until they made it taut again; nor will they.[50]

The concept of obedience underlies discipline. A failure to obey a lawful command could easily jeopardize the lives of men, the success of a mission, and, if widespread, the organization itself. The purpose of article 92 is quite clear. Men and women recruited from the wide spectrum of American society must be taught to obey the orders of their superiors. In the heat of combat or even in a hostile environment, ordinary sanctions and exhortations may be neither sufficient nor effective to enforce the military value system on the members of the organization. It is only through long years of training and associations with comrades and units that service members learn to overcome, to varying degrees, their natural instincts of self-preservation. The preservation of all requires the obedience of all. For these reasons, the law requires that all members of the military society shall obey lawful commands.

As a general rule, military men and women have a legal duty to obey, and they may be punished if they do not. Article 92 contains an important qualification: the order must be lawful. The

> problem is that, when a soldier is confronted with an [illegal] order to perform an act constituting a criminal offense, the demands of military discipline, as expressed in the duty of obedience to superior orders, come into conflict with the imperative need to preserve the supremacy of the law as

> manifested in the prescriptions of criminal law: military discipline requires unflinching compliance with orders; the supremacy of the law proscribes the commission of criminal acts.[51]

The requirement to obey only lawful orders at first seems to present a conflict between the values of the military ethic and the values of American society as reflected in the concept of "Rule of Law." In addition to a philosophical problem, there is also a practical one: if someone obeys an illegal order and thus commits a criminal act, he violates other provisions of the UCMJ and may be tried and punished for them. If, on the other hand, he does not obey, he risks being punished for the violation of article 92. Further,

> . . . the horns of the dilemma are sharp and strong enough to wangle the entire legal system insofar as its theory is concerned: if a soldier commits an offence in obedience to superior orders, and is, therefore, criminally indicted, or, alternatively, if he refuses to comply with an order to perform an act constituting an offence and is consequently charged before a court-martial—will he be convicted or acquitted? If he is convicted anyhow, whether he commits the criminal act as ordered or refrains from doing so, the legal system seems to be tainted by an iniquitous inconsistency that is all but incredible. And if the soldier is to incur criminal responsibility for his act only in one of the two cases and not in the other, certain difficulties emerge. On the one hand if the soldier risks his life in disobeying superior orders and refusing to carry out the criminal act, whereas he is exculpated when the offence is committed by him in compliance with the orders—this solution may incite the commission of crimes and bring about a public outcry. . . .[52]

Nowhere was this problem more highlighted in American military law than in the My Lai cases, which produced a massive outpouring of hyperbole and hurled invectives by an aroused public. These cases arose out of a particularly deplorable act on the part of former 1st Lt. William L. Calley and others during operations in the subhamlet of My Lai (4) in Song My village, Quang Ngai Province, Republic of South Vietnam, on 16 March 1968. The cases concerned Calley and some of his troops who did the actual shootings and those who "covered up" the incident. There were many who charged that if the perpetrators were not punished (all notions of criminal justice appeared to vanish) then the soldiers would literally be getting away with murder. Others asserted that if the soldiers were obeying orders and if they were punished, then all other military men could defy orders with impunity thereby breaking down good order and military discipline.

Not one writer appears to have indicated an awareness of American military law in this area or that the "dilemma" between the law and the military ethic had already been reconciled as far as U.S. military forces are concerned. It is submitted that the My Lai cases, posing the problem they did, were properly and correctly resolved by the U.S. Army.

At the time the act was committed, 1st Lt. William L. Calley commanded a platoon in C Company, 1st Battalion, 20th Infantry, 11th Light Infantry Brigade, in Vietnam. The brigade was a part of the America Division which was assigned a tactical area of operations along the South China Sea from Quant Ngai Province north into Quang Nan Province. Each brigade (there were three) had its

own operations area; that of the 11th Brigade ran from the Duc Pho District north to Binh Son and inland approximately 30 kilometers.[53] Sometime in January 1968, Calley's organization was assigned to a composite force known as Task Force Barker. This organization was assigned an area of operations known as Muscatine. The units of Task Force Barker drew fire from enemy forces in the Muscatine area which would then withdraw south. After the Tet offensive in February 1968, Task Force Barker extended its operations southward, enbracing the Son My village, because intelligence reports had indicated that the 48th Vietcong Battalion had its base in the My Lai area of Song My. Sweeps into the area by the Task Force were only moderately successful. Although Calley's unit had not experienced much combat prior to 16 March 1968, it did sustain casualties from mines and booby traps.

On 15 March 1968, Captain Medina, the commander of Calley's company, was notified that the company would be involved in an offensive action in the My Lai area the following day. Medina briefed his company that evening about the area, the mission, resistance to be expected from the 48th VC Battalion, and other pertinent matters. Calley argued later that Medina ordered him and others to "waste them," referring to the villagers.[54] Nevertheless, the company engaged in the My Lai operations on the 16th of March without receiving any fire. No mines or booby traps were detonated, and the only unit casualty on that day was a self-inflicted wound. In the My Lai (4) area only unwarned, unresisting, and frightened old men, women, and children were encountered —no enemy units. Yet, the evidence conclusively showed that Calley and some members of his platoon, at his urging, shot villagers and herded others into a ditch on the eastern boundary of My Lai (4) and murdered them.[55]

Calley[56] was tried and convicted by a general court-martial held at Fort Benning, Ga., of three specifications of premeditated murder and one of assault with intent to murder in violation of the Uniform Code of Military Justice. He was sentenced on 31 March 1971 to dismissal, forfeiture of all pay and allowances, and confinement at hard labor for life. The general court-martial convening authority, in his review of the case, approved the dismissal and the forfeitures, but he reduced the confinement portion of the sentence to 20 years. Calley appealed his conviction on grounds alleging numerous irregularities occurring at and during the trial. The issues raised by Calley were resolved against him by the Army Court of Military Review; that opinion was sustained by the United States Court of Military Appeals.

The significant point here is that among the arguments of extraordinary scope employed by Calley's attorneys, one factor directly highlighted the apparent conflict between the military ethic of obedience to orders and the law proscribing murder. Assuming *arguendo*, that an order was received by Calley to "waste" everybody in My Lai, was he justified in heeding such an order? Indeed, is there a basic onflict at all between civilian notions of legality and the obedience to orders?

The villagers had a right to life, and any order to kill them, so long as they were noncombatants and not belligerents, was patently illegal. The fact that the inhabitants of My Lai sympathized with the Vietcong is not important so long as they were not at the time of the Muscatine operation engaging in hostile actions against Calley's platoon. Even if some of the villagers had previously engaged in hostile operations, the wanton killing of the villagers in response to the "presumed delicts of a few is not a lawful response to the delicts."[57] Further, reprisal, if indeed this was Calley's intent, by "summary execution of the helpless is forbidden in

the laws of land warfare"[58] which are a part of the laws governing the American Armed Forces and have been for numerous years.[59] Thus, there can be no question that any orders to execute summarily innocent civilians or those eligible for prisoner-of-war status are illegal violations of American military law. Such orders are not within the orbit of article 92.[60]

The fact that Calley alleged that he was ordered to do what he did raises the question of whether he could defend his action by asserting that, ethically, obedience of superior orders was demanded of him. Obedience to an unlawful order is not a defense in the trial of any accused unless he did not know, and could not reasonably have been expected to know, that the order was unlawful.[61] Realizing that this issue could become one that is difficult to resolve, given the dynamics of combat and the ethical norm demanding obedience, the Army specifically permits the determination of legality to be made by courts-martial. Field Manual 27-10, *The Law of Land Warfare* states:

> b. In considering the question whether a superior order constitutes a valid defense, the court shall take into consideration the fact that obedience to lawful military orders is the duty of every member of the armed forces; that the latter cannot be expected, in conditions of war discipline, to weigh scrupulously the legal merits of the orders received; that certain rules of warfare may be done in obedience to orders conceived as a measure of reprisal. At the same time it must be borne in mind that members of the armed forces are bound to obey only lawful orders.[62]

In combat situations great difficulty can arise in determining the legality of an order. Therefore, permitting a court-martial to consider all of the attendant circumstances, to view the accused in a light favorable to him, and to demand that guilt be proved beyond a reasonable doubt is a proper and a practical way of reconciling the law and the ethic.[63]

The military ethic is also reconciled with civilian notions of justice because orders are presumed to be valid, and an accused who disobeys an order has the burden of proving illegality.[64] If a soldier believes that the order is ambiguous, he is obliged to seek clarification from the superior who issued the order. If the order is illegal, then he "must try to have the order rescinded, disregard the order if the superior persists, and also report the incident to higher headquarters or an alternative source."[65] There was no evidence anywhere in the Calley case that he questioned the presumed order of Captain Medina, assuming, as the author emphatically does not, that the order could be considered valid. Yet, Calley should have known that killing unarmed, unresisting men, women, and children was illegal. Neither the military ethic nor the law requires that soldiers act as automatons in obeying orders. American servicemembers are expected to respond to orders as persons imbued with our basic societal values (taught them in our military and civilian schools, the home, and the church). The military court took this into account in reaching its determination and found Calley's action as an officer woefully wanting. As the Court of Military Review stated:

> We find no impediment to the findings that appellant acted with murderous *mens rea*, including premeditation. The aggregate of all his contentions against the existence of murderous *mens rea* is no more absolving than a bare claim that he did not suspect he did any wrong act until after the operation, and indeed is not convinced of it yet. This is no excuse in law.[66]

Such a reconciliation of law and military ethic will not breed insubordination, because the servicemember is bound only to refuse patently illegal orders or those that he personally knows are illegal. In cases where legality is blurred, "the responsibility rests with the superior giving the order, not the subordinate who obeys it—he can presume legality until an obviously illegal order arises."[67] Therefore, in such cases the defense of superior orders would be a legitimate defense for the lower ranks who, in obeying illegal orders, could contend that they did not know or could not have known the orders were illegal. They are, as a result, ultimately protected by the law.

Article 134—The General Article. The final UCMJ article to be discussed is article 134, which is known as the "general" or "catchall" article. This article is similar in nature to article 133, which proscribes conduct that is unbecoming to officers, obviously an attempt to set higher standards for the officer corps than for the other ranks. Article 134 exists to punish offenses not specifically denounced elsewhere in the Uniform Code of Military Justice. It is a primary source for the enforcement of the military ethic and, as such, it is a unique tool to maintain and strengthen discipline. The law embodied in article 134 does not make "every irregular, mischievous, or improper act a Court-martial offense."[68] Rather, it is limited to conduct that is "directly and palpably . . . prejudicial to good order and discipline."[69]

Critics have assailed this provision and its officer counterpart because, they say, there is unpredictability as to what actions are punishable. The critics claim there appear to be no objective standards other than a list of specifically denounced offenses, and thus the determination of what offenses are "prejudicial to good order and discipline" are ultimately within the judgment of an officer imposing punishment or convening a court. This aspect of unpredictability would certainly appear to be true in those cases where a breach of a custom of the service is charged as an offense. The *Manual for Courts-Martial* states that:

> A breach of a custom of the service may result in a violation of this clause of Article 134. In its legal sense of the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military. . . . A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned.[70]

There appears to be a superficial justification for the criticism leveled at this codal attempt to enforce traditionally well-known and accepted standards.[71] But close analysis indicates that civilian standards which require criminal statutes to be definite and certain and to provide for predictability have been met by the filling-in done by the Court of Military Review and the Court of Military Appeals as well as the guides contained in the appendix to the *Manual for Courts-Martial.* In this manner, terms such as "customs" or "Conduct of a nature to bring discredit on the armed forces" have been continuously defined and refined by these courts in no less a manner than "fundamental rights" and "due process" have been defined and given substance by the United States Supreme Court.[72] Further, if a member of the military service is charged with a particular violation of a custom or ethic, his actions must also be shown to be prejudicial to good order and discipline or to bring discredit to his service. In

this regard, the military courts and commanders are always influenced by such factors as time, location, nature of offense, and all of the circumstances surrounding its commission.

In two recent cases the constitutionality of these articles was considered in the light of contemporary civilian standards, and in both cases the courts recognized the special nature of the military in assessing its needs for laws which implement and enforce the military ethic. The case of *United States* v. *Priest*[73] concerned an enlisted man in the Navy who, while on active duty, edited, published, and distributed an underground newspaper. As a result of these activities, he was convicted of two specifications concerning the publication and distribution of two issues of his publication with intent to promote disloyalty and disaffection among members of the Armed Forces. These two issues, in their entirety, contained statements disloyal to the United States. The Court of Military Appeals found that the pamphlets were not only a call to action but, in fact, suggested means by which the troops might actively demonstrate their own disloyalty and defection, for example, by deserting, by demonstrating in public, and by refusing promotions. The Court found this type of activity prejudicial to good order and military discipline, stating:

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce action.... In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.[74]

Finally, in the landmark case of Capt. Howard Levy,[75] the United States Supreme Court recognized the uniqueness of the military society. Levy was an Army officer and a physician who refused to obey orders to train Special Forces. He made public statements urging black enlisted men not to go to Vietnam if ordered to do so, and he characterized Special Forces personnel as liars, thieves, killers of peasants, and murderers of women and children. Levy was convicted by a general court-martial, among other things, of conduct unbecoming an officer and gentleman and for disorders and neglects to the prejudice of good order and discipline of the Armed Forces. He then filed a Writ of Habeas Corpus in the Federal District Court which denied him relief. However, the Third Circuit Court of Appeals reversed the District Court, holding that articles 133 and 134 were void because of vagueness and thereby it applied civilian concepts of due process to the military sphere. The case was heard by the Supreme Court with Justice Rehnquist writing the majority view of five members. The Court opined that because of the differentiations between military society and the civilian society, Congress was permitted to legislate with greater breadth and flexibility when prescribing rules governing the military. Further, neither articles 133 nor 134 of the UCMJ were void for vagueness under the due process clause of the fifth amendment since each article has been construed by military authorities in a

manner which narrowed their broad scope and because considerable specificity had been supplied, by way of examples, over many years. The Supreme Court indicated that Levy could have had no reasonable doubt that his public statements urging black enlisted men not to go to Vietnam if ordered to do so were punishable. The Court, in effect, recognized that in order to foster orderly and dutiful fighting forces, leeway must be granted to incorporate basic ethical considerations in a criminal statute. The Supreme Court stated that: "... to maintain the discipline essential to perform its mission effectively, the military has developed what 'may not unfitly be called the customary military law' or general usage of the military service."[76]

The Supreme Court specifically recognized that both the fundamental necessity for obedience and the consequent necessity to impose and to maintain discipline permits some actions which would be constitutionally impermissible outside a military organization. The Levy case is the best and most recent example of the recognition of the viability of the military ethic in contemporary society and its enforcement by the use of judicial sanctions.

RIGHTS OF MEMBERS IN THE ARMED SERVICES

What has gone before is not to suggest in the least that the military judicial system is void of judicial considerations in protecting servicemembers who have violated the UCMJ. Indeed, civilian influence has been extraordinary in the area of individual rights concerning military accused. In many cases the individual servicemember has enjoyed greater protection than his civilian counterpart. For example, the military criminal legal system demands that free counsel be provided all accused not only during interrogation[77] but also during pretrial stages.[78] Further, in one of the most frequently discussed areas of criminal law, that of confessions, the military legal system, since 1951, has provided most of the rights enunciated in *Miranda* v. *Arizona*,[79] a 1966 case hailed as a landmark in civil rights. The *Miranda* decision, the leading case regarding the privilege against self-incrimination during custodial interrogation, held that unless a defendant was advised of his right to remain silent, that any statement made may be used against him, and that he has the right to be represented by an attorney, the prosecutor may not use any of his statements, exculpatory or inculpatory, during the trial.

The military legal system has long required that persons in the military may not interrogate a suspected or accused party without first informing him of the rights stated in the *Miranda* decision. In addition, "military law already provided that the suspect or accused could consult the legal advisor to the court-martial authority, a lawyer or his staff, or counsel of his own choice before being subjected to interrogation,"[80] and this right was formally recognized and given juridical effect in *United States* v. *Tempia*,[81] a 1967 case decided by the Court of Military Appeals. Thereafter, all members of the uniformed services were to be afforded the protections announced by the Supreme Court in *Miranda*. As the Court stated:

> Now, the accused must have a lawyer; before, he need not have been given one; now, he must be warned of his right to counsel; before, he need not be so warned; and now, finally, he will receive effective legal advice not only as to what he can do, but also as to what he should do.[82]

Thus, members of the military have a twofold protection: the specific warning requirements afforded under article 31 and the general fifth amendment privilege against self-incrimination.

Members of the armed services have also been afforded protection from arbitrary referral of charges to general courts-martial. Congress has provided that before a criminal charge may be referred to a trial by a general court, an officer must be appointed to investigate the charges thoroughly and to recommend formally the disposition of the case to the convening authority.[83] In this article 32 investigation, the investigating officer must impartially and judiciously determine whether the evidence warrants criminal disposition. This investigation is analogous to a grand jury proceeding, but there are significant differences, the import of which is that the military procedure affords greater rights than the grand jury. No judge monitors grand jury proceedings; furthermore, they are generally secret. A prosecutor normally guides the grand jury process; and, a grand jury may, within its discretion, compel the production of evidence or the testimony of witnesses, and its process generally is unrestrained by the technical procedural and evidentiary rules which govern criminal trials. Of paramount importance is that neither the accused nor his counsel are present during any of the grand jury proceedings; they may not cross-examine witnesses or submit any evidence without the express approval of the foreman of the grand jury. The proceeding is, in reality, an *ex parte* investigation.

Although the article 32 investigation is somewhat similar to a grand jury, there are distinguishing features which inure to the benefit of a military accused. The investigation provides a discovery proceeding in which the accused may determine the validity of the charges before trial.[84] In order to insure that this is not an empty gesture, the military accused is guaranteed the right to be present and to be represented by a qualified attorney during all of the hearings. In addition, the accused is granted the right to cross-examine all witnesses against him if they are available, to present evidence in his own behalf, and to have witnesses testify for him. Hence, not only is there compatibility with civilian notions of justice and fair play, the military system has gone far beyond civilian requirements and is perhaps paving the way in the modernization of civilian criminal proceedings.

Also, civilian standards relating to searches and seizures and the right to a speedy trial have been part of the military criminal law.

The military justice system has traveled a long and sometimes stormy and misunderstood path. Yet, as this brief summary demonstrates, the civilian defendant has no rights greater than his military counterpart. Indeed, in many areas the protections afforded by the code and the *Manual for Courts-Martial* exceed those available in civilian criminal courts. Here, clearly, the military judicial system has kept ahead of civilian concepts with no apparent detrimental effect upon discipline. The opinion of Justice Douglas in *O'Callahan* v. *Parker*[85] to the effect that courts-martial are not independent instruments of justice but are a mechanism by which discipline is preserved and are marked by "retributive justice"[86] indicates a woeful lack of understanding of military criminal law today.[87] Congress has held extensive hearings on the subject of law and discipline and has consulted with numerous authorities. The UCMJ was enacted specifically to meet the needs of the Armed Forces and to guarantee to individual servicemen and women the profound American values of justice. It worked during the Korean and Vietnamese wars.

CONCLUSION

The military criminal justice system is a reinforcement of the military ethic. The Congress, the courts, and the military have continually sought to keep the UCMJ compatible with the military

need for discipline and with the basic rights of all American citizens guaranteed by the Constitution. The Congress has done so through amendment, the courts by means of judicial interpretation, and the military by practice and by proposed changes, such as those which resulted in the amendments of 1968.

What is equally important is that military personnel directly concerned—commanders, lawyers, and criminal investigators—have continuously tried to make the system "work." Balancing interests has always been a difficult task for legislators and courts alike. In the area of military justice and discipline, balancing of interests is a constant, ongoing process. The search for compromise will continue successfully, so long as both the civilian and military sectors continue to understand that one affects the other and that to be effective the military ethic and its codal implementation must be acceptable to American society.

NOTES

1. The My Lai incidents, particularly, have added fuel to this fire of public opinion, and a veritable industry now appears to exist in the production of articles, books, and newspaper articles about military criminal law. See, e.g., Robert Sherrill, *Military Justice Is to Justice as Military Music Is to Music* (New York: Harper & Row, 1970). (Where the court-martial is portrayed as a "Star Chamber" proceeding run by cretins and sadists who convict on the basis of ill-gotten evidence and torture-wrought confessions); Bishop, "Perspective, the Case for Military Justice," 62 *Mil. L. Rev.* 215 (1973); Pousner, "The Vietnam Veteran Branded by the Numbers," *Penthouse,* August 1974, p. 57; Mackenzie, "Scope of Decision on Calley Raises Press-Trial Issues," *Washington Post,* 26 September 1974, p. A1:6.

2. Schiesser and Benson, "Modern Military Justice," 19 *Cath. L. Rev.* 489, 490 (1970).

3. Poydasheff and Suter, "Military Justice?—Definitely!" XLIX *Tulane L. Rev.* 588 (1975).

4. See *O'Callahan* v. *Parker,* 395 US 258 (1969).

5. Glasser, "Justice and Captain Levy," 12 *Colum. F.* 49 (1969).

6. See, *e.g.,* Gerwig, "Viewpoints of Military Law, Civil and Criminal," 48 *Notre Dame Law* 509 (1973); Moyer, "Procedural Rights of the Military Accused: Advantages Over a Civilian Defendant," 51 *Mil. L. Rev.* 1 (1971).

7. See Bishop, p. 221.

8. Uniform Code of Military Justice, hereinafter cited as UCMJ, 10 U.S.C. § 801. The Uniform Code of Military Justice was enacted in 1950 as 64 Stat. 108 (1950). Thereafter it was revised, codified, and enacted into law as part of Title 10, United States Code, by the act of 10 August 1956. The latest amendments are contained in the Military Justice Act of 1968, PL 90-632 (82 Stat. 1335).

9. Toner, "The Military Ethic: On the Virtue of an Anachronism," *Military Review,* December 1947, pp. 9, 10.

10. Janowitz, "Volunteer Armed Forces and Military Purpose," *Foreign Affairs,* April 1972, pp. 427, 430.

11. *Toth* v. *Quarles,* 350 US 11 (1955).

12. Toner, p. 14.

13. Ward Just, *Military Men* (New York: Knopf, 1970), p. 123.

14. Janowitz, p. 440.

15. *Parker* v. *Levy,* 417 US 733 (1974). See also *United States* v. *Howe,* 37 CMR 429 (1967).

16. 417 US 733.

17. Janowitz, p. 440.

18. *United States* v. *Johnson,* 43 CMF 604, 607 (1970) (Finkelstein J. concurring in part and dissenting in part).

19. *In re Grimley,* 137 US 147 (1890).

20. There are three types of courts martial. The general court-martial is the highest military trial court. It may impose any authorized sentence, including a punitive discharge, reduction in grade, forfeiture of pay, or confinement. The special court-martial is the intermediate trial forum. This court may not adjudge confinement in excess of 6 months. However, it may impose a bad

conduct discharge in a sentence if the case was recorded verbatim and if a military judge and qualified defense counsel were assigned. The summary court-martial is the lowest trial court and has very limited jurisdiction. It is similar to a hearing before a justice of the peace. During the tenure of the author as the Staff Judge Advocate at the U.S. Army Engineer Center and Fort Belvoir during 1974-1975, this court was not used. See UCMJ arts. 18-20, U.S.C. §§ 818-20 (1970).

21. The Military Justice Act of 1968, Pub. L. No. 90-632, 92 Stat. 1335 (1969).

22. Patterson opines that in Anglo-American law the law is concerned with nonethical values and stresses the independence of the judiciary and "the corresponding limitations of the scope of the judicial function in making new law," as the prime example of this. E.W. Patterson, *Jurisprudence, Men and Ideas of the Law* (Mineola, N.Y.: Foundation Press, Inc. 1953).

23. *United States* v. *Voorhees,* 16 CMV 83 (1954).

24. 10 U.S.C. 888 (1970).

25. 10 U.S.C. § 892 (1970).

26. 10 U.S.C. § 934 (1970).

27. *United States* v. *Howe,* 37 CMR 429 (1967).

28. 10 U.S.C. § 933 (1970).

29. 10 U.S.C. § 934 (1970). This charge was dismissed during the court-martial.

30. A dismissal of a commissioned officer is the equivalent of a dishonorable discharge of an enlisted man or warrant officer.

31. In America, the right to criticize the Government is at the heart of our personal liberties protected by the first amendment. *Mills* v. *Alabama,* 384 US 214 (1966), wherein it was stated that:

> There is practically universal agreement that a major purpose of that amendment was to protect the free discussion of government affairs. This, of course, includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

at 218-19.

32. However, the author concurs in the opinion of Chap. (Col.) Kermit D. Johnson, USA, who stated that: "Loyalty, an admirable and necessary quality within limits, can become all-consuming. It also becomes dangerous when a genuine wholesome loyalty to the boss degenerates into covering up for him, hiding things from him or not differing with him when he is wrong." Johnson, "Ethical Issues of Military Leadership," IV *Parameters* 36, 37 (1974).

33. For an excellent discussion of the history of article 88, see Kester, "Soldiers Who Insult the President: An Uneasy Look at Article 88 of the Uniform Code of Military Justice," 81 *Harvard L. Rev.* 1697 (1968).

34. *Id.,* at 1730.

35. *Id.,* at 1731.

36. *Id.,* at 1742. It is beyond the scope of this paper to make an exhaustive review of all of the cases and arguments concerning this punitive article.

37. Poydasheff and Suter.

38. *Orloff* v. *Willoughby,* 345 US 83, 94 (1953).

39. Morris Janowitz, *The Professional Soldier: A Social and Political Portrait* (New York: Free Press, 1960), p. 440.

40. *Parker* v. *Levy, supra,* note 15, at 751.

41. Kester, p. 1741.

42. Emerson, "Towards a General Theory of the First Amendment," 72 *Yale L.J.* 877, 918 (1963).

43. US Const. Amend I. "Congress shall make no law . . . abridging the freedom of speech . . . "

44. Henderson, "Courts-Martial and the Constitution: The Original Understanding," 71 *Harv. L. Rev.* 293 (1957).

45. See, *e.g.,* Warren, "The Bill of Rights and the Military," 37 *N.Y.U.L. Rev.* 181 (1962); and Vagts, "Free Speech in the Armed Forces," 57 *Colum. L. Rev.* 187 (1957).

46. See, *e.g., Reid* v. *Covert,* 354 US 1 (1957); *Toth* v. *Quarles,* 350 US 11 (1955); and *O'Callahan* v. *Parker,* 395 US 258 (1969). In *United States* v. *Robel,* 389 US 258 (1967), the Court stated:

> This concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart . . .. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

47. Kester, p. 1742.

48. *United States* v. *Voorhees,* 16 CMR 83 (1954). The case of *United States* v. *Priest,* 45 CMR 338 (1972), and *United States* v. *Gray,* 42 CMR 255 (1970), appear to reinforce the author's view. In *Priest* the accused was convicted of publishing a newspaper with intent to promote disloyalty among members of the Armed Forces. The balance struck between civilian notions of free speech and the military status was approved in *Parker* v. *Levy,* 437 US 733, 758-759. In the Gray case the accused made statements inviting other members of the Marine Corps to join in defiance of military authority. The Court held, *inter alia,* "speech by a subordinate toward a superior in the military can directly undermine the power of command; such speech therefore exceeds the limits of free speech that is allowable in the armed forces."

49. 10 U.S.C. § 892 (1970).

50. Field Marshal Slim, *Defeat into Victory* (London: Cassell, 1950) at 451.

51. Yoran Dinstein, *The Defense of 'Obedience to Superior Orders' in International Law* (Leyden: Sijthoft, 1955), at 6.

52. *Id.,* at 7.

53. *United States* v. *Calley,* CM 426402, 46 CMR 1164 (1973), affmd., 22 USCMA 534, 48 CMR 19 (1973).

54. *United States* v. *Calley,* CM 426402, 46 CMR at 1180 (1973).

55. The best source of the evidence is contained in the Peers Report, compiled by a military factfinding group headed by retired Lieutenant General Peers. Although the author had access to that report, no facts or statements from that report have been utilized in this paper; rather, the primary source for this material is the cited cases.

56. *United States* v. *Calley,* CM 426402, 46 CMR 1131 (1973), affmd., 22 USCMA 534, 48 CMR 19 (1973).

57. *United States* v. *Calley, supra,* at 1174.

58. *Id.*

59. See, *e.g.,* Field Manual 27-10, *The Law of Land Warfare* (July 1956); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War,* 12 August 1949, 6 UST 3316, TIAS No. 3364, 75 UNTS 135 (1956).

60. *United States* v. *Marsh,* 3 USCMA 48, 11 CMR 48 (1953); *United States* v. *Trani,* 1 USCMA 293, 3 CMR 27 (1952).

61. Field Manual 27-10, para. 509. See generally, Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," 57 *Mil. L. Rev.* 99 (1972).

62. Field Manual 27-10.

63. Toner, p. 15.

64. *United States* v. *Trani, supra,* note 60.

65. Paust, p. 171.

66. *United States* v. *Calley, supra,* note 57, at 1184.

67. Paust, p. 172.

68. *United States* v. *Sadinsky,* 14 USCMA 563, 565, 34 CMR 343, 345 (1964).

69. *United States* v. *Holiday,* 4 USCMA 454, 456, 16 CMR 28, 30 (1954).

70. Para. 213b, MCM, 1969 (Rev.).

71. *United States* v. *Smart,* 12 CMR 826 (1953).

72. An exploration of all of the cases defining military custom, service discrediting conduct, or conduct prejudicial to good order and discipline is beyond the scope of this paper. For a good discussion, see, *e.g.,* William W. Winthrop, *Military Law and Precedents,* 2d ed. (Washington: U.S. Govt. Print. Off., 1896; 1920 reprint); and M. Moyer, *Justice and the Military* (Washington, D.C.: Public Law Ed. Inst., 1972).

73. 21 USCMA 564, 45 CMR 338 (1972).

74. *Id.,* at 344; accord., *United States* v. *Harvey,* 19 USCMA 539, 42 CMR 141 (1971).

75. *Parker* v. *Levy, supra,* note 15. The court-martial review by the Court of Military Appeals in *United States* v. *Levy,* 39 CMR 672 (1968), *pet. for rev. denied,* 18 USCMA 627 (1969).

76. 417 US 733, at 744.

77. Military law provides an accused with the same right to counsel as that recognized by civilian courts. *United States* v. *Tempia,* 16 USCMA 629, 37 CMR 249 (1967).

78. UCMJ Art. 32, 10 U.S.C. § 822 (1970). The accused is entitled to representation by an attorney throughout the entire pretrial hearings. *United States* v. *Tomaszewski,* 8 USCMA 266, 24 CMR 76 (1957), a decision that predated by 6 years the Supreme Court's decision in *Gideon* v. *Wainwright,* 372 US 335 (1963); and by 15 years that Court's decision in *Argersinger* v. *Hamlin,* 407 US 25 (1972) which postulates that absent a waiver, no person may be imprisoned for any offense unless he was represented by counsel at trial.

79. 384 US 436 (1966).

80. Quinn, "Some Comparisons Between Courts-Martial and Civilian Practice," 15 *UCLA L. Rev.* 1240, 1243 (1968), referring to *United States* v. *Gunnels,* 8 USCMA 130, 23 CMR 354 (1957).

81. 16 USCMA 629, 37 CMR 249 (1967).

82. *Id.,* at 640 and 260.

83. UCMJ Art. 32, 10 U.S.C. § 832 (1970). The convening authority is the commander of the organization authorized to convene a court-martial.

84. See *United States* v. *Cot.,* 48 CMR 723 (1974); *United States* v. *Samuels,* 10 USCMA 206, 27 CMR 280 (1959).

85. 395 US 258 (1969).

86. *Id.,* at 265-77.

87. Strassburg, "Civilian Judicial Review of Military Criminal Justice," 66 *Mil. L. Rev.* 1 (1974).